

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MICHAEL TILLMAN</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>PAYLESS SHOESOURCE</b>	)	
Respondent	)	Docket No. 1,002,332
	)	
AND	)	
	)	
<b>PACIFIC EMPLOYERS INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requests review of a preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict on April 25, 2002.

**ISSUES**

The Administrative Law Judge granted claimant's request for medical treatment but denied the request for temporary total disability compensation. The Administrative Law Judge further found claimant failed to give respondent notice of the accident within 10 days but had provided notice within 75 days and had established just cause for not giving the 10-day notice.<sup>1</sup>

Respondent and its insurance carrier contend Judge Benedict erred. They argue the record fails to establish just cause for delaying notice. Therefore, they argue claimant has failed to carry his burden of proof.

Claimant argues the Administrative Law Judge's finding of just cause for the failure to provide notice of accident within 10 days should be affirmed. In the alternative, claimant argues there was sufficient evidence to establish notice was given within 10 days.

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<sup>1</sup>See K.S.A. 44-520.

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

1. Claimant worked 3 consecutive 12-hour shifts for respondent. Claimant would work Saturday, Sunday and Monday and would then not work the next four days.

2. On January 6, 2002, claimant was pushing boxes down an assembly line. As he turned he felt a popping sensation in his hip with sharp pain down his leg. Claimant did not notify anyone of this incident at that time.

3. Claimant testified he did not initially advise anyone of the incident because he thought the pain would subside and go away. However, the pain gradually worsened.

4. The claimant testified that when he returned to work after his four days off he was climbing some stairs and his supervisor, Marcy Atkinson, asked him why he was moving so slowly. Claimant advised Ms. Atkinson that he had hurt his hip and she responded by telling claimant to let her know if it worsened.

5. Marcy Atkinson testified she had no conversation with the claimant about an accident at work until January 28, 2002, when he requested an accident report be prepared. Ms. Atkinson further testified she did not have a conversation with claimant where she inquired why he was moving slowly and claimant never otherwise indicated he was experiencing any symptoms before January 28, 2002.

6. Ms. Atkinson noted that had she been advised claimant was in pain she would have inquired if anything had happened at home or work. She further noted that if advised by claimant that his condition was related to work they would have immediately prepared an accident report.

7. On January 28, 2002, claimant advised Ms. Atkinson that he needed to fill out an accident report. Claimant testified because he had advised Ms. Atkinson about the incident the weekend after it occurred they agreed it must have occurred on January 6, 2002.

8. Ms. Atkinson testified that on January 28, 2002, she had talked to claimant on the line and was told claimant was experiencing pain. She further testified she advised claimant to come to the office so an accident report could be prepared. When claimant filled out the report he marked that the report of the accident to the supervisor had been delayed. She testified claimant noted the accident had occurred three weeks ago and he then looked at a calendar and indicated the accident occurred on January 6, 2002.

9. On the accident report the claimant wrote the report of the accident was delayed because he thought the pain would go away.

10. After the accident report was filled out, claimant did not seek medical treatment until the following weekend. On the following Saturday, claimant was unable to get out of bed because of his hip pain so he called in and advised respondent he could not work. When his pain did not improve he sought treatment the following day at St. Francis Hospital.

11. The Administrative Law Judge noted that he believed Ms. Atkinson's testimony that claimant had not advised her of an accident until January 28, 2002, when the accident report was prepared.

#### CONCLUSIONS OF LAW

1. The preliminary hearing Order should be affirmed.
2. The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.<sup>2</sup> And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.<sup>3</sup>
3. The Workers Compensation Act requires a worker to provide the employer timely notice of a work-related accident or injury. The Act reads:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice

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<sup>2</sup>K.S.A. 44-501(a).

<sup>3</sup>K.S.A. 44-508(g).

unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.<sup>4</sup>

The claimant testified that when he returned to work the week after the January 6, 2002, accident he had a conversation with his supervisor and advised her about his hip pain. This conversation was disputed. The supervisor denied any conversation about hip pain or any other pain symptomatology occurred until January 28, 2002. The Administrative Law Judge observed both witnesses' testimony and stated at the conclusion of the preliminary hearing that he believed the supervisor.

4. K.S.A. 44-520 provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

In this instance, claimant's accident was a sudden and traumatic event on or about January 6, 2002, which caused him pain. However, claimant testified he thought he had suffered a pulled muscle and he hoped the pain would go away. Claimant continued to work and instead of subsiding, the pain increased to the point where it is undisputed he finally advised his supervisor on January 28, 2002, and filled out the accident report. The report specifically identified the reason for the delay in reporting the accident was because claimant thought the pain would go away. Claimant continued to work but a week later he was unable to continue working and finally sought medical treatment. Although claimant suffered a specific traumatic incident, nonetheless the onset of pain was gradual and not debilitating until later in the month.

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<sup>4</sup>K.S.A. 44-520.

5. These facts demonstrate the difficulty workers sometimes experience in determining whether their aches and pains are the result of a work-related injury or merely soreness associated with their work. Under these facts and circumstances, claimant had just cause that extended the notice deadline to 75 days following the incident. Accordingly, the Administrative Law Judge's decision is affirmed.

6. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>5</sup>

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated April 25, 2002, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2002.

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BOARD MEMBER

c: Frank S. Eschmann, Attorney for Claimant  
James B. Biggs, Attorney for Respondent  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

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<sup>5</sup>K.S.A. 44-534a(a)(2).