NOT DESIGNATED FOR PUBLICATION

No. 125,584

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MARK FARMER,
Appellee,

v.

SOUTHWIND DRILLING, INC.,
Appellant,

and

BITCO GENERAL INSURANCE CORP.,
Appellant.

MEMORANDUM OPINION

Appeal from Workers Compensation Appeals Board. Oral argument held October 17, 2023. Opinion filed December 1, 2023. Affirmed.

Dallas Rakestraw and *P. Kelly Donley*, of McDonald Tinker PA, of Wichita, for appellants.

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

Before WARNER, P.J., ATCHESON, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: Southwind Drilling, Inc., appeals the amount awarded to Mark Farmer by the Workers Compensation Appeals Board. Because Farmer was injured in the first week of employment, a specific statute applied requiring his average weekly wage be determined "based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer . . . . The average weekly wage so determined shall not exceed the actual average weekly wage the employee was reasonably expected to earn in the employee's specific employment." K.S.A. 2018 Supp.

44-511(b)(2). The administrative law judge (ALJ) and Board disagreed on how to interpret this statute. The ALJ based its award on the earnings Southwind paid employees doing the same job in the 26 weeks preceding Farmer's injury. The Board based its decision on the earnings Southwind paid those employees the week following Farmer's injury, or, in other words, what Farmer could have reasonably expected to earn that week.

FACTUAL AND PROCEDURAL HISTORY

Southwind is an oil contractor that drills oil wells throughout Kansas. On January 4, 2019, to better recruit and retain employees, Southwind gave every employee a $6 per hour pay raise.

On April 4, 2019, Farmer began working for Southwind as an evening tower floor hand on rig 1. The next day, a chain wrapped around his right wrist, jerking his right arm. Farmer sustained a 20% functional impairment to his right upper extremity. Had Farmer not been injured, he could have worked eight hours a day his first week earning $21 per hour.

To determine Farmer's average weekly wage under K.S.A. 2018 Supp. 44-511(b)(2), the ALJ considered the earnings Southwind paid evening tower floor hands on rig 1 in the 26 weeks preceding Farmer's injury. Before the January 4 wage increase, floor hands earned $15 per hour. When Farmer started work, floor hands earned a rate of $21 per hour. Taking both rates into consideration, the ALJ found Farmer earned an average weekly wage of $634.16.

Farmer appealed the ALJ's decision to the Board. The Board disagreed with how the ALJ interpreted K.S.A. 2018 Supp. 44-511(b)(2), which directs how to calculate a worker's average weekly wage when the worker was injured in the first week of employment. The Board ruled the statute did not require the use of pre-injury wages to

determine the worker's average weekly wage. The Board instead used the wages Farmer could have expected to earn in the week following his injury if he had not been injured. The Board determined the $21 per hour rate was more representative of what Farmer was reasonably expected to earn. The Board found Farmer earned an average weekly wage of $1,092.

Southwind appeals.

ANALYSIS

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 (Act), K.S.A. 44-501 et seq. K.S.A. 44-556(a). Under the KJRA, this court can grant relief if it determines the Board "erroneously interpreted or applied the law" or the Board's action was based on a determination of fact not supported by substantial evidence. K.S.A. 77-621(c)(4), (c)(7).

I. *Did the Board erroneously interpret K.S.A. 2018 Supp. 44-511(b)(2)?*

Southwind contends the Board ignored the plain language of the statute requiring Farmer's average weekly wage be calculated based on the usual wages Southwind paid to evening tower floor hands preceding Farmer's injury, and instead relied on Farmer's speculative future wages. According to Southwind, the Board's interpretation will lead to inequitable outcomes because if one of Farmer's coworkers who had worked for Southwind for more than six months had been injured on the same date as Farmer, that worker's average weekly wage would be calculated using, in part, the $15 per hour rate the worker earned prior to January 4. Southwind argues for subsections (1) and (2) of K.S.A. 2018 Supp. 44-511(b) to be brought into workable harmony, they both must be interpreted to require consideration of wages paid in the 26 weeks preceding the date of

injury. It further insists the 2011 amendments to K.S.A. 44-511(b) shows an intent by the Legislature to depart from the prior method used to calculate average weekly wages based on speculative wages to one based on wages actually paid.

Farmer contends the plain language of K.S.A. 2018 Supp. 44-511(b)(2) grants the finder of fact wide latitude to consider pre- or post-injury wages to determine the worker's average weekly wage. Farmer points out the plain language states the average weekly wage is to be based on all the evidence and circumstances. The only limitation contained in the statute is the average weekly wage cannot exceed what the employee was reasonably expected to earn.

Interpretation of the Act is a question of law subject to de novo review. *EagleMed v. Travelers Insurance*, 315 Kan. 411, 420, 509 P.3d 471 (2022). The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *Johnson v. U.S. Food Service*, 312 Kan. 597, 600, 478 P.3d 776 (2021). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. *Schmidt v. Trademark, Inc.*, 315 Kan. 196, 200, 506 P.3d 267 (2022). Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *In re Joint Application of Westar Energy & Kansas Gas and Electric Co.*, 311 Kan. 320, 328, 460 P.3d 821 (2020).

When construing statutes to determine legislative intent, appellate courts must consider various provisions of an act *in pari materia* with a view of reconciling and

bringing the provisions into workable harmony if possible. *Bruce*, 316 Kan. at 224. The courts must construe statutes to avoid unreasonable or absurd results and presume the Legislature does not intend to enact meaningless legislation. When the Legislature revises an existing law, the court presumes that the Legislature intended to change the law as it existed before the amendment. *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 165-66, 473 P.3d 869 (2020). A specific provision within a statute controls over a more general provision within the statute. *In re E.J.D.*, 301 Kan. 790, 794, 348 P.3d 512 (2015).

K.S.A. 2018 Supp. 44-511(b) directs how to determine an injured worker's average weekly wage for the purpose of computing benefits under the Act. Subsection (b)(1) governs most cases, where the injured worker had worked for the employer more than one calendar week. In such case, the computation is a straight-forward calculation based on the wages the employee actually earned during the weeks immediately preceding the injury:

> "Unless otherwise provided, the employee's average weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be." K.S.A. 2018 Supp. 44-511(b)(1).

Subsection (b)(2) only applies to cases where the worker was injured in the first week of employment. The ALJ is directed to consider "all of the evidence and circumstances" including "the usual wage for similar services paid by the same employer" not to exceed the wage the employee "was reasonably expected to earn."

> "(2) *If actually employed by the employer for less than one calendar week immediately preceding the* accident or *injury, the average weekly wage shall be determined* by the administrative law judge *based upon all of the evidence and*

> *circumstances, including the usual wage for similar services paid by the same employer*, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. *The average weekly wage* so determined *shall not exceed the actual average weekly wage the employee was reasonably expected to earn in the employee's specific employment*, including the average weekly value of any additional compensation." (Emphases added.) K.S.A. 2018 Supp. 44-511(b)(2).

In this case, the ALJ based Farmer's average weekly wage on evidence of what other floor hands for Southwind actually earned in the 26 weeks immediately preceding Farmer's injury. During part of that timeframe, floor hands earned $15 per hour, rather than the $21 per hour rate Farmer started at. The ALJ stated its decision was based on "the 'usual wage for similar services' actually paid by Southwind."

> "The court has considered the evidence presented as to what floor hands for Southwind were actually earning in the twenty-six weeks preceding April 5, 2019. If one of Farmer's coworkers at Southwind had suffered a work injury at the same time as Farmer, and if the coworker had been employed for twenty-six weeks, his gross average weekly wage would have been computed by aggregating his wages and dividing by the number of weeks actually worked. Some of those wages in the twenty-six weeks preceding April 5, 2019 would have been paid at the lower rate of $15.00 per hour. Farmer argues that his wages should be computed based solely on $21.00 per hour, the hourly wage he was earning at the time of the accident. That would result in Farmer having a significantly higher gross average weekly wage than a coworker injured at the same time as Farmer. Farmer wants his wage computed based on projections of what he would have made, or may have made, rather than what a similarly placed coworker, earning the same floor hand wage, actually earned. The court will, instead, base Farmer's gross average weekly wage on the 'usual wage for similar services' actually paid by Southwind.
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> "The court finds and concludes that Farmer's gross average weekly wage for the 26 weeks preceding the April 5, 2019 work accident was $634.16."

The Board concluded K.S.A. 2018 Supp. 44-511(b)(2) granted the trier of fact "wide latitude" in determining the worker's average weekly wage. The Board disagreed with the ALJ's analysis, finding the evidence concerning what Farmer would have earned the week immediately following his injury, if he had not been injured, was "more representative" of what Farmer "could reasonably expect to earn" for an average weekly wage.

> "The ALJ found Claimant's average weekly wage is $634.16. The ALJ looked at the wages actually earned by floor hands for the 26 week period prior to Claimant's injury. This fails to take into consideration the hourly pay increase, from $15 per hour to $21 per hour, implemented by Respondent in an attempt to halt their high turnover rate. A $6 per hour pay increase is significant and cannot be ignored. For example, assuming a 40 hour work week, an individual would earn $240 more per week at $21 per hour as opposed to $15 per hour. Under the ALJ's analysis, over one-half of the 26 week time frame would be paid at the $15 per hour wage.
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> "Ms. Suchy testified, had Claimant not been injured, he would have worked eight hours a day, earning $21 an hour, and 8 hours of overtime earning $31.50, or $1,092 from April 5 through April 10, 2019 (immediately following Claimant's injury). Various employees worked Claimant's floor hand position during this time frame. They were paid the amount set forth above.
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> "K.S.A. 44-511(b)(2) grants the trier of fact wide latitude in determining an injured worker's average weekly wage when the worker has been employed for less than one calendar week. The ALJ chose to look at the wages earned by other floor hands for the 26 week time frame prior to Claimant's injury. The statute does not require a finding based on pre-injury wages. The Board disagrees with the ALJ's analysis because it disregards the significant hourly wage increase made on January 17, 2019. The Board finds the earnings made by Claimant's co-workers the week following his injury, and confirmed through the testimony of Ms. Suchy, is more representative of what Claimant could reasonably expect to earn for an average weekly wage. The Board finds Claimant's average weekly wage is $1,092."

The plain language of K.S.A. 2018 Supp. 44-511(b)(2) directs the fact-finder to consider all of the evidence and circumstances.

K.S.A. 2018 Supp. 44-511(b)(2) is unambiguous. The best indication of the Legislature's intent is the use of the word "all." The statute directs the fact-finder to consider "all of the evidence and circumstances," then says "including" the usual wage paid for similar services. K.S.A. 2018 Supp. 44-511(b)(2). It does not say to only consider the usual wage paid for similar services in the 26 weeks preceding the worker's injury. If the Legislature had intended the ALJ to only consider the usual wage paid for similar services in the weeks preceding the worker's injury, it would have just said so like it did in subsection (b)(1). And it would have excluded the language "all of the evidence and circumstances." K.S.A. 2018 Supp. 44-511(b)(2).

The plain language of K.S.A. 2018 Supp. 44-511(b)(2) also does not require the fact-finder to use 26 weeks of wages to determine the usual wage paid for similar services. Presumably the ALJ decided to use 26 weeks of wages because of the language in subsection (b)(1), even though subsection (b)(1) says "up to" 26 weeks. The Board decided that excluding the period before the wage increase was more representative of what Farmer was reasonably expected to earn. The statute is broad enough to permit the fact-finder to consider evidence concerning the amount the injured worker was specifically expected to earn the week of the injury if the worker had not been injured. That is what the Board did here.

One panel of this court recently recognized that K.S.A. 2020 Supp. 44-511(b)(1) and K.S.A. 2020 Supp. 44-511(b)(2) create "alternative preinjury average weekly wage calculation method[s]." *Morris v. Shilling Construction Co. Inc.*, No. 123,297, 2021 WL 5751704, at *16 (Kan. App. 2021) (unpublished opinion). The issue in *Morris* was whether K.S.A. 2020 Supp. 44-511(b)(1) required the ALJ to include all weeks that Morris worked in his average weekly wage calculation, including those weeks he worked

part time rather than full time. The panel noted that by using the term "'actually worked'" in subsection (b)(1), the Legislature intended that any week the worker worked for the employer be included in the average weekly wage calculation. 2021 WL 5751704, at *16. The panel stated the use of an alternative average weekly wage calculation method in subsection (b)(2) indicated the Legislature understood how to create alternative average weekly wage calculation methods for part-time work if it had so intended. 2021 WL 5751704, at *16. So, while *Morris* is not controlling precedent in that it did not consider how to interpret subsection (b)(2), the panel recognized the two subsections created alternative average weekly wage calculation methods.

In *Bowles v. TAP Enterprises, Inc.*, No. 106,964, 2012 WL 2149910, at *3-4 (Kan. App. 2012) (unpublished opinion), another panel of this court discussed the "'was reasonably expected to earn'" statutory language from an earlier version of this statute. The case did not involve a worker injured in the first week of employment, but the analysis is persuasive. The panel compared earlier versions of K.S.A. 2018 Supp. 44-511(b)(1) and K.S.A. 2018 Supp. 44-511(b)(2), and the analysis can be applied to the statutes in their current form. The *Bowles* panel explained the difference:

> "It is apparent that the legislature considered the calculation of the average weekly wage of an employee who worked at least 1 week to be a straightforward arithmetic calculation of dividing total pay by number of weeks worked. That calculation does not call upon the hearing officer or the Board to exercise any judgment or discretion in deciding what to consider in making it. Thus, the legislature chose the verb 'shall be' to describe this straightforward calculation.
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> "On the other hand, the legislature realized that the calculation is not so simple when an employee has worked less than 1 week for the employer. The legislature could have required a calculation similar to the one in sentence 1 that extrapolates the employee's pay for the few days worked to a full weeks' pay. But it chose a different method: the calculation of the average weekly wage based upon evidence and circumstances, including the usual wage paid for similar services. This is not the straightforward arithmetic calculation called for in sentence 1. The hearing officer and

> the Board are required to exercise judgment in identifying the relevant evidence and circumstances bearing upon the issue of what the employee's average weekly wage would have been had the employee worked for at least 1 week." 2012 WL 2149910, at *3-4.

The Board has at least five times considered the average weekly wage for a worker injured during the first week of employment. In one case, the Board calculated the claimant's average weekly wage by using a wage statement for an employee performing similar services for the employer. The wage statement covered a 26-week period running from about three months before to three months after the claimant's injury. *Harlan v. USF Holland, Inc.*, No. 1,054,886, 2013 WL 1384388, at *8 (Kan. Work. Comp. App. Bd. March 5, 2013).

In three cases, the Board calculated the claimant's average weekly wage based on testimony concerning what the claimant was expected to earn the first week of employment if the claimant had not been injured. *Olden v. Treescape & Irrigation, Inc.*, No. 233,582, 2001 WL 1725725, at *3 (Kan. Work. Comp. App. Bd. December 28, 2001); *Ghaedsharafi v. St. Louis Bread Co.*, No. 230,922, 1999 WL 722509, at *2 (Kan. Work. Comp. App. Bd. August 12, 1999); *Perryman v. ABF Freight Systems*, No. 214,180, 1998 WL 462633, at *1, 3 (Kan. Work. Comp. App. Bd. July 8, 1998).

In another case, the Board found the best evidence of the claimant's average weekly wage was testimony that part-time employees "generally worked approximately 30 hours per week" over the evidence of what claimant actually earned the five days he worked for the employer because two of those days were after claimant's injury "and would not be used to calculate a preinjury wage." *Henderson v. Shawnee County*, No. 227,046, 1999 WL 1113635, at *1, 3 (Kan. Work. Comp. App. Bd. November 18, 1999).

From these cases, it is apparent that the majority approach is what the Board did here, i.e., determine what the worker was expected to earn the first week of employment

if the worker had not been injured. But the statute does not require that approach. The fact-finder must consider all the relevant evidence and circumstances presented. In some cases, the best evidence of the worker's average weekly wage may be testimony concerning what the worker was expected to earn that first week. In other cases, the best evidence may be employment records for similarly situated employees in the weeks preceding the injury. The fact-finder must consider "all of the evidence and circumstances." K.S.A. 2018 Supp. 44-511(b)(2).

The Board recognized the wide latitude authorized by K.S.A. 2018 Supp. 44-511(b)(2). Its interpretation of the statute was not error.

Different outcomes are inevitable.

Southwind's concern about so-called "inequitable results" between the application of K.S.A. 2018 Supp. 44-511(b)(1) and (b)(2) is inevitable in cases where there was a pay increase at some point. K.S.A. 2018 Supp. 44-511(b)(1) bases the worker's average weekly wage on actual time worked for "up to" 26 calendar weeks. If another employee of Southwind had been doing the same job as Farmer for over 26 weeks and had been injured on the same day as Farmer, that employee's average weekly wage would have included both the $15 per hour and $21 per hour rate. By contrast, if an employee performing the same job was injured after working exactly one calendar week, that employee's average weekly wage likely would be determined under K.S.A. 2018 Supp. 44-511(b)(2) based on only that one week's wages at $21 per hour.

Workable harmony does not mean the calculation methods must be the same.

Subsections (b)(1) and (b)(2) can be brought into workable harmony without interpreting them the same. As stated above, determining the average weekly wage of an employee who worked at least one week for the employer is a straightforward

mathematical calculation of dividing total pay by number of weeks worked. That calculation does not call upon the hearing officer or the Board to exercise any judgment or discretion. However, the calculation is more complicated when an employee worked less than one week for the employer. In such case, the hearing officer and the Board must exercise judgment and identify the relevant evidence and circumstances from the evidence presented at the hearing. See *Bowles*, 2012 WL 2149910, at *3-4. The available evidence might be different in different cases.

The 2011 amendments did not materially alter the language at issue here.

While the 2011 amendments made significant changes to the calculation of average weekly wages for most cases, the amendments did not materially alter the language at issue in this case. The amendments merely expanded the applicability of the language to all workers injured in the first week of employment, regardless of what metric their money rate was fixed by (year, month, week, hour, commission, flat-rate for a specific job, etc.). The changes to K.S.A. 44-511(b) are illustrated here:

> ~~"(5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection.~~
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> "(2) If ~~the employee had been in the employment of~~ actually employed by the employer for less than one calendar week immediately preceding the accident or injury, the average ~~gross~~ weekly wage shall be determined by the administrative law judge based upon all of the evidence and circumstances, including the usual wage for similar services

> paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average ~~gross~~ weekly wage so determined shall not exceed the actual average ~~gross~~ weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation. ~~and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.~~" L. 2011, ch. 55, § 13.

The *Bowles* panel considered whether the 2011 amendments changed the meaning of this provision concerning the reasonable earnings expectation for a worker employed for less than a week. The panel concluded the amendment did not signal a change from the Legislature's prior intent. 2012 WL 2149910, at *4.

In sum, the Board did not err in its interpretation of K.S.A. 2018 Supp. 44-511(b)(2).

II. *Did the Board erroneously apply K.S.A. 2018 Supp. 44-511(b)(2) to the facts?*

Southwind briefly argues the Board erred by assigning Farmer an average weekly wage in excess of the actual average weekly wage he was reasonably expected to earn. Southwind bases its argument on the wages that Farmer actually earned after returning to work in September 2019. Southwind admits in its reply brief that the statute "allows the finder of fact to consider an array of evidence and circumstances when calculating the AWW of an employee injured during the first week of employment." Southwind does not actually contest any of the factual findings made by the Board.

Farmer contends the Board did not err because its average weekly wage determination was supported by the testimony of Jill Suchy—vice president of operations

for Southwind—concerning what amount Farmer was expected to earn the week immediately following his injury.

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); *Koppa v. Interim Health Care of Wichita*, No. 111,592, 2015 WL 1124693, at *7 (Kan. App. 2015) (unpublished opinion) (ruling the record failed to reflect substantial competent evidence supporting the Board's average weekly wage calculation).

When the appellant argues the Board erroneously applied the law to undisputed facts, appellate courts exercise de novo review. *Mera-Hernandez v. U.S.D. 233*, 305 Kan. 1182, 1185, 390 P.3d 875 (2017).

Implicit in K.S.A. 2018 Supp. 44-511(b)(2) is that the worker's average weekly wage is to be based on the wages the worker would have earned if the worker had not been injured. The worker's average weekly wage is not based solely on the wages that the worker actually earned like in subsection (b)(1). To base the average weekly wage on the amount the worker earned after being injured would frustrate the purpose of the Act. The language "reasonably expected to earn" means expected to earn if the worker had not been injured. K.S.A. 2018 Supp. 44-511(b)(2). Southwind's argument has no merit.

The Board's interpretation is consistent with the statute, and substantial competent evidence supports the Board's decision.

Affirmed.