

claimant requests the Board reverse the preliminary hearing Order of ALJ Hursh and find that claimant had just cause for not reporting her accidental injury within 10 days.

Respondent requests the preliminary hearing Order entered by ALJ Hursh be affirmed, first alleging the claimant did not have just cause for her failure to provide notice to respondent within 10 days of the alleged accident. Second, respondent alleges claimant's reliance on the *Kotnour* case is misplaced.

The issue is:

- Whether claimant provided timely notice of her alleged accidental injury to respondent as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

This is a claim for a March 11, 2010 accident. At the May 26, 2010 preliminary hearing, the parties agreed that claimant first provided notice of the accidental injury to the respondent on March 29, 2010.³

Claimant began working for respondent as a material handler on March 27, 2007. Her job duties required her to lift boxes of merchandise off a conveyor line and move them to another location. The boxes weighed 5 pounds to 75 pounds.⁴

On March 11, 2010, the claimant lifted a box of merchandise off the conveyor line weighing approximately 50 pounds.⁵ Claimant testified as she lifted the box, she felt a shooting pain in her lower back.⁶ After she let go of the box, the pain went away.⁷ Claimant did not report the back pain to the respondent that day because she assumed it was a temporary pain that she often experienced in performing her daily work duties.⁸

³ P.H. Trans. at 4.

⁴ *Id.*, at 6.

⁵ *Id.*, at 7, 8.

⁶ *Id.*, at 7.

⁷ *Id.*

⁸ *Id.*, at 9, 10.

Claimant did testify she had never experienced a pain like this while working at the respondent.⁹

Claimant was not scheduled to work again until March 15, 2010. When claimant returned to work on March 15, she did not feel any symptoms in her back.¹⁰ Claimant also worked March 16, 17 and 18. Claimant testified she had intense pain in her lower back on March 17 and 18 and she indicated that occurred when lifting boxes weighing as much as approximately 15 pounds.¹¹ On March 19, 2010, claimant began a 10-day vacation.¹² Claimant did not notify respondent about her back pain on March 18, her last day of work before vacation, because she figured it was just another pain and that after applying heat and ice during her time off she figured it would get better.¹³

On March 17, 2010, claimant independently visited a chiropractor, who “checked [her] back out” and “messed with [her] legs a little bit because they were uneven.”¹⁴ Claimant testified the visit was a waste of time.¹⁵

While on vacation, claimant’s back continued to be symptomatic.

When claimant returned to work on March 29, 2010, she immediately notified respondent of the March 11, 2010 accident. An accident report was completed and respondent sent claimant to Olathe Occupational Medicine Clinic for a medical evaluation.¹⁶ Claimant was treated at Olathe Occupational Medicine Clinic on two occasions before respondent informed claimant that her claim was denied. When asked by her supervisor at the time the accident report was completed why she did not report her accident sooner, claimant told her supervisor “because . . . you have aches and pains

⁹ *Id.*, at 7.

¹⁰ *Id.*, at 10.

¹¹ *Id.*, at 11, 12.

¹² *Id.*, at 12.

¹³ *Id.*

¹⁴ *Id.*, at 13.

¹⁵ *Id.*, at 22.

¹⁶ *Id.*, at 14, 15.

doing this stuff every day. I just figured it would go away like every other one of them have.”¹⁷

Claimant also testified:

Q. (Mr. Stubbs) And you knew in your mind that the pain was from work?

A. (Claimant) Yes.

Q. And you understand that you’re supposed to report your accident to the company within 10 days?

A. Yes.¹⁸

A claim for workers compensation benefits is barred unless timely notice of the injury is provided to the employer. K.S.A. 44-520 provides the following:

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 parties in this matter have stipulated that the claimant did not provide notice of her accidental injury until 18 days after the accident. Thus, the dispositive issue in this matter is whether claimant had just cause for failing to notify the respondent within 10 days after the accident. If the claimant has just cause, the time period to notify the employer of

¹⁷ *Id.*, at 18.

¹⁸ *Id.*, at 19.

an accident is extended to 75 days after the date of the accident. This Board Member finds and concludes that claimant did have “just cause.”

The phrase “just cause” is not defined in the Workers Compensation Act. However, in a recent Kansas Court of Appeals case, *Kotnour*,¹⁹ the court provided guidance on what constitutes just cause. The court held that the claimant, Kotnour, who thought his injury was trivial until his family physician advised him to report his injury to his employer, had just cause to extend the period for notifying his employer to 75 days because he was unaware that he had suffered an accidental injury which could lead to a compensable disability.

As in the *Kotnour* case, claimant was not aware the March 11, 2010 accidental injury could lead to a compensable disability. Claimant indicated she got aches and pains working with and lifting boxes and she testified she assumed the pain would go away just as other pains had in the past. In addition, the shooting pain claimant experienced on March 11, 2010, went away after she let go of the box. She then returned to work symptom free on March 15, 2010. Although claimant experienced back pain again she did not report the pain to her employer before her 10-day vacation because she thought after a week off she would get better. When the pain did not improve over her vacation, she immediately reported the accident upon returning to work. From this set of facts, this Board Member is convinced that claimant reasonably thought that she had not sustained an accidental injury which would lead to a compensable claim.

Respondent argues the instant case is not similar to the *Kotnour* case inasmuch as claimant admits she knew of the 10-day reporting requirement and that she knew the pain was related to work and finally that she sought independent medical treatment. None of the facts argued by the respondent prove claimant should have known or realized her injury was one likely to lead to a compensable injury. Arguably, the fact claimant sought independent medical treatment could indicate claimant should have realized she sustained a compensable injury. However, this single fact does not outweigh the other facts supporting claimant’s assertion she did not think the injury was a compensable injury. Furthermore, the *Kotnour* court stated: “The application of the requirement the employee give timely notice of an accident has been flexible rather than rigid. This flexibility has been shown when an employee could not reasonably have been expected to realize that an injury was one likely to lead to a compensable disability.”²⁰

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of ALJ Kenneth J. Hursh entered on May 27, 2010, is reversed. The claimant had

¹⁹ *Kotnour v. City of Overland Park*, ___ Kan. App. 2d ___, 233 P.3d 299, *pet. for rev. filed* (2010).

²⁰ *Id.*

just cause to extend the time period to notify the respondent of her March 11, 2010 accidental injury. Claimant's notice was timely and, hence, her claim is compensable. This matter is remanded to the ALJ to proceed with this case in accordance with this Order.

IT IS SO ORDERED.

Dated this ____ day of August, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Derek R. Chappell, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge