

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LEONELLA GILKEY)
Claimant)
V.)
STATE OF KANSAS) Docket No. 1,066,859
Respondent)
AND)
STATE SELF INSURANCE FUND)
Insurance Fund)

ORDER

Respondent and insurance fund (respondent), through Jeffery R. Brewer, request review of Administrative Law Judge Bruce Moore's August 19, 2015 Award. Gary K. Albin appeared for claimant. The Board heard oral argument on January 7, 2016.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations. The parties stipulated claimant sustained a June 1, 2013 accidental head injury that arose out of and in the course of her employment. The parties agreed the Award's citation to K.S.A. 2011 Supp. 44-520 was incorrect and the 2013 version of the statute controls.

ISSUE

On June 20, 2013, claimant's husband faxed respondent a document stating claimant was injured at work on June 3, 2013. Five days later, on June 25, claimant's husband faxed respondent a document correcting the date of injury to June 1.

The judge concluded claimant gave timely notice of her injury by accident because respondent received the fax with the correct date of injury within 20 days after claimant first sought medical treatment on June 7.

Respondent argues claimant's notice of a June 1 injury was defective for not including the statutorily required time and date of such injury and notice on June 25 was untimely and also did not meet the statutory requirements. Respondent argues the judge misapplied the notice statute to find notice was satisfied within 20 days after claimant first sought medical treatment. Respondent states it knew on June 20 claimant was alleging a work injury that occurred on June 3, but argues it had no actual knowledge of the June 1 injury before June 25. Respondent asserts a single Board Member's prior preliminary hearing Order did not apply the notice statute literally as written and the actual knowledge provision in K.S.A. 2013 Supp. 44-520(b) does not waive the notice requirement.

Claimant did not file an appeal brief, but argued she provided timely notice and respondent had actual knowledge of her injury. Claimant argues the purpose of the notice statute – alerting respondent to an injury and providing it the opportunity to investigate and defend the same – was satisfied based on the June 20 fax, albeit with an incorrect accident date, and when a hospital contacted respondent on June 20 to verify where to send claimant’s bill for treatment associated with her workers compensation injury. Further, claimant argues the notice statute is vague and ambiguous, such that attempts to ascertain the plain meaning of the statute are futile.

The issue is: does K.S.A. 2013 Supp. 44-520 preclude claimant’s case being maintained, *i.e.*, did claimant provide timely and sufficient notice of her injury or did respondent have actual knowledge of her injury?

FINDINGS OF FACT

Claimant works for respondent as a mental health technician at Larned State Hospital. On June 1, 2013, while preparing to escort residents, claimant entered a restroom with a wet floor.¹ She slipped and bumped her head on a sink. She "didn't think too much of it"² and finished working a double shift. She did not report her accident to respondent or complete an accident report. That evening, she had a headache. David Gilkey, claimant’s husband, testified she told him she fell at work earlier that day and struck her head.

On June 3, claimant called respondent and reported she was sick, explaining that she had a headache and was unbalanced and leaning to her left. She did not mention her fall at work. Claimant was not scheduled to work again until June 10.

Claimant continued to experience sporadic headaches and sought treatment with her personal physician, Robert E. Wray, D.O., on June 7. Claimant told Dr. Wray she was unbalanced and had headaches. Dr. Wray thought her symptoms might be related to her heart. He ordered a Doppler scan and laboratory work. Claimant denied mentioning her fall at work to Dr. Wray because she "didn't think anything of that fall."³ However, Mr. Gilkey testified he believed he mentioned claimant’s fall to Dr. Wray.

The Doppler scan, done June 10, showed nothing relevant. That same day, claimant returned to Dr. Wray, who indicated she needed an MRI of her head and gave her an off-work slip. Claimant spoke with her supervisor and advised she would not be in that day or the next day. She again did not mention her fall at work.

¹ All additional dates refer to 2013, unless noted otherwise.

² P.H. Trans. at 13.

³ *Id.* at 17.

The MRI, performed on June 12, revealed claimant had a subdural hematoma. An accompanying medical history indicated claimant reported “incoordination x 2 wks Fall on Tuesday last week MRI today – subdural.”⁴ According to claimant, the physician performing the MRI told her he believed her injury resulted from hitting her head.

On June 13, claimant was seen by John R. Dickerson, M.D., a neurological surgeon. Claimant reported severe headaches and increasing difficulty with equilibrium. Dr. Dickerson noted, “Patient observed or reported having an accident [a]bout 6 weeks ago in bathroom on wet floor but is unable to recall for sure, but thinks she may have hit her head on the sink.”⁵ Dr. Dickerson performed a right craniotomy at Wesley Medical Center (WMC) on June 13. WMC discharged claimant on June 20.

Mary Ann Haynes worked for respondent as an administrative specialist. As part of her job, she received notifications regarding work-related accidents. Ms. Haynes testified employees can either report an accident to a supervisor or contact a hotline and leave a voice mail message concerning an accident. Ms. Haynes testified that on June 20, she received a call from WMC wanting to verify claimant had a workers compensation accident and requesting contact information for respondent’s workers compensation carrier. Ms. Haynes had no prior knowledge that claimant sustained an accident at work. She referred the caller to respondent’s workers compensation representatives.

Claimant testified that only following surgery did she first link her fall at work to her head injury. Upon being released from WMC on June 20, claimant had her husband fax a document to respondent which stated:

This will confirm that employee I sustained a traumatic accident while working for Larned State Hospital on June 3, 2013. Specifically, I was in the process of working when I entered the bathroom. The bathroom floor was wet. This caused me to slip and fall. I struck my head.

I subsequently went back to work. I thought I would be fine. I experienced a headache and pain in my neck, but I thought it would go away.

I continued to work the following day and noticed issues involving my balance which caused me to fall into the walls while on the job and hit my head. I contacted Dr. [Wray] in Kinsley about my concerns. A subsequent MRI showed blood in my brain. I was taken to Wichita to see Dr. John Dickerson and underwent surgery at Wesley Medical Center on 6-12-13.

⁴ R.H. Trans., Cl. Ex. 2 at 41. An associated “Health Insurance Claim Form” (HICF) stated claimant had a June 1 date of illness or injury that was related to her employment and the listed insurance plan was “State Self Insurance Fund.” *Id.* at 50. This HICF is dated December 1.

⁵ *Id.*, Cl. Ex. 2 at 100. Claimant denied telling Dr. Dickerson the onset of her symptoms was six weeks prior to surgery.

Today is the first chance I have had to formally contact you. Wesley indicated that they have already contact[ed] you about this. Please let me know what I need to do to get my bills paid and get back into Dr. Dickerson.⁶

The entire document was typed, except the accident date, which was handwritten in cursive over a blank line. Ms. Haynes received such document on June 20. After receiving such notice of injury that day, Ms. Haynes contacted Scott Kollin, the claims adjuster, and reported claimant was alleging a work-related accident. Ms. Haynes told Mr. Kollin she was otherwise unaware of claimant having a work accident and no accident report had been completed. Ms. Haynes stated Mr. Kollin told her that a WMC patient account representative contacted him, likely on June 20, but after WMC initially contacted Ms. Haynes.

After sending the June 20 fax, claimant realized she erred regarding her date of injury by accident. She had her husband fax a supplemental notice to respondent on June 25. Such supplemental notice included her correct date of injury by accident, June 1 (not June 3), along with a corrected date of surgery, June 13 (not June 12). Claimant wrote in the corrected statement that she was confused about time and dates and had to consult her calendar and a medical bill to ascertain the correct dates.

Ms. Haynes received claimant's June 25 fax that day. Ms. Haynes contacted Mr. Kollin on June 26, who advised her to have claimant complete an accident report. The only investigation Ms. Haynes performed after receiving claimant's faxes was to confirm what dates claimant worked. Ms. Haynes undertook no additional action other than to mail an employee's report of accident to claimant and complete an employer's report of accident.

On November 4, Dr. Wray issued an addendum to his June 7 office note, stating:

In the office on 6/7 [claimant] had informed me that while she was at work she had gone to the bathroom and slipped on the wet floor striking her head. She states she did not experience any symptoms right away but since then she had increasing difficulty with her balance and worsening headaches. This is to the best of my recall to be factual.⁷

Judge Moore issued a March 7, 2014 Order stating:

Claimant's preliminary hearing requests are **CONSIDERED** and **DENIED**. Claimant has failed to sustain her burden of proof that timely notice of accident was provided. Claimant first provided notice of a claimed June 1, 2013 accident on June 25, 2013, more than 20 days after the claimed accident.

⁶ P.H. Trans., Cl. Ex. 3 at 1.

⁷ R.H. Trans., Cl. Ex. 2 at 12. The information in the November 4, 2013 addendum is contrary to claimant's testimony that she did not tell Dr. Wray about a slip and fall or head injury at work, but respondent admitted claimant sustained personal injury by accident arising out of and in the course of her employment.

The preliminary hearing Order was appealed to the Board. In an Order dated April 4, 2014, a single Board Member reversed the judge's Order and found claimant provided imperfect notice on June 20, but such information, in addition to respondent being contacted by WMC on June 20 regarding where to send the bill for claimant's workers compensation injury, gave respondent actual knowledge of claimant's asserted injury.⁸

On remand, the judge entered an Order dated April 8, 2014, finding claimant was entitled to a neuropsychological evaluation and speech therapy. The judge directed respondent to pay all outstanding and unpaid medical expenses.

On November 20, 2014, at claimant's attorney's request, claimant saw Aly Gadalla, M.D., who noted claimant had difficulty retaining new information, finding proper words, recalling names and walking long distance, as well as daily headaches and occasional dizziness and balance deficits. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.), Dr. Gadalla assigned claimant a 10% whole person functional impairment. Dr. Gadalla gave claimant permanent work restrictions and recommended yearly psycho-neurological evaluations to assess the progression and extent of her post-traumatic cognitive, memory and other neurological deficits.

At the regular hearing, claimant complained of headaches, some memory deficit, occasional limitations regarding social and interpersonal function, mood and personality changes, imbalance and difficulty walking long distances. Claimant returned to work in September 2013. She performs her regular job, without restriction or accommodation. She takes Tramadol approximately five times a week to control headaches.

On pages 8-9 of his August 19, 2015 Award, the judge stated:

The threshold issue before the court is whether Claimant gave timely notice of her June 1, 2013 accident and resulting injury.

...

Here, Claimant remained employed by Respondent following her accident, and she first sought medical treatment on June 7, 2013. Accordingly, Claimant had until June 27, 2013 to give notice of her June 1, 2013 accident. The court's preliminary hearing finding and the Board's implicit agreement that notice was required within 20 days of June 1, 2013, were [in] error. Notice given on June 25, 2013 is thus timely. **Claimant has sustained her burden of proof that she gave timely notice of her June 1, 2013 work accident.**

Respondent appealed.

⁸ Prior to the Board Member's preliminary hearing Order, all five Board Members discussed the facts and the law in detail as a group and unanimously agreed claimant either provided timely notice or respondent had actual knowledge of her injury.

PRINCIPLES OF LAW

Claimant carries the burden of proving her right to an award of compensation based on the whole record.⁹ The burden of proof is based on a “preponderance of the credible evidence” and a “more probably true than not true standard.”¹⁰

K.S.A. 2013 Supp. 44-520 states:

(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.

. . .

(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;

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

⁹ K.S.A. 2013 Supp. 44-501b(c).

¹⁰ K.S.A. 2013 Supp. 44-508(h).

Historically, the purpose of notice is to afford the employer an opportunity to investigate the claim, provide early diagnosis and treatment, and prepare a defense.¹¹ Our Supreme Court interpreted the notice requirement, as articulated in a prior version of K.S.A. 44-520 containing similar language, as follows:

The statute does not require that the notice be given by the workman personally, and it is sufficient if the giving of the notice is naturally prompted by consideration of the injury and the relationship between the workman and his employer. A reference to the injury in casual conversation would not be notice, but the notice need not be in writing, and need not have the definiteness and certainty of detail of a common-law indictment for crime Whether an injury may prove to be compensable may not be presently known, and what the statute contemplates is notice of injury, so that the employer may have fair opportunity to investigate the cause and observe the consequences.¹²

K.S.A. 2013 Supp. 44-523(a) states:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, ensure the employee and the employer an expeditious hearing and act reasonably without partiality.

Bergstrom states:

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. *Hall*, 286 Kan. at 785.

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).¹³

¹¹ *Pike v. Gas Service Co.*, 223 Kan. 408, 409-10, 573 P.2d 1055 (1978).

¹² *Davis v. Skelly Oil Co.*, 135 Kan. 249, 251, 10 P.2d 25 (1932). *Davis* was favorably cited in recent appellate opinions. See *Battah v. Hi-Lo Indus., Inc.*, No. 110,972, 2014 WL 7152361 (Kansas Court of Appeals unpublished opinion filed Dec. 12, 2014) and *Brackett v. Dynamic Educ. Sys.*, No. 108,134, 2013 WL 1339916 (Kansas Court of Appeals unpublished opinion filed Mar. 29, 2013).

¹³ *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

ANALYSIS

Within various time frames, K.S.A. 2013 Supp. 44-520 requires notice of injury by accident, including the time, date, place, person and particulars of the claimed injury. The statutory notice requirement is waived if the employer had actual knowledge of the injury. Therefore, claimant must prove respondent had timely notice or respondent had actual knowledge of her injury.

Respondent received timely notice of claimant's injury by accident.

The aforementioned statute requires notice within 20 days of the *earliest* of a variety of dates, including the date of injury by accident or the date claimant first seeks medical treatment for her injury by accident. Twenty (20) days from claimant's June 1 injury by accident is June 21. Twenty (20) days from claimant first seeking medical treatment on June 7 is June 28. The earlier deadline applies. The Board disagrees with the judge's analysis that notice on June 25 was timely because it was within 20 days after claimant first sought medical treatment on June 7.

The Board nevertheless concludes claimant provided notice, albeit imperfectly, on June 20, which is within 20 days from her June 1 injury by accident. The content of her June 20 fax demonstrated she was claiming benefits under the workers compensation act and had suffered a work-related injury, both of which would satisfy K.S.A. 2013 Supp. 44-520(a)(4).

Under the facts of this case, the Board is not requiring claimant, a brain-injured individual with memory problems, to provide 100% perfect notice. The fact that the content of her typed June 20 correspondence left blank the date of injury by accident, and she presumably later hand-wrote the incorrect date of injury by accident, illustrates claimant's uncertainty as to her date of injury by accident.

Respondent argues claimant's notice was defective until she provided the actual date and time of her injury by accident. Under respondent's view, any defect or mistake in notice is fatal. Respondent's argument rests on a technicality that claimant's initial attempt at notice on June 20 included the incorrect accident date – June 3 instead of June 1 – and claimant's June 25 fax to respondent with the correct date of injury by accident was provided too late to remedy such error. While *Bergstrom* instructs us to apply the law as written, K.S.A. 44-523, as written, states we are not bound by technical rules of procedure. The notice statute has traditionally been viewed as a procedural statute.¹⁴

¹⁴ *Kansas Workers Compensation* (Kansas Bar Association, 4th Edition, § 12.03 A. (2000)). See also *Pyeatt v. Roadway Express, Inc.*, 243 Kan. 200, 205, 756 P.2d 438 (1987) (The written notice statute, which had substantially the same purpose of our notice statute, was viewed as imposing a procedural requirement.).

Respondent also had actual knowledge of claimant's injury.

Under the plain wording of K.S.A. 2013 Supp. 44-520(b), the notice required in subsection (a) is waived if the employer or the employer's agent had actual knowledge of claimant's injury.

The Kansas Workers Compensation Act (KWCA) does not define "actual knowledge." While K.S.A. 2013 Supp. 44-520 uses the term "actual knowledge" and not "actual notice," notice and knowledge appear to be synonymous: "'Notice' means intelligence by whatever means communicated; information; knowledge."¹⁵ The phrase "actual notice" has been construed by the Kansas Supreme Court outside of the KWCA:

" 'Actual notice does not mean that which in metaphysical strictness is actual in its nature, because it is seldom that ultimate facts can be communicated in a manner so direct and unequivocal as to exclude doubts as to their existence or authenticity. Actual notice means, among other things, knowledge of facts and circumstances so pertinent in character as to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts.' [Citations omitted.]" *Thomas v. Evans*, 200 Kan. 584, 587, 438 P.2d 69 (1968) (quoting *Pope v. Nichols*, 61 Kan. 230, 236, 59 Pac. 257 [1899]).¹⁶

Thomas also states actual notice includes both express and implied notice. Express notice "includes all knowledge or information coming to the party to be charged . . . or which imposes upon him the further duty of inquiry."¹⁷ Implied notice "imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them."¹⁸ Again, it appears knowledge is used as a definition of notice. The *Thomas* commentary regarding "actual notice" is analogous to language in *Davis* indicating the purpose of notice is to give an employer the fair opportunity to explore an injured worker's allegations.

Respondent complains it could not have actual knowledge of claimant's injury because it only knew about her asserted injury. Respondent posits claimant's allegations must be ultimately true for it to have actual knowledge. Such argument requires the sort of actual "metaphysical strictness" that was specifically not required in *Bethany Medical Center*, *Thomas* and *Pope*.

¹⁵ *Colorado Interstate Gas Co. v. Duffield*, 9 Kan. App. 2d 428, 430, 681 P.2d 25 (1984) (citing *Koehn v. Central National Ins. Co.*, 187 Kan. 192, 200, 354 P.2d 352 (1960)).

¹⁶ *Bethany Med. Ctr. v. Wallace, Saunders, et al., Chtd.*, 23 Kan. App. 2d 120, 123, 928 P.2d 97 (1996).

¹⁷ *Thomas v. Evans*, 200 Kan. 584, 587, 438 P.2d 69 (1968).

¹⁸ 200 Kan. at 587.

Despite claimant's confusion as to the date of her injury (listing June 3 instead of June 1), respondent had actual knowledge of her injury based on the information her husband imparted to respondent on June 20, in addition to respondent being contacted twice by WMC on June 20 about claimant having a workers compensation injury. The formal requirements for notice under K.S.A. 2013 Supp. 44-520(a) were waived based on respondent having actual knowledge of claimant's injury.

Respondent has more arguments regarding whether it had actual knowledge of claimant's injury.

Respondent argues the actual knowledge provision of K.S.A. 2013 Supp. 44-520(b) can only be invoked as an exception to the general rule that notice requires the time, date, place, person injured and particulars of an injury. The Board does not agree. As the statute is written, the four specific requirements of notice are simply waived if the respondent has actual knowledge of the injury. Nothing in the statute refers to the four specific requirements as the general rule or that actual knowledge is an exception to the statute. K.S.A. 2013 Supp. 44-520 contemplates two alternative methods to satisfying the statutory notice requirement.

Respondent argues "actual knowledge" means respondent witnessed and corroborated the actual injury and the injury actually occurred as alleged. Based on plain language, or lack thereof, K.S.A. 2013 Supp. 44-520(b) does not contain any such requirement. Clearly, one way to get actual knowledge is by first-hand observation, but there are other ways to obtain actual knowledge. To add to the statute respondent's assertion that "actual knowledge" means respondent must personally witness an injury would impermissibly add language that is not present within the statute itself.¹⁹

At oral argument, respondent conceded actual knowledge may be imparted to an employer by means other than a supervisor or agent personally witnessing an accidental injury. For instance, respondent stated an employer would have actual knowledge from receiving a medical record documenting an injury. However, when asked if a typed letter from an injured worker would be sufficient to provide actual knowledge, respondent indicated information from a claimant might potentially be unreliable and self-serving. From the Board's perspective, any allegation by any party in litigation could be viewed as unreliable and self-serving.

¹⁹ See *Bergstrom, supra*. See also *Hoesli v. Triplett, Inc.*, ___ Kan. ___, 361 P.3d 504 (2015); *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 560, 293 P.3d 723 (2013) ("The first step . . . is simply to read the statutory language, giving common words their ordinary meanings. [Citation omitted.]"); *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 521, 154 P.3d 494 (2007) ("A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute. [Citation omitted.]"); *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

The Board concludes that as of June 20, respondent was presented with facts and circumstances sufficiently pertinent in character to enable it to investigate claimant's allegations, ascertain ultimate facts and observe the consequences. Bluntly stated, respondent had actual knowledge of claimant's injury – claimant put respondent on notice that she had been hurt at work and was seeking workers compensation benefits.

While not necessary to our decision, the Board will address some of respondent's additional arguments. Respondent argues the single Board Member's preliminary decision allowed the notice statute to be satisfied if claimant was in "substantial compliance" with notice requirements.²⁰ The preliminary decision did not say statutory notice requirements are not required if notice is substantially provided. The prior decision did not contain the term "substantial compliance" and did not rest on such theory. Rather, the preliminary decision was based on a holding that claimant proved respondent had actual knowledge of her injury based on the information she provided to respondent.

Respondent also argues the Board is allowing claimant a "mulligan" or a "do-over" by allowing her notice on June 25 to correct the date of accident deficiency in her June 20 fax. Again, that is not what the Board has done. So long as respondent had actual knowledge as of June 20, K.S.A. 2013 Supp. 44-520 is satisfied.

Several of respondent's arguments have no legal impact. For instance, whether claimant's accident was witnessed, whether she missed the remainder of her shift on June 1 or kept working a double shift, or whether she informed her employer of an injury by accident on June 1, June 3 or June 10 are not relevant. Whether claimant minimized her injury at the time of her accident is irrelevant. Claimant reporting in her typed letter that her surgery was on June 12 instead of June 13 is unimportant. Claimant telling respondent in her typed letter that she worked after the date of her injury is inaccurate, but such fact is irrelevant. Indeed, respondent was aware claimant did not work after June 1. Respondent also believes claimant's letter contains an inconsistency regarding the mechanism of her injury based on her comment that she worked on June 4 and fell into walls and hit her head due to balance problems. The preceding paragraph of claimant's letter states she slipped and fell in a bathroom the prior day and struck her head. While claimant incorrectly and initially identified June 3 as her accident date, she is not alleging injury by accident other than June 1, there is no inconsistency regarding the mechanism of her injury and respondent admits claimant sustained injury on June 1.

The Board places some credence in respondent's disbelief that June 20 was the first date claimant was able to inform respondent about her injury by accident. The evidence suggests claimant could have provided notice on an earlier date. However, the notice statute does not work that way; it provides an outside time limit for notice and does not bar a claim if notice arguably could have been provided earlier.

²⁰ See Respondent's Brief (filed Sept. 17, 2015) at 2 and 4.

CONCLUSION

Claimant provided timely and proper notice of her June 1 injury by accident on June 20. Claimant also provided respondent actual knowledge of her injury based on the information she gave respondent in her June 20 faxed letter and based on information respondent received from WMC on June 20 regarding where to send claimant's billing statement for her workers compensation injury.

AWARD

WHEREFORE, the Board affirms the result of the August 19, 2015 Award.

IT IS SO ORDERED.

Dated this _____ day of January, 2016.

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

The undersigned Board Member agrees with his brethren on the majority who found claimant provided timely notice of claimant's accident and that respondent had actual knowledge of claimant's injury, but wishes to express additional reasoning for his decision regarding statutory notice.

K.S.A. 2013 Supp. 44-520(a)(1) provides that in order for a claimant to maintain his or her workers compensation claim, they must provide timely notice of their injury by accident and repetitive trauma, and goes on to set forth the time limits for notice. K.S.A. 2013 Supp. 44-520(a)(4) requires notice, whether written or oral, must include the date, time, place, person injured and particulars of the injury.

In many instances, it may be difficult for an injured worker to provide the foregoing information. An injured worker who develops a repetitive injury often cannot provide a date, time, place and particulars of the injury. For example, a worker who works on different job sites, using different vibratory tools and equipment, would not be able to provide notice of the date, time or place of his or her injury. The Board has noted the date of injury for an injury by repetitive trauma is legal fiction.²¹ The Board also notes that a worker who sustains an injury by repetitive trauma may provide notice before the date of injury.²² Therefore, an injured worker can give notice of an injury prior to the legal date of injury.

This Board Member is aware the present case involves a single traumatic accidental injury and not an injury by repetitive trauma. However, the foregoing observations illustrate that the requirements to provide date, time, place and particulars of an injury may not be as “plain and unambiguous”²³ as they first appear.

For example, what if an injured worker provides information that he or she injured their knee last Thursday afternoon while roofing a house in Hays, Kansas? Is that sufficient notice of date, time, place and particulars of the injury? Or must the injured worker instead provide notice that he or she was injured on June 1, 2013 at 9:02 a.m. at 1600 East 13th Street, Hays, Kansas, when they slipped on the roof and twisted their right knee? What if a worker is injured during a two, four or eight-hour shift and reports he or she was injured during the shift. Is that sufficient notice of a time of accident?

Again, this Board Member realizes the forgoing did not occur in this case. However, if K.S.A. 2013 Supp. 44-520(a)(4) is construed too narrowly and strictly, there is a danger that many injured workers will not be allowed to maintain their claims because they did not provide timely notice of the specific month and day, the exact time and exactly location of their injury or sufficient detail as to how the injury occurred.

BOARD MEMBER

²¹ *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011) and *Boyce v. Blackbob Pet Hospital Chartered*, No. 1,061,806, 2012 WL 6811299 (Kan. WCAB Dec. 18, 2012).

²² *Whisenand v. Standard Motor Products*, No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012); see also the application of the predecessor statute in *Hunt v. Integrated Solutions, Inc.*, No. 1,046,939, 2010 WL 1918584 (Kan. WCAB Apr. 14, 2010) (“Admittedly, it seems unusual to conclude an injured employee gave notice of an accident that had yet to occur. Yet, that is a function of the legal fiction that results in cases of microtraumas and the terms of K.S.A. 44-508(d).”).

²³ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶¶ 1 & 2, 214 P.3d 676 (2009).

CONCURRING & DISSENTING OPINION

We agree with our colleagues regarding the actual knowledge finding, but diverge regarding notice. Respondent did not have proper and timely notice of the date and time of claimant's injury by accident.

Under the plain meaning of K.S.A. 2013 Supp. 44-520(a), the employer must be provided notice of the injury by accident, including the time, date, place, person injured and particulars of such injury. Claimant did not provide the proper date or any time of her injury by accident in her June 20 fax to respondent and the phone call from WMC did not impart these specific requirements contained in K.S.A. 2013 Supp. 44-520(a) to respondent. While claimant's June 20 fax made it apparent she was claiming benefits under the workers compensation act and had suffered a work-related injury, which satisfy the second sentence of K.S.A. 2013 Supp. 44-520(a)(4), the first sentence requiring "time, date, place, person injured and particulars of such injury" was not fully and timely met. As such, the specific statutory requirements of notice were not satisfied. However, such requirements were waived based on respondent's actual knowledge of claimant's injury.

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