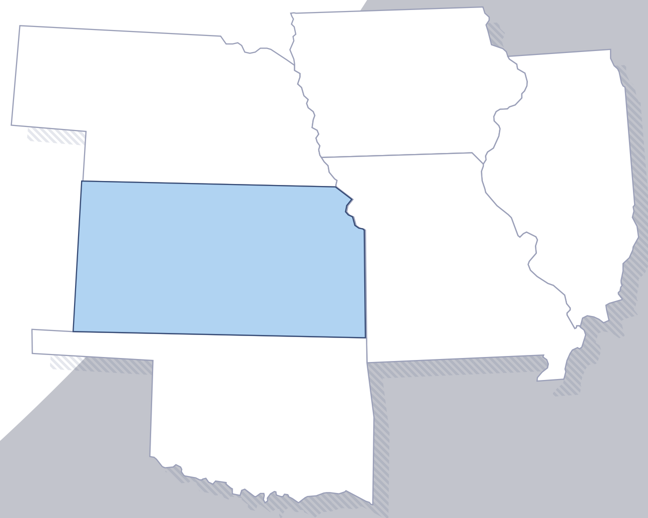
Workers' Compensation Reference Guide

Kansas



KANSAS WORKERS' COMPENSATION

Applies to injuries occurring on or after July 1, 2024.

I. JURISDICTION - K.S.A. 44-506

A. Act will apply if:

1. Accident occurs in Kansas.
2. Contract of employment was made within Kansas, unless the contract specifically provides otherwise.
3. Employee's principal place of employment is Kansas.

II. ACCIDENTS

A. Traumatic Accidental Injury

1. "Undesigned, sudden, and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force."
2. "An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift."
3. "The accident must be the prevailing factor in causing the injury."
4. Deemed to arise out of employment only if:
   a. There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
   b. The accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

B. Repetitive Use, Cumulative Traumas or Microtraumas– K.S.A. 44-508(e)

1. "The repetitive nature of injury must be demonstrated by diagnostic or clinical tests."
2. "The repetitive trauma must be the prevailing factor in causing the injury."
3. Date of accident shall be the earliest of:
   a. Date the employee is taken off work by a physician due to the diagnosed repetitive trauma;
   b. Date the employee is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
   c. Date the employee is advised by a physician that the condition is work related; OR
   d. Last day worked, if the employee no longer works for the employer.
   e. In no case shall the date of accident be later than the last date worked.

4. Deemed to arise out of employment only if:
    a. Employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
    b. The increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
    c. The repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

C. Prevailing Factor
1. Primary factor in relation to any other factor.
2. Judge considers all relevant evidence submitted by the parties.

D. Exclusions
1. Triggering/precipitating factors
2. Aggravations, accelerations, exacerbations
3. Pre-existing condition rendered symptomatic
4. Natural aging process or normal activities of daily living
5. Neutral risks, including direct or indirect results of idiopathic causes
6. Personal risks

III. NOTICE OF ACCIDENT - K.S.A. 44-520

A. Notice requirements depend on the date of accident.

B. For accidents after July 1, 2024
1. Notice must be given by the <u>earliest</u> of the following days:
    a. 30 calendar days from the date of accident or the date of injury by repetitive trauma; or
    b. 20 days from last date of employment if no longer employed.

C. For accidents between April 26, 2013 and June 30, 2024:
1. Notice must be given by the earliest of the following days:
    a. 20 calendar days from the date of accident or injury by repetitive trauma**;**
    b. 20 calendar days from the date the employee seeks medical treatment for the injury; or
    c. 10 calendar days from the employee's last day of actual work for the employer.

D. For accidents between May 15, 2011, and April 25, 2013:
1. Notice must be given by the earliest of the following days:
    a. 30 calendar days from the date of accident or injury by repetitive trauma**;**
    b. 20 calendar days from the date the employee seeks medical treatment for the injury; or
    c. 20 calendar days from the employee's last day of actual work for the employer.

E. For accidents before May 15, 2011:
   1. Notice must be given within 10 days of the accident unless the employer had actual knowledge of the accident.
   2. If an employee does not provide notice within 10 days, their claim will not be barred if their failure to provide notice was due to just cause, provided that:
      a. Notice was given within 75 days; or
      b. The employer had actual knowledge of the accident; or
      c. The employer was unavailable to receive notice; or
      d. The employee was physically unable to give such notice.

F. May be oral or in writing
   1. "Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager."

G. Notice shall include the time, date, place, person injured, and particulars of the injury and it must be apparent the employee is claiming benefits under the workers' compensation act or suffered a work-related injury.

H. Notice requirement is waived if the employee proves that
   1. the employer or employer's duly authorized agent had actual knowledge of the injury;
   2. the employer or 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.

IV. REPORT OF ACCIDENT – K.S.A. 44-557

A. Employer / carrier must file with the Division of Workers' Compensation within 28 days of obtaining knowledge of any accident that requires an employee to miss more than the remainder of the shift in which the injury occurred.
   1. Civil penalties are possible for failure to file.
   2. Accident report cannot be used as evidence.

V. APPLICATION FOR HEARING- K.S.A. 44-534

A. The employee must file an application for hearing by the later of:
   1. 3 years after the date of accident; or
   2. 2 years after the last payment of compensation.

B. Once Application for Hearing is filed, claim must proceed to hearing or award within three years or be subject to dismissal with prejudice – K.S.A. 44-523(f)

VI. MEDICAL TREATMENT

A. K.S.A. 44-510h

1. Employer has the right to select the treating physician.
2. Employee has $800 unauthorized medical allowance for treatment.
3. Rebuttable presumption that employer's obligation to provide medical treatment terminates upon the employee reaching maximum medical improvement.
4. Medical treatment does not include home exercise programs or over-the-counter medications.

B. K.S.A. 44-510k

1. After an award, any party can request a hearing for the furnishing, termination or modification of medical treatment.
2. ALJ must make a finding that it is more probably true than not that the injury is the prevailing factor in the need for future medical care
3. If the claimant has not received medical treatment (excluding home exercise programs or over-the-counter medications) from an authorized healthcare provider within two years from the date of the award or the date the claimant last received medical treatment from an authorized healthcare provider, there is a rebuttable presumption no further medical care is needed. This presumption can be overcome by competent medical evidence.

C. K.S.A. 44-515

1. All benefits suspended if employee refuses to submit to exam at employer's request until the employee complies with the employer's request.
2. Employee may request that a report from any examination be delivered within a reasonable amount of time (no longer 15-day requirement). The report requested must be identical to the report submitted to the employer.

VII. AVERAGE WEEKLY WAGE – K.S.A. 44-511

A. Add wages earned during the 26 weeks prior to the accident and divide by the number of weeks worked during that period. If the employee did not work a total of 26 weeks before the accident, divide by the number of actual weeks worked before the accident.

1. If the employee worked less than the employee's expected weekly schedule during the first week of employment, that week shall not be included in the calculation of the employee's average weekly wage.
2. If employed for less than one calendar week immediately preceding the accident or injury, the average weekly wage shall be determined by the ALJ.

B. Wages = Money + Additional compensation

1. Money: gross remuneration, including sick, vacation, other paid time off, bonuses and gratuities.

2. Additional Compensation: only considered if and when discontinued
    a. Board and lodging if furnished by the employer
    b. Employer paid life insurance, disability insurance, health, and accident insurance
    c. Employer contributions to pension or profit-sharing plan

C. Examples
1. Example One
    a. 26 weeks worked - $10,400 earned
    b. No additional compensation discontinued
    c. Average weekly wage = $400
2. Example Two
    a. 26 weeks worked - $10,400 earned
    b. Additional compensation discontinued following injury
        i. Health insurance - $200 per week.
        ii. Pension contribution - $150 per week.
    c. Average weekly wage = $750

VIII. TEMPORARY BENEFITS – K.S.A. 44-510c(b)

A. Temporary Total Disability
1. Two-thirds of Average Weekly Wage (AWW) from above, subject to statutory maximum determined by date of injury
2. Seven-day waiting period.
    *No temporary total disability for first week unless off three consecutive weeks.
3. Exists when the employee is "completely and temporarily incapable of engaging in any type of substantial gainful employment."
4. Treating physician's opinion regarding ability to work is presumed to be determinative.
5. Employee is entitled to temporary total disability benefits if employer cannot accommodate temporary restrictions of the authorized treating physician.
6. No temporary total disability benefits if the employee is receiving unemployment benefits.
7. Insurer or self-insured employer MUST provide statutorily mandated warning notice on or with the first check for temporary total disability benefits.

B. Temporary Partial Disability
1. Two-thirds of the difference between Average Weekly Wage pre- accident and claimant's actual post-accident weekly wage up to statutory maximum.
2. Available for scheduled and non-scheduled injuries

C. Termination of Benefits
   1. Maximum medical improvement
   2. Return to any type of substantial and gainful employment
   3. Employee refuses accommodated work within the temporary restrictions imposed by the authorized treating physician
   4. Employee is terminated for cause or voluntarily resigns following a compensable injury, if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

IX. PRELIMINARY HEARINGS – K.S.A. 44-534a

A. After filing an Application for Hearing pursuant to K.S.A. 44-534, any party may file an Application for Preliminary Hearing.

B. Seven days before filing Application for Preliminary Hearing the applicant must file written NOTICE OF INTENT stating benefits sought.

C. An Administrative Law Judge will be assigned

D. At least 20 days before the date of the preliminary hearing both parties shall exchange all medical reports so that all parties may be informed of all medical findings and opinions. Failure to comply may result in the ALJ granting a party's request for additional time to present evidence.

E. Hearing can be set seven days later. If claim is denied at preliminary hearing, failure to proceed to regular hearing within one year and without good faith reason results in dismissal with prejudice.

F. Benefits to Consider at Preliminary Hearing:
   1. Medical treatment (including change of physician).
      a. Ongoing or past bills.
   2. Temporary total or temporary partial benefits (including rate).
      a. Prospective or past benefits.
   3. Medical records and reports are admissible without testimony.
   4. Witnesses may be necessary.
   5. Opportunity for decision on ultimate compensability issues.

G. The ALJ may only order one Court-Ordered Independent Medical Examination (COIME) without the agreement of the parties. Parties are still free to agree to a joint IME.
   1. If the ALJ does order a COIME, the COIME must be done prior to the Prehearing Settlement Conference.
   2. The COIME may not be used for the purpose of a rating, permanent restrictions, or opinions on permanent total disability.

H. Preliminary Awards are binding unless overruled at a later Preliminary Hearing or Regular Hearing.

I. Limited right to review by the Appeals Board.
   1. “whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply”.

J. Penalties – K.S.A. 44-512a
   1. Award must be paid within 20 days of receipt of statutory demand. Penalties can be $100 per week for late temporary total and $25 per week per medical bill.

K. Dismissal of claim denied at Preliminary Hearing – K.S.A. 44-523(f)
   1. Claim dismissed with prejudice, if:
      a. Case does not proceed to Regular Hearing within one year
      b. Claimant cannot show good cause for delay
   2. Dismissal considered final disposition for fund reimbursement
      a. This will not affect any future benefits which have been left open upon proper application by an award or settlement.

X. PRE-HEARING SETTLEMENT CONFERENCES – K.S.A. 44-523(d)

A. Must occur at least 10 days before a Regular Hearing can take place.

B. Generally held after claimant reaches maximum medical improvement.

C. Court will clear case for Regular Hearing or enter order for appointment of independent physician to determine permanent impairment of function or restrictions.

D. Process varies from Judge to Judge.

E. Issues regarding final award or settlement are considered.

XI. PERMANENT DISABILITY – K.S.A. 44-510f

A. <u>Maximum Awards</u>
   1. Functional Impairment Only - $100,000 (increase from $75,000)
      a. Cap now applies even if temporary total or temporary partial disability benefits were paid.
      b. $100,000 cap shall apply whether temporary total disability or partial disabilities benefits were paid.
   2. Permanent Partial Disability - $225,000 (increase from $130,000)
      a. Cap includes temporary total or temporary partial disability benefits paid
   3. Permanent Total Disability - $400,000 (increase from $155,000)
      a. Cap includes temporary total or temporary partial disability benefits paid
   4. Death benefits - $500,000(increase from $300,000)
      a. Includes $1,000 for appointment of conservator, if required.
   5. Caps will remain fixed until July 1, 2027, at which time a cost-of-living adjustment will kick in to raise caps on a yearly basis. The annual percentage increase will be based on a 5-year average of the percentage increase in the State’s average weekly wage.

B. Reduction for Pre-existing Impairment

1. Basis of prior award in Kansas establishes percentage of pre-existing impairment.
2. If no prior award in Kansas, pre-existing impairment established by competent evidence.
3. If pre-existing injury is due to injury sustained for same employer, employer receives a dollar-for-dollar credit.
4. In all other cases, the employer receives a credit for percentage of pre-existing impairment.

C. Scheduled Injuries

1. Includes loss of and loss of use of scheduled members
2. Combine and rate multiple injuries in single extremity to highest scheduled member actually impaired
3. Formula
   a. (scheduled weeks-weeks TTD paid) x rating % x compensation rate
4. Example
   a. Arm Injury = 210 weeks
   b. TTD paid = 10 weeks
   c. Rating = 10%
   d. Compensation Rate = $546

(210 weeks – 10 weeks) x 10% = 20 weeks
x $546.00
= **$10,920.00**

D. Body as a Whole Injuries

1. Presumption is functional impairment
2. Includes loss of or loss of use of: (1) bilateral upper extremities, (2) bilateral lower extremities, or (3) both eyes.
3. Formula
   a. (415 weeks – weeks TTD paid in excess of 15 weeks) x rating % x compensation rate
4. Example
   a. TTD paid = 25 weeks
   b. Rating = 15% Body as a Whole
   c. Compensation Rate = $546.00

(415 weeks – 10 weeks) x 15% = 60.75 weeks
x $546.00
= $33,169.50

5. Work Disability
   a. High end permanent partial disability.
   b. Allows the employee to receive an Award in excess of functional impairment.

c. Employee eligible if:

i. Body as a whole injury; and

ii. The percentage of functional impairment caused by the injury exceeds 7 ½% or the overall functional impairment is equal to or exceeds 10% where there is preexisting functional impairment; and

iii. Employee sustained a post-injury wage loss of at least 10% which is directly attributable to the work injury.

6. Formula

a. ((Wage Loss % + Task Loss %) / 2) x (415 weeks – weeks TTD paid in excess of 15 weeks) x compensation rate

i. **Wage Loss**: “the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is capable of earning after the injury.”

a) Consider all factors to determine the capability of the worker, including age, education and training, prior experience, availability of jobs, and physical capabilities.

b) Legal capacity to enter contract of employment required.

c) Refusal of accommodated work within restrictions and at a comparable wage results in presumption of no wage loss

ii. **Task Loss**: “the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury.”

(a) Task loss due to pre-existing permanent restrictions not included

7. Example:

a. TTD paid = 25 weeks

b. AWW on date of accident = $1,000.00

c. AWW after accident = $350

d. Tasks performed during 5 years prior to accident = 25

e. Tasks capable of performing after the accident = 10

f. Compensation Rate = $555.00

(65% wage loss + 60% task loss) / 2 = 62.5% work disability x (415 weeks – 10 weeks) = 253.125 weeks x $555.00 = $140,484.37

i. This would be capped at $130,000.00, and the amount of TTD paid is considered in determining if the maximum has been reached.

E. <u>Permanent Total Disability</u>

1. Employee is completely and permanently incapable of engaging in any type of substantial and gainful employment.

2. Expert evidence is required to prove permanent total disability
    a. Based on the 6th edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained and;
    b. Suffers a percentage of functional impairment determined to be caused solely by the injury that is equal to or exceeds 10% to the body as a whole or the overall functional impairment is equal to or exceeds 15% if there is a preexisting functional impairment.
3. Can only be permanently and totally disabled once in a lifetime.

F. <u>Death Cases</u> – K.S.A. 44-510b
1. Burial Expenses:
    a. Employer shall pay the reasonable expense of burial not exceeding $10,000.00.
2. Upon determination of dependency an initial Lump sum payment of $60,000.00 to surviving legal spouse or a wholly dependent child or children or both.
3. Weekly benefits thereafter: 50% to surviving spouse – 50% to surviving children.
    a. Surviving children will receive weekly benefits until the child becomes 18, unless the child is enrolled in high school. In that event compensation shall continue until May 30th of the child's senior year in high school or until the child becomes 19 years of age, whichever is earlier.
    b. Surviving child will receive weekly benefits until the dependent child becomes 23 if one of the following conditions are met:
        i. Dependent child is not physically or mentally capable of earning wages in any type of substantial and gainful employment; or
        ii. Dependent child is a student enrolled full time in an accredited institution of higher education or vocational education.
    c. Conservatorship required for minor children.
4. Cap
    a. $500,000.00 - For surviving spouse and wholly dependent children
    b. $100,000.00 – If no surviving spouse or wholly dependent children, but leaves other dependents wholly dependent upon the employee's earnings (all other dependents)
    c. If the employee does not leave any dependents who were wholly dependent upon the employee's earnings but leaves dependent partially dependent on the employee's earnings, maximum amount payable to partial dependents is $100,000.00.
    d. If an employee does not leave any dependents, a lump sum payment of $100,000.00 shall be made to the legal heirs of the employee in accordance with Kansas law.
        i. However, if the employer procured a life insurance policy with beneficiaries designated by the employee and in an amount not less than $50,000.00, then the amount paid to the legal heirs under this section shall be reduced

by the amount of the life insurance policy up to a maximum deduction of $100,000.00.

XII. REGULAR HEARING – FULL TRIAL

A. Hearing

1. Claimant generally testifies.
2. Upon receipt of notice from the Division of the setting of a Regular or Post-Award Hearing the parties shall exchange medical reports at least 30 days before the hearing.
    a. Upon receipt of the proposed complete medical report, a party has 10 days to file a written objection to the offering party stating the grounds for the objection.
    b. An ALJ shall conduct a hearing on the objections as to whether the proposal meets a complete medical report's requirements.
3. Each Party has 30 days after the hearing to put on evidence.
    a. Depositions of any and all witnesses.
    b. Parties may stipulate records into evidence.
        i. The testimony of a treating or examining healthcare provider may be submitted into evidence without additional foundation by submission to the opposing side of a complete medical report that complies with procedural rules set forth in the statute.
4. Administrative Law Judge will enter an Award within thirty days of submission of evidence.
    a. Review and Modification stays open as a matter of law.
    b. The authorized treating physician’s opinion as to the need for future medical is presumed determinative on the issue of whether future medical will be awarded in cases where there have been no invasive procedures. This presumption can be overcome with clear and convincing evidence.
    c. If the injured worked had invasive treatment due to the work injury, the authorized treater’s assessment that no future treatment will be needed is still presumed determinative of the issue. However, that presumption may be overcome if claimant proves it is more likely than not that future medical will be needed.
    d. Penalties again apply per K.S.A. 44-512a.

B. Review:

1. Award can be appealed within ten days to Kansas Appeals Board.
2. Can appeal Board decisions to Court of Appeals.
    a. No change at that level if substantial evidence to support Board decision.

C. Post-Award Hearings

1. Medical – K.S.A. 44-510k
    a. Claimant seeking medical treatment.

b. Employer/Insurer seeking to modify or terminate award for medical treatment.

c. Claimant's attorney shall receive hourly attorney fees.

2. Review and Modification – K.S.A. 44-528

a. Review if change of circumstances; i.e. increase in disability.

b. Claimant's attorney can receive fees, but only out of extra compensation obtained by claimant.

XIII. SETTLEMENTS – K.S.A. 44-531

A. Can obtain full and final settlement if claimant agrees.

1. Would close all issues.

B. If the employee is represented by counsel, a settlement can be completed without the need for a settlement hearing.

1. The Division is mandated to create the appropriate stipulations and Award documentation.

2. The ALJ is given five days from receipt of the signed stipulation to approve the agreed award.

C. Case can settle on Running Award per law.

1. Leaves future medical open on application to Director.

2. Respondent controls choice of physician.

3. Leaves right to Review and Modification open.

D. Most common settlement format is Settlement Hearing before Special Administrative Law Judge with a court reporter present.

1. FORMAT:

a. Claimant is sworn in.

b. Claimant is asked to describe their accident(s).

c. Judge asks claimant if they are receiving any medical bills.

i. Court will generally order payment of valid and authorized bills.

d. Terms of settlement will be explained and read into record by Employer's attorney.

e. Unrepresented claimant will receive explanation from Judge that they could hire an attorney.

i. Explanation will detail that attorney could send claimant to a rating doctor of their choice – or claimant does not have to hire an attorney to get a rating from their own doctor.

f. Most importantly, in a full and final settlement, the court will explain that claimant is giving up all rights to future medical.

i. Additional payment can be made to compromise future medical.

g. If claimant is out of state, settlement hearing can occur by telephone or by written joint petition and stipulation.

XIV. DEFENSES

A. Drugs and Alcohol – K.S.A. 44-501(b)(1)

1. Employer not liable if the injury was contributed to by the employee's use or consumption of alcohol or drugs.
2. There is a .04 level which will establish a conclusive presumption of impairment due to alcohol. Impairment levels for drugs set by statute.
3. Rebuttable presumption that if the employee was impaired, the accident was contributed to by the impairment.
4. Refusal to submit to chemical test results in forfeiture of benefits if the employer had sufficient cause to suspect the use of alcohol or drugs or the employer's policy clearly authorizes post-injury testing.
5. Results of test admissible if the employer establishes the testing was done under any of the following circumstances
   a. As a result of an employer mandated drug testing policy in place in writing prior to the date of accident
   b. In the normal course of medical treatment for reasons related to the health and welfare of the employee and not at the direction of the employer
   c. Employee voluntarily agrees to submit a chemical test

B. Coming and Going to Work – K.S.A. 44-508

1. Accidents which occur on the way to work or on the way home are generally not compensable.
2. Exceptions:
   a. On the premises of the employer.
   b. Injuries on only available route to or from work which involves a special risk or hazard and which is not used by public except in dealing with employer.
   c. Employer's negligence is the proximate cause
   d. Employee is a provider of emergency services and the injury occurs while the employee is responding to an emergency.
3. Parking lot cases – key question is whether employer owns or controls the lot.

C. Fighting and Horseplay – K.S.A. 44-501(a)(1)

1. Voluntary participation in fighting or horseplay with a co-employee is not compensable whether related to work or not.

D. Violations of Safety Rules – K.S.A. 44-501(a)(1)

1. Compensation disallowed where injury results from:
   a. Employee's willful failure to use a guard or protection against accident or injury which is required pursuant to statute and provided for the employee
   b. Employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer
   c. Employee's reckless violation of safety rules or regulations.

2. Subparagraphs (a) and (b) do not apply if:
   a. It was reasonable under the totality of the circumstances to not use such equipment; or
   b. The employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

XV. OTHER ISSUES

A. Retirement Benefit Offset – K.S.A. 44-510(h)
   1. Applies to Work Disability cases only.
   2. Can offset payments including Social Security Retirement.
      a. An award of PPD or PTD shall be subject to an offset equal to 50% of the Claimant's Social Security retirement benefits.
      b. An award of TTD and TPD benefits shall not be subject to an offset for Social Security Retirment benefits.

B. Second Injury Fund
   1. The Kansas Second Injury Fund provides a procedure to implead a statutory employer in cases where the primary employer is determined to be uninsured and without ability to pay benefits.

C. Medicare Issues
   1. Mandatory reporting requirements
   2. Reconciliation of Conditional Payment Lien
   3. Consideration of Medicare Set-Aside when closing future medical.

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RECENTLY ASKED QUESTIONS IN KANSAS

FROM ISSUES ADDRESSED IN RECENT KANSAS CASES

Q: Should vacation and holiday pay be included in calculating an injured workers' Average Weekly Wage?

A*:* It depends on the date of accident.

Gricelda Navarette sustained injuries in October 2017 while working for Tyson Fresh Meats, Inc. When applying for workers compensation benefits, Navarette sought to have her vacation and holiday pay included in determining her average weekly wage (AWW).

The Court of Appeals determined vacation and holiday pay should not be included in AWW calculations. The Court cited *Bohanan* and *Fuller.* In *Bohanan*, the Court indicated that under the statutory definition of wages, vacation and sick leave do not constitute 'money.' The only way for vacation and sick leave to be included in the AWW is if they constitute 'additional compensation.' K.S.A. 44-511(a)(2) states that additional compensation 'shall include and mean only' the items listed in the statute. Vacation and sick leave are not listed in K.S.A. 44-511(a)(2) and do not constitute 'remuneration for services in any medium other than cash.' In *Fuller*, the court reiterated the holding of *Bohanan* and held "the terms 'wage', 'additional compensation', and 'money' as defined in 44-511(a) did not include pay for vacation and sick leave. Based on the foregoing, the court held that vacation and holiday pay should not be included in determining AWW.

It is worth noting that K.S.A. 44-511 has since been amended by 2024 changes to the Kansas Workers' Compensation Act. The statute now specifically states "money" shall be construed to mean the gross renumeration, on an hourly, output, salary, commission, or other cases while employed by the employer, <u>including sick, vacation or other paid time off</u>, bonuses and gratuities. Based on this revision of the statute, sick leave and vacation can now be included in the calculation of an employee's AWW for all injuries after July 1, 2024.

Navarrete v. Tyson Meats, 2024 WL 504076 (Kan. Ct. App. 2024)

Q. If the claimant is injured on the first day of the job, is the AWW determined by looking at the 26 weeks of preinjury wages of a similar employer?

A: No, the Court may consider pre- or post-injury wages to determine the worker's AWW.

Mark Farmer sustained injuries to his right arm while working for Southwind as an Evening Tower Hand on April 4, 2019. Farmer was injured on his second day on the job. A wage increase went into effect at Southwind on January 4, 2019, raising the hourly wage from $15.00 per hour to $21.00 per hour.

The ALJ determined the claimant's AWW was $634.16 based upon wages of similar employees in the 26 weeks preceding the work injury.

The Board disagreed with this finding and instead used the wages Farmer could have reasonably expected to earn in the week following his injury if he had not been injured. Based on this, the Board found Farmer's AWW was $1,092.00. The Court determined K.S.A. 44-511(b)(2) grants the finder of fact wide latitude to consider pre- or post-injury wages to determine the worker's AWW. Subsection (b)(2) only applies to cases where the worker was injured in the first week of employment. The ALJ is directed to consider "all of the evidence and circumstances" including "the usual wage for similar services paid by the same employer" not to exceed the wage the employee "was reasonably expected to earn." Despite the ALJ being granted wide latitude, the Board disagreed with the ALJ's analysis. The Court held that the evidence concerning what Farmer would have earned the week immediately following his injury, if he had not been injured, was "more representative" of what Farmer "could reasonably expect to earn" for an AWW.

Farmer v. Southwind Drilling, 539 P.3d 1056 (2023)

Q: Whether the AMA Guides, 6th Edition should be considered exclusively in determining impairment for scheduled injuries?

A: No. In *Weaver*, the ALJ declined to consider any ratings that were not based strictly on the *AMA Guides, 6th Edition*. The ALJ held that K.S.A. 44-510d(b)(23) requires the Court to apply the 6th Edition when determining impairment for a scheduled injury, thus "competent medical evidence" is not to be considered.

The Court of Appeals emphasized that "functional impairment" in the Workers' Compensation Act has always required that it be established by competent medical evidence. This logic applies for both scheduled injuries under K.S.A. 44-510(b)(23) and non-scheduled injuries under K.S.A. 44-510e(a)(2)(B). Therefore, in determining impairment for scheduled injuries, the fact-finder should begin with the 6th Edition as starting point and consider competent medical evidence to modify or confirm the rating.

Weaver v. Unified Govt. of Wyandotte Cnty., 539 P.3d 617 (Kan. App. 2023)

Q: May a Claimant modify an Award seeking PPD benefits when she failed to present any evidence of PPD at the Regular Hearing?

A: No, Kimberly Jackson testified during a Preliminary Hearing on May 23, 2018, her injury was not compensable under the Workers' Compensation Act because the injury was caused by an assault during an unpaid lunch hour. During a final hearing on January 29, 2019, the ALJ stated that the only issues to be decided were whether Jackson's injuries were compensable under the Act. Jackson presented no evidence about any dispute regarding benefits and her counsel indicated that they were simply asking the ALJ to find the case non-compensable. For that reason, they did not submit any medical evidence.

With the only evidence being a deposition from Jackson taken in 2018, the ALJ ruled that the injuries were compensable under the Act but awarded no PPD benefits or future medical because none were requested. Jackson appealed to the Board. However, the only issue Jackson appealed was whether the injury arose out of the course of employment. She did not appeal anything regarding benefits or a disability determination. The Board upheld the ALJ's Award. After denial by the Board, Jackson requested a review and modification of the Award under K.S.A. 44-528(a). She sought modification on the grounds that her Award was inadequate and that her PPD had increased.

The ALJ and Board denied her request for modification of her workers' compensation Award. The ALJ and Board held that Jackson failed to show "good cause" as a threshold requirement under K.S.A. 44-528(a) for modification of her award and denied her request.

The Court of Appeals agreed. The Cour stated modification of a workers' compensation award is governed by K.S.A. 44-528(a). The subsection provides that any award may be reviewed by the ALJ "for good cause shown" upon application of the employee. After review and a hearing, the ALJ may then modify the award. The provision was designed for the situation in which a worker gets considerably better or worse following an award. The Court held that Jackson had failed to present any evidence as to why good cause existed to review her appeal and that she was using the review and modification proceeding to present evidence that should have been presented at the regular hearing. The court stated that "to allow what amounts to a do-over here would both deviate from that rule and stray far from the purpose of K.S.A. 44-528(a) as a check on the vagaries of medical prognostication."

Jackson v. Johnson Cnty., No. 126,441, 2024 WL 3075674 (Kan. App. June 21, 2024)

Q: Whether a claimant's testimony alone that they received a functional impairment rating in a prior workers' compensation case is sufficient evidence to establish an offset under K.S.A. 44-501(e)?

A: No. On March 11, 2020, Cregger suffered a left tibial plateau fracture near the knee. He also complained of back and right knee pain after the accident. In a discovery deposition and hearing, Cregger testified that in 1996, he suffered bilateral fractures to both tibias in a work-related accident. Claimant settled the 1996 claim for 28% permanent partial impairment to the body as a whole. Following a Regular Hearing for the 2020 claim, the ALJ determined the claimant sustained 19% permanent partial impairment to the body as a whole. However, he found the award was subject to an offset under KSA 44-501(e)(1) given the prior finding of 28% permanent partial impairment to the body as a whole.

Claimant appealed arguing the offset was inappropriate because the 28% impairment from the 1996 injury was not based on substantial competent medical evidence. The Board reversed, finding that there was no evidence showing the 1996 and 2020 injuries were to the same body parts. More specifically, the only evidence of a pre-existing

condition was the claimant's testimony and there was no information provided as to what body parts were rated or how they were rated individually and converted to a 28% total body rating. The Fund appealed, arguing that Cregger's testimony was substantial competent evidence to support offset of his new award.

The Court of Appeals upheld the Board's decision finding a claimant's testimony alone that they received a functional impairment rating in a prior workers' compensation case is insufficient evidence to establish an offset under K.S.A. 44-501(e). Medical evidence must be furnished by the Respondent showing that the injuries are related.

Cregger v. CLW Farms, Inc., 548 P.3d 387 (Kan. App. 2024)

Q: If an injured worker refuses a drug test after an accident, and the employer's policy clearly states post-accident drug testing is required, does the claimant forfeit workers' compensation benefits?

A: Yes*.* Claimant, a truck driver, alleged repetitive injury to his back from driving.

A policy included in the Employer's Member Handbook stated, "future drug and alcohol tests are required if Members are injured on the job, are involved in an injury on the job, appear to be under the influence, or are involved in an accident where Company property is damaged."

Claimant was referred to Cotton O'Neil. He was advised he was not allowed to leave the building due to the need for a drug test. However, Claimant left the clinic prior to undergoing the drug test.

The Board indicated that the case hinged on whether the claimant refused drug testing under the parameters of K.S.A. 44-501(b)(1)(E). The statute states a worker's refusal to submit to a chemical test at the request of the employer results in forfeiture of benefits under the Workers' Compensation Act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

The Board concluded the claimant clearly refused a drug test which was authorized under the employer's policy. Therefore, Claimant forfeited all benefits available under the Kansas Workers' Compensation Act by willingly refusing to submit to a post-accident drug test clearly authorized by the respondent's policy.

Scott Suitter v. Johnsonville Sausage, 2024 WL 959458 (Kan. Work. Comp. App. Bd. 2024)

Q: Should Claimant's ongoing and future medical treatment be paid from the proceeds of settlement of a medical malpractice suit in accordance with K.S.A. 44-504?

A: Yes. Claimant sustained a compensable back injury on April 30, 2014. He underwent surgical intervention. On October 2, 2016, he presented to Geary Community Hospital

ER with urinary complaints. The evaluating physician felt the claimant's symptoms were the result of prostate issues and/or medication use. Claimant underwent surgery three days later to treat cauda equina syndrome or swelling around the nerve roots in the spinal column.

Claimant settled the underlying workers compensation on claim on April 17, 2018, leaving open future medical benefits. After settlement, claimant pursued a medical malpractice claim against the Geary Community Hospital ER physician alleging he was not properly diagnosed which led to delay in diagnosis and surgery three days later. The medical malpractice claim settled for $800,000.

Claimant later requested medical treatment to be paid by Respondent. The ALJ determined the claimant's treatment should be paid out of the settlement proceeds from his medical malpractice settlement until those proceeds have been exhausted.

"K.S.A. 44-504 states if there is an injury, payable under workers' compensation, caused by circumstances creating a legal liability from a third party, the injured worker has the right to pursue a remedy against the third party. If there is recovery from the third-party claim, the respondent in the workers' compensation case shall have subrogation rights for benefits already paid and a credit for future benefits, including additional medical treatment. There are no limits on what portion of recovery is subrogated or credited to respondent, except for loss of consortium or loss of services of a spouse and attorney fees and expenses."

The Board affirmed the ALJ's decision and found Respondent's subrogation lien was intact. As such, the Respondent was excused from paying any medical bills until the medical malpractice settlement proceeds were exhausted.

Justin Rumbaugh v. DIRECTV, 2023 WL 8440385 (Kan. Work. Comp. App. Bd. 2023)

Q: Can an injured worker who accepted a job in Kansas with an employer based in Montana establish Kansas jurisdiction?

A: Yes. Claimant who lived in Kansas was offered a job from a Montana employer. Claimant accepted the job in Kansas by signing a letter of acceptance and faxing the signed letter to the employer in Montana. She then relocated to Montana completing new hire paperwork in Montana.

On November 7, 2017, claimant fractured her right ankle. She received medical benefits in Montana. However, she relocated back to Kansas and sought benefits under the Kansas Workers' Compensation Act. The Kansas Workers' Compensation Fund argued there was no Kansas jurisdiction as the contract for employment was not complete until claimant completed the new hire paperwork in Montana.

The ALJ and Board disagreed and found jurisdiction under the Kansas Workers' Compensation Act pursuant to K.S.A. 44-506 which confers coverage under the Act

where the contract of employment was made within the state. The Board found Claimant's act of faxing the signed contract letter to Respondent from Kansas was the last act necessary for the formation of an employment contract. As such, the contract for employment was made in Kansas. Completing the new hire paperwork was a condition subsequent to the completion of the contract, not a condition precedent as was argued by the Fund. Therefore, Kansas had jurisdiction over claimant's workers' compensation claim.

Linda S. Henretty v. Health Center Northwest, 2023 WL 9106064 (Kan. Work. Comp. App. Bd. 2023)

Q: Did the claimant recklessly violate the employer's safety rules and regulations pursuant to K.S.A. 44-501(a)(1)(D) when he failed to remain at least an arm's length from a running machine?

A: Yes. The claimant knew he was supposed to remain an arm's length from running machinery but got too close and was injured. K.S.A. 44-501(a)(D) states compensation for an injury shall be disallowed if such injury results from: the employee's reckless violation of their employer's workplace safety rules or regulations." Recklessness contemplates something beyond ordinary negligence or carelessness. To show that a claimant acted with recklessness, the preponderance of the evidence must support conscious disregard of a known or obvious risk that exceeds negligence. "Recklessness is akin to gross, culpable or wanton negligence, but is a lesser standard than intentional conduct."

The ALJ found the claim compensable and ordered medical treatment and TTD benefits. Respondent appealed and the Board reversed the ALJ's ruling and found the claimant recklessly violated Respondent's workplace safety rule because his behavior was deliberate and indifferent to a high degree of harm. In coming to this conclusion, the Board cited several cases denying benefits to a claimant who reached into a running machine contrary to safety rules.

Pastran Garcia v. Packers Sanitation Services, 2024 WL 448559 (Kan. Work. Comp. App. Bd 2024)

Q: Was the Board correct to affirm the ALJ's award, pursuant to K.S.A. 44-510e(a)(2)(C), and adoption of one physician's findings that were based on a correct following of K.S.A. 44-510e(a)(2)(B) and relevant caselaw?

A: Yes, because the Board's affirmation reasonably supported how the relevant statutes and caselaw have been applied to workers' compensation issues.

Claimant, Ortega, was injured on 12/27/2017 while working as a licensed physical therapist for Encore. She needed two surgeries. She was unable to return to work

following the surgeries, and applied for workers' compensation against Encore and its insurance carrier, Twin City Fire Insurance Co.

Two physicians testified to their evaluations of Ortega. Both physicians used the Fourth and Sixth Editions of the AMA Guides in determining their impairment ratings due to *Johnson v. US Food Service* being under review at the time of the ratings. Dr. Pedro Murati, in November 2019, found a 12% whole person impairment under Fourth Edition, and 8% whole body impairment under the Sixth Edition. Dr. Vito Carabetta, appointed by the ALJ, conducted an independent assessment in August 2020. Dr. Carabetta found Ortega to have a 10% whole body impairment under the Fourth Edition, and a 7% whole body impairment under the Sixth Edition.

The ALJ adopted Dr. Carabetta findings under the Fourth and Sixth Editions at 10% and 7%, respectively, but under *Johnson v. US Food Service*, awarded based only on the 7% impairment rating, so the ALJ did not find Ortega to reach the 7.5% threshold for work disability under K.S.A. 44-510e. Board review only affirmed the ALJ's decision by placing more weight on Dr. Carabetta's opinion than Dr. Murati's, and found that competent medical evidence established the 7% impairment rating.

On appeal, the KS Court of Appeals was responsible for determining if the Board erred in its review. Ortega argued that the Board failed to consider all the medical evidence on record by failing to consider Dr. Carabetta's impairment level under the Fourth Edition. The Court explained that use of *Garcia* was not applicable here, as that holding applies to a constitutional challenge. The reading of Z*imero* in light of *Johnson II* was the correct analysis. The Court reasoned that Dr. Carabetta's rating and analysis were more persuasive than that of Dr. Murati's. His findings reflected the proper reading of *Johnson II*, *Zimero*, and *Garcia* in using the Sixth Edition as the starting point of analysis as well as using his professional experience and judgment to determine the results.

The Court found that the Board did not err in its decision not to award Ortega work disability benefits.

Ortega v. Encore Rehabilitation Services LLC, 525 P.3d 21, 2023 WL 2194559 (Kan. Ct. App. 2023)

Q: Does the Kansas Court of Appeals have the jurisdiction to review an order from the Kansas Workers' Compensation Board if its order remanded back to the ALJ for further proceedings?

A: No, because the Court lacks jurisdiction to review a nonfinal agency action without meeting the requirements of K.S.A. 77-608.

Claimant, Pesina, worked for Aegis from July 2018 to September 2019. Pesina processed checks for around seven hours a day. Most work involved opening boxes or envelopes, and handling checks, with the occasional lifting of 20-pound boxes or pushing a cart with

boxes on them. Her workload increased around the holiday season. She advised Aegis of hand wrist pain and numbness symptoms on January 16, 2019, and applied for workers' compensation on February 5, 2019. She left Aegis in September 2019 and began working at Kansas Neurological Institute. There, she cared for developmentally disabled adults. Around February or March 2020, Pesina began to feel pain in her elbow, but did not report injury to Aegis.

At the request of Aegis, Pesina underwent an independent medical evaluation (IME) on February 28, 2019, by Dr. Robert Bruce. Dr. Bruce opined that that Pesina's wrist injury was the only injury caused by her work at Aegis. Additionally, he opined that Pesina did not have carpal tunnel on either side. He determined Pesina to be at MMI with 0% impairment, and that she would not need any future medical treatment.

Dr. Brian Divelbiss performed a court-ordered IME of Pesina on July 2, 2019. He concluded that Pesina's work for Aegis was not the prevailing factor for any of her symptoms, but rather it was because of aging, gender, hypothyroidism, or a combination of them.

At request of Pesina's counsel, Dr. Daniel Zimmerman evaluated Pesina on February 19, 2020. Dr. Zimmerman found Pesina to have multiple diagnoses to both left and right extremities, and her work duties at Aegis were the prevailing factor for those diagnoses. Dr. Zimmerman rated Pesina at 4% impairment to the whole person under the Sixth Edition.

On June 7, 2021, the ALJ issued an award to Pesina of 2% impairment to the right wrist, referencing Dr. Zimmerman's rating. The ALJ awarded nothing for "alleged bilateral carpal tunnel," and no future medical treatment was awarded. Lastly, the ALJ found that her elbow injury did not arise out of and in the course of employment at Aegis.

Pesina requested the Board to remand for presentation of additional evidence. The Court relied on *Adam v. Ashby House Ltd.*, No. AP-00-0455-555, 2021 WL 1832461 (Kan. Work. Comp. App. Bd. April 26, 2021). There, the board granted remand because no party was in a position at that time to predict the nature of claimant's injury. Here, the Board vacated the ALJ's award and remanded the case for parties to present additional evidence to determine the nature and extent of Pesina's injuries. Aegis petitioned for review of the Board's order.

The Court of Appeals determined the Board's decision to be one that is considered nonfinal, stating that the Board clearly intended for the order to be "preliminary, preparatory, procedural or intermediate" in nature, and incidentally not subject to immediate judicial review.

Aegis argued that the Board's remand was unlawful, and therefore appealable, however K.S.A. 44-551(l) clearly permits the Board to remand "any matter" to the ALJ for further proceedings. Additionally, Aegis argued that even if the decision was nonfinal, it is still

appealable under K.S.A. 77-608. In order for the statute to apply, it must pass the requirements of both 77-608(a) and (b). Pesina conceded that it passes 77-608(a) requirements.

K.S.A. 77-608(b) reads as follows:

> A person is entitled to interlocutory review of nonfinal agency action only if: … (b) postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

Respective to this statute, Aegis argued that postponing judicial review would result in irreparable harm or an inadequate remedy, but the argument fails to acknowledge K.S.A. 44-551(l)(1) that allows any matter to be remanded to the ALJ for further proceedings. Additionally, Aegis argued that "there will be no public benefit derived from postponement" because delay of resolution in this case will only encourage other litigants to do the same. However, the Court reasons that the main issue in this case is still unresolved, which is what compensation Pesina could receive for work injuries, and that would be more injurious to the public than remand.

This Court affirmed the Board's remand back to the ALJ for further proceedings. The order was a nonfinal agency action, and this Court does not have the jurisdiction to review such an order. Aegis' appeal was dismissed without prejudice.

Pesina v. Aegis Processing Solutions, 514 P.3d 400, 2022 WL 3330477 (Kan. Ct. App. 2022)

Q: When a claimant receives workers' compensation benefits from his employer, will the dual capacity doctrine apply as to civil liability to claimant's employer?

A: No, the dual capacity doctrine will not apply to a claimant's employer that already provides workers' compensation benefits.

Claimant Jason Jeffries was receiving workers' compensation benefits from his employer, United Rotary Bush Co. (URBC), after getting injured at work. He then filed a civil suit against URBC alleging negligent design and manufacture of the machine that he was operating at the time of injury. Jeffries claimed URBC was civilly liable under the dual capacity doctrine, which is a judicially recognized exception to the exclusive remedy provision of the Workers' Compensation Act. The case was dismissed on summary judgment by the District Court finding that the dual capacity doctrine does not apply when the employer providing workers' compensation benefits is also the manufacturer of the machine that injured the employee.

The exclusive remedy provision, K.S.A. 44-501b(d), provides: "Except as provided in the workers' compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for

which compensation is recoverable under the workers' compensation act ....” (Emphasis added.)

Essentially, this doctrine means that an injured employee cannot maintain a civil suit against his employer for common law negligence if that employee is recovering, or could have recovered, workers' compensation benefits from his employer.

An exception to this remedy is the dual capacity doctrine, established in *Kimzey v. Interpace Corp.*, 10 Kan. App. 2d 165, 694 P.2d 907 (1985), which allows for an employee who is, or could be, receiving workers' compensation benefits from their employer, to maintain a civil suit against that employer or a third-party tortfeasor. If brought against the employer, the employer must occupy a second capacity that imposes obligations independent of those as the employer.

Jeffries argues two points: (1) a 2008 transaction involving URBC was not a merger, so URBC was conferred third-party obligations to Jeffries; and (2) if the 2008 transaction was a merger, then the dual capacity doctrine applies because the emerging entity assumes liabilities of the pre-existing entities.

The Court of Appeals rejects Jeffries' arguments. The Court ruled that the 2008 transaction in question was in fact a merger, and therefore no new entity was created, and so no additional liability was created or conferred upon URBC. Moreover, the dual capacity doctrine does not apply here because Jeffries' injury stemmed from operation of a URBC-manufactured machine, no additional/third-party liability was conferred upon URBC.

The Court of Appeals affirmed the District Court's ruling, stating their decision was reasonable and not an abuse of discretion.

Jefferies v. United Rotary Brush Corporation, 62 Kan.App.2d 354, 515 P.3d 743 (Kan. Ct. App. 2022)

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