

## HOUSE BILL No. 2840

By Representative Ward

2-11

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9 AN ACT regarding workers compensation; concerning intentional, wan-  
10 ton and reckless acts; amending K.S.A. 44-501, 44-510e, 44-545 and  
11 44-5a07 and repealing the existing sections.

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

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

25 (b) Except as provided in the workers compensation act, no em-  
26 ployer, or other employee of such employer, shall be liable for any injury  
27 for which compensation is recoverable under the workers compensation  
28 act nor shall an employer be liable to any third party for any injury or  
29 death of an employee which was caused under circumstances creating a  
30 legal liability against a third party and for which workers compensation is  
31 payable by such employer *except that an employer shall not be protected*  
32 *from any other legal remedy sought by an employee or third party for*  
33 *any injury or death of an employee where the injury or death resulted*  
34 *from an intentional, wanton or reckless act by the employer.*

35 (c) The employee shall not be entitled to recover for the aggravation  
36 of a preexisting condition, except to the extent that the work-related injury  
37 causes increased disability. Any award of compensation shall be reduced  
38 by the amount of functional impairment determined to be preexisting.

39 (d) (1) If the injury to the employee results from the employee's  
40 deliberate intention to cause such injury; or from the employee's willful  
41 failure to use a guard or protection against accident required pursuant to  
42 any statute and provided for the employee, or a reasonable and proper  
43 guard and protection voluntarily furnished the employee by the employer,

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

| Confirmatory test cutoff levels (ng/ml)    |          |
|--|----------|
| 22 Marijuana metabolite <sup>1</sup> ..... | 15       |
| 23 Cocaine metabolite <sup>2</sup> .....   | 150      |
| 24 Opiates:                                |          |
| 25 Morphine .....                          | 2000     |
| 26 Codeine .....                           | 2000     |
| 27 6-Acetylmorphine <sup>4</sup> .....     | 10 ng/ml |
| 28 Phencyclidine .....                     | 25       |
| 29 Amphetamines:                           |          |
| 30 Amphetamine.....                        | 500      |
| 31 Methamphetamine <sup>3</sup> .....      | 500      |

32 <sup>1</sup> Delta-9-tetrahydrocannabinol-9-carboxylic acid.  
 33 <sup>2</sup> Benzoylcegonine.  
 34 <sup>3</sup> Specimen must also contain amphetamine at a concentration greater than or equal to 200  
 35 ng/ml.  
 36 <sup>4</sup> Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

37 An employee's refusal to submit to a chemical test shall not be admissible  
 38 evidence to prove impairment unless there was probable cause to believe  
 39 that the employee used, possessed or was impaired by a drug or alcohol  
 40 while working. The results of a chemical test shall not be admissible ev-  
 41 idence to prove impairment unless the following conditions were met:  
 42 (A) There was probable cause to believe that the employee used, had  
 43 possession of, or was impaired by the drug or alcohol while working;

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

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

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

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

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

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

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

33 (g) It is the intent of the legislature that the workers compensation  
34 act shall be liberally construed for the purpose of bringing employers and  
35 employees within the provisions of the act to provide the protections of  
36 the workers compensation act to both.

37 (h) If the employee is receiving retirement benefits under the federal  
38 social security act or retirement benefits from any other retirement sys-  
39 tem, program or plan which is provided by the employer against which  
40 the claim is being made, any compensation benefit payments which the  
41 employee is eligible to receive under the workers compensation act for  
42 such claim shall be reduced by the weekly equivalent amount of the total  
43 amount of all such retirement benefits, less any portion of any such re-

1 tirement benefit, other than retirement benefits under the federal social  
2 security act, that is attributable to payments or contributions made by the  
3 employee, but in no event shall the workers compensation benefit be less  
4 than the workers compensation benefit payable for the employee's per-  
5 centage of functional impairment.

6 Sec. 2. K.S.A. 44-510e is hereby amended to read as follows: 44-  
7 510e. (a) If the employer and the employee are unable to agree upon the  
8 amount of compensation to be paid in the case of injury not covered by  
9 the schedule in K.S.A. 44-510d and amendments thereto, the amount of  
10 compensation shall be settled according to the provisions of the workers  
11 compensation act as in other cases of disagreement, except that in case  
12 of temporary or permanent partial general disability not covered by such  
13 schedule, the employee shall receive weekly compensation as determined  
14 in this subsection during such period of temporary or permanent partial  
15 general disability not exceeding a maximum of 415 weeks. Weekly com-  
16 pensation for temporary partial general disability shall be 66 $\frac{2}{3}$ % of the  
17 difference between the average gross weekly wage that the employee was  
18 earning prior to such injury as provided in the workers compensation act  
19 and the amount the employee is actually earning after such injury in any  
20 type of employment, except that in no case shall such weekly compen-  
21 sation exceed the maximum as provided for in K.S.A. 44-510c and amend-  
22 ments thereto. Permanent partial general disability exists when the em-  
23 ployee is disabled in a manner which is partial in character and permanent  
24 in quality and which is not covered by the schedule in K.S.A. 44-510d  
25 and amendments thereto. The extent of permanent partial general disa-  
26 bility shall be the extent, expressed as a percentage, to which the em-  
27 ployee, in the opinion of the physician, has lost the ability to perform the  
28 work tasks that the employee performed in any substantial gainful em-  
29 ployment during the fifteen-year period preceding the accident, averaged  
30 together with the difference between the average weekly wage the worker  
31 was earning at the time of the injury and the average weekly wage the  
32 worker is earning after the injury. In any event, the extent of permanent  
33 partial general disability shall not be less than the percentage of functional  
34 impairment. Functional impairment means the extent, expressed as a per-  
35 centage, of the loss of a portion of the total physiological capabilities of  
36 the human body as established by competent medical evidence and based  
37 on the fourth edition of the American Medical Association Guides to the  
38 Evaluation of Permanent Impairment, if the impairment is contained  
39 therein. An employee shall not be entitled to receive permanent partial  
40 general disability compensation in excess of the percentage of functional  
41 impairment as long as the employee is engaging in any work for wages  
42 equal to 90% or more of the average gross weekly wage that the employee  
43 was earning at the time of the injury. If the employer and the employee

1 are unable to agree upon the employee's functional impairment and if at  
2 least two medical opinions based on competent medical evidence disagree  
3 as to the percentage of functional impairment, such matter may be re-  
4 ferred by the administrative law judge to an independent health care  
5 provider who shall be selected by the administrative law judge from a list  
6 of health care providers maintained by the director. The health care pro-  
7 vider selected by the director pursuant to this section shall issue an opin-  
8 ion regarding the employee's functional impairment which shall be con-  
9 sidered by the administrative law judge in making the final determination.  
10 The amount of weekly compensation for permanent partial general dis-  
11 ability shall be determined as follows:

12 (1) Find the payment rate which shall be the lesser of (A) the amount  
13 determined by multiplying the average gross weekly wage of the worker  
14 prior to such injury by 66% or (B) the maximum provided in K.S.A. 44-  
15 510c and amendments thereto;

16 (2) find the number of disability weeks payable by subtracting from  
17 415 weeks the total number of weeks of temporary total disability com-  
18 pensation was paid, excluding the first 15 weeks of temporary total dis-  
19 ability compensation that was paid, and multiplying the remainder by the  
20 percentage of permanent partial general disability as determined under  
21 this subsection (a); and

22 (3) multiply the number of disability weeks determined in paragraph  
23 (2) of this subsection (a) by the payment rate determined in paragraph  
24 (1) of this subsection (a).

25 The resulting award shall be paid for the number of disability weeks at  
26 the full payment rate until fully paid or modified. If there is an award of  
27 permanent disability as a result of the compensable injury, there shall be  
28 a presumption that disability existed immediately after such injury. In any  
29 case of permanent partial disability under this section, the employee shall  
30 be paid compensation for not to exceed 415 weeks following the date of  
31 such injury, subject to review and modification as provided in K.S.A. 44-  
32 528 and amendments thereto.

33 (b) If an employee has received an injury for which compensation is  
34 being paid, and the employee's death is caused by other and independent  
35 causes, any payment of compensation already due the employee at the  
36 time of death and then unpaid shall be paid to the employee's dependents  
37 directly or to the employee's legal representatives if the employee left no  
38 dependent, but the liability of the employer for the payments of com-  
39 pensation not yet due at the time of the death of such employee shall  
40 cease and be abrogated by the employee's death.

41 (c) The total amount of compensation that may be allowed or  
42 awarded an injured employee for all injuries received in any one accident  
43 shall in no event exceed the compensation which would be payable under

1 the workers compensation act for 100% permanent total disability re-  
2 sulting from such accident.

3 (d) Where a minor employee or a minor employee's dependents are  
4 entitled to compensation under the workers compensation act, such com-  
5 pensation shall be exclusive of all other remedies or causes of action for  
6 such injury or death, and no claim or cause of action against the employer  
7 shall inure or accrue to or exist in favor of the parent or parents of such  
8 minor employee on account of any damage resulting to such parent or  
9 parents on account of the loss of earnings or loss of service of such minor  
10 employee.

11 (e) In any case of injury to or death of an employee, where the em-  
12 ployee or the employee's dependents are entitled to compensation under  
13 the workers compensation act, such compensation shall be exclusive of  
14 all other remedies or causes of action for such injury or death, and no  
15 claim or action shall inure, accrue to or exist in favor of the surviving  
16 spouse or any relative or next of kin of such employee against such em-  
17 ployer on account of any damage resulting to such surviving spouse or  
18 any relative or next of kin on account of the loss of earnings, services, or  
19 society of such employee or on any other account resulting from or grow-  
20 ing out of the injury or death of such employee *except that an employer*  
21 *shall not be protected from any other legal remedy sought by an employee*  
22 *or an employee's dependent or any relative or next of kin where the injury*  
23 *or death resulted from an intentional, wanton or reckless act of the em-*  
24 *ployer.*

25 Sec. 3. K.S.A. 44-545 is hereby amended to read as follows: 44-545.  
26 In an action to recover damages for an injury by accident arising out of  
27 and in the course of employment which was sustained by an employee,  
28 who is an employee subject to the provisions of the workmen's compen-  
29 sation act other than by election filed pursuant to K.S.A. 44-542a, or for  
30 death resulting from an injury so sustained, in which recovery is sought  
31 upon the ground of want of due care of the employer or of any officer,  
32 agent or servant of the employer and where such employer at the time  
33 of the accident was subject to the provisions of the workmen's compen-  
34 sation act, it shall be a defense for such employer in all cases where  
35 said employee has elected not to come within the provisions of the work-  
36 men's compensation act pursuant to a valid declaration of election as  
37 provided in K.S.A. 44-543: (a) That the employee either expressly or im-  
38 plicitly assumed the risk of the hazard complained of; (b) that the injury  
39 or death was caused in whole or in part by the want of due care of a  
40 fellow servant; or (c) that said employee was guilty of contributory neg-  
41 ligence: ~~Provided~~, *except* that none of these defenses shall be available  
42 where the injury or death was caused by the *intentional, wanton or reck-*  
43 *less act or the willful negligence* of such employer, or of any managing

1 officer, or of managing agent of said employer.

2 Sec. 4. K.S.A. 44-5a07 is hereby amended to read as follows: 44-  
3 5a07. An employer subject to the provisions of this act shall secure the  
4 payment of compensation in accordance with the provisions of this act in  
5 any method prescribed by the provisions of section 44-532 of the work-  
6 men's compensation law, and such insurance or other security may be  
7 separate and distinct from the insurance or other security under the work-  
8 men's compensation law. Where the foregoing requirement is complied  
9 with the liability of the employer under this act shall be exclusive and in  
10 place of any and all other civil liability whatsoever, at common law or  
11 otherwise *except where the employee's injury or death resulted from an*  
12 *intentional, wanton or reckless act or willful negligence of the employer,*  
13 *or any managing officer or managing agent of such employer.*

14 Sec. 5. K.S.A. 44-501, 44-510e, 44-545 and 44-5a07 are hereby re-  
15 pealed.

16 Sec. 6. This act shall take effect and be in force from and after its  
17 publication in the statute book.