BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANDREW HENSON, DECEASED	)	
Claimant	)	
V.	)	
	)	AP-00-0487-049
BELGER CARTAGE SERVICE, INC.	)	CS-00-0462-739
Self-Insured Respondent	)	

ORDER

Both parties appealed the January 13, 2025, Award by Administrative Law Judge (ALJ) Ali N. Marchant. The Board heard oral argument on May 8, 2025.

APPEARANCES

Jan L. Fisher appeared for Claimant. Timothy A. Emerson appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as did the ALJ, consisting of the documents of record filed with the Division, including the parties briefs and the following:

1) Preliminary Hearing Transcript, held May 18, 2023.
2) Evidentiary Deposition of Genia Henson, taken August 30, 2023, with exhibits 1-7.
3) Evidentiary Deposition of Dr. Jason Hampl, taken September 17, 2023, with exhibits 1-2.
4) Evidentiary Deposition of Stephen Schuman, M.D. taken October 16, 2023, with Exhibits 1-2.
5) Regular Hearing Transcript, held October 19, 2023, with Claimant's exhibits 1 & 3-5 and Respondent's exhibits 1-3.
6) Evidentiary Deposition of Dr. Hussam Farhoud, taken October 30, 2023, with Exhibits 1-4 and A-B.
7) Video conference Evidentiary Deposition of Blake Shuart, taken November 7, 2023, with exhibits 1-3.
8) Motion Hearing Transcript, held March 4, 2024.
9) Motion Hearing Transcript, held June 24, 2024.
10) Motion Hearing Transcript, held October 7, 2024.

11) Stipulation to Hospice Medical Records - Dr. Jason Hampl, filed April 5, 2024.
12) Stipulation to Hospice Medical Records - Dr. Katie Washburn, filed October 14, 2024.
13) The documents of record filed with the Division for CS-00-0318-917 (1,038,989), including the following:
    a) Preliminary Hearing Transcript, held April 10, 2008.
    b) Preliminary Hearing Transcript, held December 15, 2009.
    c) Motion Hearing Transcript, held September 16, 2010.
    d) Evidentiary Deposition of Dick Santner, taken January 5, 2011, with exhibits 1-2.
    e) Evidentiary Deposition of Dr. Daniel D. Zimmerman, taken January 27, 2011, with Exhibits 1-3.
    f) Regular Hearing Transcript, held February 14, 2011, with Claimant's Exhibits 1-3.
    g) Evidentiary Deposition of Steve Benjamin, taken March 28, 2011, with exhibits 1-2.
    h) Evidentiary Deposition of Dr. Michael Farrar, taken March 29, 2011, with exhibits 1-4.

ISSUES

1. Whether the time limitation of K.S.A. (2000) 44-520a was properly identified as an issue at the Prehearing Settlement Conference giving the Administrative Law Judge jurisdiction to decide the issue?

2. Whether Claimant's claim for death benefits is time barred pursuant to K.S.A. (2000) 44-520a?

3. Did Claimant's death arise out of and in course of his employment with Respondent?

4. Was Claimant's death on November 7, 2021, a natural and probable consequence of his work-related injury on February 4, 2008?

FINDINGS OF FACT

Claimant married Genia Henson on February 2, 1979, and remained married to her until his death. Claimant and Ms. Henson had two daughters, who are both over the age of 23 and did not reside with Claimant. Claimant did not have children outside of his marriage. Claimant died on November 7, 2021. Ms. Henson arranged a funeral for Claimant after his death, which cost $9,395.00. Ms. Henson filed the present claim for

death benefits, alleging Claimant's death was a natural and probable consequence of his February 4, 2008, work-related injuries.

Claimant's wife Genia Henson filed a claim for death benefits. A separate application must be filed for death benefits despite the claim the work accident of February 4, 2008 caused Claimant's death. Claimant (Andrew Henson) will no longer be the beneficiary of benefits, his heirs will be.[1]

On February 4, 2008 Claimant was working as a heavy hauler for Respondent. Claimant was crushed when a large crate slammed into him and pinned him between the crate and printing press. As result, Claimant suffered from crush injuries to his chest, back and internal organs, including a dissection or laceration to his right coronary artery leading to a subsequent heart attack. Claimant's work accident was compensable resulting an award of permanent total disability.[2]

Ms. Henson testified other than a few brief attempts to return to light duty work, Claimant never returned to work after his February 4, 2008, work-related accident. Claimant was granted Social Security disability benefits. Ms. Henson testified prior to Claimant's work-related accident and heart attack on February 13, 2008,he appeared to be in good health and worked hard but he had not returned to his pre-accident health. Ms. Henson denied Claimant had any cardiology treatment or high blood pressure problems prior to his February 4, 2008, accident but she acknowledged Claimant smoked daily but did not recall how much. He quit smoking after his heart attack. Ms. Henson testified Claimant did not breathe well after his accident and never regained his strength.

Claimant was under the care of a cardiologist, Dr. Hussam Farhoud, from the time of his February 13, 2008, heart attack through the time of his death. Throughout the time of his treatment with Dr. Farhoud, Claimant was diagnosed with coronary artery disease, congestive heart failure, and atrial fibrillation. Claimant underwent regular cardiac testing, including stress tests, echocardiograms, and multiple heart catheterizations. Claimant's treatment records reflect his diabetes was poorly controlled. In January 2015, Claimant was diagnosed with ischemic cardiomyopathy, complete heart block, and sick sinus syndrome.

In December 2017, Claimant had an infection in his right leg resulting in a visit to the Veteran's Administration (VA) emergency room. Dr. Farhoud noted Claimant's diabetes was poorly controlled and Claimant had non-healing ulcer wounds in his lower extremities.

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[1] *See* K.S.A. 44-510b.

[2] *See* Case No. CS-00-0318-917. This award was affirmed by the Workers Compensation Appeals Board and the Court of Appeals.

On January 4, 2018, testing of Claimant's ankles and brachial indices was done due to Claimant's leg ulcers and diabetic history, and the results were within normal limits. Claimant developed a shingles infection for a period of time.

Ms. Henson testified approximately 2 years before his death, Claimant developed bullous pemphigoid, a skin condition which caused Claimant to develop blisters on every part of his body. Claimant received medical treatment at the VA and at Heartland Dermatology for this condition, with a salve and changing bandages three times a day. Ms. Henson understood Claimant's bullous pemphigoid condition would not likely lead to death.

On February 19, 2020, Dr. Farhoud noted Claimant developed venous insufficiency in his lower extremities with weeping non-healing ulcers. Dr. Farhoud noted Claimant had been battling significant pain and swelling in his legs for more than four years with non-healing ulcers on both legs. In April 2020, Claimant underwent endovenous closure in his legs of his bilateral greater saphenous veins and his right smaller saphenous vein to treat his venous insufficiency.

On October 8, 2020, Claimant followed up with Dr. Farhoud after he went to the ER for a shock by his implanted defibrillator caused by atrial fibrillation. Dr. Farhoud changed the defibrillator's settings. Claimant saw Dr. Farhoud again on November 25, 2020, reporting a shock from his defibrillator device the day before, due to ventricular tachycardia. Dr. Farhoud's notes Claimant reported he was having shortness of breath with moderate activity. When Claimant followed up with Dr. Farhoud six months later on May 26, 2021, he reported a fair energy level and denied chest pain and leg swelling. Dr. Farhoud primarily treated Claimant for heart failure, coronary artery disease, hypertension, and venous insufficiency.

When Claimant first came under his care after his heart attack, Dr. Farhoud performed heart catheterization, angioplasty, and placed two stents. On February 15, 2008, Dr. Farhoud placed a pacemaker. Dr. Farhoud acknowledged Claimant had cardiac risk factors of smoking, untreated hypertension, and obesity at the time he came into his care. Dr. Farhoud performed an angioplasty on Claimant in 2009 and placed a defibrillator in 2011, which was replaced in 2017.

Dr. Farhoud testified Claimant's cardiac condition improved over the years he provided treatment, stated the following:

> Q. What I'm getting at is generally over the years, was the nature of your treatment to provide maintenance, for lack of a better term, for his cardiac condition?
>
> A. Maintain and improve the cardiac condition. In fact, you know, I know from the records that his heart function went back to normal over the years.

> Q. After that initial hospitalization where you first met Mr. Henson and first began providing treatment to him, did his condition over the years progressively improve?
>
> A. Yes.[3]

Dr. Farhoud explained what was meant by Claimant's heart being "close to normal" meant Claimant's heart ejection fraction had returned to normal after the defibrillator was placed. Dr. Farhoud testified Claimant had proximal atrial fibrillation initially after his accident later becoming permanent atrial fibrillation and venous stasis in his legs. Dr. Farhoud did not relate Claimant's permanent atrial fibrillation and venous stasis to his work-related accident. Dr. Farhoud last saw Claimant in his clinic on May 26, 2021. Dr. Farhoud described Claimant's condition at that time as follows:

> Well, from the cardiac standpoint of view, he was stable, as I mentioned earlier. He had congestive heart failure. The most recent echo at that time from 2019 showed ejection fraction 55 to 60 percent. He had defibrillator which showed normal heart function, and he had chronic or permanent atrial fibrillation. He was taking anticoagulant therapy and he was in appropriate therapy at that time.[4]

Although the parties have at times referred to it as an initial hospice stay, Claimant entered home health care on August 6, 2021. The records reflect from Claimant's Home Health Care, a primary diagnosis of bullous pemphigoid. Claimant was diagnosed with type 2 diabetes, hypertensive heart and chronic kidney disease with heart failure, and unspecified congestive heart failure. The records from Claimant's August 2021 home health care treatment signed by Dr. Katie Washburn, do not indicate the care Claimant was receiving was hospice care. Claimant was taking all of his heart and diabetes medications, and the primary focus was providing skilled nursing care to help with Claimant's blistering skin condition. The records also indicate a plan to get Claimant occupational and physical therapy to assist with mobility.

On August 24, 2021, Claimant was hospitalized for diverticulitis that caused a bowel perforation and sepsis. Claimant had surgery to remove 90 percent of his colon. Doctors were unable to close Claimant's surgical wound. Claimant was diagnosed with kidney cancer. Dr. Farhoud saw Claimant during the time he was hospitalized for his bowel perforation, explaining he was consulted because Claimant had, "atrial fibrillation with rapid ventricular response and was hypertensive requiring inotropes to control blood pressure."[5] Dr. Farhoud did not know if Claimant's sepsis resolved prior to his death.

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[3] Farhoud Depo. at 14-15.

[4] *Id.* at 21.

[5] *Id.* at 22.

When Claimant was released from the hospital, he was transferred to The Waterfront for rehabilitation. Ms. Henson testified Claimant was too weak to walk and had difficulty breathing. Claimant struggled to sleep because of difficulty with breathing and the blisters. Claimant was readmitted to the hospital shortly thereafter because he was hypoglycemic. Ms. Henson testified Claimant was in the ICU for a few days and his surgical wound from his colon surgery was closed at that time.

Claimant began hospice care at home on or about September 15, 2021. According to Ms. Henson Claimant decided to enter hospice care because he could not go anywhere or do anything. Claimant told Ms. Henson he was just existing. Claimant discontinued all medical treatment except palliative care. Ms. Henson testified Claimant's condition deteriorated further during that time and stated she could see where Claimant was not getting adequate blood flow to his legs and feet. Claimant died at home while in hospice care on November 7, 2021.

Dr. Farhoud denied seeing Claimant or being consulted during Claimant's final hospitalization in September 2021. Dr. Farhoud did not believe Claimant's final hospital stay was related to his cardiac condition. Dr. Farhoud did not believe Claimant saw any other cardiologists.

Claimant's Hospice Certification and Plan of Care paperwork lists Claimant's principal diagnosis as, "Unspecified systolic (congestive) heart failu[re]" with other pertinent diagnoses as follows:

> Unspecified atrial fibrillation
> . . .
> Chronic kidney disease, stage 3(mo
> Bullous pemphigoid
> Muscle weakness (generalized)
> Type 2 diabetes mellitus with diabetic neurop[athy]
> Acquired absence of other specified parts of
> Morbid (severe) obesity due to excess calorie
> Obstructive sleep apnea (adult) (pediatric)
> Other complications of colostomy
> Presence of automatic (implantable) cardiac d[evice]
> Acquired absence of left foot
> Do not resuscitate [6]

Dr. Jason Hampl is a family physician who primarily practices in geriatrics and he is the medical director for hospice at Interim Home Health and Hospice. Dr. Hampl was the medical certifier for Claimant's death. He testified when certifying a death for a hospice

[6] Stipulated Hospice Medical Records of Dr. Hampl.

patient, he typically asks the secretary for Interim Hospice why the patient was in hospice and what was the cause of death was. The worker usually looks at what condition is listed first on the patient's hospice paperwork as the cause of death. Dr. Hampl testified he does not review the patient's chart or talk to the hospital nurse who visited the patient during their hospice care when he certifies the death. Dr. Hampl then completes the Certificate of Death. Claimant's Certificate of Death lists his cause of death as congestive heart failure and coronary artery disease.

On March 1, 2022, Ms. Henson's counsel sent a letter to Dr. Farhoud along with a copy of Claimant's death certificate and some of his hospice records, asking Dr. Farhoud if Claimant's death was caused or contributed to by his work-related heart condition or if his death was a natural and probable consequence of his work-related accident and injury. On April 25, 2022, Barry Reynolds, CEO of Heartland Cardiology, wrote a letter to Ms. Henson's counsel, stating, in pertinent part, "Dr. Farhoud has considered your inquiry. He has determined that Mr. Henson's death was natural and unrelated to his cardiac condition. It was not caused by or contributed to by his work."[7] In July 2023, Dr. Farhoud hand wrote at the bottom of Mr. Reynolds's letter, "Agree" and wrote his name and date.[8]

Dr. Farhoud testified that he did not see Ms. Henson's counsel's March 1, 2022, letter or Claimant's death certificate. According to Dr. Farhoud his nurse contacted him several times about one of the attorneys wanting Dr. Farhoud's opinion as to Claimant's cause of death. Dr. Farhoud was then contacted by Mr. Reynolds who told the doctor one of the attorneys on Claimant's case needs your opinion about Claimant's cause of death. Dr. Farhoud did not want to get involved. Mr. Reynolds then asked the doctor if Claimant's cause of death was related to his cardiac condition or was it a natural death. Dr. Farhoud told him Claimant's death was a natural death.

Mr. Reynolds then asked Dr. Fahoud if a statement could be used Claimant's cause of death was a natural death. Dr. Farhoud agreed. The doctor was then given a statement dated April 25, 2022, to sign which he did.[9] Dr. Farhoud continued to believe Claimant's death was not caused by his work accident. His opinions were based on his medical treatment he gave to Claimant since 2008.

At his deposition Dr. Farhoud testified he did not know if Claimant's death was caused or contributed by his work-related heart condition. However when asked if Claimant's death was the natural and probable consequence of the 2008 work accident the

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[7] Farhoud Depo., Ex. 4.

[8] *See Id.*, Ex. 3.

[9] *See Id.* Ex. 4.

doctor opined Claimant's natural death was related to sepsis and a perforated bowel.[10]

After further review of Claimant's hospice records and death certificate, Dr. Farhoud testified as follows regarding his conclusions:

> Q. Okay. So that I'm clear, you believe he died as a result of sepsis; is that right, and the abdominal wound?
>
> A. Yes.
>
> Q. What symptoms would he exhibit if, in fact, that was the cause of his death?
>
> A. What I believe is that because of his sepsis and illness, it does exacerbate his heart failure, because I did an echocardiogram during that hospitalization and he had reduction in ejection fraction; so I base my opinion that this gentleman had normal heart function last time I saw him, and because of sepsis, because of the infection, because of the acute illness, because of the tachycardia, his ejection fraction dropped and this was based on the echocardiogram I did during that hospitalization.
>
> So the heart failure death was related to the initial illness, not the heart failure caused the illness. If it makes sense.
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> Q. The abdominal problem exacerbated his heart problem, not the reverse. Is that what you are saying?
>
> A. Correct.
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> Q. So --
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> A. The reason is because he had normal heart function based on the last echo I did and based on the last office visit I did, and during his hospice stay when I got consulted, I did echocardiogram and his heart function dropped; so because of the illness, heart function got worse and he died.
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> Q. Okay. So you agree that he died of heart failure; it's just the reason he had heart failure is the dispute. Is that fair?
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> MR. EMERSON: Objection. Misstates the testimony.
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> MS. FISHER: Well, he can correct me.

[10] See *Id.* at 30.

> A. I believe that essentially he died because of congestive heart failure because his heart gave up, but what caused exacerbation of heart failure is that illness when he came to hospital.[11]

Dr. Farhoud clarified Claimant's heart function was not normal prior to his bowel perforation and sepsis. He opined Claimant's ejection fraction in his heart was normal at the time and agreed Claimant already had a weakened heart since his 2008 accident and heart attack. The bowel perforation and infection made his heart worse.

At the request of Ms. Henson's attorney, Dr. Stephen Schuman reviewed Claimant's medical records and offered his opinions regarding Claimant's overall medical condition and death. Dr. Schuman board certified in internal medicine and cardiology and is located in Chesterfield, Missouri. Dr. Schuman typically does approximately one medical legal evaluation per week with upwards of three or four per week more recently. Approximately 70 percent of his medical legal work is for plaintiffs or claimants with the other 30 percent for defendants or respondents. Dr. Schuman reviewed Claimant's medical records associated with his original 2008 injury and heart attack as well as his records from treatment of his bullous pemphigoid, his bowel perforation, Dr. Farhoud's records, and the hospice records. The only independent medical examination report Dr. Schuman had available to review was Dr. Michelle Brown's. Dr. Schuman also spoke with Ms. Henson twice on the phone for information not available in Claimant's medical records. Dr. Schuman set forth his findings in his report dated May 17, 2023.

Dr. Schuman testified most heart attacks involve only the left ventricle of the heart, but Claimant's 2008 heart attack was a myocardial infarction of the left ventricle with extension into the right ventricle. Dr. Schuman explained that when the right ventricle is involved, it is, "much more serious."[12] Dr. Schuman further explained

> When the right ventricle is involved, it loses its ability to pump blood adequately through the lungs. Not enough blood gets to the left side of the heart, and not enough blood gets pumped around the body. That may not occur right away. That could occur somewhere down the line, as -- as with Mr. Henson.[13]

Dr. Schuman testified Claimant's right ventricular infarction also caused Claimant's need for a pacemaker because it involved the sinus node or AV node of Claimant's heart, which impacts the heart rate. Claimant's development of atrial fibrillation, according to Dr.

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[11] *Id.* at 47-48.

[12] Schuman Depo. at 11.

[13] *Id.* at 12.

Schuman, "it usually reflects severe heart muscle damage, severe heart failure."[14] Dr. Schuman discussed Claimant's period of having a lower ejection fraction and explained ejection fraction is the percentage of a person's blood volume pumped out with each heart beat.

Dr. Schuman testified Claimant's deep vein venous deficiency in his legs was caused by Claimant's 2008 heart attack because the right ventricle infarction and resulting right-sided heart failure causes blood not to pump properly and it backs up in the veins of the legs. Dr. Schuman explained the deep vein venous deficiency in Claimant's legs led to his development of venous stasis ulcers on his legs.

In his report, Dr. Schuman concluded Claimant's 2008 heart attack, need for a pacemaker and later a defibrillator, and heart failure were all caused by Claimant's February 4, 2008, work-related injury. Dr. Schuman further stated, in pertinent part:

> The ongoing physical, mental and emotional stress of his underlying heart failure negatively impacted his immune system and could very well have contributed to the autoimmune disease of bullous pemphigoid. It likewise contributed to his poor response to diverticulitis which is generally treated medically and rarely requires surgery with bowel resection or colostomy. His congestive heart failure weakened him to the point that he could not adequately defend against these other illnesses, or respond adequately to their treatment. The heart failure impaired his ability to care for himself (or at least participate in his own care).
>
> . . .
>
> Mr. Henson was admitted to hospice because he was unable to take care for himself (along with his wife having difficulty caring for him as well). His weakness and inability to get around, shortness of breath lying flat as well as on exertion, was due to his congestive heart failure. His requirement for oxygen was due to his heart failure. He had bullous pemphigoid and had a colostomy after ruptured diverticulitis. If he had normal cardiac function, he would have been able to cope with these other diagnoses much better and may not have required hospice and if he did, certainly would have lived longer (and qualitatively better). Instead, he died exhibiting typical terminal heart failure signs and symptoms. I would opine (in agreement with the certificate of death) that he died a cardiac death.[15]

Dr. Schuman testified when Claimant stopped taking his heart medications when he went into hospice, it accelerated his death. However, Claimant would have died anyway because his heart failure was getting worse despite Claimant taking medications.

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[14] *Id.* at 16-17.

[15] *Id.*, Ex. 2.

Dr. Schuman concluded, "That February 4, 2008, work injury caused his myocardial infarction, which included the right ventricular infarction, which caused him to develop heart failure, which worsened over the years and was the ultimate cause of his death on November 7 of 2021."[16]

Dr. Schuman opined Claimant's February 4, 2008, work-related accident was the prevailing factor causing Claimant's myocardial infarction and Claimant's congestive heart failure, which was the prevailing factor causing Claimant's death. Dr. Schuman opined Claimant's death was the natural and probable consequence of his February 4, 2008, work-related accident.

A preliminary hearing was held on May 18, 2023, at the request of Respondent. Respondent requested the case be dismissed in accordance with K.S.A. 2000 Supp. 44-520a, specifically the provision requiring a written claim be filed within one year after the death of the injured employee if death results from the injury within five years after the date of such accident. The ALJ ruled she did not have jurisdiction to consider the request because Respondent was asking for a finding of compensability when Claimant has not made a request for benefits nor was Respondent requesting a change in any benefits.[17]

There was no notation on the Prehearing settlement conference noted regarding the death provisions in K.S.A. (2000) 44-520a(a). However Respondent did stipulate timely written claim was made. Respondent did not raise the application of K.S.A. 44-520a(a) as to death claim at the Prehearing settlement conference or at the Regular Hearing and again stipulated timely written claim was made. Respondent did raise it in the submission brief to the ALJ.

In the award, the ALJ ruled on the issue of the claim being time barred under K.S.A. (2000) 44-520a(a) and found the claim was barred. However, if the claim were not time barred the ALJ ruled Claimant's death was the natural and probable consequence of the work-related accident.

PRINCIPLES OF LAW AND ANALYSIS

Claimant's attorney argues the time limitation of K.S.A. (2000) 44-520a was not properly identified as an issue before the ALJ and therefore the ALJ did not have jurisdiction to decide the issue. Claimant's attorney argues any exacerbation or aggravation of congestive heart failure is governed by the decision in *Logsdon.*[18]

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[16] *See Id.* at 43-44.

[17] *See* P.H. Trans. (May 18, 2023); ALJ Order (June 5, 2023).

[18] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

Claimant's prior accidental cardiac injury had never fully healed and the aggravation of that same injury by a subsequent non work-related sickness was a natural consequence of his original injury. Claimant's attorney argues Claimant's death is the natural and probable consequence of the original on-the-job injury.

Respondent argues the Board should affirm the denial of the request for death benefits and reverse the finding Claimant's death was a natural and probable consequence of the work-related injury.

1. The ALJ had jurisdiction to decide whether the claim was time barred under K.S.A. (2000) 44-520a(a).

Claimant argues this issue is not a surprise or lack of notice issue, but is rather a pleading requirement.

"The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and the present evidence."[19]

The purpose of pleadings is to ensure all parties have notice of the issues before the ALJ. Claimant was aware Respondent contended the claim should be barred according to K.S.A. (2000) 44-520a(a). This issue was the subject of a preliminary hearing. Claimant's attorney had corresponded with the ALJ about this issue and the issue was raised in Respondent's submission brief.

The provisions of K.S.A. (2000) 44-520a(a) are jurisdictional and determine whether a cause of action exists before the ALJ. Such issue can always be raised by the Court, sua sponte.

2. The claim for death benefits is time barred by K.S.A. (2000) 44-520a(a) because K.S.A. (2000) 44-520a(a) is a substantive condition precedent determining the rights of the parties.

Respondent argues Ms. Henson is not entitled to death benefits as Claimant's death did not occur within 5 years of his February 4, 2008, work accident, as required by K.S.A. (2000) 44-520a(a). Claimant argues K.S.A. (2000) 44-520a does not apply because it was repealed in 2011 and it is a procedural statute of limitations.

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[19] *See* K.S.A. 44-523(a).

K.S.A. (2000) 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail with two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

Claimant's and Ms. Henson's rights are controlled by the laws in place at the time of Claimant's original work accident, February 4, 2008.[20] Absent clear language from the legislature it intended any changes to apply retroactively or when changes are merely procedural in nature and do prejudicially affect substantive rights of the parties.[21]

There are two Supreme Court cases which are instructive on this issue. In *Forcade v. List & Clark Constr. Co.,*[22] a worker was injured in 1941 and was paid workers compensation for the injury. The worker died in 1948 and his widow and guardian of his four children filed a claim for death benefits. The claim was denied because 1927 K.S.A. 44-520a was enacted with a provision for the commencement of a proceeding to recover compensation where death of the employee results from the work injury the proceeding or claim must be filed within three (3) years after the date of the accident. The claim was barred because claimant's death occurred more than three years after the original accident.

The Court stated :

> This 1927 amendment, see 44-520a, was obviously for the purpose of setting a specific time beyond which an employer would not be liable for death resulting from an accident arising out of and in the course of employment. It required that the death occur within three years from the date of the accident. It also protected the right of the dependents by providing they should have eight months after the death within which to apply for compensation. The law was thus made certain instead of being uncertain as it was before the amendment in that, under the construction given the former statute, death might occur more than three years after the accidental injury and thus an employer complying with all provisions of the Act

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[20] *See* K.S.A 44-535.

[21] *Knoll v. Olathe School District* 233, 309 Kan. 578, Syl. 1, 439 P.3d 313 (2019).

[22] *Forcade v. List and Clark Constr. Co*., 172 Kan. 119, 238 P.2d 549 (1951).

would never have any certainty that a case was fully determined.[23]

The Supreme Court in *Brooks v. Kansas Power & Light Company*[24] citing *Forcade*, affirmed the denial of claimant's request for death because the claimant's death occurred more than three years after the claimant's original date of accident.

In the case of *Tapp v. Ferrell Const, Co.*,[25] the Board affirmed an ALJ's denial of death benefits pursuant to K.S.A. 1993 44-520a because the death occurred more than five years after the date of the work accident. The Board cited the decisions of *Forcade* and *Brooks* in affirming the denial of benefits pursuant to K.S.A. 1993 44-520a which was substantially similar to the version of K.S.A. 44-520a, in place at the time of Claimant's accident. The Board also relied on *Forcade* and *Brooks* in denying a claim for death benefits because the claimant's death occurred more than five years after the date of accident.[26]

There is no clear statutory language establishing the legislature in repealing K.S.A. (2000) 44-520a intended for the repeal to operate retroactively. The case law interpreting K.S.A. 44-520a is not a procedural statue with time limitation but is creation of condition required to be met in order to maintain a death claim due to a prior work accident. It is a substantive legal requirement determining the rights of the parties. The repeal of K.S.A. (2000) 44-520a does not operate retroactively removing the substantive requirement Claimant's death must occur within five years of the date of the accident. Ms. Henson's request for death benefits is barred by the provisions of K.S.A. (2000) 44-520a because Claimant's death did not occur within five years of the work accident.

3. Claimant's death did not arise out of and in the course of Claimant's employment with Respondent.

As previously stated Claimant had a work accident on February 4, 2008. The law in effect at the time of the work-related accident is the controlling law.

From the time of his work accident until his death on November 7, 2021, Claimant had extensive treatment for his heart. Claimant treated with Dr. Farhoud, a cardiologist since his February 13, 2008, heart attack until his death. Throughout the time of

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[23] *Id*. at 122-123.

[24] *Brooks v. Kansas Power and Light Company*, 182 Kan. 177, 318 P.2d 1036 (1957).

[25] *Tapp v. Ferrell Const. Co.,* No. 198,699, 2005 WL 1983387 (Kan. WCAB 2005).

[26] *See Peavy v. Price Brothers Equipment Inc.,* No. 1,034,431, 2010 WL 517319 (Kan. WCAB, Jan. 25, 2010).

Claimant's treatment with Dr. Farhoud he was diagnosed with coronary artery disease, congestive heart failure and atrial fibrillation. Claimant has had multiple heart catheterizations, angioplasty, placement of two stents and placement of automatic defibrillator.

Since Claimant's 2008 work accident until his death, Claimant had multiple serious medical conditions. Claimant was diagnosed with uncontrolled diabetes. In August 2021, Claimant was diagnosed bullous pemphigod, type 2 diabetes, hypertensive heart and chronic kidney disease with heart failure and unspecified congestive heart failure. On August 24, 2021, Claimant was hospitalized for diverticulitis causing a bowel perforation and sepsis. Claimant underwent surgery involving the removal of 90 percent of his colon and doctors were unable to close the surgical wound. Claimant was also diagnosed with kidney cancer.

After release from the hospital, Claimant went to The Waterfront for rehabilitation. Claimant had difficulty breathing, was weak and unable to walk. Claimant was readmitted to the hospital into intensive care because he was hypoglycemic. After Claimant was released from the hospital he decided to enter hospice care at his home on September 15, 2021, and Claimant died on November 7, 2021.

K.S.A. 44-501 states in part: "If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act."

The two phrases arising "out of" and "in the "course of" have two separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in her employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of the employment.[27]

The recitation of this medical evidence demonstrates, in addition to his heart condition Claimant in the last year of his life developed medical conditions eventually resulting in his death. The conditions like diverticulitis resulting in removal of 90 percent of his colon, kidney cancer and sepsis all developed in the last year of Claimant's life and resulted in Claimant's death.

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[27] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-198, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl.1, 512 P.2d 497 (1973).

Dr. Farhoud, the cardiologist who treated Claimant since 2008 opined Claimant's death was related to the sepsis and perforated bowel and exacerbated the heart condition but was not ultimate cause of Claimant's death. Claimant's death was not caused or contributed to by his work accident.

Dr. Stephen Schuman reviewed Claimant's medical records only and concluded Claimant's death was due to congestive heart failure, which ultimately was due to his myocardial infarction of February 13, 2008, due to his crush injury at work on February 8, 2008.

The extensive and serious medical conditions Claimant developed in the last year of his life resulted in his death. The crush injury in 2008 causing Claimant's heart condition is not sufficiently linked to Claimant's death due to the intervening medical conditions Claimant developed. This conclusion is reinforced by the opinion of Dr. Farhoud who treated Claimant from 2008 until his death. Dr. Farhoud opined the sepsis and bowel perforation was the ultimate cause of Claimant's death and were not caused by Claimant's work injury. The majority of the Board find Dr. Farhoud's opinion more credible because he saw Claimant as a treater as opposed to performing a single records review. It is found and concluded Claimant's death did not arise out of and the course of Claimant's employment.

4. Claimant's death was not the natural and probable consequence of his work-related injury on February 4, 2008.

The Kansas Supreme Court in *Jackson v. Stevens Well Service*[28] stated the natural and probable consequence rule as follows: "When a primary injury under the Kansas Workmen's Compensation Act is shown to have arisen out of and in 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."

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." [29]

In *Casco v. Armour Swift-Eckrich,*[30] the Kansas Supreme Court elaborated on the natural and probable consequence rule by stating:

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[28] *Jackson v. Stevens Well Service* 208 Kan. 637, 643, 493 P.2d (1972).

[29] *Stockman v. Goodyear Tire and Rubber Co. Of Kansas Inc.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[30] *Casco v. Armour-Swift Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

> The question of whether an injury results from a new and separate accident depends on the facts in each case. When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.

The Kansas Court of Appeals in *Logsdon v. Boeing* analyzed several cases involving the natural and probable consequences rule and held because a claimant's prior injury never fully healed, his aggravation of the same injury by a later accident more than ten years after his work-related injury was the natural and probable consequence of his original injury.[31]

For many of the same reasons why Claimant's death was not caused by his work-related accident, Claimant's death is not a natural and probable consequence of Claimant's work-related accident.

As stated previously, Claimant developed multiple serious medical conditions like diverticulitis resulting in perforated bowel and sepsis and the removal of 90 percent of his colon. While Claimant's heart condition complicated treating these conditions and Claimant's ability to recover, his heart condition did not cause these conditions.

There were two medical opinions offered as to causation. Dr. Farhoud had been treating Claimant for thirteen years opined while Claimant's heart condition was not optimal, it was stable with all the treatment he had received. Dr. Farhoud opined these other medical conditions ultimately resulted in Claimant's death. He believed Claimant's death was not the natural and probable consequence of his work-related accident.

Dr. Stephen Schuman did a records review before opining Claimant heart condition was the cause of Claimant's death.

The Board finds Dr. Farhoud's opinion more credible since he had provided Claimant significant treatment until the end of his life.

The Board finds Claimant's death was not the natural and probable consequence of his work-related accident. Between the work-related accident and his death, Claimant suffered multiple serious medical conditions, especially in the last year of his life. Dr. Farhoud, Claimant's cardiologist for thirteen years was the most knowledgeable about his heart condition and opined Claimant's death was not due to the work accident or his cardiac condition. As stated in *Casco* expert medical testimony linking the causation of the second injury to the primary injury is required. In this case, there is expert medical

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[31] *Logsdon v. Boeing Co.,* 35 Kan .App. 2d 79, 84, 128 P.3d 430 (2006).

testimony not linking the primary injury, Claimant's heart condition to the secondary injury, his death.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of ALJ Ali N. Marchant dated January 13, 2025, is affirmed in part and reversed in part. Claimant is barred from compensation pursuant to K.S.A. 2000 Supp. 44-520a. The majority of the Board found Claimant failed to prove decedent's death was the compensable natural and probable consequence of the original injury and the ALJ's findings and conclusions are reversed.

IT IS SO ORDERED.

Dated this _____ day of July, 2025.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENTING OPINION

The undersigned Board Members acknowledge the Board is duty-bound to follow precedent.

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.[32] The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is

[32] *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).

plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language.[33]

When a workers compensation statute is plain and unambiguous, the Board 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.[34]

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act ***unless*** a **written *claim*** for compensation shall be ***served upon the employer*** by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or **within one (1) year after the death** of the injured employee **if death results from the injury within five (5) years after the date of such accident.** (*emphasis added*)

Claimant's death occurred 13 years after the date of injury. There is no provision in K.S.A. Supp. 44-520a(a) barring compensability for a death that occurs after five years from the date of injury. As such, there is no provision in the Workers Compensation Act barring proceedings for failure to file a written claim if the death occurs after five years from the date of injury. We simply cannot add language to the statute saying a claim is barred if death does not occur with five years of the accident.

The undersigned Board Members' rationale is based on the dissent of Justice Smith in *Forcade*:

> I find myself unable to concur in the opinion of the majority in what is said in paragraph 3 of the syllabus and corresponding portion of the opinion. I discern no bearing the provisions of G.S.1949, 44-535, have on this question.
>
> . . .
>
> The prevailing opinion states the question to be: Where a workman dies of his injury more than three years after the accident in which the injury occurred, are

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[33] *Hall v. Dillon Companies, Inc.,* 286 Kan. 777, 785, 189 P.3d 508 (2008).

[34] *Bergstrom v. Spears Mfg. Co.,* 289 Kan. 605, 608, 214 P.3d 676 (2009).

his dependents entitled to benefits under the Workmen's Compensation Act? In view of the above question I ask: Where in the act is there any provision that death must occur within three years of the happening of the accident in order for the dependents to recover? There is no such provision in the act. We have said many times that the act was complete in itself. See *Norman v. Consolidated Cement Co.*, 127 Kan. 643, 274 P. 233. If such be the proper construction then whence cometh the statement that the 1927 amendment, sec. 44–520a was obviously for the purpose of setting a specific time, beyond which an employer would not be liable for death resulting from an accident arising out of and in the course of employment? That is not what the section says. It is a section devoted solely to the time within which a claim for compensation must be made, that is, one hundred and twenty days after the accident where the claim is for compensation for an injury not resulting in death or within eight months after the death of the injured employee if death results from the injury within three years after the date of the accident.

There is no limitation as to time for filing the claim where death occurs more than three years after the accident. That may seem strange, but that is the way the statute is written. The English language permits no other interpretation.

. . . Now if it were the obvious intent of the legislature that death must occur within three years of the accident in order to entitle the dependents to recover, in this section would have been the logical place to insert the provision. We do not find it, however, there nor anywhere else in the act.

It is true G.S.1949, 44–535, provides: 'The right to compensation shall be deemed in every case, including cases where death results from the injury, to have accrued to the injured workman or his dependents or legal representatives at the time of the accident, and the time limit in which to commence proceedings for compensation therefor shall run as against him, his legal representatives and dependents from the date of the accident.'

Where in that section do we find any provision fixing a time limit in which to commence proceedings for compensation? There is no such provision in that section nor do we find one anywhere until we read G.S.1949, 44-520a. There we find no provision fixing the time within which death must take place after the accident to enable the defendants to recover compensation.

My point is, the construction put on the act by the majority opinion is a strained construction. To say the legislature obviously intended to set a specific time beyond which an employer would not be liable for death resulting from an accident is to give the legislature an intention which it failed to put into words.

The statute is ambiguous. I will not resolve that ambiguity in favor of the employer when to do so will deprive an orphan child of the injured workman the right

to compensation a reasonable construction of the statute gives him.[35]

Simply put, K.S.A. 44-520a contains no language stating a worker is time-barred from pursuing benefits for a death claim unless the death occurs within five years after the date of accident. The statute merely concerns when a written claim must be made. *Bergstrom* requires interpreting the law based on plain language.

As for following *Forcade* or *Brooks*, Following precedent is obviously important, but not an unyielding rule. In *Casco*,[36] the Supreme Court reversed decades of precedent in *Honn*,[37] which held the loss of "both eyes, both hands, both arms, both feet, or both legs or any combination thereof" necessarily constituted a permanent total disability. The *Casco* court held the *Honn* court's interpretation of [K.S.A. 44-510c] impermissibly added something to a statute not readily found in the language of the statute.

In *Bergstrom*, the Supreme Court reversed *Foulk*,[38] because the Court of Appeals read language into "K.S.A. 44-510e(a) that require[d] an injured worker to make a good-faith effort to seek out and accept alternate employment."

Hoesli[39] overruled *Dickens*, was decided in favor of interpreting a statute based on plain language, not injecting: The problem with *Dickens* is that it ignored the legislature's intent as expressed in the statute's plain language in favor of the court's contrary perception of legislative purpose. In other words, it engaged maxims of statutory construction without discerning any uncertainty in the text.

In *Schneider*,[40] the Supreme Court's 83 years of precedent in *Graham* was found to be incorrect by the Court of Appeals. *Graham* was based on reading into K.S.A. 44-520a an unstated statutory purpose into 44-520a. Such language or statutory condition was never stated in K.S.A. 44-520a. Basically, the Court of Appeals concluded the Supreme Court did not apply plain language to interpret the statute and the Supreme Court showed indication of departing from its previous position.

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[35] *Forcade v. List & Clark Const. Co.*, 172 Kan. 119, 123-25, 238 P.2d 549, 552-53 (1951).

[36] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 525, 154 P.3d 494 (2007).

[37] *Honn v. Elliott*, 132 Kan. 454, 295 P. 719 (1931).

[38] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140 (1994).

[39] *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 364, 361 P.3d 504 (2015).

[40] *Schneider v. City of Lawrence*, 56 Kan. App. 2d 757, 767-68, 435 P.3d 1173 (2019).

The same rationale controls here. Reading K.S.A. 44-520a, with plain meaning in mind, does not bar the claim for death benefits.

The undersigned Board Members also conclude the ALJ was correct in determining Claimant's death was the natural and probable, or direct and natural result, of his 2008 work-related accident, as well-explained by the ALJ ending on page 25 of her decision.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (Via OSCAR)

Jan L. Fisher, Attorney for Claimant
Timothy A. Emerson, Attorney for Self-Insured Respondent
Hon. Ali N. Marchant, Administrative Law Judge