BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LAURO SANCHEZ	)	
Claimant	)	
V.	)	
	)	
PACKERS SANITATION SERVICES INC. LTD	)	AP-00-0471-049
Respondent	)	CS-00-0468-232
AND	)	
	)	
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

The claimant, through Brian Collignon,[1] requested review of Administrative Law Judge (ALJ) Gary Jones' preliminary hearing Order dated September 29, 2022. Darin Conklin appeared for the 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: (1) preliminary hearing transcript, held August 22, 2022; (2) preliminary hearing transcript, held September 12, 2022; (3) stipulated testimony of Jesus Chavez, filed September 21, 2022; (4) all exhibits attached to enumerated items 1-3; and (5) documents of record filed with the Division.

ISSUES

1. Did the claimant sustain an injury by accident arising out of and in the course of his employment?

2. Did the claimant provide timely notice to respondent as required by K.S.A. 44-520?

[1] After filing this appeal, Mr. Collignon withdrew as the claimant's attorney. The claimant has not retained a new attorney.

FINDINGS OF FACT

The claimant, a Spanish-speaking individual, began working for the respondent in 2015, as a cleaner. His job consisted of dragging a 25 foot hose, weighing 50 to 60 pounds, and spraying machines for seven to eight hours a shift.

This case involves an asserted injury by accident occurring on April 22, 2022.

The facts are conflicting and are presented sequentially, for the most part, to avoid more confusion. At all medical visits, the claimant's family, including his daughter, interpreted between Spanish and English as needed. The claimant used an interpreter to testify. All date references concern 2022.

On April 26, the claimant was seen at GraceMed, his primary care provider, for complaints of left leg pain for one to two weeks. He denied any injuries, noting any activity can aggravate his pain. The claimant's daughter said the claimant worked on his feet 12 hours a day, seven days a week. A specific injury or accident was not noted and no mechanism of injury was described. Work restrictions were not provided to the claimant. The nurse practitioner recommended compression stockings during work, physical therapy, and advised the claimant to switch jobs.

On May 9, the claimant returned to GraceMed for complaints of severe left back pain radiating down to his foot for one month with no improvement. The claimant reported lifting a lot of heavy things at work, it was possible he was hurt at work, and reported this to his manager, who gave him light duty.[2] The nurse practitioner advised the claimant to file a workers compensation claim, stating "it is likely work related."[3] The claimant was told to work less than 45 hours a week and was given a 20 pound lifting restriction.

On May 16, the claimant was seen at the Ascension Via Christi St. Francis emergency room. The claimant reported continuing low back pain after lifting a 70-pound water jug at work a month earlier. He had numbness and tingling down his left leg for the past two weeks. X-rays of the lumbosacral spine revealed no acute fracture or dislocation, but there was endplate sclerotic changes at L4-5 and L5-S1. The claimant was diagnosed with low back pain with sciatica, and prescribed acetaminophen and cyclobenzaprine. The claimant was given an off-work slip for May 16 through May 19.

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[2] See P.H. Trans. (Aug. 22, 2022), Ex. 2.

[3] *Id*. (Aug. 22, 2022), Ex. 2.

Mr. Chavez is the respondent's floor supervisor. By stipulation, Mr. Chavez testified he first learned of the claimant's work injury on or about May 18, when Jonathan Brambila, the respondent's safety manager, told him the claimant would not be coming to work. He denied the claimant ever told him about being injured at work. Mr. Chavez denied ever assigning the claimant to light duty. If the claimant had reported an accident, Mr. Chavez testified he would have notified Alma Brambila and Mr. Brambila.

Ms. Brambila is the respondent's manager. She testified the claimant, on May 18, told her about a personal injury, but also thought he had a work injury. Ms. Brambila had him come to her office and file a report with TriageNow, a workers compensation service used by the respondent, after midnight, or in the early morning of May 19. Ms. Brambila testified the claimant never told her he reported a work injury to Mr. Chavez.

On May 19, an incident report was completed by TriageNow. The report stated the claimant began having left leg pain after work on May 18, and was "unsure" how the injury happened.[4]

The claimant did not return to work for the respondent. On May 23, the claimant returned to the Ascension Via Christi St. Francis emergency room. He reported pain shooting down his left leg after lifting something heavy at work three weeks ago. A lumbar spine CT scan was normal, apart from mild facet hypertrophy and minimal lumbar spondylosis. The claimant was diagnosed with degenerative changes of the lumbar spine without acute osseous abnormality.

On May 24, the claimant was admitted to Ascension Via Christi St. Francis for intractable back and left leg pain. The claimant reported low back pain beginning in March. He stated he lifted heavy stuff at work and injured his back because of his work, including lifting a 70-pound jug of water. A MRI of the lumbar spine confirmed a left-sided disc herniation at L5-S1. The claimant underwent a left-sided L5-S1 laminotomy and microdiscectomy on May 28. The claimant was discharged from the hospital on May 30.

On June 15, the claimant filed an application for benefits alleging a work accident from lifting a machine/hose on May 18. A separate notice of intent listed a date of loss of May 18.

The claimant testified on July 28. He denied being injured at work on May 18. According to the claimant, on Saturday, April 23, he was carrying the hose and heard "some cracking" in his back.[5] He testified he immediately reported the accident to his

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[4] *Id*., Ex. G.

[5] P.H. Trans. (Sept. 12, 2022) at 22.

supervisor, Mr. Chavez. The claimant testified he spoke the next day to Ms. Brambila about getting hurt with the hose and doing a report. Despite pain, the claimant testified he continued working. The claimant testified he first went to GraceMed about one week after his asserted accident, and informed GraceMed he was hurt lifting a hose at work. The claimant testified he reported the accident to Ms. Brambila about one-and-one-half weeks after the accident. He further testified he gave Ms. Brambila work restrictions from GraceMed on May 17. The claimant denied being assigned light duty, and agreed he performed his regular work until his last day of work, May 17, but he also testified he was initially given light duty, only to be put back to his regular work.

At his then-attorney's request, the claimant saw Aly Gadalla, M.D., on August 17, for an independent medical examination. The claimant reported injuring himself at work on April 22, while lifting a 60-70 pound hose. He stated he was standing up when he heard a popping sound come from his lower back and experienced immediate left leg pain. The claimant stated he reported the accident the same day to his immediate supervisor, Mr. Chavez. Dr. Gadalla opined the work accident of April 22 was the prevailing factor for the claimant's injury.

On August 22, the claimant amended his application for benefits from a single accident to a series from April 22 to May 24.

The claimant testified a second time on August 24. He clarified he was injured on April 22[6] and notified Mr. Chavez of his work accident that day. The claimant also testified Mr. Chavez called him on April 24 about returning to work, but the claimant took a vacation day on April 24 instead of reporting to work, and reminded Mr. Chavez about the work accident. Call records confirm a call between the claimant and Mr. Chavez on April 24. The claimant also testified he received a work excuse form from GraceMed after the first time he went there on April 26, and he provided the form to Ms. Brambila or Mr. Chavez. He reiterated telling GraceMed about when and how he was hurt at work and testified he was taken off work for one day, but not given work restrictions. The claimant testified the respondent modified his duties to cleaning tables or taking out the trash. He testified he told GraceMed on May 9 he was hurt at work lifting a hose. The claimant testified he gave written work restrictions dated May 9 to Ms. Brambila.

Further, in his testimony on August 24, the claimant reported being intimidated by Ms. Brambila and four other people, including Jonathan Brambila (the safety manager), Herman (Hernando) Brambila, Jesus Chavez, and another boss (Reuben, the territorial manager), in Ms. Brambila's office when they called a nurse at TriageNow about the accident. An interpreter was used for the phone call. The claimant testified he was worried he would lose his job and he worried about getting Mr. Chavez in trouble for not reporting

[6] See *id.*, Ex. J at 8.

the accident. The claimant told TriageNow it had been about two weeks since his injury occurred and he told his supervisor about the accident the day before the phone call. The claimant was asked by TriageNow if he had a specific accident and said it "just started hurting all of a sudden"[7] and his pain started at his house, not at work, but he thought he was hurt at work. The claimant agreed he did not tell TriageNow he hurt himself lifting something at work. Mr. Chavez denied being present for the phone call to TriageNow.

The claimant's former attorney indicated at the September 12 preliminary hearing the date of accident was April 22 from a specific traumatic event of lifting a heavy hose. The ALJ denied benefits after finding the claimant's accident did not arise out of and in the course of his employment, and he failed to notify the respondent of a work injury until May 18.

PRINCIPLES OF LAW AND ANALYSIS

The pro se claimant did not file a brief. The respondent maintains the Order should be affirmed.

An employer is liable to pay compensation to an employee incurring personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.[8] The Workers Compensation Act should be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[9] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[10] 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.[11] To determine if claimant satisfied his or her burden of proof, the trier of fact shall consider the whole record.[12]

K.S.A. 44-508 provides, in pertinent part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily,

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[7] *Id*. at 50.

[8] K.S.A. 44-501b(b).

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

[10] See *id*.

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

[12] See *id*.

accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f) (1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) “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.

K.S.A. 44-520 states:

(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.
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> Notice may be given orally or in writing.
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> . . .
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> (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.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury . . . .
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Board review of an order is de novo on the record.[13] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[14] On de novo review, the Board makes its own factual findings.[15]

1. The claimant did not prove he sustained an injury arising out of and in the course of his employment.

Under the facts of this case, the claimant did not meet his burden of proving he sustained personal injury by accident arising out of and in the course of his employment. There are too many inconsistencies as to when and how the asserted accidental injury occurred.

Sequentially, the claimant went to GraceMed on April 26. The corresponding record indicated he had left leg pain for one to two weeks, which means his pain started between April 12 and April 19. The claimant denied injury. There is no mention of a work-related injury from dragging or pulling a hose.

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[13] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[14] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[15] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

The May 9 GraceMed record documents back pain starting about one month earlier, or starting April 9. A specific injury or accident is not documented.

The hospital record of May 16 refers to low back pain from lifting a 70-pound jug of water one month earlier, or around April 16. Mention of an injury from pulling a hose is absent.

Ms. Brambila testified the claimant told her about being hurt on May 18. The May 19 incident report by TriageNow indicated the claimant started having left leg pain after work on May 18, and he did not know how the injury happened.

The May 23 hospital record concerns low back pain from two to three weeks earlier, or May 2 to May 19.

The claimant's initial application for benefits, dated June 15, alleged a work accident from lifting a machine/hose on May 18.

In his initial testimony of July 28, the claimant denied being injured at work on May 18, instead alleging an injury on April 23.

On August 22, the claimant amended his application for benefits from a single accident to a series of injuries from April 22 to May 24.

When the claimant testified on August 24, he stated he was injured on April 22.

Considering all of the facts, the claimant had back and left leg pain starting at some indeterminate time in April, but there was no specific work-related accidental injury. The facts do not support the claimant's allegation of a known work-related injury from pulling a hose on April 22. The claimant did not prove he sustained personal injury by accident arising out of and in the course of his employment on April 22. The case, at least on a preliminary basis, is not compensable.

2. The claimant did not prove he provided timely notice to respondent as required by K.S.A. 44-520.

The greater weight of the facts suggests the claimant provided legally insufficient notice of his asserted work accident on May 18. Notice must be provided under the rules listed in K.S.A. 44-520. The notice was insufficient because the claimant could not identify a date of accident or the particulars of the accidental injury. The claimant did not tell the respondent how or when he was hurt at work. The notice is also legally insufficient as out of time. For an April 22 date of accident, the claimant had 20 days to provide notice. May 18 is more than 20 days removed from April 22. The undersigned Board Member does not

find the claimant gave notice to Mr. Chavez on April 22. If the claimant provided notice to Mr. Chavez on April 22, it stands to reason the initial medical records from GraceMed and Ascension Via Christi St Francis would corroborate the claimant's allegations as to the date and mechanics of injury. Those records do not provide such support.

In addition to the finding listed under issue one, the lack of proper and timely notice precludes compensability.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the Board affirms the Order dated September 29, 2022.

IT IS SO ORDERED.

Dated this _____ day of January, 2023.

_____
JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Darin Conklin
Hon. Gary Jones

c: (via USPS mail)
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