

HOUSE BILL No. 2058

By Committee on Commerce, Labor and Economic Development

1-12

1 AN ACT concerning workers compensation; relating to the prevailing
2 factor standard of causation; amending K.S.A. 2016 Supp. 44-508 and
3 44-510k and repealing the existing sections.
4

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

6 Section 1. K.S.A. 2016 Supp. 44-508 is hereby amended to read as
7 follows: 44-508. As used in the workers compensation act:

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

31 (b) "Workman" or "employee" or "worker" means any person who
32 has entered into the employment of or works under any contract of service
33 or apprenticeship with an employer. Such terms shall include, but not be
34 limited to: Executive officers of corporations; professional athletes;
35 persons serving on a volunteer basis as duly authorized law enforcement
36 officers, attendants, as defined in ~~subsection (f) of~~ K.S.A. 65-6112(f), and

1 amendments thereto, drivers of ambulances as defined in ~~subsection (d) of~~
2 K.S.A. 65-6112(d), and amendments thereto, firefighters, but only to the
3 extent and during such periods as they are so serving in such capacities;
4 persons employed by educational, religious and charitable organizations,
5 but only to the extent and during the periods that they are paid wages by
6 such organizations; persons in the service of the state, or any department,
7 agency or authority of the state, any city, school district, or other political
8 subdivision or municipality or public corporation and any instrumentality
9 thereof, under any contract of service, express or implied, and every
10 official or officer thereof, whether elected or appointed, while performing
11 official duties; persons in the service of the state as volunteer members of
12 the Kansas department of civil air patrol, but only to the extent and during
13 such periods as they are officially engaged in the performance of functions
14 specified in K.S.A. 48-3302, and amendments thereto; volunteers in any
15 employment, if the employer has filed an election to extend coverage to
16 such volunteers; minors, whether such minors are legally or illegally
17 employed; and persons performing community service work, but only to
18 the extent and during such periods as they are performing community
19 service work and if an election has been filed an election to extend
20 coverage to such persons. Any reference to an employee who has been
21 injured shall, where the employee is dead, include a reference to the
22 employee's dependents, to the employee's legal representatives, or, if the
23 employee is a minor or an incapacitated person, to the employee's guardian
24 or conservator. Unless there is a valid election in effect which has been
25 filed as provided in K.S.A. 44-542a, and amendments thereto, such terms
26 shall not include individual employers, limited liability company
27 members, partners or self-employed persons.

28 (c) (1) "Dependents" means such members of the employee's family
29 as were wholly or in part dependent upon the employee at the time of the
30 accident or injury.

31 (2) "Members of a family" means only surviving legal spouse and
32 children; or if no surviving legal spouse or children, then parents or
33 grandparents; or if no parents or grandparents, then grandchildren; or if no
34 grandchildren, then brothers and sisters. In the meaning of this section,
35 parents include stepparents, children include stepchildren, grandchildren
36 include stepgrandchildren, brothers and sisters include stepbrothers and
37 stepsisters, and children and parents include that relation by legal
38 adoption. In the meaning of this section, a surviving spouse shall not be
39 regarded as a dependent of a deceased employee or as a member of the
40 family, if the surviving spouse shall have for more than six months
41 willfully or voluntarily deserted or abandoned the employee prior to the
42 date of the employee's death.

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

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

3 (B) a stepchild of the employee who lives in the employee's
4 household;

5 (C) any other child who is actually dependent in whole or in part on
6 the employee and who is related to the employee by marriage or
7 consanguinity; or

8 (D) any child as defined in subsection (c)(3)(A), (3)(B) or (3)(C) who
9 is less than 23 years of age and who is not physically or mentally capable
10 of earning wages in any type of substantial and gainful employment or
11 who is a full-time student attending an accredited institution of higher
12 education or vocational education.

13 (d) "Accident" means an undesigned, sudden and unexpected
14 traumatic event, usually of an afflictive or unfortunate nature and often,
15 but not necessarily, accompanied by a manifestation of force. An accident
16 shall be identifiable by time and place of occurrence, produce at the time
17 symptoms of an injury, and occur during a single work shift. The accident
18 must be ~~the prevailing~~ *a substantial* factor in causing the injury.
19 "Accident" shall in no case be construed to include repetitive trauma in
20 any form.

21 (e) "Repetitive trauma" refers to cases where an injury occurs as a
22 result of repetitive use, cumulative traumas or microtraumas. The
23 repetitive nature of the injury must be demonstrated by diagnostic or
24 clinical tests. The repetitive trauma must be ~~the prevailing~~ *a substantial*
25 factor in causing the injury. "Repetitive trauma" shall in no case be
26 construed to include occupational disease, as defined in K.S.A. 44-5a01,
27 and amendments thereto.

28 In the case of injury by repetitive trauma, the date of injury shall be the
29 earliest of:

30 (1) The date the employee, while employed for the employer against
31 whom benefits are sought, is taken off work by a physician due to the
32 diagnosed repetitive trauma;

33 (2) the date the employee, while employed for the employer against
34 whom benefits are sought, is placed on modified or restricted duty by a
35 physician due to the diagnosed repetitive trauma;

36 (3) the date the employee, while employed for the employer against
37 whom benefits are sought, is advised by a physician that the condition is
38 work-related; or

39 (4) the last day worked, if the employee no longer works for the
40 employer against whom benefits are sought.

41 In no case shall the date of accident be later than the last date worked.

42 (f) (1) "Personal injury" and "injury" mean any lesion or change in
43 the physical structure of the body, causing damage or harm thereto.

1 Personal injury or injury may occur only by accident, repetitive trauma or
2 occupational disease as those terms are defined.

3 (2) An injury is compensable only if it arises out of and in the course
4 of employment. ~~An injury is not compensable because work was a~~
5 ~~triggering or precipitating factor. An injury is not compensable solely~~
6 ~~because it aggravates, accelerates or exacerbates a preexisting condition or~~
7 ~~renders a preexisting condition symptomatic.~~

8 (A) An injury by repetitive trauma shall be deemed to arise out of
9 employment only if:

10 (i) The employment exposed the worker to an increased risk or
11 hazard which the worker would not have been exposed in normal non-
12 employment life;

13 (ii) the increased risk or hazard to which the employment exposed the
14 worker is ~~the prevailing a substantial~~ factor in causing the repetitive
15 trauma; and

16 (iii) the repetitive trauma is ~~the prevailing a substantial~~ factor in
17 causing ~~both the medical condition and resulting disability or impairment~~
18 ~~the injury.~~

19 (B) An injury by accident shall be deemed to arise out of employment
20 only if:

21 (i) There is a causal connection between the conditions under which
22 the work is required to be performed and the resulting accident; and

23 (ii) the accident is ~~the prevailing a substantial~~ factor causing the
24 injury, ~~medical condition, and resulting disability or impairment.~~

25 (3) (A) The words "arising out of and in the course of employment,"
26 as used in the workers compensation act, shall not be construed to include:

27 (i) Injury which occurred as a result of the natural aging process or by
28 the normal activities of day-to-day living;

29 (ii) accident or injury which arose out of a neutral risk with no
30 particular employment or personal character; *or*

31 (iii) accident or injury which arose out of a risk personal to the
32 worker; ~~or~~

33 (iv) ~~accident or injury which arose either directly or indirectly from~~
34 ~~idiopathic causes.~~

35 (B) The words "arising out of and in the course of employment," as
36 used in the workers compensation act, shall not be construed to include
37 injuries to the employee occurring while the employee is on the way to
38 assume the duties of employment or after leaving such duties, the
39 proximate cause of which injury is not the employer's negligence. An
40 employee shall not be construed as being on the way to assume the duties
41 of employment or having left such duties at a time when the worker is on
42 the premises owned or under the exclusive control of the employer or on
43 the only available route to or from work which is a route involving a

1 special risk or hazard connected with the nature of the employment that is
2 not a risk or hazard to which the general public is exposed and which is a
3 route not used by the public except in dealings with the employer. An
4 employee shall not be construed as being on the way to assume the duties
5 of employment, if the employee is a provider of emergency services
6 responding to an emergency.

7 (C) The words; "arising out of and in the course of employment," as
8 used in the workers compensation act, shall not be construed to include
9 injuries to employees while engaged in recreational or social events under
10 circumstances where the employee was under no duty to attend and where
11 the injury did not result from the performance of tasks related to the
12 employee's normal job duties or as specifically instructed to be performed
13 by the employer.

14 (g) ~~"Prevailing"~~ *"Substantial,"* as it relates to the term "factor," means
15 ~~the primary factor, in relation to any other factor. In determining what~~
16 ~~constitutes the "prevailing factor" in a given case, the administrative law~~
17 ~~judge shall consider all relevant evidence submitted by the parties~~ *accident*
18 *was a material element in bringing about the injury, repetitive trauma or*
19 *occupational disease.*

20 (h) "Burden of proof" means the burden of a party to persuade the
21 trier of facts by a preponderance of the credible evidence that such party's
22 position on an issue is more probably true than not true on the basis of the
23 whole record unless a higher burden of proof is specifically required by
24 this act.

25 (i) "Director" means the director of workers compensation as
26 provided for in K.S.A. 75-5708, and amendments thereto.

27 (j) "Health care provider" means any person licensed, by the proper
28 licensing authority of this state, another state or the District of Columbia,
29 to practice medicine and surgery, osteopathy, chiropractic, dentistry,
30 optometry, podiatry, audiology or psychology.

31 (k) "Secretary" means the secretary of labor.

32 (l) "Construction design professional" means any person who is an
33 architect, professional engineer, landscape architect or land surveyor who
34 has been issued a license by the state board of technical professions to
35 practice such technical profession in Kansas or any corporation organized
36 to render professional services through the practice of one or more of such
37 technical professions in Kansas under the professional corporation law of
38 Kansas or any corporation issued a certificate of authorization under
39 K.S.A. 74-7036, and amendments thereto, to practice one or more of such
40 technical professions in Kansas.

41 (m) "Community service work" means: (1) Public or community
42 service performed as a result of a contract of diversion or of assignment to
43 a community corrections program or conservation camp or suspension of

1 sentence or as a condition of probation or in lieu of a fine imposed by
2 court order; or (2) public or community service or other work performed
3 as a requirement for receipt of any kind of public assistance in accordance
4 with any program administered by the secretary for children and families.

5 (n) "Utilization review" means the initial evaluation of
6 appropriateness in terms of both the level and the quality of health care
7 and health services provided a patient, based on accepted standards of the
8 health care profession involved. Such evaluation is accomplished by
9 means of a system which identifies the utilization of health care services
10 above the usual range of utilization for such services, which is based on
11 accepted standards of the health care profession involved, and which refers
12 instances of possible inappropriate utilization to the director for referral to
13 a peer review committee.

14 (o) "Peer review" means an evaluation by a peer review committee of
15 the appropriateness, quality and cost of health care and health services
16 provided a patient, which is based on accepted standards of the health care
17 profession involved and which is conducted in conjunction with utilization
18 review.

19 (p) "Peer review committee" means a committee composed of health
20 care providers licensed to practice the same health care profession as the
21 health care provider who rendered the health care services being reviewed.

22 (q) "Group-funded self-insurance plan" includes each group-funded
23 workers compensation pool, which is authorized to operate in this state
24 under K.S.A. 44-581 through 44-592, and amendments thereto, each
25 municipal group-funded pool under the Kansas municipal group-funded
26 pool act which is covering liabilities under the workers compensation act,
27 and any other similar group-funded or pooled plan or arrangement that
28 provides coverage for employer liabilities under the workers compensation
29 act and is authorized by law.

30 (r) On and after the effective date of this act, "workers compensation
31 board" or "board" means the workers compensation appeals board
32 established under K.S.A. 44-555c, and amendments thereto.

33 (s) "Usual charge" means the amount most commonly charged by
34 health care providers for the same or similar services.

35 (t) "Customary charge" means the usual rates or range of fees charged
36 by health care providers in a given locale or area.

37 (u) "Functional impairment" means the extent, expressed as a
38 percentage, of the loss of a portion of the total physiological capabilities of
39 the human body as established by competent medical evidence and based
40 on the fourth edition of the American medical association guides to the
41 evaluation of impairment, if the impairment is contained therein.

42 (v) "Authorized treating physician" means a licensed physician or
43 other health care provider authorized by the employer or insurance carrier

1 or both, or appointed pursuant to court-order to provide those medical
2 services deemed necessary to diagnose and treat an injury arising out of
3 and in the course of employment.

4 (w) "Mail" means the use of the United States postal service or other
5 land based delivery service or transmission by electronic means, including
6 delivery by fax, e-mail or other electronic delivery method designated by
7 the director of workers compensation.

8 Sec. 2. K.S.A. 2016 Supp. 44-510k is hereby amended to read as
9 follows: 44-510k. (a) (1) At any time after the entry of an award for
10 compensation wherein future medical benefits were awarded, the
11 employee, employer or insurance carrier may make application for a
12 hearing, in such form as the director may require for the furnishing,
13 termination or modification of medical treatment. Such post-award hearing
14 shall be held by the assigned administrative law judge, in any county
15 designated by the administrative law judge, and the judge shall conduct the
16 hearing as provided in K.S.A. 44-523, and amendments thereto.

17 (2) The administrative law judge can: (A) Make an award for further
18 medical care if the administrative law judge finds that it is more probably
19 true than not that the injury which was the subject of the underlying award
20 is ~~the prevailing~~ a *substantial* factor in the need for further medical care
21 and that the care requested is necessary to cure or relieve the effects of
22 such injury; or (B) terminate or modify an award of current or future
23 medical care if the administrative law judge finds that no further medical
24 care is required, the injury which was the subject of the underlying award
25 is ~~not the prevailing~~ a *substantial* factor in the need for further medical
26 care, or that the care requested is not necessary to cure or relieve the
27 effects of such injury.

28 (3) If the claimant has not received medical treatment, as defined in
29 ~~subsection (c) of~~ K.S.A. 44-510h(e), and amendments thereto, from an
30 authorized health care provider within two years from the date of the
31 award or two years from the date the claimant last received medical
32 treatment from an authorized health care provider, the employer shall be
33 permitted to make application under this section for permanent termination
34 of future medical benefits. In such case, there shall be a presumption that
35 no further medical care is needed as a result of the underlying injury. The
36 presumption may be overcome by competent medical evidence.

37 (4) No post-award benefits shall be ordered, modified or terminated
38 without giving all parties to the award the opportunity to present evidence,
39 including taking testimony on any disputed matters. A finding with regard
40 to a disputed issue shall be subject to a full review by the board under
41 ~~subsection (b) of~~ K.S.A. 44-551(b), and amendments thereto. Any action
42 of the board pursuant to post-award orders shall be subject to review under
43 K.S.A. 44-556, and amendments thereto.

1 (b) Any application for hearing made pursuant to this section shall
2 receive priority setting by the administrative law judge, only superseded
3 by preliminary hearings pursuant to K.S.A. 44-534a, and amendments
4 thereto. The parties shall meet and confer prior to the hearing pursuant to
5 this section, but a prehearing settlement conference shall not be necessary.
6 The administrative law judge shall have authority to award medical
7 treatment relating back to the entry of the underlying award, but in no
8 event shall such medical treatment relate back more than six months
9 following the filing of such application for post-award medical treatment.
10 Reviews taken under this section shall receive priority settings before the
11 board, only superseded by reviews for preliminary hearings. A decision
12 shall be rendered by the board within 30 days from the time the review
13 hereunder is submitted.

14 (c) The administrative law judge may award attorney fees and costs
15 on the claimant's behalf consistent with ~~subsection (g)~~ of K.S.A. 44-
16 536(g), and amendments thereto. As used in this subsection, "costs"
17 include, but are not limited to, witness fees, mileage allowances, any costs
18 associated with reproduction of documents that become a part of the
19 hearing record, the expense of making a record of the hearing and such
20 other charges as are by statute authorized to be taxed as costs.

21 Sec. 3. K.S.A. 2016 Supp. 44-508 and 44-510k are hereby repealed.

22 Sec. 4. This act shall take effect and be in force from and after its
23 publication in the statute book.