

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GLENN MOYER

Claimant

v.

NATIONAL BEEF PACKING CO. LLC

Respondent

AP-00-0473-488

CS-00-0456-317

and

ZURICH AMERICAN INS. CO.

Insurance Carrier

ORDER

Claimant requests review of the January 27, 2023, Preliminary Hearing Order issued by Administrative Law Judge (ALJ) Julie A.N. Sample.

APPEARANCES

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

RECORD AND STIPULATIONS

The Appeals Board adopted the stipulations and considered the same record as ALJ Sample, consisting of the Transcript of Preliminary and Motion to Dismiss Hearing, held January 25, 2023; the transcript of Evidentiary Deposition via Telephone of Tim Mains, taken March 8, 2022, and the signature page; the transcript of Preliminary Hearing, held June 2, 2021, including Exhibits A1 and B1-4; and the pleadings and orders contained in the administrative file. The Board also reviewed Respondent's brief.

ISSUE

Did Claimant prove he gave proper notice to Respondent?

FINDINGS OF FACT

Claimant previously sought medical treatment and temporary total disability compensation in a preliminary hearing held on June 2, 2021. The Appeals Board previously made the following 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. (June 2, 2021), Resp. Ex. A.

² P.H. Trans. (June 2, 2021), at 11.

³ *Id.* at 6.

⁴ P.H. Trans. (June 2, 2021), 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.⁵

After the administrative law judge previously assigned this matter issued a preliminary order denying compensability, Claimant sought review by the Board. The Board found the legally operative date of accident or injury for Claimant's repetitive-trauma

⁵ *Moyer v. National Beef Packing Co. LLC*, AP-00-0458-557, CS-00-0456-317, 2021 WL 3433281, at *1-2 (Kan. WCAB July 29, 2021).

claim was January 11, 2021.⁶ The Board concluded Claimant did not provide legally sufficient notice because he did not notify Respondent he either suffered a work-related injury or was seeking workers compensation benefits by January 21, 2021, which was ten days from the last day Claimant worked for Respondent.⁷ The Board noted on January 11, 2021, Claimant told his supervisor his knee was swollen and he could not walk, but reporting pain or symptoms was insufficient to prove notice.⁸ The preliminary order denying compensability was affirmed.

On March 8, 2022, the deposition of Claimant's former supervisor, Tim Mains, was taken. Mr. Mains testified if an employee reported any condition, whether work-related or not, to a supervisor, the employee would be sent to the company nurse for medical treatment. Mr. Mains also testified the company nurse would complete any necessary reports, contact the Safety Department for an investigation, and would ask Mr. Mains to sign any paperwork the nurse completed. If the company nurse was not available, the employee would be sent to the Safety Department. Mr. Mains was also familiar with the concept of repetitive injuries.

Mr. Mains was not aware of Claimant's workers compensation claim until approximately one week before his deposition. Mr. Mains confirmed Claimant spoke with him on January 11, 2021, approximately two hours into his shift. According to Mr. Mains, Claimant stated he had knee swelling and could not walk. Mr. Mains did not notice swelling, but confirmed he told Claimant to see the company nurse. Mr. Mains noticed Claimant was limping when he walked to the nurse's station. Mr. Mains testified he was not told Claimant's knee swelled up while Claimant was working. Mr. Mains did not know Claimant was reporting a work-related injury, and Claimant did not report an acute injury. Mr. Mains was not clear whether Claimant's condition occurred while working or outside of work.

Respondent filed a motion to dismiss, and Claimant requested a second preliminary hearing on medical treatment. A hearing on the motion to dismiss and Claimant's request for medical treatment took place on January 25, 2023. No testimony was taken during the hearing and no additional exhibits were offered into evidence. On January 27, 2023, ALJ Sample issued the Preliminary Hearing Order denying the request for dismissal, and denying Claimant's request for medical treatment. ALJ Sample found Claimant reported symptoms to his supervisor, but this was insufficient to prove notice. ALJ Sample concluded Claimant failed to prove he gave proper notice to Respondent. These review proceedings follow.

⁶ See *id.* at *3.

⁷ See *id.* at *4.

⁸ See *id.*

PRINCIPLES OF LAW AND ANALYSIS

Claimant seeks review of ALJ Sample's conclusion Claimant failed to prove he gave notice to Respondent. Respondent argues the proper date of accident or injury is December 3, 2020, and Claimant failed to give timely notice. Respondent also argues Claimant failed to prove the alleged repetitive trauma was the prevailing factor causing his alleged injury, even if he gave notice to Respondent.

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.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

With regard to the date of injury or accident, the Board's review authority is limited to the issues raised and considered by the administrative law judge.¹² The issue of the date of injury or accident was not raised as an issue before ALJ Sample. Moreover, no new evidence was offered to support changing the Board's prior determination the date of accident or injury is January 11, 2021. The date of accident or injury for this repetitive-trauma claim remains January 11, 2021.

The Board next considers whether Claimant proved he gave proper notice to Respondent. 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.¹³ The notice must be apparent that the employee is seeking benefits under the Workers Compensation Act or has

⁹ See K.S.A. 44-501b(a).

¹⁰ See *id.*

¹¹ See K.S.A. 44-501b(c).

¹² See K.S.A. 44-555c(a).

¹³ See K.S.A. 44-520(a)(1).

suffered a work-related injury.¹⁴ Reports of pain or symptoms do not constitute legally sufficient notice.¹⁵

No new evidence was presented changing the Board's prior determination of the date notice must be received by Respondent. Claimant first sought medical treatment 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.¹⁶ 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. Claimant must prove he notified Respondent he either suffered a work-related injury or was seeking workers compensation benefits by January 21, 2021.

Both Claimant and Mr. Mains testified Claimant reported his knee was swollen and painful, and Claimant was unable to walk. Claimant did not report he developed symptoms while working, and Claimant did not tell Mr. Mains he wanted workers compensation benefits. Respondent's employees are sent to the company nurse as a matter of course whenever they report symptoms, regardless of the cause. Claimant did not tell Respondent's nurse he was hurt while working or was 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. Mr. Mains confirmed he was not informed Claimant sustained a work-related injury, either by accident or repetitive trauma, or Claimant wanted workers compensation benefits. Although Claimant reported symptoms, this does not constitute legally sufficient notice. Claimant failed to prove he gave timely notice to Respondent. Claimant's request for benefits is denied.

Respondent also argues Claimant failed to prove the alleged repetitive trauma was the prevailing factor causing his alleged injuries. That issue was not addressed by either ALJ Fuller or ALJ Sample. In light of the Board's ruling on notice, this issue is moot.

¹⁴ See K.S.A. 44-520(a)(4).

¹⁵ See *Camp v. Bourbon County*, No. 104,784, 2012 WL 3135512, at *9 (Kansas Court of Appeals unpublished opinion filed July 27, 2012, rev. denied Sept. 4, 2013).

¹⁶ See *Kretz v. Drywall Systems, Inc.*, No. 1,076,495, 2017 WL 2991564, at *5 (Kan. WCAB June 20, 2017).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Preliminary Hearing Order issued by ALJ Julie A.N. Sample, dated January 27, 2023, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2023.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

Mitchell W. Rice
Shirla R. McQueen
Hon. Julie A.N. Sample