

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>TONI KINSEY</b>	)	
Claimant	)	
V.	)	AP-00-0487-605
	)	CS-00-0474-065
<b>UNIFIED SCHOOL DISTRICT #500 W</b>	)	
Self-Insured Respondent	)	

**ORDER**

Claimant requested review of the February 7, 2025, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on July 10, 2025.

**APPEARANCES**

Bruce A. Brumley appeared for Claimant. Frederick J. Greenbaum appeared for self-insured Respondent.

**RECORD AND STIPULATIONS**

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Regular Hearing held May 16, 2024; the transcript of the Preliminary Hearing held May 31, 2023, with exhibits attached; the transcript of the Telephonic Evidentiary Deposition of Daniel D. Zimmerman, M.D., from August 13, 2024, with exhibits attached; the transcript of the Videoconference Evidentiary Deposition of Peter Shapiro, M.D., from November 13, 2024, with exhibits attached, the documents of record filed with the Division, and the briefs filed by the parties.

**ISSUES**

1. What is the nature and extent of Claimant's disability?
2. Is Claimant entitled to future medical treatment?
3. Which version of K.S.A. 44-510h applies?
4. Did the ALJ err by not ruling on the issue of unauthorized medical expenses?
5. Is Claimant's attorney entitled to attorney fees?

### FINDINGS OF FACT

Claimant worked as a custodian for Respondent. On February 9, 2023, Claimant was directed to clean a two-stall bathroom with a mixture of bleach and QT, a COVID disinfectant. Claimant testified the mixture had a strong odor, and using it caused lightheadedness, headaches, burning eyes, and shortness of breath. Claimant used the mixture over the following week, after which she experienced a sore throat, nosebleeds, and vomited blood. Claimant acknowledged she had used this chemical combination before, but she indicated the fumes on February 9, 2023, were worse.

Respondent provided treatment for Claimant at Concentra on February 13, 2023. Medications for persistent cough and sinusitis were given, and Claimant was released to work with avoidance of exposure to QT. Claimant treated with Concentra until her release at maximum medical improvement (MMI), with no work restrictions, on March 15, 2023. Temporary total disability (TTD) benefits were paid in the amount of \$2,431.35, approximately 4.7 weeks. The dates the TTD was paid are not in the record.

Dr. Daniel Zimmerman, a board-certified independent medical examiner, examined Claimant on March 23, 2023, at her counsel's request. Claimant complained of popping sounds in her ears, stabbing sensations behind her right eye, headaches, shortness of breath, and cough. Dr. Zimmerman reviewed Claimant's history and medical records. After performing a physical examination, Dr. Zimmerman concluded Claimant sustained chemical pneumonitis and chemical-induced sinus and nasal irritation as a result of chemical exposure on February 9, 2023. Dr. Zimmerman recommended referral to an otolaryngologist (ear, nose, and throat specialist or ENT) and pulmonologist.

Following a preliminary hearing held May 31, 2023, the ALJ ordered Respondent to provide Claimant with the names of two ENTs, one from the University of Kansas Health System, from which Claimant could select an authorized physician. Claimant selected Dr. Peter Shapiro, a board-certified ENT.

Dr. Shapiro examined Claimant on August 31, 2023. Claimant complained of sinus problems, headache, nasal congestion, drainage, sore throat, and popping in her ears. Dr. Shapiro conducted a physical examination that included a laryngoscopy. The laryngoscopy revealed "mild allergic swelling of the nasal tissues with a pale purple appearance and some clear mucous."<sup>1</sup> Dr. Shapiro performed an endoscopy, another objective diagnostic test, which displayed mild allergic swelling of the nasal tissues with a pale purple appearance and some clear mucous. The nasopharynx and hypopharynx were normal, and her laryngeal examination was normal. Dr. Shapiro's overall impression of the

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<sup>1</sup> Shapiro Depo., Ex. 2 at 5.

endoscopy was a “pretty normal exam.”<sup>2</sup> Dr. Shapiro ordered a CT scan because Claimant’s complaints were inconsistent with what he observed during the examination. He recommended Claimant use Flonase on a regular basis for her sinus and nasal symptoms.

Claimant returned to Dr. Shapiro on September 13, 2023, to review the results of the CT scan. The CT scan showed no evidence of acute or chronic sinusitis or significant swelling of the nasal tissues. Dr. Shapiro determined the CT scan was normal, with no lasting sequelae from Claimant’s chemical exposure. He opined Claimant “may have allergic rhinitis, but I doubt there is a relationship between her chemical exposure and her symptoms.”<sup>3</sup> Dr. Shapiro testified Claimant had returned to her normal, pre-exposure state and does not require future medical treatment. Using the *AMA Guides* as a starting point,<sup>4</sup> Dr. Shapiro concluded Claimant has no permanent impairment of function as a result of the chemical exposure at Respondent.

Claimant returned to Dr. Zimmerman on January 24, 2024, again at her counsel’s request. Claimant complained of frontal headaches, sinus drainage, and an inability to smell, in addition to shortness of breath when walking long distances and throat irritation with frequent vocalization. Dr. Zimmerman reviewed Claimant’s updated medical records and performed a physical examination. He concluded Claimant sustained chronic nasal pharyngeal irritability, for which the prevailing factor was the chemical exposure at work on February 9, 2023. Dr. Zimmerman determined Claimant had reached MMI but would require additional medical treatment, including the regular use of Flonase.

Using a strict interpretation of the *AMA Guides*, Dr. Zimmerman assessed Claimant with 7 percent whole person functional impairment as a result of the work incident. After he incorporated his training, background, and experience, Dr. Zimmerman modified the rating to 10 percent functional impairment to the whole body. Dr. Zimmerman explained:

Because I felt that the severity of the chemical exposure to – with the residuals of the sinus involvement and nasal involvement as demonstrated by the records that were available and the examination findings that were available when I saw her warranted a somewhat larger impairment rating.<sup>5</sup>

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<sup>2</sup> Shapiro Depo. at 7.

<sup>3</sup> Shapiro Depo., Ex. 2 at 1.

<sup>4</sup> American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

<sup>5</sup> Zimmerman Depo. at 13-14.

Claimant testified regarding her current symptoms:

I still cough a lot, and like when I lay down at night, I have a lot of coughing, but I'm always clearing my throat all the time. And I don't even – I'm not even aware of doing it. And, like, it's embarrassing because sometimes I'll be in a place where we're in line and people are in front of me, and they may be talking about something and I'll clear my throat, not even knowing that I'm doing it, and people look back at me like I'm irritating them or I'm irritated, and, like, it's embarrassing.<sup>6</sup>

Claimant continues to work for Respondent, now as a safety officer at a middle school.

The ALJ found Claimant sustained an injury arising out of and in the course of her employment on February 9, 2023. The ALJ deferred to the opinions of Dr. Shapiro, finding Claimant's injury caused temporary symptoms but no permanent impairment. Further, the ALJ found Claimant is not entitled to future medical treatment. The ALJ assumed the issue of unauthorized medical expenses was resolved as it "did not appear to be pursued in the record."<sup>7</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

Claimant argues the ALJ's Award should be reversed, in part. Claimant argues she sustained permanent functional impairment of 10 percent to the whole body as a result of the work incident and is entitled to attorney fees. Claimant contends the right to future medical benefits should be left open. Further, Claimant argues the ALJ exceeded his authority in closing benefits for unauthorized medical expenses outlined in K.S.A. 44-510h(b)(2).

Respondent argues the ALJ's Award should be affirmed. Respondent maintains Claimant sustained no permanent impairment of function as a result of her alleged injury, and she is not entitled to future or unauthorized medical benefits.

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

The employee has the burden of proof to establish the right to an award of compensation, including the various conditions upon which the right to compensation depends.<sup>8</sup> "Burden of proof" generally means the burden of a party to persuade the trier

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<sup>6</sup> R.H. Trans. at 9-10.

<sup>7</sup> ALJ Award (Feb. 7, 2025) at 4.

<sup>8</sup> See K.S.A. 44-501b(c).

of facts by a preponderance of the credible evidence the party's position on an issue is more probably true than not on the basis of the whole record.<sup>9</sup> The trier of fact considers the whole record in determining if the employee satisfied the burden of proof.<sup>10</sup>

The extent of permanent partial general disability shall be the percentage of functional impairment by the employee sustained on account of the injury as established by competent medical evidence and based on the *AMA Guides*.<sup>11</sup> In *Johnson v. U.S. Food Service*,<sup>12</sup> the Kansas Supreme Court held, in rating whole body impairments, the ratings calculations should begin with the *AMA Guides* as a starting point and consider competent medical evidence to modify or confirm the rating.

Two physicians provided evidence of permanent impairment in this claim. The ALJ chose to adopt the opinions of Dr. Shapiro. Dr. Shapiro is a board-certified ear, nose, and throat specialist. The ALJ rejected the opinions of Dr. Zimmerman. There is no evidence of any board certification related to otolaryngology for Dr. Zimmerman.

Dr. Shapiro opined Claimant has no permanent impairment of function as a result of the chemical exposure while working for Respondent. Upon examination, Dr. Shapiro found no evidence of acute or chronic sinusitis or significant swelling of the nasal tissues. Dr. Shapiro ordered a CT scan. Dr. Shapiro reviewed the CT scan and stated:

It was a normal exam. There were no findings that were consistent with acute or chronic sinusitis, and no evidence of significant swelling in the nose.<sup>13</sup>

Dr. Zimmerman diagnosed chronic nasal pharyngeal irritability due to the chemical exposure. Dr. Zimmerman's diagnosis is not consistent with the CT scan findings.

The Board agrees Dr. Shapiro's opinions are more persuasive. Claimant failed to prove she suffers a permanent impairment of function as a result of her work-related activities.

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<sup>9</sup> See K.S.A. 44-508(h).

<sup>10</sup> See *id.*

<sup>11</sup> K.S.A. 44-510e(a)(2)(B).

<sup>12</sup> See *Johnson v. U.S. Food Service*, 312 Kan 597, 478 P.3d 776 (2021).

<sup>13</sup> Shapiro Depo. at 8.

## 2. Is Claimant entitled to future medical treatment?

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.<sup>14</sup> It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.<sup>15</sup>

As previously stated, the Board finds the opinions of Dr. Shapiro more persuasive. This includes future medical. Dr. Shapiro did not see a need for future medical treatment because Claimant had returned to the pre-exposure normal state of health. The Board finds Claimant failed to prove it is more probably true than not additional medical treatment will be necessary.

## 3. Which version of K.S.A. 44-510h applies?

The newest version of K.S.A. 44-510h took effect on July 1, 2024. In *Bryant v. Midwest Staff Solutions*,<sup>16</sup> the Kansas Supreme Court wrote:

As a general rule, a statute operates prospectively in the absence of clear statutory language that the legislature intended it to operate retroactively. *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 220, 73 P.3d 753 (2003). Even if the legislature expressly states that a statute will apply retroactively, vested or substantive rights are immune from retrospective statutory application. Substantive rights include rights of action "for injuries suffered in person." *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, 667, 831 P.2d 958 (1992) (citing the Kansas Constitution Bill of Rights, § 18). The retroactive application of laws that adversely affect substantive rights violates a claimant's constitutional rights, because it constitutes a taking of property without due process of law. *Rios v. Board of Public Utilities of Kansas City*, 256 Kan. 184, 190, 883 P.2d 1177 (1994).

In reviewing the 2011 legislative changes to K.S.A. 44-510h, the Board found:

The amended version of K.S.A. 44-510h affects the substantive rights of the parties. Clearly, the amended statute is not intended to make a mere procedural change.

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<sup>14</sup> See K.S.A. 44-510h(a).

<sup>15</sup> See K.S.A. 44-510h(e).

<sup>16</sup> *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 588, 257 P.3d 255, 258 (2011).

There is nothing in the language of the New Act which suggests that the legislature intended K.S.A. 2011 Supp. 44-510h(e) to apply retroactively.<sup>17</sup>

Claimant argues the right to future medical treatment is a substantive right: the changes to K.S.A. 44-510h apply prospectively, not retroactively. The Board finds K.S.A. 2024 Supp. 44-510h does not apply retroactively.

#### **4. Did the ALJ err by not ruling on the issue of unauthorized medical expenses?**

K.S.A. 2022 Supp. 44-510h(b)(2) states:

Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

The ALJ was silent on the issue of unauthorized medical expenses. The ALJ found Claimant proved an injury arising out of and in the course of employment. That finding was not appealed.

The Board finds Claimant is entitled to unauthorized medical expenses pursuant to K.S.A. 2022 Supp. 44-510h(b), up to \$500.00, if not previously paid.

#### **5. Is Claimant's attorney entitled to attorney fees?**

K.S.A. 44-536(a) states:

With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or the employee's dependents, whether secured by agreement, order, award or a judgment in any court shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section. Except as hereinafter provided in this section, in death cases, total disability and partial disability cases, the amount of attorney fees shall not exceed 25% of the sum which would be due under the workers compensation act beyond 415 weeks of permanent total disability based upon the employee's average weekly wage prior to the date of the accident

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<sup>17</sup> *Vick v. State of Kansas*, No. 1,033,888, 2012 WL 4763653 (Kan. WCAB Sept. 13, 2012).

and subject to the maximum weekly benefits provided in K.S.A. 44-510c, and amendments thereto.

The ALJ found the claimant attorney’s February 26, 2023, contract of employment conformed to K.S.A. 44-536 and approved the contract. No Claimant’s attorney fee was awarded because no compensation was awarded. The parties stipulated TTD benefits were paid in the amount of \$2,431.35.

K.S.A. 44-536(d) states:

No attorney fees shall be charged in connection with any temporary total disability compensation unless the payment of such compensation in the proper amount is refused, or unless such compensation is terminated by the employer and the payment of such compensation is obtained or reinstated by the efforts of the attorney, whether by agreement, settlement, award or judgment.

There is nothing in the record that indicates Claimant’s attorney’s role in obtaining the TTD benefits. Claimant’s attorney would be entitled to attorney fees to the extent the TTD was obtained or reinstated by the efforts of the attorney, whether by agreement, settlement, award, or judgment. A separate hearing before the ALJ is required to obtain approval of fees on the TTD award. There is no evidence in the record to support an award of attorney fees on the TTD award at the time of this appeal. The Board finds the record insufficient to award attorney fees.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of ALJ Kenneth J. Hursh dated February 7, 2025, is affirmed and modified in part.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2025.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**TONI KINSEY**

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**AP-00-0487-605**  
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c: (Via OSCAR)

Bruce A. Brumley, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Self-Insured Respondent  
Hon. Kenneth J. Hursh, Administrative Law Judge