

Claimant argues the Order should be affirmed. Claimant maintains she also notified another person about her injury, Teresa Mason, the Director of Nursing, who was not called to testify. Accordingly, claimant contends the ALJ, who had the advantage of evaluating the demeanor and veracity of the witnesses, considered Ms. Mason's absence in concluding that claimant provided timely notice. Claimant also argues that her medical records are not inconsistent with an injury at work as the alleged work-related lifting injury is recorded in the medical records of Dr. Grundmeyer, who saw claimant for a neurosurgical evaluation on August 11, 2010. Finally, claimant indicated that when she applied both for FMLA leave and short-term disability benefits, her doctor noted her condition was not work-related, which is contrary to the information that she allegedly provided the doctor. In short, claimant contends the ALJ was best positioned to judge the various witnesses' credibility and that assessment should not be disturbed.

The only issues before the Board on this appeal are:

1. Did claimant injure her back at work?
2. If so, did claimant provide respondent with timely notice of the accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimant began working for respondent in 2007 as a patient care technician, or certified nurse's aid. Claimant, among other things, helped patients to the restroom, assisted patients with bathing, changed beds, pushed and pulled beds when taking bed-ridden patients to tests, and turned and lifted patients. Some of those patients weighed nearly 400 pounds.

Claimant alleges she injured her low back working for respondent in a series of injuries commencing May 26, 2010, and continuing through June 3, 2010, when she last worked.

This was not the first time that claimant had experienced low back problems. In December 1998, claimant had a laminectomy at L1-2 from which she recovered in approximately six months. Later, when moving from Tulsa, Oklahoma to Wichita, Kansas, claimant strained her back. Claimant consulted Dr. Abay, who prescribed exercises at home to strengthen the muscles. She testified, in part:

Q. [Mr. Kinch] . . . You have a history of low back pathology, do you not?

A. [Claimant] Yes, I do.

Q. Consisting of what?

A. L1-2 laminectomy, December 1998. I had a laminectomy done and I recovered within six months with no issues. I had strained it moving from Tulsa to here. Consisted of back spasms and muscle spasms. I saw Dr. Abay, and he was just saying I needed to strengthen my muscles, and I was pretty much fine with that. I consistently stayed on course with physical therapy that they had given me, which was just small do-at-home leg lifts, stomach muscle strengthening moves to keep those muscles intact, to help keep them sturdy. I did EMT school after that. I have lifted many, many, multiple patients since then. I have not had really many issues since.¹

In the early 2000s, claimant consulted both Dr. Abay and Dr. Kris Lewonowski for her low back and received epidural steroid injections. Also, claimant strained her back at work in 2009 and consulted Dr. Yao-Ying Yang, who recommended chiropractic therapy. In short, claimant intermittently experienced low back symptoms following her 1998 surgery, including some numbness into her left leg.²

In addition to having low back problems, claimant fell from a ladder at home in March 2010 and injured an ankle. At the time, claimant also had CT scans and MRIs of the cervical, lumbar, and sacral spine. She denies the fall hurt her back.³

On May 26, 2010, claimant was working for respondent on its 7 p.m. to 7 a.m. shift. That night there were several heavy patients in claimant's area. After helping one particularly heavy patient claimant began experiencing low back symptoms. Despite having symptoms, claimant completed her shift. She also worked the next day and her symptoms increased as she experienced "burning, stabbing, sharp pains, numbness in my left leg, more in my left leg, but it was starting to go down both legs."⁴

Claimant maintains she told a charge nurse, Christy Reser, about the problems she was having with her back when lifting patients and Ms. Reser responded by indicating that claimant knew where the incident reports were kept. Moreover, claimant alleges that she obtained a report, but she did not complete it as it was too hectic that shift. Claimant was off work the next three days but when she returned to work on May 31, 2010, maneuvering the patients aggravated her back. Claimant did not work on June 1, 2010, but she did work on June 2, 2010. Claimant explained that she began to complete an incident report that night, but she was interrupted and then later forgot to complete the task. The next day, June 3, 2010, claimant allegedly completed the incident report but another charge nurse, Beth Church, refused to sign it. Claimant testified, as follows:

¹ P.H. Trans. at 10-11.

² *Id.* at 30.

³ *Id.* at 13, 38.

⁴ *Id.* at 15.

I told her [Beth Church] that I had gotten hurt the week before and I was filling out the incident report, and she had said that she was not going to sign it because she was afraid that it was from me falling at home painting because she wasn't here, at work when it happened.⁵

Claimant testified she did not retain a copy of the incident report and none was introduced as an exhibit at the preliminary hearing. She also testified she was unaware it was permitted to take the document with her.

Midway through her shift on June 3, 2010, claimant left work as she was unable to tolerate her back pain. Claimant described her pain as so sharp and intense that it affected her ability to stand. Claimant has not worked for any employer since leaving work that night.

After seeking medical treatment from her personal physician, claimant alleges that she asked the director of nursing, Theresa Mason, to complete an incident report for her low back injury but Ms. Mason declined as she believed the injury may have been caused by claimant's March 2010 fall.⁶

After leaving work, claimant initially received medical treatment on June 14, 2010, from Dr. Kirk R. Bliss, who is a colleague of claimant's personal physician, Dr. Yang. The doctor's office notes from that date indicate claimant had been experiencing low back pain for about two weeks and that claimant did not recall any specific injury. The doctor's notes from that visit read, in part:

Amanda comes in today complaining of low back pain. This has been going on for about 2 weeks. She has had an L1 L2 laminectomy in the past. She works at the hospital. She does not think that she is going to be able to lift patients secondary to the pain that she is having. She does not remember any specific injury.⁷

Claimant, however, is adamant she told the doctor she hurt her back at work but that she did not know in which room, or with which specific patient the injury occurred. Claimant saw Dr. Yang on June 24, 2010, and he ordered physical therapy and an MRI. The doctor noted claimant was having low back pain with radiculopathy and that she had missed work for the last month. But Dr. Yang did not record a cause for those symptoms.

⁵ *Id.* at 18.

⁶ *Id.* at 19.

⁷ *Id.*, Cl. Ex. 1 at 2 (Dr. Bliss' June 14, 2010 office note).

On June 24, 2010, claimant also completed her applications for short-term disability and leave under the Family Medical Leave Act (FMLA). The portion of the short-term disability application was left blank where it asked for the date of injury and where the injury occurred. Claimant explained she believed that information was to be completed by the physician.⁸ Later, claimant learned that when Dr. Yang completed the portion of the short-term disability application for the physician's statement, the doctor indicated claimant's condition was not work-related. Similar to the short-term disability application, claimant left blank the portion of the FMLA application that asked if the leave request pertained to a work-related injury. Claimant believes she received FMLA leave and several weeks of short-term disability benefits.

At Dr. Yang's request, on August 11, 2010, claimant underwent a neurosurgical evaluation by Dr. Grundmeyer. Claimant indicated in Dr. Grundmeyer's records that her back symptoms began after lifting a patient at work. She provided a date of injury of June 2, 2010. Dr. Grundmeyer recommended a second opinion from Dr. Whitaker, who performed a discogram and told claimant she needed back surgery to address the total absence of disc material at the L1-2 intervertebral space.

Claimant has submitted the medical bills for the above back treatment to her health and accident insurance carrier.

Respondent presented testimony at the preliminary hearing to refute claimant's allegations. Charge nurse, Christy Reser, testified that claimant did not report an injury to her in either late May or early June 2010. Ms. Reser also indicated that it was not possible that claimant notified her of an injury on a Thursday night as Ms. Reser has never worked that night.

Elizabeth Church, another charge nurse, also testified at the preliminary hearing. Ms. Church denies that claimant reported an injury in either May or June 2010. Moreover, Ms. Church denies refusing to sign any incident report that claimant had prepared during that same period. Ms. Church acknowledged that claimant left work early on June 3, 2010, but Ms. Church maintains claimant did not relate the numbness and tingling in her toes were related to anything that happened at work.⁹ In addition, Ms. Church acknowledged that before May 26, 2010, claimant did not appear to have low back problems at work.¹⁰

The ALJ found claimant credible and awarded her benefits. The undersigned finds the ALJ's assessment of claimant's veracity deserved. There is no question that claimant maneuvered patients and frequently those patients weighed nearly 400 pounds. Before

⁸ *Id.* at 23.

⁹ *Id.* at 56.

¹⁰ *Id.* at 62.

May 26, 2010, Ms. Church was unable to discern that claimant had any back problem at work. In short, claimant's testimony is credible she injured her back at work lifting and assisting patients. The undersigned also finds claimant's testimony credible that she notified her supervisors of her back complaints in a timely manner as notice was provided within 10 days of her initial symptoms in late May 2010.¹¹ At times the work was hectic and it is easy to understand how claimant's attempts to submit an incident report would be interrupted. Likewise, it is understandable how a supervisor may not recall certain details. In summary, the December 2, 2010, Order should be affirmed.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this is a review of a preliminary hearing Order and, therefore, it 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.¹³

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated December 2, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2011.

JULIE A.N. SAMPLE
BOARD MEMBER

c: E.L. Lee Kinch, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge

¹¹ See K.S.A. 44-520.

¹² K.S.A. 44-534a.

¹³ K.S.A. 2009 Supp. 44-555c(k).