

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GLENN MOYER

Claimant

v.

NATIONAL BEEF PACKING CO. LLC

Respondent

AP-00-0458-557

CS-00-0456-317

and

ZURICH AMERICAN INS. CO.

Insurance Carrier

ORDER

Claimant requests review of the June 8, 2021, preliminary Order issued by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Mitchell W. Rice appeared for Claimant. Shirla R. McQueen appeared for Respondent and its Insurance Carrier.

RECORD AND STIPULATIONS

The Board considered the same record as ALJ Fuller, consisting of the transcript of Preliminary Hearing held June 2, 2021, with Claimant's Exhibit 1 and Respondent's Exhibits A-D; and the pleadings and orders contained in the administrative file. The Board also reviewed Respondent's brief.

ISSUES

1. What is the date of accident or injury for this repetitive trauma claim?
2. Did Claimant prove he gave proper notice to Respondent?
3. Is Claimant otherwise ineligible to receive medical treatment or temporary total disability compensation?

FINDINGS OF FACT

From November 24, 2020 through January 11, 2021, Claimant worked for Respondent maintaining and repairing machinery. Claimant was constantly on his feet, and his work required bending and kneeling. Claimant worked twelve-hour shifts, and worked four days per week. Claimant alleges he sustained injuries to his right knee from repetitive trauma arising out of and in the course of his employment with Respondent each working day through January 11, 2021.

On December 3, 2020, Claimant went to Xpress Wellness Urgent Care (Xpress) on his own for knee problems. The record from Xpress of the appointment has no record of Claimant's history, complaints, diagnosis or etiology. The record states, "Off work, Notes: Released by Orthopedic Specialist."¹ Claimant did not report his knee problems, the visit to Xpress or the off-work note with Respondent because he did not believe he suffered a serious injury. According to Claimant, "It was just swelling from overuse for working 12-hour days."² Claimant continued performing maintenance work for Respondent.

On January 11, 2021, Claimant's right knee became swollen and he was unable to walk. According to Claimant,

My knee had swelled up to where I couldn't walk and I went and reported it to my supervisor at the time, which he return told me to go see the nurse. I went and seen the nurse, the nurse said, When did this happen? I said I couldn't be for sure when it happened, and at the time because it had swollen up so fast I couldn't say a particular time and she says I needed to go see the doctor on my own time.³

According to the record from the nurse's station, Claimant reported right knee pain and swelling, and denied an injury. The record also states, "Purpose: home."⁴ Respondent did not send Claimant to a healthcare provider. Claimant did not return to work for Respondent after January 11, 2021.

After January 11, 2021, Claimant went to another healthcare provider for treatment for his elbow, which is not related to this matter. Claimant was taken off work for his elbow.

¹ P.H. Trans., Resp. Ex. A.

² P.H. Trans., at 11.

³ *Id.* at 6.

⁴ P.H. Trans., Resp. Ex. D.

On January 25, 2021, Claimant was seen by Dr. Desai. According to Dr. Desai's records, Claimant reported a sudden onset of knee pain and swelling on January 11, 2021. Examination was notable for pain during range of motion testing, a positive medial meniscus test and a positive drawer test. An x-ray of the right knee was interpreted by the radiologist as showing tricompartment osteoarthritis with a non-specific distention of the suprapatellar recess. Dr. Desai diagnosed right knee pain, and administered a steroid injection into the right knee capsule. An MRI was ordered, and Claimant was told to return to Dr. Desai when the MRI was completed. Claimant testified Dr. Desai took him off work for three weeks, and diagnosed osteoarthritis.

Claimant provided Dr. Desai's off-work slip to Respondent's nurse's station, and was told to present the form to human resources. Claimant provided the note to human resources, and he was under the impression his condition was considered by Respondent to be a personal condition. Claimant was placed on a three-week leave of absence by Respondent. Claimant did not return to work for Respondent following the leave of absence.

Ms. Sena testified Claimant never reported he sustained a work-related injury or accident while he worked for Respondent. According to Ms. Sena, Claimant's last day of work for Respondent was January 18, 2021. After Claimant's three-week leave of absence expired, Claimant's subsequent absences were treated as no call-no shows until Claimant was terminated on March 6, 2021. Ms. Sena testified Respondent's first notice Claimant was seeking workers compensation benefits or sustained a work-related injury occurred when Claimant's attorney's letter of representation was received on February 19, 2021.

Dr. Murati evaluated Claimant on March 24, 2021. Claimant reported right knee pain, loss of strength and swelling. Claimant said he walked with a limp and was unable to go up and down stairs. Examination was notable for positive medial patellar apprehension, moderate crepitus, swelling and warmth of the right knee. No radiologic studies were reviewed. Dr. Murati diagnosed right-sided patellofemoral syndrome. Although Claimant had preexisting degenerative joint disease, Dr. Murati thought Claimant was asymptomatic before working for Respondent. After Claimant began working for Respondent, his work activities created a change in the structure of Claimant's right knee, which rendered it symptomatic and necessitated additional medical treatment. Dr. Murati imposed temporary work restrictions.

Claimant sought medical treatment and temporary total disability compensation, and a preliminary hearing was held on June 2, 2021. Respondent disputed notice, whether Claimant's work for Respondent was the prevailing factor causing his condition and need for compensation, and whether Claimant was temporarily and totally disabled. On June 6, 2021, ALJ Fuller issued the preliminary Order. ALJ Fuller found the date of accident or injury for the repetitive trauma claim was January 11, 2021. ALJ Fuller found Claimant gave Respondent notice on February 19, 2021, which was past the potential statutory

deadlines for providing notice. The claim for benefits was denied due to untimely notice. The prevailing factor issue was not addressed. This appeal follows.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues in his application for review the Order is erroneous because Claimant's supervisor did not testify or contradict Claimant's testimony regarding notice. Respondent argues the correct date of accident or injury is December 3, 2020, when Claimant first sought medical treatment, and Claimant's notice was not timely. Even if the date of accident or injury is January 11, 2021, Respondent argues Claimant did not provide timely notice. Respondent also argues Claimant is not entitled to compensation because he did not prove his work activities were the prevailing factor leading to his need for treatment and Claimant is not eligible to receive temporary total disability compensation because he abandoned his job.

To address the notice issue, the Board must first review the date of accident or injury of this repetitive trauma claim. The date of injury for a repetitive trauma claim is the earliest of: (1) the date the employee is taken off work by a physician due to a repetitive trauma diagnosis, (2) the date the employee is placed on restricted duty by a physician due to a repetitive trauma diagnosis, (3) the date the employee, while employed by employer, is advised by a physician the condition is work-related, or (4) the last day worked if the employee no longer works for the employer.⁵

In this case, while working for Respondent, Claimant was initially taken off work by a healthcare provider, Xpress, on December 3, 2020. Claimant testified he was seen for swelling of his knee from overuse for working twelve-hour days. Although it appears Claimant was referred to an orthopedist on December 3, 2020, there is no evidence in the record indicating Claimant was diagnosed with repetitive trauma or advised by a physician his condition was work-related on December 3, 2020. There is no evidence Claimant was placed on light-duty on account of diagnosed repetitive trauma while working for Respondent. The record indicates Claimant was first advised by a physician his condition was work-related when he saw Dr. Murati on March 24, 2021. Claimant's last day actually worked was January 11, 2021, based on Claimant's testimony and the nurse's record. Claimant's testimony regarding his last day worked, supported by the nurse's record, is more credible than Ms. Sena's testimony, alone, of Claimant's last day worked. The earliest of these dates is January 11, 2021. Therefore, the date of accident or injury for the claim is January 11, 2021.

The Board next considers whether Claimant gave proper notice to Respondent. Notice of the injury by repetitive trauma must be given by twenty days from the date

⁵ See K.S.A. 44-508(e).

medical treatment is sought when the employee is working for the employer, twenty days from the date of injury, or ten days from the last day worked if the employee is no longer working for the employer, whichever is earliest.⁶ The notice must be apparent that the employee is seeking benefits under the Workers Compensation Act or has suffered a work-related injury.⁷

It appears Claimant first sought medical treatment for his repetitive trauma while working for Respondent on December 3, 2020. The Appeals Board, however, ruled dates of medical treatment sought prior to the date of accident or injury are not considered in determining whether timely notice was provided.⁸ Claimant did not otherwise seek medical treatment while working for Respondent. Twenty days from the date of accident or injury is January 31, 2021. Ten days from the last day worked is January 21, 2021. The earliest of these dates is January 21, 2021. Therefore, Claimant must prove he notified Respondent he either suffered a work-related injury or was seeking workers compensation benefits by January 21, 2021.

According to Claimant, on January 11, 2021, he told his supervisor his knee was swollen and he could not walk. Reporting pain or symptoms is insufficient to satisfy proof of notice to the employer.⁹ Claimant did not report he developed pain and swelling while performing his work activities, and Claimant did not report he was seeking workers compensation benefits when he spoke with his supervisor on January 11. Claimant did not tell Respondent's nurse he was hurt while working or seeking workers compensation benefits. Claimant testified he told the nurse he did not know for certain what happened. The nurse's records do not document Claimant reporting a work-related injury or seeking workers compensation benefits. Claimant failed to prove he gave notice to Respondent on January 11, 2021.

Claimant's next contact with Respondent occurred after the appointment with Dr. Desai on January 25, 2021. Not only did the appointment occur after the notice deadline of January 21, 2021, expired, there is no evidence Claimant told Respondent he was seeking workers compensation benefits or suffered a work-related injury. According to Ms.

⁶ See K.S.A. 44-520(a)(1).

⁷ See K.S.A. 44-520(a)(4).

⁸ See *Kretz v. Drywall Systems, Inc.*, No. 1,076,495, 2017 WL 2991564, at *5 (Kan. W.C.A.B. Jun. 20, 2017).

⁹ See *Camp v. Bourbon County*, No. 104,784, 2012 WL 3135512, at *9 (Kansas Court of Appeals unpublished opinion filed Jul. 27, 2012, *rev. denied* Sept. 4, 2013.); see also *Gardner v. Certainteed Corp.*, No. 1,064,307, 2013 WL 4051836, at *5 (Kan. WCAB Jul. 25, 2013) (*citing Mendoza v. American Warrior Inc.*, No. 1,018,561, 2005 WL 600055, at *3 (Kan. WCAB Feb. 1, 2005); *Ball v. Overnite Transportation Corp.*, Nos. 219,411 & 219,442, 1997 WL 377949, at *3 (Kan. WCAB Jun. 19, 1997)).

Sena, Respondent first received notice Claimant was seeking workers compensation benefits or sustained a work-related injury when Claimant's counsel's letter of representation was received on February 19, 2021. Based on the record, the undersigned finds Claimant first notified Respondent he was seeking workers compensation benefits or sustained a work-related injury on February 19, 2021. This occurred after January 21, 2021. Therefore, Claimant failed to prove he gave proper notice to Respondent.

In light of the Board's determination on notice, the remaining issues raised by Respondent are moot.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Pamela J. Fuller, dated June 8, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2021.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

Mitchell W. Rice
Shirla R. McQueen
Hon. Pamela J. Fuller