



Claimant contends he is mindful the Act excludes from compensability idiopathic accidents and injuries, but argues that section does not apply to this claim. Claimant argues the uncontroverted evidence is that stairs are dangerous, that stairs create an increased risk of falling and an increased risk of injury. Claimant contends the increased risk associated with stairs explains what caused claimant to fall and suffer debilitating injuries. Claimant argues the Award for compensation should be affirmed or modified to find he is entitled to a 25 to 35 percent functional impairment and an 85.7 percent work disability.

The issues on appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment on August 21, 2011?
2. If so, what is the nature and extent of functional impairment and disability?
3. Do the stairs on which claimant fell constitute a special risk or hazard under K.S.A. 2011 Supp. 44-508(f)(3)(B)?
4. Is claimant entitled to TTD from August 21, 2011 to August 13, 2013, minus 11 weeks of compensation already paid?
5. If claimant sustained a compensable injury, is his Award subject to K.S.A. 2011 Supp. 44-501(f)?

#### FINDINGS OF FACT

Claimant worked for Jackson's Dairy, a subsidiary of respondent, loading semi-trailers. His hourly wage was \$17.20 per hour. Claimant's work hours were 3:00 p.m. to 11:30 p.m., Monday through Friday.

Claimant was injured while attending a mandatory safety meeting. Safety meetings for Jackson's Dairy were usually held at the Dairy during working hours. However, this meeting was held on Sunday, August 21, 2011, from 9:00 a.m. to 2:30 p.m., at Dillons offices, a half a block east of the Dairy. This was an off day for claimant as he never worked on Sundays.

The meeting had two breaks and a lunch break. Respondent provided the attendees with breakfast and lunch. Claimant, a diabetic since his kidney transplant on July 11, 1998, took his diabetic medication and his transplant medication before he arrived at the meeting. Claimant also takes medication for high blood pressure.

As a diabetic, claimant normally tests his blood sugar once a day, every day, but on the date of the accident he had not tested it because he was running behind and didn't

take the time to do it. He also testified that he notices no effects when his blood sugar is high and the only way he knows it is high is when he tests his blood. For breakfast, claimant had two glazed donuts and a soda. For lunch claimant had a sandwich, a bag of chips and a soda.

The meeting was held on the second floor of the Dillons office building and the attendees had to walk up a flight of stairs to get to the meeting location. The stairs were concrete with a diamond plastic coating and metal handrails. There was a short skid pad at the front of the step. These particular type of stairs were made to accommodate high volumes of traffic. Claimant used the stairs several times that day including both times when he went out to smoke during the two 15 minute breaks.

After the meeting, claimant stopped by the restroom before leaving the building, but does not remember leaving the restroom. Claimant does not know if he passed out as or after he left the restroom. The stairs are 20 to 30 feet from the restroom, but claimant does not remember walking to the stairs. He had no problems navigating the steps until the end of the day.

Claimant testified that when he came to he was being loaded aboard a Lifewatch helicopter. He later learned that he had fallen down the stairs. He does not know how or why he fell down the stairs. Claimant testified that he had only been in this particular building where the training was one time before. As a result of the accident, claimant shattered vertebrae in his cervical spine, including C1 and C3 through C4. Since the accident, claimant has been receiving treatment under Dr. Christian Lothes and has not been working.

Claimant had three neck surgeries after the August 21, 2011, accident. The first placed rods in the back of his neck. He was in the hospital for two weeks and in a halo for 11 weeks. The second surgery replaced rods that had broken in the back of claimant's neck in what was labeled a stress fracture. The third surgery was again to replace broken rods. These surgeries took place within three to six months of each other. Claimant continued to wear a neck brace at the regular hearing as his neck had been slow in healing. As of the regular hearing, claimant had another broken rod in his neck. Claimant was given the option of a fourth surgery to fix the broken rod, but claimant declined, given the failure of the past surgeries. Claimant was told he could live with the break because it would not cause increased pain or discomfort. Claimant reported being in constant pain and testified he is receiving pain medication, which takes the edge off his pain. He was also sent for epidural blocks, which provided temporary relief.

Claimant's current symptoms are pain in the neck starting at the base of the skull going down to the shoulders. This is the area where the bones are broken and not healing. He testified his pain level is a 5 to 7 on a 0-10 scale and varies day to day, and with weather conditions. Claimant testified the pain keeps him from doing much. He has not worked since the accident, is still under Dr. Lothes' care and has not been released to

return to work. Claimant's employment was terminated effective January 1, 2013, for being absent from work since August 2011, and having exhausted all of his available sick, vacation and unpaid leave.

Claimant is currently on a 20 pound weight restriction. He is unable to turn his neck and is almost blind in his right eye and therefore has no real peripheral vision. He must turn his entire body to the right to see oncoming traffic when he drives. The blindness is not related to the fall. Claimant testified that twisting his body is uncomfortable.

Part of claimant's job with respondent involved operating a forklift. This is something he can no longer do with his inability to twist and turn and look up and down. The job also required a lot of lifting, which claimant is no longer able to do.

Claimant applied for Social Security disability benefits and is awaiting a response. His first attempt was denied. Claimant is sixty-five years old and began receiving Medicare in December 2013. Claimant is also receiving Social Security retirement benefits (\$1,550 a month since March 2013).

There is surveillance video of the area where the claimant fell, but claimant has not seen it. Claimant assumes that he hit his head on the handrail because he had a two inch laceration on the right side of his forehead and, at the time of the preliminary hearing, was in a hard neck brace.

Timothy Heidebrecht, a plant process specialist for respondent, testified that walking up and down stairs is a part of every job with respondent on some level. Mr. Heidebrecht testified that claimant was at the mandatory safety meeting on August 21, 2011, which was a Sunday. This is a normal day off for some of the employees, but everyone was paid for their attendance.

Mr. Heidebrecht testified that he did not notice claimant acting strange on the day of the meeting. He acknowledged these meetings are not usually held at the Dillons meeting room. Mr. Heidebrecht learned about ten minutes after the meeting that claimant had fallen down the stairs.

Mr. Heidebrecht described the stairs as a commercial or industrial type of stairs, something significantly different than what would be found in a residence. He wasn't sure if the stairs were concrete or steel underneath their rubberized, vinyl like coating.

From what Mr. Heidebrecht could gather, claimant's face or head hit the stairs and then he hit the landing. Mr. Heidebrecht did not witness the fall. He has never known claimant to have any issues with his diabetes. Mr. Heidebrecht does not directly work with the claimant, but sees him at least twice a week on the job.

Mr. Heidebrecht is the union steward, so he had conversations about what happened that day with management at the plant and those that were on the scene. He had no duty to investigate the accident and would not unless respondent felt that discipline was warranted. In this instance, it was not.

Mr. Heidebrecht testified that there is video footage of the accident, which shows someone landing or ending at the bottom of the stairs. It apparently does not show claimant at the top of the stairs.<sup>1</sup>

Scott Phillips, the first shift lead on the milk side of the business, is in charge of making sure everything runs smoothly. Mr. Phillips was on site when claimant fell, but he was not in the building at the time.

Mr. Phillips testified that the meeting was on a Sunday and was mandatory. This meeting was supposed to be held during the week, but scheduling conflicts left no other choice but Sunday. Therefore he, along with the claimant and some others, were in attendance on their day off. Employees were paid overtime for attendance at this meeting. Mr. Phillips testified claimant seemed to be acting normally that day and he talked to claimant a couple of times while they were in line getting food.

Mr. Phillips testified that the risk of injury from falling on the stairs in the building where the meeting was being held is higher than falling on stairs at home on carpet and pad because the stairs are pretty hard. However, he did not recall there being anything wrong with the stairs on the date of the accident. Mr. Phillips testified that no one knows how or why claimant fell.

John Troyer, fire captain for Sedgwick County Fire Department and instructor for his company Eagle Environmental, teaches safety classes required by OSHA and performs a variety of environmental work with his company.

On August 21, 2011, Mr. Troyer was giving a safety and health presentation at Dillons. Mr. Troyer testified the training was a full day and went for 7 hours. Part of Mr. Troyer's presentation dealt with stair safety and what is required for elevations greater than 19 inches. Mr. Troyer testified that stairs are a safety hazard because of the change in elevation. Another part of the training dealt with blood borne pathogens and ladder safety.

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<sup>1</sup> This matter first came before the Board on an appeal from an April 11, 2012, preliminary hearing Order entered by the Special ALJ. At that time the record contained the video footage of the accident. The matter then returned to the SALJ for a second time from which the June 17, 2014 Award was issued. When the matter returned to the Board, the video DVD contained only still pictures with no motion footage of claimant's fall. How or when the damage to the video occurred is not known. Neither claimant's attorney nor respondent's attorney have been able, to this point, to replace the lost video.

Mr. Troyer testified he noticed nothing visibly wrong with the stairs in the building on the day of the training. He also testified that his role on that day was not as a safety person, but as an instructor. He testified that any safety risk associated with stairs can be lessened by properly maintaining/having handrails.

Claimant met with Paul Stein, M.D., for an examination on August 12, 2013, at respondent's request. Dr. Stein was asked to evaluate claimant and provide a disability rating without regard to causation. Dr. Stein noted claimant was diagnosed with a cervical spine fracture by the medical personnel at Wesley Medical Center and Dr. Lothes performed a cervical fusion. Dr. Stein was aware claimant had another neck surgery after the bone failed to heal after the first surgery.

Claimant's complaints at the time of this visit involved daily pain down the back of his neck into the top of both shoulders. There was no radicular pain into the upper extremities. Claimant wore a soft collar which provided support and reduced discomfort. His pain level was a 2 to 5 out of 10. Claimant had no issues with balance, gait or coordination. There was no numbness or tingling. Claimant reported taking Lortab 10 about six times a day for the neck discomfort. Claimant advised Dr. Stein he does not know what happened on August 21, 2011. He had dried blood below his nose and was complaining of left arm pain. Claimant also had a laceration on his forearm and right arm.

Dr. Stein examined claimant, finding him cooperative and in no acute distress. Claimant was examined with his cervical collar off. Claimant's gait and station were intact; tandem gait was intact; Romberg testing was negative and finger-nose with eyes closed was intact. Claimant's cervical range of motion was markedly restricted. There were anterior and posterior well-healed cervical incisions. There was some weakness of the intrinsic musculature of the left hand. Claimant indicated this was old and related to a nerve injury when he was treated for renal failure. Strength was otherwise intact in the upper extremities. Two point discrimination was intact at 5-6 mm in both hands, knee reflexes were markedly hypoactive and ankle reflexes were absent. Strength was intact in muscle groups of both lower extremities, no atrophy was appreciated and there was no definite dermatomal sensory deficit.

Dr. Stein opined that as a result of the accident, claimant sustained a fracture of the arch and lateral mass, which is essentially the facet joint of C1. He also felt claimant had severe stenosis at C3-4, which preexisted the accident. He declined to give an opinion regarding prevailing factor for the surgery, stating Dr. Lothes must have had his reasons for performing the surgery.

Dr. Stein, without regard to causation, found claimant had a 25 percent whole person impairment under DRE cervicothoracic category IV, under the 4th edition of the *AMA Guides*. He testified he didn't use category V, which involves substantial functional impairment to the upper extremities as a result of the cervical spine injury, to the extent that the individual should require some sort of assistive device for at least one of the upper

extremities, because claimant did not fit in category V. Category V would have provided a higher impairment.

Dr. Stein assigned restrictions including: avoid lifting more than 40 pounds up to chest level very occasionally and 30 pounds occasionally; avoid repetitive lifting; no overhead activity or activity requiring a relatively full range of neck movement; no repetitive bending or twisting of the neck and no activity requiring the cervical spine to be in a fixed and unmoving position for more than a few minutes at a time.

Dr. Stein reviewed the task list prepared by Karen Terrill and opined claimant could no longer perform 5 out of 10 tasks for a 50 percent task loss. Dr. Stein opined claimant is capable of working as long as it is within the assigned restrictions.

Dr. Stein acknowledged there is a greater risk of injury when a person falls on stairs compared to just a flat walkway.

Claimant met with George Fluter, M.D., for an examination on October 9, 2013, at the request of his attorney. The history of injury provided to Dr. Fluter was consistent with claimant's testimony.

Dr. Fluter noted that after injury, claimant had surgery on August 22, 2011, to fuse C3 to C5 and apply a halo vest. Claimant underwent another surgery on March 12, 2012, to fix a non-healing C1 fusion. On January 30, 2013, claimant underwent a third surgery to perform a revision of the first two procedures. On May 16, 2013, claimant began the process of being weaned off the cervical collar and start using a soft collar. In August 2013, claimant was advised one of the rods had again broken. A fourth surgery was discussed but claimant elected to undergo no additional surgery.

Dr. Fluter noted claimant presented with pain affecting the neck/upper back and shoulders. Claimant rated the pain at 4 to 6 out of 10. Claimant reported not being pain free since the injury, and described the pain as constant, aching, severe and distressing. He noted nothing that made the pain worse, but medication took the edge off.

Claimant was wearing a soft collar at the time of this evaluation. He was able to ambulate without problems. His cervical range of motion was significantly limited in all planes; muscle strength and bulk were within functional limits; there was atrophy of the hand intrinsic muscles more so on the left; sensation was generally preserved in the upper and lower extremities; muscle stretch reflexes were physiologic and symmetric bilaterally; there was no clonus with forced ankle dorsi flexion; there was a well-healed surgical incision over the anterior aspect of the neck; there was no evidence of erythema, fluctuance or drainage at the incision site; there was a well-healed surgical incision over the posterior aspect of the neck, and manual muscle testing was graded at 4+-5 in all major muscle groups to 5.

Dr. Fluter assessed the following from his examination:

1. Status post work-related injury; 8/21/11.
2. C1 cervical fracture, initially treated non-operatively with a halo vest; 8/22/11.
3. Anterior cervical discectomy and fusion (anterior approach); 8/22/11.
4. Non-union of C1 fracture.
5. Status post cervical spine fusion surgery (posterior approach); 3/12/12.
6. Cervical spine hardware failure.
7. Status post revision cervical spine surgery (posterior approach); 1/30/13.
8. Cervical spine fusion hardware failure.
9. Traumatic brain injury with loss of consciousness of unknown duration.
10. Right parietal cortex hemorrhagic contusion/probable subarachnoid hemorrhage.<sup>2</sup>

Dr. Fluter opined that, to a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and the reported work-related injury occurring on August 21, 2011. He felt there was no indication in the available medical records that diabetes or claimant's blood sugar level resulted in the injury occurring on August 21, 2011. Claimant's blood sugar level when drawn by Reno County EMS at the scene was 249 mg/dl. Normal blood sugar range is somewhere around 70 to 110. Dr. Fluter indicated there was no means of verifying what claimant's blood sugar level was at the time of the injury. Claimant's levels when tested were well below that of a diabetic coma.

Dr. Fluter opined that the prevailing factor for claimant's injury, the need for medical evaluation/treatment and the resulting impairment/disability is the work-related injury occurring on August 21, 2011. He felt claimant's prognosis was fair and assigned a 35 percent functional whole body impairment, in accordance with DRE Cervicothoracic Spine Impairment Category V. He wrote claimant's orthopedic impairments led to a chronic pain condition which has persisted since the time of the injury despite treatment with medications and a TENS unit. Dr. Fluter opined that, given the chronic nature of claimant's pain condition, he does not have the capacity to perform work duties on a regular and consistent basis. He felt claimant would require flexibility to alternate activities allowing him to change position and take rest breaks when needed. He opined claimant's impairments are more likely than not permanent. Dr. Fluter opined that claimant is permanently and totally disabled.

He assigned restrictions of: restrict lifting, carrying, pushing and pulling to 10 pounds occasionally and negligible weight frequently; avoid holding the head and neck in awkward and/or extreme positions; avoid overhead activities; and restrict activities at or above shoulder level using each arm to an occasional basis.

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<sup>2</sup> Fluter Depo., Ex. 2 at 10 (Dr. Fluter's Oct. 9, 2013, report).

Dr. Fluter stated future medical care is likely and will take the form of continued pain medication, a TENS unit and possibly interventional pain management procedures, which would include, but not be limited to epidural steroid injections, selective nerve root blocks, facet joint injections and trigger point injections. He also felt consideration may be given to a repeat cervical spine revision surgery because of recurrent hardware failure. Should revision surgery not be an option, claimant may be a candidate for a trial of neuromodulation with a spinal cord stimulator.

Dr. Fluter reviewed the task list of vocational expert Robert W. Barnett, Ph.D., and found claimant could no longer perform 5 out of 8 tasks for a 62.5 percent task loss.

Claimant met with Robert W. Barnett, Ph.D., on November 19, 2012, by phone and on February 13, 2014, in person, for a vocational assessment. Dr. Barnett reported that the nature of claimant's orthopedic impairments led to a chronic pain condition which has persisted since the time of injury despite treatment, and given the chronic nature of the pain condition, it is his opinion that claimant does not have the capacity to perform work activities on a regular and consistent basis. He wrote that claimant would require alternating activities, position changes and rest breaks as needed. He acknowledged claimant's use of opioid analgesic agents and muscle relaxants could result in sedation and cognitive impairment that would impact claimant's performance of safety sensitive activities.

Dr. Barnett opined that claimant is permanently and totally disabled. He found claimant to have a 100 percent wage loss because he was not working. He wrote claimant is unemployable due to his physical restrictions, age and the employment market in his area. Other notable information was that claimant has a driver's license and can drive up to one hour without difficulty; can walk without difficulty; can perform self-care independently; and takes Oxycodone and Robaxin for pain.

Claimant met with vocational expert Karen Terrill on December 9, 2013, resulting in a written report on December 30, 2013. Ms. Terrill compiled a list of tasks performed in the five years prior to the August 21, 2011, date of injury. Ms. Terrill noted claimant has not worked since the accident, and had not attempted to find work, stating he is still under doctor's care and has not been released.

Ms. Terrill wrote that, given claimant's age, 65 years old, it would likely be necessary to perform directly transferrable skills for a successful return to work. Ms. Terrill opined that within Dr. Stein's restrictions claimant could work as a machinist, depending on the physical requirements, as not every machinist job has the same physical requirements. She did not have Dr. Fluter's restrictions.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(3)(A) states:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Claimant suffered a fall shortly after exiting the restroom after a work-related safety meeting. There is no explanation for the fall and claimant remembers nothing after exiting the restroom. Additionally, there were no witnesses to the fall. To make matters even more confusing, the only video of the event showed only claimant landing on the stairway. There is no recording of the top of the stairs where claimant's fall supposedly began.

On May 15, 2011, the Kansas legislature amended the Kansas Workers Compensation Act (Act) to exclude idiopathic falls from compensation. Prior to that time, unexplained falls in Kansas were deemed compensable. According to Larson's<sup>3</sup>, the majority of jurisdictions compensate workers who are injured in unexplained falls based upon the analysis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if the employee had not been working. However, with the 2011 legislative changes to the Act, the Kansas legislature displayed a clear intent to exclude such unexplained and neutral risk injuries from compensation.

K.S.A. 2011 Supp 44-508(f)(3)(B) states:

(B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

The stairs on which claimant fell have been described as being in good shape with no obvious hazards. The stairs were not shown to be defective in any way and presented no special risk or hazard other than being a stairway. The Board finds the special risk or hazard exception to the going and coming rule has no application to this matter.

Here, claimant suffered a fall of unknown origin or cause. He remembers nothing from the time he was in the restroom until he awoke while being loaded onto a helicopter.

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<sup>3</sup> Larson's Workers' Compensation Law, Sec. 7.04[1] (2004).

There were no witnesses to the fall and no video of the top of the stairs where the fall began.

The Board finds, based upon legislative changes, specifically, the enactment of K.S.A. 2011 Supp. 44-508(f)(3)(A)(iv), that claimant's accident did not arise out of and in the course of his employment with respondent. The award of benefits by the SALJ is reversed.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed. Claimant failed to prove that he suffered personal injury by accident arising out of and in the course of his employment with respondent. The legislative intent to exclude idiopathic falls from compensation in this state, no matter how harsh, is clear.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge C. Stanley Nelson dated June 17, 2014, is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2015.

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

### CONCURRING OPINION

The SALJ acknowledged claimant did not know why he fell, but concluded claimant's fall was not due to an idiopathic cause, personal cause, neutral risk or normal activities of day-to-day living because there was a clear employment character to the accident and resulting injury. The SALJ noted that under *Bryant*,<sup>4</sup> the proper approach to determine if claimant had a work-related accident, as opposed to an injury caused by day-to-day living, is to explore whether the activity resulting in injury was connected to or inherent in performing the job.

Respondent's only argument is that claimant's injury was due to an idiopathic cause, which it defines as unknown and unexplained. Given respondent's limited argument, we need not address whether claimant's accident was due to a personal cause or was the result of day-to-day living. Analysis under *Bryant* is not relevant to this case.

K.S.A. 2011 Supp. 44-508(f)(3)(A)(iv) states the definition of "arising out of and in the course of employment" does not include an "accident or injury which arose either directly or indirectly from idiopathic causes." An idiopathic cause is described as emanating from an unknown cause,<sup>5</sup> while an unexplained fall is a neutral risk.<sup>6</sup> The terms "neutral" and "idiopathic" appear to overlap and may be redundant.<sup>7</sup>

Claimant argues his accidental injury is compensable because he was exposed to a special risk he normally did not encounter (industrial stairs) as part of a mandatory special purpose trip or special travel. "Kansas courts have recognized [an] . . . exception to the 'going and coming rule' when travel is an 'intrinsic part of the job,' or is 'required in order to complete some special work-related errand or special-purpose trip.'"<sup>8</sup> This Board Member does not view claimant as a traveling employee (such as an oil field worker or a traveling salesman) or that this matter involves the "going and coming" rule, but concludes claimant was carrying out his job duties by attending a meeting required by respondent.

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<sup>4</sup> *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 596, 257 P.3d 255 (2011).

<sup>5</sup> *Kuxhausen v. Tillman Partners, L.P.*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008) *aff'd*, 291 Kan. 314, 241 P.3d 75 (2010).

<sup>6</sup> *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 92, 200 P.3d 479 (2009).

<sup>7</sup> See *Roget's 21st Century Thesaurus* 842 (2d Ed. 1999).

<sup>8</sup> *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 939, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008) (citing *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006) and *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan.App.2d 542, 546, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001)).

Claimant's work-related attendance of the meeting is somewhat akin to the facts of *Blair*.<sup>9</sup> In such case, mechanics from Fort Scott died in a motor vehicle accident while driving home after a examination their employer expected them to take in Pittsburg. The trip was incidental to and part of their employment. The Kansas Supreme Court stated:

Having concluded that the trip to Pittsburg to take the examination was a part of the employment, it seems entirely logical to conclude that the entire undertaking is to be considered from a unitary standpoint rather than divisible. To take the examination it was necessary for decedents to make the round trip to Pittsburg. That involved travel by private automobile-going and returning-one project, so to speak, and included the normal traffic hazards inherent in such an undertaking. The act does not require that the injury be sustained on or about the employer's premises.

. . .

In conclusion, . . . the lower court was correct in ruling that the trip to Pittsburg to take the examination was an integral part of the employment, and that at the time and place in question decedents had not left the duties of such employment within the meaning of G.S.1949, 44-508(k).<sup>10</sup>

Claimant's case has similarities to other appellate decisions rendered before significant changes were made in the Kansas Workers Compensation Act changed significantly by way of May 15, 2011 amendments. For instance, in *Brobst*,<sup>11</sup> a claimant was leaving a continuing education seminar paid for by her employer. She stepped off a curb, twisted her ankle and fell in a parking lot. Her case was compensable: "*Blair* requires viewing the entire undertaking as indivisible. . . . If the whole trip is indivisible, then it includes all the normal risks involved in completing it, and Brobst's injuries should be compensable."<sup>12</sup>

In *Mendoza*,<sup>13</sup> a claimant was directed to pick up his paycheck at an office where he did not work. He slipped and fell outside the office and broke his ankle. His injury was compensable because he was injured while doing what his employer instructed. *Mendoza* states, "The exception extends to the normal risks involved in completing the task or travel, and the required perspective is to view the task or trip as unitary or indivisible, meaning an

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<sup>9</sup> *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951).

<sup>10</sup> *Id.* at 529-30.

<sup>11</sup> *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

<sup>12</sup> *Id.* at 775.

<sup>13</sup> *Mendoza v. DCS Sanitation*, 37 Kan. App. 2d 346, 152 P.3d 1270 (2007).

injury during any aspect thereof is compensable.”<sup>14</sup> If the employee's trip or task is integral or necessary to the employment, this exception makes compensable any injury suffered during any portion of such trip or task.<sup>15</sup>

However, the 2011 amendments to the Act did not apply to these cases. *Blair, Brobst* and *Mendoza* did not involve idiopathic accidents or injuries that are now statutorily precluded from having being considered to arise out of and in the course of employment. K.S.A. 2011 Supp. 44-508(f)(3)(A)(iv) excludes from the definition of “arising out of and in the course of employment” an “accident or injury which arose either directly or indirectly from idiopathic causes.”

The Kansas Supreme Court is clear that statutes are to be applied as written:

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.<sup>16</sup>

Case law, such as *Blair* which makes compensable every accidental injury during a special trip or task, from leaving home to returning home, is not based on the 2011 amendments to the Act. Under the new law, simply attending a mandatory meeting does not guarantee compensability of any accidental injury which may happen during the meeting. To incorporate the prophylactic holding of *Blair* into the 2011 amendments would be to ignore recent legislative intent.

Even if claimant was involved in a special task and even if he was performing his job at a locale as directed by respondent, the evidence still establishes the cause of his accident was unknown or unexplained. Even if we were to conclude the stairs posed a risk,<sup>17</sup> the evidence does not establish, more probably than not, that claimant fell because of the stairs. We simply do not know why claimant fell, but attributing the fall to the stairs would require assumption and speculation. We do not know if he started to fall before he reached the stairs or if he slipped, missed a step, twisted or tripped on the stairs. Simply put, while the evidence shows the stairs posed some increased risk, the evidence does not show claimant fell because of the stairs.

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<sup>14</sup> *Id.* at 350.

<sup>15</sup> See *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 277, 899 P.2d 1058 (1995).

<sup>16</sup> *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

<sup>17</sup> In passing, this Board Member does not agree with respondent's argument that stairs must be wet, slippery, defective or against building code to be an increased risk of employment.

This case would have been compensable before the May 15, 2011 legislative changes to the Act. However, the changes in the law must be applied as written.

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