BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

WILLIAM WEAVER	)	
Claimant	)	
V.	)	AP-00-0464-459
	)	CS-00-0438-834
UNIFIED GOVERNMENT OF WYANDOTTE CO.	)	
Self-Insured Respondent	)	

ORDER

All parties requested review of the March 17, 2022, Award by Administrative Law Judge (ALJ) Troy A. Larson. The Board heard oral argument on July 14, 2022.

APPEARANCES

Keith L. Mark appeared for Claimant. Denise E. Tomasic appeared for self-insured Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Regular Hearing held June 22, 2021; the transcript of the Continuation of Regular Hearing Testimony by Deposition of Claimant from August 31, 2021, with exhibits attached; the transcript of the Continuation of Regular Hearing Testimony by Deposition of Claimant from September 3, 2021, with exhibits attached; the transcript of the evidentiary deposition of Michael Poppa, D.O., from September 27, 2021, with exhibits attached; the transcript of the deposition of E. Bruce Toby, M.D., from September 27, 2021, with exhibits attached; the transcript of the evidentiary deposition of Vito J. Carabetta, M.D., from October 20, 2021, with exhibits attached; and the documents of record filed with the Division.

ISSUES

The issues for the Board's review are:

1. What is the nature and extent of Claimant's disability?

2. Is Respondent entitled to a reduction of the per month partial disability compensation awarded to Claimant pursuant to K.S.A. 44-501(e)?

3. Is Claimant entitled to future medical benefits?

4. Is Respondent subject to interest pursuant to K.S.A. 44-512b?

5. Is K.S.A. 44-501(e), or the mandate of the AMA *Guides*,[1] unconstitutional?

FINDINGS OF FACT

Claimant sustained a work-related injury to his right upper extremity on August 20, 2018, when his hand was trapped between a cinder block wall and a steel beam. Machinery was required to remove the steel beam and free Claimant's hand. Claimant felt immediate pain and swelling. Claimant reported the incident to Respondent and was directed to medical treatment.

Claimant testified he injured his right hand and wrist area from the back of his hand to the front of his hand in an area below the ring and little fingers. Claimant also noted pain in his right wrist and thumb areas, with swelling, sensitivity to touch, numbness, and lack of circulation. It is difficult for Claimant to perform daily activities, such as taking a bath, and push/pull activities increase his pain. Claimant described loss of grip strength and loss of the range of motion of his right thumb. Claimant explained his complaints related to August 20, 2018, are located in his right hand and do not extend into his forearm or elbow.

Prior to August 20, 2018, Claimant sustained multiple work-related injuries to his right upper extremity. Claimant testified his current accident has no connection or relationship to the parts injured in these previous accidents.

On March 10, 2009, Claimant injured his right long (middle) finger. He settled this case on July 26, 2010, based on 10 percent permanent partial impairment to the right long finger. On May 9, 2011, Claimant injured his right wrist and settled this case on December 17, 2012, based on 10 percent permanent partial impairment to the right wrist. Claimant's right elbow was struck with a hammer on March 16, 2016. He settled this case on December 17, 2018, based on 12 percent permanent partial impairment to the right arm. On May 2, 2016, Claimant sustained injury to the first and second fingers of his right hand. He settled this claim on December 17, 2018, based on 10 percent permanent partial impairment to the right hand.

Dr. E. Bruce Toby eventually became Claimant's authorized treating physician for injuries sustained on August 20, 2018. Dr. Toby, an orthopedic surgeon specializing in upper extremities, first examined Claimant on August 14, 2019. On September 12, 2019,

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

Dr. Toby ordered an MRI of Claimant's right hand, which showed some marrow edema at the fourth proximal portion of the metacarpal. Dr. Toby indicated the MRI findings validated Claimant's pain complaints. Dr. Toby did not recommend surgery. Claimant treated with Dr. Toby until his last visit on October 11, 2019, at which time Dr. Toby released him at maximum medical improvement (MMI). Dr. Toby released Claimant to full work duties per Claimant's request. Dr. Toby did not recommend additional medical treatment.

Using the Sixth Edition AMA *Guides*, Dr. Toby concluded Claimant sustained 3 percent permanent partial impairment to the right upper extremity. Dr. Toby testified the rating he provided under the Fourth Edition AMA *Guides*, or 5 percent permanent partial impairment to the right upper extremity, is more indicative of Claimant's impairment. He further stated his rating translates to 6 percent permanent impairment to the level of the forearm. Dr. Toby clarified, "This rating does not incorporate any impairments from his compression neuropathies which were treated by Dr. Moore nor does it incorporate any rating to other carpometacarpal joints which may have occurred with previous injuries."[2] Dr. Toby testified the treatment recommendations provided by Dr. Carabetta are reasonable.

Dr. Michael Poppa examined Claimant on May 11, 2020, per his counsel's request. Dr. Poppa reviewed Claimant's medical records, history, and performed a physical examination. Dr. Poppa concluded:

> The date of injury of 8/20/18 while he was employed by [Respondent] resulted in acute trauma injuries involving his right arm and elbow, but will only discuss wrist, hand and fingers. The diagnosis involving those areas include trauma, crush injury, tenosynovitis involving the extensor carpi radialis longus and brevis tendons of his right upper extremity, forearm area. Partial thickness intrasubstance tear involving the ulnar aspect of the triangular fibrocartilage complex. Painful arthropathy involving the first [carpometacarpal] joint in second through fifth [carpometacarpal] joints of his right hand. Subluxation involving the [carpometacarpal] joints, both the right ring and small fingers.[3]

Using a strict interpretation of the Sixth Edition AMA *Guides,* Dr. Poppa opined Claimant sustained a combined 19 percent impairment to the right upper extremity. He explained 10 percent impairment is residual tendinitis to the forearm, and 10 percent is for hand/wrist trauma resulting in a triangular fibrocartilage complex (TFCC) tear with carpometacarpal joint pain especially involving the fourth and fifth digits. Dr. Poppa stated his rating is the same regardless of which edition of the AMA *Guides* is utilized.

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[2] Toby Depo., Ex. 2 at 2.

[3] Poppa Depo. at 17-18.

Dr. Poppa testified a strict interpretation of the Sixth Edition AMA *Guides* does not adequately address Claimant's impairment. Dr. Poppa, using his expertise and competent medical evidence, determined Claimant sustained 28 percent impairment to the right upper extremity. He stated Claimant's TFCC tear with carpometacarpal joint pain alone warrants 20 percent impairment. Dr. Poppa testified he attributed his rating opinions solely to the August 20, 2018, incident and not any preexisting injuries.

Dr. Poppa recommended additional treatment in the form of prescription strength Celebrex or Meloxicam, Diclofenac gel 1%, and home strengthening exercises.

On March 18, 2021, Dr. Vito Carabetta conducted a court-ordered independent medical evaluation of Claimant. Claimant's chief complaint was right hand dysesthesias. Claimant also described numbness affecting the fourth and fifth digits of his right hand. Dr. Carabetta reviewed Claimant's medical records, history, and performed a physical examination. He determined Claimant has a partial tear of the right TFCC, chronic tenosynovitis of the dorsal right hand, and chronic instability of the right fourth and fifth carpometacarpal joints. Dr. Carabetta recommended future conservative treatment in the form of nonsteroidal anti-inflammatory medication and Voltaren gel. Dr. Carabetta testified regular use of this medication should involve a physician, at least annually, to conduct routine blood work.

Dr. Carabetta determined Claimant sustained 8 percent impairment of the right upper extremity using the Sixth Edition AMA *Guides*. Under the Fourth Edition AMA *Guides*, Claimant's impairment is 10 percent of the right upper extremity. In his report, Dr. Carabetta wrote:

> Physician judgment and experience must be utilized when assessing the presentation, and great care needs to be taken not to include impairment ratings that would be associated with prior injuries in this particular case. Taking this approach, I would suggest to ail parties concerned that a 10% impairment of the right upper extremity would be a reasonable rating with the use of the Fourth Edition.

Dr. Carabetta stated he was careful not to include any preexisting impairment in his rating, and noted the TFCC tear was a new and distinct injury sustained on August 20, 2018.

The ALJ found Claimant sustained 8 percent permanent partial impairment to the right upper extremity as a result of his August 20, 2018, work-related accident, but was not entitled to future medical treatment. The ALJ determined no credit for Claimant's preexisting impairments is required, and pre-award interest is not appropriate for

Respondent's failure to pay compensation prior to the award. The ALJ stated he lacked jurisdiction to hear Claimant's constitutionality arguments.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the benefits awarded to Claimant should be reduced by $38,700, the current dollar value of his 30 percent preexisting impairment of the right upper extremity, pursuant to K.S.A. 44-501(e).

Claimant argues he sustained new and unique injuries as a result of the August 20, 2018, accident, and all permanent impairment ratings obtained did not include any preexisting impairments. Claimant contends he sustained 20 percent impairment to the right forearm and is entitled to future medical treatment. Claimant argues Respondent owes interest and penalties due to its failure to pay compensation, without just cause, when compensation was due prior to the award. Finally, Claimant preserves his constitutional objections.

1. What is the nature and extent of Claimant's disability?

K.S.A. 44-510d states, in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i, and amendments thereto.
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> . . .
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> (b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> (12) For the loss of a forearm, 200 weeks.
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> . . .
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> (23) 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, if the impairment is contained therein.

In *Butler v. The Goodyear Tire and Rubber Company*,[4] the Board ruled:

> The language mandating the use of the AMA *Guides* in K.S.A. 44-510e(a)(B) is different than the language of K.S.A. 44-510d(b)(23), which says impairment of function related to a scheduled injury shall be determined using the Sixth Edition, if the impairment is contained therein. K.S.A. 44-510d(b)(23) does not contain the phrase "competent medical evidence."
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> The plain language of K.S.A. 44-510d(b)(23) requires the functional impairment to be based upon the Sixth Edition. There is no requirement the impairment rating be based upon any other criteria, including substantial competent evidence.
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> The ALJ was correct in concluding he was bound by the Sixth Edition when assessing functional impairment under K.S.A. 44-510d(b).

The ALJ found Claimant sustained 8 percent permanent partial impairment to the right upper extremity as a result of his August 20, 2018, work-related accident. The Board agrees with this finding. Dr. Toby concluded Claimant sustained 3 percent permanent partial impairment to the right upper extremity using the Sixth Edition AMA *Guides*. Dr. Poppa assessed 19 percent impairment to the right upper extremity using the Sixth Edition AMA *Guides*. Dr. Carabetta determined Claimant sustained 8 percent impairment of the right upper extremity using the Sixth Edition AMA *Guides*. The Board finds the rating provided by Dr. Carabetta, the court-ordered, neutral evaluator, is more persuasive and awards 8 percent impairment of the right upper extremity.

2. Is Respondent entitled to a reduction of the benefits awarded to Claimant pursuant to K.S.A. 44-501(e)?

K.S.A. 44-501(e) states:

> An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.
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> (1) Where workers compensation benefits previously been awarded through settlement or judicial or administrative determination in Kansas, the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting. Where workers compensation benefits not previously been awarded through settlement or judicial or administrative

[4] *Butler v. The Goodyear Tire and Rubber Company*, No. AP-00-0456-096, 2021 WL 2287732 (Kan. WCAB May 27, 2021).

> determination in Kansas, the amount of preexisting functional impairment shall be established by competent evidence.
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> (2) In all cases, the applicable reduction shall be calculated as follows:
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> (A) If the preexisting impairment is the result of injury sustained while working for the employer against whom workers compensation benefits are currently being sought, any award of compensation shall be reduced by the current dollar value attributable under the workers compensation act to the percentage of functional impairment determined to be preexisting. The "current dollar value" shall be calculated by multiplying the percentage of preexisting impairment by the compensation rate in effect on the date of the accident or injury against which the reduction will be applied.
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> (B) In all other cases, the employer against whom benefits are currently being sought shall be entitled to a credit for the percentage of preexisting impairment.

In *Pardo v. United Parcel Service*,[5] the Court of Appeals disallowed a credit for preexisting impairment, writing:

> UPS's second assertion—that Pardo already received an award for his new permanent partial impairment because of his prior settlement of his first shoulder injury—flies in the face of the Act. K.S.A. 2014 Supp. 44-501(e) states, in pertinent part:
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> "An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.
>
> "(1) Where workers compensation benefits previously been awarded through settlement or judicial or administrative determination in Kansas, *the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting*." (Emphasis added.)
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> Pardo's previous settlement conclusively establishes his preexisting impairment to be 15%, and a "rating conclusively established by the previous settlement must be recognized for all purposes." *Willoughby v. Goodyear Tire & Rubber*, No. 115898, 2017 WL 658267, at *2-3 (Kan. App. 2017) (unpublished opinion). Therefore, Pardo has not previously been compensated for his current injury because his preexisting impairment rating was statutorily set at 15%. See K.S.A. 2014 Supp. 44-501(e).

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[5] *Pardo v. United Parcel Serv.*, 56 Kan. App. 2d 1, 422 P.3d 1185, 1201 (2018).

> Pardo's new and additional 5% impairment rating would be compensated in addition to his preexisting permanent partial impairment rating.[6]

Prior to the accident giving rise to the Supreme Court decision, Pardo entered into a settlement for an "agreed-upon 15% permanent partial impairment rating even though the UPS doctor assigned Pardo's shoulder a 10% impairment rating."[7] The Court found Pardo was entitled to a 5 percent award for his new impairment which was found to be new and not related to the prior injury.

Under K.S.A. 44-501(e), an award of compensation shall be reduced by the amount of functional impairment determined to be preexisting. Under K.S.A. 44-501(e)(2)(A), in order to apply the credit for preexisting impairment, the Board must consider the percentage of functional impairment determined to be preexisting. Each physician testified their assessment of impairment was over and above Claimant's prior impairments. As such, no amount of the impairment awarded by the ALJ was preexisiting.

Respondent is not entitled to a credit for preexisting impairment.

3. Is Claimant entitled to future medical benefits?

K.S.A. 44-510h(e) states:

> It is presumed that the employer's obligation to provide [medical benefits] 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. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 44-525(a) states, in part:

> . . . 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.

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[6] *Id.* at 1201.

[7] *Id.* at 1190.

It is the employer's duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of a compensable injury.[8] It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching MMI. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after MMI. "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.[9]

The ALJ found Claimant was not entitled to future medical benefits. The Board disagrees. Dr. Poppa recommended future use of prescription medications. Moreover, Dr. Carabetta recommended further physician intervention, which was approved by Dr. Toby. Dr. Carabetta agreed Claimant would need annual blood work associated with the regular use of over-the-counter nonsteroidal anti-inflammatory medication. Claimant has met the burden of proving it is more probably true than not future medical treatment will be necessary.

4. Is Respondent subject to pre-award interest pursuant to K.S.A. 44-512b?

K.S.A. 44-512b(a) states:

> Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

For Respondent to be liable for penalties under K.S.A. 44-512b(a), the payment of compensation prior to award must have been withheld without just cause or excuse. The ALJ found Respondent's failure to pay not to be frivolous. The statute does not require the Respondent's failure to pay to be frivolous in order to obtain penalties. The statute only requires Respondent to have just cause or an excuse for not paying. Respondent's argument for not paying is it is entitled to a reduction in benefits due to a credit for preexisting impairment. While Respondent has failed to prevail on its argument for a credit, it is just cause or excuse for non-payment.

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[8] *See* K.S.A. 44-510h(a).

[9] *See* K.S.A. 44-510h(e).

The Board agrees with the ALJ. Claimant is not entitled to pre-award interest under K.S.A. 44-512b(a).

5. Is K.S.A. 44-501(e), or the mandate of the AMA *Guides*, unconstitutional?

The Board does not possess the authority to review independently the constitutionality of the Kansas Workers Compensation Act.[10] 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. The Board does not have jurisdiction and authority to determine a statute is unconstitutional.[11] These issues are reserved for a court of competent jurisdiction.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of ALJ Troy A. Larson dated March 17, 2022, is affirmed, in part, and reversed, in part, on the issue of Claimant's entitlement to future medical treatment. Future medical is awarded and shall be provided by agreement or upon application and hearing before the Division, pursuant to K.S.A. 44-510k. In all other respects, the Award issued by ALJ Larson is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2022.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[10] *See, e.g., Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018) (holding use of the AMA *Guides*, 6th Edition, for a scheduled injury was unconstitutional as applied in that case only).

[11] *Jones v. Tyson Fresh Meats, Inc.*, No. 1,030,753, 2008 WL 651673 (Kan. WCAB Feb. 27, 2008).

DISSENT

The undersigned Board Member dissents. The majority conclusion K.S.A. 44-510d does not require competent medical evidence is incorrect.

K.S.A. 44-510d(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, if the impairment is contained therein.

K.S.A. 44-510e(a)(2)(B) states:

> The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on 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, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

The undersigned recognizes the obvious: K.S.A. 44-510e explicitly requires competent medical evidence; K.S.A. 44-510d does not mention the word "competent." However, the lack of such language in K.S.A. 44-510d does not rule out the need for competent medical evidence regarding scheduled injuries.

Competent is defined as: 1. proper or rightly pertinent; 2. having requisite or adequate ability or qualities. https://www.merriam-webster.com/dictionary/competent Competent is defined as "having suitable or sufficient skill, knowledge, experience, etc., for some purpose; properly qualified." https://www.dictionary.com/browse/competent

Competency is required to support a medical opinion concerning a claimant's degree of functional impairment for a scheduled injury. All relevant and credible evidence should be competent. "[A medical] expert's conclusions, to be reliable, should be based on more than speculation."[12] "[Proof] in a workers compensation case must be based on

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[12] *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 955, 379 P.3d 428 (2016).

substantial evidence and not on mere speculation."[13] "When the opinion of an expert witness is not within the witness's special knowledge, the testimony is speculative."[14] The Board should reject medical opinions based on "conjecture and speculation."[15] "[Proof] . . . must be such as to take the case out of the realm of speculation and conjecture."[16] Medical opinions should demonstrate "equivalent assurance that they were not based on either conjecture or speculation."[17]

The majority conclusion seemingly validates the concept an impairment rating for a scheduled injury may be based on *incompetent* medical evidence. Statutes are not meant to be read in a manner to reach absurd results: "we must construe statutes to avoid unreasonable or absurd results."[18] Inviting medical incompetence for an expert medical opinion is absurdly laughable.

"Competency" should be properly necessary in a medical opinion concerning a worker's permanent impairment of function as a result of a scheduled injury under K.S.A. 44-510d. The Workers Compensation Act requires a minimum quantum for reliability. The general burden of proof in workers compensation matters is based on a preponderance of the evidence, or just over a 50% probability. See K.S.A. 44-508(h). A party failing to meet this minimal burden would not have presented sufficient proof. Failing to meet this minimal standard would not reflect proper, right, requisite or adequate qualities. The majority opinion, which endorses medically incompetent opinions, would not meet this low bar.

Of utmost import, the AMA *Guides*, 6th ed., must be used to formulate an impairment rating. The Kansas Court of Appeals recently stated:

> "[T]he Guides are not merely reference materials relied upon by physicians but are specifically referenced and required by the Act to be consulted when evaluating an impairment. . . . Given the Guides' incorporation into the Act, its use as a standard reference by physicians, the lack of a controversy concerning its contents, and the

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[13] *Chriestenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 460-61, 263 P.3d 821 (2011).

[14] *Wiehe v. Kissick Const. Co.*, 43 Kan. App. 2d 732, 750, 232 P.3d 866 (2010).

[15] *Stepter v. LKQ Corp.*, No. 117,002, 2017 WL 4456730, at * 4 (Kansas Court of Appeals unpublished opinion dated Oct. 6, 2017).

[16] *Beachum v. Accessory City*, No. 111,350, 2015 WL 3514027 at * 5 (Kan. Ct. App. 2015).

[17] *Turner v. State*, No. 110,508, 2014 WL 3022644, at *5 (Kansas Court of Appeals unpublished opinion filed June 27, 2014).

[18] *State v. Bodine*, 313 Kan. 378, 401, 486 P.3d 551 (2021).

fact that the ALJ and Board are not strictly bound by the rules of evidence, it is "unnecessary for the AMA Guides to be introduced into evidence."[19]

While the *Guides* do not use the word "competency," the *Guides* specifically stress the need for words similar in meaning to competency in issuing an impairment rating:

• "Precision, accuracy, reliability, and validity are critical issues in defining impairment." (*Guides*, p. 7)

• "Examiners must exercise their ability to observe the patient perform certain functional tasks to help determine if self-report is accurate." (*Guides*, p. 10)

• "[T]he evaluator must assess the validity and consistency of conventional information before assigning a rating." (*Guides*, p. 10)

• "[T]o insure reliable impairment estimates, the assessing doctor must possess the requisite medical knowledge, skills, and abilities." (*Guides*, p. 19)

• "Impairment evaluation requires medical knowledge." (*Guides*, p. 20; see also 23)

• "A valid impairment evaluation report based on the *Guides* must contain the 3-step approach described in Section 2.7." (*Guides*, p. 20)

• "The evaluating physician must use knowledge, skill, and ability generally accepted by the medical scientific community when evaluating an individual, to arrive at the correct impairment rating according to the *Guides*." (*Guides*, p. 20)

• "The *Guides* is based on objective criteria. The physician must use all clinical knowledge, skill, and abilities in determining whether the measurements, test results, or written historical information are consistent and concordant with the pathology being evaluated." (*Guides*, p. 20)

• "The physician must use all clinical knowledge, skill, and abilities in determining whether the measurements or test results are consistent and concordant with the pathology being evaluated." (*Guides*, p. 24)

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[19] *Perez v. Nat'l Beef Packing Co.*, 60 Kan. App. 2d 489, 507, 494 P.3d 268 (2021).

• "The examiner must base impairment rating on objective factors to the fullest extent possible." (*Guides*, p. 24)

• "[I]n a legal proceeding, the physician's opinion when unsupported by established science can lead to challenges and cause needless frustration or anxiety for the physician and others." (*Guides*, p. 27)

• "The use of the *Guides* requires the physician to use the same skills, knowledge, and ability as in the therapeutic practice of medicine in the collection of data and making an accurate diagnosis." (*Guides*, p. 27)

• "The physician users of the *Guides* must use objective criteria and all available clinical knowledge, skill, and abilities in deciding whether the measurements and/or test results are consistent and concordant with the pathology being evaluated." (*Guides*, p. 28)

The descriptors used in the *Guides* are akin to competency:

"Valid" is defined as: "2a. well-grounded or justifiable : being at once relevant and meaningful . . . 3: appropriate to the end in view: EFFECTIVE.[20]

"Accurate" is defined as: "1: free from error especially as the result of care . . .[;] 2: conforming exactly to truth or to a standard : EXACT[;]providing accurate color 3: able to give an accurate result[;] an accurate gauge.[21]

"Reliable" is defined as: "1: suitable or fit to be relied on : DEPENDABLE[;] 2: giving the same result on successive trials"[22]

"Science" is defined as: "1a: knowledge or a system of knowledge covering general truths or the operation of general laws especially as obtained and tested through scientific method[;] b: such knowledge or such a system of knowledge concerned with the physical world and its phenomena : NATURAL SCIENCE[;] 2a: a department of systematized knowledge as an object of study . . .[;] b: something (such as a sport or technique) that may be studied or learned like systematized knowledge . . .[;] 3: a system or method reconciling

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[20] https://www.merriam-webster.com/dictionary/valid

[21] https://www.merriam-webster.com/dictionary/accurate

[22] https://www.merriam-webster.com/dictionary/reliable

practical ends with scientific laws . . .[;] 5: the state of knowing : knowledge as distinguished from ignorance or misunderstanding."[23]

"Accuracy" is defined as: "1: freedom from mistake or error : correctness . . .[;] 2a: conformity to truth or to a standard or model : exactness . . .[;] b: degree of conformity of a measure to a standard or a true value.[24]

"Precision" is defined as: "1: the quality or state of being precise : EXACTNESS; 2a: the degree of refinement with which an operation is performed or a measurement stated."[25]

"Skill" is defined as: "1a: the ability to use one's knowledge effectively and readily in execution or performance[;] . . . 2: a learned power of doing something competently."[26]

Therefore, an impairment rating assessed using the *Guides* must also be based on a physician's medical knowledge, skill, and abilities, in addition to validity, accuracy,precision, consistency, objectivity, medical science, measurements, test results, and medical records, not merely looking at the *Guides* and assigning a number. None of these terms remotely hint at "incompetency." These terms are roughly synonymous with competency. The wording used in the *Guides* demonstrate competency is required for any valid impairment rating opinion. Kansas law requires we use the *Guides* for any impairment rating under Kansas law, whether for a whole body injury or a scheduled injury.

Also, "[w]hen construing statutes, appellate courts must consider various provisions of an act *in pari materia* with a view toward reconciling and bringing the provisions into workable harmony if possible."[27] Along these lines, K.S.A. 44-508 states, "'Functional impairment' means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein." Scheduled injuries are functional impairment injuries. Because scheduled injuries are subject to the definition of functional impairment, any impairment for a scheduled injury needs to be based on "competent medical evidence," as based on the very definition of "functional impairment." The majority opinion avoids this statutory definition.

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[23] https://www.merriam-webster.com/dictionary/science

[24] https://www.merriam-webster.com/dictionary/accuracy

[25] https://www.merriam-webster.com/dictionary/precision

[26] https://www.merriam-webster.com/dictionary/skill

[27] *City of Shawnee v. Adem*, 314 Kan. 12, 22, 494 P.3d 134 (2021).

Another statute requires competent medical evidence. K.S.A. 44-516(b) states, "If at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be agreed upon by the parties."

Lastly, and of lesser import, while the Workers Compensation Act is said to be exclusive,[28] there are many instances of the appellate courts applying the Code of Civil Procedure to workers compensation matters.[29] Along these lines, K.S.A. 60-419 states, "As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he or she has personal knowledge thereof, or experience, training or education if such be required." In like token, K.S.A. 60-456(b) states, "If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case." These statutes require competency, not incompetency.

The statutory definition of any impairment requires medical competency, and the law requires use of the *Guides*, which in turn require validity, science, objectivity, skill and knowledge (all words pointing toward competency). The assumption the Legislature meant to allow incompetent medical opinions as valid evidence for scheduled injuries is simply wrong.

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BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agrees Claimant met his burden of proving entitlement to future medical. The undersigned also agrees the Board does not possess legal authority to rule on the constitutionality of provisions of the Workers Compensation Act, and resolution of

[28] *See Acosta v. National Beef Packing Co.*, 273 Kan. 385, Syl. ¶ 5, 44 P.3d 330 (2002).

[29] *See Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 755, 986 P.2d 373, 375 (1999) (applying K.S.A. 60–206(a) to workers compensation claim); *Hernandez v. Tyson Fresh Meats, Inc.*, No. 98,547, 2008 WL 2426347, at *3-4 (Kansas Court of Appeals unpublished opinion filed June 13, 2008) (applying K.S.A. 60-234 and 60-237 to a workers compensation claim).

those issues should be reserved for a court of competent jurisdiction. Furthermore, the undersigned agrees pre-award interest should not be assessed against Respondent under K.S.A. 44-512b. The undersigned, however, disagrees with the majority on nature and extent and whether the award of compensation should be reduced under K.S.A. 44-501(e).

Where a worker sustains an injury to the forearm resulting in an award of permanent partial disability to the forearm, the worker is eligible to receive a maximum of 200 weeks of permanent partial disability compensation.[30] Permanent impairment of function to the scheduled member is determined using the sixth edition of the AMA *Guides*, if the impairment is contained therein.[31] The words "competent medical evidence" are absent from K.S.A. 44-510d.

The Workers Compensation Act also states, "An award of compensation for permanent partial impairment, work disability, or permanent total disability **shall** be reduced by the amount of functional impairment determined to be preexisting."[32] Moreover, "[w]here workers compensation benefits have previously been awarded through settlement or judicial or administrative determination in Kansas, the percentage basis of the prior settlement or award **shall** conclusively establish the amount of functional impairment determined to be preexisting."[33] Furthermore,

> If the preexisting impairment is the result of injury sustained while working for the employer against whom workers compensation benefits are currently being sought, any award of compensation **shall** be reduced by the current dollar value attributable under the workers compensation act to the percentage of functional impairment determined to be preexisting.[34]

Where the plain language of a statute is unambiguous, a court is obligated to apply the statute as written.[35] If a plain reading of a statute indicates an ambiguity or lack of clarity, however, the rules of statutory construction are used to resolve the ambiguity.[36] "Appellate courts also must consider various provisions of an act *in pari materia* to

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[30] *See* K.S.A. 44-510d(b)(12).

[31] *See* K.S.A. 44-510d(b)(23).

[32] K.S.A. 44-501(e)(emphasis added).

[33] K.S.A. 44-501(e)(1)(emphasis added).

[34] K.S.A. 44-501(e)(2)(emphasis added).

[35] *See Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[36] *See Redd v. Kansas Truck Center*, 291 Kan. 176, 195, 239 P.3d 66 (2010).

reconcile and bring the provisions into workable harmony if possible."[37] Moreover, statutes must be read in a manner not rendering a statute extraneous.[38]

In this case, it is undisputed Claimant sustained right upper extremity injuries, specifically to the hand, wrist and thumb, resulting in permanent impairment at the right forearm level. It is also undisputed Claimant sustained prior right upper extremity injuries, specifically to the hand and wrist, resulting in permanent partial impairment while working for Respondent: 10% to the right forearm attributable to the wrist, based on the *AMA Guides to the Evaluation of Permanent Impairment*, 4th edition; and 10% of the right hand attributable to the first and second fingers, based on the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition (AMA *Guides*, 6th edition). The reduction under K.S.A. 44-501(e) is determined by the situs of impairment under the schedule from K.S.A. 44-510d, and not from the location of the actual injury.[39] The prior injuries to the right elbow and right long finger are not relevant because they did not produce permanent impairment to the hand or forearm.

Respondent conclusively established preexisting impairment to the right hand and forearm. Under the plain language of K.S.A. 44-501(e), an award of compensation must be reduced by the current dollar value of the preexisting impairment. Respondent properly raised the issue before the ALJ and the Board, and K.S.A. 44-501(e) requires the issue be addressed.

Rather than address Respondent's argument for a reduction under K.S.A. 44-501(e), the ALJ declined to apply K.S.A. 44-501(e). Instead, the ALJ found Claimant's impairment on account of the newest injury was 8% to the right forearm, and concluded K.S.A. 44-501(e) did not apply because there was no preexisting impairment. The majority affirms this approach. This approach reveals a conflict between the application of K.S.A. 44-510d(b)(23) and K.S.A. 44-501(e): By limiting the determination of impairment under K.S.A. 44-510d to the impairment from the August 20, 2018 injury only, K.S.A. 44-501(e) is rendered superfluous or extraneous. The majority also directly contradicts the plain language of K.S.A. 44-501(e) by failing to apply a reduction conclusively proven by Respondent. The undersigned cannot join the majority.

Due to the conflict between K.S.A. 44-501(e) and K.S.A. 44-510d, an ambiguity is present. A court may resolve this ambiguity by employing the rules of statutory construction to give effect to the entire Act.

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[37] *Id*. (*citing State v. Breedlove*, 285 Kan. 1006, 1015, 179 P.3d 1115 (2008)).

[38] *See id*. at 196.

[39] *See Jackson v. Amsted Rail Co., Inc.*, No. 1,058,952, 2013 WL 5521839, at *7 (Kan. WCAB Sept. 12, 2013).

An alternative statutory interpretation resolves the conflict creating the ambiguity. The plain language of K.S.A. 44-510d(b)(23) does not prohibit determining Claimant's overall impairment, taking in account both his preexisting impairment and the impairment resulting from the August 20, 2018 injury, under the AMA *Guides*, 6th edition. After determining the overall impairment, and calculating the award under K.S.A. 44-510d(d), the award can be reduced by the current dollar value of the preexisting impairment to the hand and forearm proven by Respondent under the mandate of K.S.A. 44-501(e). This approach does not violate the plain language of the Act and harmonizes K.S.A. 44-510d with K.S.A. 44-501(e). The undersigned would adopt this approach here.

In calculating the award of compensation, Claimant argues "competent medical evidence" should be considered in determining permanent impairment, after using the AMA *Guides*, 6th edition, as a starting point, as in *Johnson*.[40] *Johnson* concerned a whole-body injury and interpretation of K.S.A. 44-510e.[41] This matter involves a scheduled injury and K.S.A. 44-510d, rendering *Johnson* inapplicable. Because the words "competent medical evidence" are missing from K.S.A. 44-510d, inserting those words into K.S.A. 44-510d would violate *Bergstrom*. Under the plain language of K.S.A. 44-510d(b)(23), Claimant's total functional impairment is determined by using the AMA *Guides*, 6th edition, if the impairment is contained therein.

The Board's review is limited to the record submitted to the administrative law judge.[42] The Board possesses the authority to remand a matter to the administrative law judge for further proceedings.[43] The record is silent on Claimant's overall impairment. The undersigned would remand this matter to ALJ Larson with instructions to determine Claimant's overall functional impairment to the right forearm, attributable to the hand and wrist, using the AMA *Guides*, 6th edition; to calculate the award under K.S.A. 44-510d(d); and, finally, to calculate the reduction under K.S.A. 44-501(e).

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BOARD MEMBER

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[40] *Johnson v. U.S. Food Service*, 312 Kan. 597, 478 P.3d 776 (2021).

[41] *See id*. at 600-01.

[42] *See* K.S.A. 44-555c(a).

[43] *See* K.S.A. 44-551(l)(1).

c: (Via OSCAR)

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Hon. Troy A. Larson, Administrative Law Judge