

KANSAS

1. **Citation for the state's workers' compensation statute**
Kansas Statutes Annotated §44-501 et seq.

SCOPE OF COMPENSABILITY

2. **Who are covered "employees" for purposes of workers' compensation?**

"Employee," "workman," or "worker" are defined as "any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer." K.S.A. §44-508(b).

3. **Identify and describe any "statutory employer" provision.**

Where any person (in this section "principal") undertakes to execute any work which is a part of his or her trade or business, or which he or she has contracted to perform, and the principal contracts with any other person (in this section "contractor") for the execution by, or under, the contractor of the whole or any part of the work undertaken by the principal, the principal is responsible for payment of benefits to any employee of the contractor as if that employee had been immediately employed by the principal. K.S.A. §44-503(a).

The test used to determine whether the work which gave rise to the injury was a part of the principal's trade or business is whether the work: (1) was necessarily inherent to, and an integral part of, the principal's trade or business; or (2) would ordinarily be done by the principal's employees. If either is answered in the affirmative, work being done is part of the principal's "trade or business," and the employee's sole remedy against the principal is under the Act. *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992); see also *Wescott v. LaFarge North America, Inc.*, 197 P.3d 906 (Table), 2008 WL 5428211, *3 (Kan. Ct. App. Dec. 24, 2008). K.S.A. 44-503 allows the employee of a contractor to recover workers compensation benefits from either the employee's immediate employer or the principal contractor, so long as the work being done by the employee is either an integral part of the principal's trade or business or is work that would ordinarily have been done by an employee of the principal. *Id.* *Robinett v. Haskell Co.*, 270 Kan. 95, 98, 12 P.3d 411, 414.

4. **What types of injuries are covered and what is the standard of proof for each:**

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. K.S.A. §§44-501b(c), 44-508(h).

Personal injuries by accident, repetitive trauma or occupational disease arising out of and in the course of the employment, are covered. K.S.A. §44-501b(b).

A. Accident or "single occurrence" claims.

An accident is an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force K.S.A. §44-508(d). Accidents include situations where the employee is injured under the stress of his or her usual labor. *Gilliland v. Clement Co.*, 104 Kan. 771, 180 P. 793 (1919). Accidents include circumstances where the physical structure of the employee gives out under the stress of his or her usual labor. *Id.* at 796. "Accident" shall in no case be construed to include repetitive trauma in any form. K.S.A. §44-508(d).

B. Occupational disease claims.

Occupational diseases arise out of and in the course of the employment, and are the result of the employment in which the employee was engaged. K.S.A. §44-5a01(b). Occupational disease must be a "peculiar hazard" of the employment. *Id.* The statute contains a special exception indicating that for emphysema to be compensable, it must be shown by clear and convincing evidence that the employment was the sole cause of the disease. *Id.*

C. Repetitive trauma claims.

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

5. What, if any, injuries or claims are excluded?

Most injuries or occupational diseases are covered if they fit the criteria for being related to the employment. See answer 9.

6. What psychiatric claims or treatments are compensable?

Psychiatric disorders are generally compensable to the extent they are shown to have arisen out of and in the course of the employment. In addition, the disorder must be a direct and natural result of a primary injury. *Garr v. Builders, Inc.*, 179 Kan. 617, 296 P.2d 1006 (1956); *Morris v. Garden City, Inc.*, 144 Kan. 790, 792, 62 P.2d 920 (1936); further explained in *Burger v. Hahner, Foreman and Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973). The elements to be proven are: (1) a work-related injury, (2) symptoms of the neurosis; and (3) the neurosis is directly traceable to the physical injury. *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557 (1989); see also *Nguyen v. Sharpline Converting, Inc.*, 2009 WL 978926 (Kan.Work.Comp.App.Bd. Mar. 31, 2009).

7. What are the applicable statutes of limitations?

No proceeding for compensation may be maintained unless an application for hearing is filed with the Office of the Director within the later of three years after the date of accident or two years after the last payment of compensation. K.S.A. §44-534(b). In addition, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer. K.S.A. §44-520(a).

The requirement of written or oral notice is waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable

period; or (3) the employee was physically unable to give such notice. K.S.A. §44-520(b).

8. What are the reporting and notice requirements for those alleging an injury?

See answer 7. K.S.A. §44-520. The application of the timely notice requirement has been flexible rather than rigid. *Kotnour v. Overland Park*, 43 Kan. App. 2d 833, 838, 233 P.3d 299, 304 (2010). “This flexibility has been shown when an employee could not reasonably have been expected to realize that an injury was one likely to lead to a compensable disability.” *Id.* (finding that just cause existed to extend the 10 day notice period for an employee to notify his employer of an accident because he was unaware that he had suffered an injury which could lead to a compensable disability until more than 10 days had passed).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

K.S.A. §44-501(a)(1)(A) provides that “Compensation for an injury shall be disallowed if such injury to the employee results from the employee’s deliberate intention to cause such injury.” *Id.*

B. Willful misconduct, "horseplay," etc.

Compensation for an injury shall be disallowed if such injury results from the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee; the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer; the employee's reckless violation of their employer's workplace safety rules or regulations; or the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise. K.S.A. §44-501(a)(1)(B) – (E). However, injuries resulting from an employee's horseplay may be compensable if the employee proves the horseplay is a regular incident of employment and employer knows of horseplay. *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966). Similarly, injuries resulting from an assault by one employee upon another can only result in benefit eligibility if the employer had reason to anticipate that injury would occur if the employees continued working together. *Harris v. Bethany Medical Center*, 21 Kan.App.2d 804, 909 P.2d 657 (1995). See also Answer 13, *infra*.

C. Injuries involving drugs and/or alcohol.

A claim is barred if the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. K.S.A. §44-501(b)(1)(A). In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months. K.S.A. §44-501(b)(1)(B).

It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the chart for the drugs of abuse listed. K.S.A. §44-501(b)(1)(C). If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence. K.S.A. §44-501(b)(1)(D).

10. What, if any, penalties or remedies are available in claims involving fraud?

The Kansas Legislature has established a fraud and abuse system to monitor, report, investigate and penalize suspected fraud and abuse relating to workers' compensation. K.S.A. §44-5,120(a). The provisions apply to employees, employers, insurers and their adjusters, health care providers and attorneys or other representatives. K.S.A. §44-5,120(b). Any complaint of a violation of the Fraud and Abuse Act can be made to the fraud and abuse section of the Director of Workers' Compensation Office. The statute allows for a monetary penalty of not more than \$2,000.00 for each violation, but not exceeding an aggregate penalty of \$20,000.00 for a one year period. K.S.A. §44-5,120(g)(1). Any person licensed or regulated by the commissioner of insurance, after notice and a hearing, may be given a monetary penalty for any violation of an order of the Director or the commissioner of insurance. K.S.A. §44-5,120(i). The monetary penalty must not exceed \$10,000.00 for each and every violation, and must not exceed an aggregate penalty of \$50,000.00 for any six month penalty period. *Id.*

11. Is there any defense for falsification of employment records regarding medical history?

There is no such defense per se. However, if the employer can show that the employee knowingly misrepresents: (1) an impairment or handicap; (2) that such employee has not had any previous accidents; (3) that such employee has not been previously disabled or compensated in damages or otherwise; (4) misrepresentation that such employee has not had any employment terminated or suspended due to a prior accident, injury or illness; (5) misrepresentation of any mental, emotional or psychiatric impairment; or (6) conceals any facts or information which are reasonably related to the employee's claim; the employer has the opportunity to implead the Kansas Workers' Compensation Fund and recover amounts paid to the employee for the claim. K.S.A. §44-567(c).

12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?

The Act applies to personal injuries by accident, repetitive trauma or occupational disease arising out of and in the course of employment. K.S.A. §44-501b(b). Thus, the question becomes whether injuries from recreational and non-work activities paid for or supported by the employer “arise out of and in the course of the employment.” This question is specifically answered by K.S.A. §44-508(f)(3)(C), which states: “The words ‘arising out of and in the course of employment’ as used in the workers compensation act shall not be construed to include injuries to the employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.” Thus, for the exclusion to apply, both circumstances outlined in §44-508(f)(3)(C) must be met. *See Douglas v. Ad Astra Information Systems, L.L.C.*, 296 Kan. 552, 293 P.3d 723 (2013). It should be noted that a conditional duty to attend does not satisfy the “no duty” to attend requirement. For example, in *Douglas*, an employee was injured while racing go-carts at a company sponsored recreational/social event. *Id.* The Kansas Supreme Court noted that that the employee was mandated to be at his regular work station or at the recreational/social event. *Id.* at 729. The court held that “such a duty to attend cannot be said to fulfill the high hurdle of no duty to attend.” *Id.*

13. Are injuries by co-employees compensable?

Yes. An injury received as the result of an assault by a fellow employee “arises out of” the employment, and thus is eligible for workers’ compensation coverage when the evidence supports the finding that the circumstances which caused or gave rise to the assault arose out of conditions or incidents of the job. *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 502, 704 P.2d 394 (1985), *review denied*, 238 Kan. 878. *See also Brannum v. Spring Lakes County Club, Inc.*, 203 Kan. 658, 665, 555 P.2d 546 (1969), *affirmed*, 207 Kan. 321, 485 P.2d 226 (1971); Answer 9B, *supra*.

14. Are acts by third parties unrelated to work, but committed on the premises, compensable (e.g. "irate paramour" claims)?

Such acts have been held to be compensable in some situations. *See e.g., Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979) (court upheld compensation to an employee shot by a sniper); *Orr v. Holiday Inns, Inc.*, 6 Kan. App. 2d 335, 627 P.2d 1193 (1981), *affirmed*, 230 Kan. 271, 634 P.2d 1067 (1981) (upheld compensability for a waitress raped in a public rest room on the employer's premises; court noted that the motel's "high crime area" location exposed the employee to a greater risk than the general public.)

BENEFITS

15. What criterion is used for calculating the average weekly wage?

The term wage is defined as "the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment." K.S.A. §44-511(a)(3). This includes the "gross remuneration, on an hourly, output, salary, commission or other basis earned while employed by the employer, including bonuses and gratuities" K.S.A. §44-511(a)(1). Additional compensation includes board and lodging and employer paid life insurance, disability insurance, health and accident insurance and employer contributions to pension and profit-sharing plans. K.S.A. §44-511(a)(2)(A).

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

The minimum rate for temporary total disability payments is \$25.00 per week. K.S.A. §44-510c(a)(1). The maximum weekly benefit is determined by multiplying the state average weekly wage by 75%. *Id.*

17. How long does the employer/insurer have to begin temporary benefits from the date disability begins?

No compensation is due for the first week of disability, unless the disability remains for at least

three consecutive weeks. K.S.A. §44-510c(b)(1). Payments must begin within twenty days from the date of written demand for compensation or the employer may be subject to a civil penalty up to \$100.00 per week for each week any disability compensation is past due and in an "amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill." K.S.A. §44-512a.

- 18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out ____ days before recovering benefits for the first ____ days)?**

The employee must be out three consecutive weeks before recovering temporary total disability benefits for the first seven days. K.S.A. §44-510c(b)(1). The same "waiting" or "retroactive" period applies to permanent partial disability benefits. See K.S.A. §44-510d(a).

- 19. What is the standard/procedure for terminating temporary benefits?**

Temporary total benefits may be terminated pursuant to a court order; or if the employee has reached maximum medical improvement and has been released by the physician to return to work, or has returned to work. See e.g., K.S.A. §44-510h(e).

- 20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?**

If the injury results in a general bodily disability, all weeks of temporary total disability compensation after the first fifteen weeks are deducted from the 415 weeks available. K.S.A. §44-510e(a)(2)(F).

- 21. What disfigurement benefits are available and how are they calculated?**

Disfigurement itself is not compensable, per se. However, disfigurement which results in a functional impairment to either a scheduled member or to the body as a whole is compensable. Functional impairments ratings for dates of injury on and after January 1, 2015 are made by the treating physician using the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Sixth Ed. Functional impairments ratings for dates of injury prior to January 1, 2015 are made by the treating physician using the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fourth Ed. See K.S.A. §44-510e(a)(2)(B).

22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?

A. How many weeks are available for scheduled members/parts, and the standard for recovery?

The minimum and maximum weekly benefits are determined as in answer 16. The maximum numbers of weeks for scheduled members are as follows:

Shoulder	225 weeks
Arm	210 weeks
Forearm	200 weeks
Hand	150 weeks
Leg	200 weeks
Lower leg	190 weeks
Foot	125 weeks
Eye	120 weeks
Hearing:	
binaural	110 weeks
one ear	30 weeks
Thumb	60 weeks
Index finger	37 weeks
<u>Middle finger</u>	<u>30 weeks</u>
Ring finger	20 weeks
Little finger	15 weeks
Great toe	30 weeks
Great toe - terminal phalanx	15 weeks
Each other toe	10 weeks
Other toe - terminal phalanx	5 weeks

K.S.A. §44-510d(b)

The percentage loss of use of the scheduled member is based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein. K.S.A. § 44-510d(b)(23). That percentage is multiplied times the scheduled weeks for that member to determine the duration of compensation due. See K.S.A. § 44-510d(d). Where an injury results in the loss of or loss of use of more than one scheduled member within a single extremity, the functional impairment attributable to each scheduled member shall be combined pursuant to the fourth edition of the American medical association guides for evaluation of permanent impairment and compensation awarded shall be calculated to the highest scheduled member actually impaired. K.S.A. § 44-510d(b)(24).

B. Number of weeks for "whole person" and standard for recovery.

The maximum whole body injury and resulting disability is 415 weeks of compensation. K.S.A. §44-510e(a). The amount of compensation for whole body injury is determined by multiplying the payment rate by the weeks payable.

The payment rate is the lesser of: (A) The amount determined by multiplying the average weekly wage of the worker prior to such injury by 66 2/3 %; or (B) the maximum provided in K.S.A. 44-510c, and amendments thereto.

Weeks payable is determined as follows: (A) Determine the weeks of temporary compensation paid by adding the amounts of temporary total and temporary partial disability compensation paid and dividing the sum by the payment rate above; (B) subtract from 415 weeks the total number of weeks of temporary compensation paid as determined in (F)(2)(A), excluding the first 15 such weeks; (3) multiply the number of weeks as determined in (F)(2)(B) by the percentage of functional impairment pursuant to subsection (a)(2)(B) or the percentage of work disability pursuant to subsection (a)(2)(C), whichever is applicable. K.S.A. §44-510e(a)(F).

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

Vocational rehabilitation is no longer required of employers. Any vocational rehabilitation must be with the consent of the parties. K.S.A. §44-510g(a). "Upon such agreement, the vocational rehabilitation administrator may make recommendations for and supervise such assessment, evaluation, services or training on behalf of the employee and such assessment, evaluation,

services or training shall not be arbitrarily terminated by the employer or insurance carrier once such agreement is entered into by the employer or insurance carrier.” *Id.* Do note that “If the employer or the employer’s insurance carrier do not agree to provide vocational rehabilitation services, the employee may request the vocational rehabilitation administrator to refer the employee to an appropriate provider for vocational rehabilitation services to be provided at the employee’s expense.” K.S.A. § 44-510g(b).

24. How are permanent total disability benefits calculated, including the minimum and maximum rates?

See the answer to 22 for method of calculating benefits. The minimum rate for weekly compensation is \$25. K.S.A. §44-510c(a)(1). The limit for permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments is \$155,000. K.S.A. §44-510f(a)(1). The limit for temporary total disability, including any prior permanent total, permanent partial, or temporary partial disability and for permanent partial disability is \$130,000. *Id.* at (a)(2). The limit for permanent partial disability on a functional impairment basis is \$75,000. K.S.A. §44-510f(a)(4). The limit on death is \$300,000. K.S.A. §44-510b(h).

25. How are deaths benefits calculated, including the minimum and maximum rates?

A. Funeral expenses.

The employer pays the reasonable funeral and burial expenses up to \$5,000. K.S.A. §44-510b(f).

B. Dependency claims.

Dependency benefits vary depending upon whether the employee leaves a surviving spouse or wholly dependent child or children or others wholly dependent upon the employee’s earnings. *See generally* K.S.A. §44-510b. Weekly benefits are paid to the surviving spouse for life or remarriage. *Id.* at Weekly benefits are paid to children to age 18, or until age 23 if enrolled full-time in an accredited institution of higher education or vocational education. If the worker leaves both a spouse and children, benefits are paid to both. K.S.A. §44-510b.

26. What are the criteria for establishing a "second injury" fund recovery?

The workers compensation fund pays the medical expenses and weekly compensation where the employee's employer is unable to provide said benefits. K.S.A. §44-566a(e). An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment. K.S.A. §44-501(e). If the employer has paid compensation later found to be due from the fund, the employer may be reimbursed by the workers compensation fund. K.S.A. §44-569a.

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

An award may be modified at any time before disability ends, or before final payment, by means of an application for review and modification by the Director. K.S.A. §44-528; *Doss v. Cernelison & Kelly*, 124 Kan. 631, 632, 261 P. 584 (1927); *Farr v. Mid.-Continent Lead & Zinc Co.*, 151 Kan. 51, 98 P.2d 437 (1940) (Noting "a firm determination by this court to hold that it is necessary that a proceedings to modify an award must be started before the final payment of the award has been made.")

28. What situation would place responsibility on the employer to pay an employee's attorney fees?

In the event compensation, including medical expenses, has been awarded, the employer will owe a penalty and attorneys' fees related to any collection action if not paid within 20 days of receipt of written demand for payment. K.S.A. §44-512a(b).

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The compensation remedy is generally exclusive. K.S.A. §44-501b(d).

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

According to the "dual capacity doctrine," an employer who is generally immune from tort liability to an employee injured in a work-related accident may become liable to the employee as a third party tortfeasor if it occupies, in addition to the capacity as an employer, a second capacity that confers obligations independent of those imposed as an employer. *Kimzey v. Interpace Corp., Inc.*, 10 Kan. App. 2d 165, 694 P.2d 907 (1985). However, "Kansas courts have not yet extended the dual capacity to factual situations other than the one described in *Kimzey*." *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App.2d 156, 928 P.2d 109 (1996).

30. Are there any penalties against the employer for unsafe working conditions?

No. Generally, an employee injured due to unsafe working conditions may maintain an action only through the Act. See, *Quigley v. General Motors Corp.*, 660 F.Supp. 499 (D. Kan. 1987).

31. What is the penalty, if any, for an injured minor?

There is no specific penalty. See generally K.S.A. § 44-513a.

32. What is the potential exposure for "bad faith" claims handling?

Penalties may be assessed in the amount of \$100 per week for each week any disability compensation awarded is past due. K.S.A. §44-512a(a). Moreover, attorney's fees may be awarded if the employee's attorney is forced to file an action in the district court in order to enforce an award of compensation. K.S.A. §44-512a(b).

Fraudulent and abusive practices are punishable by penalties up to \$2,000 per act and restitution to the employee. K.S.A. §44-5,120(g)(1). Fraudulent and abusive practices include collecting fees from the employee, failing to pay, failing to pay an award, and failing to confirm medical payments coverage. *Id.* at §44-5,210(d)(1)-(21)

33. What is the exposure for terminating an employee who has been injured?

The Kansas Supreme Court has recognized a cause of action for the tort of retaliatory discharge. *Ortega v. IBP, Inc.*, 255 Kan. 513, 874 P.2d 1188 (Kan. 1994), *disapproved on other grounds by In re B.D.-Y.*, 286 Kan. 686, 187 P.3d 594 (Kan. 2008); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Serv.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981). In *Murphy*, the Court recognized a valid

cause of action for retaliatory discharge of an at-will employee who filed for workers compensation benefits, adopting a limited public policy exception to the at-will doctrine.

In *Murphy*, an employee filed a workers' compensation claim. He maintained he was offered further employment on the condition that he withdraw the claim. When he refused, he was terminated. A petition was then filed in the district court alleging he was discharged in retaliation for seeking workers' compensation benefits. The trial court dismissed Murphy's cause of action, but the Kansas Court of Appeals reversed, holding:

We believe the public policy argument has merit. The Workmen's Compensation Act provides efficient remedies and protection for employees, and is designed to promote the welfare of the people in this state. It is the exclusive remedy afforded the injured employee, regardless of the nature of the employer's negligence. To allow an employer to coerce employees in the free exercise of their rights under the act would substantially subvert the purpose of the act.

Id. at 192.

The Court's holding in *Murphy* was extended to all employees, not just at-will employees, by the Kansas Supreme Court in *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645(1988).

To set forth a prima facie case of retaliatory discharge for filing a workers' compensation claim under Kansas law, plaintiff must show that (1) he or she filed a claim for workers' compensation benefits or sustained an injury for which he might assert a future claim for such benefits; (2) defendant knew of the claim or injury; (3) defendant terminated plaintiff's employment; and (4) a casual connection connects the protected activity and the termination of plaintiff's employment. *Jones v. United Parcel Service*, 411 F. Supp. 2d 1236, 1260 (D. Kan. 2006).

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. K.S.A. §44-504(a).

35. Can co-employees be sued for work-related injuries?

No. K.S.A. §44-501b(d). *See also Fox v. Loughry*, 82 P.3d 532 (Kan. App. 2004); *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App.2d 156, 928 P.2d 109 (Kan. App. 1996).

36. Is subrogation available?

Yes. K.S.A. §44-504(b). If the subrogation action is brought by the worker, the claim must be instituted within one year from the date of the injury. K.S.A. §44-504(b). If the claim is brought by a dependent or personal representative of a deceased worker, the claim must be instituted within 18 months from the date of such injury. *Id.* The employee or dependent's failure to bring an action within the time specified operates as an assignment to the employer of any cause of action in tort which the employee or dependents may have against any third party for such injury or death. K.S.A. §44-504(c).

MEDICALS

37. Is there a time limit for medical bills to be paid, and are penalties available for late payments?

Yes. Medical bills must be paid within 20 days from the date of written demand. If not, the employer may be assessed a penalty for each past due bill equal to the larger of either \$25 or 10% of the written amount which is past due, plus attorney's fees incurred in a collections action. K.S.A. §44-512a(a),(b).

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

After an employee requests worker's compensation from the employer, the employee must submit to an examination at any reasonable time and place by any one or more reputable health care providers. The employer is given the opportunity to select said provider. In addition, the employee must submit to an examination thereafter at intervals during the pendency of such employee's claim for compensation, upon the request of the employer. The employee, however, will not be required to submit to an examination more than twice in one month, unless the Director orders otherwise. K.S.A. §44-515(a). Medical reports of the physician should be submitted on a periodic basis depending upon the nature and severity of the injuries involved and, in all cases, immediately upon request of the respondent or insurance carrier. A report shall be rendered on the date on which the physician releases the worker to return to work and forwarded to the employer or insurance carrier and to the employee, if requested. K.A.R. §51-9-10(b)(1).

39. What is the rule on (a) Claimant's choice of physician; (b) employer's right to second opinion and/or Independent Medical Examination?

A. Claimant's choice of physician.

The issue of treating physicians is critical to determining workers compensation claims in the state of Kansas. Oftentimes, the treating physicians will not only provide evidence as to the nature and extent of the claimant's injuries, they will also provide functional impairment and task loss ratings which will form the basis for future workers compensation awards. Therefore, the selection of the treating physician carries important implications for the ultimate resolution of any claim.

The issue of whether a claimant is allowed to retain his own health care provider is governed by K.S.A. §44-510h. The statute states, in part, that it is the employer's duty "to provide the services of a health care provider . . . as may be reasonably necessary to cure and relieve the employee of the effects of the injury." K.S.A. §44-510h(a).

K.S.A. §44-515 governs the specific duties of the employer and the employee as it relates to medical examinations. The employee must submit to an examination at "any reasonable time and place by any one or more reputable health care providers selected by the employer, and shall so submit to an examination thereafter at intervals during the pendency of such employee's claim for compensation.. ." K.S.A. §44-515(a). The statute does contain limitations upon the ability of the employer to require multiple examinations of the employees within a specified period of time. K.S.A. §44-515(a) (employer cannot require employee to submit to more than two (2) examinations per month). The statute also requires that an employer provide funding for the employee should the employer require that the examination occur "in any town or city other than the residence of the employer at the time the employees received the injury...." K.S.A. §44-515(a). An employee may request to have a health care provider of their own choosing present at the time of the examination. K.S.A. §44-515(b).

The employer's health care provider can only provide evidence of the employee's condition at the time of the examination if (1) the health care provider provides a report to the employee within fifteen (15) days of the examination as provided in K.S.A. §44-515(a); and (2) the employee has an opportunity to have his/her own health care provider examine him/her within a reasonable time after the employer's health care provider's examination in the presence of the employer's health care provider. K.S.A. § 44-515(c).

Additionally, there are provisions for appointment of additional physicians for the purpose of examination and/or treatment. K.S.A. §44-516 provides for the appointment of a neutral health care provider by the director in case of a dispute regarding the injury.

B. Employer's right to second opinion and/or Independent Medical Examination.

The employer retains the right to provide medical care. In that regard, the employer can select the appropriate health care provider. The employer can require the employee to submit for an examination no more than twice each month. K.S.A. §44-515(a). In the event of a disagreement between the employer and the employee on the fact of injury or the functional impairment, the director may employ one or more neutral physicians to make the determination. K.S.A. §44-516(a).

40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

It is the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the employee to a place outside the community in which such employee resides, and within the community if the Director, so orders, as may be reasonably necessary to cure and relieve the employee from the effects of the injury. K.S.A. §44-510h(a). "Health care provider" is defined as any person licensed by the proper licensing authority of Kansas, another state, or the District of Columbia, to practice medicine, surgery, osteopathy, chiropractic, dentistry, optometry, podiatry, audiology or psychology. K.S.A. §44-508(j).

41. Which prosthetic devices are covered, and for how long?

Prosthetic devices are covered. K.S.A. §44-510h(a). Vehicle and home modifications may be covered as medical expenses, depending on the length which courts will go to in defining "apparatus" necessary to "cure and relieve" the effects of an injury. Administrative law judges routinely authorize doctor-prescribed mattresses, wheelchairs, beds, and TENS units. However, the majority of reported cases deny such significantly more expensive items as specially equipped vans and swimming pools as not properly being a "medical apparatus." It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, terminates upon the employee's reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee

reaches maximum medical improvement. K.S.A. §44-510h(e).

42. Are vehicle and/or home modifications covered as medical expenses?

Whether vehicle or home modifications will be ordered is essentially left to the discretion of the director and will depend upon the facts of the individual case. See answer 41.

43. Is there a medical fee guide or schedule, or other provisions for cost containment?

Yes, all fees for medical services are fixed by the Director. K.S.A. §44-510i.

44. What, if any, provisions or requirements are there for "managed care"?

None.

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

An application for hearing is filed with the Director for the purpose of docketing the case and getting an administrative law judge assigned. Preliminary issues such as fact of injury, whether the injury is covered by the Act, timely notice, timely written claim, and necessity of medical treatment are decided in a preliminary hearing. K.S.A. §44-534a. An application for a preliminary hearing can be made no sooner than seven days after written demand for benefits are served on the respondent and insurer.

46. What is the method of claim adjudication?

A. Administrative level.

Preliminary awards are made by administrative law judges, and are subject to review and approval by the Worker's Compensation Board. Such a request for review is not a prerequisite for judicial

review. K.S.A. §44-534a. Appeals to the Board of Review from preliminary orders are allowed only on issues of fact of injury, whether the injury arose out of and in the course of the employment, and whether notice was given and claim timely made. There is no judicial review of these preliminary decisions. K.S.A. §44-534a(a)(2).

Final awards are reviewable de novo by the board of review. A petition for review must be filed within ten days. *HARPER V. COFFEY GRAIN CO.*, 192 KAN. 462, 466-467, 388 P.2D 607 (1964).

B. Trial court.

There is no appeal to the district court.

C. Appellate.

Notice of appeal must be filed within thirty days of the decision by the Board of Review. The Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, provides the grounds upon which relief may be granted in appeals for workers compensation awards entered after October 1, 1993. *See* K.S.A. §44-556(a).

Under the KJRA an appellate court reviews questions of fact, in light of the record as a whole, to determine whether an agency's findings are supported to the appropriate standard of proof by substantial evidence, K.S.A. 77-621(c)(7); *Kotnour v. Overland Park*, 43 Kan. App.2d 833, 836, 233 P.3d 299, 302. An appellate court shall grant relief if it determines that "the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole. K.S.A. 77-621(c)(7). K.S.A. 77-621(d) explains that: "[I]n light of the record as a whole means that "the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record ... that detracts from such finding as well as all of the relevant evidence in the record ... that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness." Thus, the statute requires the appellate courts to consider all of the evidence that detracts agency's findings when it assess whether the evidence is substantial enough to support those findings. *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App.2d 360, 363, 212 P.3d 239, 241 (2009). Therefore, "the appellate court must determine whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency's conclusion." *Id.* Substantial evidence in a workers compensation case is "evidence possessing something of substance and relevant consequence to induce conviction that an award is proper.; it furnishes a basis of fact from which an issue can be resolved reasonably." *Graham v.*

Dokter Trucking Group, 284 Kan. 547, 553, 161 P.3d 695 (2007).

As in civil cases, a decision of the ALJ or Board of Review is also subject to appellate review for errors of law. The appellate court shall only grant relief if it determines that “the [Board or ALJ] has erroneously interpreted or applied the law.” K.S.A. 77-621(c)(4). In determining whether the ALJ or Board erroneously interpreted or applied the law, “[n]o significant deference is due the ALJ’s or the Board’s interpretation or construction of a statute.” *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, 361, 204 P.3d 1156 (2009).

47. What are the requirements for stipulations or settlements?

Methods for settlements are set forth in the Kansas Administrative Regulations, 51-3-1 *et seq.* Compensable cases may be determined and terminated only by: (1) filing a settlement agreement, final receipt and release of liability as provided by K.S.A. §44-527; (2) hearing and written award; (3) joint petition and stipulation subject to K.A.R. §51-3-16; (4) settlement hearing before an administrative law judge; or, (5) voluntary dismissal by all parties. See K.A.R. 51-3-1. The Director reviews all final settlements, and may disapprove a settlement in writing within 20 days of receipt of the settlement. K.S.A. §44-527.

Lump sum settlements can be made. Generally, lump sum settlements extinguish the employer's liability for future medical payments, or any modification of the disability. Awards can be by stipulation leaving the issue of future medical expenses open.

48. Are full and final settlements with closed medical available?

Yes. See answer 47.

49. Must stipulations and/or settlements be approved by the state administrative body?

Stipulations and/or settlements must be approved by the Director of Workers' Compensation pursuant to K.A.R. 51-3-1 *et seq.*

RISK FINANCE FOR WORKERS' COMPENSATION

50. What insurance is required; and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

Every employer must secure the payment of compensation by: (1) insuring the payment of such compensation with an authorized insurer; (2) qualifying for self-insurance, either individually or as part of a group; or (3) becoming a member in a qualified group-funded workers compensation pool. K.S.A. §44-532(b). The cost of carrying such insurance or risk must be paid by the employer and not the employee. *Id.*

51. What are the provisions/requirements for self-insurance?

A. For individual entities.

An employer may only become qualified as a self-insurer by obtaining a self-insurance permit from the Division of Workers' Compensation. An employer making such an application must, upon the request of the Director, submit any information that the Director may require to effectively evaluate the financial status of the employer. An applicant for a self-insurance permit or renewal permit must, if the Director requests, pay the fees of a consultant approved by the Division of Workers' Compensation to determine if the employer has the financial ability to become self-insured or to have its permit renewed. K.A.R. 51-14-4.

B. For groups or "pools" of private entities.

The requirements for group-funded workers' compensation pools are set forth in K.S.A. §44-581: "Five or more employers, regardless of domicile, who are members of the same bona fide trade merchant or professional association, regardless of domicile, which has been in existence for not less than five years and who are engaged in the same, similar or closely related type of business may enter into agreements to pool their liabilities for Kansas workers' compensation benefits and employers' liability...such arrangements shall be known as group-funded workers' compensation pools, which shall not be deemed to be insurance or insurance companies and shall not be subject to the provisions of chapter 40 of the Kansas Statutes Annotated, except as otherwise provided herein." K.S.A. §44-581(a)-(c).

52. Are "illegal aliens" entitled to benefits of workers' compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of "employee"?

There is no exemption for an illegal alien. *See generally Acosta v. National Beef Packing Co., L.P.*, 273 Kan. 385, 44 P.3d 330 (2002)(affirming workers' compensation award to illegal worker).

53. Are terrorist acts or injuries covered or excluded under workers' compensation law?

A terrorist act would be subject to the same principles applicable to injuries by other third parties. See answer 14.

54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?

At this time, there are no state specific statutes in Kansas affecting the federal statutory scheme for satisfying Medicare's interests under 42 U.S.C. §1395y.

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

The Federal Medicaid statute requires States to include in their plan for medical assistance provisions (1) that the individual will assign to the State any rights to payment for medical care from any third party and (2) that the individual will cooperate with the State in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. §1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. §1396k(b).

56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?

The law provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. 45 C.F.R. 164.512. Therefore, the traditional current practice of obtaining medical records could proceed under state law.

57. What are the provisions for "Independent contractors"?

UNDER KANSAS LAW, INDEPENDENT CONTRACTORS ARE NOT CONTAINED WITHIN THE DEFINITION OF EMPLOYEES UNDER K.S.A. §44-508(B). THE TEST FOR DETERMINING WHETHER AN EMPLOYER/EMPLOYEE RELATIONSHIP EXISTS IS TO CONSIDER WHETHER THERE IS A RIGHT TO CONTROL OR EXERCISE AUTHORITY. *FALLS V. SCOTT*, 249 KAN. 54, 815 P.2D 1104 (1991); *ANDERSON V. KINSLEY SAND & GRAVEL, INC.*, 221 KAN. 191, 558 P.2D 146 (1976). IF THE INDIVIDUAL IS NOT CONTROLLED, BUT RATHER FREE TO WORK ACCORDING TO HIS OWN METHODS, HE OR SHE IS AN INDEPENDENT CONTRACTOR. *EVANS V. BOARD OF ED. OF HAYS*, 178 KAN. 275, 278, 284 P.2D 1068, 1071 (1955). WHERE IT IS DETERMINED THE INDIVIDUAL IS AN INDEPENDENT CONTRACTOR, COVERAGE FOR WORKER'S COMPENSATION WILL BE DENIED AS IT RELATES TO THE CONTRACTING PRINCIPAL. *KRUG V. SUTTON*, 189 KAN. 96 (1961).

- 58. Are there any specific provisions for “Independent Contractors” pertaining to professional employment organizations, temporary service companies, or leasing companies?**

There are no specific provisions for “independent contractors” pertaining to professional employment organizations, temporary service companies, or leasing companies, with one exception. K.S.A. §44-505(a)(5), specifically excludes from coverage services of a qualified real estate agent when payment is directly related to sales and not hours worked and there exists a written contract which states that the individual is to be treated as an independent contractor for state tax purposes. Otherwise, no coverage will apply unless the facts demonstrate an employer/employee relationship.

- 59. Are there any specific provisions for “Independent Contractors” pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?**

While there are no specific provisions for “Independent Contractors,” K.S.A. §44-503 states an individual may recover workers compensation benefits from either his immediate employer or a statutory employer. Therefore, if the work being done by the employee is either an integral part of the principals’ trade or business or is work that would ordinarily have been done by an employee of the principal, owners/operators of trucks or other vehicle drivers or deliverers may arguably be able to recover from either. *See Fox v. Loughry*, 2004 WL 90081, 82 P.3d 532 (Kan. App. 2004); Answer 3 for test used to determine whether the work was an integral part of the principal’s trade or business. Since a driver is, under federal law, legally a statutory employee of the Department of Transportation permitted operator, under whose colors he or she is driving, the driver may be able to claim that he or she is entitled to workers compensation benefits from either his employer or the Department of Transportation permitted operator/statutory employer.

- 60. Are there any state specific requirements which must be satisfied in light of the obligation of the**

parties to protect Medicare's interests when settling the right to medical treatment benefits under a claim?

Kansas does not have any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interest when settling the right to medical treatment benefits under a claim. However, it should be noted that Kansas permits claimants to administer their own Workers Compensation Medicare Set-Aside Arrangements (WCMSA).

61. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?

Kansas does not permit the use of marijuana for medicinal purposes.

62. Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?

Kansas does not permit the recreational use of marijuana.

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