

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

MIRIAM SILVERTOOTH)	
Claimant)	
)	
VS.)	
)	
MILES EXCAVATING, INC.)	
Respondent)	Docket No. 1,024,746
)	
AND)	
)	
BUILDERS ASSOC. SELF INSURERS FUND OF KANSAS)	
Insurance Carrier)	

ORDER

Claimant requests review of the January 19, 2006 preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

ISSUES

Following a preliminary hearing the ALJ denied claimant's request for benefits as he concluded the claimant failed to provide timely notice of an accidental injury as required by K.S.A. 44-520.

The claimant has appealed the ALJ's preliminary hearing Order alleging the evidence establishes that she did in fact provide notice of her injury to her direct supervisor. Thus, she is entitled to temporary total disability benefits as well as medical treatment for her work-related injury.

Respondent asserts the claimant failed to establish that she was involved in any work-related accident and that even if she did sustain such an injury, she nevertheless failed to provide the statutorily required notice. Thus, the ALJ's preliminary hearing Order should be affirmed.

The issues to be determined are whether claimant sustained an accidental injury arising out of and in the course of her employment and whether she provided notice of that injury as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The ALJ's preliminary hearing Order set forth the facts in great detail and with exceptional accuracy. There is, therefore, no need to reiterate them except to explain the Board's decision. It is worth noting that the Board agrees with the ALJ when he comments that "[t]he record was confusing."¹

Highly summarized, the claimant asserts that on the morning of July 12, 2005 she woke up and noticed her left arm was tingling as if it were asleep. She went to work and told her supervisor, Shawn Berkey, of this development. She continued to work until mid-morning then told that same supervisor that she needed to go see a doctor because she was hurt. According to Mr. Berkey, claimant never mentioned that she believed her pain was attributable to her work activities.

Claimant seems to concede that she never expressly told Mr. Berkey that her work activities *caused* her pain. Rather, she told him "I hurt myself. I need to go to a doctor."² Claimant argues that by telling her supervisor that she had *hurt* herself, he (and therefore the employer) was put on notice that she had sustained a work-related injury as opposed to just generically complaining of pain. Claimant maintains the ALJ missed this distinction.

The Board has considered the claimant's argument and disagrees. The ALJ obviously reviewed the entire record and had the opportunity to observe claimant testify. He was not persuaded that claimant's conversations with Mr. Berkey met the statutorily required notice.

K.S.A. 44-520 provides:

Notice of injury. 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.

Mr. Berkey's version of the events is generally consistent with claimant's as it pertains to the content of their conversations on July 12, 2005. Claimant woke up on the morning of July 12, 2005 with problems in her left arm. She went to work and told Mr.

¹ ALJ Order (Jan. 19, 2006) at 1.

² P.H. Trans. at 25.

Berkey of those problems. She worked for awhile then told Mr. Berkey she needed to see a physician. He checked with the office and because there was no suggestion that these complaints were work-related, claimant was told to see her own physician and allowed to leave.

The medical records generated at the hospital where claimant sought treatment do not reflect a connection between her left arm complaints and work. Rather they show that claimant woke up with a tingling in her left arm. An EMG was performed and was interpreted as normal. After subsequent diagnostic studies she returned to work for a short period of time, although it is disputed whether this release was with restrictions and whether those restrictions were given to respondent and in what manner. Claimant was then fired on July 26, 2005 for refusing to work inside a manhole. A day or two later, claimant called respondent's business office asking about the status of her workers compensation claim.

The Board has considered this matter and finds no reason to disturb the ALJ's negative finding with respect to notice. Claimant admits she woke up with a left arm problem. She went to work and told her supervisor of that problem. Admittedly she performs somewhat heavy construction work, at least at times. And she could have aggravated that problem during her morning of work. But she did not tell her supervisor of that fact. She told him her arm hurt, not that she hurt her arm working. Under the circumstances, her statements would not logically put respondent on notice of a work-related injury. To the contrary, claimant woke up with a problem and told Mr. Berkey of that problem. During the course of the morning she expressed a desire to seek treatment for that problem.

Like the ALJ, the Board does not find claimant's argument persuasive. Thus, the ALJ's denial of benefits is affirmed based on a lack of evidence as to notice as required by K.S.A. 44-520.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated January 19, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2006.

BOARD MEMBER

c: Daniel R. Brown and Michael E. Callen, Attorneys for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director