BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TERRY BUCKMAN	)	
Claimant	)	
V.	)	
	)	CS-00-0443-315
PEERLESS PRODUCTS, INC.	)	AP-00-0454-185
Respondent	)	
	)	CS-00-0443-316
AND	)	AP-00-0454-186
	)	
TRAVELERS INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Claimant appeals the November 16, 2020, Award issued by Administrative Law Judge (ALJ) Steven M. Roth. The Board heard oral argument on February 25, 2021.

APPEARANCES

William L. Phalen appeared for Claimant. Katharine Collins appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The issues on appeal are:

1. Did Claimant provide timely proper notice in accordance with K.S.A. 2018 Supp. 44-520?

2. Did Claimant's injuries arise out of and in the course of his employment?

3. Were Claimant's alleged repetitive traumas the prevailing factor in causing his injuries, need for medical treatment and impairment?

FINDINGS OF FACT

The ALJ denied Claimant workers compensation benefits because Claimant failed to prove by a preponderance of the evidence, proper timely notice under K.S.A. 44-520(b), his accidental injuries arose out of and in the course of Claimant's employment, and his employment with Respondent was the prevailing factor in causing Claimant's injuries, need for medical treatment, and resulting disability or impairment.

Claimant worked for Respondent for over 25 years. Respondent manufactures windows and doors. Claimant was a lead worker in the department where windows are shaped into octagons, circles and triangles. This is not an automated department, so window products are physically picked up. According to Claimant, he lifted windows weighing anywhere from 100 to 400 pounds. Other employees working in the department helped with the lifting. Claimant worked on a cement floor and he wore uncomfortable steel-toed safety shoes.

Claimant testified he developed back pain in 2015 around the time when he first saw Dr. Arnold. Claimant recalled the time frame his back pain developed when prompted by his attorney.[1] According to Claimant, he told his supervisor, Christopher Lamb, once a week he had back pain. According to Claimant, Mr. Lamb did not respond in any way or question Claimant about the origins of the back pain.

In his testimony, Claimant maintains he told his supervisor many times he was having back problems due to work and his employer never did anything about offering medical treatment.

Claimant attributed his back pain and subsequent hip problems to all the lifting he did at work. Claimant also reports he heard pops in his back while lifting windows in 2018.

Claimant sought medical treatment on his own. Claimant had cervical spine surgery in 2015. On January 18, 2017, Claimant had a two level lumbar spine laminectomy. Claimant then had left hip replacement surgery in May 2018. On November 5, 2018, Claimant had extensive spine surgery described in Dr. Murati's report as:

> Status post, "1. L4-L5 and L5-S1 anterior lumbar interbody fusion's for deformity as well as L1-L2, L2-L3, and L3-L4 left sided anterolateral transpsoas interbody fusion's for deformity totaling 5 levels of interior interbody fusion for deformity. 2. L1-L2, L2-L3, L3-L4, L4-L5 and L5-S1 interbody cage instrumentation without interval fixation. 3. L5-S1 anterior plate instrumentation. 4. T6 to the pelvis posterior signal fusion for deformity (13 levels). 5. T6 to the pelvis posterior segmental

[1] Cl. Depo. (Jun. 4, 2020) at 13.

> instrumentation. 6. Pelvic fixation at the caudal end of a construct. 7. Revision bilateral L3-L4, neck to me, medial facetectomy, foraminotomy. 8. Revision L2-L3 laminectomy, medial facetectomy, foraminotomy. 9. L1-L2 laminectomy, bilateral medial facetectomy, foraminotomy, partially a revision. 10. Allograft for spine surgery morcellized autograft for spine surgery with local." Dr. Ipsen 11-05-18.[2]

None of the medical treatment Claimant had was paid for by Respondent. Claimant did have paid time off after his surgeries, and according to Claimant, he was given more paid time off than he earned by his employer. Claimant believed this might have been a method to record a workers compensation claim.

According to Claimant, he also talked to Mike Jackson in the HR department a couple of times about missing work. Claimant told Mr. Jackson he was missing work due to back pain caused by lifting windows at work.

Mr. Jackson did not testify in this matter.

Two witnesses testified for Respondent. Christopher Lamb was Claimant's supervisor from 2015 to 2018. Claimant's job duties as a lead person in his department were to set the schedule in the department, assign work, be certain all the materials needed were available for each job and ensure the jobs were completed on time. Mr. Lamb described this job as a desk job.

The employer's policy is to report any work related injuries to the supervisor, which in Claimant's case is Mr. Lamb. It is the supervisor's responsibility to investigate a work related injury by interviewing the employee and any other employees who might have knowledge of the injury. Then, the matter is referred to the HR department for further action.

Mr. Lamb denies Claimant reported he developed back pain due to his job. He was aware Claimant had back pain and Claimant was off work due to back problems. However, Claimant never told him these problems were work-related. He did question Claimant about the nature of his back problems and why he was off work. Claimant told him the doctors were trying to figure it out. He observed Claimant sometimes struggling due to pain. He told Claimant to ask for help if he needed it.

Mr. Lamb only recalls one specific conversation about Claimant's back pain when he and Claimant were out one night shooting pool. Claimant was taking a lot of Advil and Mr. Lamb asked why. Claimant told him it was for back and neck pain. Mr. Lamb asked what happened and Claimant told him it was hard living and mechanic work in his spare time.

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[2] Murati Depo., Ex. 2 at 4.

Claimant did not request accommodated work or return to work after his surgeries with work restrictions.

November 2, 2018, was Claimant's last day of work. On November 5, 2018, Claimant had his extensive back surgery and never returned to work after this surgery.

Mr. Lamb believed Claimant's problems were personal and not work related based on the few conversations he had with Claimant. Claimant never related any of these problems to work.

Mr. Lamb considered Claimant a good employee, dependable and honest.

Mr. Coby Jones is president of the company. He was unaware of Claimant having a work-related injury. In 2016, Mr. Jones talked to Claimant right before Thanksgiving at a gathering where holiday bonuses were awarded. Claimant told Mr. Jones he had back and neck problems. Mr. Jones asked if these problems were work-related. Claimant told him his problems were due to bad genetics and getting old.

Mr. Jones told Mike Jackson with HR something was going on with Claimant, but Claimant did not relate it to work. Mr. Jackson told Mr. Jones he would look into it.

Mr. Jones did not hear anything else about Claimant's condition. To his knowledge, no medical records were received relating Claimant's condition to work. The Safety and HR departments handle investigations of workers compensation claims.

Mr. Jones, after 2016, had some brief exchanges with Claimant about how he was doing. Claimant never said his complaints were work-related.

There were two applications for benefits filed. One application was a claim as repetitive trauma to back, both hips and right knee with last date of trauma as November 2, 2018. The second application for benefits states an accident date of January 3, 2019, for repetitive trauma to both hips, back, and right knee. Both applications were filed on May 28, 2019. Both claims have been consolidated for decision.

At the regular hearing in this matter, Claimant's counsel agreed to dates of accident as November 2, 2018, and January 3, 2019.[3]

PRINCIPLES OF LAW AND ANALYSIS

Claimant appeals, arguing the Award should be reversed as the evidence proves he met with personal injury arising out of and in the course of his employment, proper notice

[3] R.H. Trans. (Apr. 6, 2020) at 5.

was given, and the repetitive trauma was the prevailing factor in causing the injury, resulting disability and impairment and need for medical treatment. Claimant contends Respondent knew about his work injury and did nothing but ensure he did not further injure himself. Claimant requests permanent total disability, or in the alternative, an 83.5 percent work disability, and temporary total disability benefits from January 18, 2017, to April 11, 2017, and May 8, 2018, to July 15, 2018, and November 5, 2019, to May 5, 2019.

Respondent argues the denial of compensation should be affirmed. Respondent argues notice was not provided within the requirements of K.S.A. 44-520 and Claimant failed to meet his burden of proving any accident or repetitive trauma was sustained while employed by Respondent, or his work was the prevailing factor causing injury to his back, hips or knees. As such, Respondent argues the claim pertaining to a November 2, 2018, injury should be denied, as Claimant did not actually perform job tasks for Respondent after November 2, 2018, there could not have been an accident or any repetitive trauma after that date and the second claim with an injury date of January 3, 2019, should be denied.

K.S.A. 2018 Supp. 44-508(h) states:

> "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. 2018 Supp. 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;
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> (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.
>
> Notice may be given orally or in writing.
>
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been

> communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
>
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (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; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The first issue to be decided is whether Claimant gave timely proper notice to Respondent.

The dates of accident are November 2, 2018, and January 3, 2019. According to K.S.A. 2018 Supp. 44-520 notice must be given by November 12, 2018, 10 calendar days after Claimant's last day of actual work, November 2, 2018.

The statute requires notice whether given orally or in writing, shall include the time, date, place, person injured and particulars of the 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."[4]

Claimant testifies he told his supervisor weekly he had hurt his back lifting at work. He started telling his supervisor when he first hurt his back. This is the only information Claimant provides about the date of injury. Claimant does not specify when he gave notice until he is prompted by his attorney under questioning when he first saw a doctor in 2015. Claimant also reports a pop in his back in 2018 but provided no other specifics.

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[4] K.S.A. 2018 Supp. 44-520

The employer denies Claimant gave notice of a work related injury. The employer was aware Claimant had back problems because Claimant had medical treatment and was off work. It is acknowledged the employer was less than inquisitive about the nature of Claimant's back problems. However, the employer maintains when there was very brief questioning about the nature of his back problems, Claimant attributed it to bad genetics, doing mechanic work in his spare time, and old age.

Both parties are equally credible and sparse in their testimony about notice.

However, the burden of proof is on Claimant to prove by a preponderance of the evidence he gave timely, proper notice in accordance with K.S.A. 2018 Supp. 44-520.

Reviewing the evidence shows, Claimant told his supervisor at some time during his employment he hurt his back lifting at work. Claimant could not specify the year until he was reminded he saw Dr. Arnold in 2015 according to medical records. In 2018, Claimant had a pop in his back lifting a window. While claimants are not held to strict standards of notice, the proof of notice must be specific as to time frame and some specifics about cause. Casual conversations about pain or symptoms have been held insufficient to satisfy proof of notice.[5]

A general statement of lifting at work with the only specifics as to time is a year does not meet the standards of date time and particulars of such injury set out in K.S.A. 2018 Supp. 44-520. It is insufficient evidence to counter Respondent's denial a claim of a work-related injury was made.

Another key element to proper notice is Respondent receiving notice is Claimant is seeking workers compensation benefits.

The Board previously held, in the case of *Adkins v. Centurion Industries*, knowing th claimant had a car accident and was injured is insufficient to constitute actual knowledge of injury. The claimant, in that case, did not put the respondent on notice his injury was being claimed as work related injury until 7 months after the accident.[6]

Respondent, in this case, knew of Claimant's surgeries and being off work.

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[5] See *Camp v. Bourbon County*, No. 104,784, 2012 WL3135512 (Kan. Ct. of Appeals unpublished opinion filed July 27, 2012); see also *Gardner v. Certainteed Corp*., No. 1,064,307, 2013 WL 4051836 (Kan. WCAB Jul. 25, 2013) (citing *Mendoza v. American Warrior Inc.*, No. 1,018,561, 2005 WL 60055 (Kan. WCAB Feb. 1, 2005); *Ball v. Overnite Transportation Corp*., Nos. 219,411 & 219,442, 1997 WL 377949 (Kan. WCAB Jun. 19, 1997).

[6] *Adkins v. Centurion Industries*, No. CS-00-0270-700/AP-00-0450-066, 2020 WL 4530558 (Kan. WCAB Jul. 24,2020), see *Hickman v. Medicalodges* Inc., No. 1,075,418, 2016 WL 5886189 (Kan. WCAB Sept, 12, 2016).

However, there is no evidence of Claimant making a claim this medical treatment should have been paid by Respondent as workers compensation until May 28, 2019. There is no record of medical reports being given to Respondent connecting Claimant's injuries and medical treatment to work until May 28, 2019. These events occurred after the statutory notice period had expired.

Claimant failed to provide proper notice to Respondent of accidental injury which should have included specifics as when and how Claimant sustained his injury and he was seeking workers compensation benefits until the time limit had passed to make timely notice under K.S.A. 2018 Supp. 44-520. It is found and concluded Claimant has failed to provide proper timely notice and Claimant's request for benefits is denied. Because there was not timely notice, the issues of whether the repetitive trauma was the prevailing factor causing injury, need for medical treatment and impairment is moot.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Steven M. Roth, dated November 16, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2021.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (Via OSCAR)

William L. Phalen, Attorney for Claimant
Katharine Collins, Attorney for Respondent
Steven M. Roth, Administrative Law Judge