

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

**ESTELLA E. TAPIA** )  
Claimant )  
VS. )  
**SENSITIVE HOME CARE, LLC** )  
Respondent )  
AND )  
**TRAVELERS INDEMNITY COMPANY** )  
Insurance Carrier )

Docket No. 1,051,161

**ORDER**

**STATEMENT OF THE CASE**

Claimant appealed the August 15, 2011, preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge (ALJ) Pamela J. Fuller. E. L. Lee Kinch of Wichita, Kansas, appeared for claimant. Jeffrey E. King of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 12, 2011, preliminary hearing and exhibits, and all pleadings contained in the administrative file.

**ISSUES**

1. What is claimant's date of accident? Claimant alleges a repetitive injury commencing on or about January 2008 through the present. Respondent asserts the date of accident is in January 2008 and that claimant did not give timely notice and did not make a timely written claim. The ALJ's Order states the date of accident was in 2008, and the ALJ concluded that claimant did not give timely written claim. In order to resolve these issues, a specific date of accident must be determined.

2. Did claimant give timely notice of the accident to respondent?

3. Did claimant make a timely written claim for compensation to respondent?

4. If claimant gave timely notice and made a timely written claim, did claimant suffer a back injury arising out of and in the course of her employment with respondent?

#### FINDINGS OF FACT

Claimant's Application for Hearing, filed on June 14, 2010, lists the date of accident as, "On or about January 2008 and each working day thereafter to the present."<sup>1</sup> On June 2, 2010, claimant sent respondent a Notice of Intent which respondent received on June 3, 2010. The Application for Hearing alleges claimant injured her lower back and other affected body parts while lifting and transferring patients during the course of her employment.

Claimant began working for respondent in 2006. She provided services for homebound clients. Her duties consisted of housekeeping, taking clients to doctors' appointments, shopping, and transferring clients from beds to chairs, from chairs to beds or to showers.

Claimant began experiencing back problems in 2008 when she assisted a client, Mary, who is paralyzed and mentally ill. Claimant testified that she had no prior back problems. One of claimant's duties was helping Mary get out of bed and into the shower. This required claimant to put a gait belt on Mary and on herself. Mary and claimant then would grab each other's gait belt and walk to the shower. Mary stands at a rail in the shower where she is undressed by claimant. Mary is then seated by claimant in the shower. Claimant bears most of Mary's weight, who weighs 200 pounds. Claimant did not testify that her back injury was caused by a specific traumatic incident.

Claimant worked with Mary for about a year. Claimant testified she told Carla Gustason, her supervisor, about having back problems while lifting and caring for patients. Claimant does not recall when she told Ms. Gustason about the back problems. After complaining to Ms. Gustason, respondent no longer required claimant to care for Mary. Claimant was advised by Ms. Gustason to take Tylenol. Ms. Gustason indicated claimant never asked to see a doctor.

Claimant testified that most of her back problems were associated with lifting and transferring patients. She indicated the problems began in 2008 and continued through the date of the preliminary hearing (August 12, 2011).<sup>2</sup> Claimant testified that since June 2010, she no longer had to lift patients and only does light housekeeping. As of the date

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<sup>1</sup> Application for Hearing (filed June 14, 2010).

<sup>2</sup> P.H. Trans. at 14.

of the preliminary hearing, claimant was still working for respondent and testified she could do her job.<sup>3</sup>

Respondent's counsel requested he be allowed to proffer the testimony of Carla Gustason, and claimant's counsel did not object. Ms. Gustason was present in the courtroom.<sup>4</sup> Respondent then proffered the testimony of Ms. Gustason. In 2008 claimant mentioned she was having back pain to Ms. Gustason. Ms. Gustason inquired if claimant wanted to file a claim. Claimant indicated that due to the lifting, she no longer wanted Mary as a client. As a result, Ms. Gustason no longer required claimant to provide care for Mary. In 2009, claimant complained about another client to Ms. Gustason. Ms. Gustason took that client away from claimant. Ms. Gustason alleged claimant never indicated the back problems were work related. The first time Ms. Gustason was aware that claimant was seeing a doctor for back problems was when claimant brought Ms. Gustason a January 22, 2010, note from Dr. Ta.

At the preliminary hearing claimant's counsel introduced claimant's medical records from the University of Kansas Medical Center at Wichita, Kansas (KU Med). Claimant initially sought treatment there for physical problems unrelated to her back. The first entry in the records is dated December 7, 2007. Claimant visited KU Med on several other occasions for unrelated medical problems. The first report of back pain was made by claimant to KU Med personnel on April 17, 2009. The entry in the medical report from that appointment indicated claimant was having back pain from lifting patients at her job.

Claimant continued seeing medical personnel at KU Med for her back pain and other physical problems. On May 8, 2009, claimant was prescribed Flexeril for her back. On July 2, 2009, claimant was rechecked for back pain by Dr. Ha N. Ta, who prescribed Lortab. Her notes from that visit state:

The pain has been occurring in an intermittent pattern for months. The pain has been recurrent. The pain is characterized as a dull ache and shooting. The pain is described as being located in the lumbosacral area. The pain radiates to the lateral aspect of right leg and right thigh. The symptoms are aggravated by prolonged standing. The symptoms are relieved by medication. The pain has been associated with arthritis of peripheral joints, back stiffness and hip pain, while there has been no fever, flank pain, history of myelography, history of back surgery, history of disc prolapse, incontinence of stool, incontinence of urine, leg weakness or paresthesias in leg.<sup>5</sup>

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<sup>3</sup> *Id.*, at 27.

<sup>4</sup> *Id.*, at 28.

<sup>5</sup> *Id.*, Cl. Ex. 3.

Claimant continued her treatment at KU Med for her back pain and other physical problems. The reports from KU Med indicate that claimant last saw Dr. Ta on January 22, 2010. However, claimant testified she has sought additional treatment for her back at KU Med. Claimant testified she was never taken off work by Dr. Ta. However, Dr. Ta told her to take it easy, to take it easy lifting clients and not to use her back too much.

Dr. Ta recommended that claimant undergo an MRI to pinpoint the cause of claimant's back problems and drafted a note dated January 22, 2010, for claimant to take to her employer. Claimant testified she took the note to Ms. Gustason, who indicated a report and a workers compensation paper needed to be completed before claimant could undergo the MRI. Respondent did not provide claimant with an MRI.<sup>6</sup>

Claimant's counsel referred her to Dr. George G. Flutter. He saw claimant on January 11, 2011. Dr. Flutter obtained a history from claimant, reviewed the medical records from KU Med and physically examined claimant. His assessment included neck/upper back, middle back and lower back pain; cervical, thoracic and lumbosacral strain/sprain; myofascial pain affecting the neck/upper back, mid back and lower back; possible right lower extremity radiculitis; probable right-sided sacroiliac joint dysfunction and probable right-sided trochanteric bursitis.

Dr. Flutter's report states there is a causal relationship between claimant's back condition and work-related activities. Dr. Flutter recommended electrodiagnostic tests of claimant's lower extremities, a course of physical therapy, and trial use of a TENS unit. Depending on test results claimant may need interventional pain management or neurological and/or orthopedic spine surgical consultation. He gave claimant significant restrictions. Despite the fact he recommended additional treatment, Dr. Flutter indicated claimant had a 5% whole body cervicothoracic impairment related to myofascial pain, a 5% whole body lumbosacral impairment related to myofascial pain, a 1% whole body impairment for the right-sided sacroiliac joint dysfunction and a 3% right lower extremity(1% whole body) impairment for trochanteric bursitis without an abnormal gait, which combined for a 12% permanent impairment to the body as a whole.

Dr. Flutter recommended use of medications to modulate pain symptoms. He also advised that claimant should undergo imaging studies of the cervical, thoracic and lumbar portions of the spine, including x-rays and MRIs.

The ALJ found that claimant suffered an accidental injury in 2008, but did not specify a specific date of accident. Her Order states: "The Claimant has failed to give timely written claim of accidental injury of 2008. She testified that her back condition has been the same since her original injury in 2008. Written claim was not given until June of

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<sup>6</sup> *Id.*, at 18.

2010. Therefore, Claimant's request for medical treatment should be and is hereby denied."<sup>7</sup>

#### PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) in part states: "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. 2009 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 2009 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."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>8</sup>

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<sup>7</sup> ALJ Order Denying Medical Treatment (Aug. 15, 2011).

<sup>8</sup> K.S.A. 2009 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>9</sup>

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>10</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>11</sup>

### ANALYSIS

The Board normally does not have jurisdiction to review a preliminary order granting or denying a claimant medical treatment. However, K.S.A. 44-534a(a)(2) bestows upon the Board jurisdiction to review a preliminary order when the issues are timely notice and written claim and injury arising out of and in the course of employment. Claimant's request for medical treatment was denied because the ALJ determined claimant failed to give timely notice and failed to make a timely written claim.

Claimant alleged, in the Application for Hearing she filed on June 14, 2010, that she suffered a repetitive injury commencing in January 2008 until the present date. The ALJ determined the incident that gave rise to claimant's injury occurred in 2008. The ALJ's order does not identify a specific date of accident. Claimant testified she began having back problems in January 2008. She attributed the onset of back pain to lifting and transporting a particular client, Mary. Claimant did not testify that a single traumatic incident, while lifting or transferring Mary, caused her back injury. She has consistently maintained she suffered a repetitive injury.

After claimant was no longer required to care for Mary, she continued having back problems. Respondent relieved claimant of her duties of taking care of another client who required lifting, yet claimant continued having back problems. Claimant testified that her work activities caused her back pain. On April 17, 2009, claimant complained to KU Med personnel of having back pain due to lifting clients at work. She continued to seek treatment from KU Med for back pain through August 2010. This Board Member finds claimant suffered a repetitive series back injury.

When a claimant has a repetitive injury, K.S.A. 2009 Supp. 44-508(d) determines the date of accident. K.S.A. 2009 Supp. 44-508(d) provides that the earliest date of accident is the date a claimant is taken off work or given restrictions by an authorized

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<sup>9</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>10</sup> K.S.A. 44-534a.

<sup>11</sup> K.S.A. 2010 Supp. 44-555c(k).

treating physician. Here, claimant was never treated by an authorized treating physician. Claimant was not taken off work by any physician. Only Dr. Ta gave claimant restrictions, and she was not an authorized treating physician.

If no authorized treating physician took the claimant off work, or restricted claimant, then K.S.A. 2009 Supp. 44-508(d) provides the date of accident is the earlier of: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. The only written communication received by claimant concerning her back condition from a physician was the note from Dr. Ta dated January 22, 2010. That note, which claimant was to give to respondent, does not state claimant's back condition is work related. Therefore, this Board Member finds that claimant's date of accident is June 3, 2010, the date respondent received a written Notice of Intent from claimant.

Claimant sent respondent a Notice of Intent on June 2, 2010, which was received by respondent on June 3, 2010. Accordingly, this Board Member finds that claimant gave timely notice and made a timely written claim.

Claimant testified her back symptoms were caused by work activities. She communicated this to KU Med personnel on April 17, 2009. Dr. Ta told claimant to take it easy lifting clients. Dr. Flutter opined there is a causal relationship between claimant's back condition and work-related activities. Respondent presented scant evidence to rebut claimant's assertion of a work-related back injury. This Board Member concludes that claimant met her burden of proof that her back injury arose out of and in the course of her employment with respondent.

#### CONCLUSION

1. Claimant's date of accident pursuant to K.S.A. 2009 Supp. 44-508(d) is June 3, 2010.
2. Claimant gave respondent timely notice of the accident and made a timely written claim for compensation.
3. Claimant suffered a repetitive back injury that arose out of and in the course of her employment with respondent.

**WHEREFORE**, the undersigned Board Member reverses the August 15, 2011, preliminary hearing Order Denying Medical Treatment entered by ALJ Fuller and remands this matter to ALJ Fuller for further orders concerning claimant's request for medical treatment.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2011.

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THOMAS D. ARNHOLD  
BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant  
Jeffrey E. King, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge