KANSAS WORKERS' COMPENSATION

Applies to injuries occurring on or after May 15, 2011.

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 April 25, 2013:
1. Notice must be given by the <u>earliest</u> 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.

C. For accidents between May 15, 2011, and April 25, 2013:
1. Notice must be given by the <u>earliest</u> 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.

D. 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, his claim will not be barred if his 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.

E. 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."
2. "Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment." The burden is on the employee to prove that such notice was actually received by the employer.

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

G. 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. Failure to file within 28 days extends the statute of limitations from 200-days to one year from the date the period begins to run.

3. 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 $500 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 health care provider within two years from the date of the award or the date the claimant last received medical treatment from an authorized health care provider, there is a rebuttable presumption no further medical care is needed.

C. K.S.A. 44-515

1. All benefits suspended if employee refuses to submit to exam at 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).

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. No longer a difference between full-time and part-time employees.

B. Wages = Money + Additional compensation

1. Money: gross remuneration, including bonuses and gratuities.
2. Additional Compensation: only considered if and when discontinued
    i. Board and lodging if furnished by the employer
    ii. Employer paid life insurance, disability insurance, health and accident insurance
    iii. 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, a 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. Hearing can be set seven days later. If claim denied at preliminary hearing, failure to proceed to regular hearing within one year and without good faith reason results in dismissal with prejudice.

E. 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.

4. Witnesses may be necessary.
5. Opportunity for decision on ultimate compensability issues.

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

G. 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"

H. 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.

I. 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. Employer files application for dismissal
    c. Claimant cannot show good cause for delay
2. Dismissal considered final disposition for fund reimbursement

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

A. Must occur before a Regular Hearing can take place.

B. Generally 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. 44-510e

A. <u>Maximum Awards</u>
1. Functional Impairment Only - $75,000
    a. Cap now applies even if temporary total or temporary partial disability benefits were paid.

b. $75,000 cap does not include temporary total or temporary partial disability benefits paid.

2. Permanent Partial Disability - $130,000
    a. Cap includes temporary total or temporary partial disability benefits paid
3. Permanent Total Disability - $155,000
    a. Cap includes temporary total or temporary partial disability benefits paid
4. Death benefits - $300,000
    a. Includes $1,000 for appointment of conservator, if required.

B. Reduction for Pre-existing Impairments

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
        i. **(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
        i. **(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
        i. **(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**
        ii. 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. Permanent Total Disability

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
3. Can only be permanently and totally disabled once in a lifetime.

F. Death Cases – K.S.A. 44-510b

1. Cap - $300,000 total
    a. Can exceed as children receive benefits above cap to age 18.
2. 50% to surviving spouse – 50% to surviving children.
3. $40,000 lump sum paid at outset.
4. Conservatorship required for minor children.
5. Children can extend benefit receipt to age 23 if they remain in accredited school. Can exceed the $300,000.00 cap only to age 18.

XII. REGULAR HEARING – FULL TRIAL

A. Hearing

1. Claimant generally testifies.
2. 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.
3. 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. Future medical treatment only awarded if the claimant proves it is more probable than not that future medical treatment will be required as a result of the work-related injury.
c. 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 can 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.

XIII. SETTLEMENTS – K.S.A. 44-531

A. Can obtain full and final settlement if claimant agrees.
1. Would close all issues.

B. 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.

C. 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 his/her accident(s).
    c. Judge asks claimant if he/she is 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 he/she could hire an attorney.

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

B. Medicare Issues

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

XVI. RECENT LEGISLATIVE CHANGES

A. Senate Bill 187 was signed into law by Governor Sam Brownback on April 16, 2013, and published in the Kansas Register on April 25, 2013 (available at http://www.kssos.org/pubs/register%5C2013%5CVol_32_No_17_April_25_2013_p_381-444.pdf).

B. Notice

1. Reduces time for the injured worker to give notice of repetitive trauma or accident.

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.

C. Selection of Administrative Law Judges and Board Members

1. A seven member committee meets to determine if an ALJ or Board member should be retained and makes nominations to the Secretary of Labor for any vacancies.
2. Each of the following entities will have a representative on the committee:
    a. Kansas Secretary of Labor;
    b. Kansas Chamber of Commerce;
    c. the National Federation of Independent Business;
    d. Kansas AFL-CIO;
    e. Kansas State Council of the Society for Human Resource Management;
    f. the Kansas Self-Insurers Association; and
    g. A selected nominee by the Secretary of Labor from an employee organization or professional employee's organization.

D. Recusal of Administrative Law Judges

1. If the judge declines a recusal request, an appeal is made to the Workers' Compensation Appeals Board.
2. If the requesting party is not satisfied with the Board's decision, the aggrieved party may appeal to the Court of Appeals.

E. American Medical Association Guides to the Evaluation of Permanent Impairment

1. The AMA Guides 6th Edition will apply to injuries occurring on or after **January 1, 2015**.

Q. Whether providing an inadequate urine sample constitutes "refusal" to submit to a chemical test pursuant to K.S.A. 44-501(b)(1)(E)?

A. No. Pursuant to K.S.A. 544-501(b)(1)(e), a claimant forfeits workers' compensation benefits if the employer had sufficient cause to suspect the use of alcohol and drugs and the claimant refuses to submit to a post-injury chemical test. In *Byers v. Acme Foundry,* the claimant offered to provide a urine sample at the hospital following his work related injury. However, the employer advised the hospital that it would administer the urine test itself with their on-site nurse. When the claimant returned to the employer, he provided the nurse a urine sample. The nurse threw out the sample without testing it citing that it was inadequate. The employer later asked the claimant for another urine sample for which the claimant refused.

Both the ALJ and Board denied benefits citing the claimant's actions constituted a refusal under the statute. However, the Court of Appeals reversed the lower courts' findings. The Court of Appeals held that there was no evidence that the claimant was under the influence when he was injured. Additionally, "refusal" requires an element of intent to thwart the employer's drug testing policy. The Court of Appeals found no such intent and held that it was in error for the ALJ and the Appeals Board to define "refusal" to include "giving an inadequate sample."

Byers v. Acme Foundry, 53 Kan. App. 2d 485, 487, 388 P.3d 621, 623 (2017)

Q. Whether a claimant is considered an "employee" under the Kansas Workers' Compensation Act when she uses a false name and false identification documents to apply for employment and was not legally authorized to work in the United States when hired?

A. Yes. In *Mera-Hernandez v. U.S.D. 233,* the employer challenged an award of benefits arguing that it had been fraudulently induced into hiring the claimant. As such, the contract of employment was void *ab initio* as no employment relationship ever existed. It was undisputed that the claimant was not legally authorized to work in the United States. Additionally, there was a factual finding in the lower court that the employer was not aware of the claimant's true identity prior to the work accident. The Court noted that the 2011 amendments to K.S.A. 44-510e(a)(2)(E)(i) bar a claimant from receiving an award of post-injury wage loss if she lacks the legal capacity to enter into a legal employment contract. However, the definition of "employee" was not altered to include limiting language in the 2011 changes. The Supreme Court ultimately rejected the employer's argument and held that the Act does not incorporate any void *ab initio* exception to the definition of an employee.

Mera-Hernandez v. U.S.D. 233, 305 Kan. 1182, 1183, 390 P.3d 875, 876 (2017)

Q. Whether a letter written by a treating physician prior to a settlement hearing is competent medical evidence to overcome the presumption that no future medical care is needed pursuant to K.S.A. 44-510k(a)(3)?

A. No. In *Clayton v. University of Kansas Hospital Authority*, the employer requested termination of future medical benefits based upon the fact that the claimant did not receive medical treatment for the work related injury within two years of the date of the settlement hearing. In order to overcome the presumption that no further medical care necessary, Claimant presented a letter from her treating physician which stated:

> "I believe [Clayton] *will likely need future medical treatment* that is directly related to this slip and fall injury given her high-grade articular chondral lesion over the latera femoral condyle. Future medical treatment *may necessitate* steroidal injection, viscosupplementation injection, and/or surgical intervention utilizing arthroscopy with debridement, chrondroplasty, microfracture procedure."

This letter was written before the settlement hearing, was not sworn under oath, and was based upon a physical examination conducted five years prior to the Award. The Court noted that at the time of the settlement hearing, the physician felt the claimant would require future medical treatment. However, there was no evidence as to the doctor's current opinion regarding the claimant's future medical needs. The Court of Appeals felt that this letter did not constitute competent medical evidence to overcome the statutory presumption under K.S.A. 44-510k(a)(3). The case was remanded for a new evidentiary hearing.

Clayton v. Univ. of Kansas Hosp. Auth., 53 Kan. App. 2d 376, 376, 388 P.3d 187, 190 (2017)

Q. Is a claimant entitled to work disability benefits when he was terminated after being written up and counseled on three separate occasions?

A. Probably not. Pursuant to K.S.A. 44-510e(a)(2)(E)(i), an employee cannot receive work disability if he has been terminated for cause. In *Dirshe v. Cargill Meat Solutions Corp.,* the claimant was terminated after he had been written up and counseled three times for things that were sufficient in and of themselves to justify termination. In evaluating whether the claimant was terminated for cause, the Court looked to several factors including whether the claimant made a good-faith effort to maintain employment and whether the employer exercised good faith in the termination. The Court of Appeals ultimately held that the claimant's termination was reasonable given all the circumstances. As such, Claimant's award was limited to his functional impairment.

Dirshe v. Cargill Meat Solutions Corp., 53 Kan. App. 2d 118, 382 P.3d 484 (October 28, 2016)

Q. Whether dismissal of a claim for lack of prosecution is mandatory when the claimant fails to file a motion for extension within three years from the filing of an application for hearing?

A. Yes. Pursuant to K.S.A. 44-523(f)(1), an employer can file an application for dismissal for lack of prosecution if the claim has not proceeded to a regular hearing, a settlement hearing, or an agreed award within three years from the date of filing an application for hearing. The ALJ may grant an extension for good cause shown provided that the extension is requested prior to the three year limitation.

In *Glaze v. J.K. Williams*, it was undisputed that the claimant was not yet at MMI. However, the claimant failed to file a motion for extension prior to the three year limitation. The ALJ dismissed the case for lack of prosecution. The Appeals Board and Court of Appeals affirmed. The Court of Appeals rejected claimant's procedural due process challenge and held that at a minimum, claimant must have filed a motion to extend prior to expiration of the three year limitation.

Similarly, in *Garmany v. Casey's Gen. Store*, the claimant failed to request an extension within the 3 year period. The Employer's motion to dismiss pursuant to K.S.A. 44-523(f)(1) was granted. Again, there was no dispute the claimant was not yet at MMI. However, the Court of Appeals upheld the dismissal for lack of prosecution.

Glaze v. J.K. Williams, LLC, 53 Kan. App. 2d 712, 713, 390 P.3d 116, 117–18 (2017)
Garmany v. Casey's Gen. Store, 390 P.3d 123 (Kan. Ct. App. 2017)

Q. Whether the three year time limitation set forth in K.S.A. 44-523(f)(1) applies retroactively to injuries occurring prior to the 2011 amendments?

A. Yes. Prior to 2011, an employer could request dismissal for lack of prosecution if the claim did not proceed to regular hearing, a settlement hearing, or an agreed award within five years from the date of filing an application for hearing. The 2011 amendments shorted the time limitation to 3 years. In *Knoll v. Olathe School District No. 233*, the claimant sustained injury on October 29, 2009. Claimant filed an application for hearing on November 14, 2011. The employer requested dismissal for lack of prosecution on February 19, 2015. On March 4, 2015, claimant requested an extension of time pursuant to K.S.A. 44-523(f)(1). Employer argued that the request for extension was not timely as it was not filed within three years of the filing of the application for hearing.

The Court of Appeals agreed with the employer holding that the statute applied retroactively and the three year limitation was applicable to the claimant's case. As such, the claimant failed to request an extension within three years from the filing of the application for hearing. The Court remanded the matter to the Appeals Board with directions to dismiss the claim.

Knoll v. Olathe School District No. 233

Q. *Whether a claimant satisfies his burden of proof for entitlement to future medical benefits with medical evidence discussing the "possibility" of future medical treatment?*

A. No. Pursuant to K.S.A. 44-525(a), an employee is entitled to an award of future medical benefits if the employee proves "it is more probably true than not that additional medical treatment will be necessary." In *Woods v. Farmers Ins. Grp.*, the court ordered independent medical examiner felt that the claimant did not require any additional active medical care. However, he felt there was the "possibility" of future medical treatment if the claimant's symptoms increased. The ALJ and Appeals Board denied the claimant's request for future medical treatment. The Court of Appeals affirmed the lower court's findings. The mere possibility of future medical treatment is insufficient to allow an award of future medical treatment.

Woods v. Farmers Ins. Grp., Inc., 393 P.3d 633 (Kan. Ct. App. 2017)

Q. *Whether the presumption set forth in K.S.A. 44-510h(e) can be overcome through contingent medical evidence?*

A. Yes. In *Newell v. Schwan's Glob. Supply Chain, Inc*, the claimant underwent a De Quervain's release. After the claimant's release at maximum medical improvement, Claimant's treating physician testified that the claimant could require additional treatment if her symptoms worsened. At the Regular Hearing, Claimant testified that her symptoms had in fact worsened. The Court of Appeals noted that the treating physician's future medical recommendations were conditioned upon a worsening of symptoms. The Court felt that the claimant's Regular Hearing testimony that her symptoms worsened acted as fulfillment of the contingency. As such, Claimant's right to future medical treatment was left open.

Newell v. Schwan's Glob. Supply Chain, Inc., No. 114,455, 2016 WL 4499569 (Kan. Ct. App. Aug. 26, 2016)

Q. *Whether the term "idiopathic" as used in K.S.A. 44-508(f)(3)(A)(iv) is defined as "personal or innate to the claimant"?*

A. Yes. Accidents or injuries arising directly or indirectly from an idiopathic cause are excluded from coverage pursuant to the 2011 amendments. The Kansas Workers' Compensation Act does not specifically define "idiopathic." However, in *Graber v. Dillon Companies*, the Appeals Board defined "idiopathic" as "of unknown cause." The Court of Appeals disagreed with the Appeals Board's interpretation and defined "idiopathic" as "personal or innate to the claimant."

Graber v. Dillon Companies, 52 Kan. App. 2d 786, 787, 377 P.3d 1183, 1184 (2016)

Q. *Whether the secondary injury rule survived the 2011 statutory amendments to the Workers' Compensation Act?*

A. Yes. Kansas case law created the secondary injury rule which allows injured employees to recover for any secondary injuries that are the natural and probable consequence of the primary injury. In *Buchanan v. JM Staffing, LLC*, the Court of Appeals held that the 2011 amendments did not alter the secondary injury rule. As such, the secondary injury rule survived the 2011 amendments. The Court reasoned that there is nothing in the prevailing factor test which is incompatible with the secondary-injury rule. Therefore, secondary injuries must be both a natural and probable consequence of the primary injury and caused primarily by the work accident.

Buchanan v. JM Staffing, LLC, No. 114,502, 2016 WL 4492590 (Kan. Ct. App. Aug. 26, 2016)

Q. *Whether substantial competent evidence exists when a court ordered neutral examiner determines a secondary injury is not the prevailing factor in causing injury when the examiner did not specifically evaluate the body parts in question?*

A. Probably not. In *Buchanan v. JM Staffing, LLC*, the claimant sustained a compensable ankle injury. She subsequently developed a limp and alleged ongoing hip and back pain as a result of her altered gait. The Court ordered neutral examiner determined that the primary injury was not the prevailing factor in causing the claimant's hip and back complaints. However, he did not examine the claimant's hip or back nor did he provide an opinion on the cause of the hip and back pain other than aging and wear and tear.

The ALJ and Board both denied benefits for the hip and back relying on the court ordered neutral examiner's opinion. On appeal, the Court of Appeals reversed finding a compensable injury to the back and hip. The Court discounted the court ordered neutral examiner's opinion as he did not examine the back or hip. Furthermore, the Court felt that the neutral examiner's opinion that the claimant's hip and back pain was the result of aging and wear and tear was based on mere speculation.

Buchanan v. JM Staffing, LLC, No. 114,502, 2016 WL 4492590 (Kan. Ct. App. Aug. 26, 2016)

Q. *Whether the Kansas Judicial Review Act (KJRA) applies to a claim for retaliatory discharge against an administrative agency?*

A. No. The KJRA does not apply to a claim for retaliatory discharge against an administrative agency. In *Platt v. Kansas State Univ.*, the claimant filed an action in district court alleging she was terminated in retaliation for her potential workers' compensation claims. The University sought to dismiss her claim arguing that her retaliatory discharge claim was governed by KJRA and that the claimant failed to exhaust her administrative remedies.

The Court of Appeals held that jurisdiction was proper in district court. The Court reasoned that claimant was not seeking reinstatement of her job or review of an administrative procedure. Rather, she sought monetary compensation for retaliatory discharge.

Platt v. Kansas State Univ., No. 110,179, 2016 WL 4927241 (Kan. Sept. 16, 2016)

Q. ***In determining whether a claimant qualifies for a work disability award, is the claimant required to show that their functional impairment exceeds 10% <u>solely</u> based on the work injury?***

A. No. In *Stark v. Atwood Good Samaritan Center*, the claimant underwent a cervical fusion for a non-work related condition. Claimant sustained a work related injury several months after her cervical fusion. The Court determined Claimant sustained 5% impairment as a result of the work injury and 25% preexisting impairment for a total of 30% impairment to the body as a whole. The Appeals Board denied work disability citing that the claimant must show that her impairment exceeded 10% solely on the work injury.

The Court of Appeals found that the Appeals Board erred in its interpretation of K.S.A. 44-510e(a)(2)(C)(i). The Court stated that the plain language of K.S.A. 44-510e(a)(2)(C)(i) states that "overall functional impairment" must be equal to or exceed 10%. Thus, the claimant reached the 10% functional impairment threshold required for a work disability award.

Stark v. Atwood Good Samaritan Ctr., 376 P.3d 98 (Kan. Ct. App. 2016)

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