

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MELISSA CARPENTER)	
Claimant)	
V.)	AP-00-0457-955
)	CS-00-0454-473
AMERICAN FRANCHISE HOLDINGS, LLC)	
Respondent)	AP-00-0457-956
AND)	CS-00-0454-472
)	
PA MANUFACTURERS ASSOCIATION INS. CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the April 30, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

William L. Phalen appeared for Melissa Carpenter. Timothy A. Emerson appeared for 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 conducted April 5, 2021, with exhibits attached; the transcript of the Continuation of Preliminary Hearing by Evidentiary Deposition of Wayne Pankratz from April 8, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Melissa Carpenter from April 12, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Douglas F. Martin from April 1, 2021; the transcript of the Evidentiary Deposition of Melissa Lynn Carpenter from January 15, 2021, and the documents of record filed with the Division.

ISSUES

The ALJ found Ms. Carpenter sustained her burden of proving timely notice of both claimed accidents. The ALJ appointed Dr. Craig Satterlee as Ms. Carpenter's authorized treating physician and ordered temporary total disability benefits.

Respondent argues Ms. Carpenter failed to provide proper notice of her February 8, 2020, claim (CS-00-0454-472) and her September 27, 2020, claim (CS-00-0454-473). Additionally, respondent argues Ms. Carpenter's September 27, 2020, claim is an aggravation of a preexisting condition and not compensable.

Ms. Carpenter contends the ALJ's Order should be affirmed. Ms. Carpenter avers she provided proper notice to respondent for both accidents. Ms. Carpenter argues proper notice was the only issue raised for both claims; as such, it is inappropriate for respondent to raise the issue of an aggravation of a preexisting condition for the first time on appeal.

FINDINGS OF FACT

Ms. Carpenter was employed by respondent for 20 years. Her most recent position was kitchen manager for the Pittsburg, Kansas, Applebee's restaurant. At the time of the incident, this location had three managers: Doug Martin, general manager; Ms. Carpenter, kitchen manager; and Stephanie Huskey-Dick, assistant manager.

Respondent retains a company, Medcor, to manage workers compensation claims. All managers know the procedure to report injuries to Medcor, and instructions are posted on a sheet hanging on the office wall of the Pittsburg restaurant. If an employee is injured on the job, or reports an injury to a manager, company policy dictates the manager to call or to contact Medcor online within one day of the incident. Medcor makes all decisions related to a claim. Any type of injury, whether formally reported or mentioned and despite significance, must be reported to Medcor.

On February 8, 2020, Ms. Carpenter went to the bank to make a deposit on behalf of respondent. As she was walking to her car, her right foot slipped off the curb, and she fell onto her right shoulder on the sidewalk before rolling onto her head. Ms. Carpenter felt immediate pain and swelling in her right fingers and shoulder. There were no witnesses to the fall. Ms. Carpenter returned to work after the fall. She reported the incident the same day to Mr. Martin via text, which stated:

I slipped off the curb and fell when I was going to the bank. I hit my head and something popped in my right shoulder. I've got ice on it and I think I can hang until 4:00 but if I wasn't here I'd be at the ER.¹

Ms. Carpenter spoke to Mr. Martin later on February 8, 2020, when he arrived at the restaurant. Ms. Carpenter indicated she told Mr. Martin again about the accident and her injuries and discussed the need for medical treatment. Ms. Carpenter remembered Mr.

¹ P.H. Trans., Cl. Ex. A.9 at 2.

Martin saying “it was a good thing [she] had health insurance.”² Ms. Carpenter said she took this to mean she was not a candidate for workers compensation. Ms. Carpenter stated she knew the incident was not reported on Medcor. She explained:

Q. Why, if you had previously dealt with employees and gone through the process that you described for us a while ago, why didn't you push Doug [Martin] that, hey, I believe that this is a work-related injury and I'd like you to direct my medical care?

A. Well, I was in a great deal of pain at the time. And he is my supervisor, I thought [he] would advise me properly. And I was so uncomfortable at the time, I was just hoping to go home, take some medication and feel better.³

A coworker, Kyanna Thorne, submitted an affidavit stating Ms. Carpenter was in obvious physical distress and had noticeable injuries to her right hand and arm following her return from the bank. Ms. Thorne further stated Ms. Carpenter's injuries were a topic of discussion among employees on February 8, 2020, and she overheard Ms. Carpenter describe the incident and discuss the need for medical treatment with Mr. Martin the same day.

Mr. Martin disputed Ms. Carpenter's testimony, stating he never indicated she needed to pursue medical treatment through her personal insurance. Mr. Martin agreed Ms. Carpenter texted him about the incident on February 8, 2020, and he stated he was aware Ms. Carpenter went to the bank on behalf of respondent. However, he assumed the injury was improving because Ms. Carpenter indicated the ice was helping, and she did not miss any shifts. Mr. Martin testified Ms. Carpenter never asked for medical care related to the February accident and did not ask that it be reported to Medcor. Mr. Martin stated Ms. Carpenter, as a fellow manager, could have self-reported to Medcor. Ms. Carpenter testified she was unaware she had the option of self-reporting to Medcor at the time of the February incident.

Ms. Carpenter indicated she was concerned about cost and any negative impact on respondent if a workers compensation claim was pursued, and did not seek medical treatment for her injuries, other than home remedies. Ms. Carpenter stated her shoulder condition improved over time, but she never regained full use of her shoulder without pain. Ms. Carpenter testified she mentioned her ongoing condition to Mr. Martin several times over the next few months, but she was never directed to do anything about it. Mr. Martin did not recall any specific instance of Ms. Carpenter relating her condition back to the February incident. Mr. Martin recalled the conversations as more about general complaints of aches and pains.

² Claimant Depo. (Jan. 15, 2021) at 29.

³ *Id.* at 30-31.

On September 27, 2020, Ms. Carpenter was lifting a box of frozen sauce at work with her right hand when she dropped it. She immediately tried to catch the box with her right hand, resulting in a popping sensation in her right shoulder and a new onset of pain. Ms. Carpenter finished her shift and returned to work the following day despite worsening right shoulder pain.

Ms. Carpenter eventually reported to the emergency room at 1:00 a.m. on September 29, 2020, due to increased right shoulder pain. Ms. Carpenter reported she fell in February 2020 and had a re-aggravation of her right shoulder pain in the last two days. She was evaluated, provided prescription medication, and told to follow up with her primary physician.

Ms. Carpenter stated she reported her injury to Mr. Martin and was again told it was a good thing she had health insurance. Mr. Martin testified he was unaware Ms. Carpenter suffered an accident on September 27, 2020:

Q. According to the information that we have, there was an incident alleged on September 27th of 2020 where Ms. Carpenter was moving a box from a freezer to a walk-in. Do you recall around that timeframe, September 27th of 2020, Ms. Carpenter reporting to you that she had an incident that fits that description?

A. Um, it's possible, but I don't recall anything like that. But once again, if she'd hurt herself she should've probably called that in. Nothing that I would have called – I don't recall hurting herself but . . .

Q. So same question on this particular incident, September 27th of 2020, did the claimant at any time make it apparent that she was claiming benefits under the workers' compensation act for an injury sustained on September 27th, 2020?

A. Um, I don't recall. I think she was talking about filing some workman's comp for something. I thought – yeah, I'm not really for sure what was going on. Unaware.⁴

Ms. Carpenter contacted Wayne Pankratz, the area director who oversees twelve Applebee's restaurants. Ms. Carpenter knows Mr. Pankratz personally, and they occasionally exchange text messages. Ms. Carpenter sent an email to Mr. Pankratz on September 30, 2020, informing him she aggravated her shoulder injury and hoped for physical therapy instead of surgery. Ms. Carpenter sent a text to Mr. Pankratz on October 2, 2020, asking if another manager could work in her place as she was struggling with pain

⁴ Martin Depo. at 16-17.

and medication side effects.⁵ Mr. Pankratz approved the change and also checked on Ms. Carpenter's well-being the following day.⁶

Ms. Carpenter went, on her own, to St. Paul Clinic on October 6, 2020, and was evaluated by Dr. Michael Carter. Dr. Carter diagnosed rotator cuff tendinitis and right shoulder pain, and provided medication and conservative treatment. He noted an MRI would be performed if Ms. Carpenter failed to improve over the next 7-10 days. An MRI conducted on October 16, 2020, was read to reveal rotator cuff tendinopathy with a supraspinatus tendon tear.

Dr. Brad Meister evaluated Ms. Carpenter on October 20, 2020, following the MRI results. Dr. Meister concluded Ms. Carpenter could have cervical disc herniation causing nerve entrapment, and therefore causing right arm weakness. Dr. Meister indicated Ms. Carpenter required a cervical MRI, and he would do no further treatment until after the MRI because he was not comfortable addressing her rotator cuff without additional information. Dr. Meister noted this was a work-related injury based on Ms. Carpenter's history.

Ms. Carpenter sent a text to Mr. Pankratz on October 22, 2020, stating she needed his help and also needed to explain her situation. She included the text she initially sent to Mr. Martin on February 8, 2020. Mr. Pankratz reported the February 8, 2020, injury to Medcor on behalf of Ms. Carpenter. Mr. Pankratz testified he was unaware Ms. Carpenter suffered an accident on September 27, 2020. He was aware of Ms. Carpenter self-reporting a claim to Medcor of an injury occurring on November 11, 2020. The November injury is not on appeal.

On December 7, 2020, Dr. Carter determined Ms. Carpenter should not return to work. Ms. Carpenter informed respondent, and has not returned to work.

Dr. Pedro Murati examined Ms. Carpenter at her counsel's request on January 27, 2021. Dr. Murati reviewed Ms. Carpenter's available medical records, history, and performed a physical examination. He recorded the following impression:

1. Right rotator cuff tear with probable labral pathology.
2. Left rotator cuff sprain due to overuse.
3. Myofascial pain syndrome of the right shoulder girdle extending into the cervical paraspinals.⁷

⁵ See P.H. Trans., Cl. Ex. 8.

⁶ *Id.*

⁷ P.H. Trans., Cl. Ex. A.1 at 4.

Dr. Murati concluded Ms. Carpenter's diagnoses were a direct result of the accidents she sustained at work on February 8, 2020, and September 27, 2020. He recommended conservative treatment and physical therapy for Ms. Carpenter's conditions, except for the right rotator cuff tear. Dr. Murati recommended surgical repair of Ms. Carpenter's right rotator cuff tear.

PRINCIPLES OF LAW AND ANALYSIS

1. Appeal No. AP-00-0457-955

The sole issue related to this docketed claim is whether Ms. Carpenter provided proper notice of a work-related accident pursuant to K.S.A. 44-520, which provides, in part:

(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.

On the same day as her February 8, 2020, accident, Ms. Carpenter sent her supervisor, Doug Martin, a text message telling him she slipped off a curb, injuring her head and right shoulder. Mr. Martin confirmed he received Ms. Carpenter's February 8, 2020, text message. Mr. Martin also confirmed one of Ms. Carpenter's job duties was going to the bank, and he knew the text meant she was at the bank as a part of her work for respondent.

The record is clear Ms. Carpenter notified her supervisor she suffered a work-related injury by accident on the date alleged. Ms. Carpenter met her burden of proving she gave proper notice as required by K.S.A. 44-520(a)(4).

2. Appeal No. AP-00-0457-956

A. Aggravation of a preexisting disability.

This issue was not raised at the preliminary hearing. K.S.A. 44-555c mandates the Board's consideration be on issues presented to the ALJ. Issues not raised before the ALJ cannot be raised for the first time on appeal.⁸ The Board generally will not address issues raised for the first time on appeal.⁹ Therefore, this issue cannot be considered at this time. Respondent's application for review of this issued is dismissed.

B. Notice.

Ms. Carpenter testified she provided oral notice to both Mr. Martin and Mr. Pankratz during the week following the September 27, 2020, injury by accident. She described the specifics of the incident to Mr. Martin and advised him she went to the emergency room. Mr. Martin acknowledged the conversation with Ms. Carpenter. His recollection was she was talking about "filing some workman's comp for something," but he was not sure what was going on. The medical evidence confirms Ms. Carpenter went to the emergency room at Via Christi on September 29, 2020. Mr. Martin did not controvert Ms. Carpenter's testimony regarding notice.

The undersigned finds Ms. Carpenter provided oral notice of an injury by accident withing the time limits set forth in K.S.A. 44-520(a)(4). Accordingly, Ms. Carpenter met her burden of proving she provided proper notice.

⁸ See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

⁹ See *Miller v. General Motors Corporation*, Nos. 1,048,350, 1,048,351, 2013 WL 1384377 (Kan. WCAB Mar. 13, 2013); see also *Tackett v. ABM Industries, Inc.*, No. 1,052,155, 2012 WL 5461461 (Kan. WCAB Oct. 1, 2012).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Steven M. Roth dated April 30, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2021.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

William L. Phalen, Attorney for Ms. Carpenter
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Hon. Steven M. Roth, Administrative Law Judge