

The parties raise the following issues:

(1) Did claimant sustain personal injury by accident or repetitive trauma arising out of and in the course of his employment with respondent?

(2) Did respondent receive timely notice of the alleged accident?

(3) What was claimant's average gross weekly wage?

(4) Were the DVDs reviewed by the SALJ properly a part of the evidentiary record?

(5) What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Having reviewed the entire record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant, who was age 45 when he alleged injury, completed the 9th grade and thereafter received his GED. He attended some college classes, but did not receive a degree. Claimant had no additional formal education or training, although he had the ability to speak Spanish, English and Arabic.

In November 2006 claimant was hired by respondent,² a manufacturer of wood cabinets. When he alleged the work-related injury, he worked as a saw operator,³ which he described as follows:

I would lift the four by nine sheets of particle board, stacked up to six at a time and I would run them through a big panel saw that would cut them into different shapes and then I would remove them and stack them in carts.⁴

Claimant testified each particle board⁵ (also referred to as a "sheet" or "panel") weighed approximately 80 pounds and he stacked from 2-6 boards on his saw at a time. Claimant's job duties required bending, twisting and stooping. He had to lift and/or move

² Claimant worked for respondent on previous occasions.

³ According to the written job description in the record, claimant's actual job title was "face frame builder." However, the focus of this claim is claimant's primary function as a saw operator.

⁴ P.H. Trans. at 8.

⁵ Claimant testified he also worked with wooden panels that were not particle board. The wooden panels varied in size, weight and type of wood.

from 25-100 pounds. Claimant's description of the physical requirements of his job is consistent with a written job description prepared by respondent.⁶

The sheets of wood claimant sawed were brought to him on a hydraulic "scissor" lift that raised the wooden sheets/panels to the height of the saw. The boards were each pushed out so claimant could pick them up or slide them onto the saw. Once the sawing process was completed, claimant placed the cut boards on a cart located behind him.

Claimant testified he cut approximately 30 boards (one bundle) per day. Photographs of claimant's work station were offered into evidence.⁷

Claimant was a full time hourly employee and was paid a total of \$9.10⁸ per hour or \$364 per week.⁹

Claimant alleged he sustained personal injury "[e]ach and every working day ending March 16, 2007."¹⁰ On Friday, March 16, 2007, claimant picked up a sheet of particle board and felt pain in his back, hips and legs. He had been experiencing increasing symptoms in his back, hips and legs for a month or two before the lifting incident. Claimant further described his accident as follows:

Q. Now, let's talk about what happened on March 16th of 2007. Can you describe the acute accident that happened on March 16th, 2007?

A. It was just a regular day, like I said, came in and there was a board, some of the boards that I cut, and when I went to lift it up to put it onto the -- lift it up from the scissor machine onto the saw I felt this nasty pain, sharp, like an electrical thing.

Q. So you were picking up an 80-pound piece of particle board?

A. Of particle board.

Q. Lifting it up onto the --

A. Onto the thing, because the wood that they used, you have to -- you don't just slide it on the machine, because you put dents in it. You scratch in it. So I would

⁶ P.H. Trans, Cl. Ex 6 at 2.

⁷ *Id.*, Resp. Ex. 7; R.H. by Depo. (Jun. 15, 2009), Exs. 2-7 (Photographs).

⁸ This rate includes a \$1 per hour on-time bonus, in addition to the base rate of \$8.10.

⁹ R.H. by Depo. (Jun. 15, 2009) at 13.

¹⁰ R.H. Trans. (Apr. 14, 2009) at 4.

pick it up and lay it down gently. And when I laid it down, that was the end of that. And it was right before lunch.¹¹

Claimant left work after his lunch break and did not return to work that day. Claimant testified he called respondent that afternoon and told a receptionist he hurt his back and would not return to work that day.

Claimant's testimony regarding when he reported his alleged accidental injury to respondent is inconsistent. Claimant testified he reported his accident by telephone to respondent's director of human resources, Karen Clouch, the following Monday, March 19, 2007.¹² Claimant also testified he notified Karen Clouch by telephone after claimant went home after his lunch break on March 16, 2007.¹³ Claimant also seems to say he did not notify Ms. Clouch about his accident until Tuesday, March 20, 2007.¹⁴

On March 20, 2007, claimant sought treatment for bilateral hip pain at the emergency room (ER) of Neosho Memorial Regional Medical Center. The ER records noted bilateral hip pain since Saturday. The records contain a history of "no fall or injury," but also note, "HiLo—standing all day cutting wood twisting body holding wood."¹⁵ X-rays of the pelvis appeared normal. Claimant was diagnosed with arthritis and bursitis of both hips "PROBABLY RELATED TO YOUR REPETITIVE ACTIVITIES AT WORK."¹⁶ Prednisone and Vicodin were prescribed.

Also on Tuesday, March 20, 2007, claimant saw respondent's nurse practitioner, Tawnya Madl, for complaints of hip pain and breathing difficulties unrelated to this claim. Ms. Madl diagnosed, among other conditions, degenerative joint disease with an acute flare up. She provided claimant with pain medication and recommended an orthopedic consultation if his symptoms persisted. Ms. Madl did not examine claimant's back or hips, nor did she explain what caused the "acute flare up" to which she referred.¹⁷ Claimant

¹¹ R.H. by Depo. (Jun. 15, 2009) at 14.

¹² P.H. Trans. at 12.

¹³ R.H. by Depo. (Jun. 15, 2009) at 55-56.

¹⁴ *Id.* at 74.

¹⁵ P.H. Trans., Resp. Ex. 1 at 5.

¹⁶ *Id.*, Cl. Ex. 4 at 1.

¹⁷ R.H. by Depo. (Jun. 15, 2009), Ex. 8.

testified he told Ms. Madl he hurt his back and hip at work,¹⁸ but Ms. Madl's records contain no such history.

Records from the Ashley Clinic dated March 26, 2007, noted bilateral hip pain, intermittently for quite some time, with progressive and significant pain over the past three weeks. No inciting or recent aggravating trauma was reported. However, it was noted claimant "[w]orks at Hi Lo where he stands 8 hours a day plus."¹⁹ The diagnostic impression was "[b]ilateral hip pain—suspect degenerative osteoarthritis."²⁰

On April 10, 2007, claimant returned for a follow-up visit with Ms. Madl. Claimant's symptoms had not improved and she filled out papers for short-term disability benefits. It was noted by Ms. Madl that claimant's "[t]ype of injury is unknown" but that he "went home on 3/16/07 from work due to severe pain. . . ."²¹ Ms. Madl's diagnosis remained bilateral hip pain with degenerative joint disease.

Ms. Madl scheduled claimant's initial appointment with Dr. Kevin Mosier, an orthopedic surgeon, on April 18, 2007. Dr. Mosier ordered x-rays and MRI scans of claimant's lumbar spine and hips. According to claimant, Dr. Mosier told him he hurt himself at work.²² Claimant was seen by Dr. Mosier in follow up on April 30, 2007. Dr. Mosier diagnosed lumbar disc disease and moderate stenosis at L3-4 and L4-5. A series of three lumbar epidural steroid injections and physical therapy were prescribed. Claimant received only 2 of the 3 epidurals because he did not experience relief of his symptoms.

Claimant denied previous back and hip pain.²³ However, when he was confronted at the preliminary hearing with medical records from 2001, 2002 and 2004, he admitted he previously bruised his back from hitting a coffee table.²⁴ The prior records documented a history of back and hip pain in 2001 and 2002; a diagnosis of rheumatoid arthritis and degenerative arthritis in 2002; a low back injury in March 2004 when claimant fell and struck his low back on a coffee table that caused severe back pain, ecchymosis and swelling across the lower back; and x-ray evidence, also in 2004, of degenerative changes at L3-4 with mild interspace narrowing and spurring.

¹⁸ *Id.* at 18.

¹⁹ *Id.*, Resp. Ex. 2 at 1.

²⁰ P.H. Trans., Resp. Ex. 2.

²¹ *Id.*, Cl. Ex.2 at 1.

²² R.H. by Depo. (Jun. 15, 2009) at 19.

²³ P.H. Trans. at 27.

²⁴ *Id.* at 30.

There is no evidence claimant experienced hip, low pain or radicular pain between 2004 and 2007.

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on July 18, 2007, at the request of claimant's counsel. Claimant complained of back and leg pain. X-rays revealed mild degenerative changes. Dr. Prostic diagnosed lumbar spinal stenosis and recommended a lumbar myelogram to determine if decompressive surgery was needed. The doctor opined claimant's condition was caused by his work-related injury on March 16, 2007.

Claimant sought and received approximately 13 weeks of short-term disability benefits, for the period of March 27, 2007 through June 26, 2007. He talked by telephone to a representative of Reliance Insurance, the disability carrier. An "intake form" completed in connection with claimant's pursuit of short-term disability benefits was offered into evidence. The form indicated that claimant's disability was not caused by work and was not due to an accident. The record is unclear by whom that form was completed, but it appears likely the disability carrier filled out the form from information provided by claimant via telephone with the Reliance representative. All paperwork relating to claimant's claim for short and long-term disability benefits were offered into evidence.²⁵

ALJ Klein entered a preliminary hearing Order on September 27, 2007, that found the claim compensable and awarded temporary total disability benefits and medical treatment. Respondent sought Board review of the Order, and a Board Member affirmed the ALJ's decision by Order dated December 20, 2007.

Claimant last worked for respondent on March 16, 2007. He was fired by respondent when he had been absent from work for eight weeks. Claimant testified that he inquired about his status with both Ms. Clouch and Blaine Meisch, respondent's safety director. Claimant was told by Mr. Meisch he could not claim workers compensation because he no longer was employed by respondent.²⁶

Ms. Clouch testified at the preliminary hearing that if an employee reports a work-related injury to her, she refers the employee to Mr. Meisch. Ms. Clouch testified she probably did talk to claimant by telephone on Monday, March 19, 2007, but she did not remember if claimant reported a work-related injury. Ms. Clouch admitted claimant talked about his hip and back pain in that telephone conversation. If claimant had reported a work-related injury to her, she would have referred claimant to Mr. Meisch, which did not occur. Ms. Clouch also testified she continued to have conversations with claimant, both by telephone and in person, after March 19. In those conversations, claimant told Ms.

²⁵ McGill Depo., Ex. 3.

²⁶ R.H. by Depo. (Jun. 15, 2009) at 23-24.

Clounch he was unable to work because of hip and back pain. She stated she provided claimant with paperwork and a telephone number by which he could apply for short-term disability benefits.

On March 12, 2008, Dr. Theo Mellion performed a decompression laminectomy at L3, L4 and L5. Claimant testified the surgery and post-surgical treatment worsened his back symptoms and that he could thereafter sleep only 2-3 hours a night. Claimant's complaints also included constant low back pain, radiating into both lower extremities; difficulty sitting and standing for prolonged periods; loss of sensation in the right leg, requiring use of a cane; bowel and sexual dysfunction; and depression with thoughts of suicide, for which he sought psychiatric treatment. Claimant did not think he could work.

Claimant watched a DVD, and was shown additional still photographs, depicting the saw he operated. Claimant testified the DVD did not show the wood panels being lifted onto the saw, which Claimant testified was necessary at times in order to avoid scratching the wood. Claimant also testified the DVD did not show the cleaning of the saw required at the end of each work day.

On August 29, 2008, Dr. Prostic again examined claimant, who reported pain from his low back to both feet. Dr. Prostic opined claimant sustained repetitious minor trauma to his spine. Dr. Prostic diagnosed failed back syndrome, caused or contributed to by his work with respondent.

Dr. Prostic rated claimant's impairment at 25% permanent functional impairment to the whole body based upon the *AMA Guides*.²⁷

Using the *AMA Guides'* combined values chart, Dr. Prostic combined his rating with Dr. Pro's psychological impairment rating of 36% to the whole body, which totaled 52% whole body impairment. Dr. Prostic imposed permanent restrictions of no frequent bending or twisting at the waist, no forceful pushing or pulling, and no use of vibrating equipment or maintaining captive positioning.

Dr. Prostic reviewed the list of claimant's work tasks performed in the 15-year period before his injury prepared by rehabilitation consultant Karen Terrill. Dr. Prostic concluded claimant could no longer perform 39 of the 53 tasks for a 74% task loss.²⁸ The doctor also opined that claimant was unable to perform any substantial and gainful employment.

²⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

²⁸ Dr. Prostic apparently made a mathematical error in determining claimant had a 70% task loss.

Dr. Paul Stein, a board certified neurosurgeon, evaluated claimant on November 14, 2007, at the request of respondent's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. The doctor's diagnosis was lumbar spinal stenosis as a result of a degenerative process. Dr. Stein opined that claimant's work was likely an aggravating factor.²⁹

On December 4, 2007, Dr. Stein issued a follow-up report after he reviewed claimant's lumbar spine x-rays and MRI scan. The x-rays, taken on April 18, 2007, revealed mild to moderate osteophyte formation at L3-L4. The MRI scan, performed on April 25, 2007, revealed desiccation and disk bulging at L3-L4 with a triangular canal shape and moderate stenosis, predominantly lateral recess. Similar findings were revealed at L4-L5, with mild canal narrowing at L2-L3.³⁰ Dr. Stein testified the films did not alter his opinion expressed in his original November 14, 2007, report.

On February 21, 2008, Dr. Stein viewed a DVD depicting work activity claimant purportedly performed at the time of his injury. After reviewing the DVD, Dr. Stein changed his causation opinion and concluded the work activity depicted in the DVD did not permanently aggravate, accelerate or exacerbate any low back condition claimant may have had prior to his employment with respondent.

Claimant was examined again by Dr. Stein on August 7, 2008. Claimant complained of low back and lower extremity pain. Dr. Stein performed another physical examination and, on August 29, 2008, issued another report after he reviewed the lumbar CT scan images taken on May 9, 2008 and the report of an FCE.

Based upon the *AMA Guides*, Dr. Stein placed claimant in DRE Lumbosacral category III for a 10% functional impairment to the body due to radicular symptomatology and reflex changes. The doctor placed permanent restrictions on claimant as follows: (1) no lifting more than 30 pounds with any single lift up to twice per day, 20 pounds occasionally but not repetitively, and 10 pounds more often not continuously; (2) avoid repetitive lifting from below knuckle height; (3) avoid repetitive bending and twisting of the lower back; and, (4) alternate sitting with standing and walking on an hourly basis if needed. Dr. Stein did not review either of the task lists prepared in this claim. Dr. Stein opined claimant was capable of performing work in the open labor force.

Dr. John Pro, a board certified psychiatrist, evaluated claimant on December 4, 2008, at the request of claimant's attorney. The doctor reviewed claimant's medical records, took a history and performed a mental status examination. Dr. Pro diagnosed

²⁹ Stein Depo., Ex. 2 at 5.

³⁰ *Id.*, Ex. 3.

major depressive disorder and pain syndrome with medical and psychological factors related to his work injury on March 16, 2007.

Based upon the AMA Guides, Dr. Pro opined claimant had a 45% permanent psychological impairment, 30% of which was preexisting impairment due to claimant's alcoholism. Dr. Pro found claimant sustained a 12% permanent psychological impairment to the whole body due to his work-related injury.

Due to claimant's physical and psychological impairments, Dr. Pro opined that claimant was permanently and totally disabled from performing substantial and gainful employment. Dr. Pro testified:

Q. Were there any records, medical records, that you reviewed specifically between the date of injury in March of 2007 and your evaluation in 2008 that referenced any psychiatric complaints during that period of time?

A. Not that I'm aware of.³¹

Dr. Pro found claimant's alcoholism prior to his work-related injury in March 2007 contributed to his depression. The doctor recommended that claimant stop drinking alcohol completely and after six months, Dr. Pro would be able to determine his current degree of depression and impairment.

Dr. Pro testified as follows:

Q. Would you agree with the statement that proper treatment and sobriety from alcohol typically relieves clinical depression symptoms in alcohol-dependent patients within four to six weeks of attaining sobriety?

A. No.

Q. Why not?

A. Well, because the depression may linger on between that and the causality of the depression may or may not be related to the alcohol. It depends on the particular case. It depends on the situation. If you have an alcoholic who has a strong family history of major depression and bipolar illness and has no history of alcoholism and yet they're drinking -- family history of alcoholism, then you're obligated in my opinion to treat their major depression and alcoholism and to view the problem as they're having two illnesses and not one. In other instances, the depression may be originating from the alcohol.

³¹ Pro Depo. at 23.

Q. Is it possible that Mr. Battah's depression that you diagnosed was originating from his alcoholism given that he was still alcohol dependent at the time you evaluated him?

A. That's certainly a possibility. It's not my No. 1 choice. My opinion is what I have in my report here.³²

Dr. Pro opined that claimant had a 34% whole body impairment that included 25% physical (Dr. Prostic's rating) and 12% psychological impairments.

On December 4, 2009, Dr. Pro performed a repeat evaluation. The doctor reviewed additional medical records, took another history and performed a mental status examination. Dr. Pro again diagnosed major depressive disorder and pain syndrome with medical and psychological factors, both caused by the March 16, 2007 injury. Dr. Pro also diagnosed alcoholism in remission. Dr. Pro found claimant's major depressive disorder did not improve since his first evaluation. The doctor opined that claimant's major depression was the driving factor in his pain experience. Dr. Pro found claimant had reached maximum psychiatric improvement but recommended that claimant be treated for his depression and pain syndrome.

Dr. Pro attributed claimant's overall (34%) impairment, both physical and psychological, to his work injury of March 2007. Dr. Pro opined that claimant was more likely than not totally and permanently disabled due to his (25%) physical and (12%) psychological impairments.

At the request of claimant's counsel, Karen Terrill evaluated claimant to determine the work tasks claimant performed in the 15-year period prior to the alleged injury. Ms. Terrill identified a total of 53 work tasks. At the time of the interview, claimant was not working and accordingly had a 100% wage loss.

Ms. Terrill was provided three DVDs showing work activities claimant performed for respondent. After reviewing the DVDs, Ms. Terrill's opinions remained the same.

Michael Dreiling, a vocational rehabilitation consultant, performed a vocational evaluation at the request of respondent's attorney. Mr. Dreiling identified 53 work tasks claimant performed in the 15-year period before the accident. He opined that claimant was able to work and earn minimum wage.

At the request of respondent's attorney, claimant saw Dr. Patrick Hughes, who is board certified in psychiatry and neurology, on July 16, 2009. The doctor reviewed extensive medical records, took a history and performed a psychiatric examination.

³² Pro Depo. at 36-37.

Dr. Hughes testified as follows:

Q. Other than the possible MMPI-2 test, [were] there any other records that indicated any psychiatric complaints or symptoms or conditions between March, 2007, and December, 2008?

A. No.

Q. Did you find that to be significant in your evaluation?

A. Yes, in light of what Mr. Battah newly reported historically to Dr. Pro and then reiterated to me when I evaluated him that specifically being that he had been having severe psychiatric distress since very soon after the work place injury.

Q. But you didn't see any evidence of that in any of the medical records during that period of time?

A. Correct.

Q. That would be consistent with the report that Mr. Battah gave to you.

A. Correct. If Mr. Battah was having all that serious psychiatric distress, he evidently never told any of his treating physicians about it.

Q. And he was seeing doctors during that period of time for his low back condition; is that correct?

A. Correct. As well as his primary physician.³³

In Dr. Hughes' experience, "nine out of ten of those patients who presented as severely depressed when they were severely alcoholic recovered from all the depression symptoms by sobriety alone."³⁴

Dr. Hughes diagnosed the following: (1) a severe narcissistic or antisocial personality disorder; (2) alcohol dependence; and (3) pain disorder with both medical and psychological features along with both physical and psychogenic pain complaints. The doctor opined that claimant's major depression in December 2008 was due to his severe alcohol dependence and not a separate mood disorder.

³³ Hughes Depo. at 14-15.

³⁴ *Id.* at 18.

In Dr. Hughes' opinion, claimant's narcissistic or antisocial personality disorder existed before his work-related accident. Dr. Hughes testified that claimant did not have any psychiatric impairment associated with the alleged work injury.

Dr. Jeffrey MacMillan, a board certified orthopedic surgeon, evaluated claimant on October 20, 2009, at the request of respondent's counsel. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Lumbar spine x-rays demonstrated mild disk space narrowing throughout the lumbar spine but moderately severe at the L3-4. Dr. MacMillan diagnosed degenerative disk disease at L3-4 and right psoas tendonitis. The doctor opined that claimant's degenerative disk disease was the result of age related changes.

Based upon the *AMA Guides*, Dr. MacMillan rated claimant's low back at 5% whole body impairment, which was not related to his work for respondent. In his narrative report, Dr. MacMillan stated:

The weight of the information contained in the medical records suggests that Mr. Battah did not sustain a work related back injury on or about March 16th 2007, and that any treatment he has subsequently received for his back is not related to his employment at Hi-Lo Industries. No impairment is apportionable to his vocational activities at Hi-Lo Industries.³⁵

Dr. MacMillan testified:

Q. Was there any clinical finding on your physical examination of Mr. Battah to indicate that he had a case of radiculopathy or any nerve impingement in his low back?

A. No.

Q. That was consistent with what you had seen in the medical records, that his complaint, his condition was not one of a disc herniation, it was of spinal stenosis?

A. Yes.

Q. With a patient with spinal stenosis, would you have expected any of these clinical tests to be positive for radicular pain?

A. No.

Q. So the results of the physical examination or the clinical tests that you performed on Mr. Battah are not inconsistent with his diagnosis of spinal stenosis?

³⁵ MacMillan Depo., Ex. 2 at 3.

A. Correct.³⁶

Dr. MacMillan found that claimant's groin pain and psoas tendonitis were unrelated to his work for respondent. The doctor felt the epidurals and lumbar decompression treatment claimant received were for symptoms of spinal stenosis and not a work-related injury. Dr. MacMillan concluded that pain radiating into the leg is not consistent with degenerative disk disease but it is for disk herniation or spinal stenosis.

Blaine Meisch, respondent's director of environmental health and safety, prepared a DVD showing the operation of the 32-D panel saw, which claimant was operating when he alleged injury. The DVD was created on January 8, 2008. Mr. Meisch testified that the employees operating the panel saw did not have to lift any panels. According to Mr. Meisch:

Q. Did you notice in Joe Battah's regular hearing testimony that he testified that he had to lift particle board material?

A. Yes.

Q. What is your response to that?

A. There was never any reason to lift panels, full panels that would go into these machines.

Q. Specifically when it comes to particle board, how is that material loaded into the Selco panel saw?

A. The forklifts put it on the conveyers. Then the machine carried the material into itself, into position to be cut. There was no real sliding involved in that machine, manual sliding.

Q. Was that the main difference between the 32-D panel saw and the Selco panel saw?

A. Yeah. The Selco dealt with the larger particle board pieces.

Q. Those particle board pieces were automatically loaded into the machine?

A. Yes.

Q. There was no sliding involved with the Selco panel saw with the particle board?

A. No.

³⁶ MacMillan Depo. at 30.

Q. The only time an operator slid any material was when they operated the 32-D panel saw?

A. Yes. But door bottoms.³⁷

Mr. Meisch testified that employees were instructed not to lift any panels because the machine was designed to require no lifting from the employees. Mr. Meisch stated “[t]he design of the machine again, not only is it to avoid lifting the material, it also is set up where it will not scratch or damage the material.”³⁸

Lloyd Coble, respondent’s lead person in the mill department, trained claimant to operate of the 32-D panel saw. Mr. Coble was shown the DVD prepared by Mr. Meisch. Mr. Coble testified he worked with claimant on a daily basis and that claimant did not lift the panels. Mr. Coble testified:

Q. Did he [claimant] ever complain to you that sliding the material off the scissor lifts was causing damage to the material?

A. No. Well, the material we cut on that, all one sided. The good side is facing up so it ain’t going to hurt anything.³⁹

William Leonard, respondent’s production manager, testified:

Q. And Mr. Coble and you and other material handlers flip those pieces before it’s brought by forklift to the table saw?

A. Yes.

Q. And the table saw operator has no responsibility or need to flip any material once it’s been placed on the scissor lift?

A. That’s correct.⁴⁰

Although Karen Clouch testified at the preliminary hearing, she again testified by deposition:

³⁷ Meisch Depo. at 10-11.

³⁸ *Id.* at 23.

³⁹ Coble Depo. at 22.

⁴⁰ Leonard Depo. at 20.

Q. Do you understand that he [claimant] has testified that he called you over the weekend or the following Monday of the date he is claiming to be injured to report he had been hurt on the job?

A. Yes.

Q. Do you recall receiving a call like that from Mr. Battah?

A. On Monday morning, we have an answering machine and our receptionist records all the messages off the answering machine, so yes, we did receive one from Joe on in that morning.

Q. Did Mr. Battah leave a message he was claiming to have been injured on the job?

A. No, he just left a message that he wasn't there, that he was hurt.⁴¹

Ms. Clouch testified that claimant asked about workers compensation only after he had been paid all of the weeks of short-term disability benefits.

Karen McGill was employed by Reliance Standard Life Insurance Reliance, which sells long-term and short-term disability policies. When deposed her position with the company was supervisor of the quality review unit. Ms. McGill produced Reliance's file for claimant's short and long-term disability claims. She testified Reliance was not made aware that claimant was alleging a work-related injury until September 7, 2007. Ms. McGill did not talk to claimant either personally or by telephone, nor does she know which employee of Reliance talked to claimant to secure the information necessary to fill out the intake form.

David Lohmann previously worked for respondent. Mr. Lohmann testified:

Q. And how would you load the material on to the 32D saw?

A. It's physically, by hand. You have to pick it up and lay it on the table.

Q. How big is the material that you are putting on to the saw?

A. Four by eight sheets.

Q. Of wood?

A. Yes.

⁴¹ Clouch Depo. at 7-8.

Q. And when you say -- would you slide that wood into the saw, off -- does it come on like a scissor lift?

A. On a scissor lift, yes, stacked on a flat -- you have to be careful not [to] scratch the finish surface so set it down gentle.

Q. Would you slide then the wood off the --

A. No.

Q. -- scissor lift?

A. No, don't slide it because you scratch the finish.

Q. How would you, describe it for us.

A. Grab by hand, physically, pick it up, turn it and set it down.⁴²

John Dean, previously a maintenance supervisor for respondent, testified that the saw operator had to lift the piece of plywood and place it on the saw table. According to Mr. Dean:

Q. Do you have any idea the instructions employees were given as to whether or not they were supposed to lift material off that scissor lift and on to the table face?

A. No. And on that table (indicating), there's little air bubbles.

Q. Correct.

A. Got little rollers in it and 90, I would say 60 percent of them were busted, no good, and that's why they would pick up the paper material and have to set it up on there so they wouldn't have to slide it across because it could scratch it.⁴³

Brian McCracken worked for respondent from September 2004 to January 2009. Mr. McCracken testified he operated the 32D panel saw for approximately six months. He picked up materials to avoid scratching or damaging the wood. Mr. McCracken testified as follows:

Q. Let me ask it this way. When you were operating the 32D panel saw did you utilize a scissor lift?

A. Yes.

⁴² Lohmann Depo. at 5-6.

⁴³ Dean Depo. at 26.

Q. And were there times that you had to pick up a product off the scissor lift and put it on to the 32D panel saw?

A. Yes.

Q. And why would you do that?

A. To avoid from damaging the material.

Q. And why would the material be damaged?

A. Slide across it, or it will scratch the surface of it.⁴⁴

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts 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."

K.S.A. 2006 Supp. 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. 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 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.

⁴⁴ McCracken Depo. at 37-38.

The Appeals Board concludes that the award denying compensation should be affirmed, but not for the reason relied on by the SALJ. Claimant did not provide respondent with notice of the accident within the 10-day period required by the Act and the claim is therefore not maintainable.

Although claimant's testimony about notice is unclear, he maintained he called respondent on Monday, March 19, 2007, and either talked directly to Karen Clouch or left a message to the effect that he had an accident at work the previous Friday. There seems to be no dispute that Ms. Clouch either talked to claimant by telephone on March 19 or received a message that day. There also is no dispute that claimant said he was hurt and would not be coming to work. Ms. Clouch's testimony at the preliminary hearing and at her deposition is inconsistent with claimant's testimony regarding notice.

Ms. Clouch testified that if claimant would have notified her of a work-related injury she would have followed respondent's normal protocol and notified Blaine Meisch, respondent's director of environmental health and safety. The testimony of both Ms. Clouch and Mr. Meisch are consistent that no such notification was ever made by Ms. Clouch to Mr. Meisch within the 10 days allowed by K.S.A. 2006 Supp. 44-520. Moreover, Ms. Clouch testified that claimant reported no work-related accident to her on April 19, 2007. Respondent received no notification of a work-related accident or injury until after claimant stopped receiving short-term disability benefits, which was on June 26, 2007, according to the official of Reliance Insurance, Ms. McGill. Claimant testified the short-term disability was terminated eight weeks following March 26, 2007. Whether notice occurred 8 weeks or 13 weeks after the alleged accident, the 10-day requirement was not met.

There is no evidentiary support for the notion that respondent had actual knowledge of the accident, nor that there is just cause to extend the 10-day deadline up to 75 days after the accident.

The purpose of notice is to afford the employer an opportunity to investigate the claim.⁴⁵ Respondent had no such opportunity until weeks after claimant's asserted accident or series of repetitive trauma.

Given the Board's finding that respondent did not receive timely notice of the alleged accident, the other issues raised by the parties are moot and will not be addressed.

CONCLUSIONS OF LAW

1. Claimant failed to give respondent timely notice of his accidental injury.

⁴⁵ *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P2d 1055 (1978).

2. All remaining issues are moot and will not be addressed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁴⁶ Accordingly, the findings and conclusions set forth above reflect the majority’s decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board concludes that the Award of SALJ John Nodgaard dated April 9, 2013, is affirmed as modified because claimant did not prove he provided respondent with timely notice of the accident. All other issues are moot.

IT IS SO ORDERED.

Dated this 26th day of November, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant,
wlp@wlphalen.com

J. Scott Gordon, Attorney for Respondent and its Insurance Carrier,
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Honorable John C. Nodgaard, SALJ

⁴⁶ K.S.A. 2006 Supp. 44-555c(k).