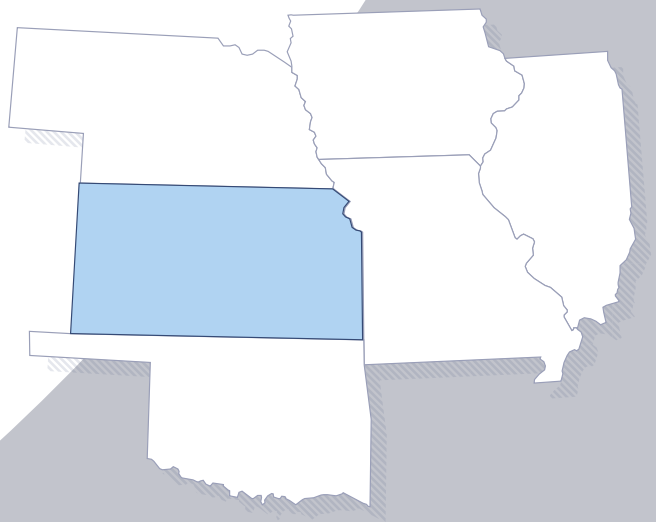
Workers' Compensation Reference Guide

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 earliest 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 earliest 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, their claim will not be barred if their 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."

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
      a. Board and lodging if furnished by the employer
      b. Employer paid life insurance, disability insurance, health, and accident insurance
      c. 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 without testimony.
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 held 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. 44-510f

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. <u>Reduction for Pre-existing Impairments</u>
   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

(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

(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

        (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

        i. 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. <u>Permanent Total Disability</u>
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. <u>Death Cases</u> – 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 until the dependent child becomes 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, but leaves other dependents wholly dependent upon the employee's earnings (all other dependents)
    c. 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).
    d. 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).
        i. 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.

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 shall 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, but only out of extra compensation obtained by claimant.

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 their accident(s).
    c. Judge asks claimant if they are 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 they could hire an attorney.
        i. Explanation will detail that attorney could send claimant to a rating doctor of their choice – or claimant does not have to hire an attorney to get a rating from their 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

Q: Was the Board correct to affirm the ALJ's award, pursuant to K.S.A. 44-510e(a)(2)(C), and adoption of one physician's findings that were based on a correct following of K.S.A. 44-510e(a)(2)(B) and relevant caselaw?

A: Yes, because the Board's affirmation reasonably supported how the relevant statutes and caselaw have been applied to workers' compensation issues.

Claimant, Ortega, was injured on 12/27/2017 while working as a licensed physical therapist for Encore. She needed two surgeries. She was unable to return to work following the surgeries, and applied for workers' compensation against Encore and its insurance carrier, Twin City Fire Insurance Co.

Two physicians testified to their evaluations of Ortega. Both physicians used the Fourth and Sixth Editions of the AMA Guides in determining their impairment ratings due to *Johnson v. US Food Service* being under review at the time of the ratings. Dr. Pedro Murati, in November 2019, found a 12% whole person impairment under Fourth Edition, and 8% whole body impairment under the Sixth Edition. Dr. Vito Carabetta, appointed by the ALJ, conducted an independent assessment in August 2020. Dr. Carabetta found Ortega to have a 10% whole body impairment under the Fourth Edition, and a 7% whole body impairment under the Sixth Edition.

The ALJ adopted Dr. Carabetta findings under the Fourth and Sixth Editions at 10% and 7%, respectively, but under *Johnson v. US Food Service*, awarded based only on the 7% impairment rating, so the ALJ did not find Ortega to reach the 7.5% threshold for work disability under K.S.A. 44-510e. Board review only affirmed the ALJ's decision by placing more weight on Dr. Carabetta's opinion than Dr. Murati's, and found that competent medical evidence established the 7% impairment rating.

On appeal, the KS Court of Appeals was responsible for determining if the Board erred in its review. Ortega argued that the Board failed to consider all the medical evidence on record by failing to consider Dr. Carabetta's impairment level under the Fourth Edition. The Court explained that use of *Garcia* was not applicable here, as that holding applies to a constitutional challenge. The reading of *Zimero* in light of *Johnson II* was the correct analysis. The Court reasoned that Dr. Carabetta's rating and analysis were more persuasive than that of Dr. Murati's. His findings reflected the proper reading of *Johnson II*, *Zimero*, and *Garcia* in using the Sixth Edition as the starting point of analysis as well as using his professional experience and judgment to determine the results.

The Court found that the Board did not err in its decision not to award Ortega work disability benefits.

Ortega v. Encore Rehabilitation Services LLC, 525 P.3d 21, 2023 WL 2194559 (Kan. Ct. App. 2023)

Q: Does the Kansas Court of Appeals have the jurisdiction to review an order from the Kansas Workers' Compensation Board if its order remanded back to the ALJ for further proceedings?

A: No, because the Court lacks jurisdiction to review a nonfinal agency action without meeting the requirements of K.S.A. 77-608.

Claimant, Pesina, worked for Aegis from July 2018 to September 2019. Pesina processed checks for around seven hours a day. Most work involved opening boxes or envelopes, and handling checks, with the occasional lifting of 20-pound boxes or pushing a cart with boxes on them. Her workload increased around the holiday season. She advised Aegis of hand wrist pain and numbness symptoms on January 16, 2019, and applied for workers' compensation on February 5, 2019. She left Aegis in September 2019 and began working at Kansas Neurological Institute. There, she cared for developmentally disabled adults. Around February or March 2020, Pesina began to feel pain in her elbow, but did not report injury to Aegis.

At the request of Aegis, Pesina underwent an independent medical evaluation (IME) on February 28, 2019, by Dr. Robert Bruce. Dr. Bruce opined that that Pesina's wrist injury was the only injury caused by her work at Aegis. Additionally, he opined that Pesina did not have carpal tunnel on either side. He determined Pesina to be at MMI with 0% impairment, and that she would not need any future medical treatment.

Dr. Brian Divelbiss performed a court-ordered IME of Pesina on July 2, 2019. He concluded that Pesina's work for Aegis was not the prevailing factor for any of her symptoms, but rather it was because of aging, gender, hypothyroidism, or a combination of them.

At request of Pesina's counsel, Dr. Daniel Zimmerman evaluated Pesina on February 19, 2020. Dr. Zimmerman found Pesina to have multiple diagnoses to both left and right extremities, and her work duties at Aegis were the prevailing factor for those diagnoses. Dr. Zimmerman rated Pesina at 4% impairment to the whole person under the Sixth Edition.

On June 7, 2021, the ALJ issued an award to Pesina of 2% impairment to the right wrist, referencing Dr. Zimmerman's rating. The ALJ awarded nothing for "alleged bilateral carpal tunnel," and no future medical treatment was awarded. Lastly, the ALJ found that her elbow injury did not arise out of and in the course of employment at Aegis.

Pesina requested the Board to remand for presentation of additional evidence. The Court relied on *Adam v. Ashby House Ltd.*, No. AP-00-0455-555, 2021 WL 1832461 (Kan. Work. Comp. App. Bd. April 26, 2021). There, the board granted remand because no party was in a position at that time to predict the nature of claimant's injury. Here, the Board vacated the ALJ's award and remanded the case for parties to present additional evidence to determine the nature and extent of Pesina's injuries. Aegis petitioned for review of the Board's order.

The Court of Appeals determined the Board's decision to be one that is considered nonfinal, stating that the Board clearly intended for the order to be "preliminary, preparatory, procedural or intermediate" in nature, and incidentally not subject to immediate judicial review.

Aegis argued that the Board's remand was unlawful, and therefore appealable, however K.S.A. 44-551(l) clearly permits the Board to remand "any matter" to the ALJ for further proceedings. Additionally, Aegis argued that even if the decision was nonfinal, it is still appealable under K.S.A. 77-608. In order for the statute to apply, it must pass the requirements of both 77-608(a) and (b). Pesina conceded that it passes 77-608(a) requirements.

K.S.A. 77-608(b) reads as follows:

> A person is entitled to interlocutory review of nonfinal agency action only if: … (b) postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

Respective to this statute, Aegis argued that postponing judicial review would result in irreparable harm or an inadequate remedy, but the argument fails to acknowledge K.S.A. 44-551(l)(1) that allows any matter to be remanded to the ALJ for further proceedings. Additionally, Aegis argued that "there will be no public benefit derived from postponement" because delay of resolution in this case will only encourage other litigants to do the same. However, the Court reasons that the main issue in this case is still unresolved, which is what compensation Pesina could receive for work injuries, and that would be more injurious to the public than remand.

This Court affirmed the Board's remand back to the ALJ for further proceedings. The order was a nonfinal agency action, and this Court does not have the jurisdiction to review such an order. Aegis' appeal was dismissed without prejudice.

Pesina v. Aegis Processing Solutions, 514 P.3d 400, 2022 WL 3330477 (Kan. Ct. App. 2022)

Q: When a claimant receives workers' compensation benefits from his employer, will the dual capacity doctrine apply as to civil liability to claimant's employer?

A: No, the dual capacity doctrine will not apply to a claimant's employer that already provides workers' compensation benefits.

Claimant Jason Jeffries was receiving workers' compensation benefits from his employer, United Rotary Bush Co. (URBC), after getting injured at work. He then filed a civil suit against URBC alleging negligent design and manufacture of the machine that he was operating at the time of injury. Jeffries claimed URBC was civilly liable under the dual capacity doctrine, which is a judicially recognized exception to the exclusive remedy provision of the Workers' Compensation Act. The case was dismissed on summary judgment by the District Court finding that the dual capacity doctrine does not apply when

the employer providing workers' compensation benefits is also the manufacturer of the machine that injured the employee.

The exclusive remedy provision, K.S.A. 44-501b(d), provides: "Except as provided in the workers' compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers' compensation act ...." (Emphasis added.)

Essentially, this doctrine means that an injured employee cannot maintain a civil suit against his employer for common law negligence if that employee is recovering, or could have recovered, workers' compensation benefits from his employer.

An exception to this remedy is the dual capacity doctrine, established in *Kimzey v. Interpace Corp.*, 10 Kan. App. 2d 165, 694 P.2d 907 (1985), which allows for an employee who is, or could be, receiving workers' compensation benefits from their employer, to maintain a civil suit against that employer or a third-party tortfeasor. If brought against the employer, the employer must occupy a second capacity that imposes obligations independent of those as the employer.

Jeffries argues two points: (1) a 2008 transaction involving URBC was not a merger, so URBC was conferred third-party obligations to Jeffries; and (2) if the 2008 transaction was a merger, then the dual capacity doctrine applies because the emerging entity assumes liabilities of the pre-existing entities.

The Court of Appeals rejects Jeffries' arguments. The Court ruled that the 2008 transaction in question was in fact a merger, and therefore no new entity was created, and so no additional liability was created or conferred upon URBC. Moreover, the dual capacity doctrine does not apply here because Jeffries' injury stemmed from operation of a URBC-manufactured machine, no additional/third-party liability was conferred upon URBC.

The Court of Appeals affirmed the District Court's ruling, stating their decision was reasonable and not an abuse of discretion.

Jefferies v. United Rotary Brush Corporation, 62 Kan.App.2d 354, 515 P.3d 743 (Kan. Ct. App. 2022)

Q. *Is the Kansas Workers' Compensation Act's exclusive remedy provision triggered when one company contracts out work to another and an employee of the subcontractor company dies on its premises while performing the work?*

A. Yes. The Kansas Workers' Compensation Act is broadly construed in terms of who comes under the coverage of the Act.

Scott's Welding Service, Inc. ("SWS") performed general fabrication, welding, and machine shop services. SWS contracted with a buyer, agreeing to manufacture and assemble three poly pipe trailers. SWS contracted out the painting of the trailers to Blackhawk Sandblasting and Coating, LLC ("Blackhawk"). Scott Stein, decedent, was

painting the trailers when one of them collapsed on him and killed him. The accident occurred on Blackhawk's premises.

Decedent's estate, Tara Stein, and the Steins' child sued SWS for negligence, alleging that SWS's failure to install a safety brace before providing the trailers to Blackhawk caused decedent's death. The district court granted SWS's motion for summary judgment. It held that the Kansas Workers' Compensation Act ("KWCA") barred the Steins' tort suit because SWS qualified as a statutory employer under K.S.A. 44-503(a). The Steins' appealed.

On appeal, the Steins' argued that SWS was not decedent's employer for purposes of KWCA coverage and that the statutory employer defense is not available to SWS because the accident did not occur on property under its control. The Kansas Court of Appeals affirmed the district court's decision.

The Court reasoned that the Kansas Legislature intended the KWCA to be liberally construed when it comes to coverage under the Act. K.S.A. 44-503(a) provides that an employer who contracts out contracted work is a statutory employer under the KWCA. Since SWS contracted out the painting work for the trailers to Blackhawk, SWS comes within the coverage of the KWCA as a statutory employer. As such, the Steins' negligence suit against SWS is barred, and the benefits within the KWCA are their only recourse for decedent's work-related death.

The Steins tried to argue that even if SWS is found to be statutory employer within the meaning of the KWCA, an exception nonetheless applies because the accident did not occur on premises SWS controlled. The Court shut down this argument as well because the Kansas Supreme Court has long-held that "in or about the premises on which the principal has undertaken to execute work" should be broadly construed to "include nearly anywhere where an injured claimant is working on behalf of the principal." Even though the decedent was on Blackhawk's property, the fact that he was performing the painting job for SWS meant that SWS was still a statutory employer under the KWCA.

Therefore, the KWCA's exclusive remedy provision is triggered, and the Steins' tort action against SWS is barred.

Est. of Stein by & through Stein v. Scott's Welding Serv., Inc., 508 P.3d 407 (Kan. Ct. App. 2022)

Q*. When a claimant files a workers' compensation claim and a federal lawsuit against his employer's uninsured motorist carrier of which the Kansas Workers' Compensation Fund is unaware, does K.S.A. 44-504 entitle the Kansas Workers' Compensation Fund to a subrogation credit on the settlement of the federal suit?*

A. Yes. K.S.A. 44-504(b) permits the Fund to attach a subrogation lien to a settlement in a separate "action against a third party that is legally liable to pay damages for the same injuries as those claimed in the workers' compensation action."

On December 12, 2016, Kendall Turner sustained a thoracic spine injury from a head-on collision while driving a truck hauling grain for Pleasant Acres LLC.

Mr. Turner sustained a previous back injury while working for a different employer about 25 years ago. He fell from a 15-foot stock tank and injured his low back. Additionally, a pinched nerve caused him to experience pain from his right shin to right ankle.

Mr. Turner filed a workers' compensation claim against Pleasant Acres LLC, who did not have workers' compensation insurance at the time of the accident. He subsequently impleaded the Kansas Workers' Compensation Fund ("the Fund") pursuant to K.S.A. 2016 Supp. 44-532a(a).

Unbeknownst to the Fund, Mr. Turner also filed a lawsuit against Continental Western Insurance Company ("Continental") in Kansas federal court. Continental served as Pleasant Acres' uninsured motorist coverage carrier. Mr. Turner alleged that the negligence of the other driver involved in the collision was what caused the vehicle collision. He claimed he suffered injuries to his spine and back and asked for damages including "pain and suffering, mental anguish, loss of time, loss of enjoyment of life, medical expenses, economic loss, permanent disfigurement, and permanent disability."

Mr. Turner and Continental reached a settlement agreement in which Mr. Turner agreed to the payment of $230,000.00 in exchange for releasing all claims arising out of the injuries, damages, and losses sustained by him in the 2016 accident. This federal lawsuit was settled without giving notice to the Fund. The Fund learned of Mr. Turner's settlement of the federal case at the regular hearing on his workers' compensation claim on June 11, 2019.

The ALJ denied the Fund's request for a subrogation credit under K.S.A. 44-504. The Fund appealed this finding, among others, to the Kansas Workers' Compensation Appeals Board ("the Board"), which affirmed the ALJ's findings in whole. The Fund appealed the Board's decision to the Kansas Court of Appeals.

The Court of Appeals' analysis involved interpreting K.S.A. 44-504. The statute serves two purposes: (1) preserve an injured worker's right to bring a claim for damages against a third party who caused the injuries; and (2) prevent double recovery for the same injuries.

The Court, first, found that the statute does not distinguish between the types of recovery the employer, or the Fund standing in the employer's shoes, can subrogate. Therefore, judgments and settlements for both tort and contract claims against third parties are subject to subrogation. Then, the Court held that the Fund can subrogate the amount of Mr. Turner's federal claim settlement to the extent of the compensation and medical aid awarded in his workers' compensation action. However, any portion of the settlement that was for loss of consortium or loss of services to a spouse is not subject to subrogation. These holdings carry out the Kansas Legislature's intent in preserving an injured worker's right to be compensated for work-related injuries but preventing double recovery.

The case was remanded to the Board to determine how much of Mr. Turner's settlement could be subrogated.

Turner v. Pleasant Acres LLC, 62 Kan. App. 2d 122, 125, 506 P.3d 963 (2022).

Q. *Can the Kansas Workers' Compensation Fund sue a general contractor to recover funds paid because of an insolvent subcontractor?*

***A.* Yes. When multiple potential employers are involved, specifically a principal and a subcontractor, who qualifies as an "employer" under K.S.A. 44-523a is not restricted to just one or the other.**

A construction general contractor (principal), Trademark, Inc., hired a subcontractor, Ballin, for a project. One of the subcontractor's employees, Juan Medina, sustained a compensable workers' compensation claim. The subcontractor did not carry workers' compensation insurance, so Medina impleaded the Kansas Workers' Compensation Fund. The ALJ awarded Medina compensation that the Fund had to pay.

The Fund subsequently filed a collateral action under K.S.A. 2020 Supp. 44-532a seeking reimbursement from the principal, who was not involved in the workers' compensation claim. The district court granted summary judgment for the Fund, and Trademark appealed. The district court also denied an award of attorney's fees for the Fund, which it cross-appealed. The Kansas Court of Appeals affirmed both decisions. The Kansas Supreme Court affirmed as well.

The principal argued that it was not Medina's "employer" as defined by K.S.A. 2020 Supp. 44-532a. The Kansas Supreme Court rejected this argument in holding that the Fund may assert the reimbursement action against either the insolvent employer (the subcontractor), or the solvent statutory employer (the principal), or both.

Schmidt v. Trademark, Inc., 506 P.3d 267 (Kan. 2022)

Q: *Does the Board have the authority to stay a workers' compensation proceeding in anticipation of a potential change in the controlling law?*

A: Generally, yes. Only if such a stay has been formally requested by the parties.

In *Guzzo v. Heartland Plant Innovations*, the ALJ considered the evidence of two physicians and determined Guzzo's impairment based on the AMA Guides 6th Edition opinion of the physician retained by Guzzo. Notably, this decision came down during the time period when the Supreme Court decision in *Johnson v. US Food Service* was still pending. Both parties appealed the decision on several issues, including whether the Sixth Edition mentioned in the Workers' Compensation Act is unconstitutional, whether Guzzo met her burden of proof in establishing need for future medical compensation, and the nature and extent of Guzzo's impairment. During oral arguments before the Appeals Board, a member of the Board asked the parties whether they wished to stay the proceedings until the Supreme Court decided *Johnson*. Guzzo agreed to a stay, but Heartland opposed it. Neither party formally requested a stay. In its decision, a majority of the Board found it lacked authority to issue a stay under K.S.A. 77-616(a) and K.S.A.

2020 Supp. 44-556(b). Guzzo timely appealed, arguing in part that the Board erred in finding that neither the Workers Compensation Act, K.S.A. 44-501 et seq., nor the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq., authorized it to stay workers compensation proceedings in anticipation of a potential change in the controlling law by the Supreme Court.

The Court of Appeals found that since Guzzo did not formally request a stay, she could not complain on appeal about the Board's failure to issue one. In coming to this conclusion, the Court noted that the KJRA states an agency may grant a stay on appropriate terms during judicial review. K.S.A. 77-616(a). By allowing the Board to "grant" a stay, the statute implies that there must first be a request to grant made by one of the parties. See K.S.A. 77-616(b). In Guzzo, neither party officially requested a stay from the Board so the issue was not preserved for appeal.

Guzzo v. Heartland Plant Innovations Inc., 490 P.3d 85 (Kan. Ct. App. 2021)

Q*. Did Kansas Supreme Court Administrative Order 2020-PR-016, which tolled statutes of limitations and deadlines to accommodate the COVID-19 pandemic, apply to workers' compensation proceedings?*

A. No. Order 2020-PR-016 does not apply to workers' compensation proceedings.

Tyler Haney alleged that he injured his shoulder while working as a police officer for the City of Lawrence. After Mr. Haney's attorney withdrew from representing him, he proceeded pro se at the preliminary hearing. The administrative law judge ("ALJ") found that Mr. Haney failed to prove that his alleged work injury was the prevailing factor causing his medical condition, need for treatment, or resulting impairment. The ALJ cautioned Mr. Haney about the upcoming deadlines since he was representing himself at the time.

Mr. Haney failed to take the matter to a regular hearing one year after the preliminary hearing as required by K.S.A. 2020 Supp. 44-523(f)(2). The City of Lawrence sought to dismiss the case. During a telephone hearing on the City's application, Mr. Haney stated that he had been working on finding an attorney. The ALJ gave Claimant a few weeks to do so.

Mr. Haney retained an attorney who filed a response brief on Haney's behalf. Mr. Haney argued that the Kansas Supreme Court Administrative Order 2020-PR-016 applied to workers' compensation proceedings and that the COVID-19 pandemic constituted good cause to extend the one-year deadline Mr. Haney missed. The ALJ rejected these arguments in granting the City's application for dismissal. The Board affirmed.

The Kansas Court of Appeals affirmed the Board's decision. It found that the Board correctly interpreted Order 2020-PR-016 to not apply to workers' compensation proceedings. While the Order applies to "judicial proceedings," the context of the entire order reveals that only proceedings in Kansas state courts are contained within this term. Therefore, workers' compensation proceedings do not count.

The COVID-19 pandemic was not a good faith reason for extending Mr. Haney's one-year deadline because he never explained how the pandemic had hampered his efforts. Furthermore, there is no evidence that Mr. Haney made any effort after the preliminary hearing to move his claim to a regular hearing.

Haney v. City of Lawrence, 507 P.3d 1150 (Kan. Ct. App. 2022).

Q: *When determining whether a claimant is entitled to work disability, do actual earnings constitute earning capacity if the Claimant's new employment includes periods with special assignments or projects where pay is at a higher level?*

A: Generally, Yes.

Four months into his employment, Williams injured himself. Williams received treatment and when he was released from care he was provided permanent restrictions. However, because his employer, Wellco, could not accommodate any permanent restrictions, it terminated Williams' employment. The doctors assigned him a 25% functional impairment of the body as a whole under the AMA Guides 6th Edition. Because his functional impairment was greater than 10%, Williams could qualify for ongoing disability payments if he suffered a post-injury wage loss of at least 10% because of the work injury.

Following his termination and medical release, Williams secured employment with Long Trucking, LLC. Long agreed to hire him as a full-time truck driver for $16 per hour, but limited Williams' duties strictly to driving and told him violation of the medical restrictions would be cause for termination. The availability of hours for Williams varied according to the season and weather, so some weeks Williams did not work at all but others he worked at least the full 40 hours. Further, for 11 days that year, Williams and other employees at Long Trucking, LLC were assigned to help clean up a natural disaster in Missouri and were paid the "prevailing wage" of $30 per hour. During this time, Williams also worked longer hours. Using the total pay Williams earned following his termination from Wellco, the two weeks of uncommon federal pay pushed his income loss to only 9%. Williams retained counsel and argued that he was entitled to ongoing disability as his actual earning did not constitute his earning capacity. However, the ALJ determined Williams could not overcome the presumption that his actual earning constituted his earning capacity and therefore he was not entitled to any disability payments. Williams appealed this decision.

Williams made two arguments before the Board that his actual earnings did not constitute his earning capacity: (1) that the truck driving position with Long Trucking was an accommodated position that did not exist in the open market; and (2) that he received a higher than usual rate of pay and worked excessive overtime hours during the two-week period, making those wages unique and not reflective of his earning capacity. For the first argument, the Court agreed with the Board's finding that there was no evidence to suggest that Williams' job with Long Trucking was an accommodated position that did not exist in the open market. As for the second argument, the Court opined that the statute (K.S.A. 2020 Supp. 44-510e(a)(2)(E)) still requires calculating the difference between pre-

injury average weekly wage and post-injury average weekly wage. The Kansas Supreme Court's disapproval of cherry-picked weeks when comparing pre- and post-injury average weekly wage remains intact even with the 2011 amendments because the Board is still required to consider actual earnings when they are available. Further, the Board concluded that the new work Williams completed over a two-week period may have been unusual, but it was work that all his coworkers also performed. So it was appropriate to impute those wages. The Court found evidence in the record to support the Board's conclusion.

Williams v. Wellco Tank Trucks, Inc., 491 P.3d 660 (Kan. Ct. App. 2021)

Q*. What is the personal comfort doctrine and when is an injured worker considered outside the scope of his employment when on a break?*

A. The personal comfort doctrine is when an employee engages in acts which minister to personal comfort but do not leave the course of employment. In some cases, the activity is considered inherent in the work despite its personal risk. In example, walking to use the restroom, smoking during a break, grabbing a cup of coffee may not be part of someone's job, but are permissible activities which may lead to workplace injuries.

In this case, an employee was on break and elected to move his motorcycle from an illegally parked handicap parking spot to another parking spot. In the process, he fell from his motorcycle and sustained an injury. The Court of Appeals affirmed the lower court's decision that there were sufficient facts demonstrating the Employer allowed employees to move vehicles during their break and such an activity benefitted the Employer because it was improperly parked. Further, the Court indicated the Employer retained control over the employee because he was required to remain on the premises and was on call via his radio. Thus, the Court maintained the employee's responsibilities to the Employer continued through his break in which he sustained an injury.

In this unpublished opinion, the Kansas Court of Appeals expanded its definition of the personal comfort doctrine holding that moving a personal motorcycle during a break and falling was within an employee's course of his employment because the Employer maintained control over the Employee.

Thach v. Farmland Foods, Inc., 2021 WL 5990059 (Kan. Ct. App. Dec. 17, 2021) (unpublished decision)

Q. *What is the standard an employer must demonstrate to determine if an employee is terminated "for cause" to disallow wage loss in a work disability claim before an Administrative Law Judge or the Kansas Workers Compensation Board?*

A. An Administrative Law Judge and the Kansas Workers Compensation Board shall evaluate whether the termination was **reasonable, given all the circumstances**. The Court shall consider whether the claimant made a good faith effort to maintain his or her employment and the employer exercised good faith. **The primary focus should be to**

determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments.

While an injured workers' compensation claim was pending, he was terminated for violating work restrictions imposed by his doctor. His supervisor observed him kneeling, reaching under a table to retrieve a glove off the floor with a long hook. However, his work restrictions prohibited kneeling. The termination followed his third write-up within the year. The Administrative Law Judge found the employee was not entitled to temporary total disability benefits because he had been terminated for cause. The Board modified the Award, finding the employer was simply getting rid of a troublesome employee to avoid paying work disability. Ultimately, the Board held the employer did not terminate the employee in good faith, but as a subterfuge to avoid work disability. The Court of Appeals held the evidence considered by the Board, including each of the three write-ups, was sufficient evidence to support the finding the injured worker was entitled to work disability payments.

Oliver v. National Beef Packing Co., 2021 WL 5984170, (Kan. Ct. App. Dec. 17, 2021) (unpublished opinion)

Q. *When an injured employee files a claim for an accident and proceeds to a Hearing before an Administrative Law Judge, is the employee precluded from bringing a new repetitive trauma claim to the same body part?*

A. No. The Kansas Court of Appeals held a firefighter was not barred from bringing a repetitive trauma claim for his hearing loss because he lacked evidence to bring the repetitive trauma claim at the time he litigated his single accident claim.

In this case, Patrick O'Neal filed a workers compensation claim alleging bilateral hearing loss and tinnitus stemming from a fire truck's air horn going off inside the fire station from a single event on February 23, 2009. Per Kansas law, this was filed as a "single accident." Following May 10, 2016 testimony by the medical expert on behalf of the employer, O'Neal filed a new claim alleging repetitive trauma from his employment as a firefighter caused hearing loss at the time his accident claim was pending on July 11, 2016.

The Employer argued Mr. O'Neal was barred from raising the repetitive trauma claim because it could have been brought at the time of the first claim. The legal challenge is called "res judicata" or "claim preclusion." As explained by the Kansas Court of Appeals, a claim is precluded if four elements are satisfied: (1) the same claim; (2) the same parties; (3) claims that were or could have been raised; and (4) a final judgment on the merits. If any element is not met, res judicata does not apply. The Kansas Court of Appeals held the claims did not meet the first and third element. First, the repetitive trauma claim was not the same as his single accident claim. Second, Mr. O'Neal did not have any knowledge at the time of filing his single accident claim that his injuries were caused by repetitive trauma and his window had closed to add evidence in his single accident claim had closed. Thus, Mr. O'Neal was not precluded from raising his repetitive trauma claim. The Court of Appeals additionally ruled the employer was on notice of the

repetitive trauma because their expert provided the opinion and they had evidence dating back to 2002 of his hearing loss.

O'Neal v. City of Hutchinson, 2021 WL 5408630 (Kan. Ct. App. November 19, 2021) (Unpublished opinion)

Q. *When an Administrative Law Judge grants a motion for extension to proceed to hearing following three years of an application for benefits and the timeframe for that extension expires, does the injured worker waive his or her rights to proceed to a Hearing?*

A. No. The Court of Appeals held there is no law concerning a second motion to extend the deadline for a Regular Hearing following an application for benefits.

The Court previously interpreted failure to have a Regular Hearing or settlement within three years is a time bar. *Glaze v. J.K. Williams*. In this case, the Court of Appeals distinguished the previous ruling and interpreted K.S.A. 44-523(f) when there is a previously granted motion for extension. Ultimately, the Court of Appeals allowed for an open-ended interpretation by the Administrative Law Judge concerning whether there is good cause for a second extension of time per K.S.A. 44-523(f), even after the time lapsed for the first extension.

On November 24, 2014, Claimant alleged a work accident to her knee. On May 29, 2015, Claimant filed an Application for Hearing with the Division of Workers Compensation. Before the statutory deadline of May 29, 2018, Claimant moved to extend the time for Hearing under KSA 44-523(f)(1) (2016) because she had not yet reached maximum medical improvement. The ALJ issued an Agreed Order (approved by the parties) extending the deadline for a Regular Hearing to November 29, 2018. The deadline passed without action from the parties. Respondent moved to dismiss the claim while Claimant moved to extend the deadline because she had not yet reached MMI. The ALJ denied the motion to dismiss and granted the motion to extend time. A Regular Hearing was held and the ALJ awarded compensation in July 2020. Respondent appealed the award arguing the ALJ erred by extending the time for a hearing and by not dismissing the claim.

The Board affirmed the ALJ ruling that **once Claimant established good cause to extend the deadline by filing her first extension then her claim remained viable until good cause no longer existed**.

The court evaluated the issue under, KSA 44-523(f)(1), upon filing a second motion for extension outside of the timeframe allowed, did the ALJ improperly grant such an extension? The Court determined KSA 44-523(f) only contains two conditions to keep a claim viable: (1) Claimant must file a motion to extend prior to the expiration of the three-year limitation; and (2) good cause must exist for the claim to be extended. Under this threshold, Claimant met both conditions. The Court found the statute only takes into consideration one motion to extend, not multiple motions. Despite the argument presented by Respondent that a second extension should have been filed prior to the

expiration of the first extension's expiration, the Court found no such statutory requirement.

The statute is silent concerning multiple motions to extend, so the Court of Appeals affirmed the Board's determination that there were only two requirements necessary to keep Claimant's claim viable: (1) moving to extend the deadline within the three-year limit; and (2) showing good cause for an extension.

Gerlach v. Choices Network, --- P.3d --- 2021 WL 5264318, (Kan. Ct. App. November 12, 2021) (Choices Network did not file a petition for review).

Q. *Can a criminal court order restitution to an insurance carrier for the medical benefits provided to the victim of a crime?*

A. Yes, where a district court awarded criminal restitution in the amount of medical benefits to the insurance carrier, the Kansas Supreme Court upheld the award as permissible. The defendant argued the award was violative of his constitutional right to a jury trial, and the Court severed the portions of the statute violative of his constitutional rights.

In this case, Mr. Robison was charged with two counts of battery of a law enforcement officer. Mr. Robison injured Corporal Bobby Cutright to the point Cutright required medical treatment from Newman Regional Health. Lyon County's insurance carrier covered Corporate Cutright's medical bills. The District Court agreed to consider the State's request for restitution and ordered Mr. Robison to pay restitution in the amount of $2,648.56 to reimburse the workers compensation insurance carrier for medical expenses paid. Defendant challenged the award of medical expenses as violative of his constitutional right to a jury trial.

Through a statutory and constitutional analysis, the Kansas Supreme Court held the criminal restitution awarded was not violative of Mr. Robison's right to a jury trial to determine damages. The Court held there is a distinction between the civil damages and criminal restitution. Within this difference, criminal restitution is recognized as rehabilitative because it forces a defendant to confront, in concrete terms, the harm his actions have caused. A defendant cannot foreclose restitution in a criminal case through execution of a release of liability or satisfaction of payment by the victim. Ultimately, the Kansas Supreme Court held a court may enforce its order of a criminal restitution through lawful means if the court has cause to believe a defendant is not in compliance. The Court decided criminal restitution does not violate the Kansas constitution's right to a jury trial and severed relevant portions of the statute that would violate such right.

State v. Robison, 496 P.3d 892 (Kan. 2021).

Q. *What is the significance of the continued reference to the A.M.A. Guides, Fourth Edition within the Kansas Workers Compensation Act?*

A. The Kansas Court of Appeals held any reference to the A.M.A. Guides, Fourth Edition occurring after January 1, 2015 is irrelevant and use of the A.M.A. Guides, Sixth Edition is "statutorily required."

In this claim, the injured worker sustained a bilateral upper extremity injury where his expert had provided impairment ratings per both the A.M.A. Guides Fourth and Sixth Editions. He argued the A.M.A. Guides, Fourth Edition should be taken into consideration to adequately consider "competent medical evidence." The Court of Appeals explained the parties and courts do not choose between using the Fourth Edition or the Sixth Edition. Rather, the Sixth Edition is statutorily required.

Zimero v. Tyson Fresh Meats, --- P.3d --- (Kan. Ct. App. 2021).

Q. When an employee sustains a work-related accident which led to a medial meniscal repair, but the accident was determined not the prevailing factor for the employee's need for a total knee replacement – does the fact a work-related injury renders preexisting arthritis symptomatic render the total knee replacement compensable?

A. No. The Court of Appeals proceeded with an evaluation of the prevailing factor test with the secondary injury rule noting statutory language: "an injury is not compensable solely because it aggravates, accelerates, or exacerbates a preexisting condition or renders a preexisting condition symptomatic."

Further, the Court said, all injuries, including secondary injuries, must be caused primarily by the work accident. Specifically, "the Board has traditionally denied total knee replacement surgeries when it has found preexisting arthritic conditions, not the work-related accident, caused the need for the knee replacement."

An additional important note within this case was the determination that the American Medical Association Guides to the Evaluation of Permanent Impairment may be judicially noticed by the Court of Appeals because it would be unnecessary to require an administrative law judge to require admission of the Guides into evidence in every single workers compensation hearing given "there is no disputing their content." Additionally, the Court additionally found the decision did not violate the Employee's constitutional rights because he still had an adequate substitute remedy available.
Perez v. National Beef Packing Co., 494 P.3d 268 (Kan. Ct. App. 2021).

Q*. Can the Kansas Workers Compensation Fund sue a general contractor to recover funds paid because of an absolvent subcontractor?*

A. Yes.

A construction general contractor (principal) hired a subcontractor. One of the subcontractor's employee's sustained a compensable workers' compensation claim. The subcontractor did not have workers' compensation insurance and the employee recovered workers' compensation benefits from the Kansas Workers Compensation Fund per an award from an Administrative Law Judge. The Kansas Workers Compensation sued the principal, who had not been involved in the workers' compensation claim, seeking recovery of costs paid to the employee and attorney's fees.

The Kansas Court of Appeals held the Workers Compensation Act mandates that a principal contractor is liable for the payment of workers compensation when its

subcontractor is uninsured or insolvent. The primary aim of the Act is the prompt payment of claims for injured workers. However, on the issue of attorney's fees, the court held there is no statute which would authorize an attorney fee payment to the Fund and the lower court had correctly denied the Kansas Fund's motion for attorney fees.

Schmidt v. Trademark, Inc., 493 P.3d 958 (Kan. Ct. App. 2021).

Q: Whether the statute of limitations for an assigned claim of breach of contract against an insurance company and its agent for failing to procure desired insurance coverage begins running at the time of the breach by the insurance company, or at a later date when the assignee discovers the breach?

A: Yes, it begins running at the time of the breach, not the discovery.

When bringing a claim for breach of an oral contract for procurement of insurance coverage, the three-year statute of limitations period begins to run when the breach occurs, not when the injured party or assignee is harmed by the breach. *Dupass v. Kansas Ins., Inc.*, 491 P.3d 660 (Kan. Ct. App. 2021), *review denied* (Dec. 6, 2021).

In *Dupass*, the plaintiff of the original action, Dupass, was severely injured in a motor vehicle accident caused by another driver, Woofter. Woofter thought his vehicle was covered by a $1,000,000 liability policy, but during discovery found it was only covered by a $100,000 motor vehicle policy. In the original Arizona lawsuit, Dupass was granted a $500,000 judgment against Woofer in December 2016. They entered into a settlement agreement whereby Woofter agreed to pay $120,000 and assign to Dupass any and all claims Woofter had against his insurance agents, Kansas Insurance, Inc. On December 7, 2018, Dupass filed a petition against Kansas Insurance and several of its agents in Kansas District Court for tort claims and a breach of contract claim for failing to procure the insurance which was part of Woofter's oral agreement with Kansas Insurance, including failure to place his vehicle under the $1,000,000 liability policy. The last policy review Woofter had with Kansas Insurance was in January 2014. The district court dismissed the tort claims, holding they were not assignable. The District Court granted Defendant's motion for judgment on the pleadings, holding the breach of oral contract claim accrued at the time of the breach, not at the time the breach was discovered during the underlying case brought in Arizona. Therefore, the three-year statute of limitations period for breach of unwritten contracts barred Dupass from proceeding. Dupass appealed the decision.

Dupass argued that the agent for Kansas Insurance breached an unwritten contract between Woofter and Kansas Insurance as Woofter had directed them to place his vehicle under his $1,000,000 umbrella policy and not under the $100,000 motor vehicle insurance policy. Dupass further argued the court erred in not finding the limitations period was tolled by the underlying Arizona case, and that the period began to run upon the discovery of the breach, shortly before December 2016. Kansas Insurance argued that the alleged oral contract duty included providing "adequate" coverage, which was accomplished with the motor vehicle policy with a $100,000 policy limit. They also asserted that regardless of the alleged breach, the statute of limitations for the breach of oral contract claim was three years under K.S.A. 60-512, and had expired since the breach occurred at the last policy review in January 2014.

In finding that the claim for breach of a duty to procure insurance could be brought as a breach of unwritten contract claim, the Court of Appeals proceeded with analyzing the statute of limitations issue. K.S.A. 60-512 provides a three-year statute of limitation for causes of action based on unwritten contracts. "As a general rule, a cause of action accrues when the plaintiff could have first filed and prosecuted his [or her] action to a successful conclusion." Despite Dupass' arguments that the underlying action in Arizona tolled the claim, the Court found the breach occurred during the last policy review with Woofter in January 2014, and reiterated the principle that an assignee of a claim "stands in the shoes of the assignor," including assuming their statute of limitations period. Furthermore, the Court denied Dupass' tolling argument because the breach of contract claim for Woofter did not rely on a preliminary finding in the underlying case in Arizona, (such as a claim against a drafter of a will pending determination of the underlying contested will decision on whether the will was valid or not), and existed at the time of the breach in January 2014. Therefore, the Court of Appeals affirmed the decision granting Kansas Insurance's motion for judgment on the pleadings, finding the statute of limitations had already run for Dupass' assigned breach of contract claim.

Dupass v. Kansas Ins., Inc., 491 P.3d 660 (Kan. Ct. App. 2021), *review denied* (Dec. 6, 2021).

Q*. Can the Kansas Court of Appeals remand a case to the Board demanding reimbursement from the Workers' Compensation Fund that was issued by the Kansas Director of Workers' Compensation?*

A. No. The Kansas Court of Appeals improperly remanded the case to a jurisdiction that had not previously decided the case.

The issue arose between two insurance carriers to determine which owed benefits to one another for certain time frames. The issue had originally been decided between the carriers by the Director, then the District Court of Kansas. However, the Kansas Court of Appeals remanded the claim to the Kansas Workers Compensation Appeals Board to include the Workers Compensation Fund. Upon the Board determination, Travelers appealed the decision alleging jurisdiction was inappropriate. The Kansas Court of Appeals agreed.

Travelers Casualty Insurance v. Karns, --- P.3d --- (Kan. Ct. App 2021).

Q: When an employee injured his knee descending stairs while at work, was this considered a normal activity of day-to-day living?

A: No. In these circumstances, an employee descending stairs while at work arose out of his employment because his work required he regularly descend stairs while wearing a 30-40 lb. tool belt.

In *Van Horn*, the claimant was working for Blue Sky Satellite and his work duties involved repeatedly climbing ladders and stairs, with a 30-40 lb. toolbelt affixed to his waist while installing satellite dishes and performing service calls. On the date of his injury, he was descending a flight of stairs while wearing his tool belt when he experienced an onset of pain in his knee. There was no fall, twist, or other actual physical incident that clearly

caused the injury. Testimony from the Claimant and the rating physicians revealed no prior knee injuries, but that he likely had degenerative tissue before the injury. The employer denied the claim as an accident arising out of the normal activities of day-to-day living.

K.S.A. 44-508(f)(2)B) provides that an injury does not arise out of and in the course of employment if it was an injury that resulted from the normal activities of day-to-day living. The employer argued walking down stairs was an activity of day-to-day living, with no particular employment character. They cited to several cases for support, including *Johnson v. Johnson County*, where the Court reversed the award of benefits to the Claimant, with prior knee injuries, who injured her knee standing up from her chair while reaching for a file, finding that while the employee was at work, the act of standing up was not "fairly traceable to the employment" in contrast to the hazards which a worker "would have been equally exposed apart from the employment." *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 790, 147 P.3d 1091 (2006). The claimant argued that his employment required him to repeatedly climb ladders and stairs, with a heavy toolbelt affixed to his waist, while installing satellite dishes, and that in his normal nonemployment life he did not climb stairs or ladders at this rate and did not do so with a 30-40 lb. toolbelt strapped to his body.

The Court affirmed the Board's award of benefits finding that claimant had suffered a compensable injury arising out of and in the course of his employment as he satisfied his burden showing it was more probably true than not that he was performing job-related activities which were different from his normal day-to-day activities. Specifically, the Court stated that "[w]hile Van Horn could climb stairs at home, many activities, while done at home or on a daily basis, can also be job-related activities, such is the case here." Thus, they affirmed the Board's finding that ascending stairs with the added weight of the tool belt, during a service call for Blue Sky, was causally connected to claimant's employment, and affirmed the award of benefits accordingly.

Van Horn v. Blue Sky Satellite Services, 491 P.3d 658 (Kan. Ct. App. 2021)

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