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HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
RANKING MEMBER: JUDICIARY
MEMBER: ELECTIONS
ENERGY & ENVIRONMENT
LOCAL GOVERNMENT

January 30, 2017

Hon. Les Mason
Chairman
Kansas House Committee on Labor Commerce and Economic Development
Kansas State Capitol, Room: 521-E
Topeka, Kansas 66612

Re: Proponent Testimony, HB 2059

Dear Mr. Chairman:

Thank you for the opportunity to submit this written testimony in support of House Bill 2059.

In 2013 the legislature voted to change from the Fourth Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment of Function*, to the Sixth Edition of the guides. This change was effective January 1, 2015. In 2011the legislature made many changes to the Kansas Workers Compensation Act in what was then described as compromise legislation. This "compromise" was based on the Fourth Edition of the Guides and set impairment of function thresholds based on the Fourth Edition for the award of "Work Disability" (Compensation based on loss of earnings and inability to perform prior job tasks). The change in 2013 to the Sixth Edition was by no means a compromise. The impairments allowed for the same injury under the Sixth Edition are generally less than under the Fourth Edition. Thus, many injured workers who would have qualified for Work Disability prior to January 1, 2015 no longer qualify. In addition, workers who received compensation under the Fourth Edition for "Scheduled Injuries" in some instances now receive no disability compensation whatsoever under the Sixth Edition.

Not only does this mean workers who previously received disability compensation based on the loss of their job and loss of ability to perform work in the open labor market now receive nothing; it also means these workers and their families eventually find themselves on our social services caseloads and this costs the state money.

More importantly, the case of *Pardo v. UPS* is now pending in the Kansas Court of Appeals. Both parties have now petitioned the State Supreme Court to take the case. The decision of the Workers Compensation Appeals Board in *Pardo* is attached. In particular, I call the committee's attention to the Concurring Opinion of Board Member Thomas Arnold in the *Pardo* case. He explains the very real risk that since under the Sixth Edition Mr. Pardo receives no disability compensation whereas under the Fourth Edition he would have received compensation, there is no longer an adequate *quid pro quo* for the immunity employers receive from civil lawsuits brought by injured employees. The phrase "*quid pro quo*" refers to the over one-hundred year old tradeoff in Kansas law between employers and injured workers; employers receive immunity from civil lawsuits by injured employees and injured workers receive workers compensation benefits in lieu of the right to sue their employer in civil courts.

While I always advise my clients there is seldom a better than 20% chance of overturning the Workers Compensation Appeals Board in the Court of Appeals or Supreme Court, in this circumstance, I believe there is a higher likelihood. If the courts should determine there no is longer an adequate *quid pro quo* for an employer's immunity from civil lawsuits, this means employees could go back for at least the preceding

two years, if not longer, and file civil lawsuits against their employers for on the job injuries. The damages for economic loss awarded in those lawsuits would not be capped as they are in workers compensation claims and the employees could also request the award of damages for pain and suffering, punitive damages and in some circumstances attorney fees as well.

As concerning, standard business liability policies generally exclude coverage for claims made by employees resulting from on the job injuries. A copy of exclusions d and e to the standard Insurance Services Office liability policy is appended for the committee's reference. This means if the *Pardo* case is successful, Kansas employers could find themselves facing civil lawsuits, with no caps on economic damages, liability for pain and suffering, and no insurance.

A second basis for finding the workers compensation act unconstitutional also concerns many lawyers, especially lawyers for employers. In 2011 we adopted the "Prevailing Factor" test to determine if an injury is compensable under the workers compensation laws. Previously, all that was necessary was that an on the job injury aggravate, accelerate or make symptomatic a pre-existing injury or other condition. Now the on the job event must be the "prevailing factor" in the injury, need for medical care or resultant disability. As a result, older workers and handicapped workers often no longer receive workers compensation benefits. This means that many Kansas Workers who previously received workers compensation benefits now must look to KanCare, TANIF, and Social Security instead. Not only does this cost the state money, but it also runs the risk the courts could find an inadequate *quid pro quo* for employer immunity on this separate basis exposing Kansas employers to civil liability. The prior case on this issue *is Injured Workers of Kansas v. Franklin* decided by our Supreme Court prior to the 2011 amendments to the Workers Compensation Act.

HB 2059 does not address this potential serious flaw in our workers compensation act, however, another bill now awaiting hearing in the committee, HB 2058 does.

Both of these changes in our law may cost employers more money in workers compensation premiums, but the certainty concerning the future of the Workers Compensation Act and employer immunity may be worth it. As a small business owner myself, the prospect of employee lawsuits for on the job injuries for which I may have no insurance is not a happy one to think about.

I appreciate the committee's consideration of my thoughts and ask that the committee favorably report HB 2059 for passage.

Sincerely,

/s/ John Carmichael

John Carmichael
Kansas State Representative
District 92

JC:

Enclosures:

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

FRANCISCO PARDO Claimant	)	
V.	)	
UNITED PARCEL SERVICE, INC. Respondent	)	Docket No. 1,073,268
AND	)	
LM INSURANCE CORPORATION Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 17, 2016, Award entered by Administrative Law Judge (ALJ) Steven J. Howard. This case has been placed on summary docket for disposition without oral argument. Keith L. Mark of Mission, Kansas, appeared for claimant. Karl L. Wenger of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant was not entitled to any permanent partial disability compensation associated with his accidental injury of March 18, 2015. The ALJ explained:

> Under the law as set forth by the Kansas Legislature, the competent medical evidence presented herein, by both doctors Rasmussen and Koprivica, indicate that under the AMA Guides, 6th Edition, claimant receives no additional impairment, since he has once previously received an impairment to the left shoulder.
>
> The evidence is clear, and unconverted [*sic*], that claimant suffered a new and distinct injury to the same member, however, to a different location of that member. Under the AMA Guides, 6th Edition, the claimant is prevented from receiving compensation where he has previously received compensation on that member.[1]

The Board has considered the record and adopted the stipulations listed in the Award.

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[1] ALJ Award (Aug. 17, 2016) at 6.

ISSUES

Claimant contends he sustained a compensable injury arising out of his March 18, 2015, work accident. Further, claimant states he sustained new structural damage to his left shoulder. Claimant argues, "Unfortunately, the Court is bound to follow K.S.A. 44-510e(a)(2)(B) which, in the infinite wisdom of the Kansas legislature, applies to all work-related injuries that occur subsequent to January 1, 2015, which provide the claimant with a zero permanent partial impairment rating."[2] Claimant argues the exclusive remedy rule of the Kansas Workers Compensation Act is unconstitutional as applied to him after the statutory adoption of the AMA *Guides*, 6th Edition.

Respondent agrees claimant sustained a compensable injury arising out of and in the course of his employment. Respondent asserts that, based on the evidence, the Board must decide whether the AMA *Guides*[3] should be literally construed or whether a physician may incorporate his professional opinion in assessing a rating.

The issue for the Board's review is: is a literal application of the AMA *Guides* unconstitutional as applied to claimant?

FINDINGS OF FACT

Claimant has been employed by respondent for 12 years as a feeder driver. In this position, claimant drives tractor-trailers, picks up and delivers loads, and works in the yard with a spotter. A spotter is a device which remains in the yard and is used to move trailers to different locations onsite. On March 18, 2015, claimant was climbing onto the spotter in the course of his job duties when he slipped on oil and grease buildup. Claimant indicated he was holding the spotter's railing with his left arm when he fell, jerking his left arm. Claimant testified he felt a pop and pull in his left shoulder. Claimant immediately reported the incident and was sent for medical treatment.

Claimant had a prior injury to his left shoulder on July 11, 2013. Claimant underwent left shoulder arthroscopic surgery with board certified orthopedic surgeon Dr. Mark Rasmussen on August 29, 2013. Dr. Rasmussen repaired a partial thickness rotator cuff tear and performed an extensive labrum repair. Dr. Rasmussen released claimant to full duty work and assessed an impairment rating of 10 percent to claimant's left shoulder based upon the labral pathology and the partial thickness rotator cuff tear.

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[2] Claimant's Brief (filed Sept. 6, 2016) at 13.

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

Following the March 18, 2015, accident, claimant was referred to KU MedWest, where he was treated conservatively. On April 8, 2015, Dr. Rasmussen examined claimant and noted complaints of pain in the subacromial region. Dr. Rasmussen ordered an MRI. The MRI was essentially inconclusive. Dr. Rasmussen explained an MRI is often inconclusive when a patient had prior surgery because "there can be different pathology abnormalities that are related to previous surgeries."[4] Dr. Rasmussen provided a steroid injection to claimant's shoulder, which provided minimal relief. Dr. Rasmussen eventually performed a repeat arthroscopic procedure on June 4, 2015.

During the procedure, Dr. Rasmussen found labral pathology in claimant's left shoulder, estimating over 50 percent of this pathology was related to claimant's 2013 surgery. Dr. Rasmussen also found a new partial thickness rotator cuff tear. Dr. Rasmussen testified that, within a reasonable degree of medical certainty, this tear was a new finding and related to claimant's March 18, 2015, accident. Dr. Rasmussen explained the new tear was in a different location than the one repaired in 2013 and "was not in direct connection with the original tear."[5] Dr. Rasmussen surgically repaired the new tear in addition to performing an acromioplasty to help resolve impingement of the rotator cuff.

Claimant continued to follow up with Dr. Rasmussen following surgery. He was released to full duty work by August 26, 2015, though he continued to complain of pain and limited range of motion. Claimant returned to Dr. Rasmussen on October 26, 2015, when his range of motion was further diminished. Dr. Rasmussen noted these findings were inconsistent when compared to his previous range of motion measurements, and could have been because claimant was performing relatively strenuous work duties.

Dr. Rasmussen again saw claimant on November 23, 2015. At that time, claimant's range of motion was greatly improved, but not normal. Claimant complained of hand pain, some headaches, and continuing left shoulder pain, particularly with overhead activity. Dr. Rasmussen opined the cause of claimant's continuing pain was the March 2015 work accident. Dr. Rasmussen released claimant at maximum medical improvement (MMI) on November 23, 2015, noting claimant felt he was ready to be released.

Dr. P. Brent Koprivica examined claimant on December 17, 2015, at claimant's counsel's request. Claimant complained of significant ongoing symptoms with his left shoulder, including loss of strength, cramping, straining, and significant ongoing limited motion. Dr. Koprivica reviewed claimant's medical records, history, and performed a physical examination. He noted claimant was cooperative and demonstrated appropriate pain behaviors. Dr. Koprivica wrote:

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[4] Rasmussen Depo. at 19.

[5] *Id*. at 26.

> There is pain and weakness in the left shoulder during the clinical examination. I would note that there is significant variation in the demonstrated motion today compared to the motion measurements documented by Dr. Rasmussen.[6]

Dr. Koprivica found claimant's March 28, 2015, work injury to be the prevailing factor in his new left shoulder structural injury, specifically, the new partial thickness rotator cuff tear for which arthroscopy was performed. Dr. Koprivica found claimant to be at MMI, but indicated claimant would require future medical treatment. Dr. Koprivica wrote:

> Of note, [claimant] clearly has new objective structural physical impairment based on evidence at the time of surgery of new partial-thickness rotator cuff injury that has been treated. There is new impact on activities of daily living based on this, in terms of limiting his tolerance to activities requiring use of his left shoulder.
>
> Despite this fact of clear-cut loss of ability to do activities of daily living, it is outlined on Page 23 in the [AMA *Guides*] Sixth Edition, "Rating permanent impairment by analogy is permissible only if The Guides provide no other method for rating objectively identifiable impairment."
>
> In this case, the [AMA *Guides*] does specifically address [claimant's] clinical situation.
>
> . . .
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> As specifically noted in Table 15-5 on Page 402, in the [AMA *Guides*], regarding the shoulder regional grid for upper extremity impairments, for a rotator cuff injury, with a partial-thickness tear with history of painful injury, with residual symptoms without consistent objective findings, a zero to two (0 to 2) percent upper extremity impairment is assigned as the range of impairment. However, it is specifically noted "This impairment can only be given once in an individual's lifetime." . . . According to the [AMA *Guides*], a zero (0) percent impairment is assigned based on strict interpretation of the text.[7]

Dr. Rasmussen provided an impairment rating on February 22, 2016. Using the AMA *Guides*, Dr. Rasmussen determined claimant sustained a 5 percent impairment to the left upper extremity.[8] Dr. Rasmussen testified the rating related to the March 2015 accident and was over and beyond the 10 percent he assessed for the 2013 incident. Dr. Rasmussen explained the 5 percent assessment was based on claimant's partial thickness rotator cuff tear requiring surgery and claimant's continuing pain.

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[6] Koprivica Report (Dec. 17, 2015) at 19. (The parties agreed to the admission of Dr. Koprivica's report in a Stipulation to Medical Reports filed June 24, 2016.)

[7] *Id.* at 22-23.

[8] See Rasmussen Depo., Ex. 4 at 1.

Dr. Rasmussen admitted that a strict interpretation of the AMA *Guides* results in a zero percent impairment for claimant, based on the fact claimant received a previous impairment rating. Even if claimant had no previous impairment, the AMA *Guides* would provide a 0-2 percent impairment for claimant's partial thickness rotator cuff tear and resulting surgery, which Dr. Rasmussen opined was too low. Dr. Rasmussen testified he did not believe zero percent to be a fair representation of claimant's impairment. Further, Dr. Rasmussen noted the AMA *Guides* allows only for the most significant pathology to be rated, with a "very small amount" of modification allowed related to any secondary pathology.[9] Dr. Rasmussen agreed the AMA *Guides*, unlike the 4th Edition of the same, does not allow for a physician's skill, experience, expertise, training, or judgment in arriving at a rating.

Claimant continues to work for respondent. He testified he continues to have pain and weakness in his left arm. Claimant cannot extend his left arm overhead, and requires help from his coworkers to perform some of his job duties.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-510d(b)(23) states:

> Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be determined by using the sixth edition of the American medical association guides to the evaluation of permanent impairment,[10] if the impairment is contained therein.

Section 18 of the Kansas Constitution Bill of Rights states:

> All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

ANALYSIS

Claimant raises no issue in his appeal alleging the ALJ erred in the application of law to the facts. Claimant primarily argues the law as applied by the ALJ is unjust and asks

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[9] *Id*. at 34.

[10] It should be noted that there is a discrepancy in the Act's mandate for the sixth edition of the AMA *Guides*. While both K.S.A. 44-510d and K.S.A. 44-510e refer to the use of the sixth edition, K.S.A. 44-508(u) defines the term "functional impairment" as "the loss of a portion of the total physiological capabilities as established by competent medical evidence and based upon the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein."

the Board for a declaratory judgment finding the adoption of the AMA *Guides*, 6th Edition, into the Kansas Workers Compensation Act (Act), and the application thereof, violates Section 18 of the Kansas Constitution Bill of Rights such that he be allowed to a tort action in district court.

Claimant raised a variety of other issues related to the mandatory use of the AMA *Guides*, 6th Edition, on pages six and seven of his brief, including issues related to due process, disparate treatment, lack of a remedy, evidentiary flaws related to mandating the AMA *Guides*, 6th Edition, unlawful delegation of legislative powers and impermissible legislative predetermination of an adjudicatory fact. All of claimant's issues are related to the validity of K.S.A. 2014 Supp. 44-510d(b)(23) and are beyond the jurisdiction of the Board to review.

In *Miller v. Johnson*, the Kansas Supreme Court found Section 18 of the Kansas Constitution Bill of Rights guarantees the right to a remedy.[11] In *Miller*, the Court wrote, "This right has been found since our early caselaw to mean 'reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure and after a fair hearing.'"[12]

Section 18 guarantees are implicated when the legislature imposes statutory caps on noneconomic damages for personal injury plaintiffs, in this case, injured workers.[13] In determining if a right to a remedy exists, the Court wrote:

> A two-step analysis is required for the quid pro quo test. For step one, we determine whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare. This first step is similar to the analysis used to decide equal protection questions under the rational basis standard. *Lemuz,* 261 Kan. at 948, 933 P.2d 134. For step two, we determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue. This step is more stringent than the first because even if a statute is consistent with public policy, there still must be an adequate substitute remedy conferred on those individuals whose rights are adversely impacted. *Lemuz.* 261 Kan. at 948, 933 P.2d 134; *Bonin*, 261 Kan. at 217-18, 929 P.2d 754; *Aves v. Shah*, 258 Kan. 506, 521-22, 906 P.2d 642 (1995); *Samsel II,* 246 Kan. at 358, 361, 789 P.2d 541; *Manzanares*, 214 Kan. at 599, 522 P.2d 1291.[14]

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[11] See *Miller v. Johnson*, 295 Kan. 636, 655, 289 P.3d 1098 (2012).

[12] *Id.,* citing *Hanson v. Krehbiel*, 68 Kan. 670, Syl. ¶ 2, 75 Pac. 1041 (1904).

[13] See *Id*.

[14] *Id.* at 657.

It is true claimant was afforded no economic recovery for permanent impairment stemming from his compensable workers compensation injury, other than payment of medical and temporary total disability benefits. However, the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional.[15] A statute is presumed constitutional, and all doubts must be resolved in favor of its validity.[16] The Board does not have jurisdiction to rule on claimant's constitutionality issues.

CONCLUSION

There is no dispute related to the ALJ's findings and application of the law. The Board does not have jurisdiction to review the constitutionality of the Act.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated August 17, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

[15] See *Anderson v. Custom Cleaning Solutions*, No. 1,070,269, 2016 WL 5886183 (Kan. WCAB Sept. 19, 2016)*; Houston v. University of Kansas Hospital Authority*, No. 1,061,355, 2016 WL 3669848 (Kan. WCAB June 17, 2016); *Anderson v. Custom Cleaning Solutions*, No. 1,070,269, 2014 WL 5798476 (Kan. WCAB Oct. 27, 2014); *Carrillo v. Sabor Latin Bar & Grille*, No. 1,045,179, 2014 WL 5798458 (Kan. WCAB Oct. 24, 2014); *Pinegar v. Jack Cooper Transport*, No.1,059,928, 2014 WL 1758036 (Kan. WCAB Apr. 9, 2014).

[16] See *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 276, 75 P.3d 226 (2003); citing *State v. Durrant*, 244 Kan. 522, 769 P.2d 1174, *cert. denied* 492 U.S. 923, 109 S.Ct. 3254, 106 L.Ed.2d 600 (1989).

CONCURRING OPINION

Based on my research, the Board, or a single Board Member, has never opined that a provision of the Act is or is not constitutional. Instead, the Board has ruled it does not have authority to review an allegation that a section of the Act is unconstitutional and made no further statement. This Board Member concurs with the majority that the Board does not have jurisdiction to consider the constitutionality of the application of the AMA *Guides*[17] to claimant's predicament, but feels compelled to comment because the issue is important and warrants meaningful and significant discussion. The reader should note this concurring opinion is that of the undersigned and is not necessarily shared by other Board Members.

K.S.A. 2014 Supp. 44-501b(b) sets forth the legislative intent of the Kansas Legislature, concerning the Act, for employers to pay employees compensation for work-related personal injuries. K.S.A. 2014 Supp. 44-501b(d) makes it clear that when an employee may recover compensation under the Act, the employer and employees are not subject to liability elsewhere, *i.e.*, the Act is the employee's exclusive remedy for recovery.

Clearly, the intent of the Kansas Legislature is to compensate Kansas workers who suffer work-related personal injuries. In the present claim, it is undisputed claimant sustained a left shoulder injury by accident arising out of and in the course of his employment, and the accident resulted in new injuries that ordinarily should be compensated based on Kansas law. Despite the fact the Kansas Legislature intended claimant to be compensated, it placed the impediment of K.S.A. 2014 Supp. 44-510d(b)(23) squarely in his path. That section of the Act provides:

> Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides for evaluation of permanent impairment until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be determined using the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

The Kansas Constitution Bill of Rights, in §18, provides: "Justice without delay. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." In this Board Member's humble opinion, application of the AMA *Guides* to claimant's case as directed in K.S.A. 2014 Supp. 44-510d(b)(23) denies claimant due process.

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[17] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

As noted by the majority, the courts have a duty to construe a statute constitutional, if the same can be done within the apparent intent of the legislature in passing the statute. The AMA *Guides*, at least in this claim, thwarts the Kansas Legislature's stated intent to compensate workers who suffer a personal injury by accident arising out of and in the course of their employment.

In *Injured Workers of Kansas,*[18] the Kansas Supreme Court stated:

> The plaintiffs claim that their due process rights have been violated because their remedy in a workers compensation claim has been restricted due to a more stringent notice of claim statute. In analyzing a potential due process violation, the following test should be utilized:
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> > " 'If a remedy protected by due process is abrogated or restricted by the legislature, "such change is constitutional if '[1] the change is reasonably necessary in the public interest to promote the general welfare of the people of the state,' *Manzanares v. Bell*, 214 Kan. 589, 599, 522 P.2d 1291 (1974), and [2] the legislature provides an adequate substitute remedy" to replace the remedy which has been restricted.' *Bonin v. Vannaman*, 261 Kan. 199, 217, 929 P.2d 754 (1996) (citing *Aves v. Shah*, 258 Kan. 506, 521, 906 P.2d 642 [1995])." *Lemuz v. Fieser,* 261 Kan. 936, 946-47, 933 P.2d 134 (1997).
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> Under Step 1 of this due process test, the first question to ask is whether the new notice of claim statute imposed on plaintiffs injured at work, which restricts the plaintiffs' right to a workers compensation remedy, is reasonably necessary in the public interest to promote the general welfare of the people of the state. Another way to state this test is whether the legislative means selected (the notice requirement) has a real and substantial relation to the objective sought. See *Bonin v. Vannaman*, 261 Kan. 199, 217, 929 P.2d 754 (1996) (citing *Liggett*, 223 Kan. at 614, 576 P.2d 221; *Manzanares v. Bell*, 214 Kan. 589, 599, 522 P.2d 1291 (1974); Ernest, 237 Kan. at 129, 697 P.2d 870).
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> . . .
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> In applying Step 2 of the due process test, it is important to realize that the workers compensation remedy is not a common-law remedy. Rather, it is an adequate substitute remedy itself (or quid pro quo) for the abrogation of a worker's right to sue an employer for an on-the-job injury caused by the employer's negligence.
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> In 1911, the legislature stripped employees of their common-law right to bring a civil action against employers for injuries caused by an employer's negligence. "The

[18] *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 854-856, 942 P.2d 591 (1997).

> legislature can modify the common law so long as it provides an adequate substitute remedy for the right infringed or abolished." *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 350, 757 P.2d 251 (1988), *overruled in part on other grounds Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991). Thus, when the legislature abolished the employees' common-law right to sue employers for injuries, the legislature provided the employees with an adequate substitute remedy (or quid pro quo) for the right abolished – the Workers Compensation Act. The Act allowed employees to quickly receive a smaller, set amount of money for injuries received at work, whether they were caused by negligence or not, as long as the notice requirement was met. Now, the legislature has made the notice requirement more strict so that workers compensation benefits are more difficult to receive, making the quid pro quo for abrogation of the employee's right to sue an employer for negligence less than what it once was. Thus, the question under Step 2 of the due process test is not whether the legislature provided an adequate substitute remedy for taking away the lenient notice requirement in the Act. Instead, the question becomes whether it has, under the Act, with its stricter notice requirement, become so difficult to receive an award that the Act is no longer an adequate substitute remedy for abrogation of employees' right to sue employers for negligence. If so, then the stricter notice requirement, making the quid pro quo inadequate, violates due process.

In analyzing the first step delineated in *Injured Workers of Kansas,* the requirement of the Kansas Legislature to calculate an award of workers compensation in accordance with the AMA *Guides* is not reasonably necessary to promote the general welfare of the state. The general welfare of Kansas is not promoted by denying injured workers permanent partial disability benefits the Kansas Legislature intended them to have. In fact, the contrary may be true.

The second step of the due process test outlined in *Injured Workers of Kansas* is whether the Act is no longer an adequate substitute remedy for abrogation of employees' right to sue employers for negligence. If so, the requirement to calculate an award in accordance with the AMA *Guides* makes the quid pro quo inadequate and violates due process. Here, the requirement to calculate claimant's award using the AMA *Guides* deprives him of any and all remedies, other than receiving medical compensation and temporary total disability benefits. He is entitled to no permanent partial disability benefits for his injury, nor may he sue respondent in civil court. If claimant were to recover permanent partial disability benefits based on a 5% shoulder rating, he would be entitled to $6,272.64 (225 weeks of benefits for a shoulder, less 13.86 weeks of temporary total disability benefits = 211.14 weeks x 5% = 10.56 weeks payable x $594 compensation rate = $6,272.64). Simply put, use of the AMA *Guide*s makes the quid pro quo inadequate. Stated another way, in the present claim, the requirement to follow the AMA *Guides* makes it impossible for claimant to be awarded permanent partial disability benefits, making the Act an inadequate substitute remedy for claimant's right to potentially sue respondent for negligence.

There are similarities between the present case and *Westphal*,[19] a case decided by the Florida Supreme Court. The Florida Legislature amended its workers compensation act to limit temporary total disability benefits (TTD) to two years, or 104 weeks, even if the injured worker had not reached MMI. Westphal, an injured worker, had numerous surgeries and despite not reaching MMI, had his TTD cut off because he reached the 104-week maximum. The Florida Supreme Court noted Westphal was not yet eligible for permanent total disability benefits and although he was incapable of working, fell in a gap in which he received no benefits. The Florida Supreme Court noted, "But, there must eventually come a 'tipping point,' where the diminution of benefits becomes so significant as to constitute a denial of benefits – thus creating a constitutional violation."[20] The Court found the statute unconstitutional, stating:

> We conclude that the 104-week limitation on temporary total disability benefits, as applied to a worker like Westphal, who falls into the statutory gap at the conclusion of those benefits, does not provide a "reasonable alternative" to tort litigation. Under the current statute, workers such as Westphal are denied their constitutional right of access to the courts.[21]

In essence, the Act is a trade. The Kansas Legislature traded injured workers' ability to file suit for their physical injuries, pain and suffering, permanent scarring, etc., for workers compensation. As part of the trade, workers who suffer a permanent impairment as the result of an injury arising out of and in the course of their employment are compensated, even when the employer was not at fault. In this Board Member's view, the AMA *Guides* are at the "tipping point" of which the Florida Supreme Court speaks. Claimant and other injured workers in similar situations are denied permanent partial disability, a property right to which they are entitled, and have no adequate remedy.

For the foregoing reasons, ***if*** the undersigned Board Member had the authority and jurisdiction to do so, he would declare the portion of K.S.A. 2014 44-510d(b)(23) requiring use of the AMA *Guides*, as applied to claimant, unconstitutional.

This Board Member has other concerns, mainly based on the AMA *Guides* conflicting with Kansas law. Where the AMA *Guides* and a Kansas statute conflict, the AMA *Guides* do not control over the statute.[22]

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[19] *Westphal v. City of St. Petersburg*, 194 So.3d 311, 2016 WL 3191086 (2016).

[20] *Id*. at 323.

[21] *Id*. at 325.

[22] See *Redd v. Kansas Truck Center*, 291 Kan. 176, 196-97, 239 P.3d 66 (2010).

First, Kansas law allows workers to recover payment for injuries that result in permanent impairment. Kansas law does not say that an injured worker's impairment "must be rated . . . where the greatest dysfunction consistent with the objectively documented pathology remains."[23] Yet, that is precisely what the AMA *Guides* say. Essentially, the AMA *Guides* tells us a worker does not get compensated for his or her full impairment, just the portion that is the worst. Obviously, this results in the worker only getting compensated for less than the remedy allowed under the Fourth Edition of the AMA *Guides*, if there is any recovery at all. When the worker gets a smaller recovery, it begs the question whether the use of the AMA *Guides* provides an adequate substitute remedy.

Second, Kansas law allows as compensable injuries that result in more than a sole aggravation, acceleration or exacerbation of a preexisting condition.[24] Here, claimant did not have what would be solely an aggravation, acceleration or exacerbation of a preexisting condition. Claimant had a new and different rotator cuff tear, in addition to other shoulder symptomatology. However, the AMA *Guides* wholly undermines this statute, and instead indicates allowing an award of permanent impairment to be given only once in an individual's lifetime, at least as applied to claimant.

Similarly, Kansas law already has a methodology to reduce an award based on preexisting impairment as spelled out in K.S.A. 2014 Supp. 44-501(e). Use of the AMA *Guides* arguably conflicts with the statute.

Another potential problem is that while K.S.A. 2014 Supp. 44-510d(b)(23) instructs us to use the AMA *Guides* to provide a rating for injuries occurring on and after January 1, 2015, K.S.A. 2014 Supp. 44-508(u), the very definition of "functional impairment," indicates impairment is based on the Fourth Edition of the AMA *Guides*.

This Board Member doubts the Kansas Legislature was aware of all potential ramifications of adopting the AMA *Guides* as the basis for determining permanent impairment of function for the loss of or loss of use of a scheduled member. Nor does the undersigned believe the Kansas Legislature was aware that K.S.A. 2014 Supp. 44-510d(b)(23), (24) and 44-510e(a)(2)(B) provide the AMA *Guides* is to be used to determine permanent partial disability, but that K.S.A. 44-508(u) continues to define functional impairment as a percentage in accordance with Fourth Edition of the AMA *Guides*.

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[23] AMA *Guides to the Evaluation of Permanent Impairment* (6th Ed.) at 21; see also p. 387 ("If a patient has 2 significant diagnoses, for instance, rotator cuff tear and biceps tendonitis, the examiner should use the diagnosis with the highest causally-related impairment rating for the impairment calculation. Thus, when rating rotator cuff injury/impingement or glenohumeral pathology/surgery, incidental resection arthroplasty of the AC joint is not rated.") and § 15.3f on p. 419 ("If there are multiple diagnoses within a specific region, then the most impairing diagnosis is rated because it is probable this will incorporate the functional losses of the less impairing diagnoses.").

[24] See K.S.A. 44-508(f)(2).

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Hon. Steven J. Howard, Administrative Law Judge

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

**COVERAGES A AND B PROVIDE CLAIMS-MADE COVERAGE.
PLEASE READ THE ENTIRE FORM CAREFULLY.**

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **VI** – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and

(3) A claim for damages because of the "bodily injury" or "property damage" is first made against any insured, in accordance with Paragraph **c.** below, during the policy period or any Extended Reporting Period we provide under Section **V** – Extended Reporting Periods.

c. A claim by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:

(1) When notice of such claim is received and recorded by any insured or by us, whichever comes first; or

(2) When we make settlement in accordance with Paragraph **a.** above.

All claims for damages because of "bodily injury" to the same person, including damages claimed by any person or organization for care, loss of services, or death resulting at any time from the "bodily injury", will be deemed to have been made at the time the first of those claims is made against any insured.

All claims for damages because of "property damage" causing loss to the same person or organization will be deemed to have been made at the time the first of those claims is made against any insured.

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

(a) The supervision, hiring, employment, training or monitoring of others by that insured; or

(b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph **(1), (2)** or **(3)** above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

