

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHANNON ROESCH Claimant	)	
V.	)	
MIDLAND CARE CONNECTION, INC.	)	AP-00-0495-782
Respondent	)	CS-00-0478-898
AND	)	
KHA WORKERS COMPENSATION FUND, INC.	)	
Insurance Carrier	)	
AND	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appealed the April 10, 2026, Award by Administrative Law Judge (ALJ) David J. Bogdan. The Board heard oral argument on August 20, 2026.

APPEARANCES

Jan L. Fisher appeared for Claimant. Christopher J. McCurdy appeared for Respondent and its insurance carrier. Kathyryn Gonzales appeared for the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

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

1. Transcript of the Preliminary Hearing held on April 10, 2024.
2. Transcript of Regular Hearing, held on September 10, 2025.
3. Evidentiary Deposition of Shannon Roesch, taken October 10, 2025, with exhibits #1 and 3 attached. (Exhibit #2 is not part of the record due to Respondent's objection to admissibility and no ruling from the ALJ as to its admissibility).

4. Evidentiary Deposition of Howard Aks, M.D., taken November 14, 2025, with exhibits attached.

6. Evidentiary Deposition of Andrew Jakoi, M.D., taken November 17, 2025, with exhibits attached.

5. Evidentiary Deposition of James Zarr, M.D., taken December 10, 2025, with exhibits attached.

ISSUES

1. Did Claimant's alleged injury of February 10, 2022, arise out of and in the course of employment ?

2. Is the accident the prevailing factor causing the cervical spine injury and need for medical treatment and resulting disability or impairment?

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

4. Is claimant entitled to unauthorized and future medical compensation?

5. Is Respondent entitled to a future credit pursuant to K.S.A. 44-504 against Claimant's uninsured motorist settlement?

6. Does the Kansas Workers Compensation Fund have liability?

FINDINGS OF FACT

Claimant worked for Respondent for over five years. She began working as a certified nurses aid (CNA). Her CNA job duties were direct patient care such as lifting, assisting with showers, physical care like toileting or dressing, getting patients in bed and bed changes. Claimant went from home to home to provide direct patient care.

In 2019, Claimant had hemorrhaging in C6-7 of her neck. Claimant had constant pain in the left side of her neck and her left arm. Claimant saw Dr. Boudreaux, who referred her to Dr. Nicolae for epidurals. She had two injections with Dr. Nicolae on October 3 and 24, 2019. After the second epidural, Claimant was so improved she was able to resume normal activity including her work as a CNA. Since 2019, Claimant has had intermittent aches and pains in her neck on her left side and back due to her work as a CNA. However no medical treatment was required.

On February 10, 2022, while working as a CNA, Claimant had completed her last scheduled patient visit and was returning to the office, located at 21st and Westport. She

discovered she did not have her phone charger for her work phone. She decided to go by her home in Topeka, located on Lane St., to pick it up. Claimant used the phone to communicate with patients and her employer and to do her charting. On her way to her house, Claimant was going west, on 29th Street and stopped at 29th and Lane to make a left hand turn to go south on Lane to get to her house. As Claimant was stopped, waiting for traffic to clear to make her turn, she was rear ended by another vehicle. Claimant was wearing her seat belt but was thrown forward and then toward the back seat. She was thrown with such force her front seat broke and she landed in the back seat. The impact was enough that her phone automatically called 911. The impact broke the rear window of her vehicle and crushed her trunk.

After the accident, Claimant was able to exit the vehicle. The other driver left the scene of the accident. Claimant felt immediate pain in her left shoulder, neck and lower back. Claimant went to Stormont Vail Emergency room on her own and was diagnosed with a whiplash injury.

After reporting the accident to her employer, Claimant was sent to Work Care. She received physical and occupational therapy for her back. This treatment increased her symptoms. Claimant was referred to Dr. Jakoi to direct her treatment. She received three epidural injections with Dr. Griffith and a nerve block from Dr. Johnson. She also had a nerve ablation on the left side of the lower back from Dr. Foster. Most of Claimant's care was directed to her low back. Claimant was on temporary work restrictions of no repetitive bending or twisting and no lifting over 10 pounds beginning August 5, 2022. The restrictions were modified to avoid frequent bending as of September 14, 2023. Claimant was released at maximum medical improvement by Dr. Jakoi on December 18, 2023, with no restrictions.

In October 2023, Claimant became employed as an intake coordinator with Respondent, which is an office job. Claimant was limited in her preferred activities like walking, fishing and kayaking. Her husband had taken over the household chores. She can no longer mow the lawn. Claimant had intermittent pain in her low back radiating from right to left at her belt line. Her back pain was aggravated by standing or walking too long or lifting. Claimant had also developed severe headaches. Claimant's neck becomes more painful if it remains in one position too long. If she stands or walks for any length of time she had to sit for at least 30 minutes. Claimant woke up frequently at night to change positions for comfort. Claimant relieved her pain with Aleve. Claimant would like to have the treatment recommended by Dr. Aks for right-sided cervical facet syndrome, a diagnostic branch block and possible radio frequency ablation.

Dr. Andre M. Jakoi, an orthopedic surgeon, examined Claimant on August 5, 2022, for cervical and lumbar spine pain at the request of Respondent. Claimant reported a February 10, 2022, motor vehicle accident. She reported chronic cervical spine pain which was present before the car accident. She reported numbness and tingling was present in

her bilateral upper extremities radiating to the first three fingers. She reported after the 2022 injury, she had experienced more intermittent left-sided lower extremity pain which intermittently radiates down leg. She stated lifting increases pain. She had treated with ice/heat, NSAIDs and Aleve.

Upon examination of the cervical spine, Dr. Jakoi found positive Spurling's to the left, sensory dulled in the C5 and C6 dermatomes on the left compared to the right, motor intact diffusely, mildly limited range of motion secondary to discomfort, no clonus, no Babinski and 2+ reflexes diffusely. Examination of the lumbar spine found limited range of motion in all planes of the lumbar spine and secondary to pain.

Dr. Jakoi opined Claimant had a history of cervical pathology prior to this injury, but it had been well controlled for over a year without the need for treatment. He recommended another MRI of the cervical spine to compare with the 2019 scan. Dr. Jakoi referred Claimant to pain management for a series of epidural injections at L5-S1. He opined based on a reasonable degree of medical certainty the work injury was the prevailing factor for the current symptoms, and need for further treatment.

Dr. Jakoi noted the September 24, 2019, MRI of Claimant's cervical spine which revealed focal kyphosis at C4-5 with a very large left-sided disc herniation causing obliteration of the nerve root and severe foraminal stenosis, no signs of high grade central stenosis or myelomalacia and C5-6 mild disc bulging and no other levels with significant pathology. The May 23, 2022, MRI of Claimant's cervical spine ordered by Dr. Jakoi revealed a left-sided disc protrusion at C5-6.

Dr. Jakoi reviewed the May 23, 2022, MRI of the lumbar spine which revealed normal appearing anatomy with the exception of the L5-S1 disc space where there was a loss of disc height and hydration. A L5-S1 disc herniation was noted with mild to moderate right lateral recess stenosis and end plate changes are noted consistent with modic changes.

Dr. Jakoi, in a letter dated September 9, 2022, stated Claimant's 2019 MRI and the 2022 MRI of the cervical spine are identical. He opined her cervical spine complaints are not work-related and the prevailing factor for Claimant's cervical complaints was the preexisting pathology. Dr. Jakoi did not review any of Claimant's medical records prior to the 2022 accident, other than the 2019 MRI. The lumbar spine was considered work related and could continue to be treated.

Claimant's treatment continued for her lumbar spine on December 15, 2022, with nurse practitioner, Kyle Thomas in Dr. Jakoi's office. Since her last visit, Claimant underwent 3 epidural steroid injections with Dr. Griffith and reported improvement with her pain. Claimant was working with light duty restrictions and found the pain tolerable with the restrictions. Claimant was hesitant to push the limits of her restrictions and continued to

work within the current restrictions for an additional 8 weeks and return for followup with Dr. Jakoi to discuss further treatment options.

Claimant returned to Dr. Jakoi on March 3, 2023, for followup of the lumbar spine. Claimant continued to have low back pain with the left side being worse than the right. She reported epidural injections provided her some relief and the pain did not travel down her legs. Dr. Jakoi ordered the lumbar spine to be treated with an LS-S1 anesthetic discogram by pain management and Claimant was instructed to followup after completion of the anesthetic discogram.

Claimant returned to Dr. Jakoi on May 18, 2023. Since March 3, 2023, she completed an L5-S1 anesthetic discogram and reported improvement in her back and hip pain by 80 percent for two hours. After two hours the pain was back at the baseline with pain in her left lower back and some pain and tenderness in her right lower back, with pain in her bilateral lateral hips. She has continued to work with restrictions. Dr. Jakoi determined the L5-S1 annular rupture Claimant sustained as a result of the accident had not healed and caused persistent pain. Claimant was referred to pain management for a basivertebral nerve ablation with the hope of avoiding a fusion. He continued Claimant with modified duty restrictions. Claimant was diagnosed with carpal tunnel in May 2023.

On September 14, 2023, Claimant reported the LS-S1 basivertebral nerve ablations helped significantly. She continued to have some left-sided back pain. Claimant had full range of motion of the lumbar spine with mild discomfort just left of midline in the lower lumbar spine. Motor and sensory were intact and bilateral lower extremities without deficit. She was determined to be an appropriate candidate for medical branch blocks with Dr. Foster and then return for evaluation of her status. The only work restriction at this time was to avoid frequent bending. Claimant was released with no restrictions on December 18, 2023.

Dr. Jakoi testified Claimant would not need additional medical treatment after having a basivertebral nerve ablation, which is permanent, but she also underwent medial branch blocks and radiofrequency ablation and those are not permanent. They can be repeated if successful, anywhere from a year to five years. Dr. Jakoi did not issue an impairment rating.

Dr. Howard A. Aks examined Claimant on February 5, 2024, at the request of her attorney. Claimant continued to have chronic right-sided neck pain to the top of her shoulder girdle. She rated her pain at 1 out of 10 while sitting and at its worst a 3 out of 10. Driving a car bothered her. Claimant continued to suffer from low back pain with a feeling her legs will give out. She rated her low back pain a 7 out of 10 with the worst being 10 out of 10. She reported bending, pushing, and pulling aggravate her pain. Claimant reported difficulty performing activities of daily living and can only lift 20 pounds without hurting her

back. She can only lift 5 pounds overhead with the right upper extremity. She has difficulty lying flat and getting up from lying flat.

Dr. Aks did not note any prior low back problems in the review of her medical records. He testified Claimant did indicate she had prior cervical spine problems. Dr. Aks reviewed Claimant medical records from the accident and medical records prior to the accident indicating there was a prior cervical spine problem and examined Claimant. His observations from his exam were as follows.

Examination of the cervical spine revealed tenderness to palpation of the right paraspinal and trapezius muscles. She was tender to palpation over the cervical facet joint on the right side involving C2-3 down to C5-6. Range of motion of her neck was within normal limits; however, rotation and right lateral flexion caused her to have increasing neck pain. She was nontender to palpation over the occipital nerves.

Examination of the upper extremities revealed normal strength, as well as range of motion except for internal rotation on the right was only to T10 versus T7 on the left.

Examination of the lumbosacral spine did reveal tenderness to palpation of the paraspinal muscles. She was tender to palpation not only in the left lower facet joints but also the right. Range of motion was within normal limits except for extension and lateral rotation to the right did increase her right lumbosacral spine pain.

Examination of the left lower extremity revealed normal strength, as well as range of motion. Deep tendon reflexes were 1+ at the patella, not obtainable at the ankle. She demonstrated a negative Patrick's sign and a negative straight leg raise.

Examination of the right lower extremity did reveal normal strength, as well as range of motion. Deep tendon reflexes were 1+ at the patella, not obtainable at the ankle. She had a positive Patrick's sign on the right side causing pain in the SI joint. She had a negative straight leg raise on the right side.

IMPRESSION:

1. Status post motor vehicle accident.
2. Chronic cervicgia, right sided.
3. Chronic cervical facet syndrome, right sided.
4. Chronic lumbar spine pain, discogenic.
5. Chronic bilateral lumbar facet syndrome.
6. Chronic right sacroiliitis.¹

¹ Aks Depo., Ex. 2 at 5-6.

The chronic cervicgia right-sided and chronic facet joint syndrome are facet injuries in the cervical spine commonly caused by whiplash injuries. Facet joints are the joints along side the mid-line of the spine allowing rotation of the neck from side to side and up and down. Injury to the facet joint can cause pain with movement and limit movement. Claimant was diagnosed with whiplash shortly after the accident. Dr. Aks noted since the motor vehicle accident, Claimant had chronic cervicgia and lumbar spine pain. Conservative treatment had provided minimal relief. Dr. Aks opined within a reasonable degree of medical certainty the motor vehicle accident was the prevailing factor for the continued chronic right-sided cervicgia and chronic lumbar spine pain. He found Claimant to be at maximum medical improvement.

Based on *The American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition (The Guides)*, competent medical evidence and his training and experience Dr. Aks assigned a 3 percent permanent partial body as a whole impairment for the cervical spine injury and 10 percent permanent partial body as whole impairment for the lumbar spine injury for total a 13 percent permanent partial impairment to the body as a whole. He took into consideration not only Claimant's injury but her pathology, her pain, body mechanics, and her future physiology. He also considered the possible future surgical procedure recommended by the spine doctor to treat her pain.

He assigned the following permanent restrictions:

1. No lifting more than 20 pounds.
2. No overhead lift with the right upper extremity more than 5 pounds.
3. No pushing or pulling more than 30 pounds.
4. No sitting more than an hour without standing.
5. No standing more than 20 minutes without changing positions.
6. No walking more than a half a block without stopping.
7. No frequent bending, twisting, or stooping.

On May 19, 2025, Dr. Aks examined Claimant again after reviewing additional records from Dr. Griffith. Claimant continued to suffer from low back pain with the right side being worse than the left.

He examined Claimant again and found:

Examination of the cervical spine did reveal tenderness to palpation over both occipital nerves, as well as the facet joints, right being worse than left. Range of motion of her cervical spine was within normal limits; however, extension and lateral rotation to both sides caused increasing cervical spine pain in the corresponding side. Flexion caused pain in the lower cervical segment posteriorly.

Examination of lumbosacral spine revealed flexion of 40° with pain, extension and lateral rotation to both sides caused pain to the corresponding side. She was tender to palpation over the facet joints L3 through LS on both sides, right being worse than left.

Examination of the lower extremities revealed straight leg raises in the supine position of 40° causing pain in the corresponding lower back on both sides. She had negative Patrick's sign on the left but positive on the right. There was no evidence of radiculopathy.

IMPRESSION:

1. Status post motor vehicle accident.
2. Chronic cervicgia, right worse than left.
3. Chronic cervical facet syndrome right and left.
4. Bilateral occipital neuralgia.
5. Chronic lumbar spine pain, discogenic.
6. Chronic bilateral lumbar facet syndrome, right being worse than left.
7. Right sacroiliitis.²

The addition of the bilateral occipital neuralgia diagnosis is an indication the upper fact joints were getting worse. Damage to the facet joints can worsen over time and result in severe headaches.³ Surgical options were discussed which Claimant declined. Dr. Aks found Claimant to be at maximum medical improvement.

Dr. Aks found Claimant's pain to be chronic and permanent and therefore Claimant will need future medical treatments to control it and manage her disability. Dr. Aks recommended radio frequency ablation for the right cervical facet syndrome and if beneficial, could be conducted annually. An additional recommendation for the lumbar spine, bilateral diagnostic medial branch blocks since she has pain on both sides and the L3-4 be addressed during this procedure. For the chronic right sacroiliitis, Dr. Aks opined it is more likely than not Claimant would benefit from right SI joint injections under guidance. These can be offered 1 to 2 times annually as long as they are beneficial. He also felt she might benefit from a surgical fusion. Dr. Aks recommended proceeding with another diagnostic discogram procedure at L4-5 and L3-4. A provocative discogram with contrast should be done to be followed by a CT, to determine if there was any indication that there was an annular tear or leakage of the contrast, an indicator of a symptomatic disc. If these treatments do not provide the relief Claimant needed she should see Dr. Jakoi for consideration of a surgical fusion. Claimant received some of the recommended treatment and had some relief, but it did not eliminate her pain totally.

² *Id.*, Ex. 3 at 4.

³ *Id.* at 25-26.

On May 19, 2025, Dr. Aks assigned a 17 percent permanent partial body as a whole impairment. The increased impairment from the first visit was due to multiple pain generators, symptomatic disc, facet syndrome, an SI problem and the fact she was getting worse and struggling with occipital headaches.

Dr. James Zarr examined Claimant on July 15, 2025, for evaluation of neck and low back pain at the request of Respondent. During his examination, Dr. Zarr noted tenderness to palpation in the in the lumbosacral paraspinal regions bilaterally and tenderness to palpation in the cervical paraspinal region bilaterally. He diagnosed persistent neck and low back pain secondary to a motor vehicle accident. Dr. Zarr opined Claimant was at maximum medical improvement and was capable of returning to full-time regular duty work without restrictions.

Dr. Zarr opined the February 10, 2022, work injury was a substantial aggravating factor in Claimant's neck pain complaints but the work accident did not rise to the level of becoming the "prevailing factor" for those complaints. However, he opined the work accident was the "prevailing factor" for Claimant's low back pain complaints. He disagreed with Dr. Aks on the prevailing factor for the neck pain and found that with reasonable certainty, the preexisting condition was the prevailing factor for the neck pain. Dr. Zarr testified he did not address the neck in his examination⁴, but testified that he would rate the cervical spine at 3 percent to the body as a whole. This is an overall rating regardless of causation.⁵ He relied on Dr. Jakoi for causation.

Dr. Zarr used *The Guides* and competent medical evidence, to assign a 3 percent impairment to the body as whole for the low back injury. The only future medical treatment, Dr. Zarr recommended was continued use of over-the-counter medications for pain control.

Dr. Zarr did not have records to review regarding the 2019 incident, the 2019 MRI and did not discuss Claimant's cervical history with her. He did have the 2022 MRI report.

While testifying at his deposition, Dr. Zarr agreed Claimant had a herniated disc at L5-S1 with radiculopathy which at one time resolved and she had soft tissue pain. He agreed the default rating for a disc herniation with resolved radiculopathy is 7 percent to the body as a whole. If the cervical complaints were to be rated it would be 3 percent impairment to the body as whole which would result in 10 percent impairment to the body as a whole.

⁴ Zarr Depo. at 19.

⁵ *Id.* at 12-13.

Claimant sought coverage under her personal insurance for injuries and damages caused by the car accident. The driver who hit Claimant was located but did not have insurance. She retained an attorney in attempt to get coverage under the uninsured motorist clause of her own auto insurance policy. This auto insurance policy covers Claimant and her husband. The uninsured motorist clause will not cover bodily injury paid for under Workers Compensation laws and duplicate payments.⁶ The policy limit was \$100,000. Claimant was paid the entire \$100,000 as settlement for her claim. Claimant's husband had to agree, which he did, to any settlement of the claim. A third of the recovery went to her attorney for fees. There is no accounting available as to what portion of the settlement was for what specific damages.

Respondent is requesting a future credit under K.S.A. 44-504 against Claimant's uninsured motorist settlement. Respondent did not provide a specific amount for the credit they are seeking or documentation of what workers compensation benefits were included in the settlement and thus a duplication of benefits. The settlement document was not made part of the record.

The ALJ found Claimant had a 13.5 percent permanent partial body as a whole impairment for cervical and lumbar injuries. He went on to find "the inability to identify any duplicate damages (which were to be limited or excluded under the UIM policy), the Court finds there is no future credit allowed against workers compensation benefits."⁷ The ALJ found the preponderance of evidence proved future medical treatment will be necessary to cure and relieve the effects of claimant's injury. No liability was assessed to the Workers Compensation Fund.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argued the accident did not arise out of and in the course of Claimant's employment, because she took a personal deviation from her business route to go home and get a phone charger. Respondent also argued the accident is not the prevailing factor causing injury, medical condition and need for medical treatment regarding the neck. Respondent argued it was entitled to a future credit pursuant to K.S.A. 44-504 against Claimant's uninsured motorist recovery. Respondent argued Claimant has not met her burden to overcome the presumption future medical benefits terminated once she reached maximum medical improvement, therefore it should be denied. Finally, Respondent argued should the cervical spine injury be found to not be compensable, it should be reimbursed for compensation paid for medical treatment and/or benefits paid for the cervical injury.

⁶ Claimant's Depo.(Oct. 10, 2025), Cl. Ex.1.

⁷ ALJ Award at 14.

Claimant argues the ALJ should be affirmed except the rating for permanent partial disability should be increased to 17 percent to the body as a whole.

The Kansas Workers Compensation Fund did not file a brief, but reserved any rights it may have under the Kansas Workers Compensation Act which may come out of the Court's decision in the event of a remand.

1. Claimant's injury arose out of and in the course of her employment.

Respondent contends Claimant's deviation to go home to pick up a phone charger caused Claimant to no longer to be in Respondent's employment when the accident occurred. K.S.A. 44-508(f)(3)(B) defines the going and coming rule, which are criteria to exclude an employee from benefits.

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

Claimant's job at the time of the accident required her to go from one client home to another to provide services. Thus travel was an intrinsic part of Claimant's job. When travel is an intrinsic part of the job the going and coming rule does not apply.⁸

Where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment"-he or she has already begun the essential tasks of the job. Such an employee is covered by

⁸ *Kendel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995); *Craig v. Val Energy, Inc.*, 47 Kan. App. 2d 164, 274 P.3d 650 (2012).

the Workers Compensation Act and is not excluded from coverage by the going-and-coming rule.⁹

Claimant's accident occurred while Claimant was on a work errand. Claimant was en route to the office after completing her last appointment with a stop at her house to pick up her phone charger for her work phone when her accident occurred. Claimant used her work phone to communicate with her employer, maintain and access other business records and chart her patient's visits.

It is found and concluded Claimant's accidental injuries arose out of and in the course of employment. There is no evidence Claimant's detour to her home, after completing patient visits, en route to the office was motivated by personal activity. A deviation from employer's work to the extent it removes an employee from employer's business generally is personal or non-business related activity.¹⁰ There was no deviation from work.

2. The accident is the prevailing factor causing the cervical spine injury, need for medical treatment and resulting disability or impairment.

Prevailing factor is defined as:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.¹¹

Respondent contends the prevailing factor for Claimant's cervical complaints was a condition in her cervical spine treated in 2019. Claimant suffered a hemorrhage in C6-7 on the left side of her cervical spine. Claimant was treated with two epidural steroid injections. After the second injection, most of Claimant's pain in her cervical spine was resolved. She was able to return to full duty as a CNA. She continued to work as a CNA with no additional treatment for her cervical spine until her February 10, 2022, accident.

Respondent relies on the prevailing factor opinion of Dr. Jakoi, an orthopedic surgeon who reviewed the 2019 MRI and 2022 MRI of Claimant's cervical spine and could see no changes in Claimant's cervical spine. Therefore, since there were no change in

⁹ *Halford v. Nowark Construction Co.*, 39 Kan. App. 2d 935, 942, 186 P.3d 206, rev. denied 287 Kan. 765 (2008).

¹⁰ *Kindel*, *supra* at 284.

¹¹ K.S.A. 44-508(g).

Claimant's cervical spine MRIs, the Claimant's current cervical spine complaints were not due to the 2022 accident. Dr. Jakoi did not review Claimant's medical records from the 2019 incident or discuss with Claimant the outcome of the treatment. The treatment led to pain being controlled to the extent Claimant was able to return to the physically demanding job as a CNA.

Dr. Zarr adopted Dr. Jakoi's prevailing factor opinion with little or no independent review of his own.

As a result of the 2022 accident, Claimant suffered a whiplash injury causing new injuries to her cervical spine. A whiplash injury, according to Dr. Aks and acknowledged by Dr. Jakoi, was a cause for injuries to the facet joints in Claimant's cervical spine. Claimant's cervical spine complaints were centered on her right side as opposed to her left side as in 2019. The Board finds the opinion of Dr. Aks on prevailing factor persuasive. His opinion is not just based on a comparison of two MRIs of the cervical spine but review of Claimant's medical records prior to the 2022 accident. Claimant after the 2019 incident, recovered to the extent she could continue to work as an CNA without restrictions in a physically demanding job, until the 2022 accident. Claimant did not seek any more medical treatment for her cervical spine after the second 2019 epidural injection until after the 2022 accident. For these reasons it is found and concluded the 2022 accident was the prevailing factor for Claimant's cervical injuries.

3. The nature and extent of Claimant disability is 13.5 percent to the body as a whole.

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

Permanent partial disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule K.S.A. 44-510d, and amendments thereto . . .

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 sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Two doctors opined as to the nature and extent of Claimant's permanent impairment, Dr. Zarr and Dr. Aks. Dr. Aks opined based on competent medical evidence and *The Guides* Claimant's permanent impairment is 17 percent to the body as whole, 10 percent is for the lumbar injury and 7 percent for the cervical injury. Dr. Zarr opined Claimant's

permanent impairment is 10 percent to the body as a whole, 3 percent for the cervical injury and 7 percent for the lumbar injury.

The Board finds both impairment ratings persuasive so the Board will afford equal weight as the ALJ did for both opinions. Therefore, Claimant's permanent impairment is 13.5 percent.

4. Claimant is entitled to future medical treatment.

K.S.A. 44-510h as amended May 15, 2011, provides a presumption the employer's liability for medical expenses terminates upon maximum medical improvement. The presumption may be overcome with medical evidence that is probably more true than not additional medical treatment will be required after maximum medical improvement. Additional "medical treatment" does not include home exercise programs or over-the-counter medications.

Dr. Aks provided extensive and persuasive recommendations for future medical treatment for Claimant. It is found and concluded Claimant is entitled to future medical treatment.

5. Respondent is not entitled to a future credit pursuant to K.S.A. 44-504(b) against Claimant's uninsured motorist settlement.

K.S.A. 44-504(b) states in part:

In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse.

The Kansas Supreme Court in *Wishon v. Cossman*¹² explained subrogation under K.S.A. 44-504(b) applies to duplicate damages.

The intent of K.S.A. 44-504(b) is two-fold: (1) to preserve injured workers claims against third-party tortfeasors and (2) to prevent double recoveries by injured workers. *Lemery v. Buffalo Airways Inc.*, 14 Kan.App.2d 301, 307-308, 789 P.2d 1176, *rev. denied* 246 Kan. 767 (1990). K.S.A. 44-504(b) grants employers subrogation liens on tort recoveries by injured workers only to the extent that a

¹² *Wishon v. Cossman*, 268 Kan. 99, 105-106, 991 P.2d 415 (1999).

worker's recovery duplicates compensation and medical expenses paid by the employer under the Worker Compensation Act.¹³

The Court of Appeals case of *Rumbaugh v. Direct TV*¹⁴ ruled on entitlement to a subrogation lien. The Kansas Workers Compensation Appeals Board ruled Respondent was entitled to a lien on claimant's recovery of medical malpractice settlement and claimant could not receive future medical benefits paid for by the employer under his workers compensation claim until he had exhausted all proceeds under this third party settlement.

In reversing the Board and remanding it for additional proceedings the Court of Appeals said:

The Board erred in interpreting K.S.A. 44-504(a) to find Respondents were entitled to subrogation lien against Rumbaugh's entire third party medical malpractice settlement award without determining whether the medical malpractice award covered duplicative damages "for which compensation is payable under the workers compensation act."¹⁵

In this case, Respondent's claim is for a lien or future credit against Claimant's uninsured motorist settlement. Respondent has presented no documentation this settlement is duplication of any workers compensation benefits received. There is speculation about possible duplication but no documentation. There is no specific evidence or documentation any of the settlement proceeds represent a duplication of benefits. There is a clause in Claimant's insured motorist coverage that there shall not be coverage for any bodily injury paid for under Workers Compensation laws. Claimant's husband was also a party to the settlement and a one third of the proceeds were paid to the attorney who represented Claimant in the settlement.

Respondent argues it is the Claimant's responsibility to show there is a duplication of benefits. The Board disagrees. Respondent is claiming a credit against K.S.A. 44-504 as a defense to paying compensation, which essentially makes it an affirmative defense.¹⁶ It is the Respondent's burden to show there was a duplication of benefits. The subrogation lien in K.S.A. 44-504(b) is conditional upon a showing of duplication of benefits. Claimant is not making the claim there is a duplication of benefits but Respondent is. It is Respondent's burden to show the duplication of benefits and they have not done so.

¹³ *Id.* at 102.

¹⁴ *Rumbaugh v. DirectTV, Inc.*, 65 Kan. App. 2d 266, 564 P.3d 17 (2025).

¹⁵ *Id.* at 280.

¹⁶ *See Messner v. Continental Plastic Containers*, 48 Kan. App. 2d 731, 751, 298 P.3d 371 (2013).

Respondent's request for a future credit is denied. Respondent has not shown there is duplication of benefits with any specifics or the nature of benefits duplicated.

6. The Kansas Workers Compensation Fund does not have liability.

Respondent does not have grounds to seek a refund from the Fund for benefits incorrectly paid. The Board ruled all injuries claimed were compensable.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge David J. Bogdan dated April 10, 2026, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2026.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Jan L. Fisher, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Kathryn Gonzales, Attorney for the Kansas Workers Compensation Fund
Hon. David J. Bogdan, Administrative Law Judge