

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

JDA S. HOPE)	
Claimant)	
VS.)	
)	Docket No. 1,015,387
NATIONAL MILLS INC.)	
Respondent)	
AND)	
)	
NATIONAL AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the March 14, 2007 Award of Administrative Law Judge Kenneth J. Hursh. Claimant appeared by her attorney, Timothy A. Short of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Ronald J. Laskowski of Topeka, Kansas. The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). The Board heard oral argument on June 20, 2007. Claimant was denied benefits after the ALJ found claimant had failed to provide timely notice of accident to respondent.

ISSUES

1. Did claimant provide timely notice of accident to respondent? Claimant contends notice was provided to respondent's financial analyst, Patrice J. Audet (the person to whom claimant was to report work-related injuries), on the date of accident. Respondent argues the notice to Ms. Audet came on December 8, 2003, 18 days after claimant's accident and 14 days after claimant's termination on November 24, 2003.
2. If claimant did provide timely notice of accident, what is the nature and extent of claimant's injury? Claimant argues entitlement to a 9 percent whole body permanent partial impairment for the injuries

suffered on November 20, 2003. Respondent argues that claimant has failed to prove that she suffered any permanent disability as a result of the injury on November 20, 2003.

FINDINGS OF FACT

Claimant alleges that she suffered accidental injury on November 20, 2003, while stacking boxes on a pallet. Claimant told a subordinate named Landon and testified she then told Ms. Audet. However, Ms. Audet denies being told of any injury until December 8, 2003, when claimant barged into her office demanding medical treatment. Ms. Audet conducted an investigation of the alleged accident after the December 8 contact and Landon verified the incident did occur. Claimant did not fill out an accident report at the time of the incident, even though, as a supervisor, she was aware of that requirement. When claimant asked Ms. Audet if she wanted claimant to fill out an accident report, Ms. Audet responded "don't worry about it. It will be fine."¹ Claimant took no further action at that time.

Claimant worked for respondent until November 24, 2003, when she was laid off due to company downsizing. Claimant argued the termination was retaliation for claimant's injury, but this is denied by Ms. Audet. Claimant also testified that respondent hired someone to fill her position shortly after her termination. Ms. Audet denies that anyone was hired to fill claimant's position.

After her termination, claimant attended school for about a year. She then obtained a job with Home Depot where she helps customers load their purchases. This requires that she lift weights up to 50 pounds. This is slightly less than the 60 pounds that claimant was required to lift while working for respondent.

Claimant was referred by respondent to board eligible occupational medicine and rehabilitation specialist John A. Munneke, M.D., for an examination on February 10, 2004. Dr. Munneke found no evidence of injury during his examination. He testified that claimant may have suffered a mild strain as a result of the November 20 incident, but on February 10, she had no objective findings of injury. She had a normal range of motion, normal reflexes, no evidence of neuro-compressive disorder and a full range of motion of the lumbar spine. He felt claimant was not in need of any treatment and suffered no impairment as the result of the November 20 incident. Dr. Munneke rated claimant pursuant to the fifth edition of the *AMA Guides*,² as is the practice in Oklahoma, but later

¹ R.H. Trans. at 15.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.).

provided a supplemental report utilizing the fourth edition of the *AMA Guides*,³ as is required in Kansas.⁴ Under either edition, the rating was still zero percent. He testified claimant had no need for treatment or restrictions. He saw no reason why claimant could not work for Home Depot.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on May 4, 2004. Claimant complained of pain on the left side of her low back with intermittent radiation of pain down the right leg, with numbness and tingling. Claimant had a limited range of motion with forward flexion only to several inches from her toes. She extended poorly beyond neutral with lateral bend restricted to one-half to the right and one-third to the left. She could squat to only one-half of normal excursion. Dr. Prostic agreed that claimant's range of motion could differ from day to day. X-rays indicated degenerative disc disease at L5-S1. Dr. Prostic rated claimant at 9 percent to the whole body pursuant to the fourth edition of the *AMA Guides*.⁵ He testified his rating was not pursuant to the DRE or the range of motion model, but rather was a compromise of both. Dr. Prostic recommended claimant take anti-inflammatory medicine, but claimant did not because she usually does not "do medicine."⁶

Claimant was referred by respondent to board certified physical medicine and rehabilitation specialist Kevin D. Komes, M.D. Dr. Komes examined claimant on December 13, 2006. At that time, claimant gave a history of back pain which had resolved. She reported no symptoms during the examination. However, she described having pain when bending forward and when riding a lawn mower. Claimant was able to walk two to three miles a day for exercise and was doing abdominal strengthening exercises at home. Dr. Komes' examination elicited no objective findings necessitating a diagnosis. Claimant's range of motion was normal and claimant was able to do a full squat. He did not take x-rays, but also did not doubt Dr. Prostic's opinion regarding degenerative disc disease. Dr. Komes found claimant to fall within the DRE Lumbosacral Category I of the fourth edition of the *AMA Guides*⁷ and rated claimant at zero percent. Claimant, in her brief to the Board, argues she should be awarded Dr. Prostic's 9 percent whole body functional impairment. There is no evidence in this record regarding task or wage loss.

³ *AMA Guides* (4th ed.).

⁴ K.S.A. 44-510e(a).

⁵ *AMA Guides* (4th ed.).

⁶ R.H. Trans. at 23.

⁷ *AMA Guides* (4th ed.).

With the exception of the three above examinations, claimant has been provided no medical treatment for the accident suffered on November 20, 2003.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁸

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁹

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹⁰

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.¹¹

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.¹²

ANALYSIS

The ALJ found that claimant suffered an accidental injury arising out of and in the course of her employment on November 20, 2003. That finding has not been challenged.

⁸ K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

⁹ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹⁰ K.S.A. 44-501(a).

¹¹ K.S.A. 44-520.

¹² K.S.A. 44-510e(a).

However, when considering the issue of notice, the ALJ found claimant’s testimony less convincing than the testimony of Ms. Audet. The Board agrees that the testimony of Ms. Audet is the more persuasive in determining that claimant did not report the accident until December 8, 2003.

The opinions of Dr. Komes and Dr. Munneke, together with the physical labor claimant has been able to perform with Home Depot, are more persuasive that claimant suffered no permanent effects from this injury.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds claimant failed to give respondent timely notice. Therefore, an award to claimant in this matter must be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated March 14, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Timothy A. Short, Attorney for Claimant
- Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
- Kenneth J. Hursh, Administrative Law Judge