

MORROW • WILLNAUER • CHURCH

LLC

ATTORNEYS AT LAW
KANSAS CITY • ST. LOUIS • OMAHA

www.mwcattorneys.com

James C. Morrow*
Gary J. Willnauer**
Daniel F. Church*
M. Todd Moulder
Thomas G. Munsell
Peggy A. Wilson
Karie E. Casey♦
Hillary Hyde

Admitted In Missouri and Kansas
also Nebraska*
also Connecticut**
Missouri only†
Nebraska and Iowa ††
Missouri and Illinois ♦

Laura A. Rhea
♦Jaudon R. Godsey
Aaron R. Schuman
Blake H. Butner
Sarah A. Sachs
¥Desirae F. Demore
¥Shawn Meyer

Of Counsel
Stanley B. Gillespie
††Julie A. Jorgensen
Claudio E. Molteni
♦Kim M. Parks
¥Thomas M. Moore
¥Kristan Dames

MEMORANDUM - CASE ALERT

TO:

FROM: Thomas Munsell
Sarah Sachs

RE: *Howard Johnson III v. U.S. Food Service and American Zurich Insurance Co.*
Case No. 117,725

DATE: January 12, 2021

On Friday, January 8, 2021, the Kansas Supreme Court issued its long-awaited decision in *Howard Johnson III v. U.S. Food Service* (KS 117,725). This decision clarifies the assessment of permanent partial impairment under the 2015 amendment to the Kansas Workers' Compensation Act (the "Act") which states that assessment of permanent partial disability shall be "based on the sixth edition of the American Medical association guides to the evaluation of permanent impairment, if the impairment is contained therein." K.S.A. § 44-510e(a)(2)(B). As discussed below, the claimant argued that the 6th Edition of the *Guides* did not provide him with an adequate remedy for his accidental injury and, therefore, the imposition of the 6th Edition by the Legislature was unconstitutional. On appeal, the Kansas Court of Appeals agreed with the claimant and held that the amendment was unconstitutional. However, the Kansas Supreme Court reversed the Kansas Court of Appeals. The Supreme Court held the use of the AMA *Guides* 6th Edition is constitutional because K.S.A. § 44-510(e)(a)(2)(B) actually provides that an impairment rating to be "established by competent medical evidence." The Court advised the 6th Edition is simply a "starting point" in assessing functional impairment. This conclusion can have a significant impact on PPD in your claims.

FACTS

The claimant, Howard Johnson III, injured his cervical spine while working for U.S. Food Service. Harold Hess, M.D. treated claimant and performed an anterior cervical discectomy and fusion at C5-C6 and C6-C7 level. Dr. Hess placed claimant at maximum medical improvement and assigned a 6% whole person impairment rating using the 6th Edition of the *Guides*. Citing the



2015 amendments to the Act, the ALJ and Board both agreed, and awarded 6% whole person impairment for permanent partial disability.

As above, claimant challenged the constitutionality of the Kansas Workers' Compensation Act's use of the 6th Edition. He argued that the 6th Edition resulted in lower permanent partial impairment ratings and deprived him of his right to an adequate remedy under section 18 of the Kansas Constitution's Bill of Rights. Notably, as you likely know, the 6% rating is below the threshold necessary to secure an award of work disability. Thus, not only did the 6th Edition limit claimant to a low functional impairment, but it also quashed claimant's ability to claim additional compensation for permanent partial general disability (i.e., "work disability"). Given the same, the Court of Appeals held the use of the 6th Edition of the *Guides* was unconstitutional, and it implied a return to the 4th Edition for assigning permanent partial functional impairment.

The case was then appealed to the Kansas Supreme Court.

ANALYSIS

After outlining the facts of the case, the Supreme Court stated that its decision would be guided by the "most functional rule of statutory construction," which is determining the intent of the Legislature. Here, the Court noted that even though permanency must be "based on" the 6th Edition, the use of the terms "'based on' indicates the Legislature intended the Sixth Edition to serve as a standard starting point for the **more important and decisive competent medical evidence.**" *Id.* at 7 [Emphasis added].

In reaching its decision, the Court quoted the *California Law Review* stating that even though the 6th Edition is the starting place for assessment of disability, the statutory scheme still "leaves work to be done." Thus, although a rating must be "based on" the 6th Edition, the rating is not bound by the 6th Edition. Rather, this decision authorizes an IME physician to use his or her education, training, and professional judgment to issue ratings which are the same as, or higher or lower than the standards set out in the 6th Edition of the *Guides*. We anticipate that this may lead to more variability in the opinions of evaluating physicians, whether they are court-ordered or retained by a party. Further, at least one Judge that we have spoken with has suggested a possible increase in depositions of court-ordered independent medical examiners as parties submit their cases to the Division at Regular Hearing.

As always, we are available to try and answer any questions you have regarding the impact of the *Johnson* case on your claims, so please do not hesitate to contact us. We greatly appreciate the opportunity to be of service to you and your insureds and look forward to working with you in the future.