

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

JOSEFA VILLALOBOS)	
Claimant)	
)	
VS.)	
)	
NORCRAFT COMPANIES)	
Respondent)	Docket No. 1,036,674
)	
AND)	
)	
ST. PAUL TRAVELERS INSURANCE)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 19, 2007, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. James R. Roth, of Wichita, Kansas, appeared for claimant. Jeffrey E. King, of Salina, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found that claimant's work activities aggravated her preexisting low back complaints but claimant failed to notify respondent that she had suffered a work-related injury within 10 days of August 2, 2007, and failed to establish just cause for expanding the notice period to 75 days. Accordingly, preliminary benefits were denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 8, 2007, Preliminary Hearing and the exhibits and the transcript of the deposition of Deanna Jones taken November 12, 2007, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues that the preponderance of the evidence indicates that she gave respondent timely notice of her work-related injury, claiming that on August 14, 2007, she

not only spoke with her supervisor, Deanna Jones, but also spoke with a coworker and a supervisor whose name was Jay, about hurting her back at work.

Respondent requests that the ALJ's preliminary hearing Order be affirmed, arguing that claimant specifically testified she gave no supervisor at respondent notice of her injury other than her supervisor, Ms. Jones. And Ms. Jones denied being told that claimant had injured her back on the job. Respondent further argues that because claimant had been used by Ms. Jones as a translator in the past, claimant's alleged language barrier was not evidence of just cause for extending the notice requirement to 75 days.

The issue for the Board's review is: Did claimant provide respondent with timely notice of her work-related accident?

FINDINGS OF FACT

Claimant began working for respondent on November 1, 1993. She had injured her back at work there in 1999. She had missed a few days of work, and respondent sent her to a chiropractor. Her back recuperated enough that she was able to return to work. She performed light duty work for awhile and then returned to her regular duties. In 2006, she was moved to a job in which she was required to lift heavy boxes. She indicated that at one point her back hurt her so badly that she was moved to a different, easier job. In July 2007, she was again given a different job in which her duties included sorting doors by color, style, and size.

On August 2, 2007, claimant was stacking some doors on chairs when one of the chairs fell over. She and a coworker tried to lift the chair to get it out of the way. In doing so, she felt a strong pain in her low back. She testified that she told her supervisor, Deanna Jones, that she had hurt her back lifting one of the chairs, carrying doors, and twisting her body to get through a passageway. Claimant finished her shift on August 2 and continued to work until August 8. During that period of time her back pain worsened. Claimant testified that she told her supervisor about her pain, and her supervisor would also have seen how she was working and noticed the fact that she could not sit down.

On August 8, 2007, claimant told Ms. Jones that she was feeling badly, that she had gone to see Dr. Jerry DeGrado, a chiropractor, and she did not think she could work the next day because of her pain. She called in to respondent on August 9 and several days thereafter, leaving messages that she was unable to work. On August 14, claimant brought an off-work slip from Dr. Ronald Stevens, her personal physician, into respondent's office. While there, she ran into a supervisor whose name was Jay. Jay called Ms. Jones in. According to claimant, at that time there was some discussion among them that claimant had been injured while at work. However, during cross-examination, claimant was specifically asked if she had ever told any supervisor or office personnel at respondent, other than Ms. Jones, that she had injured her back while at work, and she answered that

she had not. Claimant knew that if she were injured on the job, she was supposed to tell her lead worker or supervisor.

Ms. Jones testified that she has no recollection of claimant reporting a work injury to her in August 2007. Claimant did tell Ms. Jones that she was having problems with her back. But claimant's low back condition had been a problem for the nine years Ms. Jones has known her. Claimant has a history of seeing a doctor or chiropractor and had taken off work in the past because of her back problems. Claimant had previously asked Ms. Jones to ask human resources or the safety representative to get back braces for her. Claimant had also previously asked for Ibuprofen.

Claimant brought Ms. Jones a note from DeGrado Chiropractic dated August 8, 2007, indicating that the chiropractor was restricting her from work until further notice. Ms. Jones said she was not aware when she was given this note that claimant was alleging she had been hurt on the job.

Ms. Jones visited with claimant on August 9 and asked claimant if she wanted to get authorization for vacation so she could have time off and be able to recuperate. Claimant said yes, and Ms. Jones said she would have the paperwork ready for her. Claimant signed the forms on August 14. The forms were signed by Ms. Jones on August 9 because that is the day she had the conversation with claimant. Ms. Jones told claimant that since she was not sure when she was going to come back, to keep her job, she needed to get FMLA paperwork.

Ms. Jones further testified that if claimant had reported a work-related injury, she would have taken her to the front office and talked to Dean Murray, the safety person. Mr. Murray and Ms. Jones would have filled out the paperwork.

Ms. Jones does not have any problems communicating with claimant. Ms. Jones said that claimant can speak English and that she has used claimant as a translator in the past. Claimant said she spoke with Ms. Jones in English or sign language, but that she and Ms. Jones understood each other.

The ALJ found that respondent did not receive notice of claimant's injury until her counsel submitted a written claim, which was received by respondent on September 20, 2007, more than 10 business days after the alleged date of accident of August 2, 2007. The ALJ further found that while English is not claimant's native language, she was able to communicate with respondent in English and, therefore, her language skills do not constitute good cause for failure to give timely notice.

PRINCIPLES OF LAW

K.S.A. 44-520 states:

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.

The method of computing the 10 days requires that intermediate Saturdays, Sundays, and legal holidays are to be excluded from the computation.¹

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 and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) finds 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."

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

¹ *McIntyre v. A. L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996), K.S.A. 2006 Supp. 44-551(b)(1).

² K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.³

ANALYSIS

Claimant is alleging she injured her back in a single accident on August 2, 2007. She is not alleging a series of accidents or aggravations. Accordingly, the statute requires that she give notice of her accident to her employer within 10 days. The 10-day period for giving notice can be extended to 75 days if claimant shows there was just cause for the failure to give notice within 10 days. However, claimant does not argue that her time for giving notice should be extended beyond 10 days due to just cause.

Claimant contends that she gave notice of her work-related back injury to Deanna Jones on August 2, 2007, and again to either a woman named Canice⁴, or a supervisor named Jay, or Ms. Jones, on August 14, 2007. Both of these alleged conversations would have occurred within 10 days of the accident, excluding intervening Saturdays and Sundays. Claimant argues that even though Deanna Jones cannot recall being told of an August 2, 2007, accident by claimant or that her back problem was work related, Ms. Jones was the only supervisor to testify, and Ms. Jones would not have known if claimant reported her accident to a different supervisor, such as Canice or Jay. However, this argument is contradicted by claimant's testimony that the only supervisor she gave notice to was Ms. Jones.

Clearly, Ms. Jones was aware of claimant's back problems and the fact that those problems worsened in August 2007. However, given claimant's long history of back problems, it is understandable that Ms. Jones would not necessarily connect claimant's most recent flare-up to her work activities absent some indication from claimant to that effect. Furthermore, Ms. Jones would have no knowledge of claimant's back condition being due to a specific accident that occurred on August 2, 2007, absent being told so by claimant. Ms. Jones denies having such knowledge. Claimant went on her own to a doctor. And claimant does not allege that the notes from her doctor that she gave to her employer made any mention of her treatment being for a work-related injury until Dr.

³ K.S.A. 2006 Supp. 44-555c(k).

⁴ This person's name was spelled "Canice" in the transcript of the preliminary hearing and "Kanece" in the transcript of the deposition of Deanna Jones. Claimant's brief to the board filed December 21, 2007, identifies her as "Candice."

Stevens' note of September 7, 2007.⁵ The off-work slip dated August 14, 2007, does not mention that the back injury was work related.

Ms. Jones testified that if claimant had told her that claimant's back problems were work related, then she would have taken claimant to the safety person, Dean Murray, to fill out the appropriate paperwork. She would not have had claimant complete the vacation leave and the FMLA paperwork.

Perhaps there are other witnesses, such as Jay, who can remember the conversation with claimant in the office on August 14, 2007, but based on the record presented to date, claimant has failed to prove that Ms. Jones or any other supervisor was aware that claimant injured her back at work on August 2, 2007.

CONCLUSION

Claimant has failed to prove she gave her employer notice of her August 2, 2007, accident within 10 days. Therefore, her claim for compensation is time barred.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 19, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James R. Roth, Attorney for Claimant
Jeffrey E. King, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

⁵ Although Dr. Stevens' office note of August 14, 2007, states that claimant relates her back pain to work when lifting doors and then making a twisting motion, there is no testimony that this office note was given to anyone at the respondent company.