

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARVIN J. SAMUELS)
Claimant)
V.) Docket No. 1,068,849
U.S.D. 501)
Self-Insured Respondent)

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 3, 2015, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on December 8, 2015. Bruce A. Brumley of Topeka, Kansas, appeared for claimant. Patrick M. Salsbury of Topeka, Kansas, appeared for self-insured respondent.

The ALJ found that while claimant gave timely notice, he did not give proper notice as defined by K.S.A. 44-520(a)(4).¹ Further, the ALJ determined claimant's condition did not arise out of and in the course of his employment with respondent. She wrote:

Claimant's symptoms are just too remote in time to link the December 17, 2012 incident as the prevailing factor for Claimant's condition. It is found and concluded that Claimant has an injury but it did not arise out of and in the course of Claimant's employment.²

The ALJ did not address claimant's request for attorney fee approval.

The Board has considered the record and adopted the stipulations listed in the Award. Not listed in the Award is the transcript of claimant's deposition taken April 14, 2014. The parties stipulated this transcript may be entered into the record as an evidentiary deposition.³

¹ The ALJ found claimant did not provide the date, time, location, place or particulars of his injury by accident.

² ALJ Award (Aug. 3, 2015) at 6.

³ See Claimant's Depo. (Apr. 10, 2015) at 25.

ISSUES

Claimant argues he provided proper notice on January 14, 2013, 28 days after the accident. Further, claimant contends the evidence, in that he sustained a personal injury by accident arising out of and in the course of his employment, is uncontradicted. Claimant argues he sustained a 5 percent impairment to the whole body as a result of the accident and is entitled to future medical treatment and payment of authorized medical care. Claimant asks that his attorney fee contract be approved.

Respondent maintains the ALJ's Award should be affirmed. Respondent argues claimant's notice was not timely. Additionally, respondent contends claimant's written statement, received by respondent on January 14, 2013, does not comply with the requirements of K.S.A. 44-520(a)(4). Respondent argues claimant failed to prove that his injury arose out of and in the course of his employment or that his work was the prevailing factor in causing his injury or condition.

The issues for the Board's review are:

1. Did claimant suffer a personal injury by accident arising out of and in the course of his employment on December 17, 2012?
2. Did claimant provide timely notice to respondent?
3. Is claimant's alleged accident the prevailing factor causing his injury and need for medical treatment?
4. What is the nature and extent of claimant's disability?
5. Is claimant entitled to authorized, unauthorized, and future medical compensation?
6. Is claimant's counsel entitled to attorney fees?

FINDINGS OF FACT

Claimant was employed by respondent as a speech teacher. On December 17, 2012, claimant intervened in a fight between two students and was pushed into a concrete rail. Claimant testified he injured his right groin and hip areas upon striking the concrete rail.

Respondent's principal and assistant principal did not arrive at the scene until after the fight, where they saw claimant holding one of the involved students. Claimant and the assistant principal exchanged words, and claimant was suspended with pay. Claimant appealed his suspension. Claimant provided an undated written statement reciting the

events of December 17, 2012. The last sentence of the statement says, "I suffered some injuries from the fight and will be seeing a doctor soon."⁴ The statement was received by respondent on January 14, 2013.

Claimant testified his injury was recorded by respondent's security system.⁵ He alleged in his January 2013 statement the principal had viewed the video. Neither the video nor the principal's observations are in evidence.

Claimant testified he did not inform any supervisor about hitting the railing and injuring his hip and groin areas prior to January 14, 2013.⁶ Claimant stated he did not feel any pain on the day of the fight, although he mentioned injuries in his statement. He explained:

I felt it when I went over that railing so I – and I know from – from the history of people having wrecks you don't feel something right then and there, and I figured something may come later on. And as hard as I hit that thing, I kind of figure[d] that something may happen. In case it did, I wanted to protect myself.⁷

Claimant felt some pain in January 2013, but did not seek medical treatment. Claimant testified the pain gradually worsened, causing him to seek treatment at a Cotton O'Neil clinic in February 2013. Claimant did not initially seek treatment because he thought it might interfere with his suspension appeal. He remained suspended with pay until April 19, 2013, the date of his termination.

Claimant retained counsel in February 2014 and was referred to Dr. Daniel Zimmerman, a medical doctor. Dr. Zimmerman first examined claimant on April 2, 2014. Claimant complained of right groin pain. Dr. Zimmerman reviewed claimant's history, took x-rays, and performed a physical examination. He did not have claimant's medical records available for review. Dr. Zimmerman diagnosed claimant with ilioinguinal nerve entrapment syndrome and chronic adductor muscle strain "prevalingly due to the December 7 [*sic*], 2012, work related incident."⁸ He determined claimant had not yet reached maximum medical improvement (MMI) and recommended conservative treatment.

Claimant returned to Dr. Zimmerman on November 26, 2014, complaining of pain and discomfort in the right hip and right groin. After reviewing claimant's history and

⁴ Claimant's Depo. (Apr. 10, 2015), Ex. 2 at 2.

⁵ Claimant's Depo. (Apr. 14, 2014) at 24.

⁶ Claimant's Depo. (Apr. 10, 2015) at 14

⁷ *Id.* at 30.

⁸ Zimmerman Depo., Ex. 2 at 4.

performing a physical examination, Dr. Zimmerman found claimant sustained right hip trochanteric bursitis and ilioinguinal nerve entrapment syndrome as a result of the work-related incident. Because claimant had not received the recommended treatment and his condition remained relatively unchanged, Dr. Zimmerman determined claimant was at MMI.

Using the AMA *Guides*,⁹ Dr. Zimmerman opined claimant sustained a 5 percent permanent partial impairment to the body as a whole due to permanent residuals of his ilioinguinal nerve entrapment and right hip trochanteric bursitis. Dr. Zimmerman testified the examination findings were consistent with the history provided by claimant. He explained that while his evaluation findings were subjective, neither diagnosis could be documented with an objective test.

Dr. Zimmerman did not impose permanent restrictions. He wrote, "Although [claimant] has achieved [MMI], it is more probably true than not that additional medical treatment provided or prescribed by a licensed physician will be necessary in the future."¹⁰

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

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. 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(h) states:

"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 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) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

⁹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹⁰ Zimmerman Depo., Ex. 3 at 2.

(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, 20 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.

K.S.A. 2012 Supp. 44-508(f)(2)(B) states:

An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2012 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

1. Did claimant suffer a personal injury by accident arising out of and in the course of his employment on December 17, 2012?

Claimant's testimony that he suffered an injury on December 17, 2012, while breaking up a fight between two students is uncontroverted. Respondent submitted no evidence to refute claimant's allegations regarding his injury. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.¹¹ The Board finds claimant suffered an injury by accident on or about on December 17, 2012, arising out of and in the course of his employment.

2. Did claimant provide timely notice to respondent?

Claimant filed a statement with respondent's district office on January 14, 2013. In that statement claimant states, "I suffered some injuries from the fight and will be seeing a doctor soon." The ALJ found the notice to be insufficient, as it provided no specifics about the nature of his injury, nor did the notice state claimant was pursuing workers compensation benefits.

K.S.A. 2012 Supp. 44-520(a)(1)(C) requires notice of an injury within 20 calendar days after the employee's last day of actual work for the employer. Actual employment means the time the worker is actually employed and on the job.¹² The plain and unambiguous meaning of the term "last day of actual work" is the last day an employee physically performs work activities for his or her employer.¹³ Claimant's last day of actual work was the date of the alleged accident, December 17, 2012. Respondent did not receive claimant's written statement until January 14, 2014, 28 calendar days after claimant's alleged accident. Claimant failed to provide respondent with timely notice.

¹¹ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

¹² See *Zeitner v. Floair, Inc.*, 211 Kan. 19, 19, 505 P.2d 661 (1973); see also *Elder v. Arma Mobile Transit Co.*, 253 Kan. 824, 828, 861 P.2d 822 (1993).

¹³ See *Brooks v. Hawker Beechcraft, Inc.*, No. 1,059,392, 2012 WL 2890476 (Kan. WCAB June 22, 2012); *Barber v. HF Rubber Machinery, Inc.*, No. 1,066,302, 2014 WL 517241 (Kan. WCAB Jan. 16, 2014).

All other issues are moot.

CONCLUSION

Claimant met the burden of proving he suffered an injury by accident arising out of and in the course of his employment on or about on December 17, 2012. Claimant failed to provide respondent with timely notice within 20 calendar days after his last day of actual work for respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated August 3, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Rebecca A. Sanders, Administrative Law Judge