

Workers Compensation Reform

Sub. for HB 2134 revises 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 prior law, the bill requires an employer to be liable to pay compensation to an employee who has been injured in the course of employment because of repetitive trauma or occupational disease. An injured employee must show that the work incident was the prevailing factor that caused the injury.

Definitions

The bill defines or revises the following substantive words and terms in the Workers Compensation Act:

- “Accident” excludes repetitive trauma;
- “Arising out of and in the course of employment” is revised to clarify when an employee was on the employer’s premises;
- “Authorized treating physician” is a new term that means 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” is revised to include higher standards if specifically required by the Workers Compensation Act;
- “Functional impairment” is a new term, and it is expressed in terms of the percentage of loss of human function as estimated by medical evidence;
- “Occupational disease” excludes repetitive trauma;
- “Personal injury” or “injury” occurs only by accident, repetitive trauma, or occupational disease as defined in the bill. An injury is compensable only if it arose out of and in the course of employment. An injury is not compensable if it affected a preexisting condition;
- “Prevailing factor” is a new term that would mean the cause when measured against other contributing causes;
- “Repetitive trauma” is a new term that would refer to an injury that occurs due to repetitive use or cumulative trauma. The bill outlines several instances in time where repetitive trauma injury could be identified in an employee;
- “Task loss” is a new term that means 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” is a new term that means 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 is 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 needs the legal capacity to enter into an employment contract. Fringe benefits are taken into consideration. There is 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

Prior law disallowed 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 disallows 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 is disallowed as well. The bill provides an exception to the existing 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 extends 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 no longer employed or where the employee sought medical treatment specifically for the injury, the employee has twenty calendar days to give notice. The employee has 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 prior law. Provisions regarding employee drug testing and the admissibility of that evidence are revised. With regard to proving that an employee was impaired due to alcohol or drugs, the bill deletes references to an employer needing probable cause to require testing and replaces the standard with “sufficient cause.”

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

Administrative Hearings

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

Preexisting Conditions

The bill requires 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 outlines the method of calculating a value for a preexisting condition; however, this kind of reduction will 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 conclusively establishes the amount of preexisting condition.

Permanent Total, Permanent Partial General, and Temporary Total Disabilities

The bill replaces the prior statutory conditions for permanent total disability and requires expert evidence to prove permanent total disability instead. An injured worker is not 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 is revised so that an employee is eligible to receive benefits if the functional impairment exceeds 7.5 percent to the body or 10.0 percent to the body when a preexisting condition is present. The employee has 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 stipulates that the opinion of an authorized treating physician is presumed to be determinative of an employee's ability to engage in gainful employment. If an employer cannot accommodate the temporary work restrictions imposed by the physician, then the employee is 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 is a rebuttable presumption that the employee is ineligible to receive benefits. If an employee were to quit or be terminated, the employer is not liable for temporary total disability benefits. An employee is ineligible to receive temporary total disability benefits if that person also was receiving unemployment benefits.

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

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

Prior to the bill's enactment, parties were allowed to enter into agreements for the lump sum payment of benefits for cases involving permanent total or permanent partial disability. The bill allows 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 applies retroactively.

Wage Calculations

The bill replaces the term “average gross wages” as it appeared in several statutory provisions with the term “average wages.” The bill revises 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, are divided by the same period of weeks.

Caps on Benefits

The cap on maximum compensation for various benefits is 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 injury causes an employee's death, the employer has the responsibility, when necessary, to pay up to \$1,000 for a court-appointed conservator.

Lump Sum Retirement Benefits

Under prior law if an employee who was eligible for compensation benefits also accepted retirement from the same employer, then the compensation benefits were reduced accordingly on a weekly equivalent basis. The bill specifies that in instances where an employee takes a lump sum retirement, the weekly equivalent value of benefits is 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 are reduced accordingly.

Medical Treatment

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

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

The bill authorizes 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.

The bill broadens the appeals process regarding future medical treatment so that in addition to employees as previously provided by law, an employer or the insurance carrier also has standing to request a post-award hearing for medical treatment. The bill requires all parties to receive notice when post-award benefits are to be modified or terminated. If an administrative law judge finds the work-related injury to be the prevailing factor, future medical treatment may 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 may seek termination of future medical benefits.

After a benefits award has been established, an employee has the responsibility to prove that future medical treatment is necessary. The employee has 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

Prior law authorized 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 extends coverage to cover claims arising from employers who have insufficient self-insurance bonds.

A private insurer or self-insured employer is required to issue warning notices to employees who are receiving temporary disability benefits. The notice informs the employees that they could be committing fraud if the person has accepted work with a

different employer that requires the performance of activities that the employee previously claimed he or she could not perform due to the injury. The loss of benefits and restitution could result from the fraud.

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

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

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

The bill authorizes 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 repeals:

- 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.