STRATEGIC OUTCOMES PRACTICE

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YOU SHOULD KNOW

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2011 KANSAS WORKERS' COMPENSATION CHANGES – HB 2134

On May 15, 2011, the Kansas General Assembly passed HB 2134, the first significant workers' compensation reform in the state of Kansas since 1993. This represents not only long-awaited workers' compensation reforms but also significant concessions from both business and labor groups. The statute language impacts prior case law, most notably Casco and Bergstrom (*Casco v. Armour Swift Eckrich*, 154 P.3d 494 [Kan. 2007]; *Bergstrom v. Spears Mfg. Co.*, 214 P.3d 676 [Kan. 2009]).

The following summarizes the new defenses and changes to the Kansas Workers' Compensation Act that took effect May 15, 2011.

EMPLOYEE BEHAVIOR

The following behaviors by an employee may disallow compensation for an injury: deliberate intention to cause injury, willful failure to use a guard or protection required by statute and provided for employee, willful failure to use reasonable and proper guard and protection voluntarily furnished by employer, reckless violation of employer's workplace safety rules and regulations, and voluntary participation in fighting or horseplay with co-employee for any reason, work-related or not. (Additional information can be found on page 2 of **HB 2134**.)

INTOXICATION – DRUGS AND ALCOHOL

There shall be a rebuttal presumption that impairment contributed to the accident. There is provision for a forfeiture of benefits for refusal to submit to a test if the employer's policy clearly authorizes post-injury testing. Under the new revision, a split sample must be retained and made available to the employee within 48 hours of a positive test. (Additional information can be found pages 2-3 of HB 2134.)

DEFINITION OF ACCIDENT

Accident is now defined in the HB 2134 as an "undesigned, sudden and unexpected traumatic event." An accident shall be identified by time and place of occurrence, produce symptoms of an injury and occur during a single work shift. The accident must be the prevailing factor in causing the injury. Furthermore, the accident shall in no case be construed to include repetitive trauma in any form. (Additional information can be found on pages 6-7 of HB 2134.)

This issue of *You Should Know* is one in a series of brief articles designed to keep our clients abreast of significant breaking news in the claim and loss control areas that could affect their operations or exposures. Additional information about this and other topics can be obtained from your Regional Strategic Outcomes Practice Associate.

CLARIFICATION OF REPETITIVE TRAUMA

Repetitive trauma must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury and shall in no case be construed to include occupational disease. (Additional information can be found on pages 7 of HB 2134.)

ARISING OUT OF COURSE AND IN SCOPE OF EMPLOYMENT

The injury is compensable only if it arises out of and in the course of employment. The injury is not compensable as an injury because work was a triggering or precipitating factor or because it aggravates, accelerates or exacerbates a pre-existing condition or renders a pre-existing condition symptomatic.

Arising out of course and in the course of employment does not include:

1. Injury occurring as a result of the natural aging process or by normal activities of day-to-day living
2. Neutral risk with no particular employment characteristics
3. Personal risk to employee
4. Idiopathic causes
5. Recreational or social events if no duty to attend and where injury did not result from risks related to normal job duties or as specifically instructed to be performed

(Additional information can be found on pages 7-8 of HB 2134 and includes language relative to the accidents and repetitive trauma.)

TIMELY NOTICE – EMPLOYEE REQUIREMENTS

The burden on notice has been moved to the employee despite the fact that the lack of a written claim is no longer a defense under repealed 44-520a. A detailed outline of the requirements for timely notice can be found on page 26 of HB 2134. A basic outline follows:

Notice must be given to the employer by the earliest of:

1. 30 days from date of accident or date of injury by repetitive trauma
2. 20 calendar days from date medical treatment is sought
3. 20 calendar days after last day of actual work

Notice may be given orally or in writing:

1. If orally, notice must be given to designated individual or department. Designation must be communicated to employee in writing. If no such designation is made, then notice can be given to supervisor or manager.
2. If in writing, notice must be given to supervisor or manager at principal location of employment. The burden of proof rests with the employee that this notice was actually received by employer.
3. The notice, whether given orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the Workers' Compensation Act.

FRIVOLOUS PROSECUTION

If the additional services of an attorney result in denial of additional compensation, penalties or other benefits and it is determined that the attorney engaged in frivolous prosecution of the claim, the employer and insurance carrier shall not be liable for any portion of the attorney fees incurred for such services. (Additional information can be found on page 33 of HB 2134.)

COMPLIANCE WITH MEDICAL CARE

All benefits shall be suspended to an employee who refuses to submit to examinations until such time as the employee complies with the employer's request. The suspension of benefits shall occur even if the employer is under preliminary order to provide such benefits. (Additional information can be found on page 24 of HB 2134.)

AUTHORIZED TREATING PHYSICIAN

The new house bill formalizes the role of the treating physician by presuming such physician's

opinion regarding the employee's work status to be determinative and as defining the role of treating physician as a licensed physician or other health care provider authorized by the employer or insurance carrier. This gives extra weight to the direction of medical care under the new language. (Additional information can be found on page 9 of the HB 2134.)

LIGHT DUTY/ RETURN TO WORK

A refusal by the employee of accommodated work within the temporary restrictions imposed by the authorized treating physician shall result in a rebuttable presumption that the employee is ineligible to receive temporary total disability benefits. Additionally, if the employee has been terminated for cause or voluntarily resigns following a compensable event, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician. (Additional information can be found on page 12 of HB 2134.)

PREVAILING FACTOR

In order to be compensable, the work accident must be the prevailing factor relative to the injury or disability claimed. An accident will no longer be compensable just because it aggravates, accelerates or exacerbates a pre-existing condition. In determination of what constitutes the "prevailing factor," the administrative law judge shall consider all relevant evidence. (Additional information can be found on page 8 of HB 2134.)

FUTURE MEDICAL

Instead of Future Medical being left open automatically, as occurs now, the claimant will have to prove it is more probable than not that future medical treatment will be necessary. Further, if future medical is awarded, and then there is a two-year gap from the date of the award or from the date of last treatment from an authorized provider, during which the claimant receives no medical treatment from an authorized provider, the employer can seek a hearing to permanently terminate future medical benefits. The employer will be afforded a presumption that no more medical treatment is necessary. (Additional information can be found on page 20 of HB 2134.)

CALCULATION OF TEMPORARY TOTAL DISABILITY

Under the new standard, the average weekly wage will be figured on a review and averaging of 26 weeks of earnings, including bonuses and overtime, prior to date of accident for both full- and part-time workers. Prior to the change, an employee was allowed to multiply their hourly rate by 40 whether they worked 40 hours or not.

NEW CAPS

The caps under the statute had not been increased in more than 17 years. These changes were inevitable. New caps will be in place: Death Benefits – $300,000, Permanent Total Benefits – $155,000, Permanent Partial Benefits –$130,000, Functional Impairment – $75,000.

A complete copy of the legislative changes can be found by **clicking here.**

CONTACT

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