

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

RONALD L. JONES)	
Claimant)	
VS.)	
)	Docket No. 1,017,137
HAHNER FOREMAN & HARNESS, INC.)	
Respondent)	
AND)	
)	
BUILDERS' ASSOCIATION)	
SELF-INSURERS' FUND OF KANSAS)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the July 20, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ found claimant suffered personal injury by accident on April 23, 2004, that the accident arose out of and in the course of claimant's employment with respondent and that notice was timely. Respondent was ordered to provide medical benefits and temporary total disability compensation. Respondent contends claimant failed to prove that he met with personal injury by accident, that his alleged accidental injury arose out of and in the course of his employment and that he gave timely notice. Claimant asks that the ALJ's Order be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for respondent doing construction and remodeling of QuikTrips. His recollection of how long he was employed by respondent before April 23, 2004 is vague, answering "four, five, six weeks, might have been two weeks, I don't - - something like that."¹

¹ *Id.* at 6.

Claimant alleges he injured his "[l]ow back, left back and left arm" by "[j]ackhammering & lifting" on April 23, 2004.² At the July 20, 2004 preliminary hearing, counsel for claimant stated the alleged accident date was "[o]n or about April 23, '04."³ Claimant testified that his back pain began on Wednesday and worsened Thursday and Friday until it got to the point where he could not continue working. At about 1:30 p.m. claimant told his supervisor, Robert (Bob) Dick that he needed to go to the hospital. Claimant left work early on Friday, April 23, and went to the emergency room at Via Christi Regional Medical Center. Claimant was given pain medication and released that same day. Claimant has not worked since April 23, 2004.

On April 28, 2004 claimant returned to Via Christi "because I couldn't deal with it, my back hurt so bad."⁴ Whereupon claimant was admitted to the hospital and remained there for three weeks. After claimant was released he continued receiving physical therapy on an outpatient basis.

Claimant said that when he left work on Friday, April 23, that in addition to his back pain, his left ankle was swollen. Subsequently, he also received treatment for his left knee. However, it is not clear whether claimant is alleging that he hurt his left knee at work.

Q. (Mr. Lee) Are you alleging that you hurt your left knee at work?

A. (Mr. Jones) No, man, I don't know what it is, but my back and my whole left side was just real weak after I got up. I was in the bed for three weeks and after I got up, my whole left side wasn't as strong as my right side and so that's why - - I don't know if it's got anything to do with my back or not, I just - -

Q. Dr. Eyster reports that you had some swelling in your left knee and they attempted to drain it but couldn't.

A. Yeah, that's right. When I left work on Friday, my ankle was swollen up, right here my ankle was swollen up and my back was killing me, so I don't - -⁵

Claimant acknowledges that he did not tell his supervisor that his back problems were work-related nor did he request medical treatment from respondent. In fact, claimant admits that at no time before his attorney sent a letter dated May 19, 2004 to respondent did he tell anyone that he hurt his back at work.

² K-WC E-1 Application for Hearing (filed June 2, 2004).

³ P.H. Trans. at 3.

⁴ *Id.* at 9.

⁵ *Id.* at 10.

When asked why he didn't tell anyone that he hurt his back at work, claimant answered that he did not think he was hurt that bad and would quickly recover.

Q. (Mr. Lee) Is the reason that you didn't tell them that you hurt your back at work or that you wanted medical treatment provided through Hahner, Foreman & Harness was because you didn't know that you had hurt your back at work?

A. (Mr. Jones) Well, I didn't know that it was that bad, I mean, I didn't know it - - I had no idea that I was going to be in the hospital for three weeks, I just thought that I'd - - I would get me some pills. Because, I mean, I woke up with backaches before and they just went away, so I didn't think I was going to be in no hospital for another three weeks.⁶

Claimant's supervisor, Robert Dick, testified that claimant starting working for respondent "approximately two to three weeks before the day that he had to take off work because he was hurt."⁷ On Friday, April 23, 2004, claimant left work early because his back was hurting him and he could not work anymore. Claimant had not complained to Mr. Dick about his back before that date. Claimant did not say what had caused his back problem and did not ask to be sent to a doctor. The following Monday claimant left a message on Mr. Dick's phone that his back was still hurting and that he would not be at work that day. The next day, Tuesday, Mr. Dick said that claimant called and told him that his back was still hurting him and he could not work. That was the last conversation Mr. Dick had with claimant. At no time did claimant say that his back problem was work-related nor did he request medical treatment from respondent.

Claimant could not recall whether or not he spoke with Mr. Dick after he left work on Friday, April 23. Claimant had his mother deliver an off work slip from his doctor. Mr. Dick said claimant's mother made no mention of his condition being work-related at that time. This was probably the April 27, 2004 work release signed by Dr. John McMaster.⁸ That release form refers to "[l]ow back pain/strain" but makes no mention of it being work-related.

Claimant explains his delay in reporting his back injury to his employer as work-related because he did not think it was serious. This explanation does not fit with claimant's description of his pain as being unlike anything he had ever experienced before. The pain also caused him such discomfort that he could not work nor even stand up straight. By the time of his second visit to the emergency room claimant was unable to raise his arms. Moreover, not only had claimant been to the emergency room twice within

⁶ *Id.* at 16.

⁷ *Id.* at 19.

⁸ P.H. Trans., Resp. Ex. 1.

a week of his injury, but also had x-rays which were suggestive of a compression fracture in his spine at the T11 level which was confirmed by a CT scan on April 29, 2004. The CT scan also revealed stenosis and disc bulges at L3-4 and L4-5 intervertebral disc levels.

K.S.A. 44-520 requires a claimant provide notice of a work-related accident to his or her employer within ten (10) days of the date of the accident. The notice must state the time, place and particulars of the accident so as to alert the respondent to the possible work connection to the injury and the potential for a claim.⁹ That same statute permits the reporting period to be extended when the employee has "just cause" for not reporting the accident in a timely manner.

Although not intended as an exhaustive list, some of the factors to consider in determining whether "just cause" exists are:

- (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 either 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 has posted notice as required by K.A.R. 51-12-2.

When just cause is an issue, the above factors should be considered but each case must be determined on its own facts. In his brief to the Board, claimant argues that there is just cause for his failure to give notice within ten (10) days because claimant was not aware that he had suffered an accident. However, that is not the explanation claimant gave at the preliminary hearing. Furthermore, there is nothing in the record to indicate what caused claimant later to realize that his back condition was related to an accident at work. Also, there is no allegation that claimant was unaware of the requirement to report a work-related accident. Although the claim is pleaded as having occurred on a single date, the testimony suggests that it developed over a period of a few days. Nevertheless, the symptoms were severe and claimant was acutely aware of his problem. He even described it at his preliminary hearing as worsening while at work, but he failed to mention this to his supervisor or any of the emergency room personnel.

The record does not contain persuasive evidence establishing just cause for claimant failing to report the accident within the 10-day period contained in K.S.A. 44-520. As such, the time for giving respondent notice of accident cannot be extended to 75 days for just cause. Therefore, the May 19, 2004 letter from claimant's counsel does not satisfy the statutory notice requirement.

⁹ See e.g., *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the July 20, 2004 Order entered by Administrative Law Judge John D. Clark should be and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of October 2004.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director