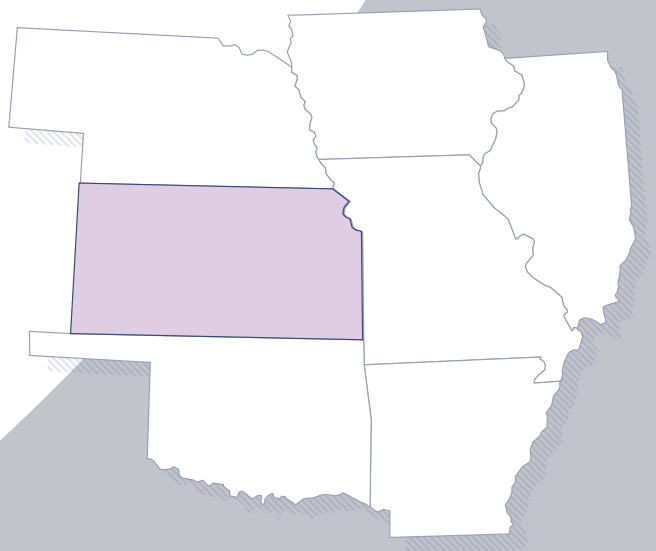
Workers Compensation Reference Guide

Kansas



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. Burial Expenses:
    a. Employer shall pay the reasonable expense of burial not exceeding $10,000.00 (increase from previous maximum of $5,000.00).
2. Initial Lump sum payment of $60,000.00 to surviving legal spouse or a wholly dependent child or children or both (increase from previous amount of $40,000.00).
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 through the age of 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. $300,000.00 - For surviving spouse and wholly dependent children

i. Can exceed as children receive benefits above cap to age 18.

b. $100,000.00 – If no surviving spouse or wholly dependent children (all other dependents)

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 (effective July 1, 2018)

A. K.S.A. 44-510b - Death Benefits:
1. Maximum burial expenses increased from $5,000.00 to $10,000.00.
2. Initial lump sum payment increased from $40,000.00 to $60,000.00.
3. 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.
4. If the employee leaves no legal spouse or dependent children but leaves other dependents wholly dependent upon the employee's earnings, maximum amount payable to such dependents is $100,000.00 (increase from $18,500.00).
5. 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. (Increase from $18,500.00).
6. 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. (Increase from $25,000.00).
    a. 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.

RECENTLY ASKED QUESTIONS IN KANSAS
FROM ISSUES ADDRESSED IN RECENT KANSAS CASES

Q. May preliminary orders be appealed from the Kansas Workers Compensation Appeals Board to the Kansas Court of Appeals?

A. No. K.S.A. 2018 Supp. 44-556(a) provides for the appeal of final orders of the Board to the Court of Appeals, not preliminary orders. K.S.A. 2018 Supp. 44-534(a) states that preliminary hearings are "summary in nature" which provide an opportunity for a "full presentation of the facts" at the "full hearing on the claim." K.S.A. 2018 Supp. 44-534a(a)(1) and (2).

In this case, employer appealed an ALJ's order directing claimant be treated by Dr. Eva Henry. Employer claimed that the administrative law judge had denied employer due process by ordering that Dr. Henry provide the treatment without first allowing the employer to submit two names of treatment providers for the judge to choose from under K.S.A. 2018 Supp. 44-510(h).

Employer argues that the Court of Appeals has jurisdiction because the administrative law judge denied it due process by failing to follow a statutory directive (that the employer be allowed to submit the names of two health-care providers for consideration if the administrative law judge decides a change in treatment provider is called for). This is distinguishable from previously decided cases concerning a preliminary order for continued medical treatment after the award of benefits had already been made. *Naff v. Davol, Inc.,* 28 Kan. App. 2d 726, 20 P.3d 738 (2001). Naff was a post award decision wherein a decision on the merits had already been decided after a full presentation of the facts. Naff is distinguishable as the case at point has not been decided in a final hearing.

There's a limited right of review for key issues that are jurisdictional to the workers'-compensation proceeding itself, like whether the injury arose out of the employment and whether the employee suffered an accident. But preliminary orders on those issues are subject to review by the board not a court. K.S.A. 2018 Supp. 44-534a(a)(2). The statute specifically precludes judicial review of preliminary orders even on these key issues. Preliminary orders are still subject to a full hearing on the claim and are not binding in resolving the underlying issues. Employer still has a chance to contest the decision made by the ALJ. Furthermore, if Employer makes payments it should not have made but for the ALJ's preliminary orders, the Employer shall seek compensation from the Fund.

Blakeslee v. Mansel Constr., 440 P.3d 627 (Kan. Ct. App. 2019).

Q. Is a claimant required to request an extension within three years of filing an application of hearing to avoid dismissal?

A. Yes. K.S.A. 2011 Supp. 44-523(f)(1) states that if a claim has not proceeded to a regular hearing, settlement hearing or a final award within three years from the filing of an

application for hearing, an ALJ may grant a dismissal unless claimant has moved for an extension within the three years.

In this case claimant filed an application for hearing on December 5, 2012. Employer filed an application for dismissal on January 4, 2016 stating claimant had failed to move the claim toward regular hearing or settlement within three years pursuant to K.S.A. 2011 Supp. 44-523(f) . Claimant filed a request for extension of time to schedule depositions and a regular hearing after the application for dismissal was filed. The ALJ dismissed the claim stating K.S.A. 2011 Supp. 44-523(f)(1) required the dismissal because claimant had not moved for an extension within three years of filing his application for hearing.

Glaze petitioned for the court's review of the following issues: (1) whether the panel erred in interpreting K.S.A. 2011 Supp. 44-523(f)(1) and dismissing his claim; (2) whether the panel erred when it held that K.S.A. 2011 Supp. 44-523(f)(1) requires dismissal of a claim when a motion to extend is not filed within three years of filing an application for hearing; and (3) whether the panel's interpretation of K.S.A. 2011 Supp. 44-523(f)(1) deprived him of due process under section 18 of the Bill of Rights of the Kansas Constitution. Review was granted on the first two issues.

The Board has consistently interpreted K.S.A. 2011 Supp. 44-523(f)(1) to mean that when a claim has not proceeded to a regular hearing, settlement hearing or a final award within three years from the filing of an application for hearing, an ALJ may grant an extension only if the claimant moved for an extension within the three years. See *Hackler v. Peninsula Gaming Partners, LLC*, No. 1060758, 2016 WL 858312 (Kan. Work. Comp. App. Bd. February 25, 2016); *Hoffman v. Dental Central*, No. 1058645, 2015 WL 4071473 (Kan. Work. Comp. App. Bd. June 26, 2015); *Ramstad v. U.S.D*. 229, No. 1059881, 2015 WL 5462026 (Kan. Work. Comp. App. Bd. August 31, 2015). The ALJ and the Board interpreted it in the same way here. The Court agrees that K.S.A. 2011 Supp. 44-523(f)(1) unambiguously prohibits an ALJ from granting an extension unless a motion for extension has been filed within three years of filing the application for hearing. Any other interpretation strains the common reading of the statute's ordinary language. This conclusion is confirmed when general rules of grammar and punctuation are applied. The Court of Appeals' conclusion that the statute unambiguously requires a party to move for extension within three years of filing an application for hearing is correct.

Glaze v. J.K. Williams, LLC, 439 P.3d 920 (Kan. 2019).

Q. Is a claim which occurred prior to the 2011 Amendments but which had an application for hearing filed after the 2011 Amendments took effect, subject to the 2011 Amendments?

A. Yes. The Supreme Court concluded that K.S.A. 2011 Supp. 44-523(f)(1) requires the dismissal of a claim if claimant has not filed a motion for extension within three years from the filing of her application for hearing. In addition, the Supreme Court rejected claimant's argument that her claim shall be governed by the 2009 laws, rather than 2011 law, as she had not yet filed her application for hearing when the 2011 laws went into effect.

In this case, Knoll was injured while working for the school district on October 29, 2009. Knoll filed an application for hearing with the Kansas Division of Workers Compensation on November 14, 2011. On February 15, 2015, the school district and its insurer moved to have Knoll's claim dismissed pursuant to K.S.A. 2011 Supp. 44-523(f)(1), because the claim had not proceeded to a final hearing within three years of the filing of an application for hearing. Knoll argued the motion to dismiss should be denied because K.S.A. 2009 Supp. 44-523(f) actually governed her claim and that version of the statute gives a claimant five years from the date of filing an application for hearing to file a motion for extension.

In a worker's compensation cases, the substantive rights between the parties are determined by the law in effect on the date of injury. However, amendments to the compensation act that are merely procedural or remedial in nature and that do not prejudicially affect substantive rights of the parties apply to pending cases. Generally, statutes of limitations are considered procedural. The 2011 amendment is not exactly a statute of limitations, but it is very similar. K.S.A. 2011 Supp. 44-523 establishes a time limit on completing a claim based on the date when the claim was filed. Similar to a statute of limitations, this statute cuts off a remedy and can be waived, lost, or extended by statute. If a workers compensation claimant filed an application for hearing under K.S.A. 44-534 after K.S.A. 2011 Supp. 44-523(f)(1) took effect, the 2011 statute governs the claim.

The Court concluded that K.S.A. 2011 Supp. 44-523(f)(1) applies to any cases that were pending during its enactment when the claimant did not file an application for hearing until after the 2011 amendments took effect. Though Knoll suffered her injury in 2009, she filed her application for hearing six months after the 2011 amendments became effective. Accordingly, K.S.A. 2011 Supp. 44-523(f)(1) controlled her claim. Because Knoll did not file her motion for extension until after the three-year time limit provided for therein, the Court of Appeals was correct when it reversed the Board's decision affirming the ALJ's denial of the school district's motion for dismissal.

Knoll v. Olathe Sch. Dist. No. 233, 439 P.3d 313, 317 (Kan. 2019).

Q. What is an "idiopathic cause" under Kan. Stat. Ann. 44-508(f)(3)(A)(iv)?

A. The Kansas Supreme Court defined the term "idiopathic causes" to refer to **medical conditions or medical events of unknown origin that are peculiar to the injured individual** under the Kansas Workers Compensation Act.

In this case, claimant worked as a forklift operator and was required to attend a paid safety meeting at the nearby headquarters. When the meeting ended, claimant walked to a restroom near the stairs and ended up face down on a landing at about the midpoint on the stairway, shattering or breaking three vertebra in his neck. The accident's cause remains a mystery.

Employer argued the fall's cause was unknown, which meant claimant's injuries arose from an idiopathic cause and were not compensable under the 2011 Amendments which excluded compensation for any accident or injury that arose either directly or indirectly from idiopathic causes. The 2011 Amendments however did not define the term idiopathic cause.

The court determined "idiopathic causes" refers to medical conditions or medical events of unknown origin that are peculiar to the injured individual. The court's decision reversed the interpretation given by the Workers Compensation Appeals Board, which denied Graber compensation. The court returned the claim to the board for reconsideration based on the court's definition.

Estate of Graber v. Dillon Companies, 439 P.3d 291, 301 (Kan. 2019).

Q. Is prior authorization required for an employer to be liable for a claimant's medical treatment?

A. Yes. In this case, the claimant sustained a compensable injury to her neck, lower back, and right arm. She then settled her case in 2013, leaving open her right to future medical care and review and modification. After her settlement, she received authorized care from multiple doctors. Her employer had also informed her that any referral from one doctor to another would not be authorized unless either her employer or the Administrative Law Judge preauthorized the treatment with the new doctor. However, the claimant also sought care from a podiatrist in 2014 to treat numbness, burning, and pain in her feet but did not obtain her employer's prior approval. The podiatrist recommended claimant to a neurologist who in turn recommended a biopsy. The biopsy did not determine the cause of her pain, and she was again referred to another doctor who the claimant treated with for seven to nine months before the doctor was designated as an authorized treating physician.

Claimant filed for a post-award medical hearing in September 2016 for reimbursement of her medical mileage. At the hearing, Claimant admitted she knew "no referrals from doctors were authorized unless either [her employer] or the ALJ clarified the orders beforehand." And that she ran four 5Ks, two 10Ks, one regular triathlon and one short course triathlon, and two half-marathons between November 2014 and June 2016. The Administrative Law Judge held the employer was not responsible for any of the mileage reimbursements for treatment claimant received without prior authorization and that the treatment was not related to her original work injury. Rather, it was related to her athletic activities. This decision was adopted by the Board, which held the treatment was unauthorized but did not address whether claimant's treatment was related to her work injury.

The Court of Appeals also did not determine whether the treatment was related to claimant's work injury or her athletic activities. The court did, however, affirm the Judge's and Board's determination that the treatment claimant was seeking reimbursement for was unauthorized. The court found it persuasive that throughout the period claimant was

seeking unauthorized treatment, her employer had provided her with an authorized treating physician, she had attended appointments with that physician even after her settlement, and she had never received a bill for that treatment. Additionally, the court emphasized that claimant knew she had to seek prior approval of any referrals or medical treatment for it to be authorized and because she failed to do so, the treatment and any related travel expenses was unauthorized, and was not the employer's responsibility to pay.

Christenson v. Home Depot, No. 118,450, 2019 WL 985526 (Kan. Ct. App. Mar. 1, 2019).

Q. If an employer pays for medical compensation, can it revive a workers' compensation claim even though the two-year statute of limitations contained in K.S.A. 44-534 has already run?

A. Yes. Another statute of limitations is contained in K.S.A. 44-534, and this provision was interpreted by the Court of Appeals in *Schneider v. City of Lawrence*, who rendered a decision on the same day as the *Green* case. The statute states:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

K.S.A. 44-534(b).

In the *Schneider* case, the claimant had two back injuries, one in 2008 and another in 2010. However, he did not file an application for hearing until 2016, long after the limitation contained in 44-534(b) had run. The claimant argued that although his applications were untimely as the statutes of limitation had passed in 2011 and 2013, respectively, his claim had been revived because the respondent had paid for medical treatment for his work-related injuries in 2015 and 2016. The Court of Appeals accepted this position and held that because the employer had paid compensation, the claimant's claim had been revived and he had two additional years from the dates of those payments to file a claim for compensation. Therefore, because the claimant filed a claim for application in 2016, the court held his claims for both injuries were still timely.

Schneider v. City of Lawrence, No. 119,340, 2019 WL 494486 (Kan. Ct. App. Feb. 8, 2019).

Q. Does the 6th Edition or the 4th Edition AMA Guidelines govern workers' compensation impairment ratings in Kansas?

A. The law is unclear. According to the Court of Appeals, the 6th Edition of the AMA Guidelines is facially unconstitutional because it violates due process.

In order for the Kansas Workers' Compensation Act to satisfy due process, "(1) the changes must be reasonably necessary in the public interest to promote the general

welfare of the people of Kansas, and (2) the Act in its currently modified form must continue to provide an adequate substitute remedy for an injured worker's right to bring a common-law action for the recovery of damages." The Court of Appeals stated that in order for the State to satisfy the first prong of the due process analysis, there can be "any state of facts which reasonably may be conceived to justify" switching from the 4th Edition to the 6th Edition. The court affirmed the State had met this first prong in *Pardo v. United Parcel Service*, by showing the 6th Edition was more medically sound than the 4th Edition.

Where the court took issue is with the second prong of the test. The injured worker, Mr. Howard Johnson, injured his neck and was given a 6% permanent impairment rating under the 6th Edition. His operating doctor opined his impairment rating would have been 25% had Mr. Johnson been rated under the 4th Edition. This impairment rating was also supported by Dr. Koprivica who testified 25% was Mr. Johnson's "true impairment rating given the severity of his injury" and that there was no scientific support for the 6th Edition's 6% rating.

Based on this evidence and after considering the Act as a whole, with the 6th Edition included, the court held the Workers' Compensation Act no longer provided an adequate substitute remedy when considering any worker who suffered permanent impairment after the 6th Edition came into effect on January 1, 2015. The court did not opine on the constitutionality of the 2011 amendments as a whole, but instead limited its ruling to whether the adoption of the 6th Edition was constitutional.

Therefore, after the Court of Appeals opinion, the 6th Edition is unconstitutional and no longer controls. But this is not the end of the matter. The case has been appealed to the Kansas Supreme Court, which has not rendered a decision on the matter Consequently, until the Kansas Supreme Court issues a decision, the issue remains unclear.

Johnson v. U.S. Food Service, 427 P.3d 996 (Kan. Ct. App. 2018).

Q. Does the dismissal statute contained in K.S.A. 44-523(f) require dismissal of a workers' compensation case if the employee has not proceeded to a regular hearing, settlement hearing, or agreed award within three years from the date of filing an application for hearing?

A. The law is unclear. The most recent decision on this issue was *Green v. General Motors*. This is a decision from the Kansas Court of Appeals and there is a possibility it will be appealed to the Kansas Supreme Court, so this issue may not be decided. However, the case did lay out some general principles to work from. The court first recognized the applicable dismissal statute is K.S.A. 44-523(f), which states:

> (f)(1) In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing… the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the

> claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution.
>
> (2) In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge.

K.S.A. 44-523(f)(1)–(2).

The court acknowledged the above statute was amended in 2011 and reduced the statute of limitations from five years down to three. In a previous decision *Knoll v. Olathe Sch. Dist. No. 233*, the Court of Appeals held this change was procedural and therefore would have retroactive application. *Knoll*, 398 P.3d 223, 228 (Kan. Ct. App. 2017). However, the Kansas Supreme Court has granted review of the *Knoll* decision and therefore this issue is also in flux.

Regardless, the claimant in the *Green* case had not filed a motion for extension within the three-year period, nor had his claim proceeded to a regular hearing. Therefore, the employer filed a motion to dismiss for lack of prosecution. The court in *Green* further recognized that failure or lack of prosecution is not defined in the Kansas Workers' Compensation Act, and it therefore defined that term as "a party's failure to pursue an action with due diligence and at least suggests indifference approaching abandonment of the cause." *Green*, No. 119,044, 2019 WL 494582, at *5 (Kan. Ct. App. Feb. 8, 2019). The court then held that based upon 44-523(f)(1)'s language the claimant was entitled to a hearing to determine whether there was good cause to grant an extension regardless of whether the employee filed a motion for extension. This marked a change from prior case law, which had interpreted the statute to impose a strict statute of limitations and dismiss any claim where such a motion had not been filed. For example, two recent Court of Appeals cases determined that even if the claimant had not reached maximum medical improvement, if his or her attorney did not file a motion for extension within the three-year time period, the court must dismiss the claim. *Glaze v. J.K. Williams, LLC*, 390 P.3d 116, 117–18 (Kan. Ct. App. 2017); *Garmany v. Casey's Gen. Store*, 390 P.3d 123 (Kan. Ct. App. 2017).

Green v. Gen. Motors Corp., No. 119,044, 2019 WL 494582 (Kan. Ct. App. Feb. 8, 2019).

Q. What is considered "good cause" which would allow a claim to proceed beyond the three-year statute of limitations contained in K.S.A. 44-523(f)(1)?

A. The law is developing. What is considered good cause is also another issue being litigated. K.S.A. 44-523 says that if the claimant has not reached maximum medical improvement, good cause shall be conclusively presumed, if a motion for extension is filed within the three-year time period. Additionally, a panel of the Board recently held that given the recent confusion in Kansas over the constitutionality of the 6th Edition of the AMA Guides, this constitutes good cause to grant an extension. Specifically, the Board in *Terry v. Excelligence* held that the change in the law after *Johnson v. U.S. Foods*—combined with the uncertainty surrounding the 6th Edition's future while the case is on appeal to the Kansas Supreme Court and the time it will require for the Supreme Court to render a decision—is a legally sufficient reason for an extension. This decision was not appealed and therefore is final, but as it is a Board decision, it is not controlling on future panels.

Terry v. Excelligence, No. Docket No. 1,074,385, 2018 WL 6587510 (Kan. Work. Comp. App. Bd. Nov. 1, 2018).

Q. If an employer pays for medical compensation, can it revive a workers' compensation claim even though the two-year statute of limitations contained in K.S.A. 44-534 has already run?

A. Yes. Another statute of limitations is contained in K.S.A. 44-534, and this provision was interpreted by the Court of Appeals in *Schneider v. City of Lawrence*, who rendered a decision on the same day as the *Green* case. The statute states:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

K.S.A. 44-534(b).

In the *Schneider* case, the claimant had two back injuries, one in 2008 and another in 2010. However, he did not file an application for hearing until 2016, long after the limitation contained in 44-534(b) had run. The claimant argued that although his applications were untimely as the statutes of limitation had passed in 2011 and 2013, respectively, his claim had been revived because the respondent had paid for medical treatment for his work-related injuries in 2015 and 2016. The Court of Appeals accepted this position and held that because the employer had paid compensation, the claimant's claim had been revived and he had two additional years from the dates of those payments to file a claim for compensation. Therefore, because the claimant filed a claim for application in 2016, the court held his claims for both injuries were still timely.

Schneider v. City of Lawrence, No. 119,340, 2019 WL 494486 (Kan. Ct. App. Feb. 8, 2019).

Q. What are the requirements for a drug or alcohol test to be admissible under K.S.A. 44-501?

A. This issue was discussed extensively by the Court of Appeals in *Woessner v. Labor Max Staffing.* The court first pointed out that proceedings in workers' compensation are not bound by the technical rules of evidence. And therefore, hearsay can be admitted in workers' compensation proceedings, even though it is inadmissible in civil proceedings, unless it is irrelevant or redundant. The hearsay evidence must still be reliable to be admissible, even in workers' compensation proceedings.

The court then turned to the relevant statutory provision explaining employer defenses based on employee drug and alcohol use–K.S.A. 44-501. Under this section there are various defenses which may apply depending on whether the employee consumed drugs or alcohol, what type of test was administered, and whether the test was performed at the employer's direction or in the ordinary course of treatment. The statute also has what the court deemed an "admissibility" section and an "inadmissibility" section, which are 44-501(b)(2) & (3), respectively. 44-501(b)(2) has more relaxed rules for admissibility if certain factual scenarios arise and 44-501(b)(3) has very strict rules which an employer must meet for a drug test "collected by an employer" to be admissible. However, the court held none of the scenarios laid out in these two sections applied to the case.

The court also held K.A.R. 51-3-5a, which applies to preliminary hearings was inapplicable in this case. The Board had relied upon this regulation to hold the drug test was inadmissible at a regular hearing, but the court stated the regulation did not apply to regular hearings, only preliminary hearings. Therefore, the Court of Appeals concluded that no special statute or regulation precluded the drug test from being admissible and held that as long as the test was supported by foundation showing it was reliable, it should be admissible.

When considering the reliability of the test, the court found it sufficient that the employer had presented evidence regarding how the hospital obtained the sample, tested it and stored it, and then transferred it to a third party for further testing. The court held that this testimony would have been sufficient under the Kansas Rules of Evidence and therefore would also be sufficient under the relaxed workers' compensation evidence standards. The test from the hospital was therefore admissible. The court then turned to the third-party company, whose report was supported by an affidavit from the lab supervisor. This affidavit was also sufficient to allow the third-party's report to be admissible, even though it was hearsay evidence. It was sufficiently reliable because the third-party lab was federally certified, and the lab supervisor had no interest in the outcome of the case. The court therefore held both the hospital and the third-party testing records were admissible.

Woessner v. Labor Max Staffing, No. 119,087, 2019 WL 638290 (Kan. Ct. App. Feb. 15, 2019).

Q. Are fringe benefits included in calculating an employee's average weekly wage for purposes of determining wage loss in a work disability claim?

A. Yes. In *Long v. ICL Performance Products*, the employee was seeking work disability and argued he suffered greater than ten percent functional impairment when considering his current and prior injuries and greater than ten percent wage loss. The Court of Appeals agreed that because the employee's permanent partial impairment from his current injury was seven and a half percent to the body as a whole, and his impairment attributed to his former injuries was ten percent to the body as a whole, the employee has a functional impairment of seventeen and a half percent.

However, the Court of Appeals determined the employee did not suffer a ten percent wage loss. The court held that although health insurance and other "additional compensation" is not included in the average weekly wage calculations unless it is discontinued, this provision did not apply to "fringe benefits." The court found it controlling that the provision excluding additional compensation is contained in K.S.A. 44-511(a)(2)(A) & (C), while the provision discussing fringe benefits is contained in 44-510e(a)(2)(E). Under 44-510e, "[t]he actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge." 44-510e(a)(2)(E)(ii). The court further held that while fringe benefits are not defined by the Workers' Compensation Act, they do include insurance. Therefore, it was appropriate to include these benefits when calculating whether the employee had suffered a ten percent wage loss. Consequently, the court found the employee did not suffer a ten percent wage loss and was not entitled to work disability.

Long v. ICL Performance Prod., 432 P.3d 112 (Table) (Kan. Ct. App. 2019) (unpublished)

Q. If an employee is assaulted on the sidewalk outside of his work, does that injury arise out of and in the course of his or her employment?

A. Maybe, depending on the facts of the specific case. In *Connolly v. Minsky's City Market*, the claimant was the general manager of a Minsky's Pizza and part of his job duties were to inspect the outdoor coolers and the rest of the area surrounding the restaurant to ensure it was clean and secure. While performing this check, he was assaulted by three customers and suffered permanent injuries from the attack. The employer denied compensability, arguing the connection between the employee's job and the attack was too speculative.

On appeal, the Court of Appeals reiterated that to determine whether an injury arises out of employment, the court must focus on "whether the activity that results in injury is connected to, or is inherent in, the performance of the job." The court then examined two similar cases. One where the employee was installing glass on the roof of a parking garage when he was shot and killed by a sniper. The shooter shot ten victims total, although he had no connection to any of them. In that case, the court held the injuries were compensable because the employee's work on the roof made him a "prime target

for the sniper." In the other case, the employee was also shot and killed at work while managing the local dairy distribution office. He was found dead in his office, but there were no signs of forced entry and nothing was stolen. The district court found the death was work related and believed the employee had been killed by a burglar. But on appeal, the Kansas Supreme Court reversed and held that conclusion was based on mere conjecture and there was insufficient evidence to connect the death to the employment.

The Court of Appeals in *Connolly* believed the first case was more applicable and held the employee's injury arose out of and in the course of his employment. The court emphasized that the area outside the restaurant was not well lit, had been vandalized, and the employee regularly walked waitresses to their car for their protection. Therefore, the court concluded that while the restaurant might not be in a "high-crime area," it subjected the employee to a greater risk of assault than the general public. And because the employee was at a greater risk, his injury was compensable.

Connolly v. Minsky's City Mkt., 432 P.3d 107 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. If an employee is terminated for cause, does the employer still owe the employee work disability in additional to permanent partial disability?

A. No. In *Garcia v. Tyson Fresh Meats*, the employee suffered a compensable injury to his back and returned to work on light duty. However, he was terminated shortly thereafter due to poor work performance. As part of Tyson's Alternative Dispute Resolution process, the termination was reversed, and the employee was reinstated and issued a written warning about his work performance. The employer then called the employee and instructed him to return to work on a certain date. However, the employee did not return on that date even though he admitted receiving the employer's phone call. The employer then sent him a letter summarizing his reinstatement and stating that if he did not report by a certain date, he would be terminated. The employee did return to the facility this time but left shortly after arriving. He returned three days later and was informed that someone from Tyson would contact him about his return. Despite multiple calls and voice messages from Tyson, the employee never returned to the facility and was therefore terminated for failing to return to work. The employee disputed he ever received those phone calls or voice messages.

In deciding whether the employee was owed work disability, in additional to his permanent partial disability, the court turned to K.S.A. 44-510e(a)(2)(E)(i) which states that if an employee is terminated for cause, their wage loss is not directly attributable to the work injury and they are therefore not entitled to work disability. In deciding whether a termination is "for cause," the court will look to the employee's good faith attempts to remain employed and whether the employer acted in good faith during the termination or if the termination was "subterfuge to avoid work disability payments." The court found the employee was terminated for cause based on multiple facts. First, the employer had multiple contacts with the employee including multiple phone calls and at least one letter. Second, when the employee did report, he left the first visit suddenly and during the second visit, the employer verified his contact information and informed the employee

they would be in contact. Therefore, the court found the employer had acted in good faith. However, the court found the employee had not acted in good faith because he failed to return to work on multiple occasions, abruptly left when he did return to work the first time, and although the employee disputed receiving the phone calls and voice messages following his second return to work, he never followed-up with his employer to determine when he was supposed to report. The court consequently held the employee showed no desire to return to work and he was terminated for cause, and therefore the employer was not responsible for work disability benefits in addition to the employee's permanent partial disability benefits.

Garcia v. Tyson Fresh Meats, Inc., 430 P.3d 995 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. If a foreman knows an employee is violating a safety rule but allows him to continue working, does that constitute "approval" of the safety violation by the employer?

A. Yes, under the facts of this case. Under K.S.A. 44-501(a), compensation to a claimant can be denied if the claimant was injured while willfully failing to use reasonable and proper protection furnished by the employer, unless the employer approved of the employee's work without the equipment. In *Anderson v. PAR Electrical Contractors, Inc.* an employee was injured while he was transferring electrical lines from old utility poles to new ones. The employee was working in a lift bucket with another employee. PAR Electrical has a five-foot-rule while requires employees working within five feet of an "energized source" to wear rubber gloves and sleeves. However, the employee did not wear rubber gloves or sleeves because he believed he was more than five feet from an energized source. Instead, he wore regular leather gloves. The jobsite foreman testified he knew the claimant was working without rubber gloves and that he allowed the claimant to continue working because he had worked with the claimant in the past and he was very precise with his movements. The claimant was electrocuted while holding onto the electrical lines while the other employee prepared the cable housing for the transfer. Shortly following the accident, the jobsite foreman was terminated.

The Court of Appeals established that the word "approved" in 44-501(a) had not been defined and turned to Board decisions to construct a definition. The court further recognized that the employer as a whole did not approve of the foreman allowing the claimant to work without rubber gloves. However, the court believed it was important that the foreman stated he had worked with the claimant in the past, knew he was working without rubber gloves, and allowed the claimant to continue working without them on the date in question. From this, the court determined it was possible that the foreman routinely allowed the claimant to work without rubber gloves, rather than this being a one-time incident. And therefore, the court held the foreman approved of the claimant's actions and consequently that the employer approved of the actions as well because the foreman was acting on the employer's behalf.

Anderson v. PAR Electrical Controls, Inc., No. 118,999, 2018 WL 6074279 (Kan. Ct. App. Nov. 21, 2018) (unpublished).

Q. What constitutes a "reckless" violation of an employer's workplace safety rule?

A. "Reckless" behavior in Kansas workers' compensation is not defined, and therefore depends on the facts of the case. In *Anderson v. PAR Electrical Contractors, Inc.*, the employer also argued the claimant's violation of the employer's five-foot safety rule was "reckless." Under K.S.A. 44-501(a), compensation can be denied if the claimant recklessly violates his or her employer's workplace safety rule. The court also recognized this lack of a definition but failed to provide one for future cases. Instead, the court reiterated the definitions used in tort and criminal law. These laws require that the person either have known, or should have known, of a high degree of risk of harm, and then acted either deliberately, or in conscious disregard, of this risk. Alternatively, if the claimant knows, or has reason to know, of the high degree of risk of harm and "does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so" then the claimant has also acted recklessly, as judged by an objective standard.

The day of the injury, the employee had training on the proper use of safety equipment during that particular job, including safety around energized sources and the use of rubber gloves and sleeves. The employee even signed a document stating he attended the safety meeting the morning of the accident where these topics were discussed. As stated above, the employer also had a rule requiring employees to wear rubber gloves and sleeves whenever they were within five feet of an energized source. But on the date in question, the claimant was merely wearing leather gloves because he thought he was more than five feet away from the energized source and he believed the rubber gloves would affect his ability to perform his job. Therefore, the Court of Appeals held the claimant had not acted recklessly because he believed he was more than five feet from any energized source. Rather, the court deemed his conduct to be merely negligent.

Anderson v. PAR Electrical Controls, Inc., No. 118,999, 2018 WL 6074279 (Kan. Ct. App. Nov. 21, 2018) (unpublished).

Q. May the Director of Workers' Compensation make findings of fact, conclusions or law, or enter orders of reimbursement?

A. No. In this case, a secretary filed a workers' compensation claim for repetitive use injuries. The claim alleged these injuries occurred over the course of two years, with two different employers, and multiple insurance companies were involved, namely OneBeacon and Travelers. The Court of Appeals, in a prior action, found the injuries were compensable but remanded to determine whether there was a single injury or multiple injuries. The Board determined there were two injuries but failed to determine which insurance company was financially responsible. This is significant because it was possible OneBeacon paid for benefits which should have been paid for by Travelers, and either Travelers or the Workers Compensation Fund could be responsible for any reimbursement due to OneBeacon.

To resolve the issue, OneBeacon wrote to the Director and asked him to decide who was financially responsible. However, under K.S.A. 44-556(e), the Board must make these types of determinations and the Director may then "certify" the amounts to be reimbursed. Which, as the Court of Appeals noted, did not happen in this case. Rather, the Director made findings of fact, conclusions of law, and entered an order directing Travelers to reimburse OneBeacon. Travelers appealed the decision to the district court and ultimately the Court of Appeals.

The Court held that K.S.A. 44-556(e) requires either an ALJ, the Board, or a court to identify the benefits and the company responsible for them with particularity. Only then, after the order has been entered by the proper authority, can the Director be involved. And the Director's only possible action is to "certify" that the amounts to be reimbursed are correct, what entity is obligated to make those payments, and to whom. The court noted the Director's actions should merely be a "rote exercise rather than ones subject to challenge and review" because "certification" involves merely confirming something to be true, not making factual or legal determinations in the first instance.

The Court of Appeals therefore held the Director had exceeded his statutory authority and that his actions were invalid. Hence, the court remanded the case to the Board to make the determination as to who was financially responsible for the benefits and which entity, if any, was entitled to reimbursement and from whom.

Travelers Casualty Ins. v. Karns, ___P.3d___, No. 117, 128, 2018 WL 4841525 (Kan. Ct. App. Oct. 5, 2018), *modifying Travelers Casualty Ins. v. Karns*, No. 117, 128, 2018 WL 4039423 (Kan. Ct. App. Aug. 24, 2018).

Q. To seek reimbursement from the Workers' Compensation Fund, must the Fund be impleaded?

A. Possibly. A sub-issue in *Travelers Casualty Ins. v. Karns*, was whether the Fund must be impleaded into any case where a party is seeking reimbursement. Although the issue was not definitely decided by the Court of Appeals and was instead remanded to the Board to issue a ruling, the court suggested that the Fund may need to be impleaded. Specifically, the Court of Appeals implied that in order for the Fund to be held liable under K.S.A 44-534a or 44-556(d)–(e), they may need to be impleaded according to 44-566a(c)(1)–(3). The Board has not yet rendered a decision.

Travelers Casualty Ins. v. Karns, ___P.3d___, No. 117, 128, 2018 WL 4841525 (Kan. Ct. App. Oct. 5, 2018), *modifying Travelers Casualty Ins. v. Karns*, No. 117, 128, 2018 WL 4039423 (Kan. Ct. App. Aug. 24, 2018).

Q. Can an employee who was injured during an altercation with another employee suffer a compensable injury, even if he lied to his doctors about how he was injured?

A. Yes. Mr. Billington was assaulted at work by a co-worker who picked him up and threw him onto a pile of rocks. This injured Mr. Billington's ribs and punctured one of his lungs. However, instead of telling his employer and the doctors this was how he was injured, Mr. Billington initially told his boss he was injured when he fell out of the bed of a pickup truck after work and struck the ball hitch. Mr. Billington claimed he initially lied because he was on probation for an assault conviction and did not want to be sent back to prison if his supervision officer thought he had been fighting other co-workers. However, after the doctors told Mr. Billington that this story did not match his injuries, he told the doctors the truth. He then returned to his employer and told his employer the truth as well. In the workers' compensation matter, his employer did not dispute that there was a fight, as there were witnesses to corroborate its occurrence, rather the employer disputed the manner of injury. Mr. Billington's employer argued that both the fight during work and the fall from the truck after work had occurred and Mr. Billington had been injured in the latter, and his injuries were therefore non-compensable.

The Administrative Law Judge sided with the employer. It held the claimant was not a credible witness and had failed to sustain his burden of proof. The Workers' Compensation Board reversed and held Mr. Billington had sustained his burden of proof because it found the testimony of two other corroborating witnesses to be credible, even if Mr. Billington's was not. Both Mr. Billington's roommate and his neighbor testified he was favoring one side and having trouble breathing the night of the altercation. Additionally, the Board found it was significant that the employer did not dispute the fight had occurred in the manner Mr. Billington described it and had terminated the employee who threw Mr. Billington onto the rocks. The Court of Appeals affirmed the Board's determination as it found the decision was supported by substantial evidence, despite Mr. Billington's initial credibility issues.

Billington v. Midwest Minerals, Inc., 423 P.3d 565 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. Does the Board have jurisdiction to set aside a temporary total disability (TTD) award if the award was not challenged at a hearing before the Administrative Law Judge?

A. No. The claimant in this case was injured when he wrecked a truck while hauling a load in icy and snowy weather conditions. The parties stipulated the claimant was injured within the scope of his employment and to the existence of an employee-employer relationship. They did not, however, stipulate to TTD benefits. The claimant filed for a preliminary hearing and at the hearing, the claimant was awarded TTD. The case eventually proceeded to a regular hearing and the ALJ ordered the claimant receive 43.71 weeks of TTD. Neither the employer nor the Fund, both of whom were parties to the action, contested the availability or the amount of TTD at the hearing before the ALJ.

However, on appeal to the Board, the employer contested the TTD award and argued claimant had not presented sufficient evidence to warrant the award. The Board sided with the employer and reversed the award.

On appeal the claimant argued the Board lacked jurisdiction to reverse the TTD award because the issue had not been raised before the ALJ. The Court of Appeals agreed and held that under K.S.A. 44-555c(a), the Board lacked jurisdiction to reverse the TTD award because the issue was not contested before the ALJ and the Board lacks jurisdiction to hear any issues which were not previously raised before the ALJ. Thus the court reinstated the TTD award.

Castaneda v. ALG Transport Services, Inc., 421 P.3d 777 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. Is an aggravation of a pre-existing injury compensable under K.S.A. 44-508(f)(2)?

A. No, but a new injury to an area which was previously injured is compensable. Compare two claimants: Mr. Keith Bennett and Ms. Patricia Staples. Mr. Bennett sustained a non-compensable aggravation to a preexisting back injury whereas Mr. Staples suffered a compensable injury to both of her wrists, even though she had previously had a similar injury to her left wrist.

In Mr. Bennett's case, he worked for the City of Topeka and while he was driving his truck across a wooden pedestrian bridge in 2015, the bridge collapsed, and the back end of his truck fell to the ground below while the front end remained on the bridge. Mr. Bennett alleged this caused pain in his lower back which radiated into his legs. Of importance is that Mr. Bennett had previously injured his lower back at the L4-5 level in 1996 and again at the L5-S1 level in 2005. The 2005 injury also involved some pain radiating into Mr. Bennett's right leg. Both of these injuries ended in workers' compensation settlements.

Mr. Bennett visited multiple doctors: one opined he suffered a compensable injury, but this doctor did not know about his preexisting injuries; another opined Mr. Bennett did not suffer a compensable injury, but his pain was an aggravation of his preexisting degenerative disc disease; the third doctor also believed the pain was an aggravation of preexisting degenerative disk disease. The Court of Appeals agreed with two of the three doctors and held the claimant failed to prove his injury was compensable. Of note, it stated that although the 2015 incident may have rendered Mr. Bennett's preexisting injuries symptomatic, the injuries were in fact preexisting, and this was merely an aggravation of those injuries. The court held no new injury had been sustained and therefore Mr. Bennett's 2015 accident did not lead to a compensable injury.

While in Ms. Staples's case, she alleged injuries to both wrists in 2013 due to the repetitive nature of her job. She worked at a computer typing most of the day, prepared paperwork, and answered the phone. Similar to Mr. Bennett, Ms. Staples had a previous workers' compensation settlement to her left hand for a similar type of injury, which she suffered around 2004 or 2005. Ms. Staples also visited multiple doctors: one diagnosed her with

osteoarthritis in both hands but did not render a causation opinion; another also diagnosed her with osteoarthritis and opined it was not work related, but this doctor spent less than five minutes with Ms. Staples and did not conduct a thorough analysis; a third doctor diagnosed Mr. Staples' with arthritis and claimed her work advanced the progression of her arthritis and therefor was the prevailing factor of her injuries; finally, the last doctor Mr. Staples saw was Dr. Poppa, who also opined her work was the prevailing factor of her injuries. None of the doctors testified before the ALJ, who found the injury was non-compensable and that those doctors who believed the injuries were non-compensable more credible. However, the Board reversed after making its own credibility determination and found the doctors who believed her injury was compensable were more credible. Of note, the Board found it persuasive that Dr. Poppa examined Ms. Staples on three separate occasions and thus believed his report was the most credible. On appeal, the Court of Appeals deferred to the Board's credibility determination and found it was supported by substantial evidence. It did not give any weight to the ALJ's determination because no doctor testified in person in front of the ALJ, rather only their reports were submitted. Thus, the court found the Board was in the same position to determine credibility as the ALJ.

Although there are many facts which make these two cases different, they both ultimately came down to the credibility of the claimant and the doctors who gave causation opinions. In Mr. Bennett's case, the court found he was not credible because he was a poor historian, and this affected the doctor's opinions who found his injury was compensable. In Ms. Staples's case, on the other hand, the Board found the doctors who opined her injury was compensable to be more credible. This was in part due to one of the doctors who said her injury was non-compensable spent less than five minutes with Ms. Staples, barely reviewed her x-rays, and did not perform any physical tests on her. Whereas Dr. Poppa, who opined her injuries were compensable, observed Ms. Staples on multiple occasions. In both cases, the Court of Appeals deferred to the credibility determinations of the lower courts, therefore showing how important it is to have credible witnesses.

Bennett v. City of Topeka, 422 P.3d 688 (Table) (Kan. Ct. App. 2018) (unpublished); *Staples v. Allstate Insurance Co.*, 425 P.3d 374 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. Does an employee's injury arise out of her employment if she is injured while playing catch with a football during working hours?

A. Yes. Ms. Fishman was a paraprofessional assigned to watch over a particular disabled child. During gym class, the child was riding a specialized bicycle and Ms. Fishman was watching the child while sitting on nearby bleachers. While Ms. Fishman was still sitting on the bleachers, one of the other paraprofessionals began throwing a football around with her. However, one of the throws was too short and when Ms. Fishman dove off of the bleachers after it she severely broke her right pinky finger. The ALJ denied compensability as Ms. Fishman was willingly participating in a "sportive event." However, the Board reversed and held the injury was compensable because "work being performed in a forbidden manner is not prohibited. An employee is still acting in the course of his or

her employment even while performing work in a [forbidden] manner." After remand and another appeal, the Board affirmed compensability, and the case went to the Court of Appeals.

On appeal, the employer argued Ms. Fishman's injury was not compensable because it did not arise out of her employment, even though it occurred during the course of her employment. The employer argued that because Ms. Fishman was playing catch instead of performing her job duties when she was injured, her injury was not compensable. However, the Court of Appeals agreed with the Board that although Ms. Fishman may have been performing her job in a forbidden manner, her injury still arose out of her employment. The employer also argued that Ms. Fishman's injury was due to horseplay, and thus non-compensable under K.S.A. 44-501(a)(1)(E). The Court of Appeals noted a lack of case law surrounding horseplay and that "horseplay" is a nebulous concept with no legal meaning. The Court of Appeals also observed that in the cases where employees had been denied compensation they had either "stepped away from their job duties or had interfered with their coworkers' abilities to do their jobs," or had "engaged in potentially hazardous activities." While in Ms. Fishman's case she had done neither. Ms. Fishman testified that from the bleachers she could have reached her disabled student in a matter of seconds and the court stated that throwing the football did not affect her ability to watch her student. And likened to other cases the court mentioned such as throwing mortars at coworkers or electrically shocking coworkers, throwing a football appeared tame in comparison.

Thus, the Court of Appeals held Ms. Fishman's injury was compensable as it arose out of her employment and her throwing the football around did not constitute horseplay.

Fishman v. U.S.D. 229, 422 P.3d 686 (Table) (Kan. Ct. App. 2018) (unpublished).

Q. May parties raise issues for the first time on appeal that were not raised to either the Administrative Law Judge or the Appeals Board?

A. Generally, no. The claimant in this case attempted to raise two new issues to the Court of Appeals which had not been raised to either the ALJ or the Board. First, he argued that because he and his employer had stipulated that work was the prevailing factor of his injuries and that his injuries arose out of and in the course of his employment, the ALJ was required to find his claim compensable and erred in denying it. Second, he argued that the ALJ and the Board ignored the plain language of the Workers' Compensation Act by holding his work was not the prevailing factor of his injuries.

The Court of Appeals stated that it generally will not consider issues raised for the first time on appeal, subject to narrow exceptions. And the claimant failed to even argue that any of these exceptions applied to his case. Additionally, the court noted the claimant had an opportunity to raise his first argument concerning the stipulations to the ALJ as the parties made their stipulations more than a month before they submitted their submissions letters. This was ample time for the claimant to argue that his employer had stipulated to the compensability of his claim, but he failed to do so.

Similarly, the claimant failed to raise his prevailing factor argument below and even admitted to the Court of Appeals he was "advancing a new interpretation of the Act that he did not advance below." And like the stipulations issue, the claimant failed to provide any valid reason why he had not raised the argument below or argue that any exception to the general rule precluding review of such arguments applied to his claim. Therefore, the Court of Appeals refused to address either argument and dismissed the appeal.

Viet Hoang v. Metal Fab, Inc., 422 P.3d 1206 (Table) (Kan. Ct. App. 2018) (unpublished).

KANSAS WORKERS' COMPENSATION 201

WORKING WITH THE EMPLOYER, HOW THE EMPLOYER CAN HELP ATTORNEY'S IN WORKERS' COMPENSATION CLAIMS

I. Assist in Preparation of Contested Hearings

Preliminary Hearings

- Witness
- Evidence

Most Common Issues

1. Did accident arise out of an in the course of employment?
    a. Job duties
    b. What happened
    c. Were there any witnesses
    d. How and why did the accident occur
    e. When did the accident happen – date and time
    f. Is there past medical history
2. Notice
    a. Is there a designated person to receive notice of the accident
    b. Was notice given
        i. When
        ii. To who
        iii. Where did this take place
        iv. What was said
        v. Was treatment authorized and provided
3. Employment
    a. Was accommodated employment offered
    b. Detail conversation
        i. Date of offer
        ii. Verbal or written
        iii. Who was present
        iv. Detail any conversation that occurred regarding employment after
    c. Was there a resignation
        i. Written
        ii. Verbal
    d. Unemployment
    e. Other employment
    f. Termination
    g. Personnel file
        i. Date of hire
        ii. Reviews

Regular Hearings

- Witness
- Evidence

II. Evidence

Personnel file

- Evaluations

Wages

- Calculate Average Weekly Wages
- Temporary Benefits

Other valuable information on employee

III. Witnesses

Questions Regarding Accident:

- Who was/is in charge?
- Who saw accident itself?
- Who was told of accident?
    - Notice prepared?

Employee's Work Status:

- Able to accommodate restrictions

If No Longer Employed:

Witnesses as to leaving employer and circumstances surrounding

- Voluntarily left
    - Able to accommodate restrictions
    - Documented?
- Fired
    - Occur after Workers' Compensation claim filed
    - Able to accommodate restrictions
    - Documented?

IV. Medical Information

Temporary or Permanent Accommodations

- Restrictions
- Maximum medical improvement
- Ratings

Employee's Performance and Communication with Employer

- Different than what they are telling Dr?

Understanding medical and procedures

Notes Pages

Notes Pages

Notes Pages