

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ELOISE MCALISTER)	
Claimant)	
V.)	
)	AP-00-0469-932
NATIONAL FLOOD SERVICES)	CS-00-0457-088
Respondent)	
AND)	
)	
NATIONAL FIRE INS. CO OF HARTFORD)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier, National Fire Ins. Co. of Hartford, requested review of the August 12, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Troy Larson. Mike Stang appeared for Claimant. James R. Hess appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of:

1. Deposition Transcript of Eloise McAlister taken November 2, 2021;
2. Preliminary Hearing held June 21, 2022;
3. Preliminary Hearing By Deposition of Eloise McAlister taken July 22, 2022;
4. Preliminary Hearing By Deposition of Clorissa Bindel taken July 22, 2022, with exhibits attached.
5. The pleadings and orders contained in the administrative file.

ISSUE

1. Did Claimant give timely notice to Respondent?

FINDINGS OF FACT

Claimant suffered two work-related injuries prior to her employment with Respondent. Claimant's first injury was to her bilateral upper extremities while working for

the Kansas City Star in the 1990's. Her injury resulted in bilateral carpal tunnel surgery. Claimant's second work-related injury was to her left shoulder while employed with RMA in 2004. This injury also required surgery. Claimant settled both of these claims on a full and final basis, and was released to return to work without restrictions. Claimant testified she had no residual complaints/symptoms from her prior injuries when she began work with Respondent.

Respondent hired Claimant on June 17, 2017 to work as an Operation 2. Claimant answered calls from agents and inputted their information (data entry) into the system. Claimant began experiencing symptoms in 2019. Her symptoms included tingling in her little fingers and numbness in her hands. She reported her symptoms to her supervisor, Ron Sceinzski, who is no longer employed with Respondent. Mr. Sceinzski did nothing with the reported complaints. Claimant did not have additional communication with Respondent regarding her symptoms. She did not request medical treatment, alteration of her job tasks or complete any paperwork regarding an injury to her upper extremities. She continued to perform her regular job duties.

Claimant and approximately five others were laid off for economic reasons by Respondent. Claimant's last day of actual work for Respondent was March 9, 2021. Claimant was paid through March 31, 2021. Claimant received unemployment benefits until she returned to work for a new employer, Advantage Tech, scanning documents in September 2021.

At her own expense, Claimant sought medical treatment at Johnson County Orthopedics with Dr. Michael Azzam sometime in 2019. Claimant was referred to Dr. Vito Carabetta who performed an EMG, which revealed Claimant had bilateral carpal tunnel. Dr. Azzam discussed surgical intervention with Claimant, which she declined. During this time, Claimant purchased braces for her wrists, which she wore "practically" every day.

In 2020, Claimant's supervisor was Clorissa Bindel. Overall, Ms. Bindel was Claimant's supervisor for two to three years up to her lay-off. Ms. Bindel testified she did not recall seeing Claimant wear her braces, report a work-related injury, complain about her hands tingling or being numb or discussing symptoms with her hands due to the work she performed. Ms. Bindel confirmed Ron Sceinski had been one of Claimant's supervisors and he would have been required to report to HR any injury suffered by an employee. Ms. Bindel further testified Claimant began working from home in March, 2020 due to COVID issues and continued to work from home up to her lay-off.

At her own expense, Claimant saw Dr. Matthew Drake on June 11, 2020. He diagnosed claimant with bilateral carpal tunnel syndrome and referred her to Dr. Carabetta for an EMG, which was performed on June 25, 2020. Claimant followed up with Dr. Drake on December 11, 2020 to discuss the EMG results.

On December 15, Claimant sent an email to Ms. Bindel advising surgery was scheduled for her elbow on the following Wednesday. Prior to this email, Claimant sent an email to Ms. Bindel on December 3, 2020, referencing possible surgery on her shoulder. Claimant testified the reference to shoulder surgery was a mistake. The email should have stated surgery was being discussed regarding her elbow. Surgery on Claimant's elbow was not performed on the following Wednesday. Claimant saw Dr. Drake on February 26, 2021, and her surgery was re-scheduled for March 26, 2021. Claimant sent an email to Ms. Bindel on March 1 advising her of the March 26 surgery.

The parties agree Claimant's date of accident is her last day worked, March 9, 2021 and she did not provide timely notice pursuant to K.S.A. 44-520(a)(1). At issue is whether Respondent had actual knowledge of Claimant's injury thereby waiving the notice requirements contained in K.S.A. 44-520(a)(1). The ALJ found Respondent had actual knowledge of Claimant's injury, thereby relieving Claimant from her obligation to provide notice pursuant to K.S.A. 44-520(b)(1):

Applying *Ramirez* to the case at hand, the Court finds Claimant's emails to Ms. Bindel to be the most relevant piece of evidence. They clearly display Claimant's efforts to obtain surgery on her upper extremities. The emails are "more than a casual conversation" and indicate that Respondent had actual knowledge of Claimant's injuries. Whether either party knew that the injuries were work-related at the time is irrelevant, because there is no language in K.S.A. 44-520(b)(1) requiring such a finding. The only pertinent issue is whether Respondent "had actual knowledge of the injury," which the Court finds in the affirmative for the reasons set out above.¹

Respondent argues the ALJ erred in finding Respondent had actual knowledge of a work-related injury, as set forth in K.S.A. 44-520(b)(1). Therefore, Claimant failed to prove she gave timely and adequate notice of a work-related injury and her claim for benefits should be denied. Claimant contends Respondent had actual knowledge of Claimant's injury and urges the Board to affirm the ALJ's Order.

PRINCIPLES OF LAW AND ANALYSIS

1. Timely notice was not given by Claimant.

This Board Member disagrees with the ALJ's finding Respondent had actual knowledge of Claimant's injury as contemplated by K.S.A. 44-520(b)(1). The ALJ found the facts of this case analogous with *Ramirez*. This Board Member disagrees. In *Ramirez*, the injured worker, following two appointments with an unauthorized physician approximately six weeks apart, had discussions following each appointment with her

¹ ALJ Order (August 12, 2022) at p. 2.

supervisor regarding pain, numbness, swelling in her hands and the need to change her job tasks. Following these discussions, the injured worker's supervisor altered her job tasks resulting in improvement in her symptoms during the time her job tasks were altered. Approximately six weeks later, the injured worker advised her supervisor her hand pain was constant and requested medical treatment.

Claimant testified she told her supervisor Ron she had tingling in her little fingers and numbness in her hands sometime in 2019. From then until her lay-off on March 9, 2021, Claimant did not talk with anyone for Respondent regarding the condition with her hands. She did not request medical treatment or alteration of her job tasks due to her hand symptoms. The emails provided to Ms. Bindel in late 2020 up to her layoff in March 2021 were in relation to surgery on her elbow. Claimant had two prior work-related injuries for which she received authorized medical treatment and full and final settlements. In short, there is no evidence Claimant communicated to Respondent she intended to pursue benefits from Respondent or suffered a work-related injury.

The Board previously held knowledge of a medical condition or accident is insufficient to satisfy the "actual knowledge of the injury" requirement of timely notice.² No requests for benefits were made by Claimant until after ten days had passed since her last day worked. Respondent has the duty to provide medical treatment reasonably necessary to cure or relieve an injured worker from the effects of the injury.³ This requirement allows Respondent to direct and control medical treatment. Claimant's failure to request any benefits under the Act prior to her last day worked left Respondent without sufficient notice of her intent to pursue benefits and denied Respondent the opportunity to direct and control the medical treatment Claimant was receiving.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the August 12, 2022 preliminary Order entered by Administrative Law Judge Troy A. Larson is reversed. Claimant's request for benefits is denied for lack of proper notice.

² See *Hickman v. Medicalodges, Inc.*, No. 1,075,418, 2016 WL 5886189 (Kan. WCAB Sept. 12, 2016).

³ See K.S.A. 44-510h(a).

IT IS SO ORDERED.

Dated this _____ day of October, 2022.

CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Mike Stang, Attorney for Claimant
James R Hess, Attorney for Respondent and its Insurance Carrier
Hon. Troy Larson, Administrative Law Judge