No. 13-109393-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

LINDA SPIVEY
Claimant/Appellant

v.

BREWSTER PLACE
Respondent/Appellee

and
KANSAS ASSOCIATION OF HOMES FOR THE AGING
INSURANCE GROUP, INC.
Insurance Carrier

# BRIEF OF APPELLEE

Appeal from the Kansas Workers Compensation Appeals Board
Docket No. 1025,309

Michael L. Entz
1414 SW Ashworth Place, Suite 201
Topeka, Kansas 66604
Sup. Ct. No. 17727
Phone: (785) 267-5004
Fax: (785) 267-7106
E-mail: mike@entzlaw.com

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## I. NATURE OF THE CASE

Appellant ("Claimant") suffered a work-related injury on March 29, 2005 while working for Brewster Place Retirement Community ("Respondent"). Claimant seeks review of an Order entered by the Worker Compensation Board (the "Board") on January 28, 2013, wherein the Board found that Claimant suffered a work-related injury, but no permanent disability as a result of accident.

## II. ISSUES PRESENTED

1. Whether the Board erroneously interpreted or applied the law. (K.S.A. 77-621(c)(4)).
2. Whether the Board's action is supported by substantial evidence. (K.S.A. 77-621(c)(7) & (8)).
3. Whether the Kansas Workers Compensation Act provides benefits for non-physical injuries.

## III. FACTS OF RECORD

### Accident and Employment

Claimant worked as a certified nurse aide and Kaizen for Respondent. (Vol. 6, p. 11; Vol. 3, p. 6; Vol. 10, p. 4). On March 29, 2005, while Claimant was at work, a metal part fell from an automatic door-closer and hit Claimant on the head. (Vol. 6, p. 29). Brenda Phillips, co-employee, was present when the incident occured. (Vol. 6, p. 30; Vol. 9, p. 6). Ms. Phillips did not remember anyone else being present. (Vol. 9, p. 11).

*At the time of the accident* happened, Claimant believed that someone "ambushed" her (Vol. 5, p. 20) and was trying to kill her. (Vol. 6, p. 33 and 71). Claimant testified that she knew at the time of the accident that "this wasn't an accident." (Vol. 5, p. 20). Claimant testified that there was also a 3-foot 11-inch tall man who was present at the time the accident. (Vol. 6, p. 31-32). Claimant reported seeing this man three times since the accident at a bus stop and also in her dreams. (Vol. 6, p. 32).

Claimant reported the incident to Angala Anderson the following day (Vol. 6, p. 36) and then went to the emergency room (Vol. 6, p. 39). The emergency room records indicate that Claimant went to the ER at 3:54 pm the day after the accident at which time she reported "mild headache" and was later discharged with instructions to take Tylenol. (Vol. 6, p. 75, Exhibit A). After the injury on March 29, 2005, Claimant returned to work and continued working full-duty at for Respondent through September 15, 2005. (Vol. 10, p. 22). On September 15, 2005, Claimant was terminated for threatening and intimidating co-workers. (Vol. 10, p. 14; Exhibit 4).

## Evidence That Supports the Board's Finding that Claimant Suffered No Permanent Impairment as a Result of the Work Accident

Claimant has been examined by numerous physicians. Dr. Oliva Fondoble ordered an MRI, which came back "normal." (Vol. 16, Exhibit. 2, p. 2). Dr. Johnson Huang order visual evoked responses and EEG tests, which came back "negative." (Vol. 16, Exhibit 2, p. 3). Dr. Dewey Ziegler, at the Kansas University Physicians, department of neurology, conducted a neurological exam, which came back "negative." (*Id.*).

Dr. Gordon Kelley, a board certified neurologist, examined Claimant on August 15, 2006. (Vol. 17, p. 4; Exhibit 2). Dr. Kelley performed a physical examination, a

neurological examination, and reviewed the May 2005 MRI. (Vol. 17, p. 10-11). Dr. Kelley ordered a CT scan to rule out Dr. Curtis's suggestion of C2 radiculopathy or occipital neuralgia, which Dr. Kelley thought was "very unlikely." (Vol. 17, Exhibit 2, p. 3). After reviewing the results of the CT scan, Dr. Kelley concluded that the CT Scan was normal and there was "no evidence to substantiate theory of 'C2 radiculopathy' and that Claimant was at maximum medical improvement and able to work without restrictions. (Vol. 17, p . 16-17; Exhibit 2, p. 5).

Dr. Paul Stein evaluated Claimant on July 24, 2009, pursuant to an order of the administrative law judge ("ALJ"). (Vol. 1, p. 187-89). The ALJ asked Dr. Stein to evaluate Claimant to: 1) offer treatment recommendations, if any, 2) determine if Claimant's current complaints or presenting condition was causally related to the work accident, and 3) offer any opinion as to permanent impairment. (*Id.*). Dr. Stein was provided a complete set of Claimant's medical records. (Vol. 16, Exhibit 2). Dr. Stein reviewed all of the testing performed to-date and determined that the results "were essentially normal." (Vol. 16, p. 8). Dr. Stein testified that he didn't find any impairment to the neck that he would relate to the work accident. (Vol. 16, p. 10). Dr. Stein testified that he could not document any physical structural injury related to the accident and that all of the problems Claimant reported had been ruled out (except headaches, which were subjective). (Vol. 16, p. 11-12). Dr. Stein testified that it was *not* his opinion that Claimant had a 2% impairment. To the contrary, Dr. Stein stated that "if" she had impairment, then it wouldn't be more than 2%. *However*, Dr. Stein expressly stated that, even if there was some impairment, he *could not* say within a reasonable degree of medical certainty that the impairment was caused by the March 29, 2005 accident. (Vol.

16, p. 13-15). Dr. Stein noted that at the time of the initial visit to the emergency room Claimant's headaches were not nearly as bad as they became later. (Vol. 16, p. 26). Dr. Stein stated that it was "very unusual" for a head injury headache to become worse later, suggesting that Claimant's ongoing headache had a different origin. (*Id.*).

For this Appeal, Claimant relies, in part, on an argument that the Board disregarded the opinions offered by Dr. Lynn Curtis. Dr. Curtis authored six (6) reports for Claimant. (Vol. 8, Exhibits 2, 4, 5, 6, 7, and 11). Dr. Curtis's reports are fraught with errors, including a reference to a "concussion" (Vol. 8, Exhibits 2 & 3) and "skull fracture" (Vol. 8, Exhibits 5 (p. 2, 3rd para. from bottom). Dr. Curtis later acknowledged that these report were "incorrect." (Vol. 8, p. 58; see also Exhibit 12). Dr. Curtis offer opinions regarding cervical impairments on March 2, 2006 (Vol. 8, Exhibit 4) notwithstanding the fact that Dr. Curtis's own report documented that claimant had no symptoms in her neck when he examined her six months earlier. (Vol. 8, p. 28-29; Exhibit 2). Dr. Curtis offered two different impairment ratings. (Vol. 8, Exhibits. 4 & 11.) While Dr. Curtis did offered an impairment rating of 5 percent "for the greater occipital neuralgia," Dr. Curtis could not substantiate the rating within the table contained in the AMA Guide. (Vol. 8, p. 35, 52). Therefore, Dr. Curtis decided to "just change [the basis of the functional impairment]" to a DRE Category II because it provided the same 5% impairment. (Vol. 8, p. 36). Claimant's counsel then made a suggestion and Dr. Curtis increased his impairment rating to DRE Category III ( which provides for a 15%) suggesting radiculopathy, but that he was only giving 5% impairment "because it was "upper cervical." (*Id.*). Then, Dr. Curtis came across the words "ligamentous instability" in his report and *spontaneously* decided that it justified a DRE Category IV, 25%

impairment. (*Id.*). At this point, Dr. Curtis was reminded that the AMA Guides require that instability be shown by flexion and extension x-rays, and Dr. Curtis admitted that he didn't have x-rays to confirm the required 3.5 millimeters of translation required for a finding of motion segment instability. (Vol. 8, p. 37-8). ). The lack of credibility in Dr. Curtis's functional impairment rating is evident by the number of times he decided "change" the rating during cross examination. (Vol. 8, p. 51-2).

Intervening Accidents at Subsequent Employers

Claimant reported to Dr. Curtis that she experienced increased neck and head pain while transferring and lifting for another employer. (Vol. 8, p. 48-9, Exhibit 11, p. 2; Vol. 11, Exhibit 10). In fact, Claimant testified that she "injured [her] back several times" while working for a subsequent employer. (Vol. 11, p. 40). In particular, on or about August 20, 2006, Claimant injured her back to where she "couldn't even move" and "had to call in and go to the hospital." (*Id.*; Exhibit 10). At the time of Dr. Eyman's first interview (three years after Claimant's employment with Respondent had ended), Claimant reported that her current employment was "causing more symptoms" because she was "using [her] neck too much." (Vol. 13, p. 22-25; Exhibt 3, p. 6). Claimant admitted seeking treatment from Dr. Sankoorikal "years later," but falsely testified at Regular Hearing that it was "for problems related to the accident that [she] sustained at Brewster Place." (Vol. 6, p. 46). To the contrary, Claimant previously testified at a preliminary hearing on October 17, 2008, that she experienced "new symptoms" starting in April 2007 when she went to the beauty shop and had her head back on the wash bowl and experienced an "excruciating" pain in her neck. (Vol. 4, p. 26-7). Claimant sought treatment from Drs. Brian Gibson, Michael Smith and Joseph Sankoorikal on her own

accord (Vol. 6, 77-8) *after* she "first experienced" neck pain at the beauty shop in April 2007. (Vol. 6, p. 78).

In May 2007, Dr. Gibson performed and MRI of the brain and cervical spine, both of which came back "normal." (Vol. 12, p. 9). Claimant returned to Dr. Gibson in July 2007 complaining of neck pain and requested a referral to a neck specialist. (Vol. 12, p. 10-11). Dr. Gibson had an x-ray performed, which came back normal. (Vol. 12, pp. 12-13; 27-28). Dr. Gibson testified that there was no physical damage to Claimant's skull. (Vol. 12, p. 14). Dr. Gibson never imposed any work restrictions on Claimant during the course of his treatment. (Vol. 12, p. 15).

Subsequent Employment Problems Unrelated

In August 2006, Claimant quit her job at McCrite Nursing Home (a subsequent employer) because of the stress of her job, perceived discrimination, the work environment, and the people. (Vol. 3, p. 20; Vol. 11, p. 44; Exhibits 12 & 13 (p. 2-3)). Claimant testified that her employment at McCrite was stressful because the employees at McCrite were "disrespecting" her. (Vol. 3, p. 27-8).

Opinions on Claimant's Mental Condition

At the preliminary hearing on October 17, 2008, Claimant indicated that she was *not* seeking psychological treatment as part of her workers compensation claim. (Vol. 4, p. 29). Yet, the ALJ ordered an independent medical evaluation ("IME") with James Eyman ("Eyman") regarding apparent psychological concerns. (Vol. 1, p. 94-6). On or about January 29, 2009, Eyman authored a report suggesting that Claimant suffered from a "delusional disorder" and suggested that it was "possible" the work-accident increased

her existing paranoia. (Vol. 13, Exhibit 3). During Eyman's evaluation, Claimant refused to take the Minnesota Multiphasic Personality Inventory Test for Eyman. (Vol. 13, p. 23). Eyman did not talk to Claimant about her perception that she was discriminated against while working at subsequent employers. (Vol. 13, p. 19-20). Claimant never informed Dr. Eyman (court-ordered psychologist) that her subsequent employment at McCrite was causing her stress. (Vol. 13, p. 21). Eyman did not formulate an opinion as to whether or not Claimant had a paranoid personality disorder, but he agreed that paranoid personality disorders were caused by environment, upbringing or genetics, but not by being hit on the head. (Vol. 13, p. 7; 9-10).

Based on Eyman's report, the ALJ ordered psychological treatment with Kathleen Keenan. (Preliminary Hearing Order, dated June 23, 2009). Claimant never pursued treatment with Keenan. (RH 21-24).

On November 26, 2010, there was a Prehearing Settlement Conference. At that time, Claimant had *never* been seen for treatment by an authorized mental health provider in relation to her workers compensation claim. (Entire Record). Yet, the ALJ ordered another independent medical examination with Eyman. (Vol. 1, p. 262-4).

In response to the ALJ's order for Claimant to return to Eyman, Respondent exercised its right under the Kansas Workers Compensation to require Claimant to appear for a mental health evaluation with Dr. Patrick Hughes on December 21, 2010. (Vol. 14, p. 4, Exhibit 2) Dr. Hughes is a psychiatrist at Psychiatric and Family Services and is certified with the American Board of Psychiatry and Neurology. (Vol. 14, p. 3-4; Exhibit 1). Dr. Hughes examined Claimant to determine the cause of her psychiatric condition. (Vol. 14, p. 4-5). Dr. Hughes concluded that Claimant is suffering from an episode of

major depression with psychotic features, which onset *prior to* the work-accident. (Vol. 14, Exhibit 2, p. 6). In response to Eyman's delusional disorder diagnosis, Dr. Hughes testified that delusional disorders are "generally isolated relatively controllable delusions...but they don't change a person's overall well-being about anything and they are not global." (Vol. 14, p. 29).

Dr. Hughes testified that Major Depression with psychotic features is a more complete explanation for a person's delusional thoughts. (Vol. 14, p. 36). Dr. Hughes stated that the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM – IV") indicates that delusional disorders usually produce less impairment in *occupational* and *social* function because people with delusional disorders generally have enough retained insight to know that their delusional thoughts might sound "crazy" so they are less like to confide in strangers. (Hughes Depo. 27:17-6). Dr. Hughes stated that the DSM-IV also indicates that, with a delusional disorder, the person's psychosocial functioning is not markedly impaired and behavior is neither obviously odd nor bizarre. Dr. Hughes did not believe Claimant's conduct fit within these diagnosing factors for delusional disorder. (Vol. 14, p. 28).

Dr. Hughes testified that it was significant that Claimant was treated for depression with medications and therapy in 1995. (Vol. 14, p. 7-8; Exhibit 2, p. 2). Dr. Hughes found Claimant's job performance prior to the March 2005 injury was significant because as early as 2004 he felt there had been a "shift in her mental state and interactions with people at work" and that she was "very suspicious in her globally blaming others for unlikely negative actions at the workplace." (Vol. 14, p. 8). Dr. Hughes testified that his retrospective review of Claimant pre-injury conduct indicated

that Claimant was "already developing paranoid thoughts ... or paranoid delusions, in 2004." (*Id.*). Specifically, Dr. Hughes compared the February 2004 job performance report to the November 2004 job performance report and noted that Claimant's conduct went from being "calm, quiet, cooperative, [and] reliable" to "absences, argumentative, [and] not a team player," which he believed were "early symptoms of an emerging psychotic brain condition." (before the March 29, 2005 date of injury) (Vol. 14, p. 40). Dr. Hughes testified that the employer's performance evaluations were suggestive of paranoia sneaking into her thoughts in 2004, and Claimant further confirmed the paranoia in 2004 telling Dr. Hughes that "everyone I worked with was against me and did all these horrible things to me." (Vol. 14, p. 9).

With respect to the work-accident, Dr. Hughes testified that it was significant that there was no loss of consciousness, no reported changes in her mental state, no neurological complaints in the emergency room, and no scalp laceration, and as a result, Claimant "certainly" didn't suffer a brain injury, or even a closed head injury or concussion. (Vol. 14, p. 10). Dr. Hughes testified that there was "no medical credibility" to the idea that the work-accident could have caused or aggravated an already evolving depressive episode. (Vol 14, p. 22).

Eyman authored a second report that responds to Dr. Hughes' diagnosis wherein Eyman stated that Claimant "is not currently severely depressed." (Vol. 13, Exhibit 3, p.5, 2nd full para.) Dr. Hughes later corrected Eyman's oversight by explaining at deposition that the psychosis overwhelms the depressive symptoms and overlooking the underlying Major Depression is a common mistake. (Vol. 14, p. 28-29). Dr. Hughes testified that it was "significant" that Eyman did not have knowledge of Claimant's 1995

episode of clinical depression because such early life episodes are the most common way that major depressive disorders work in people. (Vol. 14, p. 15-16). Eyman stated that antidepressant medication would *not* have a beneficial effect on for someone with delusional disorder. (Vol. 13, p. 58). Yet, Dr. Hughes testified that Claimant reported she was calmer, sleeping better, and didn't feel as depressed after she started taking antidepressant medications a month earlier. (Vol. 14, pp. 20, 45; Exhibit 2, p. 5).

Respondent coordinated a second mental health evaluation with Kathleen Keenan ("Keenan") on April 12, 2011. Keenan has a Ph.D. in consulting psychology and has been in private practice in Prairie Village, Kansas since 1995. (Vol. 15, p. 4). About one-third of Keenan's practice is treating individuals that are experiencing work-related injuries. (Vol. 15, p. 3, 4 13; Exhibit 1). Keenan also diagnosed Claimant as suffering from major depressive disorder, recurrent, severe, with psychotic features. (Vol. 15, p. 19; Exhibit 2, p. 18).

Keenan testified that psychological testing is a "key piece" of the puzzle and "essential to form a psychological opinion. (Vol. 15, p. 7-8). As part of Keenan's evaluation, Claimant fully participated in six separate psychological tests that were administered personally by Keenan. (Vol. 15, p. 6). Keenan reviewed the test results, medical records, and her interview notes to formulate her opinions regarding Claimant's psychological disorders and whether those disorders were caused or aggravated by the March 29, 2005 accident. (Vol. 15, p. 5, 14-15). Interestingly, on the Battery for Health Improvement 2 test, Claimant disclosed a high level of psychological and life problems, and in fact, tested higher than 36 percent of a group of pain patients who were asked to "fake bad" when completing the test. (Vol. 15, p. 15). Keenan characterized Claimant's

score as "pretty extreme." (Vol. 15, p. 15-16). Keenan also review medical records and noted ten pages of significant findings in her report. (Vol. 15, p. 6; Exhibit 2).

Contrary to Eyman's misunderstanding of Claimant's level of depression, Keenan testified that Claimant self-reported her own depression at a ten (10) on a scale of one to ten with ten being severe. (Vol. 15, p. 9-10). Claimant completed the Beck Depression Inventory 2 test for Keenan, which is a test that relies on a patient's insight and honesty for accuracy. A score of 20 or higher indicates significant depression. Claimant's score was 23. (Vol. 15, p. 17-8). Keenan felt Claimant's "oddness or eccentricity is more pronounced than the delusional disorder diagnosis would imply" therefore "the psychotic depression is a broader diagnosis that takes in more of her presentation and her symptoms than the delusional disorder diagnosis would do." Keenan testified that Claimant did not fit into the parameters of a delusional disorder. (Vol. 15, p. 27). Keenan does not believe that the work-accident caused or aggravated Claimant's psychological problems. (Vol. 15, p. 21). Keenan testified that Claimant actual psychological problems are separate and apart from the work-accident and that she has just tied those problems to the work incident. (Vol. 15, p. 25). Keenan determined that mood plays a much more prominent part in Claimant's presentation. (Vol. 15, p. 52). Keenan explained that Claimant's "injury became a focus, a way for her to externalize the craziness that she was feeling inside. A way for her to explain it, to make sense of it, to justify it..." Her injury has been distorted to fit into the delusional schemata, and thereby she is not recognizing the psychological problems are separate and apart from the work accident. (Vol. 15, p. 22-5).

Interestingly, even a report *offered by Claimant* at the preliminary hearing on October 17, 2008, concludes that Claimant suffers from "major depression, severe with psychotic features (296.34)." (Vol. 4, Claimant Ex. 2).

Claimant told Keenan that she "had major depression after her divorce in 1995" and that she talked to someone two or three times about her depression. (Vol. 15, p. 40). Claimant also admits seeking treatment on "probably two or three times" for depression prior to the accident at Brewster Place. (Vol. 6, p. 26-7).

Claimant's evolving psychosocial dysfunction due to paranoia was evident prior to the work accident. Claimant testified that she perceived her co-workers as harassing her. (Vol. 11, p. 28), which caused Claimant to request "a change in position due to the disrespect and verbal abuse [she was] subject[ed] to at [her] current position by fellow employees." (Vol. 10, p. 24). Prior to the date of accident, Claimant file a complaint with the KDHE alleging that Brewster Place discriminated against Claimant in July 2004 and November 2004. (Vol. 11, p. 5-6; Spivey Ex. 1). Claimant believed that her co-employees "constantly harassed" her "ever since" she filed the "discrimination case" against Brewster Place. (Vol. 2, p. 34). Ultimately, the discrimination complaint that Ms. Spivey filed against Brewster Place with the Kansas Department of Human Resources (KDHE) was dismissed. (Vol. 10, p. 23-4). Notwithstanding the KDHE's dismissal of Claimant's discrimination allegations, Claimant later filed a lawsuit against Brewster Place on April 12, 2006, alleging discrimination. (Vol. 11, p. 8; Spivey Ex. 2).

Problems with Subsequent Employers

On October 16, 2006, Claimant "quit" her job at McCrite because she felt she "was discriminated against by" a fellow employee who was "abusive." Specifically, Claimant felt she "was discriminated, harassed, humiliated, verbally and physically abused by" a fellow employee. (Vol. 11, p. 41-2; Spivey Ex. 12 & 13).

Psychological Considerations Outside the Work Comp Proceeding

At the time of the Regular Hearing, Claimant acknowledged that she has been seeing by Dr. Policard, a psychiatrist, and Shelia Redmond, a therapist, since 2009. (Vol. 6, p. 6). (Claimant did not offer any of these treatment records.) The treatment with Dr. Policard is paid for by the Social Security Administration. (Vol. 6, 79-80). Claimant's psychological treatment through the social security administration is not for a delusional disorder. (Vol. 13, p. 33). Claimant confirmed at the Regular Hearing that she has family members that are "borderline mentally ill" (Vol. 6, p. 16) and/or experience "severe social problems." (Vol. 6, p. 17).

Task Loss

Dr. Hughes testified that there weren't any tasks that Claimant could no longer perform as a result of the March 29, 2005 work accident. (Vol. 14, p. 25-6). Keenan confirmed that the tasks that Claimant cannot do are not related to her injury, but rather her underlying condition. (Vol. 15, p. 28).

Wage Loss

Claimant asserts that she is permanently and totally disabled as a result of the incident occurred on March 29, 2005. (Vol. 6, p. 64). Eyman testified that he had "no doubt that [Claimant's] suspiciousness and paranoia interfered with her... subsequent employment." (Vol. 13, p. 22).

After the alleged injury, Claimant continued working as a CNA and CMA for Brewster Place and subsequent employers for four years. (Vol. 11, p. 39). After being terminated for insubordination at Brewster Place, Claimant continued working as a certified medication aide at McCrite from March 2006 to July 2006, then the Topeka Adult Care Center from July 2006 to July 2008 (Vol. 6, p. 55), then Autumn Home Plus Center from June 2008 to April 2009 (Vol. 6, p. 55), then the Topeka Call Center from May 2009 to July 2009 (Vol. 6, p. 55) where she was earning "somewhere around" $10.00 to $10.50 per hour. (Vol. 6, p. 50-2; see also Santner Ex. 2).

## IV. ARGUMENTS AND AUTHORITIES

The Workers Compensation Act adopts the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77–601 *et seq.*, for workers compensation cases. K.S.A. 44–556(a). The burden of proving the invalidity of an agency action is on the party asserting invalidity. K.S.A. 77-621(a)(1). The Court may grant relief "only if" certain conditions exists. K.S.A. 77-621(c).

Claimant's arguments fail to delineate the statutory bases for review, therefore, appropriate standard of review is lost and the arguments evolve into an attempt to reargue the Board's findings of fact.

## I. The Board Properly Interpreted and Applied the Law After Finding that Claimant Suffered No Permanent Disability.

Proper analysis under K.S.A. 77-621(c)(4) requires the Court to determine whether the Board's findings of fact were properly applied to the law in reaching the Board's decision. In the present case, the Board found that Claimant "suffers no permanent disability as the result of this work-accident." (Board Order, p. 20) With this finding, the Board applied the law and awarded no benefits for permanent total or permanent partial disability. On appeal, Claimant asks the Court to reweigh the evidence as to whether a disability exists, *and then* apply the law and award benefits that might be available under Claimant's alternative findings. Respondent respectfully submits that Claimant's attempt to re-argue the facts using K.S.A. 77-621(c)(4) is inappropriate. The Board did not erroneously interpret or apply the law based on the findings of fact.

### A. *Standard of Review*.

K.S.A. 77-621(c)(4) allows appellate review of an agency's decision to determine whether that agency "erroneously interpreted or applied the law." When the facts in a workers compensation case are not disputed, the question is whether the Board correctly applied those facts to the law, which the appellate court reviews *de novo*. *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 388-89, 224 P.3d 1197, 1199 (2010), citing, *Martinez v. Excel Corp.*, 32 Kan.App.2d 139, 142, 79 P.3d 230 (2003). Respondent respectfully submits that *de novo* review is not applicable to the Court's review under K.S.A. 77-621(c)(4) in this matter because Claimant's brief clearly shows that the facts remain disputed. Notwithstanding Claimant's reference to the incorrect standard for review under K.S.A. 77-621(c)(4), there are no arguments in Claimant's

brief to explain how the Board incorrectly applied the findings of fact to the law. Nor are any arguments asking this Court to interpret the Kansas Workers Compensation Act. Instead, Claimant is asking this Court to reweigh the facts as to whether a disability exists, *and then* apply them to the law. This type of review is specifically restricted under K.S.A.77-621(d).

B. *The Workers Compensation Act Only Allows Benefits When Permanent Disability Exists*.

The Kansas Workers Compensation Act (the "Act") provides benefits for permanent partial (K.S.A. 44-510d & e) and permanent total disability (K.S.A. 44-510c). The express language of each of these statutes ties an injured worker's right to compensation to the existence of a "disability." K.S.A. 44-510c, which allows benefits for permanent total disability, provides that "[t]he payment of compensation for permanent total disability shall continue for the duration of such *disability*." *(Emphasis added)*. K.S.A. 44-510d, which allows benefits for permanent partial disabilities to injuries to certain body parts, provides "[*w]here disability... results*...the injured employee shall be entitled to ...compensation...". *(Emphasis added)*. Lastly, K.S.A. 44-510e(a), which allows benefits for permanent partial disabilities to the whole body, provides that "[p]ermanent partial general disability exists when the employee *is disabled* in a manner which is partial in character and permanent in quality." *(Emphasis added)*. This Court, in *Blaskowski v. Cheney Door Co.*, 2012 WL 3444330, *3, 286 P.3d 239 (2012) (unpublished opinion), found that "any use of the [work disability] formula... presupposes that the 'employee is disabled in a manner that is partial in character and permanent in quality.' This requires a threshold finding of a permanent impairment or disability before applying the formula for work disability."

Claimant asserts that the Board erroneously interpreted or applied the law, but fails to provide any argument in support of this argument. In fact, unless the Court reweighs the evidence and changes the Board's findings of fact (which is not appropriate in reviewing a question of law), Claimant provides no argument or explanation to support the assertion that the Board erroneously interpreted or applied the law. For this reason, Claimant fails to satisfy her burden to show that the Board's action is invalid, and thereby K.S.A. 77-621(c)(4) provides no basis for relief.

## II. The Board's Action is Supported by Substantial Evidence.

Claimant's request for relief from the Board's action under both K.S.A. 77-621(c)(7) and K.S.A. 77-621(c)(8) requires this Court to determine whether there is substantial evidence to support the Board's findings.

### A. *Standard of Review*.

K.S.A. 77–621(c)(7) provides relief when an agency's action is based on a determination of fact "that is not supported by evidence that is substantial when viewed in light of the record as a whole." Substantial evidence "is such evidence as a reasonable person might accept as being sufficient to support a conclusion." *Herrera-Gallegos v. H & H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239, 242 (2009), citing *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 263, 75 P.3d 226 (2003). The Board's decision should be upheld if supported by substantial evidence, even though there is other evidence in the record supporting contrary findings. *Mitchell v. PetSmart, Inc.*, 291 Kan. 153, 172, 239 P.3d 51 (2011).

The appellate court does "not reweigh the evidence or engage in de novo review..., but... must... consider all of the evidence – including evidence that detracts from the agency's factual findings – when ...assess[ing] whether the evidence is substantial enough to support [the agency's] findings. *Herrera-Gallegos* at 363; *K.S.A. 77-621(d).* In other words, the appellate court must determine "whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency's conclusions." *Herrera-Gallegos* at 363.

K.S.A. 77–621(c)(8) provides relief when an agency's action "is otherwise unreasonable, arbitrary or capricious." An agency's action is arbitrary and capricious if it is unreasonable, without foundation in fact, not supported by substantial evidence, or without adequate determining principles. *Denning v. Johnson Cnty., Sheriff's Civil Serv. Bd.*, 46 Kan. App. 2d 688, 701, 266 P.3d 557, 568 (2011).

1. *There is Substantial Evidence to Support the Board's Finding that Claimant Did Not Sustain Any Permanent Physical Impairment or Disability.*

The ALJ appointed Dr. Paul Stein to conduct an independent medical examination regarding functional impairment. Claimant erroneously asserts that "Dr. Stein **did** conclude that Ms. Spivey had a ratable impairment as a result of the injury." (*emphasis in original*) (citing Vol. 1, p. 177). This statement is not supported by the record. While Dr. Stein's July 24, 2009 report indicates that the AMA Guides would provide a 2% impairment for headaches, the report does *not* conclude that Claimant's headaches were the result of the work-accident. Contrary to what Claimant suggests, Dr. Stein did not "change[] his mind" or "retract" any of his opinions at his deposition. Instead, Dr. Stein

responded to specific questions regarding causation. In doing so, Dr. Stein confirmed that he did not believe that the accident in question would cause the headaches Claimant was reporting. (Vol. 16, p. 26). Dr. Stein also noted that it would be "very unusual" for headaches to get worse with time given the nature of the accident and the initial symptoms. (Vol. 16, p. 26). Most importantly, Dr. Stein confirmed that Claimant has no functional impairment related to the March 29, 2005 incident. (Vol. 16, p. 13). In doing so, Dr. Stein confirmed what all of Claimant's previous providers (except Dr. Curtis) concluded – there is no permanent physical impairment or disability resulting from the March 29, 2005 incident. (Vol. 16, p. 10) .

The only testimony regarding physical functional impairment were the opinions of Dr. Lynn Curtis, who was hired by Claimant to prepare six (6) separate reports, each containing different diagnosis, rating, restrictions, and most importantly, errors and oversights. On the issue of functional impairment, neither the ALJ nor the Board viewed Dr. Curtis as credible. Therefore, it is unlikely that Dr. Curtis' opinions would undermine the opinions of the court-ordered physician on the issue of functional impairment.

2. *There is Substantial Evidence to Support the Board's Finding that Claimant's Psychiatric Illness Is Not a Compensable Disability.*

Claimant's fallback for the lack of a physical functional impairment is to assert a claim based her psychiatric illness. On this point, the Board considered the opinions of four mental health specialists, to conclude that Claimant's psychiatric illness is unrelated to the work-injury. Claimant, who has never sought or received treatment from Respondent for psychological problems, argues that the Board's findings are not

supported by substantial evidence. In order to succeed in this argument, Claimant must convince the Court that the opinions of Patrick Hughes, Ph.D ("Hughes"), and Kathleen Keenan, Ph.D ("Keenan"), and Jeanne Frieman ('Freiman") (retained by claimant), are so undermined by the opinions of James Eyman that Hughes', Keenan's and Frieman's opinions are insufficient to support the Board's conclusions.

Dr. Hughes, Keenan, and Jeanne Frieman all conducted comprehensive evaluations of Claimant's presentation. In doing so, each considered pre-injury and post-injury conduct, including a battery of psychological testing to reveal evidence of depression, delusions, and paranoia. Each of them arrived at the same diagnosis – Major Depression with Psychotic Features, which has been described as a more complete explanation for Claimant's psychotic behavior.

Keenan testified that Claimant's psychological problems are separate and apart from the work accident, and because these problems went untreated, they naturally evolved to include psychotic behavior. Keenan explained that Claimant simply uses the work accident to "externalize the craziness that she [is] feeling inside... it's a way for her to explain it, to make sense of it, to justify it..." In other words, the work-accident didn't cause the delusions. Instead, Claimant's mind is using the work-accident to explain her bizarre conduct. Similarly, Claimant's co-workers did not cause Claimant's paranoia. Instead, Claimant attempts to make sense out of the paranoia with accusations of discrimination against her co-workers.

According to Hughes and Keenan, Claimant's psychological illness was not caused or aggravated by the work accident. Hughes testified that Claimant's inability to

properly process the events going on around her would exist regardless of whether Claimant sustained a work-injury.

Claimant argues that Eyman's "Delusional Disorder" diagnosis is sufficient to undermine Board's reliance on the opinions of Hughes and Keenan. Yet, the record shows that Eyman arrived at this diagnosis without successfully completing psychological testing (Vol. 13, p. 23), without *any* consideration for Claimant's pre- and post-injury paranoia (Vol. 13, 19-20), *and* without any knowledge of Claimant's self-admitted pre-injury depression. (Vol. 15, p. 9-10).

Eyman's response to the idea that Claimant was suffering from an episode of Major Depression, was that Claimant "is not currently severely depressed." (Vol. 13, Ex. 3, p.5, 2nd full para). This opinion alone raises serious questions as to the foundation and credibility of Eyman's diagnosis because Claimant *herself* reported to Dr. Keenan was she was depressed and self-rated her depression at a ten (10) on a scale of 1 to 10 with 10 being "severe." (Vol. 15, p. 9-10). In addition, Claimant scored a 23 on the Beck Depression Inventory 2, where a score of 20 or higher indicates significant depression. (Vol. 14, p. 17-8).

Dr. Hughes testified that it was "significant" that Eyman did not know about Claimant's clinical depression in 1995 and 2004 because early episodes of depression are indicative of how Major Depression evolves. (Vol. 14, p. 15-6).

Interestingly, Eyman admitted that antidepressant medication would not have a beneficial effect for someone with delusional disorder (Vol. 14, p. 58). Yet, Dr. Hughes confirmed that Claimant reported feeling calmer, sleeping better, and feeling less depressed after she started taking antidepressant medications. (Vol. 14, p. 20 & 45; Ex.

2, p. 5). From this, one must ask: If Eyman was correct and Claimant did have a delusional disorder, but a person with delusional disorder does not benefit from antidepressant medication, then why did Claimant report improvements while taking antidepressant medications. Even more interesting is the fact that Claimant's current treatment through the social security administration is not for a delusional disorder. (Vol. 13, p. 33).

The Board acted appropriate and upon substantial evidence when it reversed the ALJ's acceptance of Eyman's opinion, which contained deficiencies with respect to the scope of the evaluation and foundation for the opinions expressed therein.

3. *Eyman's Opinion on Causation is Not Based On Competent Evidence*

Eyman testified that the work-accident caused the Delusion Disorder because "Ms. Spivey does not appear to have had a delusional disorder prior to her work accident." (Vol. 13, Ex. 3, p. 8). With this statement, Eyman acknowledges that he simply looked for delusions about the perceived injury *before* the date of accident, and having not found any (because the accident hadn't occurred yet), Eyman concluded that Claimant's behaviors were caused by the accident. The fundamental flaw with the logic is that Eyman overlooked unrelated underlying mental incapacities that have been identified by other mental health providers as the true cause of Claimant's bizarre conduct.

The Kansas Supreme Court found that an expert's opinion on causation is "inadequate" when it is based on nothing more than *post hoc, ergo proper hoc* logic: the symptoms follow the accident; therefore, they must be due to it. *Kuxhausen v. Tillman*

*Partners*, 291 Kan. 314, 320; 241 P.3d 75 (2010). Similarly, the Court of Appeals has held in a workers compensation case that "when the salient question is the cause of the medical condition, the maxim of *post hoc, ergo proper hoc* is not competent evidence of causation." *Gann v. Driver Management, Inc.* 147 P.3d 163, 2006 WL 3589971, at *3 (Kan.App. 2006). See also *Chriestenson v. Candies*, 46 Kan.App.2d 453, 263 P.3d 821 (2011). In the present case, Claimant argues that the Court should accept Eyman's opinions over the opinions of three other mental health providers despite the fact that Eyman's opinion on causation applies logic that the Kansas courts have deemed to be incompetent.

The issue of causation in a workers compensation case must be based on substantial evidence and not on mere speculation. *Anderson v. Victory Junction Restaurant*, 144 P.3d 782, 206 WL 3056514 at *2 (Kan.App. 2006). Eyman did not think Claimant was depressed. (Vol. 13, Ex. 3, p.5, 2nd full para.). Yet, Claimant self-reported her depression at a level of 10 (Vol. 15, p. 9-10), which was confirmed by diagnostic testing. (Vol. 15, p. 17-8). At the same time, Eyman could not say for certain whether Claimant had paranoid personality. (Vol. 13, p. 16). Yet, the social security administration has place Claimant on total disability for a schizophrenic, paranoid and personality disorder. (Vol. 13, Ex. 2, p. 1). In short, the record contains numerous examples of how Eyman's narrow evaluation lead him to a conclusion that is inconsistent with all the other medical providers (including current providers with the SSA). By applying such generic logic, Eyman overlooked key aspects of Claimant's presentation.

4. *Missing Medical Records Are Irrelevant*

Claimant's response also makes light of the fact that Dr. Hughes and Dr. Keenan did not have the opportunity to review medical records generated by the mental health providers who are treating Claimant's mental problems on behalf of the social security administration[1]. On this point, Respondent respectfully submits that Dr. Eyman testified that the treatment being provided by the social security administration was not for a delusional disorder. (Vol. 13, p. 33). Therefore, if anything, these records would only confirm that Dr. Eyman's diagnosis is inconsistent with each and every mental health provider who has evaluated Claimant.

Respondent respectfully submits that the Board's action in this matter is supported by substantial evidence and thereby precludes any relief under K.S.A. 77-621(c)(7) or (8).

## III. The Workers Compensation Act Does Not Provide Benefits for Psychological Impairment or Disabilities.

Kansas Workers Compensation Act defines functional impairment as "the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment..." K.S.A. 44-510e(a).

First, it is important to note that Dr. Eyman's 65% functional impairment is based on percentages derived from the 2nd Edition of the AMA Guides because the 4th Edition of the AMA Guides does not contain functional impairment percentages for mental

[1] Sheila Redmond, Dr. Gordon Parks and Dr. Jean-Daniel Policard.

disorders. (Vol. 13, p. 42-44). However, more importantly, Claimant's reliance on an underlying mental disorder as a basis for seeking workers compensation benefits evolves from three judicially created criteria for determining whether a psychological condition is compensable. (citing *Love v. McDonald's Restaurant*, 13 Kan.App.2d 397, 773 P.2d 557, rev. denied 245 Kan. 784 (1989).

In *Love*, the court held that, in order to establish a compensable claim for traumatic neurosis, claimant must show: 1) a work-related physical injury; 2) symptoms of the traumatic neurosis, and 3) that the neurosis is directly traceable to the physical injury. If this Court determines that the Board's action is not supported by substantial evidence, then there remains a concern with applying the three judicially created criteria from in *Love* to the facts in this case because these criteria are not contained in the express language of the Kansas Workers Compensation Act. K.S.A. 44-501 et seq.

The Board, in finding Claimant's psychiatric illness was unrelated, avoided Respondent's argument that psychological conditions are not compensable. However, should this Court determine that the Board's findings are not supported by substantial evidence, then the issue of whether psychological conditions are compensable remains an argument that Respondent asserted to the Board.

In *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009), the Kansas Supreme Court addressed an employee's obligation to make a "good faith effort" to find employment before receiving work disability benefits under K.S.A. 44-510e. Ultimately, the Court struck down the "good faith doctrine" and "disapproved" all cases that imposed the good-faith doctrine based on the following principles:

1. The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).
2. The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when the statute is plain and unambiguous, the courts must give effect to the legislative intention expressed in the statutory language. *Hall v. Dillon Companies, Inc.* 286 Kan. 777, 783, 189 P.3d 508 (2008).
3. When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should be or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547 554, 161 P.3d 695 (2007).

*Bergstrom* at 607-8.

The Supreme Court applied the above-referenced principles to eliminate the "judicial addition" (*Id.* at 609) of the "good faith doctrine," and in doing so, found "nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment." *Id.* More importantly, the Court cited *Hall* to point out that "a history of incorrectly decided cases does not compel us to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes." (*Hall* at 787-88). Further, the Court stated that "this court is not inexorably bound by precedent; it will reject rules that were originally

erroneous or no longer sound." (citing *Coleman v. Swift-Eckrich*, 281 Kan. 381, 388, 130 P.3d 111 (2006).

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

K.S.A. 44-508(e) defines "Personal injury" as:

> any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.

The definition of "personal injury" is clear and unambiguous. It requires a "lesion" or "change in the physical structure of the body." There is nothing in the express language of K.S.A. 44-508(e) to suggest that an employer is liable to pay compensation to an employee for non-physical psychological conditions or traumatic neurosis.

Claimant request for relief relies on an argument that a traumatic neurosis, shown to be "directly traceable" to the injury, is compensable. On this point, Respondent respectfully submits that *Love* predates *Bergstrom*, and is now inconsistent with and contrary to the Supreme Court's directive in *Bergstrom* because, in order to reach the conclusion that a traumatic neurosis is compensable, the court must apply a "judicial addition" of language that broadens the definition of "personal injury" from a physical injury to everything that is "directly traceable" to the physical injury. If the legislature intended to include non-physical psychological conditions and/or traumatic neurosis

flowing from a personal injury, then it could have included express language in to statute to provide for a more expansive definition of "personal injury."

In *Bergstrom*, the Kansas Supreme Court held that the express language the Kansas Workers Compensation Act should be applied and any judicial supplementation of the express language of the statute was "disproved." On this basis, Respondent respectfully submits that definition of "personal injury" does not contemplate an award for non-physical injuries such as mental or psychological conditions that do not involve lesions or changes to the physical structure of the body.

## V. CONCLUSION

Respondent respectfully submits that the Board's findings are supported by substantial competent evidence in light of the record as a whole. The Board made a factual determination based upon the disputed testimony, which the court should not disturb on appeal based on this record. The evidence supports the Board's finding that Claimant's psychiatric illness is not the result of the work accident. There is no evidence that is sufficient to undermine the evidence the Board relied upon. Accordingly, the Board's action should be affirmed.

Respectfully submitted,

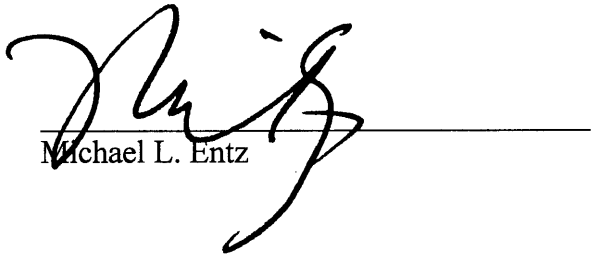
ENTZ & ENTZ, P.A.
1414 S.W. Ashworth Pl.
Topeka, Kansas 66604
(785) 267-5004

By_____
Michael L. Entz, #17717
Attorney for Respondent/Insurance
Carrier/Appellees

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were deposited in the U.S. mail, this 29th day of May, 2013, postage paid, addressed to

Paul D. Post
5897 SW 29th Street
Topeka, Kansas 66614.



Michael L. Entz