BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

REX ALLEN
Claimant

v.

AP-00-0463-348
ACTION TENTS, INC. CS-00-0459-448
Respondent

and

HARTFORD FIRE INSURANCE COMPANY
Insurance Carrier

ORDER

Claimant requests review of the January 21, 2022, preliminary Order issued by Administrative Law Judge (ALJ) Ali Marchant.

APPEARANCES

Joseph Seiwert appeared for the Claimant. Bruce L. Wendel appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing held October 28, 2021, with exhibits 2-3; the transcript of Remote Discovery Deposition of Rex W. Allen taken October 11, 2021; the transcript of Evidentiary Deposition via Zoom of Vecelli Domebo taken October 26, 2021; the transcript of Evidentiary Deposition via Zoom of Greg Dunnegan taken October 26, 2021; the transcript of Evidentiary Deposition via Zoom of Tina Dunnegan taken October 26, 2021; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Did Claimant give proper notice of his injury by repetitive trauma to Respondent?

FINDINGS OF FACT

Claimant was employed by Respondent from July 2019 until June 30, 2021. Claimant initially worked for Respondent performing yard work and clean-up of an old amusement park Respondent purchased. Claimant later worked for Respondent driving trucks and delivering rental tents, chairs and tables to events. Claimant loaded and unloaded the trucks, and set up and tore down tents and tables.

On Friday, June 18, 2021, Claimant was delivering and setting up large tents for fireworks stands with many temporary employees. Claimant made several deliveries and set up numerous tents. While setting up the tents, Claimant noticed abdominal pain. Claimant could not recall the specific time he noticed his symptoms, which he described as feeling like "bees in my pocket."[1] Claimant later testified, however, he had pain in his abdomen before June 18. Claimant also noticed a bulge in his abdomen on June 18. Claimant thought he was injured in the afternoon. Claimant told some of the temporary employees he injured himself, because he was slumped over and holding his groin on account of his symptoms. At the end of the day, Claimant also loaded tents from Respondent's warehouse into the truck for deliveries the following day.

Claimant testified he told Greg Dunnegan, Respondent's manager, he thought he suffered a hernia from lifting at work. Claimant testified the conversation occurred on June 18. Claimant did not ask for medical treatment, but thought Mr. Dunnegan would send Claimant to a doctor for treatment. According to Claimant, Mr. Dunnegan said, "I never had a hernia before," and did not say anything else.[2] Claimant later testified Mr. Dunnegan attempted to attribute Claimant's hernia to Claimant's work for a prior employer. Claimant testified he knew from prior workers compensation claims how to report a work-related injury. Apparently nothing further was discussed on June 18 and Claimant went home.

Claimant testified he did nothing over the weekend. Claimant did not seek medical treatment. Claimant performed his usual work for Respondent from Monday, June 21, through Thursday, June 24, and did not tell anyone about his hernia. Claimant did not seek medical treatment from June 21 through June 24.

On Friday, June 25, Claimant performed his usual work, which involved driving a large rental truck. Claimant testified he loaded several deliveries into the truck, and returned the truck to the Penske rental office after the deliveries were made. According to Claimant, his symptoms worsened to the point he was folded over in pain and could barely get into his car at Penske. Claimant testified he called Respondent's Office

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[1] Claimant's Depo. at 23.

[2] *Id.* at 24.

Manager, Ms. Domebo, and asked her to pick him up at Penske and drive him to Respondent's office.

Ms. Domebo picked up Claimant at Penske. Claimant testified while he was riding with Ms. Domebo, he was experiencing pain, burning and stinging in his abdomen and groin. Claimant told Ms. Domebo he was in pain, but did not tell Ms. Domebo why. Upon arriving to Respondent's office, Claimant told Ms. Domebo he needed to leave work early because of his pain, and Ms. Domebo told Claimant to clock out. Claimant clocked out and left work early. Claimant did not tell Ms. Domebo why he was in pain at Respondent's office.

Claimant also testified he spoke with Mr. Dunnegan while at work on June 25, 2021. Claimant testified Mr. Dunnegan asked Claimant to drive a truck with a manual transmission, and Claimant said he doubted he could push the clutch pedal. According to Claimant, Mr. Dunnegan took the truck and drove off with no further discussion.

On June 26, Claimant sought treatment on his own with Dr. Niederee. According to Dr. Niederee's notes, Claimant reported abdominal pain with an onset of "month(s) ago" with no event preceding the onset of symptoms.[3] The notes also document constant symptoms, moderate in severity and worsening. Dr. Niederee diagnosed a left inguinal hernia. Claimant did not recall telling Dr. Niederee the onset of symptoms was months ago or no event preceded the onset of symptoms. Claimant testified Dr. Niederee told Claimant to follow with Dr. Comer, Claimant's primary care physician.

Claimant testified he spoke with Mr. Dunnegan on Sunday, June 27. Claimant did not testify to the content of the conversation he had with Mr. Dunnegan.

Claimant did not go to work on June 28 or 29. Claimant denied calling Respondent on June 28. According to Claimant, he was in pain due to the hernia, and was resting and applying ice packs to relieve his symptoms.

Claimant testified on June 30 he went to Respondent's office, turned in his keys and company credit card, and told Ms. Domebo he was resigning his employment with Respondent.

Claimant saw Dr. Comer on July 1. Dr. Comer's notes state Claimant saw Dr. Niederee, and was diagnosed with a left inguinal hernia. Dr. Comer's notes do not document a work-related injury or a history of symptoms. Dr. Comer was unable to feel a protrusion or abdominal wall defect, but recommended Claimant have a surgical consultation.

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[3] P.H. Trans., Cl. Ex. 2 at 11.

On July 6 Claimant sent Respondent a letter requesting medical treatment and temporary total disability compensation. Claimant denied receiving a letter from Respondent in response to the July 6 letter.

Claimant returned to Dr. Comer on July 12. According to Dr. Comer's notes, Claimant stated his hernia was a work-related health problem, and Dr. Comer palpated an inguinal bulge on the left side. Dr. Comer confirmed Claimant had a left inguinal hernia. Dr. Comer's office also completed a hand-written form stating Claimant sustained an injury from repetitive heavy lifting and putting up numerous large tents, and the date of injury was June 18, 2021. Dr. Comer recommended Claimant proceed with a surgical consultation, and imposed light-duty work restrictions.

Claimant's wife faxed Dr. Comer's hand-written note to Respondent on July 12. Claimant had no other contact with Respondent.

Respondent's workers compensation insurance carrier referred Claimant to Dr. Hentzen, who evaluated Claimant on August 3. Dr. Hentzen's note states Claimant lifted heavy objects at work and was on his feet a lot. Dr. Hentzen identified a palpable and reducible left inguinal hernia and recommended a surgical repair. Light-duty work restrictions were imposed, effective June 25 to the date of surgery.

On August 17 Claimant underwent surgery by Dr. Hentzen. Dr. Hentzen performed a robotic-assisted bilateral inguinal hernia repair with mesh. Claimant was taken off work for four weeks. A post-operative evaluation took place on August 27 and mild post-operative pain was noted. Light-duty work restrictions were imposed to September 14, 2021. Claimant testified Dr. Hentzen released Claimant from treatment on September 14.

Claimant has not resumed working, and has not looked for work since Dr. Hentzen's release. Claimant testified he continues to have burning and stinging in the area where the mesh was implanted, as well as back pain. Claimant conceded he did not report back pain to Respondent. Claimant has not contacted Dr. Hentzen's office to schedule a return appointment.

Mr. Dunnegan testified Claimant did not report a work-related injury to him on June 18. According to Mr. Dunnegan, if Claimant reported a work-related injury to him, he would have told Claimant to see a doctor. Mr. Dunnegan also testified he would have told his wife, Tina Dunnegan, and Ms. Dunnegan would have notified Respondent's workers compensation insurance carrier. Mr. Dunnegan confirmed Claimant worked on June 21 through 24, and did not report a work-related injury. Mr. Dunnegan could not recall if he spoke with Claimant on June 25, and did not recall Claimant reporting a work-related injury on June 25.

Mr. Dunnegan testified he learned Claimant left work early on June 25, and he called Claimant on June 27 to confirm whether Claimant intended to work on June 28 because the volume of deliveries. Based on his conversation with Claimant, Mr. Dunnegan understood Claimant was doing well and would be at work on Monday. According to Mr. Dunnegan, Claimant called him on June 28, stated he overdid it over the weekend, and would not be coming to work. Mr. Dunnegan testified Claimant did not report a work-related injury during the conversation. Mr. Dunnegan had no further contact with Claimant.

Ms. Domebo testified she worked in Respondent's office and had regular contact with Claimant when he clocked in and out of work. Ms. Domebo confirmed under Respondent's policy, if she was informed an employee sustained a work-related injury, she would tell the employee to see a physician and notify Ms. Dunnegan. Ms. Domebo confirmed Claimant did not report a work-related injury when she visited with him between June 18 through 24.

According to Ms. Domebo, on June 25 Mr. Dunnegan asked her to follow Claimant when he was returning the rental truck and to drive Claimant back to the office. Ms. Domebo performed the task around 1-1:30 p.m. Ms. Domebo testified Claimant said his side was hurting really bad, but did not state the cause of the pain. Claimant did not tell Ms. Domebo he sustained a work-related injury. Claimant did not tell Ms. Domebo he spoke with Mr. Dunnegan. Upon returning to the office, Ms. Domebo told Claimant he should see a physician because he continued to report pain in his side. Claimant left work early.

Ms. Domebo had no contact with Claimant on June 28 or 29. Ms. Domebo testified on June 30 Claimant came to the office, and turned in his keys and credit card. Claimant said he would be out for a while and may undergo surgery. According to Ms. Domebo, Claimant did not state he sustained a work-related injury. Ms. Domebo had no further contact with Claimant.

Ms. Domebo confirmed Respondent received, on July 6 or 7, a letter from Claimant alleging he sustained a work-related injury. In response, Respondent sent Claimant a letter requesting additional information about the work-related injuries, and telling Claimant to see a physician. Ms. Domebo testified a few days later Respondent received a fax containing a medical report, which was sent to Respondent's insurance carrier.

Ms. Dunnegan, who owns Respondent, confirmed she performs administrative work, including workers compensation matters. Ms. Dunnegan typically does not have contact with the non-office employees due to her working hours. Ms. Dunnegan testified Claimant did not report a work-related injury to her directly. Ms. Dunnegan did not know if Claimant reported a work-related injury to Mr. Dunnegan, but confirmed policy would require Mr. Dunnegan or Ms. Domebo to report known injuries to her. Ms. Dunnegan confirmed she received a letter from Claimant requesting medical treatment on July 6, a letter was sent

to Claimant requesting additional information, and a fax with a medical report was received on July 12.

A preliminary hearing took place, and Respondent disputed Claimant gave timely notice. No other issues were raised at the preliminary hearing. ALJ Marchant subsequently issued the preliminary Order, dated January 21, 2022, ruling Claimant had to provide timely notice by July 5. ALJ Marchant noted Claimant's complaints of pain, with no further information, did not constitute notice under K.S.A. 44-520. ALJ Marchant also noted Claimant was familiar with workers compensation and the process for giving notice. ALJ Marchant found Claimant gave notice on July 6, and concluded Claimant failed to give timely notice to Respondent. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant contends he gave timely notice when he told Mr. Dunnegan he sustained a work-related injury on June 18, which also imbued Respondent with actual knowledge rendering K.S.A. 44-520 inapplicable. Respondent argues Claimant did not advise Respondent he sustained a work-related injury, which was underscored by the lack of a history of a work-related injury in the medical records, until July 6. Respondent contends the preliminary Order was decided correctly.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[4] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[5] The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.[6]

Claimant alleges he sustained personal injury from repetitive trauma, with a date of accident or injury of June 18, 2021, which was undisputed at the preliminary hearing. Notice of the injury by repetitive trauma must be given by twenty days from the date 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.[7] An employer may designate an individual or department to receive notice, or notice must be given to a supervisor or manager where

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[4] *See* K.S.A. 44-501b(a).

[5] *See id*.

[6] *See* K.S.A. 44-501b(c).

[7] *See* K.S.A. 44-520(a)(1).

an individual or department is not designated.[8] The notice must be apparent that the employee is seeking benefits under the Workers Compensation Act or has suffered a work-related injury.[9]

In this case, it is undisputed the date of accident or injury is June 18, 2021, and twenty days from that date is July 8, 2021. Claimant first sought medical treatment on June 26, 2021, from Dr. Niederee, and twenty days from that date is July 16, 2021. By Claimant's own testimony, he resigned his employment, and last actually worked for Respondent on June 25, 2021. Ten days from that date is July 5, 2021. Under K.S.A. 44-520(a), Claimant must prove he notified Respondent he either sustained a work-related injury or was claiming workers compensation benefits by July 5, 2021.

Claimant argues he notified Respondent's manager, Mr. Dunnegan, he sustained a work-related injury on June 18, 2021, which would satisfy K.S.A. 44-520. Mr. Dunnegan denies the conversation occurred. Determining whether the conversation of June 18, occurred requires a credibility determination. The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges,[10] and the Board possesses the authority to grant or refuse compensation, or to increase or diminish an award of compensation.[11] A *de novo* hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the administrative law judge.[12] Although the Board frequently gives some credence to an administrative law judge's credibility determination of witnesses who testify live,[13] the Board is not required to do so, and may modify an award as it deems necessary.[14] For example, the Board previously reversed an administrative law judge's credibility determination of an employee's live testimony, after asserting its authority to

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

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

[10] *See* K.S.A. 44-555c(a).

[11] *See* K.S.A. 44-551(l)(1).

[12] *See Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555, at *4 (Kan. WCAB June 22, 2017).

[13] *See, e.g., Parker v. Deffenbaugh Industries, Inc.*, Nos. 1,069,143; 1,069,144; 1,069,145, 2014 WL 5798471, at *9 (Kan. WCAB Oct. 14, 2014).

[14] *See Samples v. City of Glasco*, No. 265,499, 2011 WL 2693241, at *3 (Kan. WCAB June 22, 2011).

conduct *de novo* review.[15] Moreover, the Board is as equally capable as an administrative law judge in reviewing evidence when a witness does not testify live.[16] Personal observation of testifying witnesses is a common basis for determining witness credibility, but another method to determine credibility is analyzing the facts and determining which witness' version makes the most sense based on those facts.[17]

Claimant's testimony is contradictory. Claimant initially testified he felt an onset of pain while working on June 18 of sufficient severity to cause him to slump over and grab his groin. Later, Claimant testified he felt the pain before June 18 but no protrusion. Despite experiencing such debilitating pain, Claimant continued to work his regular duties, including loading equipment into a truck for the next day's deliveries. Claimant continued performing his normal working duties of driving and repetitive lifting, apparently without complaint, for four days without discussing his symptoms with anyone. Claimant's behavior is inconsistent with his testimony regarding his debilitating symptoms.

The initial histories contained in the records of Drs. Niederee and Comer also contradict Claimant's testimony. Dr. Niederee's record of June 26, 2021, states the onset of Claimant's abdominal pain occurred months ago without an event. Dr. Comer's record of July 1, 2021, contains no description of a work-related accident or an onset of symptoms on June 18. Both physicians would have relied on Claimant to provide a history. It is illogical for Claimant to tell Dr. Niederee he had an onset of abdominal pain months ago if his actual onset of severe symptoms, leading to his alleged conversation with Mr. Dunnegan, occurred eight days before. There is no record Claimant told a health care provider he suffered symptoms of a hernia on June 18 until the appointment with Dr. Comer on July 12, which is almost a month after the date of accident or injury.

Finally, Claimant's testimony of the events of June 25 was contradicted by Ms. Domebo, and further undermines Claimant's credibility. According to Claimant, he drove a rental truck alone to Penske, where his car apparently was located so he could drive back to work. Claimant also testified he was unable to drive his car at Penske due to his hernia symptoms and called Ms. Domebo for assistance. Apparently Ms. Domebo drove to Penske, picked up Claimant, and drove Claimant back to Respondent's office. Claimant testified while riding with Ms. Domebo, he reported symptoms but did not report his symptoms were caused by work. Upon arriving at Respondent's office, Claimant clocked

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[15] *See Lichtenberger v. Air Capital Vending*, No. 1,012,933, 2004 WL 1778911, at *3 (Kan. WCAB July 16, 2004).

[16] *See Gilmore v. Henke Manufacturing Co.*, No. 1,074,792, 2016 WL 3208237, at *3 (Kan. WCAB May 12, 2016).

[17] *See Dick v. Park Electrochemical Corp.*, CS-00-0444-763, 2020 WL 2991808, at *2 (Kan. WCAB Mar. 19, 2020).

out early and left work. It is unknown how Claimant got home if his car was at Penske and he was in debilitating pain. Claimant's description is illogical. In contrast, Ms. Domebo's testimony is logical. According to Ms. Domebo, she followed Claimant to Penske in her car while Claimant was driving the rental truck, and drove Claimant to the office after the truck was returned.

After considering the record as a whole, Claimant's testimony is contradictory and illogical in the face of the medical records and the other testimony. Based on the greater weight of the credible evidence, the undersigned finds the conversation of June 18 described by Claimant did not occur. While Claimant may have told fellow employees of his symptoms or injury, there is no credible evidence Claimant informed a supervisor or manager on June 18 he suffered a work-related injury. Similarly, Claimant did not prove Respondent was imbued with actual knowledge of a work-related injury by virtue of a conversation occurring on June 18.

In like token, the greater weight of the credible evidence does not prove Claimant notified a supervisor or manager he sustained a work-related injury or was claiming workers compensation benefits before July 6. By Claimant's admission, he told no one of his work injury, despite pain and a protrusion, when he worked from June 21 through 24. Claimant may have told Mr. Dunnegan he was in pain and unable to push a clutch pedal on June 25, and may have told Ms. Domebo he was in pain and unable to continue working on June 25, but Claimant did not testify he was in pain due to a work-related injury or wanted workers compensation benefits. Claimant is familiar with the workers compensation system and the process of reporting a work injury, but did not do so. Claimant denied talking to anyone with Respondent on June 26 despite seeking medical attention. Claimant confirmed he spoke with Mr. Dunnegan on June 27, but did not advise he sustained a work-related injury or was seeking workers compensation benefits. Claimant did not notify Respondent on June 28 or 29, despite being in such pain he was resting and applying ice packs. Finally, on June 30 Claimant either resigned, by his account, or was taking time off from work to undergo surgery, by Ms. Domebo's account, without describing a work-related injury or a claim for workers compensation benefits. While Claimant reported symptoms during this time, reporting pain, alone, does not constitute proper notice under K.S.A. 44-520.[18] Claimant failed to prove he gave proper notice between June 19 and July 5.

On July 6, 2021, Respondent received a letter from Claimant requesting medical treatment and temporary total disability compensation. In response, Respondent sent Claimant a letter requesting additional information about Claimant's alleged injuries. Claimant's letter, received on July 6, indicated Claimant wanted workers compensation

[18] *See Hickman v. Medicalodges, Inc.*, No. 1,075,418, 2016 WL 5886189, at *6 (Kan. WCAB Sept. 12, 2016).

benefits. Based on this letter, Respondent was placed on notice of a potential workers compensation claim and began its investigation. The undersigned finds Claimant first gave Respondent notice he either sustained a work-related injury or was seeking workers compensation benefits on July 6. Because this occurred after the statutory notice deadline of July 5, the undersigned concludes Claimant failed to give proper notice to Respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the preliminary Order of ALJ Ali Marchant, dated January 21, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2022.

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WILLIAM G. BELDEN
BOARD MEMBER

c: Via OSCAR

Joseph Seiwert
Bruce L. Wendel
Hon. Ali Marchant