

SENATE BILL No. 181

By Committee on Commerce

2-10

AN ACT concerning workers compensation; relating to work disability; amending K.S.A. 44-501 and 44-510e and K.S.A. 2002 Supp. 44-508 and repealing the existing sections; also repealing K.S.A. 44-510a.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 44-501 is hereby amended to read as follows: 44-501. (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(b) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.

(c) The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased *functional impairment or disability. A prior impairment rating or permanent restrictions are not necessary to prove preexisting functional impairment or disability. The trier of fact shall consider all medical testimony on the issue of preexisting impairment or disability.* Any award of compensation shall be ~~reduced~~ *determined by showing, through medical evidence, the amount of functional impairment determined to be preexisting or disability caused by work activity for the employer from whom the employee is seeking compensation.*

(d) (1) If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful

1 failure to use a guard or protection against accident required pursuant to
 2 any statute and provided for the employee, or a reasonable and proper
 3 guard and protection voluntarily furnished the employee by the employer,
 4 any compensation in respect to that injury shall be disallowed.

5 (2) The employer shall not be liable under the workers compensation
 6 act where the injury, disability or death was contributed to by the em-
 7 ployee's use or consumption of alcohol or any drugs, chemicals or any
 8 other compounds or substances, including but not limited to, any drugs
 9 or medications which are available to the public without a prescription
 10 from a health care provider, prescription drugs or medications, any form
 11 or type of narcotic drugs, marijuana, stimulants, depressants or hallucin-
 12 ogens. In the case of drugs or medications which are available to the
 13 public without a prescription from a health care provider and prescription
 14 drugs or medications, compensation shall not be denied if the employee
 15 can show that such drugs or medications were being taken or used in
 16 therapeutic doses and there have been no prior incidences of the em-
 17 ployee's impairment on the job as the result of the use of such drugs or
 18 medications within the previous 24 months. It shall be conclusively pre-
 19 sumed that the employee was impaired due to alcohol or drugs if it is
 20 shown that at the time of the injury that the employee had an alcohol
 21 concentration of .04 or more, or a GCMS confirmatory test by quantita-
 22 tive analysis showing a concentration at or above the levels shown on the
 23 following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
26 Marijuana metabolite 1	15
27 Cocaine metabolite 2	150
28 Opiates:	
29 Morphine.....	2000
30 Codeine.....	2000
31 6-Acetylmorphine ⁴	10 ng/ml
32 Phencyclidine	25
33 Amphetamines:	
34 Amphetamine.....	500
35 Methamphetamine 3	500

36 1 Delta-9-tetrahydrocannabinol-9-carboxylic acid.

37 2 Benzoyllecgonine.

38 3 Specimen must also contain amphetamine at a concentration greater
 39 than or equal to 200 ng/ml.

40 4 Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

41 An employee's refusal to submit to a chemical test shall not be admissible
 42 evidence to prove impairment unless there was probable cause to believe
 43 that the employee used, possessed or was impaired by a drug or alcohol

1 while working. The results of a chemical test shall not be admissible ev-
2 idence to prove impairment unless the following conditions were met:

3 (A) There was probable cause to believe that the employee used, had
4 possession of, or was impaired by the drug or alcohol while working;

5 (B) the test sample was collected at a time contemporaneous with
6 the events establishing probable cause;

7 (C) the collecting and labeling of the test sample was performed by
8 or under the supervision of a licensed health care professional;

9 (D) the test was performed by a laboratory approved by the United
10 States department of health and human services or licensed by the de-
11 partment of health and environment, except that a blood sample may be
12 tested for alcohol content by a laboratory commonly used for that purpose
13 by state law enforcement agencies;

14 (E) the test was confirmed by gas chromatography-mass spectroscopy
15 or other comparably reliable analytical method, except that no such con-
16 firmation is required for a blood alcohol sample; and

17 (F) the foundation evidence must establish, beyond a reasonable
18 doubt, that the test results were from the sample taken from the em-
19 ployee.

20 (e) Compensation shall not be paid in case of coronary or coronary
21 artery disease or cerebrovascular injury unless it is shown that the exertion
22 of the work necessary to precipitate the disability was more than the
23 employee's usual work in the course of the employee's regular employ-
24 ment.

25 (f) Except as provided in the workers compensation act, no construc-
26 tion design professional who is retained to perform professional services
27 on a construction project or any employee of a construction design pro-
28 fessional who is assisting or representing the construction design profes-
29 sional in the performance of professional services on the site of the con-
30 struction project, shall be liable for any injury resulting from the
31 employer's failure to comply with safety standards on the construction
32 project for which compensation is recoverable under the workers com-
33 pensation act, unless responsibility for safety practices is specifically as-
34 sumed by contract. The immunity provided by this subsection to any
35 construction design professional shall not apply to the negligent prepara-
36 tion of design plans or specifications.

37 (g) It is the intent of the legislature that the workers compensation
38 act shall be liberally construed for the purpose of bringing employers and
39 employees within the provisions of the act to provide the protections of
40 the workers compensation act to both. The provisions of the workers
41 compensation act shall be applied impartially to both employers and em-
42 ployees in cases arising thereunder.

43 (h) If the employee is receiving retirement benefits under the federal

1 social security act or retirement benefits, *including disability retirement*
2 *benefits*, from any other retirement system, program or plan which is
3 provided *or funded* by the employer against which the claim is being
4 made, any compensation benefit payments which the employee is eligible
5 to receive under the workers compensation act for such claim shall be
6 reduced by the weekly equivalent amount of the total amount of all such
7 retirement *or disability retirement* benefits, less any portion of any such
8 retirement *or disability retirement* benefit, other than retirement benefits
9 under the federal social security act, that is attributable to payments or
10 contributions made by the employee, but in no event shall the workers
11 compensation benefit be less than the workers compensation benefit pay-
12 able for the employee's percentage of functional impairment.

13 Sec. 2. K.S.A. 44-510e is hereby amended to read as follows: 44-
14 510e. (a) If the employer and the employee are unable to agree upon the
15 amount of compensation to be paid in the case of injury not covered by
16 the schedule in K.S.A. 44-510d and amendments thereto, the amount of
17 compensation shall be settled according to the provisions of the workers
18 compensation act as in other cases of disagreement, except that in case
19 of temporary or permanent partial general disability not covered by such
20 schedule, the employee shall receive weekly compensation as determined
21 in this subsection during such period of temporary or permanent partial
22 general disability not exceeding a maximum of 415 weeks. Weekly com-
23 pensation for temporary partial general disability shall be 66 $\frac{2}{3}$ % of the
24 difference between the average gross weekly wage that the employee was
25 earning prior to such injury as provided in the workers compensation act
26 and the amount the employee is actually earning after such injury in any
27 type of employment, except that in no case shall such weekly compen-
28 sation exceed the maximum as provided for in K.S.A. 44-510c and amend-
29 ments thereto. Permanent partial general disability exists when the em-
30 ployee is disabled in a manner which is partial in character and permanent
31 in quality and which is not covered by the schedule in K.S.A. 44-510d
32 and amendments thereto. ~~The extent of permanent partial general disa-~~
33 ~~bility shall be the extent, expressed as a percentage, to which the em-~~
34 ~~ployee, in the opinion of the physician, has lost the ability to perform the~~
35 ~~work tasks that the employee performed in any substantial gainful em-~~
36 ~~ployment during the fifteen-year period preceding the accident, averaged~~
37 ~~together with the difference between the average weekly wage the worker~~
38 ~~was earning at the time of the injury and the average weekly wage the~~
39 ~~worker is earning after the injury. In any event, The extent of permanent~~
40 partial general disability shall not be less than the percentage of functional
41 impairment. Functional impairment means the extent, expressed as a per-
42 centage, of the loss of a portion of the total physiological capabilities of
43 the human body as established by competent medical evidence and based

1 on the fourth edition of the American Medical Association Guides to the
2 Evaluation of Permanent Impairment, if the impairment is contained
3 therein. An employee shall not be entitled to receive permanent partial
4 general disability compensation in excess of the percentage of functional
5 impairment as long as the employee is engaging in any work for wages
6 equal to 90% or more of the average gross weekly wage that the employee
7 was earning at the time of the injury. *An employee shall not be entitled*
8 *to receive general disability compensation in excess of the percentage of*
9 *functional impairment as long as the employee was not under work re-*
10 *strictions at the time of separation from employment. If due to the work-*
11 *related injury the employee is not engaging in any work for wages equal*
12 *to 90% or more of the average gross weekly wage that the employee was*
13 *earning at the time of the injury, the employee shall be entitled to sup-*
14 *plemental functional disability compensation.* If the employer and the
15 employee are unable to agree upon the employee's functional impairment
16 and if at least two medical opinions based on competent medical evidence
17 disagree as to the percentage of functional impairment, such matter may
18 be referred by the administrative law judge to an independent health care
19 provider who shall be selected by the administrative law judge from a list
20 of health care providers maintained by the director. The health care pro-
21 vider selected by the director pursuant to this section shall issue an opin-
22 ion regarding the employee's functional impairment which shall be con-
23 sidered by the administrative law judge in making the final determination.
24 The amount of weekly compensation for permanent partial general dis-
25 ability shall be determined as follows:

26 (1) Find the payment rate which shall be the lesser of (A) the amount
27 determined by multiplying the average gross weekly wage of the worker
28 prior to such injury by 66⅔% or (B) the maximum provided in K.S.A. 44-
29 510c and amendments thereto;

30 (2) find the number of disability weeks payable by subtracting from
31 415 weeks the total number of weeks of temporary total disability com-
32 pensation was paid, excluding the first 15 weeks of temporary total disa-
33 bility compensation that was paid, and multiplying the remainder by the
34 percentage of ~~permanent partial general disability~~ *functional impairment*
35 as determined under this subsection (a); and

36 (3) multiply the number of disability weeks determined in paragraph
37 (2) of this subsection (a) by the payment rate determined in paragraph
38 (1) of this subsection (a).

39 The resulting award shall be paid for the number of disability weeks at
40 the full payment rate until fully paid or modified. If there is an award of
41 permanent disability as a result of the compensable injury, there shall be
42 a presumption that disability existed immediately after such injury. In any
43 case of permanent partial disability under this section, the employee shall

1 be paid compensation for not to exceed 415 weeks following the date of
2 such injury, subject to review and modification as provided in K.S.A. 44-
3 528 and amendments thereto.

4 (4) *If the employee is entitled to supplemental functional disability*
5 *compensation, the amount of such compensation shall be calculated by*
6 *determining the percentage difference between the average weekly wage*
7 *the worker was earning at the time of the injury and the average weekly*
8 *wage the employee is earning after the injury. The percentage difference*
9 *will represent the number of weeks of supplemental compensation for*
10 *functional impairment to be paid in addition to the disability weeks de-*
11 *termined in paragraph (3) of this subsection (a). If the worker is unem-*
12 *ployed or is not earning a wage at the time of the decision, the trier of*
13 *fact shall impute a post injury average weekly wage based upon the ability*
14 *of the worker to earn a commensurate wage based on the evidence in the*
15 *record.*

16 (b) If an employee has received an injury for which compensation is
17 being paid, and the employee's death is caused by other and independent
18 causes, any payment of compensation already due the employee at the
19 time of death and then unpaid shall be paid to the employee's dependents
20 directly or to the employee's legal representatives if the employee left no
21 dependent, but the liability of the employer for the payments of com-
22 pensation not yet due at the time of the death of such employee shall
23 cease and be abrogated by the employee's death.

24 (c) The total amount of compensation that may be allowed or
25 awarded an injured employee for all injuries received in any one accident
26 shall in no event exceed the compensation which would be payable under
27 the workers compensation act for 100% permanent total disability re-
28 sulting from such accident.

29 (d) Where a minor employee or a minor employee's dependents are
30 entitled to compensation under the workers compensation act, such com-
31 pensation shall be exclusive of all other remedies or causes of action for
32 such injury or death, and no claim or cause of action against the employer
33 shall inure or accrue to or exist in favor of the parent or parents of such
34 minor employee on account of any damage resulting to such parent or
35 parents on account of the loss of earnings or loss of service of such minor
36 employee.

37 (e) In any case of injury to or death of an employee, where the em-
38 ployee or the employee's dependents are entitled to compensation under
39 the workers compensation act, such compensation shall be exclusive of
40 all other remedies or causes of action for such injury or death, and no
41 claim or action shall inure, accrue to or exist in favor of the surviving
42 spouse or any relative or next of kin of such employee against such em-
43 ployer on account of any damage resulting to such surviving spouse or

1 any relative or next of kin on account of the loss of earnings, services, or
2 society of such employee or on any other account resulting from or grow-
3 ing out of the injury or death of such employee.

4 Sec. 3. K.S.A. 2002 Supp. 44-508 is hereby amended to read as fol-
5 lows: 44-508. As used in the workers compensation act:

6 (a) "Employer" includes: (1) Any person or body of persons, corpo-
7 rate or unincorporate, and the legal representative of a deceased em-
8 ployer or the receiver or trustee of a person, corporation, association or
9 partnership; (2) the state or any department, agency or authority of the
10 state, any city, county, school district or other political subdivision or
11 municipality or public corporation and any instrumentality thereof; and
12 (3) for the purposes of community service work, the entity for which the
13 community service work is being performed and the governmental agency
14 which assigned the community service work, if any, if either such entity
15 or such governmental agency has filed a written statement of election
16 with the director to accept the provisions under the workers compensa-
17 tion act for persons performing community service work and in such case
18 such entity and such governmental agency shall be deemed to be the joint
19 employer of the person performing the community service work and both
20 shall have the rights, liabilities and immunities provided under the work-
21 ers compensation act for an employer with regard to the community serv-
22 ice work, except that the liability for providing benefits shall be imposed
23 only on the party which filed such election with the director, or on both
24 if both parties have filed such election with the director; for purposes of
25 community service work, "governmental agency" shall not include any
26 court or any officer or employee thereof and any case where there is
27 deemed to be a "joint employer" shall not be construed to be a case of
28 dual or multiple employment.

29 (b) "Workman" or "employee" or "worker" means any person who
30 has entered into the employment of or works under any contract of serv-
31 ice or apprenticeship with an employer. Such terms shall include but not
32 be limited to: Executive officers of corporations; professional athletes;
33 persons serving on a volunteer basis as duly authorized law enforcement
34 officers, attendants, as defined in subsection (d) of K.S.A. 65-6112 and
35 amendments thereto, drivers of ambulances as defined in subsection (b)
36 of K.S.A. 65-6112, and amendments thereto, firefighters, but only to the
37 extent and during such periods as they are so serving in such capacities;
38 persons employed by educational, religious and charitable organizations,
39 but only to the extent and during the periods that they are paid wages by
40 such organizations; persons in the service of the state, or any department,
41 agency or authority of the state, any city, school district, or other political
42 subdivision or municipality or public corporation and any instrumentality
43 thereof, under any contract of service, express or implied, and every of-

1 ficial or officer thereof, whether elected or appointed, while performing
2 official duties; persons in the service of the state as volunteer members
3 of the Kansas department of civil air patrol, but only to the extent and
4 during such periods as they are officially engaged in the performance of
5 functions specified in K.S.A. 48-3302 and amendments thereto; volun-
6 teers in any employment, if the employer has filed an election to extend
7 coverage to such volunteers; minors, whether such minors are legally or
8 illegally employed; and persons performing community service work, but
9 only to the extent and during such periods as they are performing com-
10 munity service work and if an election has been filed an election to extend
11 coverage to such persons. Any reference to an employee who has been
12 injured shall, where the employee is dead, include a reference to the
13 employee's dependents, to the employee's legal representatives, or, if the
14 employee is a minor or an incapacitated person, to the employee's guard-
15 ian or conservator. Unless there is a valid election in effect which has
16 been filed as provided in K.S.A. 44-542a and amendments thereto, such
17 terms shall not include individual employers, limited liability company
18 members, partners or self-employed persons.

19 (c) (1) "Dependents" means such members of the employee's family
20 as were wholly or in part dependent upon the employee at the time of
21 the accident.

22 (2) "Members of a family" means only surviving legal spouse and
23 children; or if no surviving legal spouse or children, then parents or grand-
24 parents; or if no parents or grandparents, then grandchildren; or if no
25 grandchildren, then brothers and sisters. In the meaning of this section,
26 parents include stepparents, children include stepchildren, grandchildren
27 include stepgrandchildren, brothers and sisters include stepbrothers and
28 stepsisters, and children and parents include that relation by legal adop-
29 tion. In the meaning of this section, a surviving spouse shall not be re-
30 garded as a dependent of a deceased employee or as a member of the
31 family, if the surviving spouse shall have for more than six months willfully
32 or voluntarily deserted or abandoned the employee prior to the date of
33 the employee's death.

34 (3) "Wholly dependent child or children" means:

35 (A) A birth child or adopted child of the employee except such a child
36 whose relationship to the employee has been severed by adoption;

37 (B) a stepchild of the employee who lives in the employee's house-
38 hold;

39 (C) any other child who is actually dependent in whole or in part on
40 the employee and who is related to the employee by marriage or consan-
41 guinity; or

42 (D) any child as defined in subsections (3)(A), (3)(B) or (3)(C) who
43 is less than 23 years of age and who is not physically or mentally capable

1 of earning wages in any type of substantial and gainful employment or
2 who is a full-time student attending an accredited institution of higher
3 education or vocational education.

4 (d) “Accident” means an undesigned, sudden and unexpected event
5 or events, usually of an afflictive or unfortunate nature and often, but not
6 necessarily, accompanied by a manifestation of force. The elements of an
7 accident, as stated herein, are not to be construed in a strict and literal
8 sense, but in a manner designed to effectuate the purpose of the workers
9 compensation act that the employer bear the expense of accidental injury
10 to a worker caused by the employment. *In cases where the accident occurs*
11 *as a result of a series of events, repetitive use, cumulative traumas or micro*
12 *traumas, the date of accident shall be the earliest of the following dates:*
13 *(1) The date upon which the employee gives notice to the employer of the*
14 *injury; (2) the date the condition is diagnosed as work-related, providing*
15 *such fact is communicated to the injured worker; or (3) the first day the*
16 *authorized physician takes the employee off work due to the condition or*
17 *restricts the employee from performing the work which is the cause of the*
18 *condition.*

19 (e) “Personal injury” and “injury” mean any lesion or change in the
20 physical structure of the body, causing damage or harm thereto, so that
21 it gives way under the stress of the worker’s usual labor. It is not essential
22 that such lesion or change be of such character as to present external or
23 visible signs of its existence. An injury shall not be deemed to have been
24 directly caused by the employment where it is shown that the employee
25 suffers disability as a result of the natural aging process or by the normal
26 activities of day-to-day living.

27 (f) The words “arising out of and in the course of employment” as
28 used in the workers compensation act shall not be construed to include
29 injuries to the employee occurring while the employee is on the way to
30 assume the duties of employment or after leaving such duties, the prox-
31 imate cause of which injury is not the employer’s negligence. An em-
32 ployee shall not be construed as being on the way to assume the duties
33 of employment or having left such duties at a time when the worker is
34 on the premises of the employer or on the only available route to or from
35 work which is a route involving a special risk or hazard and which is a
36 route not used by the public except in dealings with the employer. An
37 employee shall not be construed as being on the way to assume the duties
38 of employment, if the employee is a provider of emergency services re-
39 sponding to an emergency.

40 The words, “arising out of and in the course of employment” as used
41 in the workers compensation act shall not be construed to include injuries
42 to employees while engaged in recreational or social events under cir-
43 cumstances where the employee was under no duty to attend and where

1 the injury did not result from the performance of tasks related to the
2 employee's normal job duties or as specifically instructed to be performed
3 by the employer.

4 (g) "Burden of proof" means the burden of a party to persuade the
5 trier of facts by a preponderance of the credible evidence that such party's
6 position on an issue is more probably true than not true on the basis of
7 the whole record.

8 (h) "Director" means the director of workers compensation as pro-
9 vided for in K.S.A. 75-5708 and amendments thereto.

10 (i) "Health care provider" means any person licensed, by the proper
11 licensing authority of this state, another state or the District of Columbia,
12 to practice medicine and surgery, osteopathy, chiropractic, dentistry, op-
13 tometry, podiatry, audiology or psychology.

14 (j) "Secretary" means the secretary of human resources.

15 (k) "Construction design professional" means any person who is an
16 architect, professional engineer, landscape architect or land surveyor who
17 has been issued a license by the state board of technical professions to
18 practice such technical profession in Kansas or any corporation organized
19 to render professional services through the practice of one or more of
20 such technical professions in Kansas under the professional corporation
21 law of Kansas or any corporation issued a certificate of authorization un-
22 der K.S.A. 74-7036 and amendments thereto to practice one or more of
23 such technical professions in Kansas.

24 (l) "Community service work" means: (1) Public or community serv-
25 ice performed as a result of a contract of diversion or of assignment to a
26 community corrections program or conservation camp or suspension of
27 sentence or as a condition of probation or in lieu of a fine imposed by
28 court order; or (2) public or community service or other work performed
29 as a requirement for receipt of any kind of public assistance in accordance
30 with any program administered by the secretary of social and rehabilita-
31 tion services.

32 (m) "Utilization review" means the initial evaluation of appropriate-
33 ness in terms of both the level and the quality of health care and health
34 services provided a patient, based on accepted standards of the health
35 care profession involved. Such evaluation is accomplished by means of a
36 system which identifies the utilization of health care services above the
37 usual range of utilization for such services, which is based on accepted
38 standards of the health care profession involved, and which refers in-
39 stances of possible inappropriate utilization to the director for referral to
40 a peer review committee.

41 (n) "Peer review" means an evaluation by a peer review committee
42 of the appropriateness, quality and cost of health care and health services
43 provided a patient, which is based on accepted standards of the health

1 care profession involved and which is conducted in conjunction with util-
2 ization review.

3 (o) “Peer review committee” means a committee composed of health
4 care providers licensed to practice the same health care profession as the
5 health care provider who rendered the health care services being re-
6 viewed.

7 (p) “Group-funded self-insurance plan” includes each group-funded
8 workers compensation pool, which is authorized to operate in this state
9 under K.S.A. 44-581 through 44-592 and amendments thereto, each mu-
10 nicipal group-funded pool under the Kansas municipal group-funded pool
11 act which is covering liabilities under the workers compensation act, and
12 any other similar group-funded or pooled plan or arrangement that pro-
13 vides coverage for employer liabilities under the workers compensation
14 act and is authorized by law.

15 (q) On and after the effective date of this act, “workers compensation
16 board” or “board” means the workers compensation board established
17 under K.S.A. 44-555c and amendments thereto.

18 (r) “Usual charge” means the amount most commonly charged by
19 health care providers for the same or similar services.

20 (s) “Customary charge” means the usual rates or range of fees
21 charged by health care providers in a given locale or area.

22 Sec. 4. K.S.A. 44-501, 44-510a and 44-510e and K.S.A. 2002 Supp.
23 44-508 are hereby repealed.

24 Sec. 5. This act shall take effect and be in force from and after its
25 publication in the statute book.

26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43