

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**OSCAR WHITMORE**  
Claimant

v.

CS-00-0453-202  
AP-00-0454-758

**COMMUNITY LIVING OPPORTUNITIES, INC.**  
Respondent

and

**AMERICAN COMPENSATION INS. CO.**  
Insurance Carrier

**ORDER**

Respondent and Insurance Carrier request review of the November 25, 2020, preliminary Order issued by Administrative Law Judge (ALJ) Troy A. Larson.

**APPEARANCES**

Michael Patton appeared for Claimant. Steven J. Quinn appeared for Respondent and its Insurance Carrier.

**RECORD AND STIPULATIONS**

The Appeals Board adopted the stipulations and considered the same record as the ALJ, consisting of the Transcript of Preliminary Hearing held November 3, 2020, including Exhibits A1 and A2; the Transcript of Proceedings held November 12, 2020, including Exhibits A3-A6; and the pleadings and orders contained in the administrative file. The Appeals Board also reviewed the parties' briefs.

**ISSUE**

Did Claimant prove he gave Respondent timely notice he sustained personal injury from an accident arising out of and in the course of his employment on July 5, 2020?

**FINDINGS OF FACT**

Claimant alleges he sustained personal injuries from two accidents arising out of and in the course of his employment with Respondent on July 5, 2020, and September 1, 2020. The preliminary Order and accompanying proceedings only address the July 5, 2020, accident. With regard to the July 5, 2020 accident, Respondent does not dispute

Claimant met with personal injury from an accident arising out of and in the course of his employment with Respondent, but Respondent disputes timely notice was provided.

Claimant works for Respondent providing residential care for disabled clients. On July 5, 2020, Claimant was assisting a wheelchair-bound client in the bathroom. Claimant was almost at the end of his shift, and another co-worker, Ms. Ackley, had arrived to take over from Claimant. As Claimant was moving the client back into her wheelchair, the client began to fall and Claimant tried to hold onto her. Ms. Ackley assisted Claimant with a controlled fall, and the client went to the ground safely. In the process of catching the client and performing the controlled fall, Claimant felt a pop in his middle and lower back. After the controlled fall, Ms. Ackley and Claimant put the client in the wheelchair.

Claimant went home because it was the end of his shift. Ms. Ackley completed an electronic report in Respondent's "T-log" system that evening. Although the T-log entries are available for management to review, Ms. Ackley did not know if management actually reviewed this entry. Ms. Ackley reported the client's fall, but did not report any injuries or the pop Claimant felt in his back. Ms. Ackley was not Claimant's supervisor.

Claimant woke up the next day with middle and lower back pain and fatigue in both arms and legs. Claimant struggled to get out of bed, and said his entire body hurt. Despite those symptoms, Claimant worked his entire shift. Respondent's attendance records indicate Claimant did not work on July 7, but worked on July 8 and 12.

Claimant testified he called one of his managers, Ms. Lemine, and reported the July 5 incident and his current symptoms. Claimant testified he requested lighter work until he felt better. Claimant was not certain when he spoke with Ms. Lemine, and was unable to state he called her the next day. Claimant believed he called Ms. Lemine within one week of the July 5 incident. Claimant stated he was assigned easier work in a different location based on his conversation with Ms. Lemine. Respondent's records confirm Claimant began work at a different location starting July 13, 2020. Claimant worked at that location until September 2020.

According to Claimant, approximately two weeks after the July 5 incident, he was talking with another manager, Ms. Black, about obtaining health insurance coverage and he mentioned the back injury he sustained on July 5. Claimant later testified the conversation occurred in August. Claimant testified Ms. Black referred Claimant to another manager, Ms. McFadden, to report a workers compensation injury. According to Claimant, he spoke with Ms. McFadden two days later, and was referred to the Human Resources Department. Claimant testified he was more concerned about obtaining health insurance coverage than reporting a work-related injury, and did not report a work-related injury with the Human Resources Department until September 2020.

Between July 13 and September 1, 2020, Claimant continued working for Respondent. Claimant's symptoms persisted. On two occasions, Claimant called Respondent and reported he could not work because he did not believe he could physically perform his job. Respondent's attendance records confirm Claimant called in sick on July 27 and September 1, 2020. Claimant did not receive medical treatment until after he felt a sudden pop and worsening of his symptoms when he bent forward at a medication cart on September 1, 2020. Claimant commenced conservative treatment for thoracic and lumbar sprain/strains at KU MedWest on September 9, 2020. Claimant's symptoms persisted, and additional testing and treatment was recommended by KU MedWest, which was not authorized by Respondent and Insurance Carrier.

Ms. Lemine testified she was Claimant's supervisor on July 5. Ms. Lemine could not recall whether she spoke with Claimant about his being injured in an accident occurring on July 5. Ms. Lemine also testified if she received notice of a work-related injury from an employee, she would have referred the employee to another manager, Ms. Wangler. Ms. Lemine did not recall telling Claimant to report a work-related injury to Ms. Wangler. Ms. Lemine did not recall talking to Claimant about moving him to a lighter position in a different location on July 6. Ms. Lemine could not recall when Claimant moved to the different location, and thought Claimant was moved to replace a coworker on maternity leave. Ms. Lemine later testified, however, she became aware of Claimant being in an accident on July 5 because Claimant told her, and the conversation could have been within a week of July 5. Ms. Lemine also communicated with Claimant via text, but did not receive a text from Claimant, post-July 5, until after the September 2020 event. Ms. Lemine did not receive notice of a July 5 accident via text message.

Ms. Black testified she did not recall talking with Claimant in early August about a back injury sustained from a work-related injury. Ms. Black testified she spoke with Claimant about health insurance, and did not recall talking with Claimant about a work-related back injury. Ms. Black did not recall when the conversation occurred. Ms. Black testified if Claimant reported a work-related injury, she would have reported the injury to the Human Resources Department. Ms. Black was not aware of the date Claimant was transferred to a different location, was not aware of a T-log entry concerning the July 5 event, and was not aware of a later incident in September.

Ms. McFadden testified she had a conversation with Claimant about health insurance, and another conversation about sustaining a work-related injury in September 2020. Ms. McFadden understood Claimant had prior low back pain, but was not aware Claimant injured his back on July 5. Ms. McFadden testified she told Claimant to complete a written report as soon as Claimant reported the September incident, and Ms. McFadden notified the Human Resources Department.

Ms. Kuzinski confirmed she was in charge of workers compensation matters for Respondent, and typically managers report injuries to her. Ms. Kuzinski testified she did

not receive notice of an injury occurring on July 5 from Claimant until September. Ms. Kuzinski also testified to her knowledge, Claimant was not transferred to a different location in July because it was lighter duty, but because a coworker went on maternity leave. According to Ms. Kuzinski, the work at the different location was more physically demanding. Ms. Kuzinski confirmed Ms. Lemine was Claimant's acting manager on July 5.

Claimant sought additional medical treatment and testing. A preliminary hearing took place before ALJ Larson. On November 25, 2020, ALJ Larson issued the preliminary Order, concluding Claimant provided timely notice to Respondent. This conclusion was based on Claimant testifying he told Ms. Lemine about the accident and his symptoms within a week of the July 5 accident, and Ms. Lemine testifying she was not sure when the conversation occurred, but could have been within a week of July 5. Respondent and Insurance Carrier were ordered to provide a list of two health care providers, from which Claimant would select one as the authorized treating physician. Respondent appeals.

#### **ANALYSIS AND CONCLUSIONS OF LAW**

Respondent argues the preliminary Order should be reversed because Claimant did not meet his burden of proving he gave proper notice of a work-related injury by an accident occurring on July 5, 2020. Respondent also argues Claimant did not meet his burden of proving he sustained a compensable injury by an accident occurring on September 1, 2020. Claimant argues ALJ Larson correctly found Claimant gave timely notice of a work-related injury by an accident occurring on July 5, 2020, and the Order should be affirmed. Because ALJ Larson did not consider the compensability of the September 1, 2020, claimed accident, the Appeals Board does not address the issue here.<sup>1</sup> The Appeals Board, however, will consider whether Claimant met his burden of proving he gave proper notice of an injury by an accident occurring on July 5, 2020.

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.<sup>2</sup> The provisions of the Workers Compensation Act shall be applied impartially to all parties.<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> See K.S.A. 44-555c(a).

<sup>2</sup> See K.S.A. 44-501b(a).

<sup>3</sup> See *id.*

<sup>4</sup> See K.S.A. 44-501b(c).

Where an employee alleges personal injury from an accident arising out of and in the course of employment, the employee must give the employer notice by the earliest of twenty days from the date of accident, twenty days from the date medical treatment is sought when the employee continues to work for the employer, or ten days from the last date worked if the employee no longer works for the employer, whichever is earliest.<sup>5</sup> Notice must be provided either to the employer's designee or to a supervisor or manager, and must include the time, date, place and particulars, and must evidence the employee is seeking workers compensation benefits or sustained a work-related injury.<sup>6</sup> The notice required under K.S.A. 44-520(a) shall be waived if the employee proves the employer had actual knowledge of the injury.<sup>7</sup>

In this case, twenty days from the July 5, 2020, accident is July 25, 2020, and twenty days from the date Claimant first sought medical treatment is September 29, 2020. Claimant continues working for Respondent, and there is no last day worked. The earliest of these dates is July 25, 2020. Therefore, Claimant must prove by a greater weight of the credible evidence he gave Respondent notice he was seeking workers compensation benefits or suffered a work-related injury by July 25, 2020.

Ms. Ackley made a record of the July 5, 2020, incident involving the client in Respondent's T-log system on July 5, 2020. Claimant's managers had access to the T-log system. Ms. Ackley's entry only states a client was involved in a controlled fall. The entry is silent on whether Claimant suffered an injury during the incident. Therefore, the entry in Respondent's T-log system cannot imbue Respondent with actual knowledge of the injury under K.S.A. 44-520(b).

Having considered the entire record, the undersigned finds Claimant met his burden of proving he gave Respondent notice of a work-related injury. Claimant testified he told Ms. Lemire, his supervisor, he was experiencing back pain as a result of the July 5, 2020, incident and needed lighter work. Claimant could not state he gave notice on July 6, but he believed he told Ms. Lemire within a week of the accident. Ms. Lemire did not recall having a conversation with Claimant about his back symptoms or moving to a different position on July 6, but Claimant was not certain the conversation occurred that day. Ms. Lemire admitted she could have spoken with Claimant about the work-related accident and injury within a week of July 5, 2020. Respondent's records confirm Claimant transferred to a different location eight days after the accident, which supports Claimant's testimony. Although Ms. Lemire testified she did not have a conversation with Claimant about work restrictions in July, the record indicates no work restrictions were imposed until September

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<sup>5</sup> See K.S.A. 44-520(a).

<sup>6</sup> See K.S.A. 44-520(a)(2).

<sup>7</sup> See K.S.A. 44-520(b).

9, 2020. Essentially, Claimant testified he gave notice to Ms. Lemire of a work-related injury within a week of the July 5 accident, and Ms. Lemire testified Claimant reported a work-related injury and the report could have occurred within a week of the accident.

The testimony of Respondent's other witnesses fail to contradict Claimant's testimony regarding notice. Claimant testified he spoke with Ms. Black about enrolling in Respondent's health insurance approximately two weeks after the July 5 accident, and mentioned he injured his back on July 5. Ms. Black recalled speaking with Claimant about health insurance, but could not recall when the conversation occurred and could not recall whether Claimant said he hurt his back at work. Claimant spoke with Ms. McFadden primarily about health insurance two days after the conversation with Ms. Black; Ms. McFadden recalled talking with Claimant about health insurance, but could not recall when the conversation occurred. Both Claimant and Ms. Kuzinski testified Claimant reported in September 2020 he suffered a work-related injury. Although Ms. Kuzinski did not believe the work at the different location was easier, the basis for her opinion is unknown. These witnesses do not directly contradict Claimant's testimony he gave notice to Ms. Lemire. Moreover, Respondent's attendance records corroborate Claimant's testimony he called in sick twice, on July 27 and September 1, 2020, due to his back symptoms.

Based on a greater weight of the credible evidence, the undersigned finds Claimant notified Respondent he sustained a work-related injury within a week of the July 5, 2020, accident. Because this conversation occurred before July 25, 2020, Claimant met his burden of proving he gave proper notice under K.S.A. 44-520(a). Accordingly, ALJ Larson's preliminary Order for medical treatment should be affirmed.

### **DECISION**

**WHEREFORE** it is the finding, decision and order of the undersigned the Order issued by ALJ Troy A. Larson, dated November 25, 2020, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2021.

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WILLIAM G. BELDEN  
APPEALS BOARD MEMBER

**OSCAR WHITMORE**

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cc: Via OSCAR

Michael Patton  
Steven J. Quinn  
Hon. Troy A. Larson