



# Legislative Update

July 16, 2013

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**SB1.2**

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# **SECOND INJURY FUND**

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- **287.210.1**

The Attorney General can get an independent medical examination but only if the employer/insurer has not.

- **287.210.7**

The employee can now try cases against the Second Injury Fund on medical reports.

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- **287.220.1.3**

Effective January 1, 2014 there will no longer be permanent partial disability claims against the Second Injury Fund.

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- **287.220.1.3 (continued)**

Permanent total disability cases will be allowed where the prior is at least a 50-week permanent partial disability that is:

- 1) an active military disability; or
- 2) a prior Workers' Compensation disability; or
- 3) is any prior disability which directly and significantly aggravates or accelerates the work related disability; or
- 4) is a preexisting permanent partial disability of an extremity, loss of eyesight in one eye or loss of hearing in one ear, when there is a subsequent compensable work injury of the opposite extremity, loss of eyesight in the other eye, or loss of hearing in the other ear which results in permanent total disability.

# Aggravate

The Webster Dictionary defines “aggravate” as to make worse, more serious, or more severe.

# Accelerate

It defines “accelerate” to bring about at an earlier time, to hasten the progress or development of, to cause to grow, increase.

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- **287.220.3(2)**

When the employee gets compensation under this subsection, the employer is only responsible for the last work related injury considered alone and of itself.

The implication here is, of course, that when the employee is not entitled to Second Injury Fund compensation, the employer remains liable for the employee as he/she is found.

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See also *Federal Mutual Insurance Company v. Carpenter*, 371 S.W. 2d 955 (Mo. 1963). In the absence of a Second Injury Fund, the employer is liable for the entire disability resulting from a compensable injury and this, of course, may include lifelong ... payments. (At 997).

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- **287.220.7**

Money for death benefits and medical bill benefits for an injured worker working for an illegally uninsured employer is deleted.

- **287.220.11**

Money for Second Injury Fund payments for second job wage loss is deleted.

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- **287.220.12**

The employee cannot file a Second Injury Fund claim in Missouri when the employee has filed a claim for compensation in another state.


Without permanent partial disability benefits, this is unimportant.

- **287.220.13**

Language with regard to suspension of permanent total disability benefits

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- **287.220.15**

Priority Language:

1. Attorney General's office;
2. PTD;
3. PPD;
4. Medical Expenses;
5. Interest.

Sausage Mistake: medical expenses prioritized for expenses incurred prior to July 1, 2012.

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- **287.220.16**

Interest: 5% or pursuant to §32.065, whichever is greater.

- **287.715.6**

Supplemental surcharge of an additional 3% in the calendar years 2014-2021 (8 years).

- **287.715.7**

The surcharges are the sole source of payment for Second Injury Fund obligations.

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- 1,200 final unpaid awards  
Over \$32 million
  - First increased payment into Second Injury Fund April 2014
  - Unpaid balance in April 2014 should exceed \$40 million
  - Current unpaid awards should be paid by the end of 2014
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- The additional 3% in today's economy should raise about \$45 million additional dollars for a total of \$90 million annually. Over 8 years of the increased surcharge, that will bring in approximately an extra \$360 million.
  - Whether 6% through 2021 is enough is an open question.
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# **OCCUPATIONAL DISEASE**

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- **287.020.11**

Defines an additional category of occupational diseases due to toxic exposure. There are 10 such diseases.

- **287.067.2**

Adds the words “or death” to injury by occupational disease.

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- **287.067.6**

Adds paid “peace officers” of a police department to the psychological stress benefit language.

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- **287.120.1 and .2**

Adds occupational diseases to the exclusive remedy provision of the Workers' Compensation Act.

- **287.150.7**

The employer has no subrogation rights for benefits paid for an occupational disease due to toxic exposure in the event there is a 3<sup>rd</sup> party recovery.

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- **287.200.4**

(1) Exhaustion language: The enhanced remedies must be “exhausted” before regular permanent total disability or death benefits are paid under the law.

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- **287.200.4 (continued)**

(2) For 9 of the toxic exposure diseases that result in permanent total disability or death, that individual shall receive “an amount equal to” 200% of the state’s average weekly wage for 100 weeks. Currently that is \$157,666.00. This language suggests the benefit will be paid in a lump sum.

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- **287.200.4 (continued)**

(3) With regard to mesothelioma that results in permanent total disability or death, the individual will receive “an additional amount” of 300% of the state average weekly wage for 212 weeks, currently \$501,377.88.

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- **287.200.4 (continued)**

(a) It is the employer's election with regard to the mesothelioma enhanced remedy. The employer can elect into the enhanced remedy for mesothelioma by buying insurance for it, self-insuring for it, or joining an employer pool.

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- **287.200.4 (continued)**

(b) If the employer opts out of the enhanced mesothelioma benefit by not insuring its obligation, the employer is subject to the basic Workers' Compensation occupational disease obligation to the injured worker. But, the occupational disease of mesothelioma is not subject to the exclusive remedy provision and the employee has the right to sue the employer in civil court.

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- **287.200.4(4)**

The enhanced benefits cannot be suspended under the law.

- **287.200.4(5)**

The enhanced benefits can go to a spouse, independent children, or the person's estate.

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- **287.200.5**

A person cannot double up the enhanced remedy from asbestosis that might later morph into mesothelioma. That individual can only acquire the mesothelioma enhancement when the two are added together. As such, the mesothelioma enhanced benefit would have a credit for the asbestosis benefit previously paid.

The mesothelioma benefit sunsets on December 31, 2038.

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- **287.223**

Creation and management language for the self-insured pool of employers for the mesothelioma benefit. The pool will be known as the Missouri Mesothelioma Risk Management Fund.

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# MISCELLANEOUS

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- **287.020.1**

A person performing work for board, lodging, aid, or sustenance for a religious, charitable, or relief organization is not an employee.

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- **287.140.4**

Provides for a statute of limitations for medical fee disputes: 2 years from the first notice of a dispute was received by the healthcare provider for services rendered before July 1, 2013 or 1 year from the first notice of a dispute was received by the healthcare provider for services rendered after July 1, 2013.

Notice can be provided by certified mail.

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- **287.280.1**

Technical changes with regard to insurance coverage for liability under the Act.

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- **287.610.1**

Deals with the Administrative Law Judge's Review Committee. The Director of the Division of Workers' Compensation is removed from Administrative Law Judge committee, which now becomes a 4-person committee. An Administrative Law Judge with 3 or more votes of no confidence under 2 successive audits may have his/her appointment withdrawn.

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- **287.995.6**

Deals with more insurance issues allowing an insurance company to establish its own risk modification information as opposed to simply relying on NCCI.

- **Section B**

The Act shall become effective  
January 1, 2014.

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# Legislative Update

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# **KANSAS Update**

SB 187

Effective April 25, 2013

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# AMA Guides

- For Scheduled injuries occurring on/after January 1, 2015, physicians must use the 6<sup>th</sup> Edition to determine the extent of functional impairment and permanent partial general disability.
  - Sec. 8(b)(23, 24), found at pp. 17-19 of the bill, amending KSA 2012 Supp. 44-510d and e.
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# AMA Guides

- (Physicians currently use the 4<sup>th</sup> Edition).
  - **Impairment Defined:** Loss or abnormality of psychological, physiological, or anatomical structure or function.
  - A physician determines it by selecting a number based upon a chart or schedule, which equals the impairment percentage.
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# AMA Guides

- **Disability Defined:** Alteration of the capacity to meet personal, social or occupational demands, because of the impairment.
  - It may be thought of as the gap between what the employee can do, and what they need or want to do.
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# AMA Guides, 4<sup>th</sup> Ed., Sect. 1.5

- “It must be emphasized and clearly understood that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities.”
  - Not mentioned in the 6<sup>th</sup>.
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# 6<sup>th</sup> Edition

- Methodology heavily criticized.
  - Hearing before Congressional Committees
  - John Burton, Professor Emeritus, Rutgers, co-chair of the National Commission on States' Workmens' Compensation Laws.
  - Emily Speiler, Dean, Northeastern University School of Law.
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# 6<sup>th</sup> Edition

- Opponents to SB 187 argued unsuccessfully that it will have a negative impact on Kansans with permanent disabilities, as the 6th reduces the numbers assigned arbitrarily without a scientific basis.
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# 6<sup>th</sup> Edition

- New approaches to rating impairment designed to increase standardization.
  - Decreases in impairment ratings cannot be attributed to greater validity or reliability.
  - Guides designed by a consensus process.
  - No independent testing was done.
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# 6<sup>th</sup> Edition

- 3 states rejected the 6th Edition, including New York, Kentucky, and Iowa. An Iowa Task Force was charged with making recommendations regarding incorporation of the 6th Edition, and concluded, “The six edition paradigm is not the future for Iowa.”
  - New York: Prof. Burton has challenged the 6th Edition as not being evidence-based. He also told the New York State Workers’ Compensation Board that the basis for the AMA Guides was “hokum.”
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# 6<sup>th</sup> Edition

- Proponents of the 6th Edition urge that the 6th, and earlier editions of the *Guide*, are intended only to aid physician assessment of impairment.
  - 44 states, 2 commonwealths, and FECA claims comprise 90+% of US jurisdictions using a form of the Guides.
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# Use of the Guides

- There is no uniform nationwide standard for using the AMA Guides. Some states have developed a state-specific rating schedule.
  - Not all states use the AMA Guides or mandate which edition be used. Of those that do, some commonly use the 3rd, 4th, 5th, or 6th Edition. Regionally, there is no consistency. Colorado uses the 3rd Edition; Nebraska and Missouri do not specify; and Oklahoma commonly uses the 5th Edition (as of 2012.)
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# Notice of Injury—KSA 44-520

- The time periods for notice of injury were reduced.
  - Notice of accident or injury is reduced from 30 calendar days to 20 calendar days from the date of accident or the date of injury by repetitive trauma. If the employee no longer works for the employer against whom benefits are being sought, the period for providing notice of injury is reduced from 20 days to 10 calendar days after the employee's last day of actual work for the employer. (Sec. 11 of the bill, page 21.)
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# Notice

- Critics argue reductions in notice work against both the injured worker and the employer and are inconsistent with the concept of the Workers Compensation Act in many ways.
  - The notice reductions were not part of the legislation that was introduced, but were raised by legislators when the committees worked the bills.
  - There was little opportunity to provide legislators with testimony about the reductions. Legislators stated that reducing the notice periods encouraged employees to report injuries so that they could be treated sooner and get better results. However, labor stated that it would result in increased claims and over-reporting.
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# **Selection of ALJs and Appeals Board Members**

- Sec. 1-6 consolidates the processes for selecting workers comp ALJs, Members of the Appeals Board, and the Employment Security Review Board members into one new Nominating Committee.
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# Judicial Selection

- Employee advocates argue it creates a nominating process for judges that will be perpetually weighted in favor of insurance companies and self-insurers.
  - The new Nominating Committee will be insulated from the political changes in the Department of Labor but it will never be divested of being more heavily weighted in favor of insurance and business interests, thus having the potential to adversely impact bias.
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# Judicial Selection

- Business organizations will hold the majority of positions on the Nominating Committee (4 or 5 of 7), appointed by the governor from nominees submitted by the following: the secretary of Labor, the Kansas Chamber, the NFIB, the Kansas AFL-CIO, the Kansas state council of the society for human resource management (KS SHRM), Kansas Self Insurers association, and a representative of either KPERS or the KNEA as selected by the Secretary of Labor.
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# Judicial Selection

- SB 187 establishes a gatekeeper system for workers compensation judges that is subject to criticism of being heavily weighted in favor of employer interests.
  - SB 187 undermines the independence and impartiality of workers compensation system judges and the fairness of workers compensation decisions.
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# Judicial Selection

- *SB 187 eliminates a system that has worked well since 1993*, when both the Kansas Chamber of Commerce & Industry and the Kansas AFL-CIO agreed upon legislation establishing the current nominating committee for workers compensation administrative law judges. Business and labor agreed that the system at that time was too political. The independence of the trier of fact needed to be protected for the benefit of all Kansas businesses and all Kansas employees.
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# Judicial Selection

- A 2/3 majority is required for approval for any action the committee takes, including selecting a chair or filling a vacancy.
- The "supermajority" requirement guarantees that a candidate favored by employee representatives will never advance.
- Deadlock within the committee will be more the rule than the exception because of the increased burden of the supermajority requirement.
- A 2/3 majority is also required to reject the renomination of an ALJ, which creates an incentive for ALJs to rule favorably towards interests holding the majority on the committee--employers.





# **KANSAS Update**

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