

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>CHRISTINA PORTLOCK</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0475-909
<b>AZW LLC</b>	)	CS-00-0474-445
Respondent	)	
AND	)	
	)	
<b>TRI STATE INSURANCE CO. OF MINNESOTA</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the May 31, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

**APPEARANCES**

Phillip B. Slape appeared for Claimant. Heather E. Hutsell 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 May 15, 2023, with exhibits attached; the transcript of the Evidentiary Deposition of Christina Antoinette Portlock from May 8, 2023, with exhibits attached; the transcript of the Evidentiary Deposition of Erica Dear from May 10, 2023; the transcript of the Videoconference Evidentiary Deposition of Alyssa Lyons from May 12, 2023, with exhibits attached; the transcript of the Videoconference Evidentiary Deposition of Cynthia Welton from May 12, 2023, with exhibits attached; the transcript of the Videoconference Evidentiary Deposition of Brianna Smith from May 12, 2023; the transcript of the Videoconference Evidentiary Deposition of Rhonda Cawthorn from May 12, 2023; the transcript of the Videoconference Evidentiary Deposition of Debbie McBroom from May 12, 2023; the documents of record filed with the Division; and the briefs submitted by the parties.

ISSUE

Did Claimant provide proper notice of an injury to Respondent pursuant to K.S.A. 44-520?

FINDINGS OF FACT

Claimant worked for Respondent as a CNA beginning in August 2021. This position required Claimant to move patients in a prescribed manner, including the use of a gait belt and pivot disc. On November 23, 2022, Claimant attempted to move a patient when she experienced a pulling sensation in her right shoulder and chest. Claimant testified she left the patient's room and reported the injury to the charge nurse, Debbie McBroom, the same day.

The events of the day are in dispute. Claimant testified she informed Ms. McBroom of the injury while at the nurses' station. Claimant stated others were present, including another charge nurse, Rhonda Cawthorn, and fellow CNAs Erica Dear and Brianna Smith. Claimant was unsure if Ms. Cawthorn heard the exchange when she reported the incident to Ms. McBroom. Claimant testified Ms. McBroom provided a "sticky" cream for her shoulder.<sup>1</sup> Claimant said she did not discuss the stickiness of the cream to anyone at the time. Claimant stated she complained about her shoulder daily to everyone at work.

Ms. Smith agreed with Claimant's testimony, stating she was present at the nurses' station when Claimant reported an injury to Ms. McBroom. Ms. Smith testified Ms. McBroom provided something for Claimant's shoulder, something Claimant realized was sticky. Ms. Smith could not recall whether a conversation about its stickiness occurred. Ms. Smith estimated Claimant complained about her shoulder daily. She opined it was general knowledge Claimant hurt her right shoulder.

Ms. McBroom, Ms. Cawthorn, and Ms. Dear disputed Claimant's testimony. Ms. McBroom testified the conversation at the nurses' station never occurred, and she never provided any cream for Claimant's shoulder at any time. Ms. McBroom stated if an injury had been reported, she would have followed Respondent's procedures and initiated paperwork. Ms. Cawthorn denied Claimant reported an injury at the nurses' station. Ms. Dear testified she was not present at the nurses' station during the conversation, but instead learned about it from Claimant approximately two days later. Ms. Dear agreed Claimant complained about her right shoulder on every shift they worked together.

Claimant indicated she only knew Ms. Smith and Ms. Dear from work. Ms. Dear stated they were friends and occasionally spent time together outside of work.

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<sup>1</sup> Claimant Depo. at 11.

Claimant changed positions at Respondent from CNA to housekeeping on November 28, 2022. Claimant voluntarily changed positions because the new schedule would allow more time with her children. On February 22, 2023, Claimant's shoulder pain worsened, and she sought medical treatment at the emergency department. Claimant reported the injury to her current supervisor, who directed Claimant to human resources.

Alyssa Lyons, Respondent's Human Resources Director, testified she became aware Claimant was reporting a work-related injury on March 1, 2023. Claimant did not report a specific date of injury, but stated it was sometime in November. Ms. Lyons directed Claimant to complete the requisite paperwork, which Ms. Lyons then provided to the insurance carrier. Ms. Lyons stated she was unaware of any concerns related to Claimant's right shoulder prior to March 1, 2023.

Cynthia Welton, Director of Nursing, was Claimant's supervisor in November 2022. Ms. Welton testified she and Claimant were friendly, and had weekly informal chats in Ms. Welton's office even after Claimant moved to housekeeping. Ms. Welton stated she was unaware Claimant had problems with her right shoulder until March 1 or 2, 2023, when Claimant provided the supervisor's portion of the paperwork for Ms. Welton to complete. Ms. Welton testified Claimant informed her of the emergency room visit on February 22, 2023, stating, "[Claimant] had been having problems with a shoulder – I'm paraphrasing – and she said that as soon as she said something to the fact that she hurt it at work, then they stopped, and that's when she realized that she had never reported it."<sup>2</sup> Ms. Welton asked Claimant why she did not report the incident in November, and Claimant "didn't really have a solid answer."<sup>3</sup>

Ms. Cawthorn testified she was not aware Claimant was claiming a work-related injury until approximately April 2023, when she saw Claimant working in an accommodated position. Ms. Cawthorn stated Claimant mentioned shoulder pain to her one time in late November 2022, while they were alone, walking in a hallway during a shift. She was unaware of any injury at work. Ms. Cawthorn did not ask how Claimant injured her shoulder or whether Claimant required medical treatment. Ms. Cawthorn agreed, as a charge nurse, Claimant could have reported an injury to her, and she would then have informed the Director of Nursing.

Respondent offered Claimant an accommodated position after she was given work restrictions. Claimant stated she was told not to return to work following a planned vacation until her restrictions were lifted. Claimant agreed she signed documentation acknowledging her understanding of Respondent's employee handbook. Claimant further

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<sup>2</sup> Welton Depo. at 7.

<sup>3</sup> *Id.* at 8.

agreed she signed documentation acknowledging she received additional training on gait belt use on March 2, 2023. Claimant testified she did not actually receive additional training, however. Ms. Welton stated she did not review each category when providing the additional training. Instead, she generalized the information because Claimant was no longer an active CNA.

The ALJ determined Claimant failed to meet her burden of showing she provided timely notice of an injury to Respondent. Further, the ALJ found Respondent's knowledge Claimant had a shoulder condition was "insufficient to satisfy the 'actual knowledge of the injury' requirement of timely notice."<sup>4</sup>

In his Order, the ALJ concluded:

The Court concludes that the Claimant has not met her burden to show that she gave timely notice of the injury. There is conflicting testimony about whether or not notice was given to Ms. McBroom on or about November 23, 2022. The Court finds the testimony of the witnesses who said that the Claimant did not report the injury to Ms. McBroom on that date to be more credible than those who said she did.<sup>5</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

Claimant argues she notified Respondent of her injury when she reported to Ms. McBroom on November 23, 2022. Alternatively, Claimant argues Respondent had actual knowledge of her injury through the November 2022 conversation with Ms. Cawthorn.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues this claim hinges on Claimant's credibility.

Where an employee alleges personal injury from an accident 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 accident, 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.<sup>6</sup> 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

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<sup>4</sup> ALJ Order (May 31, 2023) at 3.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> See K.S.A. 44-520(a).

is seeking workers compensation benefits or sustained a work-related injury.<sup>7</sup> 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.<sup>8</sup>

K.S.A. 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. 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.

Claimant and Brianna Smith both testified Claimant came to the nurses' station on the date of the injury and told everyone there, including her supervisor, she hurt her shoulder helping a resident. Ms. McBroom, Ms. Cawthorn, and Ms. Dear denied participating in a conversation where Claimant told them she hurt her shoulder helping a resident. In his Order, the ALJ concluded:

The Court concludes that the Claimant has not met her burden to show that she gave timely notice of the injury. There is conflicting testimony about whether or not notice was given to Ms. McBroom on or about November 23, 2022. The Court finds the testimony of the witnesses who said that the Claimant did not report the injury to Ms. McBroom on that date to be more credible than those who said she did.<sup>9</sup>

Claimant's burden is to prove it is more probably true than not true on the basis of the whole record she gave notice pursuant to K.S.A. 44-520. Even if all the witnesses are equally credible, the weight of the evidence leads to the conclusion Claimant did not provide proper notice. At best, it could be found Claimant gave notice of a shoulder problem by complaining to her co-workers, but the evidence does not support she gave notice of a specific work-related injury as required by K.S.A. 44-520. The complaints of

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<sup>7</sup> See K.S.A. 44-520(a)(2).

<sup>8</sup> See K.S.A. 44-520(b).

<sup>9</sup> ALJ Order (May 31, 2023) at 2.

pain do not constitute notice of an injury.<sup>10</sup> Casual conversations about pain or symptoms have been held insufficient to satisfy proof of notice.<sup>11</sup>

The undersigned agrees with the ALJ and finds Claimant failed to provide proper 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 Gary K. Jones, dated May 31, 2023, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2023.

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SETH G. VALERIUS  
BOARD MEMBER

c: Via OSCAR

Phillip B. Slape, Attorney for Claimant  
Heather E. Hutsell, Attorney for Respondent and its Insurance Carrier  
Hon. Gary K. Jones, Administrative Law Judge

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<sup>10</sup> See *Bishop v. P1 Group, Inc.*, No. 1,065,448, 2014 WL 517228 (Kan. WCAB Jan. 27, 2014); *Lewis v. Sun Graphics, Inc.*, No. 1,031,707, 2007 WL 740432 (Kan. WCAB Feb. 28, 2007); *Shah v. Cessna Aircraft Company*, No. 1,002,287, 2003 WL 22994487 (Kan. WCAB Nov. 7, 2003).

<sup>11</sup> See *Camp v. Bourbon County*, No. 104,784, 2012 WL 3135512 (Kansas Court of Appeals unpublished opinion filed July 27, 2012); see also *Gardner v. Certainteed Corp.*, No. 1,064,307, 2013 WL 4051836 (Kan. WCAB Jul. 25, 2013), citing *Mendoza v. American Warrior, Inc.*, No. 1,018,561, 2005 WL 600055 (Kan. WCAB Feb. 1, 2005); *Ball v. Overnite Transportation Company*, Nos. 219,411 & 219,442, 1997 WL 377949 (Kan. WCAB Jun. 19, 1997).