NOT DESIGNATED FOR PUBLICATION

No. 125,517

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STEVEN LANGVARDT,
Appellee,

v.

INNOVATIVE LIVESTOCK SERVICES and KANSAS LIVESTOCK ASSOC.
RISK MANAGEMENT,
Appellants.

MEMORANDUM OPINION

Appeal from Workers Compensation Board. Opinion filed June 30, 2023. Affirmed.

D. Shane Bangerter, of Bangerter Law, P.A., of Dodge City, for appellants.

Scott J. Mann, of Mann Wyatt Tanksley, of Hutchinson, for appellee.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

PER CURIAM: Innovative Livestock Services and the Kansas Livestock Association (ILS) appeal an award of compensation from the Kansas Workers Compensation Appeals Board (Board). The Board awarded Steven Langvardt benefits for a workplace injury to his back. ILS argues that the Board erred because Langvardt failed to prove that the workplace accident was the prevailing factor in his compensable injury, given his history of back problems. ILS also contests the Board's award of unauthorized medical expenses in excess of $500. And ILS claims a credit against any award for payment of unearned wages. We have considered ILS's contentions and have determined that their contentions are fatally flawed. As a result, we affirm the Board's order.

FACTS

Langvardt started working as an accountant for ILS in 2006. During his employment, he had lumbar spine difficulties, including difficulty walking long distances and prolonged standing. Langvardt underwent imaging scans and epidural steroid injections. In 2014, he had a posterior decompression of three discs and then a lumbar fusion in 2016. Both of those surgeries were performed by Dr. Raymond Grundmeyer.

On October 15, 2018, Langvardt fell through an open access door in the floor, also called a trap door, at work. He struck his upper back on the edge of the floor before landing on his back 5 to 6 feet below. He received an MRI that day. The MRI showed extensive age-related degenerative changes throughout the cervical, thoracic, and lumbar spines.

The authorized treating physician, Dr. John Estivo, diagnosed a thoracic sprain, pain in Langvardt's shoulders, and a nondisplaced fracture of the left small finger. When Langvardt went back to Dr. Estivo in December, Langvardt was using a cane. Dr. Estivo diagnosed a thoracic spine strain, a right shoulder labral tear, a left shoulder acromioclavicular separation, and rotator cuff tendinitis, the prevailing factor being the work accident.

A week later, Langvardt returned for an appointment and reported lower extremity weakness, with difficulty standing and walking. Dr. Estivo ordered an MRI of the lumbar spine. That MRI showed evidence of a previous lumbar spine fusion and degenerative changes, but no other abnormalities, such as a compressed spine. Dr. Estivo testified that the MRI of Langvardt's lumbar region did not explain his lower extremity complaints.

In January 2019, Dr. Estivo reviewed Langvardt's records. The MRI from the day of the accident "reveal[ed] advanced degenerative changes throughout the thoracic spine

with multiple bulging degenerative discs. No acute abnormalities are seen." Dr. Estivo determined that Langvardt reached maximum medical improvement (MMI) for his work-related injuries. Dr. Estivo opined that Langvardt's remaining spinal issues were due to his preexisting advanced degenerative disc disease of the thoracic spine. Dr. Estivo stated that the work incident was not the prevailing factor in Langvardt's spinal condition.

The neurosurgical consultant, Dr. John Dickerson, agreed that Langvardt reached MMI for his work accident and that the need for treatment came from the underlying condition of his back. Dr. Dickerson also wrote that Langvardt had extensive age-related degenerative changes throughout the cervical, thoracic, and lumbar spine. By the time Langvardt saw Dr. Dickerson, he had significant back pain and had gone from using a cane to using a walker, and to using a wheelchair to get around at work. Dr. Dickerson performed laminectomies at T6-7 to decompress Langvardt's spinal cord.

In April 2019, Langvardt got up from his wheelchair and felt a pop in his back. An MRI showed a '"blown out"' disc, and Dr. Dickerson performed a transpedicular microdiscectomy to remove fragments that had broken off and were pressing on the spinal cord.

ILS and Langvardt also reached a severance agreement. Langvardt released ILS from liability with a covenant not to sue. In exchange, ILS agreed to pay Langvardt biweekly wages from April 2019 to August 2019, when his Social Security retirement benefits began.

In May 2019, the administrative law judge (ALJ) conducted a settlement hearing with Langvardt appearing by phone from a rehabilitation hospital. In the phone conversation, Langvardt "agreed to a lump sum payment of $20,512.50, closing out all issues. Shortly thereafter, [Langvardt] changed his mind after being told by physical therapists his condition was permanent, he would never walk again and he would need

modifications to his home." Langvardt told ILS that he wanted to reverse the settlement, and he appealed the settlement to the Board. When the Board set aside the settlement, ILS appealed to this court, which dismissed ILS's appeal as not stemming from a final agency action.

After remand, Langvardt sought out Dr. Paul Stein to perform a records review of his case. Dr. Stein concluded that the work accident was the prevailing factor in Langvardt's spinal injury. He testified that Langvardt's previous issues in the lumbar region were unconnected: "The reasoning behind it was that the thoracic spine is very different from the lumbar spine in that the thoracic spine, you have the rib cage which stabilizes the spine considerably."

Dr. Stein agreed that the MRI from the day of the injury showed preexisting degenerative disc disease in the thoracic spine and some disc bulging but not a true disc herniation. Dr. Stein testified: "[Y]ou have very little movement in the thoracic spine, and the pathology, like dis[c] herniation or spinal stenosis in the thoracic spine is very uncommon, very, very, very uncommon. I think in all of my years of doing active surgery I operated on maybe three cases." He believed that Langvardt's workplace injury caused trauma to the thoracic region, with a later edema—which usually takes days or weeks to develop. Dr. Stein testified about the surgery to correct the edema as follows:

> "Doctor Dickerson did not take out any dis[c], he just took out a lot of bone and ligament to make more room for the spinal cord, and I'm not saying that was inappropriate, that was appropriate, but what happened as a result of all of that is that he became even more unstable in that area and that's what resulted in that large dis[c] rupture that he subsequently went in to remove, and that's my opinion."

Dr. Dickerson wrote a letter in 2020 to state that he did not write the 2019 letter which stated Langvardt's condition was not caused by the workplace accident. Dr. Dickerson testified that the earlier letter was written by a midlevel employee who

summarized medical records. He stated that the 2019 letter did not represent his medical opinions. Dr. Dickerson testified that the accident was the prevailing factor for the T6-7 herniation, and he erred by not reading the 2019 letter closely when reviewing his midlevel employee's work.

ILS had Dr. Alexander Bailey review Langvardt's records. Dr. Bailey reported that Langvardt's preexisting medical condition consisted of an entire spine in severe degenerative state, several surgeries since 2013, previous problems walking and standing, numbness, and a need for crutches or a cane. Dr. Bailey concluded that Langvardt's condition was not related to the workplace accident. Dr. Bailey opined that the prevailing factor is the random event of progression of spine degeneration. The cause is "'unknown specific reason.'"

At a preliminary hearing, the ALJ initially denied the compensability of Langvardt's claim. In the order, the ALJ stated the following:

> "The court has serious concerns about the shifting positions of Dr. Dickerson. It is difficult to believe that he would approve the March 7, 2019 letter without reading it, and even a cursory review of the letter demonstrates an opinion that the work injury was not the prevailing factor for the subsequent herniation at T6,7. It should be noted that Dr. Dickerson did not fuse the thoracic spine when he did the first surgery in January, 2019, but removed bone thereby weakening the spine and leading to the subsequent catastrophic reherniation that left Langvardt a paraplegic. The shifting opinion could be perceived as an effort to shift responsibility for Langvardt's paraplegia from the surgery he performed to the work accident."

After the preliminary hearing, the ALJ ordered a neutral independent medical examination by orthopedic surgeon Dr. Theodore Koreckij. Dr. Koreckij testified that he looked closely at the MRI from the day of the accident and found nothing significant. He testified that if the accident caused spinal edema, it should have been visible that day. He

testified that thoracic herniations are due to degeneration or trauma but stated that Langvardt's herniation within 60 days of the accident was just a coincidence. Dr. Koreckij testified: "'I don't have a cause for the actual disc herniation. I did not feel it was related to the work injury in question. . . . I don't have a good reason as to why he had a disc herniation.'"

The ALJ found that "the greater weight of the medical evidence before the court, including the opinions of Drs. Estivo, Bailey and Koreckij, establishes that the work accident of October 15, 2018 was not the prevailing factor for the subsequent herniation at T6,7 and Langvardt's resulting paraplegia."

Langvardt supplemented the record with two more record reviews, by Dr. Harold Hess and Dr. Joshua Klemp. Dr. Hess testified that the day-of-accident MRI was of poor quality but showed an acute injury—disc disruption. He testified that thoracic herniations are rare absent trauma because the rib cage stabilizes that part of the spine. He stated that—absent a significant trauma—Langvardt would not have developed a T6-7 large disc herniation compressing his spinal cord. He acknowledged that Langvardt's entire spine, pre-accident, was basically fused above and below T6-7, either due to surgery or degenerative disc disease. He testified that this fusion would cause all stress, in the event of a trauma, to concentrate on T6-7. Dr. Hess testified that Langvardt's accident was the prevailing factor in his injury.

Dr. Klemp testified that the day-of-accident MRI was of lesser quality and, absent adjusting resolution, did not make the ligamentous disruption apparent. But after he adjusted the resolution of the MRI, it showed ligamentous disruption, demonstrated a traumatic injury, and explained why a progressive disc herniation "'may have started to occur.'" Dr. Klemp testified that thoracic herniations are rare without trauma, concluding that the accident was the prevailing factor causing Langvardt's injury. In Dr. Klemp's

opinion, Langvardt going from no thoracic symptoms to paralysis in five months is too short a time to attribute the problem to degeneration.

All the doctors who testified agreed that thoracic herniations are extremely rare and only 1% to 5% of all disc herniations are thoracic. As the Board stated: "The general consensus was the rib cage helps protect the thoracic spine from injury."

After holding a regular hearing, the ALJ found that substantial, competent, and credible evidence supported the conclusion that the work accident caused the physical injury and failure of the intervertebral disc at T6,7 and was the prevailing factor in Langvardt's paraplegia. The ALJ held that Langvardt was entitled to an award of benefits.

ILS appealed to the Board. The Board upheld Langvardt's benefits award. The Board reviewed the evidence of Langvardt's preexisting back problems and weighed that evidence against the workplace accident as follows:

> "Is it medically and legally probable, based on a more likely than not likely burden of proof, the claimant developed a disc herniation and corresponding leg weakness within 60 days of his accident as a matter [of] mere coincidence? The Board thinks not. The credible evidence is the claimant sustained a T6-7 injury on the date of accident. The injury progressed and the claimant sustained the full herniation as of December 15, 2018. Based on the greater weight of the credible medical evidence, the Board finds this scenario not only happened, but it would not have happened absent the trauma, and the progression of the injury within just two months could not be explained by coincidence and the simple passage of time."

The Board also awarded unauthorized medical expenses and declined to apply a credit for unearned wages to Langvardt's compensation award.

ILS timely appeals.

ANALYSIS

Did substantial competent evidence support the workplace accident as the prevailing factor in Langvardt's thoracic spine injury?

ILS argues that substantial competent evidence does not a support a finding that the accident is the prevailing factor of Langvardt's thoracic spine injury. Langvardt argues that ILS is simply asking this court to review the record, reweigh the evidence, and arrive at a different conclusion from the Board.

The Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq., governs this court's review of cases arising under the Workers Compensation Act, K.S.A. 44-501 et seq. K.S.A. 44-556(a). The standard of review varies depending upon the issue raised. See K.S.A. 77-621 (defining and limiting scope of review of administrative decisions under KJRA).

In the first instance, the burden of proof rests on the injured worker:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act." K.S.A. 44-508(h).

The claimant has the burden of proof to establish the right to an award of compensation under the Workers Compensation Act and to prove the various conditions on which the claimant's right depends. K.S.A. 44-501b(c); see *Moore v. Venture Corporation*, 51 Kan. App. 2d 132, 137, 343 P.3d 114 (2015) ("At a hearing before the Board, a claimant has the burden of proving his or her right to compensation."). Once the claimant has met the burden of proving a right to compensation, the employer has the burden of proving relief from that liability based upon any statutory defense or exception.

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

Appellate courts review a challenge to the Board's factual findings in light of the record as a whole to determine whether the findings are supported to the appropriate standard of proof by substantial evidence. See K.S.A. 77-621(c)(7). "Substantial evidence" refers to "'evidence possessing something of substance and relevant consequence to induce the conclusion that the award was proper, furnishing a basis [of fact] from which the issue raised could be easily resolved.' [Citation omitted.]" *Rogers v. ALT-A&M JV*, 52 Kan. App. 2d 213, 216, 364 P.3d 1206 (2015).

Under the KJRA, reviewing the Board's factual findings in light of the record as a whole means:

> "[T]he adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review." K.S.A. 77-621(d).

When determining fact questions, an appellate court's responsibility is to review the record as a whole to determine whether the Board's factual determinations are supported by substantial evidence:

> "This analysis requires the court to (1) review evidence both supporting and contradicting the agency's findings; (2) examine the presiding officer's credibility determinations, if any; and (3) review the agency's explanation as to why the evidence

> supports its findings. The court does not reweigh the evidence or engage in de novo review. [Citations omitted.]" *Williams v. Petromark Drilling*, 299 Kan. 792, 795, 326 P.3d 1057 (2014).

ILS argues for its first issue as follows: "Claimant's work-place accident is not the prevailing factor in causing his injury." ILS then describes the evidence in the record that it believes shows that preexisting conditions inevitably led to Langvardt's present condition, with or without contributing trauma from the work accident. The first problem with ILS's argument is that its citations to the record are lacking. For example, ILS claims, without citation to the record, that Langvardt suffered back problems dating back to 2013.

Also, ILS's appellant brief has serious record citation problems. For example, a sentence on pages 5-6 states: "He also reported that he had suffered from this problem for 'several years' and the problem 'has steadily worsened.'" Despite the quotation marks, which required a pin cite to a specific page, the citation for this sentence is as follows: "(R. II, 1-744)." In fact, ILS repeatedly cites the entire 744 pages of volume II multiple times. We further note other citations which do not contain the information specified. Thus, a great number of ILS's citations in its brief are incorrect. The failure to key factual allegations to the record has led a court to presume that alleged facts are unsupported. *McCaffree Financial Corp. v. Nunnink*, 18 Kan. App. 2d 40, 48, 847 P.2d 1321 (1993); see also Kansas Supreme Court Rule 6.02(a)(4) (2023 Kan. S. Ct. R. at 36).

Moreover, it is not our job to piece together the location where in the record there is support for the arguments made in ILS's brief. As the Seventh Circuit Court of Appeals persuasively pointed out when discussing appellants who include sequences of unreasoned arguments in their briefs, the court appropriately stated: "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Judges should not have to scour an appellant's brief or the record on

appeal to understand the appellant's claims or arguments. *Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005). Instead, "[a] brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record." *DeSilva v. DiLeonardi*, 181 F.3d 865, 867 (7th Cir. 1999). That responsibility falls to the advocates "to make it easy for the court to rule in [their] favor." *Dal Pozzo v. Basic Machinery Co., Inc.*, 463 F.3d 609, 613 (7th Cir. 2006).

Langvardt accuses ILS of "point[ing] to a variety of red herrings and other distractions in the hopes that this court will lose sight of the real issues." Langvardt's point is well taken. ILS contends in its statement of facts that Langvardt weighed over 300 pounds and "participated extensively in competitive weightlifting until back complaints interrupted that pursuit." ILS's record citation does not support its statement of fact. Furthermore, the Board specifically found that weightlifting was not a cause of injury, stating the following: "The claimant engaged in competitive weightlifting for about 20 years, stopping in the early-1990s, perhaps as late as 1993 or 1994. No doctor attributed the claimant's T6-7 injury to weightlifting or the long-term consequences of such activity."

The second problem with ILS's argument is our standard of review. We have previously explained that an amendment to the Kansas Workers Compensation Act (KWCA) changed our standard of review. *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 362-63, 212 P.3d 239 (2009). There, we stated: "[O]ur cases had limited that review by directing that we take the evidence in the light most favorable to the Board's ruling. If we found substantial evidence that would support the Board's decision, we were not concerned about other evidence that might have led to a different conclusion." 42 Kan. App. 2d at 362. But the 2009 amendment to K.S.A. 77-621(d) requires us to consider evidence that both support and detract from an agency's finding. We further stated:

> "[W]e must now consider all of the evidence—including evidence that detracts from an agency's factual findings—when we assess whether the evidence is substantial enough to support those findings. Thus, the appellate court now 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 conclusion." 42 Kan. App. 2d at 363.

The Board's conclusion was that Langvardt was an employee with degenerative back disease in his lumbar region that put him at risk of serious back injury. The Board found that Langvardt basically had a fused lumbar spine and a fused cervical spine, leaving T6-7 vulnerable as a "'hinge,'" based on Dr. Koreckij's medical opinion. The Board further concluded: "However, the susceptibility of a T6-7 injury was still contingent on trauma. That trauma, the accident of October 15, 2018, was the prevailing factor in causing the claimant's injury, medical condition, disability or impairment."

ILS cites no legal authority but essentially restates its facts section with heavier emphasis on certain details. ILS claims that Langvardt's preexisting issues led inevitably to his current medical condition. But the Board weighed the evidence of Langvardt's preexisting issues and incorporated that evidence into its ruling.

ILS argues that Langvardt had back problems four years before the event which progressively worsened over time. The Board acknowledged this fact when discussing Dr. Stein's testimony that Langvardt's "preexisting cervical spine and lumbar spine issues were red herrings and '[a]bsolutely not' the problem."

ILS asserts that the "more persuasive" medical opinions agree that the work accident was not the prevailing factor causing Langvardt's condition. On this point, ILS asks us to reweigh the evidence and determine which medical opinion was more persuasive, which we cannot do. *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 614, 256 P.3d 828 (2011).

And ILS contends that the day-of-accident MRI shows that an acute injury was not present. But the Board reviewed at length the testimony from all doctors on that MRI, and later MRIs, before constructing a timeline which showed a rapid degeneration from the day of the accident to Langvardt's current paraplegia. In fact, the Board agreed with ILS on the initial MRI, stating as follows: "The Board concludes the claimant did not have an identifiable T6-7 herniation or spinal stenosis as of October 15, 2018." But "[t]he injury progressed and the claimant sustained the full herniation as of December 15, 2018."

Nevertheless, ILS asks us to review the evidence that the Board reviewed and considered and give greater weight to some of that evidence—the opinions of some doctors over others and the significance of the day-of-accident MRI. Thus, ILS asks us to go beyond our scope of review.

Finally, we note that ILS has failed to show that the evidence supporting the Board's decision has been so undermined by cross-examination and other evidence that the Board's evidence is insufficient to support its conclusions. See *Herrera-Gallegos*, 42 Kan. App. 2d 360, Syl. ¶ 3. Thus, ILS seeks to be excused from complying with the standard of review set out in *Herrera-Gallegos*, 42 Kan. App. 2d at 363.

Because the Board reasonably concluded from the testimony of all doctors that a thoracic spine injury "would not have happened absent the trauma [the accident], and the progression of the injury within just two months could not be explained by coincidence and the simple passage of time," we affirm the findings of the Board.

Did the Board err by including an injury that aggravated, accelerated, or exacerbated a preexisting condition?

ILS argues that the Board erred because it awarded compensation for an injury that aggravated, accelerated, or exacerbated a preexisting condition. Langvardt argues that the Board correctly found that the accident was the prevailing factor, not merely a triggering or precipitating factor.

"[I]nterpretation of the Workers Compensation Act and the administrative regulations promulgated to implement the Act's provisions are questions of law subject to de novo review." *EagleMed v. Travelers Insurance*, 315 Kan. 411, 420, 509 P.3d 471 (2022).

"The interpretation or construction of the Workers Compensation Act is a question of law. But once that interpretation or construction occurs, the ultimate question of whether an accident arises out of and in the course of employment is a question of fact. [Citation omitted.]" *Estate of Graber v. Dillon Companies*, 309 Kan. 509, 513, 439 P.3d 291 (2019). "When exercising unlimited review on questions of statutory interpretation, an appellate court owes no deference to interpretations given to the Act by the [Board]." 309 Kan. 509, Syl. ¶ 2.

K.S.A. 44-508(f)(2) limits compensable injuries as follows:

> "An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."

ILS argues that the Board erred by not addressing and applying the language at K.S.A. 44-508(f)(2). ILS contends the following: "It is clear from the record Claimant suffered extensive pre-existing problems with his back. At most, his work-place accident only accelerated or exacerbated his pre-existing injuries." But the facts—as found by the Board—render this provision inapplicable.

The Board found that Langvardt had previous fusion of his lumbar spine and age-related fusion of his cervical spine. But then Langvardt suffered a new injury to his thoracic spine. ILS refers to these issues generically in its brief as follows: "It is clear from the record Claimant suffered extensive pre-existing problems with *his back*." (Emphasis added.) By blurring the distinction between injuries, ILS misses the Board's point that causation ran in the opposite direction. Instead of finding that the accident aggravated the condition, the Board held that the condition rendered Langvardt more vulnerable to a new injury—the T6-7 herniation.

The Board discussed the evidence of how and why a T6-7 herniation resulted from Langvardt hitting his back at the opening of the trap door in the floor and his then landing on his back at the bottom. "Dr. Koreckij clarified, 'I believe the disc herniation occurred for him where it did because he unfortunately has an ankylosed spine whereby he has multiple areas of his spine fused together, which imparts, basically, two long bones.'" The Board held that Langvardt's fused lumbar spine and fused cervical spine left his T6-7 vulnerable. The Board further concluded: "However, the susceptibility of a T6-7 injury was still contingent on trauma. That trauma, the accident of October 15, 2018, was the prevailing factor in causing the claimant's injury, medical condition, disability or impairment."

Thus, ILS's argument fails because it too broadly defines the injury as "extensive pre-existing problems with his back." Langvardt had a preexisting condition in the lumbar region of his spine. But ILS points to no evidence in the record that the accident

aggravated, accelerated, or exacerbated a lumbar injury. The evidence in the record points instead to a disc herniation in the thoracic region, not the lumbar region.

The Board correctly accounted for Langvardt's preexisting condition when it held that he was vulnerable for a new injury at T6-7 in the event of trauma. The evidence supports the Board's finding, which was not that the accident aggravated, accelerated, or exacerbated Langvardt's condition. Langvardt's preexisting condition left him vulnerable to a new injury. Thus, K.S.A. 44-508(f)(2) does not apply. Because the accident injury did not aggravate, accelerate, or exacerbate Langvardt's preexisting condition, we affirm the Board's award of compensation.

Did the Board err by ordering payment of unauthorized medical expenses in excess of $500?

ILS argues that the Board erred by ordering unauthorized medical expenses in excess of $500. Langvardt argues that ILS was obligated to pay for all of his medical treatment from the point ILS knew that Langvardt's injury required further treatment.

ILS argues that it should not be responsible for Langvardt's unauthorized care because of the following: (1) that it had no notice of the injury, (2) that the injury was noncompensable, (3) that its denial of additional care was reasonable, and (4) that Langvardt should have filed a K.S.A. 44-510h(b)(1) claim for insufficient medical attention.

Part of Langvardt's treatment timeline is entirely undisputed. The accident occurred in mid-October 2018. ILS sent Langvardt to Dr. Estivo for treatment. Dr. Estivo released Langvardt from treatment as having achieved MMI in mid-January 2019. On appeal, ILS argues that it correctly and reasonably provided treatment to Langvardt for those (approximately) three months. The ALJ found no issues related to Langvardt's care

during those three months. The Board majority found no issues related to Langvardt's care during those three months. The dissenting Board member did not identify any issues during those three months. And on appeal, Langvardt does not argue that ILS failed to provide care or provided inadequate care between October 2018 and January 2019.

The issue arises from Dr. Estivo declaring that Langvardt achieved MMI in January 2019. ILS argues that its duty to provide treatment ended with Dr. Estivo's MMI opinion in January 2019. The Board majority agreed that ILS reasonably relied on Dr. Estivo's opinion. But the majority held that ILS's duty to provide treatment resumed in May 2019 when Langvardt called ILS to inform them that he required future treatment. ILS appeals this part of the majority's holding.

Two provisions in the KWCA—K.S.A. 44-510h and K.S.A. 44-510j—control the balance between an employee's rights and responsibilities in seeking treatment against the employer's rights and responsibilities in providing treatment. K.S.A. 44-510h(a) states as follows:

> "It shall be the duty of the employer to provide the services of a healthcare provider and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with K.S.A. 44-515(a), and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury."

K.S.A. 44-510h(b)(2) states as follows:

> "Without application or approval, an employee may consult a healthcare provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the

> employer shall only be liable for the fees and charges of such healthcare provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act."

And the portion of K.S.A. 44-510j(h) which is relevant to this appeal states as follows:

> "If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director."

The trigger for applying K.S.A. 44-510j(h) is for the employer to have requisite knowledge of the injury. See *Saylor*, 292 Kan. at 623. Cory Saylor had surgery to repair an injured knee. Westar argued that it should not be responsible for the unauthorized treatment because it had no notice that Saylor was claiming a work-related injury to his knee until after the medical services had already been performed. But substantial competent evidence supported the finding that Westar knew of the injury, rendering Westar liable for the cost of Saylor's knee replacement surgery. 292 Kan. at 623-24.

This court's most recent application of K.S.A. 44-510j(h) and *Saylor* comes from *Van Horn v. Blue Sky Satellite Svcs.*, No. 122,888, 2021 WL 3124167 (Kan. App. 2021) (unpublished opinion). William Van Horn was ascending stairs to install a satellite dish in a customer's home when he injured his knee. He called his employer who directed him to go to urgent care. Van Horn later required knee surgery. Blue Sky argued on appeal that it should not be required to pay for Van Horn's unauthorized care. The *Van Horn* court explained as follows: "First, K.S.A. 2020 Supp. 44-510h(a) gives the employer a duty to provide health care services. Then, K.S.A. 2020 Supp. 44-510j(h) provides the employee

with a remedy if the employer fails to carry out that duty." 2021 WL 3124167, at *9. The *Van Horn* court held that the employer's duty hinged on knowledge of the injury. An injured employee is not required to go without treatment until the employer is satisfied that the injury is a compensable work-related injury. 2021 WL 3124167, at *10.

The *Van Horn* court's reasoning was based on facts which differentiate *Van Horn* from *Evans v. Cessna Aircraft Co.*, No. 115,258, 2017 WL 1295710 (Kan. App. 2017) (unpublished opinion). After Kevin D. Evans fell at work and suffered a back injury, Cessna sent him to Dr. Estivo for treatment. After examinations, both Dr. Estivo and Dr. Stein agreed that Evans did not need surgery. But Evans unilaterally sought surgery on his back from Dr. Dickerson. The *Evans* court held that Cessna was not financially liable for the unauthorized treatment. 2017 WL 1295710, at *7-8.

The contrast between *Evans* and *Van Horn* demonstrates the importance of the operative language of "knowledge of injury" in K.S.A. 44-510j(h). In *Evans*, the employer had the opinions of two doctors declaring that surgery was unnecessary. The doctors cleared the employee as not requiring any surgical intervention to correct any condition. The employer did not know that an ongoing injury still required further treatment. In *Van Horn*, the record established that the employer knew of the injury, but disputed whether the injury should be considered a compensable work-related injury under the KWCA. All the doctors in *Van Horn* agreed that Van Horn needed knee surgery. They disagreed about whether the work accident was the cause. The employer knew that an ongoing injury still required further treatment, but it refused to provide care because it disputed whether Van Horn's injury was compensable.

ILS argues that an employer can have notice of an employee's injuries and not be liable for unauthorized treatment, citing this court's opinion in *Thompson v. Hasty Awards, Inc.*, No. 106,359, 2012 WL 1970241 (Kan. App. 2012) (unpublished opinion). But *Thompson* is factually dissimilar to this case. Donna K. Thompson suffered an injury

to her right shoulder, affecting the right side of her neck and her right arm. Her employer provided health care. But outside of her doctors' office hours, Thompson went to the emergency room with symptoms that she believed were related to a heart attack. She then submitted a bill to her employer stating that the emergency room visit was because of pain between her shoulder blades. Thus, *Thompson* is different from this case in two ways. First, Thompson's care may not have been related to her work injury, or at least the ALJ found insufficient evidence to support the need for emergent treatment of the injury. Second, Thompson's employer was providing health care and Thompson went outside of that process to get additional—perhaps unrelated—care. 2012 WL 1970241, at *9.

Similarly, ILS argues that the $500 cap applies to unauthorized expenses, citing *Mohamed v. Tyson Fresh Meats, Inc.*, No. 112,436, 2015 WL 4094333 (Kan. App. 2015) (unpublished opinion). But Tyson appointed a treating physician for Mohamed D. Mohamed's back injuries. When Mohamed expressed dissatisfaction with his doctor, Tyson authorized him to see a second doctor. Mohamed did not attend appointments and went to the emergency room instead. But the record shows that Langvardt did not miss any appointments set up by ILS to seek medical care. In both *Thompson* and *Mohamed*, the employer provided care, making those cases of limited value in analyzing whether an employer refused to provide medical care when obligated to do so.

In awarding Langvardt workers compensation, the ALJ considered the impact of K.S.A. 44-510h(b)(2) and its $500 cap on unauthorized treatment. The ALJ stated the following:

> "While not identified in the record as a separate issue, the court's finding as to prevailing factor impacts the medical bills and expenses already incurred or paid. The court finds that the expenses for remodeling the house, and purchasing a hospital bed, wheel chair and wheel chair accessible van, are all expenses that should be paid by ILS.
>
> . . . .

> "While ILS may claim that they had no duty to provide medical care and treatment after the opinions of the treating physicians, Estivo and Dickerson, it still had the right to direct medical care. If the treatment was later found to be in excess of what Langvardt was ultimately entitled to, ILS and its carrier would have been able to recover excess expenses from the Kansas Workers' Compensation Fund. K.S.A. 44-534a(b)."

The dissenting Board member agreed with the ALJ that all of Langvardt's care and treatment was ILS's responsibility. But the dissent argued a different reason—that Dr. Estivo releasing Langvardt from medical treatment in January 2019 was not reasonable because Langvardt was still using a walker due to leg weakness. The dissent asserted that ILS's duty to provide treatment never ended, making ILS responsible for all later expenses including from January to May 2019.

But a majority of the Board held that ILS reasonably relied on Dr. Estivo's opinion that Langvardt needed no additional medical treatment because he had reached maximum medical improvement in January 2019. The majority held that ILS's duty to provide care resumed when it later learned that Langvardt would incur future medical expenses.

On May 17, 2019, Langvardt appeared by telephone for a settlement hearing from Madonna Rehabilitation Hospital in Lincoln, Nebraska. Later that day, a social worker and occupational therapist advised Langvardt for the first time that he would never walk again. Langvardt immediately called ILS Vice President and HR Manager Paul Norbert. Langvardt stated that he wanted to get out of the settlement agreement because of the future medical expenses that he would incur because of his work accident. The ALJ quoted Langvardt's testimony as follows:

> "I told Norbert—he told me that he still had the check in his desk drawer. And I said, don't send it, I don't want it. I have to see if I can get this settlement reversed. I told him that if we can't do something, we're going to go bankrupt, because we can't afford all these—everything and the ongoing medical. So he said he would not send it. He said, of

> course you know you've got some doctors that say it's not related. And I told Norbert, I said Norbert, you and I both know in all honesty that if I don't fall at work on October 15th, 2018, none of this other stuff ever even happens, it's not—it's not an issue, I'm still at my desk working. And he didn't say anything, but I know he agreed with me. He just didn't say it."

The majority held that ILS's obligation to provide treatment resumed when that phone call on May 17, 2019, occurred. "At the time, the respondent had the right to direct medical treatment, but did nothing. The claimant was within his rights to pursue treatment on his own behalf." It noted that Dr. Estivo released Langvardt from treatment as having achieved MMI in January. Then Langvardt made this phone call on May 17, 2019. In between those two events, "[t]here is no evidence of a conversation, email, text message, or any other communication between the claimant and the respondent in which the claimant asked for additional medical treatment."

The Board correctly held that ILS did not know—and had no reason to know—of the ongoing injury and the need for further treatment between January and May 2019. An employer cannot refuse or neglect to reasonably provide services unless it knows of an injury which requires services. K.S.A. 44-510j(h); *Evans*, 2017 WL 1295710, at *6-7. ILS did not have the requisite knowledge between when Dr. Estivo declared Langvardt at MMI and when Langvardt called ILS to say that further care was needed.

But, as in *Saylor* and *Van Horn*, the requisite knowledge of injury triggers the application of K.S.A. 44-510j(h). *Saylor*, 292 Kan. at 623. The injured employee does not need to show more than that the employer knew of the injury before receiving treatment. The plain text of K.S.A. 44-510j(h) does not require the employee to wait for a determination of a compensable work-related injury before treating the condition. *Van Horn*, 2021 WL 3124167, at *10. ILS knew of the injury and of the need for treatment on May 17, 2019, but refused or neglected to provide health services as contemplated by

K.S.A. 44-510j(h). Because the Board correctly determined the date when ILS had a duty to provide services, ILS's argument fails.

ILS's final argument to avoid this conclusion relates to K.S.A. 44-510h(e). ILS claims that the Board failed to apply the presumption that an award of future medical expenses terminates when the employee reaches MMI. ILS argues that Dr. Estivo declared Langvardt at MMI, terminating the employer obligation to provide services. But K.S.A. 44-510h(e) simply does not apply. In February 2022, the ALJ awarded Langvardt past medical expenses, both authorized and unauthorized, including the expenses at issue here. In that same order, the ALJ also applied K.S.A. 44-510h(e) and awarded future medical expenses, that is, from the date of the order going forward. ILS cites no legal authority applying K.S.A. 44-510h(e)—a provision governing *future* medical expenses—to expenses which occurred *before* the ALJ's award. ILS's argument on K.S.A. 44-510h(e) is inapplicable here. Thus, ILS's argument fails.

Is Innovative Livestock entitled to a credit for payment of unearned wages?

ILS argues that it paid Langvardt unearned wages while he was receiving treatment and is entitled to receive a credit for those paid wages. Langvardt argues that the Board correctly held that the credit can apply only to a settlement or future wages, neither of which are at issue here.

K.S.A. 44-510f(b) states the following:

> "If an employer shall voluntarily pay unearned wages to an employee in addition to any amount of disability benefits to which the employee is entitled under the workers compensation act, the excess amount paid:
>
> (1) Shall be allowed as a credit to the employer in any final settlement, or
>
> (2) may be withheld from the employee's wages in weekly amounts equal to the weekly amount or amounts paid in excess of compensation due."

ILS notes that Langvardt did not return to work in January 2019, but it continued to pay his wage. Then in April 2019, the parties formalized an arrangement in a written contract. Langvardt agreed he would settle his workers compensation case in exchange for receiving wages and benefits until August 2019. Langvardt disputes whether those wages were "voluntarily" paid because an agreement obligated ILS to pay. Thus, Langvardt argues, ILS would not be entitled to a credit for wages paid between April and August 2019.

While the ALJ held that the payments were not "voluntary" and therefore not eligible for credit, the Board correctly held that it does not matter. K.S.A. 44-510f(b) only allows for a credit to be applied to two possible forms of payment: a settlement, or future wages. ILS asked for a credit for unearned wages to apply against the award entered in a litigated claim. But an ALJ's final award is neither a settlement nor future wages. K.S.A. 44-510f(b)(1)-(2).

The Workers Compensation Appeals Board is entirely a creature of statute, with only as much power as granted by the Legislature. See *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 895, 451 P.3d 459 (2019) (holding that the Board had no authority to correct an obvious error in a rule created by the Director of Workers Compensation because no statutory authority gave the Board the power to correct errors in regulations). The Board correctly held that—even assuming ILS was entitled to a credit—it had no mechanism for applying the credit to the award of compensation. "The respondent is commendable for having paid unearned wages. However, the Kansas workers compensation statutory system is not worded to allow a credit for the payment of unearned wages, so no credit may be awarded." The Board was correct that K.S.A. 44-510f(b) is not worded to allow a credit for the payment of unearned wages applied to a workers compensation award. Because the plain language of the statute does not allow the relief ILS is seeking, we affirm the Board.

For the preceding reasons, we affirm.

Affirmed.