2011 Changes to Kansas Workers Compensation Act

On April 18, 2011, Kansas Governor Sam Brownback signed a new law changing the workers compensation system. (H.B. 2134) amends the Workers Compensation Act (KSA Sec. 44-501, et seq.) by changing Sections 44-503a; 44-510c; 44-510d; 44-510e; 44-51 Of; 44-515; 44-516; 44-520; 44-525; 44-528; 44-531; 44-532a; 44-534a; 44-536; 44-549; and 44-5a01 and KSA 2010 Supp. 44-501; 44-508; 44-510b; 44-510h; 44-510k; 44-511; 44-523; and 44-552 and repealing KSA 44-51a and 44-520a and KSA 2010 Supp. 44-596.

Among other changes, the bill raises the requirements necessary to prove a compensable injury; sets limitations on repetitive trauma or occupational disease; excludes compensation for cases arising out of fighting or horseplay; increases the potential penalty or forfeiture for failure to use protective equipment; allows a credit for pre-existing conditions/injuries; increases the indemnity caps for all injuries; lengthens and clarifies the notice requirement; allows some bilateral injuries to be treated as “body as a whole” type injuries; eliminates some conditions attributable to natural aging or daily activities; establishes that the employee must show the need for future medical treatment; allows only one permanent total disability award in an employee's lifetime; changes the average weekly wage calculation; and increases the threshold for maintaining a work disability action.

This document discusses the significant changes to the Act. Overall, we think the net effect of the bill will be to decrease the overall cost of workers compensation cases to the employer and insurer. Long term, there should be a positive impact on employer’s loss experience.

MAJOR PROVISIONS OF HOUSE BILL 2134

Indemnity Changes

- Indemnity awards are reduced by any preexisting functional impairment;
- Permanent Total Disability (PTD) requires expert evidence, and an injured worker can only be PTD once in his or her lifetime;
- Indemnity caps have been increased to $300,000 for death; $155,000 for Permanent Total Disability (PTD); $130,000 for Permanent Partial Disability (PPD); and the functional impairment cap has been increased to $75,000;

Impairment /Disability Changes

- The opinion of the authorized treating physician is presumed determinative of work status;
- Work Disability is available only when functional impairment meets or exceeds 7.5% (or 10% if there is a preexisting impairment) and wage loss meets or exceeds 10%;
- Task Loss equals the ability to perform work tasks performed over the last five years of employment (reduced from 15 years);
- Wage Loss equals the difference between the pre-injury average weekly wage (AWW) and AWW the injured employee is capable of earning after the injury;
- Bilateral scheduled injuries to opposing extremities are now compensated as a body as a whole (BAW) disability, and the loss of use of both eyes is treated as a general bodily injury.

Defenses, Dismissal and Settlement Changes

- The accident must be the prevailing factor (primary factor) in causing the injury;
- An injury is not compensable solely because work was a triggering or precipitating cause;
- An injury is no longer compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic;

- The Act excludes injuries resulting out of the natural aging process or the normal activities of day-to-day living, injuries arising out of neutral risks, idiopathic causes, or risks personal to the worker;
- Employers may suspend benefits for refusal to submit to a physical exam at employer's request;
- The injured worker must prove there is a need for future medical. It is no longer automatically left open;
- The time frame for the employee to give notice of an injury to the employer has been increased from 10 days to 30 days.

Effective date:

The act took effect on May 15, 2011.

ACCIDENT

➢ **Traumatic Accident/Injury – Section 44-508**

"Accident" is now defined as an undesigned, sudden and unexpected traumatic event. The claimed accident must be "the prevailing factor" in causing the injury. The prevailing factor is defined as the "primary" factor in causing the accident. The legislature has also included language that an "accident" shall in no case be construed to include repetitive trauma in any form. Previously, if work aggravated, accelerated or exacerbated the condition, it was sufficient to hold the employer liable. That standard has now changed to a firmer definition.

Analysis/Impact

- This is a higher standard for an injured employee to meet to prove there is a compensable accident.
- Whether this will lead to a reduction in the number of compensable claims is unknown. It is anticipated that more claims will be denied based on this new definition.
- This new definition is somewhat loosely based on the neighboring state of Missouri which adopted this same standard in 2005.

➢ **Repetitive Trauma – Section 44-508(e)**

This new section redefines what constitutes repetitive use, cumulative trauma or micro-trauma injuries. It requires that the repetitive nature of the industry be demonstrated by diagnostic or clinical tests. The new standard of the prevailing factor goes much further than the previous standard and increases the burden of proof on the employee to establish such a case.

Analysis/Impact

- This section should reduce the number of compensable claims by excluding claims that may have been previously compensable based on:
    1. Triggering/precipitating factors;
    2. Aggravations, accelerations, exacerbations;
    3. A pre-existing condition rendered symptomatic.

NOTICE

➢ **Notice – Section 44-520**

The section now contains specific information on how to give notice and clarifies what constitutes permissible notice. The changes in this section lengthen the time frame afforded to an employee to inform the employer of an injury. Employees now have 20 calendar days to give their employer

notice of a claim if they have either already sought treatment for an alleged work-related injury or if they no longer work for the employer. Otherwise, they have 30 calendar days to report an injury.

Analysis/Impact

- To constitute permissible notice, the employee must assert he or she is claiming benefits or suffered a work-related injury. This eliminates the previous position where an employee could simply report an injury without specifying that it was work-related or whether the employee was seeking workers compensation benefits.
- The burden is now on the employee to prove that the employer actually received notice.
- Notice may be oral or written whereas previously, written notice was required in most cases.

WAGES

➢ **Average Weekly Wage – Section 44-511**

The Average Weekly Wage is now based solely upon the wages actually paid to the employee for the 26 weeks immediately preceding the date of accident. Fringe benefits and additional compensation are no longer included unless such benefits are terminated. Wages are calculated based on what the individual employee was actually earning at the time of the accident.

Analysis/Impact

- The revisions simplify the average weekly wage computation. The revisions have also omitted distinctions between hourly, salaried, full-time and part-time employments.
- The changes should eliminate much of the confusion and, potentially, the litigation over computing the average weekly wage. The revisions may reduce the average weekly wage on some claims based on the simpler calculation and a lower base rate.

DEFENSES, DISMISSALS, SETTLEMENTS

➢ **Drugs and Alcohol – Section 44-501(b)(1)**

New subsections were added to create a rebuttable presumption that drug or alcohol impairment contributed to the accident and to allow a forfeiture of benefits when an employee refuses to submit to a chemical test. The burden of proof is now on the employee to show that the impairment did not contribute to the accident.

If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there is a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption by clear and convincing evidence.

An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the employee or if the employer's policy clearly authorizes post-injury testing.

Analysis/Impact

- The requirements have been significantly relaxed making it easier for employers to introduce evidence of impairment from drug or alcohol use.

➢ **Horseplay and Fighting – Section 44-501**

This new section allows for forfeiture of benefits if the injury results from horseplay or fighting no matter the cause or who may have been the aggressor.

Analysis/Impact

- The impact of this section will likely be minimal as there are few claims that involve horseplay or fighting. However, because fighting for any reason can now be denied, some previously compensable injuries to persons other than the initial aggressor would no longer be compensable. That may result in some reduction in payout overall.

➢ **Statute of Limitations – Section 44-534**

An Application for Hearing must be filed within three years of the accident date or two years after the last payment of compensation. Once an Application for Hearing is filed, the claim must proceed to hearing or award within three years or be subject to dismissal with prejudice. The change to this section allows the employer to bring an action for dismissal of a claim for failure to prosecute. While the Administrative law judge can grant an extension for good cause, the claimant bears the burden of proof on that issue.

Analysis/Impact

- The impact of this section will likely be minimal as there are few claims that have a true statute of limitations defense. The time frames have been simplified and there is now an actual process by which to obtain a dismissal.

Dismissals – Section 44-523

The time limit for an injured employee to file an Application for Hearing has been reduced from five years to three years. The requirement that the judge automatically dismiss such claims has been removed and replaced with a dismissal process.

Analysis/Impact

- There is no longer a guaranteed dismissal for failure to prosecute, and employees have an opportunity to show good cause for the delay. However, the statute does not provide direction on what would constitute "good cause."

➢ **Settlements – Section 44-531**

Subsection C is a new section that formally authorizes an Administrative Law Judge (ALJ) to allow a lump sum settlement to be prorated over the injured worker's life expectancy, and reduces the weekly compensation rate to the prorated rate. This section has the greatest impact on employees receiving Social Security or similar type benefits. The statutory compensation rate is no longer applicable when the lump sum settlement is prorated over the employee's life.

Example: the statutory compensation rate may be $400 per week but the prorated rate over the employee's life is determined to be $300. If the employee is entitled to additional TTD or disability (such as a running award), those benefits will be paid at $300 per week. The same is true in the event the prorated amount is higher than the statutory rate, but in no case can the prorated amount exceed the maximum rate for that date of injury.

Previously, a work disability claim could not be settled until nine months after the employee returned to work to prevent employers from settling a claim on a functional basis and then terminating the employee after the settlement was approved. The revisions to how work disability is calculated and awarded have removed the necessity for such a limitation on settlements.

Analysis/Impact

- Removing the nine-month prohibition on settlements has no real impact because of changes elsewhere in the statute that make it moot.

IMPAIRMENT and DISABILITY

➢ **Maximum Benefits – Section 44-510f**

The major revisions to this section raise the caps on disability. Functional disability is now capped at $75,000. Previously, if more than one week of temporary total disability was paid, the functional disability cap was raised from $50,000 to $100,000. Work disability is capped at $130,000, up from $100,000, and PTD is capped at $155,000, up from $125,000.

Analysis/Impact

- The main impact of these changes is that functional disability is now capped at $75,000 regardless of how much TTD is paid. This will reduce payouts in claims where more than a week of TTD benefits is paid.
- Obviously, the increased caps will result in higher payouts for work disability claims.

➢ **Scheduled and Non-Scheduled Injuries – Section 44-510d**

The revisions to this section allow for temporary partial disability benefits for scheduled injuries. In the past, injuries to multiple body parts to a single extremity resulted in disability being assessed for each body part. Now, disability will be assessed at the highest level.

Example:

o Employee has a compensation rate of $300

Employee has injured his right arm: carpal tunnel syndrome (wrist), cubital tunnel syndrome (elbow) and rotator cuff tear (shoulder).

Old Law	**New Law**
Disability would be calculated separately at: • 10% at the wrist for $6,000 • 15% at the elbow for $9450 • 20% at the shoulder for $13,500 Total Settlement is $28,950	Disability would be calculated at: • the shoulder level per the Guides at 25% Total Settlement is $16,875

Analysis/Impact

- We should see a reduction in disability payouts in claims involving multiple injuries to a single extremity.

➢ **Permanent Partial General Disability (Work Disability) – Section 44-510e**

This section significantly changes the requirements for an injured employee to be eligible for work disability. The time frame to consider task loss has been reduced from the 15 years preceding the injury down to five years. An employee must have a minimum of 7.5% functional impairment before work disability can be considered, and the judge is now allowed to impute a post-injury average weekly wage.

Analysis/Impact

- This section alone may have the greatest impact in reducing costs of litigation and reducing payouts for disability by reducing the number and severity of work disability cases.

- Previously, an employee could claim work disability with no work restrictions imposed and minimal to no disability as long as the employee was earning less than 90% of their pre-injury wage for any reason (including layoff, termination for cause, seasonal lay offs, etc.) and potentially receive an award up to $100,000 (*Bergstrom decision*). The changes in the law will reduce these types of settlements because of the new limitations on work disability.
- An employee's refusal to accept accommodated work, a voluntary resignation or termination for cause is no longer assumed to be caused by the injury. Refusal of accommodated work creates a rebuttable presumption of no wage loss.

➢ **Permanent Total Disability – Section 44-510c**

This section eliminates the permanent total disability (PTD) presumption and now requires that permanent total disability be proven by expert testimony. An employee can no longer receive more than one award of PTD in their lifetime.

Analysis/Impact

- The revisions to this section should reduce the number of PTD claims.
- An injured employee now has a higher standard to meet to prove PTD because expert testimony is required.

➢ **Temporary Total Disability - Section 44-510c**

Employers are no longer liable for temporary total disability (TTD) benefits if an injured employee is terminated for cause or voluntarily resigns as long as the employer could have accommodated the injured employee's work restrictions imposed by the authorized treating physician. There is also a specific prohibition of receiving TTD benefits while also receiving unemployment compensation. A refusal by the employee of accommodated work within the temporary restrictions imposed by the authorized treating physician shall result in a rebuttable presumption that the employee is ineligible to receive temporary total disability benefits.

Analysis/Impact

- We should see a reduction in TTD payouts as a result of these changes in cases involving terminations and refusals of offers of accommodation within work restrictions.

➢ **Pre-existing Injuries – Section 44-501**

This new section discusses the implications of preexisting functional impairment. It includes a formula whereby an award for permanent disability may be reduced by the amount of the preexisting impairment. There is a dollar-for-dollar reduction if the impairment was sustained with the same employer. If the impairment was not sustained with the same employer, then there is a percentage credit for the impairment rather than the dollar value.

Example:

1. Claimant has a prior injury to his back in which he was awarded 10% to the body with a compensation rate of $300 or $12,450. He has a current injury to the back with the same employer, and his current compensation rate is $500. The employer will receive a credit for the current value of 10% or $20,750 (415 weeks x 10% x $500). If the new injury results in an award for 25% disability or $51,875, the employer only owes $31,125 ($51,875 - $20,750).
2. If claimant's prior injury was with a different employer, the current employer receives a percentage credit of 10% against the current claim rather than the dollar value. Therefore, if claimant was awarded 15% for the current claim, the employer only pays 5% (15% - 10%).

Analysis/Impact

- The previous method of calculating credits for preexisting impairment was convoluted and not of much benefit to the employer. The revisions to this section have simplified the formula.

MEDICAL TREATMENT`

- **Medical Treatment -- Section 44-510h**

  In cases where there is a dispute among the parties regarding the provisions of medical treatment, the employer is required to submit the names of two providers rather than three from which the employee can chose. The section added a presumption that the employer's obligation to provide medical treatment terminates at the point the employee reaches maximum medical improvement.

Analysis/Impact

- Previously, the employer could be required to provide additional medical treatment even after an employee had reached maximum medical improvement based upon a theory of maintaining the employee's condition.
- Under the revisions, credible medical evidence has to be presented by the employee to show that it is "more probable than not" that treatment will be necessary after employee has reached maximum medical improvement.

- **Future Medical Treatment – Section 44-510k**

- After an award of future medical benefits, any party can request a hearing to terminate or modify the medical treatment. The administrative law judge must make a finding that is more probably true than not that the injury is the prevailing factor in the need for future medical care. If the claimant has not received medical treatment from an authorized health care provider, within two years from the date of the award or the date the claimant last received medical treatment from an authorized health care provider, there is a rebuttable presumption that no further medical care is needed. Termination of benefits pursuant to this section is permanent.

Analysis/Impact

- The burden is on the employee to show a need for future medical care by way of competent medical evidence.

- **Medical Examinations – Section 44-515**

  New language was added to this section stating that all benefits shall be suspended to an employee who refuses to submit to such examination or examinations until such time as the employee complies with the employer's request. The suspension of benefits shall occur even if the employer is under preliminary order to provide such benefits. The requirement to provide the report within 15 days was changed to "within a reasonable time."

Analysis/Impact

- This new language simplifies the process for employers to terminate benefits when an employee has refused to submit to a medical examination.

- **Court-Ordered Independent Medical Examinations – Section 44-516**

  This new section outlines when an independent medical examination (IME) may be ordered. The administrative law judge may no longer order an IME when only one party has an impairment rating. IMEs are still at the discretion of the judge but are no longer automatically ordered if there are two differing medical opinions regarding functional impairment.

Analysis/Impact

- This new section eliminates those situations where the employer has a medical opinion on causation and/or impairment and injured employee does not but requests a court-ordered IME anyway.