

SESSION OF 2011

**CONFERENCE COMMITTEE REPORT BRIEF ON  
SUBSTITUTE FOR HOUSE BILL NO. 2134**

As Agreed to April 1, 2011

**Brief\***

Sub. for HB 2134 would revise portions of the Workers Compensation Act pertaining to definitions contained in the Act, exemptions from compensation benefits, notice of injury, drug testing, administrative hearings, preexisting conditions, permanent total and temporary total disabilities, wage calculations, the caps on benefits, lump sum retirement benefits, medical treatment, and ancillary provisions.

In addition to injury caused by an accident, as provided by current law, the bill would require an employer to be liable to pay compensation to an employee that has been injured in the course of employment because of repetitive trauma or occupational disease. An injured employee would have to show that the work incident was the prevailing factor that caused the injury.

***Definitions***

The bill would define or revise the following substantive words and terms in the Workers Compensation Act:

- “Accident” would exclude repetitive trauma;

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\* Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. Conference committee report briefs may be accessed on the Internet at <http://www.kslegislature.org/kldr>

- “Arising out of and in the course of employment” would be revised to clarify when an employee was on the employer's premises;
- “Authorized treating physician” would be a new term that would mean a licensed physician or other medical provider authorized by the employer, the employer's insurance carrier, or by court order to provide medical services that are necessary to diagnose and treat a work-related injury;
- “Burden of proof” would be revised to include higher standards if specifically required by the Workers Compensation Act;
- “Functional impairment” would be a new term, and it would be expressed in terms of the percentage of loss of human function as estimated by medical evidence;
- “Occupational disease” would exclude repetitive trauma;
- “Personal injury” or “injury” would occur only by accident, repetitive trauma, or occupational disease as defined in the bill. An injury would be compensable only if it arose out of and in the course of employment. An injury would not be compensable if it affected a preexisting condition;
- “Prevailing factor” would be a new term that would mean the cause when measured against other contributing causes;
- “Repetitive trauma” would be a new term that would refer to an injury that occurs due to repetitive use or cumulative trauma. The bill would outline several instances in time where repetitive trauma injury could be identified in an employee;
- “Task loss” would be a new term that would mean the percentage to which an employee had lost the ability to

perform work, based on a five-year period preceding the injury and excluding preexisting conditions; and

- “Wage loss” would be a new term that would mean the difference between the average weekly wage that the employee was earning at the time of the injury and the average weekly wage that the employee would be capable of earning after the injury. The capability to earn wages would be based upon the injured worker’s age, physical capabilities, education, training, experience, and availability of jobs. In order to establish post-injury job loss, an employee would need the legal capacity to enter into an employment contract. Fringe benefits would be taken into consideration. There would be a rebuttable presumption of no wage loss if an injured worker refused accommodated employment at a wage that was 90 percent or greater than the pre-injury wage.

### ***Exemptions from Compensation Benefits***

Current law disallows compensation for certain types of employee injuries that were caused by the employee’s deliberate actions or that were caused by the employee’s willful failure to use protection. The bill would disallow compensation if the injury resulted from the employee’s reckless violation of the employer’s workplace safety rules and regulations. Injury caused by fighting or horseplay with a co-employee for any reason would be disallowed as well. The bill would provide an exception to the current statutory exemptions when in the totality of the circumstances, or when the employer approves, it is not reasonable for safety equipment to be used.

### ***Notice of Injury***

The bill would extend the period of time, from ten days to thirty calendar days, in which an employee must give notice that an injury by accident or repetitive trauma has occurred. However, in instances where the employee was not

longer employed or where the employee sought medical treatment specifically for the injury, the employee would have twenty calendar days to give notice. The employee would have the responsibility to inform the employer's appropriate designee.

### ***Drug Testing***

Injuries caused by the influence of alcohol or drugs may not be compensated under current law. Provisions regarding employee drug testing and the admissibility of that evidence would be revised. With regard to proving that an employee was impaired due to alcohol or drugs, the bill would delete references to an employer needing probable cause to require testing and would replace the standard with "sufficient cause."

In order for the chemical analysis to be admissible evidence, the bill would require a split sample to be retained and made available to the employee within forty-eight hours of the positive test. An employee could overcome the positive results of the drug test by providing clear and convincing evidence.

### ***Administrative Hearings***

The bill would shorten the period of time, from five years to three years, that a case may remain open without a hearing. After which time, an employer would be permitted to file an application for dismissal with the Department of Labor's Division of Workers Compensation. If an employee could not establish good cause for keeping the case open, the bill would require an administrative law judge to dismiss the claim with prejudice. If a claim had not proceeded to a regular hearing within a year from the date of a preliminary award, the employer would be allowed to file for dismissal.

### ***Preexisting Conditions***

The bill would require compensation awards for permanent partial impairment, work disability, or permanent total disability to be reduced by that amount of functional impairment that is determined to be preexisting. The bill would outline the method of calculating a value for a preexisting condition; however, this kind of reduction would not apply to compensation for temporary total disability or for medical treatment. If compensation benefits have been awarded already, the percentage basis of the prior settlement or award would establish conclusively the amount of preexisting condition.

### ***Permanent Total, Permanent Partial General, and Temporary Total Disabilities***

The bill would replace the current statutory conditions for permanent total disability and would require expert evidence to prove permanent total disability instead. An injured worker would not be eligible to receive more than one award for permanent total disability during the worker's lifetime.

With regard to permanent partial general disability, the compensation calculation would be revised so that an employee would be eligible to receive benefits if the functional impairment exceeded 7.5 percent to the body or 10.0 percent to the body when a preexisting condition is present. The employee also would have to suffer a post-injury wage loss of at least 10.0 percent due to the work injury.

With regard to temporary total disability, the bill would stipulate that the opinion of an authorized treating physician would be presumed to be determinative of an employee's ability to engage in gainful employment. If an employer can not accommodate the temporary work restrictions imposed by the physician, then the employee would be entitled to benefits for the temporary total disability. If an employee were to

refuse to accept work that accommodates the temporary total disability, the result would be a rebuttable presumption that the employee would be ineligible to receive benefits. If an employee were to quit or be terminated, the employer would not be liable for temporary total disability benefits. An employee would be ineligible to receive temporary total disability benefits if that person also was receiving unemployment benefits.

The bill would prohibit compensation for permanent partial disability to run concurrently with compensation for temporary total or temporary partial disabilities. The bill also would prohibit compensation for functional impairment and work disability to be awarded together.

The bill would revise the method of calculating compensation for bilateral injuries involving upper and lower extremities which would be considered as a whole instead of separately.

Under current law, parties are allowed to enter into agreements for the lump sum payment of benefits for cases involving permanent total or permanent partial disability. The bill would allow lump sum settlements, with the approval of an administrative law judge, to be prorated over the life expectancy of the injured employee, notwithstanding the weekly compensation rate calculation. This provision would apply retroactively.

### ***Wage Calculations***

The bill also would replace the term “average gross wages” as it appears in several statutory provisions with the term “average wages.” The bill would revise the calculation for determining an employee's average wages which are used to determine compensation benefits. The cumulative wages earned prior to the injury, up to a maximum period of twenty-six weeks, would be divided by the same period of weeks.

### ***Caps on Benefits***

The cap on maximum compensation for various benefits would be increased as follows:

- For permanent total disability, from \$125,000 to \$155,000;
- For temporary total disability, from \$100,000 to \$130,000;
- For permanent or temporary partial disability, from \$100,000 to \$130,000; and
- For death, from \$250,000 to \$300,000.

When an employee's death would be caused by injury, the employer would have the responsibility, when necessary, to pay up to \$1,000 for a court appointed conservator.

### ***Lump Sum Retirement Benefits***

Under current law if an employee that is eligible for compensation benefits also accepts retirement from the same employer, then the compensation benefits are reduced accordingly on a weekly equivalent basis. The bill would specify that in instances where an employee takes a lump sum retirement, the weekly equivalent value of benefits would be determined by amortizing the lump sum payment at the rate of 4.0 percent per year over the employee's life expectancy, and the compensation benefits would be reduced accordingly.

### ***Medical Treatment***

An employer's obligation to provide medical and health care services to an injured employee would be presumed to terminate once the employee had reached maximum medical treatment as prescribed.

Under current law, an injured employee must submit to a medical exam if requested to do so by the employer. At the employer's discretion, the employee also is required to submit to subsequent examinations. The bill would suspend benefits if an employee refuses to submit to an exam, even if the employer is under a preliminary order to provide benefits.

The bill would authorize an administrative law judge to appoint an independent healthcare provider to determine an employee's functional impairment, if the medical opinions for the employer and the employee disagree and the parties can not settle on an independent healthcare provider between themselves to make the determination. Current law requires notice to be given to all parties before post-award benefits can be ordered.

The bill would broaden the appeals process regarding future medical treatment so that in addition to employees as currently provided by law, an employer or the insurance carrier also would have standing to request a post-award hearing for medical treatment. The bill would require all parties to receive notice when post-award benefits would be modified or terminated. If an administrative law judge finds the work-related injury to be the prevailing factor, future medical treatment could be awarded. If an employee has not received medical treatment within two years from the date of a compensation award, or within two years from the date the employee last received medical treatment, an employer would be permitted to seek termination of future medical benefits.

After a benefits award had been established, an employee would have the responsibility to prove that future medical treatment would be necessary. The employee would have the burden to prove, more probably than not, that the medical treatment will be required in the future as a result of the work-related injury.

### ***Ancillary Provisions***

Current law authorizes the Workers Compensation Fund, which is under the administration of the Department of Insurance, to pay for compensation benefits when an employer has no insurance. The bill would extend coverage to cover claims arising from employers who have insufficient self-insurance bonds.

A private insurer or self-insured employer would be required to issue warning notices to employees that are receiving temporary disability benefits. The notice would inform the employees that they could be committing fraud if the person had accepted work with a different employer that requires the performance of activities that the employee previously claimed they could not perform due to the injury. The loss of benefits and restitution could result from the fraud.

If an attorney's services were found to be frivolous, the employer and the insurance carrier would not be liable for attorney fees.

The Commissioner of Insurance would be authorized to establish an affidavit form by which a person or company could establish a rebuttable presumption that the Workers Compensation Act did not apply to them. It would be made a misdemeanor, punishable with a fine up to \$1,000, to falsify information on the affidavit. The bill would grant rules and regulations making authority to the Commissioner of Insurance.

The bill would permit worker compensation claims to be heard by video or telephone conference.

The bill would authorize the fee for certified shorthand reporters to be taxed to the Division of Workers Compensation if a fee is incurred and no record taken.

The bill also would repeal:

- KSA 44-510a which pertains to the reduction in compensation for prior compensable permanent injury;
- KSA 44-520a which outlines the time limitation of 200 days for employers to receive notice of claims; and
- KSA 44-596 which creates the Workforce Advisory Council within the Department of Labor.

The bill would be effective after May 15, 2011, and its publication in the *Kansas Register*.

### **Conference Committee Action**

In addition to technical and grammatical amendments, the Conference Committee further amended the bill with changes pertaining to:

- The disallowance of compensation benefits when an employee knowingly violates the employer's workplace rules or engages in fighting or horseplay with another co-employee, and provide for an exception to the current statutory disallowances when it is not reasonable to use safety equipment;
- The deadlines for an injured employee to give notice to the employer;
- A prohibition for dual compensation for functional impairment and work disability;
- Definitions for the terms "arising out of and in the course of employment," "burden of proof," "personal injury," and "prevailing factor";
- Fees paid for short-hand reporter services;
- The repeal of the Workforce Advisory Council; and

- The bill's effective date, changing it from publication in the *Kansas Register* to May 15, 2011.

## **Background**

Worker Compensation is an insurance plan that is required by law for an employer to pay an employee's benefits for job-related injuries, disability, or death. Kansas law covers almost all employers, with exceptions for certain agricultural pursuits, realtors, employers with a gross annual payroll of \$20,000 or less, certain firefighters, and certain vehicle owner-operators. Insurance may be obtained from one of three sources: a licensed insurance carrier, a group-funded pool, or self-insurance. Benefits are paid at the employer's expense. Coverage begins on the first day at work. Employees who are disabled due to a job-related injury or disease are entitled to medical expenses to treat the job-related injury or illness, and they are entitled to income benefits to replace part of the wages lost due to disability. Death benefits may be paid to a surviving spouse, dependents, or heirs.

The Workforce Advisory Council is composed of twelve members appointed from various business and labor constituencies to study and make recommendations pertaining to the Workers Compensation Act.

The bill was introduced at the request of business and labor groups who negotiated the bill's provisions during the previous year. Proponent testimony was provided by representatives from the Kansas Chamber, the Kansas Economic Progress Council, the Kansas AFL-CIO, the Society of Human Resources Management, the Department of Insurance, the Department of Labor, and the Kansas Self-Insurers Association. Due to the consequences of recent court decisions, which have favored employers in some instances and employees in other cases, proponents generally believed it to be necessary to revise portions of the

State's Workers Compensation Act in order to achieve a balance between business owners and management and their employees.

There was no opponent testimony.

According to the fiscal note prepared by the Division of the Budget, in consultation with the Department of Labor, the bill as introduced would have a net decrease in expenditures by \$30,596 from the Workers Compensation Fund in FY 2012. This amount would include savings of \$39,288 for the elimination of approximately 60,000 mailings each year. However, there would be a one-time expense of approximately \$8,700 for training costs to inform Labor Department employees about the various changes contained in the bill.

The House Committee on Commerce and Economic Development adopted a substitute bill that retained the text found in the original bill with changes pertaining to:

- The disallowance of compensation benefits when an employee knowingly violates the employer's workplace rules or engages in fighting or horseplay;
- The disallowance of compensation benefits when an employee is illegally present in the country or is not authorized to work in the country; and to make an exception when the employer is aware of the employee's status;
- The disallowance of compensation benefits when an employer has not been given timely notice to request a drug test;
- The use of split drug test samples;
- Separate chemical cutoff levels, depending if urine or oral samples would be used;

- The definition of “arising out of and in the course of employment” as it pertains to recreational activities or social events;
- Alternative accommodations that an employer may provide for an employee with a temporary total disability;
- The benefits caps on permanent partial or temporary partial disabilities, raising the caps from \$100,000 to \$300,000;
- The time period after which an employer may petition for the permanent termination of medical benefits;
- The deadlines for an injured employee to give notice to the employer;
- A preliminary hearing involving temporary partial disability;
- The expanded use of the Workers Compensation Fund to pay for compensation benefits when a self-insured employer has insufficient coverage;
- Warning notices issued by insurers and self-insured employers to injured employees receiving temporary benefits;
- Authority granted to the Department of Labor to develop an affidavit form for those persons or companies who are exempt from the Workers Compensation Act;
- Fees paid for short-hand reporters and language translator services; and
- The repeal of the Workforce Advisory Council.

The House Committee of the Whole amended the bill to clarify that “medical treatment,” as it is referenced in the provision relating to the employer's termination process of

future medical benefits, is to be provided by an authorized medical provider. The Committee also amended the bill to retain the existing statutory provision that excludes the first fifteen weeks of temporary total disability compensation from the calculation that determines compensation for permanent partial general disability.

The Senate Committee on Commerce amended the bill by deleting amendments previously adopted by the House pertaining to:

- The disallowance of compensation benefits when an employee knowingly violates the employer's workplace rules or engages in fighting or horseplay;
- The disallowance of compensation benefits when an employee is illegally present in the country or is not authorized to work in the country; and to make an exception when the employer is aware of the employee's status;
- The disallowance of compensation benefits when an employer has not been given timely notice to request a drug test;
- Separate chemical cutoff levels, depending if urine or oral samples would be used;
- The definition of "arising out of and in the course of employment" as it pertains to recreational activities or social events;
- Alternative accommodations that an employer may provide for an employee with a temporary total disability;
- Authority granted to the Department of Labor to develop an affidavit form for those persons or companies who are exempt from the Workers Compensation Act;

- Fees paid for short-hand reporters and language translator services; and
- The repeal of the Workforce Advisory Council.

The Senate Committee further amended the bill to:

- Require uniform deadlines for an injured employee to give notice to the employer;
- Mandate insurers and self-insured employers to issue warning notices to injured employees receiving temporary benefits;
- Modify the use of split drug test samples;
- Revise the method by which persons are appointed to the Workers Compensation Board;
- Allow an employer or the insurance carrier to request a post-award hearing for medical treatment; and
- Change the bill's effective date from July 1 to publication in the *Kansas Register*.

In addition, technical amendments to clarify the bill's provisions, the Senate Committee of the Whole amended the bill to:

- Grant authority to Commissioner of Insurance to develop an affidavit for those persons or companies who are exempt from the Workers Compensation Act;
- Permit administrative hearings to be conducted by video and telephonic means; and
- Delete Section 27 of the Senate Commerce Committee version of the bill which would have revised the selection

process for members of the Workers Compensation Board.

Workers Compensation Act