BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALVINA M. OSTRANDER Claimant v. **GGNSC LINCOLN** Respondent and **NEW HAMPSHIRE INSURANCE COMPANY** Insurance Carrier	))))))))))	Docket No. 1,070,813

ORDER

Claimant requests review of the November 3, 2014, preliminary hearing Order entered by Administrative Law Judge Ali Marchant. Claimant appears by Chris A. Clements, of Wichita, Kansas. Respondent and insurance carrier (respondent) appear by Stephen P. Doherty, of Overland Park, Kansas.

ISSUES

The Administrative Law Judge (ALJ) denied preliminary relief because respondent was not given timely notice of claimant's alleged November 6, 2013, personal injury by accident.

Claimant contends the ALJ erred by finding timely notice was not given and by not addressing whether respondent had actual knowledge of the injury.

Respondent requests the Board affirm the ALJ's decision.

The issues raised for the Board's consideration are:

1. Was respondent given timely notice of claimant's injury by accident?

2. Did respondent have actual knowledge of the injury?

FINDINGS OF FACT

When claimant's alleged accidental injury occurred, she was the director of nursing at Golden Living Center, an assisted living facility operated by respondent in Wichita,

Kansas. As director of nursing, claimant supervised the nursing staff, ensured the residents received appropriate care and monitored the nursing staff to assure compliance with state law.

Claimant testified that on November 6, 2013, a 420-pound resident in a wheelchair attempted to enter claimant's office. A wheel on the front of the wheelchair turned sideways and the wheelchair became stuck in the door frame. Claimant testified she squatted in front of the wheelchair, facing toward the resident, and attempted to lift the wheelchair to straighten it out, pushing the chair backwards out of the doorway. Claimant testified that after this incident, she experienced the "[n]ormal discomfort you get from lifting somebody 420 pounds."[1] Claimant testified that after the incident, she experienced burning pain across her shoulders and back.[2]

Respondent's company policy required employees to report work related injuries to their supervisor and see an incident report was completed and signed. Claimant did not report the incident to her supervisor on the day it occurred because she did not think she was injured.

The following morning, claimant asserted she reported the alleged accident to Mary Ellen Olson, respondent's executive director, at a meeting of department heads. Claimant testified:

> Q. And approximately what time of day was this department head meeting the day after the incident?
>
> A. About 8:30 in the morning.
>
> Q. Did you report this incident to anybody at that time?
>
> A. Yes. We talked about the resident and how her weight was becoming excessive, the wheelchair getting stuck in the door, there's no bigger wheelchair than the one we had for her, and that we were going to have to talk to the doctor about getting her on a diet. I talked to the dietary manager. We looked at her weight and it was just - - it was steadily increasing.
>
> Q. And was Mary Ellen Olson present?
>
> A. Yes, she was.
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> Q. Was she involved in the conversation about the weight loss?

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[1] P.H. at 11.

[2] *Id*. at 12.

A. I don't know that she was involved. It was she - - we were all discussing it.

Q. Okay. Did you say anything to her about experiencing some back discomfort?

A. She asked me if I was okay that morning. I told her, "I'm okay, it's just normal lifting her because she weighs that much."[3]

. . .

Q. Okay. But then you say the next day you told Ms. Olson about the injury at work?

A. Yes.

Q. How could you tell her about an injury at work if you didn't know you had hurt yourself yet?

A. I told her about the incident at work.

. . .

Q. Okay. So at that point still you hadn't put two and two together that your back was hurting because of this incident, correct?

A. No.

Q. So the day after this incident you had no intention of reporting a work injury; is that correct?

A. No.

Q. That's a correct statement?

A. Yes, that is a correct statement.[4]

Claimant testified the first time she thought she might have been injured was when she consulted her personal physician, Oswaldo C. Bacani, M.D., on November 12, 2013, for a cold. Claimant told the doctor that when she coughed, it was so painful she could not breathe. Claimant said she had experienced back pain for one week and a bad cold for a couple weeks. Claimant thought she may have injured her ribs from coughing. She told the doctor her pain was located between her shoulder blades and underneath her right breast. Dr. Bacani's assessment was a possible fractured rib on the right side. Dr. Bacani

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[3] *Id.* at 14-15.

[4] *Id.* at 35-36.

had chest x-rays conducted and provided claimant with a muscle relaxant and an antibiotic. Claimant did not tell Dr. Bacani about any alleged work injury. Claimant testified:

> Q. Okay. And it sounds like from your testimony when you saw Dr. Bacani, even the first few times you saw Dr. Bacani you didn't know you had injured yourself; is that correct?
>
> A. Yes, that's correct.[5]

On November 16, 2013, claimant and Ms. Olson talked about claimant's back pain. Claimant did not tell Ms. Olson the pain was from the November 6 wheelchair incident.

Claimant testified she told Ms. Olson between November 12, 2013, and December 6, 2013, her back hurt all of the time, but she (claimant) did not know why:

> A. Ms. Olson and I had discussed my back pain between November the 6th and December - -
>
> Q. Right, but you had not discussed your back pain being related to the lifting the wheelchair?
>
> A. No.
>
> Q. Because you didn't know at that point?
>
> A. Right.
>
> Q. So there was no way you could have told her before - -
>
> A. Right.
>
> Q. - - December 6th, correct?
>
> A. Right.[6]

Claimant returned to Dr. Bacani on December 6, 2013. The doctor asked claimant if she sustained an accident or injury at work, or perhaps an auto accident, that caused her back pain. She told the doctor she had not done anything recently, but she sprained her back in 1982 and was involved a car accident a couple years before that.

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[5] *Id.* at 35.

[6] *Id.* at 52.

Dr. Bacani's December 6, 2013 treatment records indicate claimant complained of right thoracic spine and right rib pain, and was taking Lortab and Flexeril. Dr. Bacani found tenderness in her mid-back on the right side. Claimant gave a history of a herniated disc in 1982. Dr. Bacani's impressions were weight loss, thoracic spine pain, low back pain and generalized anxiety disorder. Dr. Bacani recommended an MRI of the spine and CT scans of the abdomen and chest.

Claimant testified she called Ms. Olson on December 6, 2013:

> Q. So did you have a conversation with Mary Ellen Olson about it being work-related?
>
> A. I called her and talked to her on the telephone and told her, 'We don't know exactly what's causing it, he's checking me out for everything from cancer up because I have a back injury."
>
> Q. When did that conversation take place?
>
> A. Friday the 7th - - 6th.
>
> Q. Did you talk to her about maybe even filling out some paperwork for work comp?
>
> A. I told her that they had said that - - no, I didn't. I did not tell her about any paperwork, in fact.[7]

According to claimant, when she went to the Fredonia Regional Hospital for the MRI and CT scans, she was asked if her injury was work related and she said she did not know. Claimant was told the hospital needed pre-approval for the diagnostic testing. Claimant testified she was told by Marva in the hospital's finance department that respondent's workers compensation carrier declined to authorize the testing because it had been too long since the injury date, and the hospital would instead have to bill her health insurance. Approval for the testing was eventually given by claimant's group carrier.

The abdominal CT scan was conducted at Fredonia Regional Hospital on December 11, 2013, revealing degenerative changes in the lumbar spine. The thoracic MRI scan was conducted on December 12, 2013, and revealed degenerative disc disease at multiple levels in the lower cervical and upper thoracic spine, with possible disc herniations and neurological compromise.

Ms. Olson testified she did not remember being informed by claimant on December 6, 2013, about injuring herself in the wheelchair incident of November 6, 2013. Ms. Olson knew claimant had chronic back pain, but did not remember when she learned about it.

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[7] *Id.* at 19.

Ms. Olson knew claimant went to a lot of doctor appointments. Ms. Olson and claimant discussed a leave of absence on December 9, 2013, after claimant missed three work days for medical reasons. According to Ms. Olson, claimant said the doctor believed she had back pain because of coughing.

On December 31, 2013, Ms. Olson wrote claimant up for disciplinary purposes. Claimant testified that since her injury, she and Ms. Olson had a lot of issues and Ms. Olson felt claimant was not doing her job correctly. According to claimant, she was in pain and had difficulty doing her job.

Claimant testified that when she returned to Dr. Bacani on January 10, 2014, he told her she had two herniated discs in her spine and he asked her to think about when she could have injured it:

> A. He asked me to stop and think about when I could have injured it. That's the only time I have had any problems was the 6th of November when I lifted on the resident.[8]

Ms. Olson testified claimant reported her work injury for the first time on January 13, 2014. It was respondent's policy that once an employee reports a work injury, the supervisor must immediately fill out the incident form, which the employee must read and sign the form for accuracy. Respondent's policy and practice was that the incident report be completed the same day the employee reports the injury.

Ms. Olson testified that on January 13, 2014, claimant told Ms. Olson her doctors exhausted every other possible cause of claimant's pain, leaving only that the pain may have been due to lifting the resident. Once claimant informed Ms. Olson of this, they completed the incident form. Ms. Olson testified she watched claimant read through the incident report and sign it.

Claimant continued to work for respondent until March 3, 2014, when she was terminated because she failed to do her job duties.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b provides 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.

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[8] *Id.* at 21.

(c) 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. 2013 Supp. 44-508(h) provides:

'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. 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.

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

The purpose of notice is to afford the employer an opportunity to investigate the claim, provide early diagnosis and treatment, and prepare a defense.[9]

Claimant admitted she did not provide notice of her November 6, 2013, injury by accident to respondent within the time periods set forth in K.S.A. 2013 Supp. 44-520(a). Claimant testified December 6, 2013, was the earliest claimant could have notified respondent about her alleged injury and accident.[10] Ms. Olson testified she was not provided with notice until January 13, 2014.[11] Moreover, claimant has not proven respondent had actual knowledge of claimant's injury.

The undersigned Board Member finds the ALJ correctly concluded claimant did not prove respondent was given timely notice of claimant's injury by accident, nor did claimant prove respondent had actual knowledge of claimant's injury. The ALJ's decision is accordingly affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

1. Claimant did not prove respondent was given timely notice of her alleged injury by accident.

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

[10] P.H. at 52.

[11] *Id*. at 63.

[12] K.S.A. 44-534a.

2. Claimant did not prove respondent had actual knowledge of claimant's alleged injury.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Ali Marchant dated November 3, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

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The Honorable Ali Marchant, Administrative Law Judge