KANSAS CASE LAW UPDATE

2013 Spring Client Seminar

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Pre-2011 Amendments Cases

Fernandez v. McDonald's, Kansas Supreme Court 2013

Issue: Work disability for undocumented worker

Facts: Ms. Fernandez was an undocumented worker who injured her back at work in 2007. Following treatment, she was awarded work disability of 59% based on 100% wage loss and 18% task loss. Respondent appealed, arguing that Ms. Fernandez should be ineligible for work disability based on her immigration status.

Decision: Respondent's argument centered on K.S.A. 44-510g(a), which provided that, "[a] primary purpose of the workers compensation act shall be to restore the injured employee to work at a comparable wage." Since Respondent could not return Ms. Fernandez to work at a comparable wage pursuant to federal law, she should not be allowed to recover for wage loss. However, the Kansas Supreme Court found that this section does not govern the calculation of wage loss for work disability purposes. The language of the Act did not contain a provision preventing an undocumented worker from getting work disability. Therefore, the Court was not going to read this into the statute. The 2011 Amendments have changed this result by requiring that an employee be able to legally enter into a contract for employment in order to be eligible for work disability benefits.

Scott v. Hughes, 275 P.3d 890 (Kan. App. 2012)

Issue: Co-worker liability

Facts: Defendant Hughes was driving his crew to a job site when they were involved in an accident. One crew member died and two others were severely injured. The injured crew members, and the surviving spouse of the deceased crew member brought a civil suit against Defendant Hughes. Defendant Hughes was intoxicated at the time of the accident. In pre-trial litigation, the Court found that the coming and going rule applied and therefore, Defendant Hughes was not acting in the course and scope of his employment. Likewise, the jury found that Hughes was not in the course and scope of his employment and therefore recovery was allowed at trial. Defendant appealed.

Decision: While this was a civil action, the Court of Appeals applied workers' compensation laws to the situation. Looking at oil field cases, the Court determined that several factors were important: (1) Defendant Hughes was paid mileage for the trip to the job site, (2) the crew was taking the shortest and most direct route to the job site, and (3) for this particular employer, the driller (Defendant Hughes), was typically in charge of getting his crew to the job site. The Court found all these facts pointed to the conclusion that Hughes was covered by the

Workers' Compensation Act. As such, civil actions against him by his co-workers were barred. It is unclear whether the co-workers were within the course and scope of their employment at the time of the accident. However, the Court of Appeals found that this would have no bearing on the outcome of the case. If a negligent co-worker is covered by the Act, injured employees cannot bring an action against the negligent co-worker. Lastly, nothing in the 2011 amendments would appear to change the outcome of this case.

Camp v. Bourbon County, 281 P.3d 597 (Kan. App. 2012)

Issue: Calculation of work disability

Facts: Mr. Camp initially injured his back in 2000. He settled his claim and continued working for Bourbon County. His back popped again in 2005. In 2008, he complained of back pain which he attributed to driving a dump truck over a bumpy road. Dr. Burton then recommended increased restrictions and Mr. Camp was terminated. Mr. Camp filed an Application for Review and Modification of his original settlement and also filed an Application for Hearing, alleging a new back injury in 2008. At regular hearing, Mr. Camp's review and modification was limited to the 415 weeks immediately after the injury, significantly reducing his work disability award. Mr. Camp appealed.

Decision: The Court of Appeals upheld this calculation of work disability. Therefore, a claimant is not entitled to receive work disability benefits more than 415 weeks after the injury, whether any benefits were received during those weeks or not. This will serve as one of the few limitations on any running awards entered prior to the 2011 amendments.

Omar v. Tyson Fresh Meats, Inc., 276 P.3d 838 (Kan. App. 2012)

Issue: Application for Post Award Medical

Facts: Mr. Omar was initially injured when a beef carcass fell on his neck and shoulders. After treatment, the ALJ awarded impairment for a shoulder injury, but denied impairment for any neck or back injury. This was affirmed on appeal. Mr. Omar then filed an Application for Post Award Medical requesting back treatment. The ALJ and Board denied the Application as the back was not included in the original Award.

Decision: The Court of Appeals upheld the denial of medical treatment for the back injury. A key distinction to the Court of Appeals was that Mr. Omar never tried to argue that his back injury was a natural and probable consequence of his original injury. Instead, he tried to argue that it was a part of the initial injury itself. Based on the opinion, it appears if he had just argued this, he would have won. Instead, his argument that the back was part of the injury the whole time was not supported by the Award of the ALJ. Therefore, the denial of treatment was appropriate.

Duxbury v. Sonic Drive-In, Docket No. 1051973 and 1051974

Issues: Accident and Arising Out Of

Facts: Claimant worked as a car hop for Sonic. She began experiencing pain in her lower back and left hip approximately three weeks before May 17, 2010. She went to her primary care physician complaining as she was concerned that her running activities were causing problems. She also worked full time at the YMCA. On May 17, 2010, she was walking briskly while working, pivoted around a corner, felt severe pain and a pop in her left hip, and fell to the ground. She alleged both repetitive injury to her left hip and lower back as well as an acute accident on May 17, 2010. The ALJ denied benefits finding that she did not suffer an accident or repetitive trauma.

Decision: The Board affirmed the denial on both claims. Medical evidence supported the conclusion that she had a stress fracture at the time of her fall on May 17, 2010. The Board also agreed that walking was a day to day activity and that the mere fact that Claimant alleged she was walking faster due to her job duties did not change that. The Board equated her quick walking with her large amounts of recreational running. In short, walking is not a work risk. This matter has been appealed to the Court of Appeals and it is still pending.

Perez v. Midwest Pallet, Docket No. 1060838

Issues: Notice/written claim

Facts: On December 13, 2005, Claimant was struck in the eye by a nail gun. He eventually came under the care of Dr. Stiles. He continued to follow up with Dr. Stiles and Respondent paid for Claimant's November 28, 2008 evaluation on May 30, 2008. Claimant followed up with Dr. Stiles annually, though it was unclear from the evidence if Respondent ever paid for any of these visits. He last saw Dr. Stiles on November 18, 2011. Written claim was filed on May 17, 2012. Further benefits were denied following the Application for Hearing.

Decision: Dr. Stiles was still authorized as of November 18, 2011. If Respondent knows Claimant is continuing to obtain treatment which it no longer wants to authorize, Claimant must be notified. There was no evidence to that effect in this case, so the Board felt Dr. Stiles was still authorized. Therefore, Claimant did file a written claim within 200 days of the last authorized treatment. Employer also failed to file a report of accident. Therefore, the time limit for filing an Application for Hearing was also extended. This case highlights the importance of communicating with an injured worker with respect to the status of medical care. If a doctor has been authorized and that authorization is going to cease, absent a release from the doctor, Claimant should be notified immediately (as should the doctor).

Post-2011 Amendments – New Act Effective May 15, 2011

Navinskey v. Advanced Protective Coating and Performance Contracting Group

Issues: Causation for multiple employers

Facts: Mr. Navinskey worked for Advanced as a painter until June 3, 2012. At that time, Advanced was purchased by Performance. Before the sale, Mr. Navinskey began having problems with his bilateral hands. He was hired by Performance following the sale and did work

for Performance. He sought medical treatment on June 12, 2012. The only issue was which employer was responsible.

Decision: The Board agreed with the ALJ that the prevailing factor for Mr. Navinskey's injuries was his employment at Advanced, not at Performance. Mr. Navinskey would technically have two dates of injury for two alleged claims. However, Mr. Navinskey did not prove that his work duties at Performance were the prevailing factor in his need for treatment. Therefore, benefits were ordered to be provided by Advanced.

Hart v. T & T Management Co., Inc., Docket No. 1060240

Issue: Causation

Facts: Claimant developed a DVT while standing for a long shift at work. The ER doctor noted that "the cause of the problem was unknown" and that work activities "likely aggravated the problem." Claimant was significantly obese and smoked. Dr. Zimmerman indicated that the DVT was work related.

Decision: While neither doctor provided any reasoning or support for their decision, as Claimant had the burden of proof, this would be sufficient for the case to be denied. If this had been a more typical orthopedic injury, rather than a DVT, the result probably would have been different. The ALJ would probably have ordered an IME.

Hinds v. Excellence in Drywall, Docket No. 1059822

Issues: Drug Testing

Facts: On February 21, 2012, claimant fell from a scaffold and underwent immediate emergency surgery that day. Drug test also was positive but only used qualitative screening, not gas chromatography as required by the Kansas Act. The hospital refused to perform this test on the sample without claimant's permission or court order. Respondent filed a motion seeking to compel testing pursuant to the statute. The ALJ denied this and Respondent appealed.

Decision: The Appeals Board ordered the claimant to consent to the test. Refusal to consent to the test would be tantamount to a refusal under K.S.A. 44-518 that would allow termination of benefits for refusal to obstructing treatment. The ALJ had no jurisdiction over the hospital, so the proper remedy was ordering the claimant to consent. If claimant failed to do so, then Respondent could terminate benefits.

Robles v. Braums, Inc., Docket No. 1061870

Issues: Arising Out Of Employment

Facts: Claimant clocked out on February 16, 2012, walked out of the facility, crossed the parking lot, and stepped on a black rubbery hose. She twisted her right ankle and sought medical treatment. The parking lot was dry and the weather was good at the time. She was wearing

tennis shoes and was carrying only her purse. She was walking at normal speed. Respondent contended that walking was an activity of daily living and that this was a neutral risk to the claimant. The ALJ ordered benefits and Respondent appealed.

Decision: The Board acknowledged that walking was a normal activity of day to day living. However, the distinction that the Board found was that because Respondent's business relied on a heavy stream of customers in its parking lot, the presence of the piece of hose that Claimant stepped on was a direct result of that traffic. Stepping on this hose was not simply walking. The Board summarily dismissed the neutral risk analysis as a neutral risk is "a situation where there is no explanation for the cause of the accident." In this case, the cause was known.

Wenrich v. Duke Drilling Co., Docket No. 1060610

Issues: Drug Testing; Fighting/Horseplay

Facts: On April 11, 2012, Claimant was working on a drilling crew. Claimant became involved in a verbal confrontation over where a ditch was to be placed. This led to punches being thrown and Claimant eventually lost his balance and fell, fracturing his left hip. At the hospital, Claimant tested positive for marijuana. Witnesses testified that they were not sure who started the fight. There were also no indications that claimant was visibly impaired. The ALJ denied benefits based on the drug test.

Decision: The Board affirmed the denial but did so based on fighting. Because it was easier to reach this decision, the Board did not address the validity of the drug test in this situation. Because claimant was clearly involved in a fight with the co-employee, the Act now precludes any benefits. The decision is extremely to the point and makes no analysis of the facts involved, such as who started the fight or whether the employer had allowed such activity in the past. Based on this, the standard under the Act now appears to be much more cut and dry. Injuries that result from fighting or horseplay would appear to be not compensable no matter the circumstances.

Reed v. Plastic Packaging Technologies, Docket No. 1061812

Issues: Drug Testing/Impairment

Facts: Claimant tested positive for marijuana following an injury on July 23, 2012. He denied smoking any marijuana after his negative employment screening drug test on July 2, 2012. However, after the positive test, he learned that he had unknowingly ingested marijuana brownies. He testified he did not know about this and he was not impaired in any way at the time of his injury on July 23, 2012. Claimant's supervisor admitted that he did not see any evidence during Claimant's shift that he was impaired in any way. The ALJ found that this was sufficient to overcome the presumption of impairment and awarded benefits. Respondent appealed.

Decision: The Appeals Board agreed. A positive drug test does not automatically preclude benefits. A drug test that meets the statutory threshold for impairment can be rebutted by clear

and convincing evidence from the worker. In this case, the supervisor's admission that the claimant was not visibly impaired or acting out of the ordinary was sufficient to rebut this presumption. Claimant had been working a forklift without problem for 11 hours prior to this accident.

Jones v. Junction City Wire Harness, Docket No. 1059933

Issue: Admissibility of Drug Test

Facts: Claimant crushed his right finger at work on February 2, 2012. He went to the ER and submitted a urine sample for a drug screen at Respondent's request. The test was positive for marijuana metabolite and Claimant was terminated. The nurse testified that she took the sample from Claimant at the request of Respondent, who was a client of the facility. The sample was sent to MEDTOX for further testing and the positive test was confirmed. Neither the nurse nor MEDTOX saved the sample or a split sample. The ALJ excluded the evidence because the statute requires that "a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test" and this was not done.

Decision: The Appeals Board affirmed the decision. Respondent argued that this requirement only applies when the employer takes the sample, not a medical facility. The Appeals Board did not agree with this distinction. The Board felt that such an interpretation would allow employers to circumvent this requirement by having drug tests arranged at a third party. As such, it is imperative to make sure that whatever facility an employee is sent to strictly adheres to all requirements for drug testing, including the use of gas chromatography, the proper chain of custody, and that a split sample is made available to the claimant.

Martin v. Staffpoint, Docket No. 1058718

Issue: Drug Test

Facts: Claimant alleged that on October 11, 2011, she injured her back as a result of repetitive lifting at work. Due to transportation issues (at least according to Claimant), she did not make it to OHS until October 14, 2011 and a drug test was positive for cocaine and amphetamine. A confirmatory test was also positive. Claimant felt her positive test results were due to prescriptions for Xanax and Adderall. She asked to be retested on several occasions, but this was not done. The ALJ allowed benefits.

Decision: The Appeals Board confirmed. A drug test three days after the accident was not done within a reasonable time and therefore was not admissible. Respondent tried to argue that Claimant intentionally delayed going to OHS and that delay was Claimant's fault. However, there was no evidence that Claimant knew she was going to be drug tested, so the Board disagreed. The Board also felt that even if the test had been done in a reasonable time frame that the requirement for a split sample was not met and the evidence would be inadmissible for that reason as well. Once again, the technical requirements for the drug screen were shown to be very rigid and difficult to meet. Medical providers must be aware of all of the requirements and adhere to them very strictly.

Rybeck v. Husky Hogs, LLC, Docket No. 1059545

Issue: Accident

Facts: On November 3, 2011, Claimant was assisting a driver who fell on top of a trailer. Claimant was struck and knocked to the ground as well. He alleged injury to his left shoulder, neck, and low back. He also had a long history of low back problems, including a 2008 strain lifting a refrigerator and a 2009 compression fracture after an ATV fall. Dr. Fluter's report indicated that his work injury was the prevailing factor in his complaints at the time of the hearing. Claimant indicated he was not having any problems just prior to the work injury. Dr. Estivo felt that the problems were pre-existing. Dr. Carabetta performed an IME. He found that the work injury was the prevailing factor for some myofascial pain in the left upper trapezius, but that the left shoulder and low back problems were pre-existing. Specifically, for the low back, the work injury just caused aggravation of an underlying condition. The ALJ denied benefits and Claimant appealed.

Decision: For the low back, Claimant did not prove anything beyond an aggravation of a pre-existing condition. This is clearly not compensable under the Act. Under the old provisions of the Act, this would have been compensable to the extent that the aggravation made Claimant's condition worse. However, this is not a compensable claim now and no benefits would have to be provided, even to relieve the aggravation. The Board did reverse the ALJ to the extent that the case was found not compensable for the trapezius problems, however. Dr. Carabetta clearly indicated that these problems were related and therefore, to that extent, the Board felt that the case was compensable only for that problem.

Greer v. Wifco Steel, Inc., Docket No. 1061486

Issues: Appellate jurisdiction

Facts: Respondent argued that Claimant violated safety statutes when he was injured at work. The ALJ disagreed and awarded treatment. However, despite Claimant's request for TTD and payment of outstanding medical expenses, the ALJ neither granted nor denied this request. Claimant appealed.

Decision: Appeals to the Board from a preliminary hearing are limited to cases in which the ALJ exceeded the Division's jurisdiction on specific issues at the preliminary hearing. Essentially, if compensability is admitted, the Board does not have jurisdiction to hear an appeal. Since compensability was found at the hearing, Respondent argued that the Board could not hear an appeal on these issues. The Board disagreed. In this case, obtaining a decision based on the issues presented at the preliminary hearing is a matter of due process. Due process requires not only notice and the opportunity to be heard, but a decision on the merits. Therefore, the ALJ exceeded his jurisdiction in failing to rule on these issues. This applicability of this case to other circumstances is probably fairly narrow, but it serves as a reminder that only decisions contesting compensability can be appealed from a preliminary hearing. If an appeal is anticipated from a preliminary hearing, compensability must be denied.