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Pain Management and Post Award Medical

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Future Medical treatment:

K.S.A. 44-510h: Future Medical Treatment (Amended)
Redefines a claimant's ability to obtain future medical treatment. As amended, the statute provides:

- A rebuttable presumption that the employer's obligation to provide medical treatment terminates at MMI.
- The claimant may rebut the presumption with medical evidence "that is more probably true than not" that additional medical treatment will be necessary after MMI.

44-510h(e).

(e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 44-525, the Form of Findings and Awards statute (Amended)
As amended the statute provides that no award shall include the right to future medical treatment unless it is proved by the claimant that "it is more probably true than not" that future medical treatment will be required. This applies to settlements as well as Regular Hearing Awards.

44-525. Form of findings and awards; effective date.

(a) Every finding or award of compensation shall be in writing, signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury. The award of the administrative law judge shall be effective the day following the date noted in the award.

(b) No award shall be or provide for payment of compensation in a lump sum, except as to such portion of the compensation as shall be found to be due and

> unpaid at the time of the award, or except at the discretion of the director on settlement agreements, and credit shall be given to the employer in such award for any amount or amounts paid by the employer to the employee as compensation prior to the date of the award.
>
> (c) In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

Post-award Medical Benefits:

K.S.A. 44-510k: Post-award Medical Benefits (Amended)
Redefines a claimant's ability to obtain post-award medical treatment. As amended the statute provides:

- Where future medical benefits have been awarded, either party may make application for the "furnishing, termination or modification of medical treatment;
- The ALJ may award additional medical treatment only if "more probably true than not" that the original injury is the prevailing factor in the need for additional medical care; or
- The ALJ may terminate or modify an award if the ALJ finds no further care is required, the original injury is not the prevailing factor, or that the care requested is not necessary to treat the effects of the original injury.

44-510k(a)(3), as amended, provides for the permanent termination of previously awarded future medical treatment:

- If a claimant has not received authorized medical treatment within two years from the award or last authorized medical treatment, then there is a rebuttable presumption that no further care is needed and the employer can make application for the permanent termination of the future medical benefits.
- The claimant may rebut the presumption with "competent medical evidence."

No termination can occur without all parties given the opportunity to present evidence.

K.S.A. 44-510k.

44-510k. Post-award medical benefits; application; notice; attorney fees; termination or modification of benefits.

(a) (1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.

(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

(3) If the claimant has not received medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, from an authorized health care provider within two years from the date of the award or two years from the date the claimant last received medical treatment from an authorized health care provider, the employer shall be permitted to make application under this section for permanent termination of future medical benefits. In such case, there shall be a presumption that no further medical care is needed as a result of the underlying injury. The presumption may be overcome by competent medical evidence.

(4) No post-award benefits shall be ordered, modified or terminated without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551, and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556, and amendments thereto.

(b) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superseded by preliminary hearings pursuant to K.S.A. 44-534a, and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. The administrative law judge shall have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following the filing of such application for post-award medical treatment. Reviews taken under this section shall receive priority settings before the board, only superseded by reviews for preliminary hearings. A decision shall be rendered by the board within 30 days from the time the review hereunder is submitted.

Attorney Fees:

44-510k(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536, and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

K.S.A. 44-536(g): Attorney Fees (Amended)
As amended, the statute provides that in the event of a denial of additional compensation, benefits or penalties and where “the attorney engaged in frivolous prosecution of the claim,” no attorney fees will be allowed.

44-536(g).

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.

(1) If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation.

(2) If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567, and amendments thereto, to the extent of the liability of the fund.

(3) If the services rendered herein result in a denial of additional compensation, penalties, or other benefits, and it is determined that the attorney engaged in frivolous prosecution of the claim, the employer and insurance carrier shall not be liable for any portion of the attorney fees incurred for such services.

RETROACTIVITY OF 2011 AMENDMENTS

The Kansas Supreme Court, in *Bryant v. Midwest Staff Solutions, Inc*., 292 Kan. B585, 257 P.3d 255 (2011), held that certain 2011 amendments to the Act operate prospectively because they would "adversely affect substantive rights". Arguably, the Amendments will be applied prospectively, and the statute as of the date of injury will apply.

Case law prior to 5/15/11 amendments:

Is the present need for medical treatment a natural and probable consequence of the original injury?

- Claimant has burden of proof – medical evidence typically necessary to meet burden of preponderance of evidence, even if only entered through Claimant's testimony. See *Troy Smith v. Goodyear Tire*, KS WCAB, Docket #1,050,654, 6/11/12
- *Omar v. Tyson Fresh Meats, Inc.* – Court of Appeals of Kansas – 276 P.3d 838 (2012)
    - ALJ denied any post-award medical treatment for Omar's back because the back was not included in the underlying compensation award and, therefore, could not form the basis for post-award medical benefits
    - Back injury had been litigated in a prior proceeding and was resolved against Omar
    - The dispute in this case turns on the words "accidental injury which was the subject of the underlying award." Omar contends that he is entitled to post-award medical benefits for treatment of his lower

back because the original award merely concluded that Omar had not established impairment arising from a lower back injury.
    - Omar's argument conveniently ignores the language "subject to the underlying award." Clearly, in order to be part of an "accidental injury which was the subject of the underlying award," the existence of the accidental injury would necessarily have to be expressly recognized in the original award.
    - The Board properly denied Omar's request for post-award medical benefits under K.S.A.2010 Supp. 44–510k.
    - 44–510k clearly anticipates that an application for post-award medical benefits will correspond to ongoing medical treatment for compensable injuries. Inherent in post-award medical benefits, therefore, is a requirement that the treatment arose after the date of the original compensation award. Otherwise, expenses related to the treatment should have been included in the original award, either as unpaid medical expenses or as future medical expenses.
- *Ruben Parga v. Farmland Foods*, KS WCAB Docket #1,042,364, 4/5/12, applied analysis in *Montgomery v. Volume Shoe Corp.,* 2010 WL 4009108 (Kan. WCAB 9/15/10)*:*
    - Montgomery underwent back surgery and returned to work in an accommodated position; beginning in 2009, Montgomery had increase of back pain and filed a post-award medical application.
    - *Jackson v. Stevens Well Service,* 208 Kan. 637 (1972), the Court held: "When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury."
    - *Stockman v. Goodyear Tire*, 211 Kan. 260 (1973), the Court clarified: "The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident."
    - In *Logsdon*, the Kansas Court of Appeals stated that whether an injury is a natural and probable result of a previous injury is generally a fact question. The Court in *Logsdon* indicated there are cases in which (1) the original injury caused further injury and in those cases there was usually not an intervening accident or trauma; (2) there is a subsequent injury that is a direct and natural consequence of the primary injury despite an intervening accident or trauma, and (3) compensability for a subsequent injury has been denied on the grounds it resulted from a new or separate injury.
        - *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79 (2006), Kansas Court of Appeals stated: Since *Jackson* and *Stockman*, our courts have

struggled to understand and consistently apply the rule. The more straightforward situations are those where a primary injury itself causes subsequent further injury to the same or other body parts; in these cases there is usually no "intervening" trauma or accident and the subsequent claim is allowed. See, e.g., *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977); *Reese v. Gas Engineering & Construction Co*., 219 Kan. 536, 548 P.2d 746 (1976). These cases should not be confused with the tougher cases where some intervening accident or trauma has aggravated a prior injury; as noted by the Board here, these cases make it "difficult to discern ... consistent criteria."

- Although not intended to be exhaustive, the following reported cases have allowed compensability for a subsequent injury that is a "direct and natural consequence" of a primary injury, despite an intervening accident or trauma: *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353[, 995 P.2d 855 (2000)] (claimant's subsequent injury was aggravation of a preexisting back injury while participating in medical treatment programs for a compensable injury to his right forearm and shoulder); *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990) (where court "expanded" the rule holding that any additional injury arising from medical malpractice in the treatment of the primary injury is compensable); *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977) (2 years after initial injury to knee, claimant stepped from tractor and knee locked up).
- In contrast, the following reported cases have denied compensability for a subsequent injury on the grounds it resulted from a new and separate accident: *Wietharn v. Safeway Stores, Inc.*, 16 Kan. App. 2d 188 [, 820 P.2d 719, rev. denied 250 Kan. 808 (1991)] (where original injury was broken knee, and knee "gave way" while lifting heavy crate 30 days after return to work; denied despite evidence knee tended to "give way" and treating physician had warned could "give way" in the future); *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, Syl., 648 P.2d 265, rev. denied 231 Kan. 800 (1982) (after original back injury had healed and been fused, claimant slipped and broke part of the fusion during his fall; court said "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back").

Walker v. Century Mfg., Inc., Kansas Work Comp Board, Docket # 1,038,041, 5/3/12

- The Kansas Workers Compensation Act permits a claimant to request post-award medical benefits and authorizes an award of attorney fees in connection with that request. The purpose of the attorney fee statute is to encourage attorneys to represent claimants in circumstances where there is no additional award of disability compensation from which a fee could be taken. The general purpose of allowing attorney fees in these situations includes the policy reasons that (1) attorney fee awards serve to deter potential violators and encourage voluntary compliance with the statute involved; and, (2) statutes allowing an award of attorney fees are not passed to benefit the attorney, but are passed to enable litigants to obtain competent counsel. Thus, the Workers Compensation Act provides that an attorney who represents an employee is entitled to reasonable attorney fees for services rendered after the ultimate disposition of the initial and original claim. <u>And if those legal services result in no additional award of disability compensation but result in an additional award of medical compensation or other benefits the director shall fix the proper amount of such attorney fees to be paid by the employer.</u>
- There is no statutory prohibition against an attorney receiving fees from the disability compensation awarded claimant and then receiving additional fees for services performed seeking certain post-award benefits. In this instance claimant's attorney rendered services to claimant in a post-award hearing for additional medical benefits.
- The Board concludes that *Naff* is distinguishable from this claim. In *Naff*, the Court of Appeals held that under the facts presented in that particular case, an injured worker was not entitled to an award of attorney fees where medical treatment that was being sought following a final award was actually recommended before the final award was entered. Naff v. Davol, Inc., No. 85,559, COURT OF APPEALS OF KANSAS, 28 Kan. App. 2d 726; 20 P.3d 738; 2001 Kan. App. LEXIS 220, March 23, 2001
- **Attorney fees typically collectible as a result of post-award litigation, but not when a treatment, which was recommended prior to disability award, is pursued after receiving the award.**

Siler v Shawnee Mission School District, USD 512, 45 Kan.App. 586, 251 P.3d 92 (2011) (Decided 4/1/11). In *Siler,* the Appeals Board held the ALJ had jurisdiction to issue preliminary order denying future psychological treatment. The Court of Appeals dismissed claimant's appeal citing lack of jurisdiction because the preliminary order was not a final order. A settlement award that leaves future medical open is not a final order. Therefore, an employer can request preliminary hearing to deny or terminate treatment. Because the claimant retains the right to seek a preliminary hearing order authorizing future medical treatment, the ALJ's preliminary order denying treatment is not a termination of the claimant's right to seek post-award treatment.

Issues:

Do the 5/15/11 amendments apply to dates of accident before 5/15/11?

The Kansas Supreme Court, in *Bryant v. Midwest Staff Solutions, Inc*., 292 Kan. B585, 257 P.3d 255 (2011), held that certain 2011 amendments to the Act operate prospectively because they would "adversely affect substantive rights". Arguably, the Amendments will be applied prospectively, and the statute as of the date of injury will apply.

Do the 5/15/11 amendments require a finding in the award "that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement" in order for the claimant to pursue post award medical?

Do the 5/15/11 amendments allow for medical to be permanently closed even when left open in the initial award?

How will the new prevailing factor language change the case law regarding medical treatment that is a natural and probable consequence of the original injury?

Pain Management:

In the few cases in which I was involved, where pain management was ordered, the pain management was very expensive, not effective and addicted the claimant to the prescribed medications.

However, chronic pain is a substantial problem as the following quote from Newsweek 2007 states:

"Chronic pain is one of the most pervasive and intractable medical conditions in the U.S., with one in five Americans afflicted." Civilian chronic pain costs the country approximately $61 billion in lost productivity and "many more" in medical fees.

Hopefully, physicians such as Dr. Parks can provide the kind of pain management that is effective and affordable.