

# *McCullough, Wareheim & LaBunker, P.A.*

JAN L. FISHER  
[ianfisher35@gmail.com](mailto:ianfisher35@gmail.com)

MITCHELL D. WULFEKOETTER  
[mitchwulfekoetter@mcwala.com](mailto:mitchwulfekoetter@mcwala.com)

JAMES E. BENFER, III  
[jebbenfer@mcwala.com](mailto:jebbenfer@mcwala.com)

*Workers' Compensation*

*Personal Injury*

*Social Security Disability*

*Family Law*

1507 S.W. Topeka Blvd.  
P.O. Box 1453  
Topeka, Kansas 66601-1453  
Telephone: (785)233-2323  
FAX: (785)233-0430 or  
(785)233-1955

My name is Jan Fisher. I am an attorney who has practiced - almost exclusively - in the area of workers compensation for the last 37 years. I also teach workers compensation as an adjunct professor of law at Washburn Law School. I am a registered lobbyist for State AFL-CIO. I am a proponent of SB 361.

Workers' compensation benefits are designed to create a base level of compensation for those workers injured on the job. The two (2) basic benefits are medical treatment and monetary payments which are payable when a person is off work trying to recover from the injury or suffering from the effects of a permanent injury.

SB 361 addresses compensation for those workers who are injured so severely that they may never go back to work. They are considered permanently and totally disabled and entitled to permanent total disability compensation (PTD). Currently, the Kansas law limits compensation to a maximum of \$155,000.00. SB 361 eliminates the maximum benefit and allows the disabled worker to collect benefits during the duration of their disability.

This bill deals with a relatively small number of injured workers. According to the Division of Workers Compensation, most injury claims do not result in compensation for lost time. The Division of Worker's Compensation Statistical Report (1/2022) reports

5,680 compensated lost time claims which represents only twelve percent (12%) of all claims. Obviously, most of these do not involve permanent and total disability claims.

The Division Report does not indicate the number of awards or settlements involving those permanently and totally disabled. The National Academy of Social Insurance (NASI) issues an annual report comparing workers compensation benefits for each state and the federal government. Their latest report - issued in October, 2021 - is based on 2019 data. According to the NASI, most states allow permanently and totally disabling conditions to be compensated for life if the condition leads to an inability to work. Nationally, permanent total disability claims are relatively rare - accounting for less than one-fourth (1/4) of one percent (1%) of the claims involving cash benefits.

The maximum compensation of \$155,000.00 is woefully inadequate. Benefits are paid on a weekly basis and are based on two-thirds (2/3) of the employee's average weekly wage. This means an injured worker collecting at the maximum benefit rate for 2022 of \$737.00 per week collects disability checks for permanent and total disability for approximately four (4) years.

Even for relatively low paid workers, the maximum compensation is inadequate.

Consider the factory worker who makes \$15.00 per hour and works full-time. He has an annual salary of \$31,200.00 per year. However, if this same worker is injured and cannot return to work, he would receive only \$20,801.00 per year from workers compensation benefits. The \$155,000.00 cap would be fully paid in 7 ½ years.

If the injured worker is permanently and totally disabled, what is he supposed to do after this relatively short period of time?

According to the NASI, the two (2) most common compensation schemes for permanent and total disability are either payments for life or payment until full retirement age when Social Security Retirement (SSR) benefits would be payable. Only six (6) states have some other type of cap. Two (2) of these states pay compensation up to 500 weeks. **Kansas appears to pay less for permanent and total disability than any other state's workers compensation system.**

A comparison of the workers compensation acts of our neighboring states illustrates the inadequacy of the current Kansas cap on permanent and total disability of \$155,000.00. For example, Missouri compensation for PTD states as follows:

“Compensation for permanent total disability shall be paid during the continuance of such disability for lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made.”

Rs.Mo. 287.200.1

Nebraska has a similar statute. Individuals who are permanently and totally disabled “are paid compensation during such disability” and it is based on sixty-six and two-thirds percent (66 2/3%) of the wages received at the time of the injury. Nebraska statute 48-1211(1).

Iowa also awards compensation for life for those permanently and totally disabled. Under Iowa 85.34(3)(a), compensation for an injury causing permanent total disability shall be upon the basis of eighty percent (80%) of the employee's average spendable weekly earnings but not more than a weekly benefit amount - rounded to the nearest

dollar - equal to two hundred percent (200%) of the statewide average weekly wage. The weekly compensation is payable “until the employee is no longer permanently and totally disabled.”

The Colorado Workers Compensation Act indicates:

“In cases of permanent total disability, the award shall be sixty-six and two-thirds percent of the average weekly wages of the injured employee and shall continue until death of such person so totally disabled...”

2016 CO Rev. State Sec. 8-42-11 (2016).

Oklahoma does limit compensation for PTD but is much more generous than the Kansas statute.

“Permanent and total disability is payable if an injured worker is incapable of returning to any form of gainful employment based upon her education and experience. PTD is typically paid in a weekly amount, currently set at 70% of the injured worker’s average weekly wage, but capped at 100% of the state’s average weekly wage, which is currently \$816.50. A claimant may receive permanent total disability benefits for a period of fifteen (15) years, or until such time as the employee reaches the age of maximum Social Security retirement benefits, whichever period is longer.”

“Guide for Injured Workers” found at <https://www.ok.gov/wcc/documents/Guide%20for%20Injured%20Workerslatest%20edit.pdf>

Enacting SB 361 would simply put the compensation available in Kansas for severely injured workers on par with our neighboring states.

SB 361 allows compensation for the “duration of the disability”. Therefore, if a worker improves and can return to work, compensation would no longer be payable. This is accomplished through our system of review and modification.

I would also like to address the common argument given by the insurance industry whenever benefits are increased. These benefits will increase the cost and will encourage litigation. For example, the fiscal note from the Self-insurance Fund calculates an increase in costs of 10.8 million annually. The calculations in this document are flawed in several ways:

- The calculations are based upon a wage of \$904.00 per week even though K.S.A. 44-510c mandates the use of two-thirds (2/3) of the average weekly wage up to a statutory maximum. The current statutory maximum is \$737.00 per week.
- The calculations assume payments up to age 78 although K.S.A. 44-501(f) allows for an offset for those receiving Social Security Retirement. As a result, workers compensation benefits would be eliminated - or severely reduced - at age 65.
- The calculations consider payments of a 28 year period but place the entire cost over the lifetime of the award in fiscal year 2023. This is based upon a misunderstanding that workers compensation is not paid in a lump sum but paid weekly.

I would like to recommend a change in the language of the bill to reflect the true intent. I believe that the intention of this bill was to pay compensation based upon two-thirds (2/3) of the average weekly wage subject to the maximum rate established each year. I suggest the following change to Section 1(a)(1):

*“For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, benefits shall be paid from the date of maximum medical improvement and continuing for the lifetime of the employee for the duration of the disability.”*

Increasing the maximum benefit for claimants who can never work will not encourage litigation. The NASI data above is based upon national data. Most states do not have a cap on permanent total disability benefits. Despite this, only one-fourth (1/4) of one percent (1%) of all indemnity claims are for permanent total compensation. The burden of proof - especially in Kansas with the prevailing factor standard of causation - is simply too high.

Our workers compensation system should provide a safety net for all injured workers. This is especially true of those workers who suffer the most severe injuries. SB 361 provides this safety net for those most severely injured by work-related accidents.