

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Susan Wagle at 8:30 a.m. on March 3, 2011, in Room 548-S of the Capitol.

All members were present.
Senator Emler – excused

Committee staff present:
Ms. Margaret Cianciarulo, Committee Assistant
Mr. Ken Wilke, Office of the Revisor of Statutes
Mr. Reed Holwegner, Kansas Legislative Research Department
Ms. Dorothy Noblitt, Kansas Legislative Research Department

Conferees appearing before the Committee:
Mr. Fred Greenbaum, Attorney, McAnany, Van Cleave & Phillips
Mr. John Ostrowski, Attorney, McCullough, Wareheim and LaBunker

Others attending:
See attached list.

Hearing on Substitute for HB2134 – an act concerning workers compensation

Upon calling the meeting to order, Chairperson Wagle announced we have some information on a bill that has come to our Committee from the House on worker compensation and since this is the first worker compensation bill we have seen in a number of years, and since a lot of negotiations took place before the session started, she wanted to have both business and labor explain some background information on the bill, their negotiations, and what was originally placed before the House and what changed. She went on to say Mr. Fred Greenbaum, Attorney, McAnany, Van Cleave & Phillips is here representing business and Mr. John Ostrowski, McCullough, Wareheim & LaBunker is representing labor.

Mr. Greenbaum offered the Committee proposed Kansas Legislative changes including:

1.) If the presumption is functional impairment, work disability is available only if certain thresholds are met:

A.) The wage loss is greater than 10%;

B.) Functional impairment is greater than 75% or equal to or greater than 10% of preexisting impairment.

He said, any wage or task, in order to be compensable, has to be work related.

2.) Two components have been redefined:

A.) “Task loss” equals lost ability of claimant to perform work tasks, performed in the last five years of employment. “Last five years” is a reduced look-back from 15 years.

B.) On page 3, Mr. Greenbaum defined “wage loss” as the difference between the Average Weekly Wage (AWW) employee earned before injury and AWW employee capable of earning after injury. Referring to page 6, he stated what now will be the standard prevailing factor, injury must arise out of and in the course of employment and the “prevailing factor equals the primary factor in relation to any other factor. Some of the exclusions to this include:

A.) Triggering/precipitating factors;

B.) Aggravations/accelerations/exacerbations;

C.) Natural aging process or normal activities of daily living;

D.) Neutral risks, including direct or indirect results of idiopathic causes;

CONTINUATION SHEET

The minutes of the Senate Commerce Committee at 8:15 a.m. on March 3, 2011, in Room 548-S of the Capitol.

3.) Page 9 refers to the Bilateral Extremity cases and

A.) Allows bilateral scheduled injuries in opposing extremities to be compensated as general bodily injuries;

B.) Combines and rates multiple injuries in a single extremity to the highest scheduled member actually impaired.

4.) Page 10 covers caps for death benefits, permanent total and partial. Functional impairment cap is \$75K. What was the death benefit cap before? (\$250K)

5.) He offered definitions on page 13, including wages and average weekly wage.

6.) The statute on page 14 changed, the strict 30-day notice requirement was 10-day, 30-days was the compromise. Also, the good cause extended to 75-days.

7.) Page 17 offers two changes, the first is to future medical and the second, presumption that future medical not needed if not used within two year period.

As they were running out of meeting time, the Chair said they will meet next Tuesday. A copy of the testimony is (Attachment 1) attached and incorporated into the Minutes as referenced.

She recognized Senator Longbine who would like to have a side by side comparison of the bill as passed by the House, the original compromise and what the current law is.

Adjournment

The meeting was adjourned. The time was 9:30 a.m.

The next meeting is scheduled for March 8, 2011.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: 3.3.11

NAME	REPRESENTING
George Shelton	Shelton Consulting
Dennis Phillips	KSCFF
Ed Redmon	KSCFF
Dady Sanchez	KS AFL-CIO
Nik Taghizadeh	wash bur ministry
Kathie Sparks	KDOL
Anne Hays	KDOL
Carol L. Cast	KDOL
Daniel Munroe	KDOL
Bernie Koch	KEFG
Michelle Butler	Cap. Strategics
Calvin + Denton	KS Assn for Justice
Natalie Bugis	KS SHRM
Ashley Sheppard	Lexia Chamber
Eric Sheppard	KS Chamber
Scott Heidner	KS Self Insurers Association
John Ostrowski	KS AFE - CIO
Tammy Lamm	KS Chamber

Harriet Brownlee

KDOL

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: Thursday, March 3, 2011

NAME	REPRESENTING
Liz Maisberger-Clark	KASB
David Shriver	KASB
Kevin McFarland	Ks. Homes & Services for the Aging
Joe Ewers	KAWSA
Kathleen Outlaw	KANA
Dustin Moyer	KHPA
Patrick Vogelbein	KCDAA
Mark Johnston	Natl Assoc Mutual Ins. NAMIC
John Donley	KS Lusk Ass'n
Ron Secker	KAF
Page Routhier	Hein Law Firm
Calvin Reid	Pyle
ERIC BENEDICT	INTERN TO WAGLE.
FRANK FORZAR	KCWS
Jane Carter	KOSE
Donna Vothues	Washburn University SONI
Susan Allen	legis
Ed Klumpp	KACP/KSA/KPDA

PROPOSED KANSAS LEGISLATIVE CHANGES

Revamping Workers'
Compensation 2011

Senate Commerce Committee
Date: March 3, 2011
Attachment 1

Proposed Legislative Changes Body as a Whole Injuries – 44- 510e

- Presumption is functional impairment
- Ⓢ Work disability available only if certain thresholds met:
 - ▣ Functional impairment $> 7.5\%$ or equal to or greater than 10% , if preexisting impairment
 - ▣ Wage loss $> 10\%$
- If thresholds met due solely to work injury, work disability is average of
 - ❖ Post-injury task loss caused by injury; and
 - ▣ Post-injury wage loss caused by injury.

Changes to 44-510e, Defining Task Loss

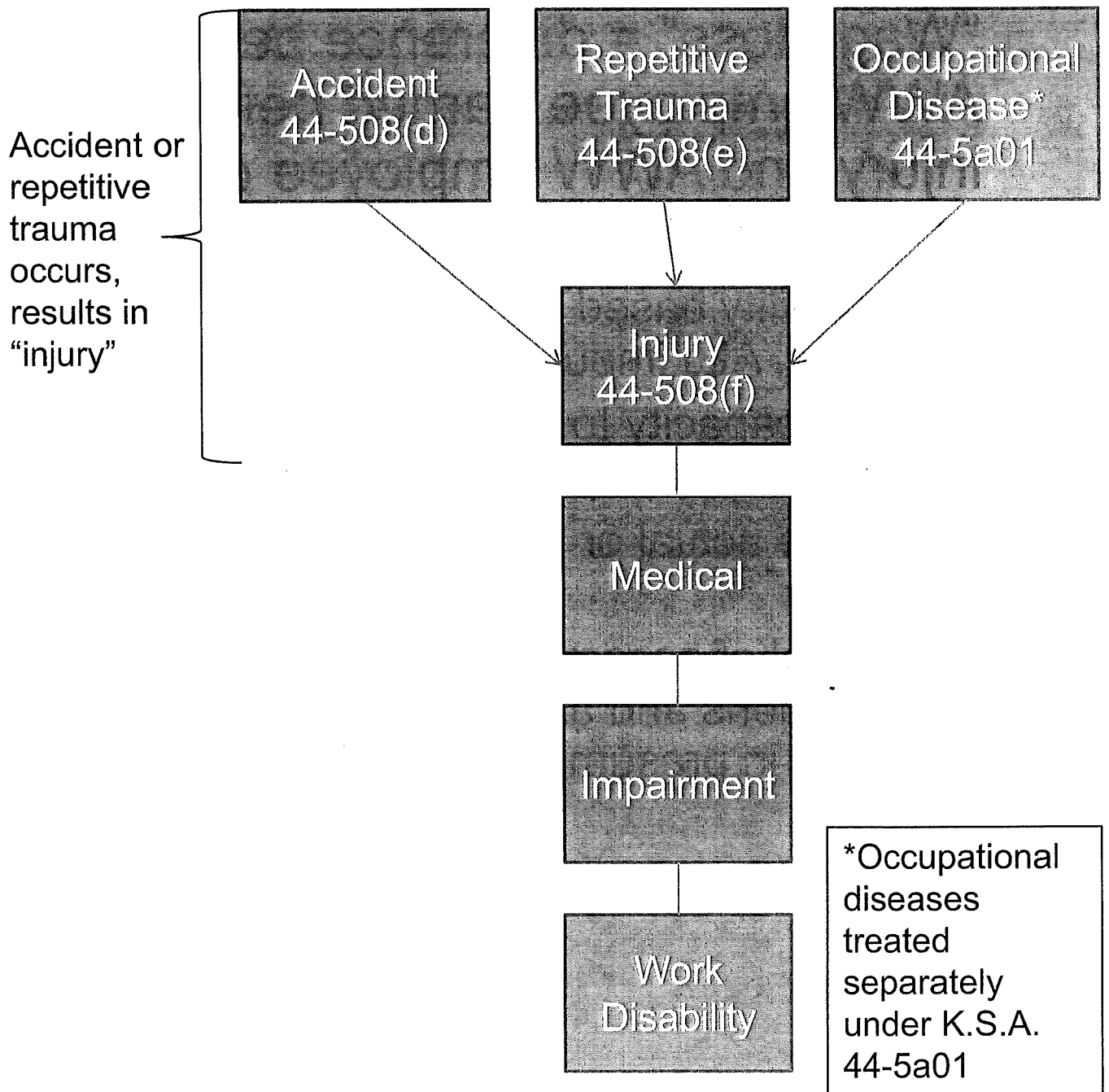
- “Task loss” = lost ability of claimant to perform work tasks performed in last 5 years of employment
 - ▣ Reduced look-back from 15 years to 5 years
 - ▣ Based on permanent restrictions issued by licensed physician
 - ▣ Tasks lost due to preexisting permanent restrictions not included in calculation

Changes to 44-510e, cont'd

Defining Wage Loss

- “Wage loss” = difference between AWW employee earned before injury and AWW employee *capable* of earning after injury
 - ▣ Capability based on consideration of all factors, ALJ imputes appropriate wage
 - ▣ Legal capacity to enter contract of employment required
 - ▣ Include actual or projected weekly value of fringes
 - ▣ Refusal of accommodated work within restrictions and at comparable wage results in presumption of no wage loss

Overview: Accident, Repetitive Trauma, Injury



Proposed Legislative Changes

K.S.A. 44-508

- “Accident” –
 - ▣ Occurs during a single work shift
 - ▣ Produces objective symptoms of injury
- “Repetitive Trauma” –
 - ▣ Occurs by repetitive use, microtraumas
 - ▣ Repetitive nature demonstrated by diagnostic or clinical tests
 - ▣ Date of injury – earliest of triggering events but not later than last day worked
- Accident/repetitive trauma must be prevailing factor in causing injury

Changes to 44-508, cont'd

- “Injury” – must arise out of and in the course of employment
 - ▣ Arises out of **only** if:
 - Repetitive Trauma:
 - Employment peculiarly exposed worker to increased risk which worker would not have been otherwise exposed;
 - Increased risk is prevailing factor in causing repetitive trauma;
 - Repetitive trauma is prevailing factor in medical condition and resulting disability or impairment.
 - Injury by Accident:
 - Causal connection between work and accident;
 - Accident is prevailing factor in injury, medical condition and resulting disability/impairment.
 - ▣ “Prevailing factor” = primary factor in relation to any other factor

Changes to 44-508, cont'd

☒ Exclusions:

- ☒ Triggering/precipitating factors;
- ☒ Aggravations/accelerations/exacerbations;
- ☐ Preexisting condition rendered symptomatic;
- ☒ Natural aging process or normal activities of daily living;
- ☒ Neutral risks, including direct or indirect results of idiopathic causes;
- ☐ Personal risks.

Changes to 44-508, cont'd

- “Functional Impairment” –
 - ▣ Move definition from work disability statute
 - ▣ Continue using 4th Edition of AMA Guides
- “Authorized treating physician” –
 - ▣ Currently undefined
 - Licensed physician/other medical provider;
 - Authorized by employer/insurance carrier or appointed pursuant to court-order.

Proposed Legislative Changes Scheduled Injuries

- K.S.A. 44-510d
 - ✦ Allow payment of TPD for scheduled injuries
 - Include loss of and loss of use of scheduled members
 - Combine and rate multiple injuries in single extremity to highest scheduled member actually impaired
 - ✦ Allow bilateral scheduled injuries in opposing extremities to be compensated as general bodily injuries
 - ✦ Loss of or loss of use of both eyes treated as general bodily injury
 - Include instructions for calculation of PPD award

Proposed Legislative Changes

K.S.A. 44-510f

- Caps:
 - Death benefit cap – \$300,000
 - Includes \$1,000 for appointment of conservator, if required
 - Permanent total cap – \$155,000
 - Permanent partial cap – \$130,000
 - Functional impairment cap – \$75,000
 - Cap applies even if TTD/TPD paid
- Voluntary payment of unearned wages:
 - Allowed as credit in any final settlement;
or
 - Withhold from employee's wages.

Proposed Legislative Changes Permanent Total Disability



- K.S.A. 44-510c(a)(2)
 - ▣ Require expert evidence
 - ▣ Can only be PTD once in lifetime

Proposed Legislative Changes

Temporary Total Disability

- K.S.A. 44-510c(b)(2)
 - ▣ Opinion of authorized treating physician presumed determinative as to work status
 - ❖ Employee entitled to TTD if employer cannot accommodate temporary restrictions of authorized treating physician
 - ▣ No TTD if employee is terminated for cause or voluntarily resigns and employer could have accommodated
 - ▣ No TTD for weeks during which employee receives unemployment benefits

Proposed Legislative Changes

K.S.A. 44-511

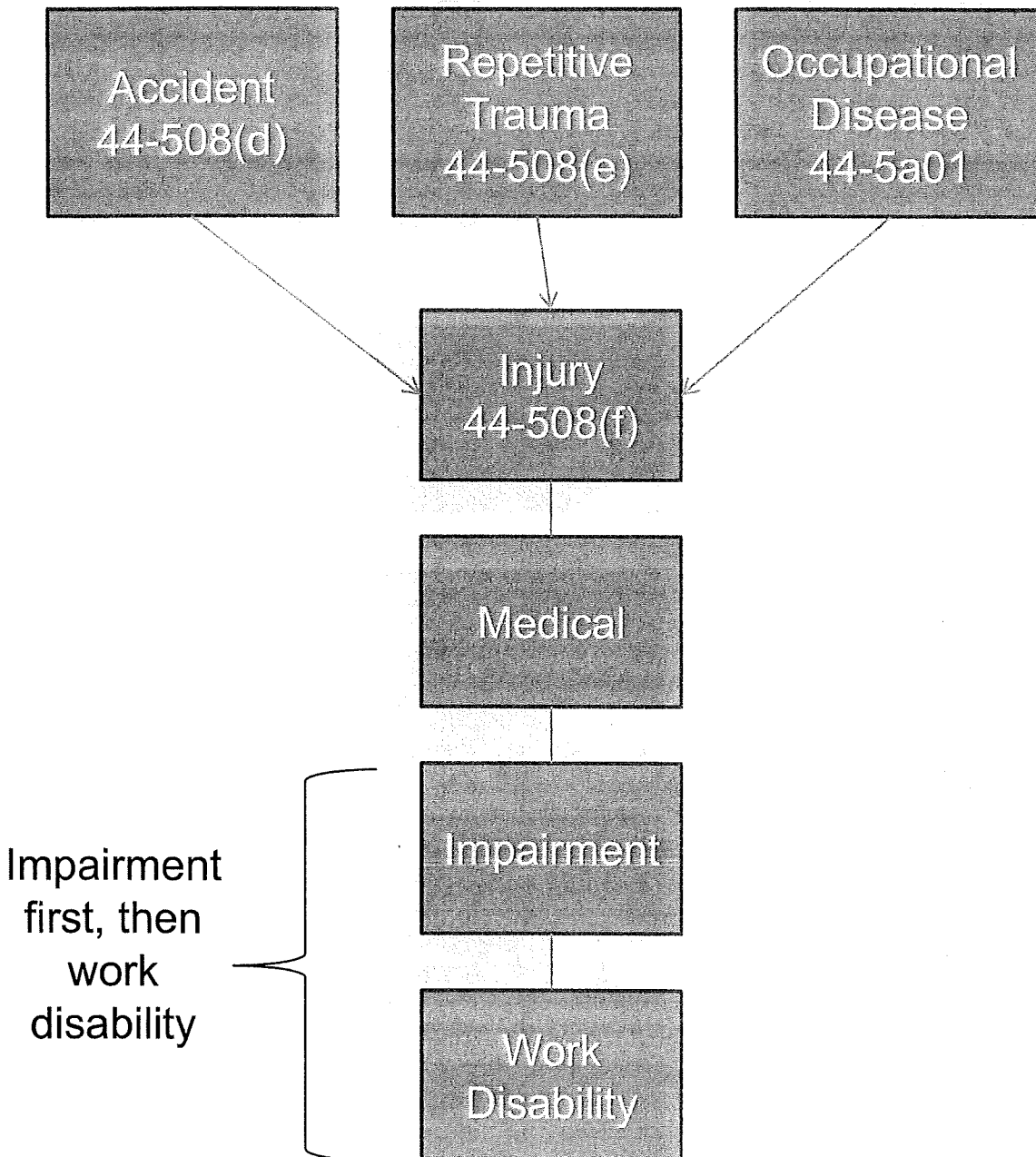
- “Wages” = Money + Additional Compensation
 - “Money”
 - Include bonuses and gratuities
 - “Additional Compensation”
 - Board/lodging and employer-paid fringes only;
 - Include only if discontinued
- Average Weekly Wage:
 - Calculate using add and divide method
 - Use up to 26 weeks preceding injury, if worked

Proposed Legislative Changes

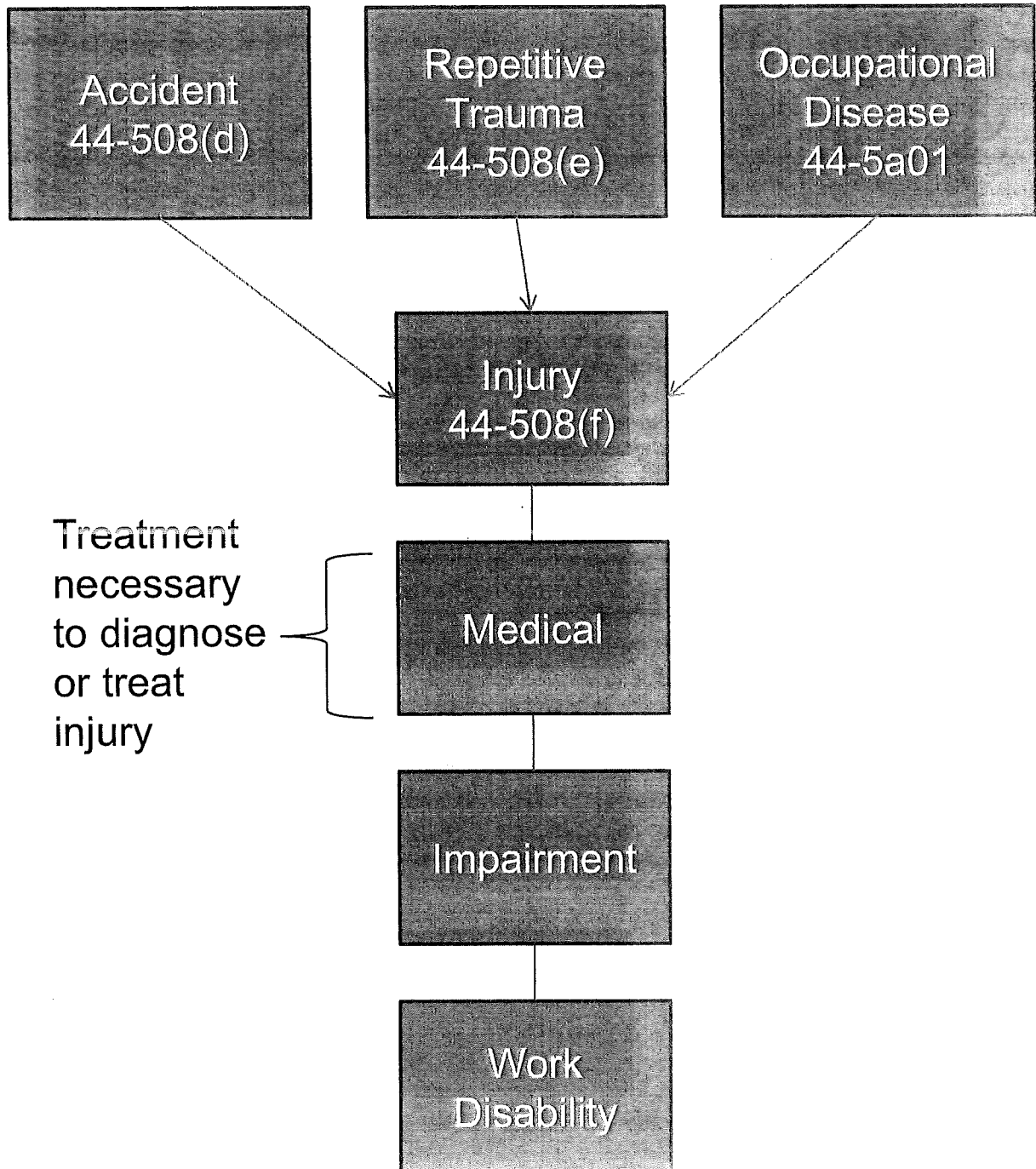
K.S.A. 44-520

- Strict 30-day notice requirement, weekends included
 - ▣ Oral notice →
 - If employer has designated department/individual and communicated such to employee in writing, notice to other individual/department insufficient;
 - If no designation, notice must be given to supervisor or manager.
 - ▣ Written notice →
 - Sent via certified mail to principal location of employment
- Notice must include particulars of injury and it must be apparent employee is claiming benefits or suffered a work-related injury
- Written claim requirement abolished

Overview: Impairment and Work Disability



Overview: Medical Treatment



Proposed Legislative Changes

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

K.S.A. 44-510h

- ☐ Reduce choice of providers from 3 to 2
- ☐ No medical after MMI unless proven necessary
- ☐ "Medical treatment" does not include home exercise program or OTC medications

K.S.A. 44-510k

- ☐ Add power of ALJ to modify/terminate award of future medical
- ☐ Include prevailing factor language
- ☐ Give employer and carrier right to make application 2 years from date of award
- ☐ Presumption that future medical not needed if not used within 2 year period

Proposed Legislative Changes

K.S.A. 44-515

- Suspend benefits for refusal to submit to exam at employer's request
- Eliminate obligation to provide report within 15 days
 - ▣ All parties to submit written request;
 - ▣ Provide report within reasonable time after evaluation.

Proposed Legislative Changes

K.S.A. 44-510k - 44-525

- ❑ Medical not automatically left open if claim proceeds to award
- ❑ Claimant must prove need for future medical
- ❑ Definition of medical treatment same as in 44-510h
- ❑ Future medical may be terminated if not used for two years

Proposed Legislative Changes

K.S.A. 44-523

- Modified mechanism for dismissing dormant claims
 - ▣ Failure to proceed to any hearing or award within three years from date of Application for Hearing and no good cause shown
 - ▣ Dismissal with prejudice
- Addition of mechanism for dismissing claims denied at preliminary hearing
 - ▣ Failure to proceed to regular hearing within one year and without good faith reason
 - ▣ Dismissal with prejudice
- Dismissal considered final disposition for purposes of employer reimbursement from Fund

Other Procedural Changes

□ K.S.A. 44-516:

- Provides for appointment of neutral in disputes over functional impairment
- Default to physician agreed upon by parties
- If parties cannot agree, ALJ chooses neutral examiner

□ K.S.A. 44-531:

- Removed 9 month prohibition on settlement for BAW injuries
- Allow lump sum to be prorated over claimant's life expectancy

□ K.S.A. 44-536:

- No post-award attorney fees if unsuccessful and frivolous prosecution

Changes to 44-501

- Reduction for Preexisting –
 - ▣ Basis of prior award in Kansas establishes percentage of preexisting impairment
 - ▣ If no prior award in Kansas, preexisting impairment established by competent evidence
 - ▣ If preexisting impairment due to injury sustained for same employer – dollar-for-dollar credit
 - ▣ In all other cases, credit for percentage of preexisting impairment
- Retirement Offset –
 - ▣ Addressed amortization of lump sum distribution

Proposed Legislative Changes

K.S.A. 44-501

- Impairment Defense –
 - ▣ Removed evidentiary roadblocks to admission of test results
 - ❖ Added safeguards for employer-controlled testing
 - ▣ Added rebuttable presumption that impairment contributed to accident
 - ▣ Refusal to submit to chemical test results in forfeiture of benefits if cause to suspect use of alcohol/drugs OR testing authorized per employer policy

Proposed Legislative Changes

K.S.A. 44-500

- Proposed new section
- Moved language from 44-501
 - ▣ Clarifies construction of Act
 - ▣ Includes reference to injuries by accident or repetitive trauma
 - ▣ Retains exclusive remedy provision

Procedural Changes:

- K.S.A. 44-510f
- K.S.A. 44-511
- K.S.A. 44-516
- K.S.A. 44-520
- K.S.A. 44-523
- K.S.A. 44-531
- K.S.A. 44-536