BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEREMY L. BISHOP Claimant	)	
VS.	)	
P1 GROUP, INC. Respondent	)	Docket No. 1,065,448
AND	)	
STANDARD FIRE INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 15, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Michael L. Snider of Wichita, Kansas, appeared for claimant. John D. Jurcyk of Kansas City, Kansas, appeared for respondent.

The ALJ found claimant was injured each and every working day through April 19, 2013, out of and in the course of his employment with respondent. Moreover, the ALJ found respondent had statutory notice of claimant's injury when claimant's foreman called claimant while he was in the hospital. The ALJ determined claimant's foreman was also informed by claimant's union representative that claimant’s back problems were work-related.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 12, 2013, Preliminary Hearing and the exhibits; the transcript of the June 14, 2013, Discovery Deposition of claimant; the transcript of the July 17, 2013, Evidentiary Deposition of Donald Campbell; the transcript of the July 19, 2013, Evidentiary Deposition of Gary L. Dyke; the transcript of the July 19, 2013, Evidentiary Deposition of Jason Daniel Wilson; and the transcript of the July 19, 2013, Evidentiary Deposition of Drew Schon, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ incorrectly found claimant sustained an injury arising out of and in the course of his employment with respondent. Respondent contends claimant's April 19, 2013, accident aggravated a preexisting condition rather than causing a new injury; therefore, claimant failed to meet his burden of proving his work was the prevailing factor in causing the injury, medical condition, and resulting disability. Further, respondent argues it did not receive proper notice of a work-related injury, and thus, compensation should be denied.

Claimant maintains the ALJ's Order should be affirmed, as it is fully supported by the evidence of record. Claimant argues respondent had notice of the work-related injury according to respondent's witnesses, claimant's coworkers, and claimant.

The issues for the Board's review are:

1. Did respondent have proper notice of claimant's work-related injury?

2. Did claimant's condition arise out of and in the course of his employment with respondent?

3. Was claimant's work the prevailing factor in claimant's medical condition?

FINDINGS OF FACT

Claimant has worked for respondent on and off since 2009 as a pipe fitter. On Friday, April 19, 2013, claimant was on a job at Susan B. Allen Hospital in El Dorado, Kansas, dismantling an air handling unit. Each part of the unit weighed between 75 to 100 pounds. Claimant testified he and a coworker, Jamin Wayne, loaded the parts of the air handling unit into tubs for removal, and while performing this duty claimant felt pain in his back. Claimant stated he informed Mr. Wayne his back was hurting. Gary Dyke, claimant's union steward, testified claimant mentioned back pain to him that same day. Mr. Dyke stated he told Jason Wilson, claimant's foreman, of claimant's back pain while at the job site. Mr. Wilson denied any knowledge of this occurrence.

Claimant was not scheduled to work the following Saturday or Sunday. On Sunday, April 21, 2013, claimant went to the Robert J. Dole VA Medical Center (VA) in Wichita, Kansas, for what he believed was kidney pain. He was admitted overnight for evaluation. Claimant's wife notified Drew Schon, the project supervisor, of claimant's admission to the VA. She told Mr. Schon claimant was admitted for kidney problems. After discharge, claimant followed up with Dr. Mahfuza Hussain, who diagnosed him with musculoskeletal problems instead of a kidney infection.

Claimant returned to work on Thursday, April 25, 2013. Claimant testified he informed Mr. Wilson "first thing in the morning" that he had injured his back.[1] Claimant further indicated Mr. Dyke, Mr. Wayne, and another apprentice were also present while claimant discussed his back injury with Mr. Wilson. Both Mr. Dyke and Mr. Wilson denied any knowledge of this conversation.

At the end of his shift on April 25, 2013, claimant again presented at the VA with back pain and was again admitted. The next morning, April 26, 2013, Mr. Wilson called claimant on his personal cellular phone to say claimant had been laid off. Mr. Schon testified respondent had a scheduled layoff and two workers were to be let go. Mr. Schon described the decision process:

> A. One guy had asked for a layoff, and I was letting two guys go. His wife called Thursday morning, said [claimant's] back in the hospital. She was pretty upset, didn't know how they was going to pay their house payment or anything else.
>
> Q. Right.
>
> A. So being a good union brother, I thought unemployment is better than no work at all.
>
> Q. Okay.
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> A. So I – that's – I decided to let [claimant] – lay [claimant] off so he could draw at least unemployment instead of drawing –
>
> Q. Okay.
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> A. – no money at all sitting in the hospital.
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> Q. And you were scheduling layoffs anyhow.
>
> A. Yes.[2]

Claimant testified he informed Mr. Wilson he was in the hospital while on the phone. Further, claimant stated he discussed his back problem with Mr. Wilson during the conversation:

> Yes, he was my – we did talk about it when he – on the phone when he laid me off. We did discuss it on the phone some, but I can't remember what was said, but we did – because I was highly medicated, but we talked about it while I was on the

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[1] Claimant's Depo. at 38.

[2] Schon Depo. at 24-25.

> phone, but I don't remember what was said. There was a conversation on the 26th when he laid me off.[3]

However, Mr. Wilson denied this conversation occurred:

> Q. Okay. Did he ever tell you that he was having pain in his back while he was in the VA hospital?
>
> A. No.
>
> Q. And so you didn't ask him about any of – how he was feeling?
>
> A. No.[4]
>
> . . . .
>
> Q. Do you know what – did [claimant] seem to be under influence of any medications at the time you were talking to him? If you –
>
> A. No.
>
> Q. – could tell?[5]

Claimant remained in the VA until the evening of April 26, 2013, when he was discharged. An MRI had been ordered but was unable to be completed due to a problem with the scanner.

On May 10, 2013, the MRI was completed. Results of the MRI revealed claimant has degenerative changes of the lumbar spine with disc bulges/protrusions and findings suggestive of radial tears at L4-5 and L5-S1. It also showed left neuroforaminal narrowing at L4-5 and right neuroforaminal narrowing at L5-S1. A year prior, on May 14, 2012, a CT scan was performed on claimant's lumbar spine, revealing mild degenerative changes at the L4-5 and L5-S1, a possible foraminal disc protrusion at L5-S1 which appears to be contacting the exiting right L5 nerve root and mild to moderate right foraminal narrowing.

Respondent received a copy of the May 10, 2013, MRI results from claimant's counsel on May 15, 2013. Both Mr. Schon and Mr. Wilson testified they had no knowledge claimant's back problems were work-related until May 15, 2013, when claimant delivered

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[3] Claimant's Depo. at 42.

[4] Wilson Depo. at 27-28.

[5] *Id*. at 41.

the MRI. Until that time, it was their understanding claimant's back pain was related to kidney or liver trouble. No incident report was filed.

Dr. Pedro A. Murati, a physician board certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical examinations, examined claimant at his counsel's request on June 26, 2013. Claimant presented with constant low back pain that frequently goes into the left leg, numbness and tingling in the left leg and left foot, and a burning sensation in the low back and buttocks. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Murati's diagnoses were low back pain with signs of radiculopathy and bilateral SI joint dysfunction. Dr. Murati's recommendations were as follows:

> For the low back pain with signs of radiculopathy, I recommend this claimant see a spinal surgeon for evaluation and treatment for probable two level fusion. In order for this claimant to become a good surgical candidate, he should stop smoking. I also recommend a bilateral lower extremity NCS/EMG to include the lumbar paraspinals, to evaluate and/or document any radiculopathy performed by a Board Certified Physician.[6]

Dr. Murati also recommended claimant receive cortisone injections, medication, and physical therapy for his SI bilateral joint dysfunction. Dr. Murati indicated in his report that claimant sustained an accident at work which resulted in his low back pain:

> He has significant clinical findings that have given him diagnoses consistent with his described accident at work. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of his conditions is the accident at work.[7]

Claimant indicated to Dr. Murati he had no significant preexisting injuries to his low back prior to April 19, 2013.

Claimant testified he currently uses a cane, a walker, and a wheelchair due to back pain. He stated he primarily has problems in his lower spine toward the left side, problems with his left leg, and has had multiple falls and stumbles subsequent to April 19, 2013. Claimant currently receives unemployment benefits.

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[6] P.H. Trans., Cl. Ex. 3 at 4.

[7] *Id*. at 5.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b states, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the laimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 provides, in part:

(e) “Repetitive trauma” refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. “Repetitive trauma” shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(h) “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 unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-520 provides:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 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.[9]

ANALYSIS

Claimant alleges a series of accidents each day worked through April 19, 2013. Claimant's last day of actual work for the employer was April 25, 2013. The first issue addressed is whether claimant provided respondent notice within 10 days of April 25, 2013, pursuant to K.S.A. 2012 Supp. 44-520(a)(1)(C).

Claimant alleges notice is either: actual knowledge received by his supervisor when the supervisor called him while in the hospital, or oral notice given to claimant's foreman by his union representative. Respondent alleges it did not receive notice until it received a copy of claimant's MRI report on May 15, 2013.

Claimant testified to at least two separate conversations he alleges create actual knowledge or oral notice. Claimant described a conversation on April 25, 2013, while sitting around a table, where he told Jason Wilson, his foreman, about the April 19, 2013 injury. He did not remember talking about or asking respondent to provide medical treatment for the injury.[10] Claimant also stated that Gary Dyke, the union steward, and Jamin Wayne were present during the conversation. Jamin Wayne did not testify.

Mr. Wilson, claimant's foreman, testified there was no meeting where they sat around a table and discussed how claimant might have injured his back.[11] Mr. Wilson testified he received a text from his boss on April 21, 2013, advising claimant was in the hospital for kidney problems. Mr. Wilson testified he presumed claimant was suffering from kidney problems until two or three weeks after claimant was laid off.

Claimant also testified he had a conversation with Mr. Wilson by telephone on April 26, 2013, while he was in the hospital. Claimant thinks he talked about his back condition

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[8] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2012 Supp. 44-555c(k).

[10] Claimant's Depo. at 38.

[11] Wilson Depo. at 7.

but admits he was heavily medicated and cannot recall exactly what was said. Mr. Wilson testified he thought claimant was in the hospital for liver problems.

Mr. Dyke also denied attending a discussion around a table on April 25, 2013. Mr. Dyke testified claimant did not tell him that his back was hurt at work, just that his back hurt. Mr. Dyke told claimant's supervisor that claimant's back was hurting that day. Mr. Dyke did not tell claimant's supervisor that claimant suffered an on-the-job injury.

Drew Schon, project supervisor, testified claimant's wife called him and told him claimant was in the hospital for kidney problems. Mr. Schon admitted Jason Wilson and Jamin Wayne told him that claimant had back injuries and back problems. Mr. Schon stated the first time he heard claimant was alleging a work injury was May 15, 2013.

The weight of the evidence supports claimant failed to provided notice within 10 days of April 25, 2013, claimant's last day of actual work for respondent, as required by K.S.A. 2012 Supp. 44-520(a)(1)(C). There is little doubt claimant was experiencing pain while working for respondent. It is clear claimant told Mr. Wilson and Jamin Wayne that he was experiencing pain. The Board has held in prior decisions that complaints of pain do not necessarily constitute notice of an injury.[12] The weight of the evidence does not support either actual knowledge or oral notice of an accidental injury until May 15, 2013, more than 10 days after the last day claimant performed work for respondent.

Claimant's attorney asked Drew Schon, "It's difficult for Jeremy to be reporting to you an injury that he doesn't even know he's got and hasn't been diagnosed until May 10th, right?"[13] In applying the new notice provisions that became effective on May 15, 2011, another Board Member has held that not finding out a condition is work-related until after the required time period has expired does not waive the notice requirement.[14] While this is a harsh result, there is no longer a just cause exception to the notice requirements contained in the Act.

CONCLUSION

Claimant has failed to show by a preponderance of the evidence that he gave timely notice of a series of accidental injuries while working for respondent. All other issues are moot.

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[12] *Lewis v. Sun Graphics, Inc.*, No. 1,031,707, 2007 WL 740432 (Kan. WCAB Feb. 28, 2007); *Shah v. Cessna Aircraft Company*, No. 1,002,287, 2003 WL 22994487 (Kan. WCAB Nov. 7, 2003)

[13] Schon Depo. at 44.

[14] *Meza v. Calvin Opp Concrete, Inc.*, No. 1,060,588, 2012 WL 6811295 (Kan. WCAB Dec. 11, 2012).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated November 15, 2013, is reversed.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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