

## **Cold-Hearted Application of the Heart Amendment Leaves Kansas Workers' Compensation Claimants Gasping [*Mudd v. Neosho Memorial Regional Medical Center*, 62 P.3d 236 (Kan. 2003)]**

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### I. INTRODUCTION

Debra Mudd worked as an intensive care unit and emergency room nurse for the Neosho Memorial Regional Medical Center (NMRMC).<sup>1</sup> Her job of more than ten years required her to treat the ill and injured and to help save the lives of the dying.<sup>2</sup> However, while performing her duties on September 13, 1999, Mudd became the patient in need of urgent medical attention rather than the provider of medical attention.<sup>3</sup> While running to help save a dying hospital patient, Mudd suffered a stroke that ultimately resulted in her own death.<sup>4</sup> One might expect that an unfortunate accident like this would at least result in Mudd's surviving husband and dependent children receiving workers' compensation death benefits. As inequitable as it may seem, Kansas denied these benefits to Mudd's survivors in *Mudd v. Neosho Memorial Regional Medical Center*.<sup>5</sup>

The Kansas Supreme Court applied section 44-501(e) of the Kansas Statutes Annotated, commonly known as the Heart Amendment, to the Kansas Workers Compensation Act, in denying compensation to Mudd's surviving husband and dependent children.<sup>6</sup> The Heart Amendment bars payment of workers' compensation benefits to employees or their surviving dependents for heart injuries,<sup>7</sup> unless unusual work exertion precipitated the injury.<sup>8</sup> Previous case law and case dicta from the Kansas Supreme Court itself may have indicated that such a factual scenario would either (1) satisfy the requirements

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1. *Mudd v. Neosho Mem'l Reg'l Med. Ctr.*, 62 P.3d 236, 239 (Kan. 2003).

2. *Id.*

3. *Id.*

4. *Id.* at 239-40.

5. *See id.* at 246.

6. *Id.* at 240, 242.

7. The Heart Amendment covers injuries including strokes, heart attacks, cerebral hemorrhages, and cerebrovascular injuries. Norman I. Cooley, *Compensability of Heart Attacks, Strokes, and Psychological Injury*, in *KANSAS WORKERS COMPENSATION* 5-1 (Tom Hammond et al. eds., 4th ed. 2000).

8. KAN. STAT. ANN. § 44-501(e) (2000).

of the Heart Amendment thus resulting in compensation or (2) make the Heart Amendment inapplicable altogether. However, the *Mudd* decision contradicted this case law and dicta.

## II. CASE DESCRIPTION

One of Mudd's infrequent job duties as a nurse was responding to code blues.<sup>9</sup> During a code blue, Mudd rushed to help save a dying patient.<sup>10</sup> In the six months prior to Mudd's stroke on September 13, 1999, NMRMC hosted nineteen code blues.<sup>11</sup> Mudd responded to seven of the nineteen.<sup>12</sup> On September 13, 1999, Mudd passed out while running to a code blue.<sup>13</sup> Doctors ultimately determined that she had suffered a cerebrovascular stroke that resulted in her death.<sup>14</sup>

Mudd's surviving husband and dependent children (Mudd's family) filed a workers' compensation claim for death benefits.<sup>15</sup> Mudd's husband testified that responding to code blues was very stressful for Mudd and that she would often remain "upset, stressed, and unable to sleep" for days after responding to a code blue.<sup>16</sup>

Mudd's treating physician testified that her stroke was likely due to "a preexisting aneurysm, which is a weakening of a blood vessel wall."<sup>17</sup> He explained that the weakened wall ultimately ruptures, usually after the victim's blood pressure has been raised by exertion or stress.<sup>18</sup> He also testified that the exertion and stress that Mudd experienced while running to the code blue on September 13, 1999, were factors in precipitating her stroke.<sup>19</sup>

At the conclusion of Mudd's family's workers' compensation claim, the Administrative Law Judge (ALJ) denied survivors' benefits to Mudd's family.<sup>20</sup> The ALJ reasoned that they had not shown the stroke was a result of an unusual work exertion as required by the Heart Amendment to the Workers Compensation Act.<sup>21</sup> The ALJ found that Mudd had been performing her usual work in the course of her regular employment at the time of her stroke.<sup>22</sup>

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9. *Mudd*, 62 P.3d at 239.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 239-40.

15. *Id.*

16. *Id.* at 239.

17. *Id.* at 240.

18. *Id.*

19. *Id.*

20. *Id.* at 239-40.

21. *Id.*

22. *Id.* at 240.

Mudd's family appealed the ALJ's decision to the Appeals Board (Board) for the Kansas Division of Workers Compensation.<sup>23</sup> The Board reversed the ALJ's decision and awarded survivors' benefits to Mudd's family.<sup>24</sup> The Board reasoned that since running to a code blue only occurred roughly once a month, it was an unusual activity for Mudd, which constituted unusual exertion.<sup>25</sup> In addition, the Board found that the unusual stress related to code blue responses qualified as an external force.<sup>26</sup> Thus, the Board held that Mudd's family had essentially prevailed in their claim on two independent bases.<sup>27</sup> First, Mudd's family established that Mudd's stroke was caused by unusual exertion, satisfying the compensability requirements of the Heart Amendment.<sup>28</sup> Second, they also established that Mudd's stroke was caused by unusual stress combined with her running, which constituted an external force, making the Heart Amendment and its "usual vs. unusual" exertion test inapplicable.<sup>29</sup>

The Board based its latter finding on two previous case opinions from the Kansas Supreme Court.<sup>30</sup> First, it relied on dicta from *Dial v. C.V. Dome Co.*,<sup>31</sup> which indicated that natural fear and anxiety or stress felt by a worker could constitute external forces, thus making the Heart Amendment inapplicable where those external forces are present.<sup>32</sup>

Second, the Board relied on an implication present in *Suhm v. Volks Homes, Inc.*,<sup>33</sup> which supported the dicta from *Dial*, that stress could be an external force.<sup>34</sup> In *Suhm*, an employee who suffered a heart attack claimed that it was caused by exceptional work stress, an external force.<sup>35</sup> The Kansas Supreme Court denied the claim because there was not any clear medical proof that the heart attack was caused by stress.<sup>36</sup> Consequently, the Board noted that not only did the *Suhm* court fail to expressly reject stress as a possible external force, the court also wrote an opinion that implied that stress would

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23. *Id.* at 239-40.

24. *Id.*

25. *See id.* at 240.

26. *Id.* If a claimant's heart injury was precipitated by an external force rather than his work exertion, then the Heart Amendment is inapplicable. *Dial v. C.V. Dome Co.*, 515 P.2d 1046, 1047, 1051 (Kan. 1973).

27. *See Mudd*, 62 P.3d at 240.

28. *Id.*

29. *Id.* The "usual vs. unusual" exertion test is applied to determine whether an employee's work exertion at the time of his heart injury was *usual* or *unusual* based on the work history of that particular employee. *See Chapman v. Wilkenson Co.*, 567 P.2d 888, 889, 892 (Kan. 1977).

30. *Mudd*, 62 P.3d at 242.

31. 515 P.2d 1046 (Kan. 1973).

32. *Mudd*, 62 P.3d at 242.

33. 549 P.2d 944 (Kan. 1976).

34. *Mudd*, 62 P.3d at 242-43.

35. *Suhm*, 549 P.2d at 949.

36. *Id.* at 949-50.

constitute an external force in a case where the medical causation was proven.<sup>37</sup>

NMRMC and its insurance carrier, Kansas Hospital Association Worker Compensation Fund, Inc. (collectively referred to as NMRMC), appealed from the Board's decision to the Kansas Court of Appeals.<sup>38</sup> Mudd's family promptly filed a motion to transfer the case to the Kansas Supreme Court for final review and determination.<sup>39</sup> The Kansas Supreme Court granted the motion.<sup>40</sup>

The Kansas Supreme Court overturned the Board's award of workers' compensation benefits to Mudd's family.<sup>41</sup> First, the court found that there was not substantial competent evidence from which the Board could have found that Mudd's September 13, 1999, code blue response constituted unusual exertion.<sup>42</sup> Second, the court held that stress did not qualify as an external force under the facts of the case.<sup>43</sup> Accordingly, the Heart Amendment was applicable to the Mudd family claim, and it barred compensation because Mudd's family had not shown that Mudd's stroke was precipitated by unusual work exertion.<sup>44</sup>

### III. BACKGROUND

Prior to 1967, Kansas treated workers' compensation heart injury cases<sup>45</sup> similar to other types of injuries.<sup>46</sup> There was no requirement of unusual exertion and heart claims were compensable even where the employment merely worsened a worker's preexisting weak heart.<sup>47</sup> Like other workers' compensation claims, the standard for compensating heart claims required that "[i]f 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."<sup>48</sup>

The Kansas Supreme Court has held that the phrase "arising out of" one's employment means that there must be a causal connection between the employment and the injury.<sup>49</sup> Courts will find that an

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37. *Mudd*, 62 P.3d at 242-43.

38. *Id.* at 239-40.

39. *See id.* at 239; Reply Brief of Appellants at 1, *Mudd* (No. 89,091).

40. *Mudd*, 62 P.3d at 239.

41. *Id.* at 239, 246.

42. *Id.* at 239, 241.

43. *Id.* at 239, 243.

44. *Id.* at 241, 244.

45. *See Cooley*, *supra* note 7.

46. William A. Kelly, *The Unusual-Exertion Requirement and Employment-Connected Heart Attacks*, 16 U. KAN. L. REV. 411, 415-16 (1968).

47. *Id.*

48. KAN. STAT. ANN. § 44-501(a) (2000); *see also Cooley*, *supra* note 7.

49. *Pinkston v. Rice Motor Co.*, 303 P.2d 197, 199 (Kan. 1956).

injury sufficiently arose out of the employment when the injury was caused by the “nature, conditions, obligations or incidents of employment.”<sup>50</sup> In addition, the Kansas Supreme Court has held that mere aggravation of a preexisting condition constitutes “arising out of” the employment.<sup>51</sup>

The phrase “in the course of employment,” contained within section 44-501(a) of the Kansas Statutes Annotated, requires that an injury occur while one is working for his employer.<sup>52</sup> Essentially, the time and place in which an injury occurs are the critical factors as to whether the injury was “in the course of employment.”<sup>53</sup>

In addition, section 44-508(f) of the Kansas Statutes Annotated provides that injuries incurred while coming to or going home from work or while attending a recreational or social event where the employee was not required to attend, will not fall within the “arising out of and in the course of employment” requirement of section 44-501(a).<sup>54</sup> However, there are at least three major exceptions to the above general rule, whereby courts will find that injuries incurred on the way to or from work did “arise out of and in the course of employment.”<sup>55</sup> The second sentence of section 44-508(f) sets out the first two exceptions, as follows:

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 of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.<sup>56</sup>

An employee’s injury, sustained while traveling to or from a place for a work-related task, triggers the third major exception so long as the travel is essential to the employment.<sup>57</sup>

Courts have construed the phrase “arising out of and in the course of employment” liberally to bring injuries within the Kansas Workers Compensation Act.<sup>58</sup> For example, the Kansas Supreme Court, in *Phillips v. Kansas City, L. & W. Railway Co.*,<sup>59</sup> held that the death of a railway ticket agent arose out of his employment when he was beaten by an unknown attacker on the job.<sup>60</sup> In *Hillyard v. Loh-*

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50. *Id.*

51. *See Kronig v. Nolan Motor Co.*, 351 P.2d 1, 2 (Kan. 1960).

52. *Pinkston*, 303 P.2d at 199.

53. *Id.*

54. KAN. STAT. ANN. § 44-508(f) (2000).

55. *Brobst v. Brighton Place N.*, 955 P.2d 1315, 1321 (Kan. Ct. App. 1997).

56. KAN. STAT. ANN. § 44-508(f); *Brobst*, 955 P.2d at 1321.

57. *Brobst*, 955 P.2d at 1322.

58. *See generally* *Taylor v. Centex Constr. Co.*, 379 P.2d 217 (Kan. 1963); *Hillyard v. Lohmann-Johnson Drilling Co.*, 211 P.2d 89 (Kan. 1949); *Floro v. Ticehurst*, 76 P.2d 773 (Kan. 1938); *Phillips v. Kan. City, L. & W. Ry. Co.*, 267 P. 4 (Kan. 1928).

59. 267 P. 4 (Kan. 1928).

60. *Id.* at 4, 7.

*mann-Johnson Drilling Co.*,<sup>61</sup> the Kansas Supreme Court held that an employee's injury arose out of his employment, although the employee was injured while fixing his own car when there was no other company-related work available.<sup>62</sup> Likewise, the Kansas Supreme Court has found injuries to be "in the course of employment" when they were incurred while helping strangers on the roadside<sup>63</sup> or while traveling to receive medical treatment for a work-related injury.<sup>64</sup>

#### A. Heart Amendment

In 1967, the Kansas legislature created a new standard for compensating heart claims by enacting the Heart Amendment.<sup>65</sup> The Heart Amendment provides, "Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment."<sup>66</sup> In enacting the Heart Amendment, the Kansas legislature intended to limit employers' liability for preexisting heart-disease conditions.<sup>67</sup>

When Kansas enacted the Heart Amendment in 1967, it joined a minority of jurisdictions in denying workers' compensation benefits to a heart-injury claimant or his family unless the exertion that caused the heart injury exceeded the claimant's usual exertion during the course of his regular employment.<sup>68</sup> Legal scholars, including Arthur Larson and Lex K. Larson, have often criticized statutes such as the Kansas Heart Amendment, which require a showing of unusual exertion before a court will compensate a heart injury.<sup>69</sup> The Larsons criticized the "usual vs. unusual" exertion test, reasoning that the test is impractical and often inconsistently applied.<sup>70</sup>

Any employee looking forward to the coming year's work knows that he or she will work long hours as well as short hours, in cold weather and hot, sometimes faster and sometimes more slowly. The butcher will lift some light sides of beef, some heavy – and one day will come the heaviest side of beef the butcher has lifted all year – will that be a usual lift? The firefighter will have easy fires and difficult fires; the loader will lift little boxes and bigger boxes and biggest boxes; the police officer will arrest complaisant drunks and

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61. 211 P.2d 89 (Kan. 1949).

62. *Id.* at 91, 94.

63. *Floro*, 76 P.2d at 774, 776.

64. *Taylor v. Centex Constr. Co.*, 379 P.2d 217, 218, 224 (Kan. 1963).

65. KAN. STAT. ANN. § 44-501(e) (2000).

66. *Id.*

67. See *Nichols v. Kan. State Highway Comm'n*, 508 P.2d 856, 860 (Kan. 1973); Kelly, *supra* note 46, at 416.

68. ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 43.03[1][b] (MB 2002).

69. *Id.* § 44.03.

70. *Id.*

difficult drunks. None of this is either unusual or unexpected; yet a surprising number of cases will hold an exertion unusual when it is nothing more than the heaviest part of the claimant's usual work. And exposure will sometimes be held accidental because it was a little longer or colder or hotter than the average.<sup>71</sup>

Although the Heart Amendment did not specifically provide a rigid test for determining what constitutes unusual exertion, since 1967, Kansas case law has provided several guiding principles and factors.<sup>72</sup> In *Chapman v. Wilkenson Co.*,<sup>73</sup> the court held that the basis for determining "usualness" is the work history of the injured employee, rather than the typical work performed by others working in the same occupation.<sup>74</sup> For a task to be deemed *unusual* exertion, it is not dispositive to merely ask if the injured employee has done identical work in the past.<sup>75</sup> The court illustrated this principle in *Simpson v. Logan-Moore Lumber Co.*<sup>76</sup> and *Lentz v. City of Marion*.<sup>77</sup>

In *Simpson*, although the claimant-laborer had not previously unloaded and carried sheetrock as great a distance as at the time of his heart attack, the Kansas Supreme Court affirmed the district court's holding that the claimant's work exertion at the time of his heart attack was no more than usual.<sup>78</sup> On the other hand, in *Lentz*, the Kansas Supreme Court affirmed the district court's holding the claimant's work exertion in mowing grass was unusual, although the claimant had previously mowed the same area.<sup>79</sup> The court deemed the claimant's exertion to be unusual on the day of his heart attack because he was using a push-mower for the first time in tall bermuda grass and had also already worked an eight-hour day at the time of his heart attack.<sup>80</sup>

Factors considered in determining "usualness" include the worker's daily activities, the nature of the employment, the employment classification, and the assortment of tasks performed.<sup>81</sup> In addition, "[u]nusualness may be a matter of degree and may appear in the duration, strenuousness, distance or other circumstances involved in the work."<sup>82</sup>

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71. *Id.*

72. Cooley, *supra* note 7.

73. 567 P.2d 888 (Kan. 1977).

74. *Id.* at 892.

75. See *Lentz v. City of Marion*, 563 P.2d 456, 459 (Kan. 1977); *Simpson v. Logan-Moore Lumber Co.*, 510 P.2d 1234 (Kan. 1973).

76. 510 P.2d 1234 (Kan. 1973).

77. 563 P.2d 456 (Kan. 1977).

78. *Simpson*, 510 P.2d at 1235.

79. *Lentz*, 563 P.2d at 457-59.

80. *Id.* at 460.

81. *Nichols v. Kan. State Highway Comm'n*, 508 P.2d 856, 862 (Kan. 1973).

82. *Chapman v. Wilkenson Co.*, 567 P.2d 888, 889 (Kan. 1977).

### B. *External Force Exception to the Heart Amendment*

The Kansas Supreme Court, in *Dial*, mitigated the harshness of the Heart Amendment by creating the external force exception to the Heart Amendment.<sup>83</sup> The *Dial* court held that under the Heart Amendment, benefits are denied only when a claimant's heart injury was caused by usual work exertion and not some other external force.<sup>84</sup> After *Dial*, if a worker could show that his heart injury was caused by an external force rather than the exertion of his work, his claim was compensable, and the Heart Amendment would not apply.<sup>85</sup> However, to date the Kansas Supreme Court has found that only "oppressive heat" and "freezing cold and windy weather" constitute external forces.<sup>86</sup>

In *Dial*, an employee suffered a stroke caused by oppressive heat in his work environment.<sup>87</sup> At the time of the stroke, the employee had been engaged in his usual exertion in the course of his regular employment.<sup>88</sup> However, compensation was awarded because the claimant's injury had been caused by oppressive heat, constituting an external force.<sup>89</sup> The *Dial* court limited the applicability of the Heart Amendment and created the external force exception to the Heart Amendment as follows:

2. The 'heart cases' to which the amendment applies are those where the exertion of the claimant's work is the agency necessary to precipitate the disability.
3. *Where the claimant's disability is the product of some external force or agency, and not of the exertion of the claimant's work, the heart amendment has no applicability.* This is true even though a coronary or cerebrovascular injury may be one manifestation of the injury.
4. *Where exertion is not the agency which produces the workman's disability, the usual vs. unusual exertion test of the heart amendment is irrelevant.*<sup>90</sup>

The dicta from *Dial* also gave examples of what could potentially constitute external forces in future compensable cases.<sup>91</sup> The first example described an employee who suffered a blow to the head from a falling beam, resulting in cerebral hemorrhage.<sup>92</sup> The court's second example described an employee who experiences fear and anxiety

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83. *Dial v. C.V. Dome Co.*, 515 P.2d 1046, 1047, 1051 (Kan. 1973).

84. *Id.*

85. *Id.*

86. *See id.* (holding that oppressive heat qualified as an external force); *Makalous v. Kan. State Highway Comm'n.*, 565 P.2d 254, 259-60 (Kan. 1977) (holding that "freezing cold and windy weather" qualified as an external force).

87. *Dial*, 515 P.2d at 1048-50.

88. *Id.* at 1049.

89. *Id.* at 1050-51.

90. *Id.* at Syl. ¶¶ 2-4 (emphasis added).

91. *Id.* at 1051.

92. *Id.*

while being robbed during his employment, causing his weak heart to fail.<sup>93</sup> Subsequent to *Dial*, courts have widely accepted the *Dial* court's use of the term "anxiety" as being synonymous with "stress."<sup>94</sup>

*Suhm* also implied and reaffirmed the *Dial* dicta, that stress would constitute an external force in a case where the medical causation was proven.<sup>95</sup> Specifically, the *Suhm* court appeared to have accepted the claimant's contention that stress was an external force.<sup>96</sup> The *Suhm* court went on to deny compensation based on a lack of medical testimony that the external force (stress) caused the claimant's heart attack.<sup>97</sup>

The next significant case to address the external force exception was *Makalous v. Kansas State Highway Commission*.<sup>98</sup> In *Makalous*, the court awarded compensation to an employee who suffered a heart attack while pulling posts out of asphalt pavement in extremely cold weather.<sup>99</sup> Although pulling posts was one of the claimant's typical job duties, the court held that the extremely cold weather that was present in the claimant's work environment on the day of his heart attack constituted an external force, making the Heart Amendment inapplicable.<sup>100</sup> Claimant's medical expert testified that the extreme cold combined with his work exertion likely caused the heart attack.<sup>101</sup> The *Makalous* court held that for the external force rule to apply, the external force claimed does not have to be the only cause of the worker's heart injury.<sup>102</sup> Specifically, the court stated, "The external force rule in heart cases . . . should not be construed to preclude recovery merely because the usual exertion of the claimant's work may have contributed in some degree to producing the injury which resulted in disability."<sup>103</sup>

*Makalous* also established the burden of proof required to bring a case within the external force rule as follows:

To support a finding that claimant's cardiac or vascular injury is the product of some extreme external force[,] *the presence of a substantial external force in the working environment must be established and there must be expert medical testimony that the external force*

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93. *Id.*

94. See *Mudd v. Neosho Mem'l Reg'l Med. Ctr.*, 62 P.3d 236, 242-43 (Kan. 2003); *Suhm v. Volks Homes, Inc.*, 549 P.2d 944, 949 (Kan. 1976).

95. *Suhm*, 549 P.2d at 949.

96. See *id.*

97. *Id.* at 949-50.

98. 565 P.2d 254 (Kan. 1977).

99. *Id.* at 256, 261. Specifically, the temperature on the day of claimant's heart attack was eighteen degrees with a wind chill factor below zero. *Id.* at 256.

100. *Id.* at 256, 259-60.

101. *Id.* at 257.

102. *Id.* at 255, 260.

103. *Id.*

was a substantial causative factor in producing the injury and resulting disability.<sup>104</sup>

As mentioned above, Kansas is among a minority of jurisdictions that require unusual exertion before compensating a heart claim.<sup>105</sup> Among this minority, several jurisdictions including Colorado, Missouri, South Carolina, and Washington have held that physical strain combined with stress constitutes unusual exertion.<sup>106</sup> Section 8-41-302(2) of the Colorado Revised Statutes Annotated, similar to the Kansas Heart Amendment, proscribes that “[a]ccident,’ ‘injury,’ and ‘occupational disease’ shall not be construed to include disability or death caused by heart attack unless it is shown by competent evidence that such heart attack was proximately caused by an unusual exertion arising out of and within the course of the employment.”<sup>107</sup> However, Colorado has held that job stress, consisting of physical strain combined with emotional or mental tension, constitutes unusual exertion and will support an award for compensation.<sup>108</sup>

New York and New Jersey both previously applied the “usual vs. unusual” exertion test to determine compensability of heart cases before finally adopting alternative tests to remedy the difficult application of the “usual vs. unusual” exertion test.<sup>109</sup> In New York, a court will now award compensation for a heart claim if the strain that caused the heart injury was “greater than the ordinary wear and tear of life,” as well as if the claimant was engaged in unusual exertion.<sup>110</sup> New Jersey now compensates heart claims if “an incident of the work, alone or in combination with preexisting disease, played a ‘material part’ in causing, contributing to, or accelerating a heart attack.”<sup>111</sup>

The *Makalous* decision left room for interpretation as to how significantly the worker’s exertion can contribute to a heart injury in a compensable external force claim.<sup>112</sup> However, Kansas law generally denied compensation for heart injuries unless (1) unusual work exertion precipitated the heart injury<sup>113</sup> or (2) an external force, independent of the worker’s exertion, such as extreme hot or cold weather, precipitated the heart injury.<sup>114</sup>

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104. *Id.* at 260 (emphasis added).

105. LARSON & LARSON, *supra* note 68, § 43.03[1][b].

106. *See City & County of Denver v. Indus. Comm’n of Colo.*, 579 P.2d 80, 82 (Colo. 1978) (citing *Louderback v. Dep’t of Labor & Indus.*, 547 P.2d 889 (Wash. 1976); *Snuggs v. Steel Haulers*, 501 S.W.2d 481 (Mo. 1973); *McWhorter v. S.C. Dep’t of Ins.*, 165 S.E.2d 365 (S.C. 1969)).

107. COLO. REV. STAT. ANN. § 8-41-302(2) (West 2003).

108. *Indus. Comm’n*, 579 P.2d at 82.

109. *See* LARSON & LARSON, *supra* note 68, § 44.04.

110. *See id.*

111. *See id.*

112. *See generally Makalous v. Kan. State Highway Comm’n*, 565 P.2d 254 (Kan. 1977).

113. KAN. STAT. ANN. § 44-501(e) (2000).

114. *Makalous*, 565 P.2d at 256, 259-60 (holding that “freezing cold and windy weather” qualified as an external force); *Dial v. C.V. Dome Co.*, 515 P.2d 1046, 1047, 1051 (Kan. 1973) (holding that oppressive heat qualified as an external force).

### C. Constitutionality of the Heart Amendment

After the Kansas Supreme Court, in *Stephenson v. Sugar Creek Packing*,<sup>115</sup> struck down the Carpal Tunnel Amendment to the Kansas Workers Compensation Act for violating the Equal Protection Clause of the United States Constitution, some practitioners and commentators believed that the Heart Amendment was likewise unconstitutional.<sup>116</sup> In fact, the respondents' attempted defense of the Carpal Tunnel Amendment in *Stephenson* pointed to the Heart Amendment as a similar statute that provided for unequal treatment.<sup>117</sup>

The Carpal Tunnel Amendment essentially provided for different compensation of bilateral upper extremity injuries based upon whether the injuries were incurred in a single trauma or through repetitive use.<sup>118</sup> Under the Carpal Tunnel Amendment, a worker sustaining bilateral upper extremity injuries through repetitive use received less compensation than a worker sustaining the exact same injuries from a single trauma.<sup>119</sup>

Applying the rational basis test, the Kansas Supreme Court found that this discrimination violated the Equal Protection Clause.<sup>120</sup> Specifically, the only objective that the court could conceive of to support the Carpal Tunnel Amendment was to reduce workers' compensation insurance premiums for employers.<sup>121</sup> However, the court found that this was not a sufficient objective to justify the arbitrary discrimination provided in the Carpal Tunnel Amendment.<sup>122</sup>

The Heart Amendment is very similar to the Carpal Tunnel Amendment, except that the Heart Amendment's discrimination is far harsher.<sup>123</sup> Under the Heart Amendment, workers with the *exact same injury* resulting from the *exact same trauma*, are treated differently depending on how often the workers face the trauma in their employment.<sup>124</sup> The Heart Amendment is harsher than the Carpal Tunnel Amendment because the Heart Amendment denies all benefits to one set of workers, while fully compensating a second set of similarly situated workers.<sup>125</sup> The Carpal Tunnel Amendment merely provided for different amounts of compensation to similarly situated

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115. 830 P.2d 41 (Kan. 1992).

116. Timothy A. Short, *Heart Attacks and Strokes Under the Kansas Workers Compensation Act*, 24 J. KAN. TRIAL LAW. ASS'N 1, 8, 11 (2000).

117. *Stephenson*, 830 P.2d at 43.

118. *Id.* at 44.

119. *Id.* at 49.

120. *Id.* at 49-50. Under the rational basis test, a statute must have legitimate goals, and the method chosen by the legislature must be rationally related to those goals. *Barrett v. U.S.D.* 259, 32 P.3d 1156, 1162 (Kan. 2001).

121. *Stephenson*, 830 P.2d at 43, 49.

122. *Id.* at 49, 50.

123. Short, *supra* note 116, at 11.

124. *Id.*

125. *Id.* at 12.

workers.<sup>126</sup> The main difference between the Heart Amendment and the Carpal Tunnel Amendment is the Heart Amendment's objective in attempting to reduce the responsibility of employers for their workers' preexisting heart disease conditions.<sup>127</sup>

#### IV. ANALYSIS

In *Mudd*, the Kansas Supreme Court first addressed whether there had been substantial competent evidence<sup>128</sup> to establish that Mudd's stroke was caused by unusual exertion as required by the Heart Amendment.<sup>129</sup> Second, the court addressed whether stress qualified as an external force, making the Heart Amendment inapplicable to the claim.<sup>130</sup> Finally, the court determined whether the Heart Amendment violated the Equal Protection Clause of the United States Constitution, thus making the Heart Amendment unconstitutional.<sup>131</sup>

##### A. Parties' Arguments

###### 1. Mudd's Surviving Husband and Dependent Children (Mudd's family)

Mudd's family first argued that the running required when responding to a code blue was unusual exertion for Mudd.<sup>132</sup> The record contained evidence that Mudd had only responded to seven code blue calls in the six months preceding her stroke.<sup>133</sup> Mudd's family contended that to constitute unusual exertion, the work does not have to involve something a worker has never done before.<sup>134</sup> Mudd's family asserted that responding to a code blue constituted unusual exertion within the meaning of the Heart Amendment because of both the rarity of code blue calls and the physical running code blues required, which was not a part of Mudd's normal duties.<sup>135</sup>

Mudd's family also noted that the original ALJ denied compensation because "the Claimant was acting within the course and scope of her usual work and her regular employment when she suffered her

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126. *Stephenson*, 830 P.2d at 44.

127. *Id.* at 43, 49; *Nichols v. Kan. State Highway Comm'n*, 508 P.2d 856, 860 (Kan. 1973); *Kelly*, *supra* note 46, at 416.

128. "In workers compensation cases, substantial evidence is evidence possessing something of substance and relevant consequence and carrying with it fitness to induce conviction that the award is proper, or furnishing a substantiating basis of fact from which the issue tendered can be reasonably resolved." *Mudd v. Neosho Mem'l Reg'l Med. Ctr.*, 62 P.3d 236, 241 (Kan. 2003).

129. *Id.* at 240.

130. *Id.* at 242.

131. *Id.* at 244.

132. Amended Brief of Appellees at 15-17, *Mudd* (No. 89,091).

133. *Mudd*, 62 P.3d at 239.

134. Amended Brief of Appellees at 15, *Mudd* (No. 89,091) (citing *Lentz v. City of Marion*, 563 P.2d 456 (Kan. 1977)).

135. *See id.* at 15-17.

cerebrovascular stroke.”<sup>136</sup> Mudd’s family pointed out that section 44-501(a) of the Kansas Statutes Annotated requires that, to be compensable, an injury must arise “out of and in the course of employment.”<sup>137</sup> Consequently, Mudd’s family asserted that requiring work precipitating a heart injury to be outside the course and scope of a worker’s employment in order to qualify as unusual exertion would create a situation where compensation would have to be denied in every heart case.<sup>138</sup> Instead, Mudd’s family argued that the standard to be applied was whether or not the level of *exertion* expended at the time of Mudd’s stroke was *unusual* compared with her other routine duties.<sup>139</sup>

In their argument that stress qualified as an external force, making the Heart Amendment irrelevant, Mudd’s family first noted that the Kansas Workers Compensation Act’s main purpose was to burden industry with economic loss suffered by employees who are hurt during the course of employment.<sup>140</sup> Mudd’s family also argued that the Kansas Supreme Court had already approved stress as an external force that would make the Heart Amendment irrelevant.<sup>141</sup> Mudd’s family pointed out that the dicta from the *Dial* decision indicated that stress would qualify as an external force, and the *Dial* dicta should be followed in the present case.<sup>142</sup> Mudd’s family further asserted that *Suhm* implied that stress could constitute an external force where medical causation was established.<sup>143</sup>

Finally, Mudd’s family argued that the Heart Amendment violated the Equal Protection Clause.<sup>144</sup> Mudd’s family asserted that the Heart Amendment was analogous to the Carpal Tunnel Amendment,<sup>145</sup> which the Kansas Supreme Court struck down for violating equal protection in *Stephenson*.<sup>146</sup> The Carpal Tunnel Amendment provided for the unequal treatment of identical injuries based on

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136. *Id.* at 15-16.

137. KAN. STAT. ANN. § 44-501(a) (2000); Amended Brief of Appellees at 16-17, *Mudd* (No. 89,091).

138. Amended Brief of Appellees at 16-17, *Mudd* (No. 89,091).

139. *Id.* at 16 (citing *Chapman v. Wilkenson Co.*, 567 P.2d 888 (Kan. 1977)).

140. *Id.* at 18 (citing *Anderson v. Kinsley Sand & Gravel, Inc.*, 558 P.2d 146 (Kan. 1976)). Mudd’s family also contended that the Heart Amendment should be narrowly construed because it is an exception to the general rule of burdening industry with economic loss suffered by injured workers. *See id.* (citing *Broadhurst Found. v. New Hope Baptist Soc’y*, 397 P.2d 360 (Kan. 1964)). However, the court did not address this argument. *See generally Mudd*, 62 P.3d at 236.

141. Amended Brief of Appellees at 19-21, *Mudd* (No. 89,091).

142. *Id.* at 19-20.

143. *See id.*

144. *Id.* at 22-27.

145. KAN. STAT. ANN. § 44-510d(a)(23) (1991).

146. Amended Brief of Appellees at 22, *Mudd* (No. 89,091) (citing *Stephenson v. Sugar Creek Packing*, 830 P.2d 41 (Kan. 1992)).

whether the injury was caused by repetitive motion or a single traumatic event.<sup>147</sup>

Mudd's family argued that the unequal treatment received by similarly situated workers under the Heart Amendment was far harsher than that received by workers under the Carpal Tunnel Amendment.<sup>148</sup> They also pointed out that under the Heart Amendment, one worker would be denied all compensation because the exertion that caused his heart injury was routine for him.<sup>149</sup> However, another worker who engaged in the exact same task as the first worker would be awarded full compensation for his heart injury merely because the task was unusual for him.<sup>150</sup>

Mudd's family asserted that the Heart Amendment's unequal treatment of injured workers "must serve a legitimate purpose, and that purpose must bear a rational relationship to the criteria upon which injured workers or dependents are singled out for unequal treatment."<sup>151</sup> Mudd's family contended that if the Heart Amendment's purpose is to reduce insurance premiums for employers, then that purpose has already been addressed and struck down in *Stephenson*, where that court held that unequal treatment of identical injuries for the purpose of reducing insurance premiums was not, by itself, a legitimate purpose.<sup>152</sup>

## 2. Neosho Memorial Regional Medical Center and Kansas Hospital Association WCF, Inc. (NMRMC)

NMRMC first contended that the Heart Amendment and its "usual vs. unusual" exertion test should apply to the present case because Mudd's stroke was caused by her usual work exertion and not by any recognized external force.<sup>153</sup> Furthermore, NMRMC stressed that Mudd's family had the burden of proof under section 44-501(a) of the Kansas Statutes Annotated to "establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."<sup>154</sup>

NMRMC also contended that for Mudd's claim to be compensable, Mudd's family had to first prove what Mudd's usual work duties were.<sup>155</sup> NMRMC claimed that since the record was void of any evi-

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147. See KAN. STAT. ANN. § 44-510d(a)(23); *Stephenson*, 830 P.2d at 49.

148. Amended Brief of Appellees at 26, *Mudd* (No. 89,091).

149. *Id.*

150. *Id.*

151. *Id.* at 27. This standard is known as the rational basis test for determining constitutionality. *Stephenson*, 830 P.2d at 45; see also *supra* note 120.

152. Amended Brief of Appellees at 27, *Mudd* (No. 89,091) (citing *Stephenson*, 830 P.2d at 41).

153. Brief of Appellants at 6, 16-20, *Mudd* (No. 89,091).

154. *Id.* at 6 (quoting KAN. STAT. ANN. § 44-501(a) (2000)).

155. *Id.* at 7.

dence regarding Mudd's work history, other than that responding to code blues was part of her duties as an intensive care unit (ICU) and emergency room nurse, Mudd's family had not established Mudd's *usual* work.<sup>156</sup> Therefore, the court did not have substantial competent evidence from which it could determine if running to the code blue constituted *unusual* exertion.<sup>157</sup>

NMRMC further asserted that the infrequency of Mudd's code blue responses, alone, did not establish that Mudd's exertion while running to respond to a code blue on September 13, 1999, was unusual.<sup>158</sup> NMRMC argued that Mudd's family had not satisfied the relevant standard for unusualness.<sup>159</sup> Specifically, NMRMC argued that rather than the frequency with which a particular task is performed, the correct inquiry is whether Mudd's *exertion* in responding to the September 13, 1999, code blue was *unusual*.<sup>160</sup>

In response to the second issue, whether stress qualified as an external force, making the Heart Amendment inapplicable, NMRMC challenged the Board's determination that stress qualified as an external force.<sup>161</sup> NMRMC contended that the Board misapplied the relevant case law and *Dial* dicta in its conclusion that stress qualified as an external force.<sup>162</sup> Further, NMRMC noted that the Board ignored the *Dial* court's description of an external force as being "wholly independent of the workman's exertion."<sup>163</sup> Because Mudd's stroke was precipitated by her work exertion in running, NMRMC contended that any stress combined with the exertion would not constitute an external force because it was not completely independent of Mudd's exertion.<sup>164</sup> NMRMC also argued that to date, only heat and cold have been recognized by the Kansas Supreme Court as constituting external forces.<sup>165</sup>

NMRMC further argued that even if stress qualified as an external force, there was not substantial competent evidence in the present case to satisfy the requirements of *Makalous*<sup>166</sup> for an external force claim.<sup>167</sup> Specifically, NMRMC asserted that there was no evidence that stress was present or that it was a substantial causative factor in producing Mudd's stroke.<sup>168</sup>

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156. *Id.* at 8.

157. *Id.*

158. *See id.* at 13.

159. *See id.* at 9-10, 13.

160. *See id.*

161. *Id.* at 16.

162. *See id.* at 20.

163. *Id.* at 18 (quoting *Dial v. C.V. Dome Co.*, 515 P.2d 1046 (Kan. 1973)).

164. *See id.*

165. *See id.* at 20.

166. *See supra* text accompanying note 104.

167. *See* Brief of Appellants at 21-23, *Mudd* (No. 89,091).

168. *See id.* at 21, 23.

Finally, NMRMC argued that the Heart Amendment satisfies the rational basis test<sup>169</sup> and is constitutional.<sup>170</sup> NMRMC began its defense of the Heart Amendment's constitutionality by stressing that a statute is presumed constitutional and that a party challenging its validity has the burden to prove it is unconstitutional.<sup>171</sup>

NMRMC also attempted to distinguish the Heart Amendment from the Carpal Tunnel Amendment that was struck down as unconstitutional in *Stephenson*.<sup>172</sup> NMRMC argued that the issue in *Stephenson* was the amount of compensation received by workers with identical injuries, while the issue in the present case was whether identical injuries can be constitutionally divided into compensable and non-compensable injuries based on how they are caused.<sup>173</sup> NMRMC asserted that the distinction between a compensable and non-compensable injury is the legislature's prerogative.<sup>174</sup> NMRMC also claimed that workers covered under the Workers Compensation Act are not similarly situated with claimants who are not covered; therefore, there is no equal protection violation.<sup>175</sup>

NMRMC argued that the Heart Amendment and its unique requirement of unusual exertion for heart injury compensation is analogous to section 44-5a01(b) of the Kansas Statutes Annotated, which also establishes a unique requirement for compensation in cases of emphysema.<sup>176</sup> NMRMC asserted that both of these injury types rightfully have higher standards for claimants to meet for compensation, due to the pervasiveness of heart disease and emphysema.<sup>177</sup>

NMRMC further offered a list of several legitimate interests in the legislature's enactment of the Heart Amendment.<sup>178</sup> First, NMRMC stressed the vastness of heart disease deaths in the United States and pointed out that workers' compensation is supposed to compensate only work-related injuries and deaths.<sup>179</sup> NMRMC asserted that the Heart Amendment's unique requirement of unusual exertion for compensability in heart cases is reasonable and rational in light of the high number of deaths caused by heart disease.<sup>180</sup> NMRMC argued that workers' compensation in Kansas prior to the Heart Amendment was basically a "sickness or survivors[]" insur-

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169. See *supra* note 120.

170. See Reply Brief of Appellants at 9-10, *Mudd* (No. 89,091).

171. *Id.* at 6-8.

172. See *id.* at 11-12.

173. See *id.*

174. *Id.* at 11.

175. See *id.* at 12.

176. See *id.* at 13-14.

177. See *id.* at 14.

178. *Id.* at 12-13.

179. See *id.*

180. See *id.*

ance,” rather than a compensation system for work-related injuries, based on the case law at that time.<sup>181</sup>

NMRMC also asserted that the Heart Amendment prevented workers with heart disease from being denied job offers by employers who would otherwise be responsible for all on-the-job heart injuries if the Heart Amendment were not in place.<sup>182</sup> Again, NMRMC contended that this was a reasonable legislative objective.<sup>183</sup>

### B. *Kansas Supreme Court Opinion*

Applying the substantial competent evidence<sup>184</sup> standard of review to the first issue, the Kansas Supreme Court held that Mudd’s code blue response did not constitute unusual exertion within the meaning of the Heart Amendment.<sup>185</sup> Specifically, the court held there was not substantial competent evidence to support the Board’s finding that running was an unusual activity for Mudd, which constituted unusual exertion.<sup>186</sup> Likewise, the court did not find there was enough evidence to show Mudd suffered increased stress when responding to code blues, which contributed to Mudd’s unusual exertion level.<sup>187</sup> As a result, the Heart Amendment prevented Mudd’s family from receiving compensation.<sup>188</sup>

In its analysis of the unusual exertion requirement, the court held that Mudd’s family must first establish the nature of Mudd’s *usual* work before the court can determine what types of tasks would be *unusual* for her.<sup>189</sup> Because the court thought the record lacked any evidence that demonstrated Mudd’s usual work, the court held that no determination could be made as to what would constitute unusual exertion for Mudd.<sup>190</sup>

The court further noted its doubts as to whether Mudd’s family would have been able to show unusual exertion in Mudd’s code blue response, even if they had properly established Mudd’s usual level of exertion in the record below.<sup>191</sup> The court based this belief on the established principle that the Heart Amendment does not require that a task be performed daily for it to meet the definition of “usual work.”<sup>192</sup> In addition, there was testimony by Mudd’s treating physi-

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181. *Id.* at 13.

182. *See id.*

183. *See id.*

184. *See supra* note 128.

185. *Mudd*, 62 P.3d at 240.

186. *Id.* at 241.

187. *Id.*

188. *Id.* at 246.

189. *Id.* at 241.

190. *Id.*

191. *Id.* at 242.

192. *Id.*

cian that code blue responses were within the normal scope of Mudd's duties as an ICU nurse.<sup>193</sup>

The Kansas Supreme Court held that stress did not qualify as an external force under *Mudd*'s specific facts, despite a reasonable interpretation of *Dial*'s dicta and *Suhm*'s implications to the contrary.<sup>194</sup> The court justified this holding by first examining the Heart Amendment's legislative purpose, which was to limit employers' liability for heart attack and stroke cases where preexisting conditions are present.<sup>195</sup>

The court also considered the legislature's 1987 addition of section 44-501(g) to the Kansas Statutes Annotated, which provides that the Workers Compensation Act provisions are to be applied impartially to both employers and employees.<sup>196</sup> Prior to 1987, the Kansas Workers Compensation Act required courts to "liberally construe the workers['] compensation statutes to award compensation to the worker where it was reasonably possible to do so."<sup>197</sup>

Finally, the court noted that it had previously described in *Dial* an external force as being "wholly independent of the workman's exertion."<sup>198</sup> The court found that because Mudd's stress was *combined* with her exertion, it did not qualify as an external force in this case.<sup>199</sup> However, the court reaffirmed its support for its previous examples from *Dial* of circumstances where stress and anxiety could constitute external forces.<sup>200</sup>

The court applied the rational basis test and upheld the constitutionality of the Heart Amendment.<sup>201</sup> The court found that the Heart Amendment's purpose of limiting employer liability for employees' preexisting heart conditions was legitimate.<sup>202</sup> The court also found the "usual vs. unusual" exertion distinction was rationally related to the Heart Amendment's goal of reducing employer liability for preexisting heart conditions.<sup>203</sup> The court admitted that the "usual vs. unusual" exertion test was not completely precise in achieving the Heart Amendment's goal, but also stated that the "rational basis test does not require such precision."<sup>204</sup>

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193. *Id.*

194. *Id.* at 242-44.

195. *Id.* at 243.

196. KAN. STAT. ANN. § 44-501(g) (2000); *Mudd*, 62 P.3d at 243.

197. *Nguyen v. IBP, Inc.*, 972 P.2d 747, 749 (Kan. 1999).

198. *Mudd*, 62 P.3d at 243 (quoting *Dial v. C.V. Dome Co.*, 515 P.2d 1046, 1050 (Kan. 1973)).

199. *Id.* at 243-44.

200. *Id.* at 244.

201. *Id.* at 245-46.

202. *Id.* at 245.

203. *See id.* at 246.

204. *Id.*

The court also noted that one-third of the states also require unusual exertions in heart cases.<sup>205</sup> Among those states, Arizona, Colorado, and Louisiana have previously upheld their unusual exertion statutes when faced with constitutional challenges.<sup>206</sup>

### C. Commentary

The *Mudd* court incorrectly decided this case, and the decision will be problematic in the future for several reasons. First, *Mudd* sets the bar too high for a claimant to prove unusual exertion without running the risk of falling outside of the coverage of the Workers Compensation Act altogether. Second, *Mudd* closed the door on a possible interpretation of *Makalous* that an external force can be significantly combined with work exertion to cause heart injury.<sup>207</sup> *Mudd* also created an unresolved discrepancy as to whether extreme cold will remain considered as an external force for future cold weather cases, which commonly involve a heart injury that was produced by cold weather combined with physical exertion. Finally, as in *Suhm*, the best tool for the *Mudd* court to use to deny compensation to Mudd's family would have been the arguably weak medical causation between Mudd's alleged job stress and her stroke. However, the *Mudd* court seemed to accept Mudd's family's causation testimony, leaving the workers' compensation practitioner to wonder if *Mudd* relaxed the medical causation standard for an external force.

#### 1. Unusual Exertion

The *Mudd* court incorrectly found that Mudd's family had not presented sufficient evidence of Mudd's *usual* work from which the court could determine what would be *unusual* exertion. Apparently, the court discounted the ample evidence that was presented regarding Mudd's work activities.

First, the evidence established that Mudd only responded to code blues roughly once per month.<sup>208</sup> Second, the record showed that Mudd worked in the emergency room and ICU of the hospital.<sup>209</sup> While the layperson likely does not know of all the routine tasks performed by an ICU/emergency room nurse, common sense and a general understanding of the hospital setting and medical profession would lead one to the conclusion that running is not *usual exertion* for one in such employment. While running to a code blue may be an

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205. *Id.* at 245.

206. *Id.*

207. *Id.* at 243. *See generally* Makalous v. Kan. State Highway Comm'n, 565 P.2d 254 (Kan. 1977).

208. *Mudd*, 62 P.3d at 239.

209. *Id.*

infrequent yet typical task of an ICU nurse, it is hard to imagine the run to a code blue as being anything other than *unusual exertion* when compared with the other routine tasks that an ICU nurse performs. In addition, Mudd's husband testified to establish that running was unusual exertion for Mudd, stating that she was required to run when responding to code blues.<sup>210</sup> This testimony implied that running was not part of Mudd's routine work, but rather was something she was required to do in emergency situations.<sup>211</sup>

Expert opinions differ as to whether running is part of an ICU nurse's usual work and constitutes usual exertion. NMRMC's own medical expert even opined that he believed *no one ever* ran in a hospital setting.<sup>212</sup> Karen Crist Terrill, a vocational rehabilitation consultant stated, "I'm not aware of any treatises that address running as part of an ICU nurse's duties. However, common sense tells us that ICU nurses do often run when responding to code blues. It's just a part of providing good quality patient care."<sup>213</sup> Trisha Rogers, an ICU nurse at Wesley Medical Center in Wichita, Kansas, said that running to a code blue could constitute either usual or unusual exertion, depending on the distance a nurse must run to arrive at the code scene.<sup>214</sup> Lifting heavy patients is the only ICU nurse task that Rogers thought was comparable to running to a code blue with respect to the amount of exertion expended.<sup>215</sup>

In addition, the court's determination that responding to code blues was part of Mudd's job duties, and thus not unusual exertion, is subject to challenge. As Mudd's family argued, if unusual exertion is only constituted by tasks not in the course of one's regular employment, then no heart cases will ever be compensated under section 44-501(a) of the Kansas Statutes Annotated, which requires injuries to "arise out of and in the course of" the workers' employment.<sup>216</sup> For instance, if a task resulting in heart injury is outside a worker's regular employment, then it may satisfy the unusual exertion requirement of the Heart Amendment, but it arguably will be insufficient for compensation because it did not arise out of and in the course of the worker's employment pursuant to section 44-501(a) of the Kansas Statutes Annotated. Obviously, all compensated heart claims to date have been

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210. *See id.*

211. *See id.*

212. Amended Brief of Appellees at 15, *Mudd* (No. 89,091).

213. Telephone interview with Karen Crist Terrill, M.S., Q.R.P., C.L.C.P., Vocational Rehabilitation Consultant, Terrill & Associates, Inc. (Aug. 18, 2003).

214. Telephone interview with Trisha Rogers, R.N., ICU Nurse, Wesley Medical Center (Sept. 15, 2003).

215. *Id.*

216. KAN. STAT. ANN. § 44-501(a) (2000).

found to “arise out of and in the course of” the workers’ employment.<sup>217</sup>

## 2. Stress as an External Force

Stress should have been considered an external force in *Mudd* because at least two different interpretations of *Makalous* were possible.<sup>218</sup> The first possible interpretation was that the law would not deny compensation to a heart injury caused by an external force merely because the injured worker was also engaged in his usual exertion at the time of his injury.<sup>219</sup> This interpretation is consistent with *Makalous* because the trial court in that case specifically found that the *extreme cold* precipitated the claimant’s heart attack.<sup>220</sup> With the benefit of *Mudd*, it is now apparent in hindsight that the *Makalous* court probably intended for this first interpretation to govern future cases.<sup>221</sup>

However, the more logical interpretation of *Makalous* was that it expanded the external force exception created in *Dial*. Specifically, *Makalous* could have been interpreted to indicate that the law would compensate heart claims where both an external force and a claimant’s usual exertion *combined* to produce the heart injury.<sup>222</sup> This interpretation is supported by the claimant’s expert medical testimony that the *Makalous* trial court relied upon.<sup>223</sup> Dr. Duane L. Scott testified that the claimant’s heart attack was caused by “the extreme cold *coupled* with the physical exertion.”<sup>224</sup> Similarly, Dr. Bratrud testified that work exertion *coupled* with extreme cold weather increases the risk of heart attack and that the extreme cold experienced by claimant was a precipitating cause of his heart attack.<sup>225</sup> Dr. Bratrud’s testimony merely indicated that the extreme cold was a precipitating cause, but not the *only* precipitating cause, of claimant’s heart attack.<sup>226</sup>

As *Makalous* pointed out, accidents are often caused by several contributing factors.<sup>227</sup> Heart cases are no different, and they will often be caused by a preexisting disease combined with stress and

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217. See, e.g., *Makalous v. Kan. State Highway Comm’n*, 565 P.2d 254, 260-61 (Kan. 1977).

218. See generally *id.* at 254.

219. See generally *id.*

220. *Id.* at 259.

221. Cf. *Mudd v. Neosho Mem’l Reg’l Med. Ctr.*, 62 P.3d 236, 243 (Kan. 2003).

222. WEST, MODERN WORKERS COMPENSATION § 109:19 (2003). Additionally, Westlaw appears to support this interpretation because it reports that *Mudd* overruled *Makalous*, presumably by holding that an external force must cause a heart injury completely independent of the worker’s exertion.

223. *Makalous*, 565 P.2d at 257.

224. *Id.* at 257 (emphasis added).

225. *Id.* at 257-58.

226. See *id.* at 258.

227. *Id.* at 260.

work exertion.<sup>228</sup> Theoretically, since employees are always engaged in the service of their employer while on the job, stress will nearly always occur in combination with the employee's work exertion. The *Makalous* court stated, "If we should hold that an external force cannot produce a cardiac or vascular injury under the [H]eart [A]mendment when a claimant is engaged in his usual work, we would practically eliminate external forces as possible producing causes of these injuries."<sup>229</sup> If the external force exception was eliminated, then many claimants would be left without compensation for their heart injuries that were genuinely employment related and not the result of a preexisting heart disease. For example, the Heart Amendment would deny compensation to an electrician, who suffers a heart attack after receiving an accidental electric shock, merely because he was engaged in his customary electrical work at the time of the shock. It is important that the coverage of the external force exception is not narrowed any more than it is currently.

Further, it is interesting that the *Mudd* court relied on the legislative purpose of the Heart Amendment in deciding that stress would not be considered an external force in *Mudd* since the stress was combined with her work exertion.<sup>230</sup> As mentioned above, a previously reasonable interpretation of the 1977 *Makalous* decision was that an external force may be one that is combined with a worker's exertion.<sup>231</sup> Under this interpretation, if the Kansas legislature thought that the *Makalous* holding impaired or contravened the Heart Amendment's goals, it has surely had ample time, twenty-six years, since *Makalous* to correct any such problem with additional legislation. Courts are reluctant to change the law and often appropriately defer the law-making responsibility to the legislature.<sup>232</sup> In addition, when case law remains unaltered by the legislature for a substantial time period, courts often presume that the legislature approves of such law.<sup>233</sup>

The *Mudd* court also cited section 44-501(g) of the Kansas Statutes Annotated, proposing that workers' compensation statutes no longer have to be construed in favor of awarding compensation to employees wherever reasonably possible to do so.<sup>234</sup> While this proposition is certainly true, there is no apparent indication from *Makalous* that supports that court's reliance on any tilt in favor of the employee when the court deemed an external force could be combined with

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228. *Id.*

229. *Id.*

230. *See supra* text accompanying notes 194, 195, 199.

231. *Makalous*, 565 P.2d at 255.

232. *See, e.g.*, *McIver v. State Highway Comm'n*, 426 P.2d 118, 123 (Kan. 1967).

233. *Id.*

234. *Mudd v. Neosho Mem'l Reg'l Med. Ctr.*, 62 P.3d 236, 243 (Kan. 2003).

work exertion.<sup>235</sup> In addition, the issue of whether stress qualifies as an external force involves analysis of the judicially created external force exception, rather than a workers' compensation statute. For the foregoing reasons, it is arguable that section 44-501(g) of the Kansas Statutes Annotated really has no relevance to the issue of whether stress can be deemed as an external force when it is combined with work exertion. If courts frequently defer to section 44-501(g) when deciding a case in favor an employer, then it will in effect become a statute that now provides a tilt in favor of the employer, rather than putting the parties on equal ground as the legislature intended.

Considering the *Dial* dicta and *Suhm*'s implication that stress qualifies as an external force, there is no apparent reason why stress should not have qualified as an external force in *Mudd*. Rather than applying these cases that have discussed external forces, the *Mudd* court reached out to legislative intent to find that stress would not qualify as an external force under the facts of *Mudd*.<sup>236</sup> *Dial*'s example of stress constituting an external force when a worker's heart fails during a robbery<sup>237</sup> could have been applied to *Mudd* as well.

*Mudd* may also indicate that stress must be unusual before it will qualify as an external force. *Mudd* stated that if stress was allowed as an external force under the facts of that case, then "a stroke or heart attack claimant who has unsuccessfully tried to prove the statutory requirement of unusual exertion could nevertheless prevail by instead showing the cause of the injury was merely the usual (though 'substantial' per *Makalous*) stress of her work at the time."<sup>238</sup> However, if *Mudd* required external forces to be unusual, then that holding may contradict the established principles that extreme heat and cold constitute external forces. Arguably, extreme heat and cold will not be unusual in some employments, such as in the case of a cook who always works in a hot kitchen without air conditioning.

The court overlooked its previous case discussions that implied stress would constitute an external force. Also, *Mudd* foreclosed the more logical interpretation of *Makalous*, which would have led to a practical result for future cases. Thus, stress should have been considered an external force in *Mudd*.

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235. *Makalous*, 565 P.2d at 254.

236. *Mudd*, 62 P.3d at 243.

237. *Dial v. C.V. Dome Co.*, 515 P.2d 1046, 1051 (Kan. 1973). This example is legally significant in that it may create an exception for heart cases to the general rule that disability or death will not be compensated where it is caused by emotional stimuli and absent any physical trauma. See *Followill v. Emerson Elec. Co.*, 674 P.2d 1050, 1052 (Kan. 1984). Under *Dial*'s robbery example, a physical injury is compensable although it was caused by purely emotional stimuli. *Dial*, 515 P.2d at 1051.

238. *Mudd*, 62 P.3d at 243-44.

### 3. Established External Forces

*Mudd* may have also created doubt as to whether cold will qualify as an external force in future litigated cases. Although *Mudd* purported to uphold the court's previous determinations that extreme heat and cold qualified as external forces, a deeper examination may reveal otherwise. While heat alone may cause heatstroke, with respect to cold, *Makalous* stated, "Cold can cause frostbite and, after examining the record in the present case, there is expert medical evidence available that extreme cold coupled with outdoor exertion can cause a heart attack."<sup>239</sup> The *Makalous* court went on to uphold the trial court's finding that the extreme cold was the precipitating cause of the claimant's heart attack.<sup>240</sup> Although the *Makalous* court may not have fully appreciated the significant role that the claimant's work exertion played in precipitating his heart attack, future courts may be more impressed. The medical community widely recognizes that cold weather coupled with exertion substantially increases the risk of heart injury.<sup>241</sup>

Expert medical testimony in future cases might clarify that both extreme cold and a worker's usual exertion combined to precipitate a heart attack and that the heart attack would not have resulted without the presence of both. In such a future case, arguably, cold weather would not qualify as an external force under the *Mudd* decision because *Mudd* requires an external force to cause heart injury completely independent of the worker's exertion.<sup>242</sup> However, the *Mudd* opinion seeks to reaffirm the established principles of extreme heat and cold as external forces, without specifically addressing the contradiction that the opinion creates.<sup>243</sup> In future cold weather cases, claimants will certainly assert that cold is an established external force, while respondents will likely contend that under *Mudd*, cold is not an external force because it does not cause a heart attack independent of any physical exertion. A future court will have to sort out this issue and either uphold or correct the *Mudd* opinion accordingly.

*Mudd* also relaxed the medical causation standard that is required to establish an external force claim.<sup>244</sup> *Makalous* held that an external force must be a "substantial causative factor" in producing the heart injury.<sup>245</sup> However, the *Mudd* court readily accepted expert medical testimony that Mudd's running and stress experienced while

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239. *Makalous*, 565 P.2d at 259.

240. *Id.*

241. American Heart Association, *Cold Weather and Cardiovascular Disease* (2003), at <http://www.americanheart.org/presenter.jhtml?identifier=4570>.

242. *See supra* text accompanying notes 198, 199.

243. *Mudd*, 62 P.3d at 243.

244. *Cf. id.* at 242.

245. *Makalous*, 565 P.2d at 260.

responding to the code blue were “conductive” to her injury.<sup>246</sup> This medical causation testimony of “conductive” equaled “substantial causative factor” for the *Mudd* court.<sup>247</sup> This lowering of the medical causation standard required for an external force claim is significant, especially in light of previous cases where courts denied compensation because claimants had not established that the external force was a substantial causative factor in precipitating the heart injury.<sup>248</sup> For example, in *Martin v. Monfort, Inc.*,<sup>249</sup> the Workers’ Compensation Appeals Board denied compensation to the claimant because he had not established that heat in his working environment was a substantial causative factor in producing his heart attack.<sup>250</sup>

## V. CONCLUSION

*Mudd* eliminated any possible interpretation of *Makalous* that an external force may be one that is combined with work exertion to cause a heart injury and rescinded any dicta or implications from *Dial* and *Suhm* that stress would qualify as an external force when combined with work exertion.<sup>251</sup> *Mudd* also created an unresolved contradiction regarding previous precedent that extreme cold qualified as an external force and lowered the medical causation standard required for an external force.<sup>252</sup> The *Mudd* decision illustrated the Larsons’ criticism of the “usual vs. unusual” exertion test, specifically that it is difficult to apply consistently to multiple cases.

The *Mudd* opinion also provided workers’ compensation practitioners some guidance in litigating future heart cases. Specifically, *Mudd* stressed the absolute necessity for a claimant’s attorney to present detailed evidence of what an employee’s *usual* work involves, so that a court may next determine if the work in question was *unusual*. This is true even in a case such as *Mudd*, where it is reasonably obvious that although running to code blues was part of Mudd’s job, it was probably not *usual* exertion for her as an ICU and emergency room nurse.

Although *Mudd* provides guidance for litigating heart cases, *Mudd* also leaves several questions looming for future cases. The first question is whether extreme cold weather will qualify as an external force for future cases when a worker has a heart attack caused by physical exertion combined with the cold weather. Second, it is not

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246. *Mudd*, 62 P.3d at 242.

247. *See id.*

248. *See, e.g.,* *Suhm v. Volks Homes, Inc.*, 549 P.2d 944, 949 (Kan. 1976); *Martin v. Monfort, Inc.*, No. 152,124, 1996 WL 580391 (Kan. Workers Comp. App. Bd. 1996).

249. No. 152,124, 1996 WL 580391 (Kan. Workers Comp. App. Bd. 1996).

250. *Id.* at \*3.

251. *Mudd*, 62 P.3d at 243.

252. *Cf. id.* at 242-43.

clear after *Mudd* what medical causation standard is required for establishing an external force. For instance, does the external force have to be “conductive” to the heart injury, or a “substantial causative factor” in precipitating the heart injury, or something else? The third unknown issue after *Mudd* is how much weight will be given to prior dicta that appear helpful in determining what constitutes an external force. The *Mudd* opinion is a sharp reminder to practitioners that dicta is not binding on courts and is certainly subject to further explanation and interpretation.