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January 30, 2017

Dear Kansas Legislature:

My name is Keith Mark, and I have practiced in the area of workers' compensation for my entire law career – the first 7 years being exclusively on the defense side and the last 24 years on the claimant's side. I am honored to have the opportunity to address this Committee and will restrict my remarks to the issue of the practical and constitutional impact of the Kansas Legislature mandating the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* be strictly utilized in assigning permanent impairment in all Kansas workers' compensation claims.

When the law mandating the *AMA Guides 6th Edition* was initially passed on a partisan basis, no one fully vetted the contents of the *AMA Guides 6th Edition*. My understanding is the Legislature was advised by certain special interest groups that moving from the *AMA Guides 4th Edition* to the *AMA Guides 6th Edition* was simply the "latest, greatest update." Just prior to, and shortly after, the statute coming into effect in January of 2015, a number of individuals from business and labor fully studied the *Guides* and recognized the potential problems the *AMA Guides 6th Edition* could bring to Kansas.

The consensus among most who studied the application of the *AMA Guides 6th Edition*, including the architect of most all of the recent Kansas workers' compensation statutory changes, defense attorney Fred Greenbaum, Secretary of State Kris Kobach, Constitutional Law expert from Washburn University School of Law Bill Rich, and many others, was that the implementation of the *AMA Guides 6th Edition* would render Kansas workers' compensation laws unconstitutional. A bill was introduced two years ago to rectify these looming concerns and despite the testimony from the above, the bill was tabled. The special interest groups convinced the Kansas Legislature there was no chance the *AMA Guides 6th Edition* would be determined unconstitutional. However, within three months of its implementation, a Kansas worker was involved in an on-the-job accident which will prove the implementation of the law mandating the *AMA Guides 6th Edition* is unconstitutional.

Francisco Pardo, a 13-year employee of UPS, on March 18, 2015, was involved in a slip-and-fall accident in which he injured his left shoulder due to the negligence of UPS and their failure to provide a safe working environment by not cleaning up oil and grease on equipment, even though they had been put on notice of this dangerous condition prior to Mr. Pardo's accident. As a result of the accident, Mr. Pardo sustained a partial-thickness rotator cuff tear in his left shoulder. Mr. Pardo had sustained a partial-thickness rotator cuff tear back in 2013, also while working at UPS in a compensable work-related accident.

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UPS' chosen authorized treating physician, Dr. Mark Rasmussen, performed a left shoulder surgery on Mr. Pardo subsequent to his most recent accident. Dr. Rasmussen performed the 2013 surgery, so he had the benefit of full knowledge of Mr. Pardo's overall injuries. Dr. Rasmussen testified that Mr. Pardo had sustained a compensable workers' compensation injury in his March 18, 2015 accident and that the work accident had caused new structural damage, namely a partial-thickness rotator cuff tear on the opposite end of the tendon from where the previous tear had occurred. Dr. Rasmussen also testified that as a result of the compensable injury, surgery was performed and Mr. Pardo was left with documented pain and loss of physiological function. Dr. Rasmussen further testified that although he did not believe it to be a fair representation of Mr. Pardo's impairment, the *AMA Guides 6th Edition* mandated he issue a 0% rating.

Based on the uncontroverted evidence that Mr. Pardo sustained a compensable injury, required surgical intervention, had documented structural damage and was left with residual symptoms, Administrative Law Judge Steven J. Howard issued an award denying Mr. Pardo any disability compensation. The matter was appealed to the Kansas Workers' Compensation Appeals Board, and on October 26, 2016, they affirmed Judge Howard's Award providing Mr. Pardo with no permanent disability benefits in this claim.

In its decision, the Appeals Board stated, "It is true claimant was afforded no economic recovery for permanent impairment stemming from his compensable workers' compensation injury, other than payment of medical and temporary total disability benefits. However, the Board is not a court established pursuant to Article 3 of the Kansas Constitution and does not have the authority to hold an act of the Kansas Legislature unconstitutional." There is a concurring opinion from Board Member Thomas Arnhold. After giving a constitutional history and applying the Kansas Constitution to the facts in the *Pardo* case, he stated, "**For the foregoing reasons, if the undersigned Board Member had the authority and jurisdiction to do so, he would declare the portion of K.S.A. 2014 44-510d(b)(23) requiring use of the *AMA Guides*, as applied to the claimant, unconstitutional.**"

The *Pardo* case is now on appeal to the Court of Appeals, and both the claimant **and** UPS have requested the Kansas Supreme Court accept and rule on the *Pardo* case without the necessity of going through the Court of Appeals. In his petition to the Supreme Court, Mr. Pardo contends that as Section 18 of the Kansas Bill of Rights states, "All persons, for injuries suffered in person, reputation or property, shall have remedy by course of law..." the Workers' Compensation Act is based on quid pro quo, whereby an injured worker trades his right to recover in tort for an adequate substitute recovery amount in the workers' compensation system. Accordingly, a covered worker with a covered injury must recover some amount of money through the workers' compensation system.

As Mr. Pardo was denied an economic recovery, he is requesting the Supreme Court to rule the exclusive remedy rule does not apply to him and that he be allowed to file a direct negligence action against UPS in District Court. In fact, a Petition for Damages pursuant to K.S.A. 60 has been filed in the District Court of Johnson County, Kansas, Civil Court Department, on behalf of Mr. Pardo against UPS arising out of this work accident.

Mr. Pardo is one of more than a dozen cases like him which we have in our office and will be pursuing District Court remedies directly against negligent employers in Kansas due to the implementation of the *AMA Guides 6th Edition*.

This is an easy fix. A switch back from the *AMA Guides 6th Edition* to the *AMA Guides 4th Edition* will resolve the immediate problem of unconstitutionality, which the State of Kansas now faces with regard to its Workers' Compensation Act. The chaos and economic uncertainty, which will exist across the State of Kansas when employers are held personally and financially responsible in District Court for work-related accidents, will be devastating to the Kansas economy.

On behalf of Kansas injured workers and employers, who will no doubt be exposed to civil lawsuits, I implore this Legislature to do the right thing and switch back to the *AMA Guides 4th Edition*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K L Mark', with a stylized flourish at the end.

Keith L. Mark

Attachments:

Kansas Appeals Board Order dated October 26, 2016

Kansas Court of Appeals-Petition for Judicial Review dated November 22, 2016

District Court of Johnson County – Civil – Petition for Damages

ISSUES

Claimant contends he sustained a compensable injury arising out of his March 18, 2015, work accident. Further, claimant states he sustained new structural damage to his left shoulder. Claimant argues, "Unfortunately, the Court is bound to follow K.S.A. 44-510e(a)(2)(B) which, in the infinite wisdom of the Kansas legislature, applies to all work-related injuries that occur subsequent to January 1, 2015, which provide the claimant with a zero permanent partial impairment rating."² Claimant argues the exclusive remedy rule of the Kansas Workers Compensation Act is unconstitutional as applied to him after the statutory adoption of the *AMA Guides*, 6th Edition.

Respondent agrees claimant sustained a compensable injury arising out of and in the course of his employment. Respondent asserts that, based on the evidence, the Board must decide whether the *AMA Guides*³ should be literally construed or whether a physician may incorporate his professional opinion in assessing a rating.

The issue for the Board's review is: is a literal application of the *AMA Guides* unconstitutional as applied to claimant?

FINDINGS OF FACT

Claimant has been employed by respondent for 12 years as a feeder driver. In this position, claimant drives tractor-trailers, picks up and delivers loads, and works in the yard with a spotter. A spotter is a device which remains in the yard and is used to move trailers to different locations onsite. On March 18, 2015, claimant was climbing onto the spotter in the course of his job duties when he slipped on oil and grease buildup. Claimant indicated he was holding the spotter's railing with his left arm when he fell, jerking his left arm. Claimant testified he felt a pop and pull in his left shoulder. Claimant immediately reported the incident and was sent for medical treatment.

Claimant had a prior injury to his left shoulder on July 11, 2013. Claimant underwent left shoulder arthroscopic surgery with board certified orthopedic surgeon Dr. Mark Rasmussen on August 29, 2013. Dr. Rasmussen repaired a partial thickness rotator cuff tear and performed an extensive labrum repair. Dr. Rasmussen released claimant to full duty work and assessed an impairment rating of 10 percent to claimant's left shoulder based upon the labral pathology and the partial thickness rotator cuff tear.

² Claimant's Brief (filed Sept. 6, 2016) at 13.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

Following the March 18, 2015, accident, claimant was referred to KU MedWest, where he was treated conservatively. On April 8, 2015, Dr. Rasmussen examined claimant and noted complaints of pain in the subacromial region. Dr. Rasmussen ordered an MRI. The MRI was essentially inconclusive. Dr. Rasmussen explained an MRI is often inconclusive when a patient had prior surgery because "there can be different pathology abnormalities that are related to previous surgeries."⁴ Dr. Rasmussen provided a steroid injection to claimant's shoulder, which provided minimal relief. Dr. Rasmussen eventually performed a repeat arthroscopic procedure on June 4, 2015.

During the procedure, Dr. Rasmussen found labral pathology in claimant's left shoulder, estimating over 50 percent of this pathology was related to claimant's 2013 surgery. Dr. Rasmussen also found a new partial thickness rotator cuff tear. Dr. Rasmussen testified that, within a reasonable degree of medical certainty, this tear was a new finding and related to claimant's March 18, 2015, accident. Dr. Rasmussen explained the new tear was in a different location than the one repaired in 2013 and "was not in direct connection with the original tear."⁵ Dr. Rasmussen surgically repaired the new tear in addition to performing an acromioplasty to help resolve impingement of the rotator cuff.

Claimant continued to follow up with Dr. Rasmussen following surgery. He was released to full duty work by August 26, 2015, though he continued to complain of pain and limited range of motion. Claimant returned to Dr. Rasmussen on October 26, 2015, when his range of motion was further diminished. Dr. Rasmussen noted these findings were inconsistent when compared to his previous range of motion measurements, and could have been because claimant was performing relatively strenuous work duties.

Dr. Rasmussen again saw claimant on November 23, 2015. At that time, claimant's range of motion was greatly improved, but not normal. Claimant complained of hand pain, some headaches, and continuing left shoulder pain, particularly with overhead activity. Dr. Rasmussen opined the cause of claimant's continuing pain was the March 2015 work accident. Dr. Rasmussen released claimant at maximum medical improvement (MMI) on November 23, 2015, noting claimant felt he was ready to be released.

Dr. P. Brent Koprivica examined claimant on December 17, 2015, at claimant's counsel's request. Claimant complained of significant ongoing symptoms with his left shoulder, including loss of strength, cramping, straining, and significant ongoing limited motion. Dr. Koprivica reviewed claimant's medical records, history, and performed a physical examination. He noted claimant was cooperative and demonstrated appropriate pain behaviors. Dr. Koprivica wrote:

⁴ Rasmussen Depo. at 19.

⁵ *Id.* at 26.

There is pain and weakness in the left shoulder during the clinical examination. I would note that there is significant variation in the demonstrated motion today compared to the motion measurements documented by Dr. Rasmussen.⁶

Dr. Koprivica found claimant's March 28, 2015, work injury to be the prevailing factor in his new left shoulder structural injury, specifically, the new partial thickness rotator cuff tear for which arthroscopy was performed. Dr. Koprivica found claimant to be at MMI, but indicated claimant would require future medical treatment. Dr. Koprivica wrote:

Of note, [claimant] clearly has new objective structural physical impairment based on evidence at the time of surgery of new partial-thickness rotator cuff injury that has been treated. There is new impact on activities of daily living based on this, in terms of limiting his tolerance to activities requiring use of his left shoulder.

Despite this fact of clear-cut loss of ability to do activities of daily living, it is outlined on Page 23 in the [AMA Guides] Sixth Edition, "Rating permanent impairment by analogy is permissible only if The Guides provide no other method for rating objectively identifiable impairment."

In this case, the [AMA Guides] does specifically address [claimant's] clinical situation.

...

As specifically noted in Table 15-5 on Page 402, in the [AMA Guides], regarding the shoulder regional grid for upper extremity impairments, for a rotator cuff injury, with a partial-thickness tear with history of painful injury, with residual symptoms without consistent objective findings, a zero to two (0 to 2) percent upper extremity impairment is assigned as the range of impairment. However, it is specifically noted "This impairment can only be given once in an individual's lifetime." . . . According to the [AMA Guides], a zero (0) percent impairment is assigned based on strict interpretation of the text.⁷

Dr. Rasmussen provided an impairment rating on February 22, 2016. Using the *AMA Guides*, Dr. Rasmussen determined claimant sustained a 5 percent impairment to the left upper extremity.⁸ Dr. Rasmussen testified the rating related to the March 2015 accident and was over and beyond the 10 percent he assessed for the 2013 incident. Dr. Rasmussen explained the 5 percent assessment was based on claimant's partial thickness rotator cuff tear requiring surgery and claimant's continuing pain.

⁶ Koprivica Report (Dec. 17, 2015) at 19. (The parties agreed to the admission of Dr. Koprivica's report in a Stipulation to Medical Reports filed June 24, 2016.)

⁷ *Id.* at 22-23.

⁸ See Rasmussen Depo., Ex. 4 at 1.

Dr. Rasmussen admitted that a strict interpretation of the *AMA Guides* results in a zero percent impairment for claimant, based on the fact claimant received a previous impairment rating. Even if claimant had no previous impairment, the *AMA Guides* would provide a 0-2 percent impairment for claimant's partial thickness rotator cuff tear and resulting surgery, which Dr. Rasmussen opined was too low. Dr. Rasmussen testified he did not believe zero percent to be a fair representation of claimant's impairment. Further, Dr. Rasmussen noted the *AMA Guides* allows only for the most significant pathology to be rated, with a "very small amount" of modification allowed related to any secondary pathology.⁹ Dr. Rasmussen agreed the *AMA Guides*, unlike the 4th Edition of the same, does not allow for a physician's skill, experience, expertise, training, or judgment in arriving at a rating.

Claimant continues to work for respondent. He testified he continues to have pain and weakness in his left arm. Claimant cannot extend his left arm overhead, and requires help from his coworkers to perform some of his job duties.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-510d(b)(23) states:

Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be determined by using the sixth edition of the American medical association guides to the evaluation of permanent impairment,¹⁰ if the impairment is contained therein.

Section 18 of the Kansas Constitution Bill of Rights states:

All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

ANALYSIS

Claimant raises no issue in his appeal alleging the ALJ erred in the application of law to the facts. Claimant primarily argues the law as applied by the ALJ is unjust and asks

⁹ *Id.* at 34.

¹⁰ It should be noted that there is a discrepancy in the Act's mandate for the sixth edition of the *AMA Guides*. While both K.S.A. 44-510d and K.S.A. 44-510e refer to the use of the sixth edition, K.S.A. 44-508(u) defines the term "functional impairment" as "the loss of a portion of the total physiological capabilities as established by competent medical evidence and based upon the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein."

the Board for a declaratory judgment finding the adoption of the *AMA Guides*, 6th Edition, into the Kansas Workers Compensation Act (Act), and the application thereof, violates Section 18 of the Kansas Constitution Bill of Rights such that he be allowed to a tort action in district court.

Claimant raised a variety of other issues related to the mandatory use of the *AMA Guides*, 6th Edition, on pages six and seven of his brief, including issues related to due process, disparate treatment, lack of a remedy, evidentiary flaws related to mandating the *AMA Guides*, 6th Edition, unlawful delegation of legislative powers and impermissible legislative predetermination of an adjudicatory fact. All of claimant's issues are related to the validity of K.S.A. 2014 Supp. 44-510d(b)(23) and are beyond the jurisdiction of the Board to review.

In *Miller v. Johnson*, the Kansas Supreme Court found Section 18 of the Kansas Constitution Bill of Rights guarantees the right to a remedy.¹¹ In *Miller*, the Court wrote, "This right has been found since our early caselaw to mean 'reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure and after a fair hearing.'"¹²

Section 18 guarantees are implicated when the legislature imposes statutory caps on noneconomic damages for personal injury plaintiffs, in this case, injured workers.¹³ In determining if a right to a remedy exists, the Court wrote:

A two-step analysis is required for the quid pro quo test. For step one, we determine whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare. This first step is similar to the analysis used to decide equal protection questions under the rational basis standard. *Lemuz*, 261 Kan. at 948, 933 P.2d 134. For step two, we determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue. This step is more stringent than the first because even if a statute is consistent with public policy, there still must be an adequate substitute remedy conferred on those individuals whose rights are adversely impacted. *Lemuz*, 261 Kan. at 948, 933 P.2d 134; *Bonin*, 261 Kan. at 217-18, 929 P.2d 754; *Aves v. Shah*, 258 Kan. 506, 521-22, 906 P.2d 642 (1995); *Samsel II*, 246 Kan. at 358, 361, 789 P.2d 541; *Manzanares*, 214 Kan. at 599, 522 P.2d 1291.¹⁴

¹¹ See *Miller v. Johnson*, 295 Kan. 636, 655, 269 P.3d 1098 (2012).

¹² *Id.*, citing *Hanson v. Krehbiel*, 68 Kan. 670, Syl. ¶ 2, 75 Pac. 1041 (1904).

¹³ See *Id.*

¹⁴ *Id.* at 657.

It is true claimant was afforded no economic recovery for permanent impairment stemming from his compensable workers compensation injury, other than payment of medical and temporary total disability benefits. However, the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional.¹⁶ A statute is presumed constitutional, and all doubts must be resolved in favor of its validity.¹⁶ The Board does not have jurisdiction to rule on claimant's constitutionality issues.

CONCLUSION

There is no dispute related to the ALJ's findings and application of the law. The Board does not have jurisdiction to review the constitutionality of the Act.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated August 17, 2016, is affirmed.

IT IS SO ORDERED.

Dated this 26th day of October, 2016.



BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹⁶ See *Anderson v. Custom Cleaning Solutions*, No. 1,070,269, 2016 WL 5886183 (Kan. WCAB Sept. 19, 2016); *Houston v. University of Kansas Hospital Authority*, No. 1,061,355, 2016 WL 3669848 (Kan. WCAB June 17, 2016); *Anderson v. Custom Cleaning Solutions*, No. 1,070,269, 2014 WL 5798476 (Kan. WCAB Oct. 27, 2014); *Carrillo v. Sabor Latin Bar & Grille*, No. 1,045,179, 2014 WL 5798458 (Kan. WCAB Oct. 24, 2014); *Pinegar v. Jack Cooper Transport*, No.1,059,928, 2014 WL 1758036 (Kan. WCAB Apr. 9, 2014).

¹⁶ See *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 276, 75 P.3d 226 (2003); citing *State v. Durrant*, 244 Kan. 522, 769 P.2d 1174, cert. denied 492 U.S. 923, 109 S.Ct. 3254, 106 L.Ed.2d 600 (1989).

CONCURRING OPINION

Based on my research, the Board, or a single Board Member, has never opined that a provision of the Act is or is not constitutional. Instead, the Board has ruled it does not have authority to review an allegation that a section of the Act is unconstitutional and made no further statement. This Board Member concurs with the majority that the Board does not have jurisdiction to consider the constitutionality of the application of the *AMA Guides*¹⁷ to claimant's predicament, but feels compelled to comment because the issue is important and warrants meaningful and significant discussion. The reader should note this concurring opinion is that of the undersigned and is not necessarily shared by other Board Members.

K.S.A. 2014 Supp. 44-501b(b) sets forth the legislative intent of the Kansas Legislature, concerning the Act, for employers to pay employees compensation for work-related personal injuries. K.S.A. 2014 Supp. 44-501b(d) makes it clear that when an employee may recover compensation under the Act, the employer and employees are not subject to liability elsewhere, *i.e.*, the Act is the employee's exclusive remedy for recovery.

Clearly, the intent of the Kansas Legislature is to compensate Kansas workers who suffer work-related personal injuries. In the present claim, it is undisputed claimant sustained a left shoulder injury by accident arising out of and in the course of his employment, and the accident resulted in new injuries that ordinarily should be compensated based on Kansas law. Despite the fact the Kansas Legislature intended claimant to be compensated, it placed the impediment of K.S.A. 2014 Supp. 44-510d(b)(23) squarely in his path. That section of the Act provides:

Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides for evaluation of permanent impairment until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be determined using the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

The Kansas Constitution Bill of Rights, in §18, provides: "Justice without delay. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." In this Board Member's humble opinion, application of the *AMA Guides* to claimant's case as directed in K.S.A. 2014 Supp. 44-510d(b)(23) denies claimant due process.

¹⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

As noted by the majority, the courts have a duty to construe a statute constitutional, if the same can be done within the apparent intent of the legislature in passing the statute. The *AMA Guides*, at least in this claim, thwarts the Kansas Legislature's stated intent to compensate workers who suffer a personal injury by accident arising out of and in the course of their employment.

In *Injured Workers of Kansas*,¹⁰ the Kansas Supreme Court stated:

The plaintiffs claim that their due process rights have been violated because their remedy in a workers compensation claim has been restricted due to a more stringent notice of claim statute. In analyzing a potential due process violation, the following test should be utilized:

"If a remedy protected by due process is abrogated or restricted by the legislature, 'such change is constitutional if '[1] the change is reasonably necessary in the public interest to promote the general welfare of the people of the state,' *Manzanares v. Bell*, 214 Kan. 589, 599, 522 P.2d 1291 (1974), and [2] the legislature provides an adequate substitute remedy" to replace the remedy which has been restricted.' *Bonin v. Vannaman*, 261 Kan. 199, 217, 929 P.2d 754 (1996) (citing *Aves v. Shah*, 258 Kan. 506, 521, 906 P.2d 642 [1995])." *Lemuz v. Fieser*, 261 Kan. 936, 946-47, 933 P.2d 134 (1997).

Under Step 1 of this due process test, the first question to ask is whether the new notice of claim statute imposed on plaintiffs injured at work, which restricts the plaintiffs' right to a workers compensation remedy, is reasonably necessary in the public interest to promote the general welfare of the people of the state. Another way to state this test is whether the legislative means selected (the notice requirement) has a real and substantial relation to the objective sought. See *Bonin v. Vannaman*, 261 Kan. 199, 217, 929 P.2d 754 (1996) (citing *Liggett*, 223 Kan. at 614, 576 P.2d 221; *Manzanares v. Bell*, 214 Kan. 589, 599, 522 P.2d 1291 (1974); *Ernest*, 237 Kan. at 129, 697 P.2d 870).

...

In applying Step 2 of the due process test, it is important to realize that the workers compensation remedy is not a common-law remedy. Rather, it is an adequate substitute remedy itself (or *quid pro quo*) for the abrogation of a worker's right to sue an employer for an on-the-job injury caused by the employer's negligence.

In 1911, the legislature stripped employees of their common-law right to bring a civil action against employers for injuries caused by an employer's negligence. "The

¹⁰ *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 854-856, 942 P.2d 591 (1997).

legislature can modify the common law so long as it provides an adequate substitute remedy for the right infringed or abolished." *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 350, 757 P.2d 251 (1988), *overruled in part on other grounds Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991). Thus, when the legislature abolished the employees' common-law right to sue employers for injuries, the legislature provided the employees with an adequate substitute remedy (or quid pro quo) for the right abolished – the Workers Compensation Act. The Act allowed employees to quickly receive a smaller, set amount of money for injuries received at work, whether they were caused by negligence or not, as long as the notice requirement was met. Now, the legislature has made the notice requirement more strict so that workers compensation benefits are more difficult to receive, making the quid pro quo for abrogation of the employee's right to sue an employer for negligence less than what it once was. Thus, the question under Step 2 of the due process test is not whether the legislature provided an adequate substitute remedy for taking away the lenient notice requirement in the Act. Instead, the question becomes whether it has, under the Act, with its stricter notice requirement, become so difficult to receive an award that the Act is no longer an adequate substitute remedy for abrogation of employees' right to sue employers for negligence. If so, then the stricter notice requirement, making the quid pro quo inadequate, violates due process.

In analyzing the first step delineated in *Injured Workers of Kansas*, the requirement of the Kansas Legislature to calculate an award of workers compensation in accordance with the *AMA Guides* is not reasonably necessary to promote the general welfare of the state. The general welfare of Kansas is not promoted by denying injured workers permanent partial disability benefits the Kansas Legislature intended them to have. In fact, the contrary may be true.

The second step of the due process test outlined in *Injured Workers of Kansas* is whether the Act is no longer an adequate substitute remedy for abrogation of employees' right to sue employers for negligence. If so, the requirement to calculate an award in accordance with the *AMA Guides* makes the quid pro quo inadequate and violates due process. Here, the requirement to calculate claimant's award using the *AMA Guides* deprives him of any and all remedies, other than receiving medical compensation and temporary total disability benefits. He is entitled to no permanent partial disability benefits for his injury, nor may he sue respondent in civil court. If claimant were to recover permanent partial disability benefits based on a 5% shoulder rating, he would be entitled to \$6,272.64 (225 weeks of benefits for a shoulder, less 13.86 weeks of temporary total disability benefits = 211.14 weeks x 5% = 10.56 weeks payable x \$594 compensation rate = \$6,272.64). Simply put, use of the *AMA Guides* makes the quid pro quo inadequate. Stated another way, in the present claim, the requirement to follow the *AMA Guides* makes it impossible for claimant to be awarded permanent partial disability benefits, making the Act an inadequate substitute remedy for claimant's right to potentially sue respondent for negligence.

There are similarities between the present case and *Westphal*,¹⁹ a case decided by the Florida Supreme Court. The Florida Legislature amended its workers compensation act to limit temporary total disability benefits (TTD) to two years, or 104 weeks, even if the injured worker had not reached MMI. *Westphal*, an injured worker, had numerous surgeries and despite not reaching MMI, had his TTD cut off because he reached the 104-week maximum. The Florida Supreme Court noted *Westphal* was not yet eligible for permanent total disability benefits and although he was incapable of working, fell in a gap in which he received no benefits. The Florida Supreme Court noted, "But, there must eventually come a 'tipping point,' where the diminution of benefits becomes so significant as to constitute a denial of benefits – thus creating a constitutional violation."²⁰ The Court found the statute unconstitutional, stating:

We conclude that the 104-week limitation on temporary total disability benefits, as applied to a worker like *Westphal*, who falls into the statutory gap at the conclusion of those benefits, does not provide a "reasonable alternative" to tort litigation. Under the current statute, workers such as *Westphal* are denied their constitutional right of access to the courts.²¹

In essence, the Act is a trade. The Kansas Legislature traded injured workers' ability to file suit for their physical injuries, pain and suffering, permanent scarring, etc., for workers compensation. As part of the trade, workers who suffer a permanent impairment as the result of an injury arising out of and in the course of their employment are compensated, even when the employer was not at fault. In this Board Member's view, the *AMA Guides* are at the "tipping point" of which the Florida Supreme Court speaks. Claimant and other injured workers in similar situations are denied permanent partial disability, a property right to which they are entitled, and have no adequate remedy.

For the foregoing reasons, *if* the undersigned Board Member had the authority and jurisdiction to do so, he would declare the portion of K.S.A. 2014 44-510d(b)(23) requiring use of the *AMA Guides*, as applied to claimant, unconstitutional.

This Board Member has other concerns, mainly based on the *AMA Guides* conflicting with Kansas law. Where the *AMA Guides* and a Kansas statute conflict, the *AMA Guides* do not control over the statute.²²

¹⁹ *Westphal v. City of St. Petersburg*, 194 So.3d 311, 2016 WL 3191086 (2016).

²⁰ *Id.* at 323.

²¹ *Id.* at 325.

²² See *Redd v. Kansas Truck Center*, 291 Kan. 176, 196-97, 239 P.3d 66 (2010).

First, Kansas law allows workers to recover payment for injuries that result in permanent impairment. Kansas law does not say that an injured worker's impairment "must be rated . . . where the greatest dysfunction consistent with the objectively documented pathology remains."²³ Yet, that is precisely what the *AMA Guides* say. Essentially, the *AMA Guides* tells us a worker does not get compensated for his or her full impairment, just the portion that is the worst. Obviously, this results in the worker only getting compensated for less than the remedy allowed under the Fourth Edition of the *AMA Guides*, if there is any recovery at all. When the worker gets a smaller recovery, it begs the question whether the use of the *AMA Guides* provides an adequate substitute remedy.

Second, Kansas law allows as compensable injuries that result in more than a sole aggravation, acceleration or exacerbation of a preexisting condition.²⁴ Here, claimant did not have what would be solely an aggravation, acceleration or exacerbation of a preexisting condition. Claimant had a new and different rotator cuff tear, in addition to other shoulder symptomatology. However, the *AMA Guides* wholly undermines this statute, and instead indicates allowing an award of permanent impairment to be given only once in an individual's lifetime, at least as applied to claimant.

Similarly, Kansas law already has a methodology to reduce an award based on preexisting impairment as spelled out in K.S.A. 2014 Supp. 44-501(e). Use of the *AMA Guides* arguably conflicts with the statute.

Another potential problem is that while K.S.A. 2014 Supp. 44-510d(b)(23) instructs us to use the *AMA Guides* to provide a rating for injuries occurring on and after January 1, 2015, K.S.A. 2014 Supp. 44-508(u), the very definition of "functional impairment," indicates impairment is based on the Fourth Edition of the *AMA Guides*.

This Board Member doubts the Kansas Legislature was aware of all potential ramifications of adopting the *AMA Guides* as the basis for determining permanent impairment of function for the loss of or loss of use of a scheduled member. Nor does the undersigned believe the Kansas Legislature was aware that K.S.A. 2014 Supp. 44-510d(b)(23), (24) and 44-510e(a)(2)(B) provide the *AMA Guides* is to be used to determine permanent partial disability, but that K.S.A. 44-508(u) continues to define functional impairment as a percentage in accordance with Fourth Edition of the *AMA Guides*.

²³ *AMA Guides to the Evaluation of Permanent Impairment* (6th Ed.) at 21; see also p. 387 ("If a patient has 2 significant diagnoses, for instance, rotator cuff tear and biceps tendonitis, the examiner should use the diagnosis with the highest causally-related impairment rating for the impairment calculation. Thus, when rating rotator cuff injury/impingement or glenohumeral pathology/surgery, incidental resection arthroplasty of the AC joint is not rated.") and § 15.3f on p. 419 ("If there are multiple diagnoses within a specific region, then the most impairing diagnosis is rated because it is probable this will incorporate the functional losses of the less impairing diagnoses.").

²⁴ See K.S.A. 44-508(f)(2).


BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
llivengood@markandburkhead.com

Karl L. Wenger, Attorney for Respondent and its Insurance Carrier
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Hon. Steven J. Howard, Administrative Law Judge

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Francisco Pardo)
Claimant/Appellant,)
-vs-)
UPS) Docket No.: 1,073,268
Respondent/Appellee,)
and)
Liberty Mutual Ins. Corp.)
Insurance Carrier/Appellee.)

**PETITION FOR JUDICIAL REVIEW OF A DECISION OF THE
WORKERS COMPENSATION APPEALS BOARD**

Francisco Pardo, Petitioner, by and through Keith L. Mark of Mark & Burkhead,
petitions the Court of Appeals for judicial review of the decision of the Workers Compensation
Appeals Board.

The Petitioner states:

1. *Name and mailing address of the petitioner.*

Keith L. Mark
Mark & Burkhead
6700 Squibb Road, Suite 103
Mission, KS 66202

2. *Name and mailing address of the agency whose action is at issue.*

Workers Compensation Appeals Board
401 SW Topeka Boulevard
Topeka, KS 66603

3. *Authority.* K.S.A. 44-556, K.S.A. 77-614, and Supreme Court Rule 9.04.

4. *Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action.*

The Workers Compensation Appeals Board entered an order dated October 26, 2016, in which the Board denied workers compensation benefits to claimant in Docket No. 1,073,268, a duplicate of which is attached as Exhibit A.

5. *Identification of persons who were parties in any adjudicative proceedings that led to the agency action.*

Francisco Pardo
UPS
Liberty Mutual Insurance Corporation

6. *Facts to demonstrate that the petitioner is entitled to obtain judicial review.*

The Petitioner sustained a compensable injury to his left shoulder arising out of a March 18, 2015, work accident. Petitioner has been employed by Appellee for twelve years as a feeder driver. In this capacity, he drives tractor-trailers, picks up and delivers loads, and works in the yard with a spotter. A spotter is a device that remains in the yard and is used to move trailers to different locations onsite. On March 18, 2015, Petitioner was climbing onto the spotter in the course of his job duties when he slipped on oil and grease buildup. He was holding the spotter's railing with his left arm when he fell, resulting in a jerking of his left shoulder. He immediately reported the incident and was sent for medical treatment.

Petitioner had suffered a prior injury to his left shoulder on July 11, 2013, which necessitated an August 29, 2013, arthroscopic surgery to repair the damage to his shoulder. As a result of the subsequent March 18, 2015, accident, Petitioner underwent another arthroscopic surgery on June 4, 2015. During that surgery, the doctor found new labral pathology in the Petitioner's shoulder and a new partial thickness rotator cuff tear stemming from the 2015 accident. The doctor surgically repaired the new tear in addition to performing an acromioplasty to help resolve impingement of the rotator cuff.

Petitioner was released to full work duty by August 25, 2015. However, he suffered continued pain and reduced range of motion in his shoulder. Petitioner now requires assistance at work to perform his job duties, has difficulty sleeping, and has loss of strength due to this accident. The treating doctor, Dr. Rasmussen, testified that even though Petitioner sustained new structural damage and new permanent injury and impairment as a result of the March 2015 accident, he concluded that a strict interpretation of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* resulted in a zero percent impairment rating for Petitioner. He also stated that the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition*, unlike the *Fourth Edition* of the same, did

not allow for a physician's skill, experience, expertise, training, or judgment in determining a rating. He testified that he did not believe zero percent was fair.

Independent evaluating physician, Dr. Koprivica, also documented Petitioner's loss of strength, loss of motion and continued pain due to the March 18, 2015, accident. Dr. Koprivica also opined Petitioner suffered new structural damage and permanent injury/impairment from this accident but due to the use of *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition*, he was forced to give a zero percent impairment rating, even though it was unfair to Petitioner.

7. *Reasons why relief should be granted.*

The Petitioner sustained a compensable injury to his shoulder that would have resulted in compensation through the workers compensation system prior to January 1, 2015. It is uncontroverted that Petitioner sustained new structural damage to his left shoulder, has lost strength, motion, and has continued pain that affects his ability to work and perform activities of daily living. However the Kansas Legislature adopted K.S.A. § 44-510d(b)(23), which provides that for injuries incurred after January 1, 2015, the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* (rather than the *American Medical Association Guides to the Evaluation of Permanent Impairment Fourth Edition*) determines the compensation amount. Under the *Sixth Edition*, the Petitioner received a zero permanent partial impairment rating and was, accordingly, denied any compensation for this impairment.

The workers compensation exclusive remedy rule provides that "such compensation shall be exclusive of all other remedies or causes of action for such injury or death, and no claim or action shall inure, accrue to, or exist..." K.S.A. 44-510(e). At the same time, Section 18 of the Kansas Bill of Rights states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by course of law..." The Workers Compensation Act is based on a *quid pro quo*, whereby an injured worker trades his right to recover in tort for an adequate substitute recovery amount in the workers compensation system. Accordingly, a covered worker with a covered injury must recover *some* amount of money through the workers compensation system.

Petitioner maintains that either the exclusive remedy rule is unconstitutional as applied to him because he has been denied any compensation in the workers compensation system and he is unable to recover by bringing a tort action, or K.S.A. § 44-510d(b)(23) is unconstitutional because it denies him any compensation for his injury. Prior to the Kansas Legislature's adoption of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition*, Petitioner would have been eligible to recover a reasonable amount in compensation for his injury.

Petitioner also maintains that the mandatory use of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition*, as required by K.S.A. § 44-510d(b)(23), is unconstitutional because it denies him due process through the determination of

ratings and compensation amounts without consideration of his specific circumstances. Such rigid determinations without regard to Petitioner's specific circumstances constitute a violation of due process under the Kansas Constitution.

Petitioner also maintains that the mandatory use of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* to determine permanent partial disability, as required for non-scheduled members by the administrative Workers' Compensation Act, violates the evidentiary standards of *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993) and any report solely based upon the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* should be excluded from evidence.

Petitioner also maintains that the mandatory use of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* to determine permanent partial disability, as required for non-scheduled members by the administrative Workers' Compensation Act, is an unconstitutional restraint upon an administrative law judge, the trier of fact.

Petitioner also maintains that the mandatory use of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* to determine permanent partial disability, as required for non-scheduled members by the administrative Workers' Compensation Act, is unconstitutional as an unlawful delegation of the State's legislative powers to the American Medical Association under the doctrine of *delegata potestas non potest delegari*.

Petitioner also maintains that the mandatory use of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* to determine permanent partial disability, as required for non-scheduled members by the administrative Workers' Compensation Act, is an impermissible legislative predetermination of adjudicatory scientific fact.

Petitioner also maintains that the mandatory use of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* to determine permanent partial disability for non-scheduled members, as required by the administrative Workers' Compensation Act, violates the constitutional guarantees of due process and equal protection because said mandatory use shifts the economic burden to the injured worker without a legitimate State interest.

Petitioner also maintains that the mandatory use of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* to determine permanent partial disability, as required for non-scheduled members by the administrative Workers' Compensation Act, violates the constitutional guarantee of an adequate remedy for an injury and is arbitrary and capricious.

Petitioner also maintains that the mandatory use of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* to determine permanent partial disability, as required for non-scheduled members by the administrative Workers' Compensation Act, is unconstitutional because the Legislature has created a special law creating disparate treatment of members of a class without a reasonable basis.

8. *The type and extent of relief petitioner requests.*

Petitioner requests a declaratory judgment that the exclusive remedy rule and/or the use of the *American Medical Association Guides to the Evaluation of Permanent Impairment Sixth Edition* as required by K.S.A. § 44-510d(b)(23) are unconstitutional as applied to him. If the Court determines that the exclusive remedy rule is unconstitutional, Petitioner seeks a declaratory judgment that he may file a tort claim in the appropriate district court. Petitioner also requests any injunctive relief that the Court deems appropriate and in the interests of justice.

9. *Petitioner reserves the right to supplement and/or amend the Petition for Judicial Review pursuant to K.S.A. 77-614(c).*

Respectfully submitted,

By: /s/ Keith L. Mark
Keith L. Mark #12888
MARK & BURKHEAD
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ATTORNEYS FOR THE PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent by United States

Mail, postage prepaid, on the 22nd day of November 2016, addressed as follows:

Workers' Compensation Appeals Board
401 SW Topeka Boulevard
Topeka, KS 66603

Division of Workers compensation
401 SW Topeka Boulevard
Topeka, KS 66603

Karl L. Wenger
McAnany, Van Cleave & Phillips
10 E. Cambridge Circle Dr., Suite 300
Kansas City, KS 66103
Respondent's Counsel

And filed electronically with:

Court of Appeals
Kansas Judicial Center
301 West 10th Avenue
Topeka, KS 66612-1507

By: /s/ Keith L. Mark
Keith L. Mark #12888

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT**

FRANCISCO PARDO)
)
 Plaintiff,)
)
 v.)
)
 UNITED PARCEL SERVICE, INC.)
 Serve: Registered Agent)
 Corporation Service Co.)
 2900 SW Wanamaker Drive)
 Suite 204)
 Topeka, KS 66614,)
)
 Defendant.)

Case Number: _____

PETITION FOR DAMAGES
PURSUANT TO K.S.A. CHAPTER 60

COMES NOW Francisco Pardo, a Plaintiff in this action, by and through his attorneys, for his cause of action against Defendant, United Parcel Service, Inc. (hereinafter Defendant UPS), and states the following claim for relief:

1. Plaintiff is an individual and resident of Kansas City, Missouri, residing at 6629 N.E. 49th Street, Kansas City, MO 64119.

2. That at all times herein mentioned, Defendant UPS was and is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was and is transacting business in Johnson County, Kansas, and has committed a tortious act by and through its employees in Johnson County, Kansas, and by virtue of the foregoing acts, has submitted itself to the jurisdiction of this Court.

3. This is a cause of action for personal injuries pursuant to Chapter 60 K.S.A.

4. That venue is vested in this Court by virtue of K.S.A. 60-603 in that the cause of action arose in Johnson County, Kansas.

5. That at all times herein mentioned, Defendant's agents and employees were acting within the course and scope of their agency or employment, and on behalf of Defendant, and that the negligent acts and/or omissions of the agents, employees and servants of Defendant, as hereinafter specified, occurred during the course and scope of their employment with Defendant, and are imputed to Defendant by operation of law.

6. On March 18, 2015, Plaintiff was working in the course and scope of his employment with Defendant UPS at Defendant's Lenexa, Kansas, trucking facility.

7. On March 18, 2015, Plaintiff was walking to his spotter truck to begin his shift.

8. At the same time and place, grease and oil had been allowed to accumulate on the surface of the trucking facility parking lot next to where the spotter trucks were parked.

9. Prior to March 18, 2015, Plaintiff had reported the greasy/oily condition of the spotter truck parking area to supervisors and the safety committee on numerous occasions, but nothing was ever done by Defendant to remedy the greasy and oily conditions.

10. In the process of climbing up onto the spotter truck on March 18, 2015, Plaintiff grabbed the spotter truck's rear grab rail with his left arm and his foot slipped on the first step due to the grease/oily conditions causing his left arm to be jerked feeling a pop.

11. Following Plaintiff's March 18, 2015, injury to his left shoulder, he filed a worker's compensation claim for a new injury to his left shoulder.

12. Prior to March 18, 2015, Plaintiff had sustained a prior injury to his left shoulder on July 11, 2013, that resulted in a repair of a partial thickness rotator cuff tear and an extensive labrum repair. As a result of that prior left shoulder injury, the surgeon assessed a 10% impairment rating to his left shoulder.

13. Following Plaintiff's March 18, 2015 injury, the same surgeon who performed the prior surgery on Plaintiff's left shoulder on July 11, 2013, performed an arthroscopic procedure on June 4, 2015. During that arthroscopic procedure, labral pathology was found in Plaintiff's left shoulder and the surgeon estimated was over 50% related to the July 11, 2013, surgery. However, the same surgeon found a new partial thickness rotator cuff tear, which was a new finding and related to the March 18, 2015, incident. The surgeon found that the new tear was in a different location than the one repaired in 2013, and was not in direct connection with the original tear. The surgeon surgically repaired the new tear and performed an acromioplasty to help resolve impingement of the rotator cuff.

14. Application of K.S.A. 44-501d(b)(23) requiring usage of the Sixth Edition of the American Medical Association guide to the evaluation of permanent impairment, resulted in a zero percent impairment as a result of Plaintiff's prior left shoulder injury despite the fact that Plaintiff suffered a new and different injury to the same left shoulder on March 18, 2015.

15. Consequently, Plaintiff was left without a remedy under the Kansas Workers' Compensation Act.

16. K.S.A. 44-501b(d) makes it clear that when an employee may recover compensation under the Act, the employer and employees are not subject to liability elsewhere, i.e. the Act is the employee's exclusive remedy for recovery.

17. It is undisputed the Plaintiff sustained a left shoulder injury arising out of and in the course of his employment, and the incident resulted in new injuries that ordinarily should be compensated based on Kansas law.

18. However, the AMA guidelines, Sixth Edition, precludes any additional permanency award if Plaintiff has received any prior compensation for impairment of his left shoulder even if a new and different injury to the same body part.

19. Consequently, the Act does not provide an adequate substitute remedy for abrogation of the employee's right to sue his employer for negligence and the usage of the AMA Sixth Edition makes the quid pro quo agreement inadequate and violates due process making Section 2014 440510d(b)(23) of the Act unconstitutional. See Exhibit A – Order Kansas Workers' Compensation Appeals Board.

20. That as a direct and proximate result of the negligence and carelessness of the Defendant, Plaintiff has suffered the following injuries and damages:

a. He suffered additional labral pathology to his left shoulder, including a new partial thickness tear of his left rotator cuff requiring surgical repair.

b. As a result of the foregoing injuries, he has suffered pain, physical impairment, inconvenience and loss of enjoyment of life.

c. He has incurred medical expenses in the past for medical treatment for the foregoing injuries and will incur medical expenses in the future.

d. He has suffered impairment in the past in performing household work and will incur in the future impairment in the ability to perform household work duties and responsibilities.

e. As a result of his injuries, he has suffered impairment of his earning capacity and suffered lost wages.

21. Defendant was negligent in failing to provide a safe workplace in that Defendant failed to remedy or remediate the greasy and oily conditions of the parking area near the spotter trucks despite having knowledge of such unsafe and dangerous conditions.

22. Defendant failed to exercise ordinary care in cleaning up or remediating the greasy and oily conditions of the parking area near the spotter trucks despite having knowledge of such unsafe and dangerous conditions.

23. Defendant has the exclusive control over the area where the greasy and oily conditions in the parking area near the spotter trucks existed and despite having knowledge of such unsafe and dangerous conditions did nothing to correct the greasy and oily conditions.

24. The dangerous and unsafe greasy and oily conditions in the parking area near the spotter trucks were created and/or maintained by the Defendant.

25. Defendant failed to keep the subject premises in proper repair and allowed the greasy and oily conditions of the parking area near the spotter trucks to exist despite having knowledge of such unsafe and dangerous conditions.

26. That at all times herein mentioned, Plaintiff Francisco Pardo was injured as a direct and proximate result of the negligence of the Defendant in the following particulars:

a. There was grease or oil in the spotter truck parking lot of Defendant's trucking facility, and as a result the trucking facility was not reasonably safe, and

b. The Defendant knew or by using ordinary care could have known of this condition, and

c. The Defendant failed to use ordinary care to remove the grease/oil, barricade the grease/oil, or warn of the greasy/oily conditions, and

d. Such condition directly caused or directly contributed to cause Plaintiff Francisco Pardo to slip and suffer injuries to his left shoulder.

WHEREFORE, Plaintiff Francisco Pardo prays for judgment against Defendant UPS for monetary damages in excess of Seventy-Five Thousand Dollars (\$75,000.00), cost of suit and for such other relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

COMES NOW Plaintiff and demands a jury trial on all claims and issues that may be tried by jury.

Respectfully submitted,

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