BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALDO PIVA	)	
Claimant	)	
V.	)	
	)	AP-00-0474-911
RUSSELL STOVER CHOCOLATES, LLC	)	CS-00-0469-648
Respondent	)	
AND	)	
	)	
FARMINGTON CASUALTY CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the April 6, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Scott J. Mann appeared for Claimant. Michael P. Bandre appeared for Respondent and its insurance carrier (Respondent).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Preliminary Hearing held April 6, 2023, with exhibits attached, and the documents of record filed with the Division.

ISSUE

Did Claimant provide proper notice to Respondent?

FINDINGS OF FACT

On September 1, 2016, while working for Respondent, Claimant sustained an injury to his left ankle after jumping from a trailer. Claimant underwent left ankle surgery with Dr. Steven Anderson on January 26, 2017, and was considered to have reached maximum medical improvement on April 24, 2017. Dr. Anderson noted Claimant had preexisting ankle arthrosis and suggested referral to a specialist. This claim was docketed as CS-00-0001-247.

Claimant complained of pain in his left lower extremity while being seen at Heartland Health Care Clinic (Heartland) in February 2021. Claimant again visited Heartland on April 9, 2021, with a chief complaint of a left ankle problem. An orthopedic referral was provided and an MRI of Claimant's ankle ordered. Dr. Bryce Palmgren examined Claimant on June 1, 2021, noting Claimant's MRI and x-rays demonstrated significant ankle osteoarthritis. Dr. Palmgren recommended ankle replacement surgery.

On June 11, 2021, Claimant's sister, Sandra Piva, sent an email to Janelle Rogers, Respondent's Human Resources Manager. Ms. Piva wrote, in part:

> 1. My brother stated to me that his previous ankle injury has continued to provide health problems for him. He went to an orthopedic doctor on June 1st (I believe) Dr. Bryce Palgren [*sic*] who has diagnosed the need for surgery to correct the ankle. The continuous pain my brother has been suffering since the injury is due to aggravation of his original surgery. As I stated to you, I do not believe he has a lawyer at this time. Ideally, we would like this resolved without the need of a lawyer. The question is:
>
> a. What does my brother need to do to get WC process reactivated as it is related to the previous injury? . . .[1]

Claim CS-00-0001-247 was dismissed with prejudice pursuant to K.S.A. 44-523(f) on April 14, 2022.

Claimant was seen by Dr. Pedro Murati on June 13, 2022. Dr. Murati found Claimant's work was the prevailing factor causing a repetitive trauma injury to the left ankle and recommended additional medical treatment.

Claimant filed an Application for Benefits (E-1) with the Division on August 15, 2022, claiming injury to his left lower extremity and all affected body parts with an accident date of June 13, 2022. A preliminary hearing was held before the ALJ on December 2, 2022. In his Order, the ALJ denied Claimant's preliminary hearing requests, finding Claimant failed to provide timely notice of a new claim to Respondent. The ALJ wrote:

> The first record notice of the new claim is the August 15, 2022 Application for Benefits. Claimant saw Dr. Murati June 13, 2022 and was advised his problems

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[1] P.H. Trans., Cl. Ex. 1 at 3.

> were work-related. **K.S.A. 44-520(a)(1)(B)** required Notice to Respondent within 20 days, or by July 4, 2022. Notice given August 15, 2022 was not timely.[2]

The ALJ's Order was not appealed. Claimant applied for another preliminary hearing, held April 6, 2023, and offered the email exchange between Ms. Piva and Ms. Rogers as new evidence. The ALJ found Claimant failed to sustain his burden of proving he provided timely notice to Respondent. The ALJ wrote:

> The present case is for a claimed aggravation to the left lower extremity after the earlier case was dismissed. The June 11, 2021 email is ineffective as notice of a repetitive use injury that ostensibly developed after April 14, 2022.[3]

Claimant timely appealed.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the email sent to Respondent on June 11, 2021, was sufficient to provide notice of a possible new injury caused by work activity.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues Claimant failed to prove timely notice because the email does not support an allegation of a new claim, nor was it sent within 20 days of initially seeking treatment for the alleged repetitive use injury.

Where an employee alleges personal injury from an injury by repetitive trauma arising out of and in the course of employment, the employee must give the employer notice by the earliest of twenty days from the date of injury by repetitive trauma, twenty days from the date medical treatment is sought when the employee continues to work for the employer, or ten days from the last date worked if the employee no longer works for the employer, whichever is earliest.[4] Notice must be provided either to the employer's designee or to a supervisor or manager, and must include the time, date, place and particulars, and must evidence the employee is seeking workers compensation benefits or sustained a work-related injury.[5] The notice required under K.S.A. 44-520(a) shall be waived if the employee proves the employer had actual knowledge of the injury.[6]

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[2] ALJ Order (Dec. 2, 2022) at 2 (emphasis in original).

[3] ALJ Order (Apr. 6, 2023).

[4] *See* K.S.A. 44-520(a).

[5] *See* K.S.A. 44-520(a)(2).

[6] *See* K.S.A. 44-520(b).

K.S.A. 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.

Claimant alleges an injury by repetitive trauma through and after June 13, 2022. Normally, a claimant would be required to provide notice within 20 days of the injury date. In this case, Claimant alleges the notice came from an email text chain occurring a year prior to the alleged date of injury by repetitive trauma.

Notice of accident must include the time, date, place, person injured, and particulars of such injury. It must be apparent from the content of the notice the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

In the email dated June 11, 2021, Sandra Piva stated Claimant's pain was due to aggravation of his original surgery. This relates to an old injury claim, not a new claim. She asked, "What does my brother need to do to get WC process reactivated as it is related to the previous injury?"[7] This clearly shows the text relates to the old claim and not a new or future claim. The content that follows appears to be related to a prior injury.

The email did not include a time, date, place or particulars of a new injury. It related Claimant's symptoms back to a prior surgery and workers compensation claim. It was not apparent from the content of the notice the employee is claiming benefits under the workers compensation act or suffered a new work-related injury by repetitive trauma.

The undersigned concludes Claimant failed to meet the burden of proving notice as required by K.S.A. 44-520.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Bruce E. Moore dated April 6, 2023, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2023.

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SETH G. VALERIUS
BOARD MEMBER

[7] P.H. Trans., Cl. Ex. 1 at 3.

c: Via OSCAR

Scott J. Mann, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge