

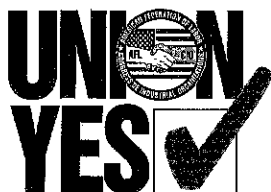
Kansas AFL-CIO

2131 S.W. 36th St.

Topeka, KS 66611

785/267-0100

Fax 785/267-2775



President
Steve Rooney

Executive Secretary
Treasurer
Andy Sanchez

Executive Vice
President
Bruce Tunnell

Executive Board

*Richard Anderson
Kurt Chaffee
Don Graves
Jim Keele
Mark Love
Kevin McClain
Roger Maack
Mike Maloney
Randy Mousley
Lisa Ochs
Kristin Percell
Ron Perry
Dennis Phillips
Emil Ramirez
Clay Rodgers
George Ruiz
Deb Shepard
Mark Shughart
Debbie Snow
William Tanner
Richard Taylor
Brian Threadgold
Chris Urie*

HOUSE COMMERCE AND LABOR AND ECONOMIC DEVELOPMENT COMMITTEE

TESTIMONY IN SUPPORT OF HB 2059

ON BEHALF OF
KANSAS AFL-CIO

BY

JOHN M. OSTROWSKI
JANUARY 31, 2017

Mr. Chairman and Members of the Committee:

My name is John M. Ostrowski, and on behalf of the Kansas AFL-CIO, present this written testimony in support of HB 2059. I have lobbied for the Kansas AFL-CIO regarding workers compensation matters for over 35 years. In addition, I am an attorney regularly representing injured workers and their families. I believe it would be appropriate for the Committee to have some background information relative to the argument of "6th versus the 4th".

We believe that everyone would agree that doctors and their opinions play a critical role in the Kansas workers compensation system. Furthermore, that for many years there have only been a handful of doctors who are "willing to be involved in" workers compensation; either as part of their practice or for providing opinions in a medical/legal context.

The reasons for this are varied, but include:

1. a shortage of doctors generally in Kansas;
2. having to deal with multiple parties beyond their patients including nurse case managers, claims managers, attorneys, vocational rehabilitation specialists, return to work programs, issuing of multiple treatment reports, etc.;
3. complying with the medical fee schedule;



4. having to seek "approval" for all recommended treatment from third persons;
5. having to respond to multiple medical/legal issues.

In 2011, those dealing with workers compensation on a regular basis recognized that certain changes were needed to the system. As a result, multiple "stakeholders" held extensive meetings to formulate a bill to present to the legislature. The negotiators included representatives of the Kansas Chamber of Commerce, Society of Human Resource Managers, self-insureds, insurance carriers, the Kansas Trial Lawyers, and the Kansas AFL-CIO.

One of the very first items the stakeholders agreed to was that Kansas should continue to use the 4th Edition of the AMA Guidelines.¹ At that time, the 6th Edition had been in publication for a decade, and the 5th Edition since 2000. The agreement to use the 4th Edition was based on many factors, including:

1. The recognition that no "guide" was more scientific than any other guide.
2. The recognition that doctors in Kansas involved in the system were familiar with the 4th Edition.
3. The recognition that treating doctors were authorized to provide impairment ratings using the 4th Edition.
4. The recognition that Kansas had used the rating guide for many years so any preexisting conditions would be determined by a consistent standard (i.e. there could be an apple to apple comparison of old injury versus new).
5. Judges, claims adjusters, and attorneys were also knowledgeable in the guides such that predictability could be obtained and litigation decreased.

¹ "At the outset of the 2011 meetings, the Committee considered a move to the 6th Edition of the A.M.A. Guides. The Committee agreed to continue to use the 4th Edition, and then proceeded with negotiations." (Written testimony of Frederick Greenbaum, defense attorney, before the Senate Commerce Committee in support of Senate Bill 167; February 2015.)

When the stakeholders agreed to continue to use the 4th Edition of the Guides, it served as a foundation around which multiple other issues were resolved. As with any successful negotiation and compromise, both sides were somewhat unhappy. The changes were nonetheless unanimously presented as a package to the legislature, and accepted.

The substantial changes made in 2011 were successful in the eyes of many (if not most) employers/insurance carriers.² Notwithstanding that (and following state elections), the Kansas Chamber and certain other entities who had participated in the negotiations pushed for passage of utilization of the 6th Edition. The primary purpose of promoting the 6th Edition was to further reduce benefits to injured workers and their families.

Recall that there were multiple reasons for utilization of the 4th Edition initially. Recall also that the agreement to use the 4th Edition served as a foundational building block for other changes. The change from the 4th to the 6th has indeed given rise to other problems which you will continue to hear about, including:

1. Constitutional questions will continually be put before the court relative to equal protection and violation of quid pro quo. A finding of unconstitutionality by the courts will have a severe negative impact on employers; including exposure to liability outside of workers compensation.
2. Litigation as to preexisting conditions and appropriate offset of benefits by utilizing different mathematical measures of impairment.
3. Further reduction of doctors willing to become involved in workers compensation.
4. Increases in cost of litigation since the treating physicians are disqualified from providing ratings according to the 6th

² "The 2011 changes have been very successful and have resulted in cost savings and significantly reduced premium costs for Kansas businesses." (Written testimony before the Senate Committee on Commerce for SB 167; 2/18/15; Larry Karns, Director of the Division of Workers Compensation.) "It is my understanding these changes have resulted in approximately a \$50 million reduction of workers' compensation payouts and the expectations are for continuing excellent results." ((Written testimony of Frederick Greenbaum, defense attorney, before the Senate Commerce Committee in support of Senate Bill 167; February 2015.)

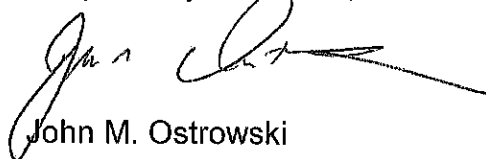
Edition, thereby forcing the hiring of multiple experts.

5. Increases in litigation as the claims adjusters and attorneys are unable to predict outcomes within reasonable certainty.
6. Severe reduction in compensation for injured workers who are unable to return to comparable employment because the threshold for "work disability" cannot be met under the 6th Edition.³
7. Loss of incentive for employers to return injured workers to their jobs because of the elimination of work disability.
8. Increased costs in other programs such as unemployment, welfare and bankruptcy as the reduction in benefit structure eliminates an injured worker's ability to meet basic needs for his family.

As you will hear from other proponents of the bill, the 6th Edition has fallen into disfavor throughout the United States. States in the midwest continue to use the 3rd Edition Revised, the 4th Edition and the 5th Edition; but not the 6th.

The Kansas AFL-CIO believes that a return to the 4th Edition will serve all parties in the workers compensation arena better.

Respectfully submitted,



John M. Ostrowski

³ In certain circumstances, injured workers may be entitled to increased compensation if they are not able to be returned to work at 90% of their wage due to the on-the-job injury; i.e. so called "work disability." One of the thresholds established by the legislature is a medical impairment of greater than 7.5% to the body as a whole. The threshold under the 4th Edition requires a significant injury. Under the 6th Edition, the threshold virtually eliminates even severely injured workers from the enhanced compensation.