BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VERONICA WOODARD Claimant	)	
VS.	)	Docket Nos. 244,096 & 1,012,939
ARMOUR SWIFT ECKRICH Self-Insured Respondent	)	

ORDER

Claimant requests review of the March 18, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bryce D. Benedict.

ISSUES

The ALJ denied claimant's request for medical treatment as he found claimant failed to establish that she provided notice of an accidental injury within 10 days as required by the Act.

Claimant requests review of the ALJ's Order denying her compensation based upon her alleged lack of notice. The claimant maintains she verbally notified her supervisor of her June 6, 2003 injury on the same day the accident occurred. Additionally, claimant asserts that her application for post-award medical filed with the Division on June 11, 2003, under a prior workers compensation claim, placed respondent on notice that she may have re-injured her low back at work. Accordingly, claimant seeks treatment with Dr. E. Jerome Hanson and any referrals he deems necessary. Claimant also requests that if she is taken off work because of her June 6, 2003 accident, the respondent be ordered to pay temporary total disability benefits until released to return to work or until she reaches maximum medical improvement.

Respondent argues that claimant's decision to contact her attorney on June 6, 2003 and ask him to pursue post-award medical treatment is inconsistent with claimant's present contention that she sustained a new accident. Moreover, the respondent's witnesses deny

claimant ever told them of this alleged June 6, 2003 accident. Respondent argues that because it had no notice of this second injury within the statutorily prescribed time period, compensation is not appropriate. Accordingly, the ALJ's Order should be affirmed.

The sole issue for determination in Docket No. 1,012,939 is whether claimant provided notice of her new injury as required by K.S.A. 44-520. Both the older claim, Docket No. 244,096 and the most recent claim, Docket No. 1,012,939, were the subject of proper notice of hearing and were heard simultaneously.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

Claimant sustained a compensable injury in 1999. That accident was the subject of a workers compensation claim, Docket No. 244,096, and was settled on January 2, 2001. Among the terms of settlement was the right to request further treatment in the future for her work-related injury.

Claimant continued to work at her regular position from the date of settlement up to June 6, 2003, and was working pain free but with some sporadic stiffness.[1] On that date she was "palletizing" which required her to lift a 28 pound box. Claimant heard a "pop" in her back as she was twisting with the box. Claimant went on break and as she got up to return to work, she noticed radiating pain from her low back into her legs. These symptoms were in the same general area as where she had been injured in her prior claim. Claimant testified she didn't know if she had a new accident, or merely that she had pain in the same area as she had before.

Claimant sought out the plant nurse but found the office was empty. Claimant then sought out her supervisor, Ann Shumate, and told her of the accident. According to claimant, Ms. Shumate indicated the nurse was gone for the day and told her to take some Ibuprofen. No accident report was completed nor was claimant referred for any sort of treatment.

On June 16, 2003, claimant's counsel from the earlier claim Docket No. 244,096, filed a post-award request for medical treatment. Respondent provided an evaluation with Dr. E. Jerome Hanson on September 2, 2003. According to Dr. Hanson claimant's current

[1] Claimant's Depo. at 5.

symptoms "began two months ago without specific injury or illness."[2] He goes on to state that claimant notes a "gradual onset of pain in her back and left leg."[3]

On September 24, 2003, claimant filed a new claim, Docket No. 1,012,939, alleging a specific injury on June 6, 2003. Treatment was apparently not offered. Thereafter, a preliminary hearing was held for both docket numbers at which claimant testified as well as her supervisor, Ann Shumate, and the plant nurse, Dawn Stein.

Ms. Shumate denied claimant ever told her about any accident on June 6, 2003. She further testified that when any of the employees advise her of an injury, she would send them to the plant nurse. In the event the nurse was unavailable, she would go to the next person in charge or if the injury was minor, email the nurse and direct the employee to her the next working day. According to Ms. Shumate, she knew claimant had a prior back injury but did not know the terms of the claimant's settlement and whether future medical treatment was available.

Ms. Stein, the plant nurse, testified that she was working at the plant in June 2003 and is unaware of any reason why she was not in her office on June 6, 2003. According to her, at no time has claimant reported any accident to her that occurred on June 6, 2003, although claimant was routinely in her office during this period "checking in" as required because claimant was on light duty for a prior shoulder injury.

After hearing this evidence, the ALJ ruled that claimant failed to provide notice as required by K.S.A. 44-520. Implicit in this finding is the conclusion that claimant sustained a new accident on June 6, 2003 for which she failed to provide timely notice. This is clear because notice is not a statutory criteria in any request for a post-award medical proceeding. Thus, there would be no reason to consider notice in connection with claimant's request for post-award medical benefits in Docket No. 244,096. Similarly, there was no need to expressly deny treatment with respect to Docket No. 244,096 as the ALJ concluded claimant had sustained a new accident and was therefore not entitled to further medical treatment in connection with that earlier claim.

It is also worth noting that with respect to Docket No. 244,096, the parties implicitly waived the evidentiary provisions associated with a post-award hearing. Claimant offered the medical reports of Dr. Hanson and they were admitted without objection or supporting deposition testimony. Indeed, neither party requested additional time to submit further medical evidence as contemplated by K.S.A. 44-523. Thus, the Board believes the record is complete as to Docket No. 244,096. That same medical evidence can be considered

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[2] P.H. Trans., Ex. 1 (September 2nd report).

[3] *Id*.

in Docket No. 1,012,939 as that came to the ALJ as a preliminary hearing and such reports are admissible in that context.[4]

Turning now to the issue at hand, the Board finds the ALJ's Order should be affirmed. K.S.A. 44-520 provides as follows:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer with 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. . .

In this instance, the ALJ observed the testimony of each of the witnesses and after reviewing the exhibits offered at the hearing as well as claimant's deposition testimony, he concluded claimant failed to establish timely notice as required by the statute. Claimant presented a very specific event as the basis for her request for additional medical treatment, yet when a medical evaluation was provided in September 2003, she denied any specific accident caused the onset of complaints. This inconsistency is not explained in the record. Ms. Shumate and Ms. Stein both deny any notice regarding a new accident, or any injury whatsoever on June 6, 2003, although Ms. Shumate acknowledges claimant came to her on that date. These denials obviously called into question claimant's testimony. By her own admission, claimant sought assistance from her attorney and requested treatment in her earlier case, Docket No. 244,096. Given the record as it is presently developed, the Board finds claimant failed to provide timely notice.

Moreover, the Board does not believe the filing of a post-award request for additional medical treatment based upon a prior claim, particularly when that request fails to mention a new event or aggravation, but instead only references the earlier event, satisfies the notice requirement for purposes of a new claim. To make such a finding would unnecessarily blur the separate and distinct nature of workers compensation injuries and resulting claims. The claimant's confusion about whether or not she had suffered a new accident could constitute just cause for extending the time for giving notice from 10 to 75 days, but in this case notice was beyond even the 75 day limit.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated March 18, 2004, is affirmed.

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

IT IS SO ORDERED.

Dated this _____ day of May 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Mark E. Kolich, Attorney for Self-Insured Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director