

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

VALERIE WAITE)	
Claimant)	
V.)	
)	AP-00-0491-926
PHK STAFFING, LLC)	CS-00-0490-348
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the August 21, 2025, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Roger D. Fincher appeared for Claimant. Thomas J. Walsh appeared for 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 briefs submitted by the parties; the transcript of the Preliminary Hearing held August 20, 2025, with the following exhibits attached:

1. Claimant's Exhibit 1: 7-Day Demand to Respondent dated May 29, 2025;
2. Claimant's Exhibit 2: 7-Day Demand to Respondent dated July 9, 2025;
3. Claimant's Exhibit 3: Dr. Zimmerman Report dated July 7, 2025;
4. Claimant's Exhibit 4: Dr. Zimmerman Invoice;
5. Claimant's Exhibit 5: Dr. Yang Medical Records;
6. Respondent's Exhibit A: Zoom Evidentiary Deposition of Laura Tucker from August 4, 2025;
7. Respondent's Exhibit B: Zoom Evidentiary Deposition of Sheila Rogoza from August 4, 2025;
8. Respondent's Exhibit C: Dr. Yang Medical Record dated June 2, 2023;
9. Respondent's Exhibit D: Affidavit of Abbey Heller;

10. Respondent's Exhibit E: Deposition of Claimant from August 4, 2025; and, the documents of record filed with the Division.

ISSUES

1. Did Claimant meet her burden of proving she sustained a personal injury by accident?
2. Did Claimant provide timely notice of her injury to Respondent?

FINDINGS OF FACT

Claimant began working as a server for Respondent in October 2017. Claimant worked at the Marquee Café in the Hollywood Casino full-time and estimated she walked 8 to 10 miles per shift. On September 22, 2022, approximately two hours into her shift, Claimant was walking when she felt a sharp pain in her right leg. Claimant described:

It was – I just, like, stepped down and it was a sharp pain that went all the way up my leg to up about my kneecap, up underneath there, and it was just a sharp pain. And then when I tried to continue to walk it was just sharp pains that kept going up through my leg.¹

Claimant did not recall twisting her right foot or ankle, only stepping down. Claimant was not carrying anything at the time. Her foot did not slip, and there was no debris on the floor. Claimant was walking on hard flooring with non-skid shoes. Claimant testified she had no problems with her right foot, ankle, or leg prior to September 2022.

Claimant testified she informed a manager, Sheila Rogoza, about the injury immediately afterward. Claimant stated Ms. Rogoza and another manager, Abbey Heller, taped her right leg as one would for shin splints. Claimant indicated the tape did not improve her symptoms, and she left work early. Claimant testified she did not tell either Ms. Rogoza or Ms. Heller she wanted to claim workers compensation or go to the doctor.

Ms. Rogoza disputed Claimant's testimony, stating she was unaware of Claimant's injury in September 2022. Ms. Rogoza testified:

[Claimant] never reported this to me. There is one incident that I am familiar with, and I came out onto the smoking patio and [Claimant] was having a conversation with [Ms. Heller] and said she had like a cramp or something in the back of her calf. [Ms. Heller] told her she gets those too. And they – [Ms. Heller] told her she had

¹ P.H. Trans. at 7.

medical tape in her purse and they could go tape it up after we were done. I did not go with them.²

Ms. Heller submitted an Affidavit dated August 16, 2025. Ms. Heller was an assistant food and beverage manager at the Marquee Café in 2022. Ms. Heller affirmed:

4. At some point, I became aware that [Claimant] was having problems with her right foot and ankle. She never told me the cause of her right foot and ankle problems. At no point in time did she report to me that she had injured her right foot or ankle while working.

5. At no time did I assist [Claimant] by taping her foot or ankle.

6. As a manager, I was trained in the process when an employee reported a work-related accident. Had [Claimant] reported a work-related accident to me, I would have followed that process. Security would have been notified and all necessary paperwork would have been completed.³

Ms. Rogoza explained, when an employee reports a work-related accident, the first step in Respondent's process is to contact Security. Security then interviews the employee and completes the first half of the paperwork. Next, the employee's supervisor completes the second half of the paperwork, reviews the paperwork with the employee, and, if signed and approved, leaves the paperwork with Security. From there, the Risk and Safety department takes over the process. Ms. Rogoza stated Security should be contacted immediately when an accident is reported, whether the accident is a papercut or more serious. It is up to Security to make any determinations with the employee regarding an accident.

Claimant testified she was unfamiliar with Respondent's workers compensation process. Claimant said she was not trained on how to report a work injury, only that she should report everything to her managers. When she left work early on September 22, 2022, Claimant went to her primary physician. Claimant's doctor eventually referred her to Dr. Zhipeng Yang, a podiatrist.

Dr. Yang first examined Claimant on June 2, 2023. He recorded a subjective history of "chronic right foot and ankle pain for 6 months without any inciting events."⁴ Dr. Yang initially provided a lateral brace and ordered an MRI and physical therapy, which Claimant did not complete due to financial constraints. On August 25, 2023, Dr. Yang decided to

² *Id.*, Resp. Ex. B at 11.

³ P.H. Trans., Resp. Ex. D.

⁴ P.H. Trans., Resp. Ex. C at 1.

proceed with surgical intervention without the MRI because Claimant's "pain and debilitation have been chronic and remain recalcitrant despite conservative management."⁵ Claimant could not afford to undergo surgery at that time.

By November 15, 2024, Claimant had obtained an MRI. Dr. Yang assessed Claimant with osteoarthritis of the right ankle and foot, right foot congenital pes cavus, unspecified cartilage disorder, right peroneal tendonitis, and right ankle sprain. Dr. Yang performed right ankle/foot surgery on December 19, 2024, which included arthroscopic osteochondral lesion repair, Broström-Gould peroneal tendon repair with retinacular reefing, metatarsal dorsal osteotomy, and calcaneal osteotomy. Claimant testified she has three screws, two pins, and one staple in her right foot and ankle as a result of the surgery.

Dr. Yang took Claimant off work from December 19, 2024, through May 19, 2025. Claimant applied for and received short-term disability benefits and FMLA. Claimant explained she met with HR Generalist Robin Brown for help with the applications. Claimant indicated she told Ms. Brown she was hurt at work, "but that was as far as the sense of the conversation ever went."⁶ Claimant testified:

Q. Did you ever ask anybody at [Respondent] why you were not being provided lost time benefits through workers' compensation?

A. I was just – the way the conversation went with Robin [Brown] and I, that it was just all handled through FMLA, Cedric and Metlife. It never even dawned on me of why I wasn't getting any help until this last December prior to surgery, I hurt my thumb at work and left work, went to St. Luke's to have my thumb looked at. And I was like why isn't, you know, anybody doing anything about this?⁷

Laura Tucker, HR Business Partner, manages Respondent's human resource team. Ms. Tucker testified she was aware Claimant was on FMLA but did not know the reason. To Ms. Tucker's knowledge, no accident report was ever completed for Claimant's injury. Ms. Tucker explained, had Respondent become aware Claimant was claiming a work-related injury while applying for disability benefits, Security would have been notified to instead begin the reporting process. Ms. Tucker explained she does not have interactions with employees in her position as HR manager because that is Ms. Brown's job. Ms. Brown then apprises Ms. Tucker of pertinent developments. Ms. Brown's testimony is not in evidence.

⁵ P.H. Trans., Cl. Ex. 5 at 52.

⁶ P.H. Trans., Resp. Ex. E at 22.

⁷ *Id.* at 23.

Ms. Tucker stated Claimant had applied for long-term disability benefits, though the outcome was pending at the time of her deposition. Ms. Tucker testified she received correspondence from MetLife indicating Claimant's short-term disability application was approved, and the short-term disability was not work-related and no workers compensation claim was filed. Ms. Tucker noted Claimant's long-term disability application also indicated it was not work-related and no workers compensation claim was filed. Respondent cancelled Claimant's benefits, including group health insurance, after she had been off work for 120 days.

On April 30, 2025, Dr. Yang ordered a CT scan "to evaluate the osseous healing status across the 1st metatarsal osteotomy site."⁸ He noted he would consider hardware removal should the staple in Claimant's foot be loose or prominent, as long as "there is at least 50% osseous healing."⁹ Dr. Yang ordered a bone stimulator to help consolidate the osteotomy site. Claimant returned to Dr. Yang on May 23, 2025. Dr. Yang reported Claimant discontinued physical therapy since her last visit due to the lapse in health insurance. He further noted Claimant had not undergone the CT evaluation and had not received a bone stimulator. Claimant has not returned to Dr. Yang.

Dr. Daniel Zimmerman evaluated Claimant on July 7, 2025, at her counsel's request. Dr. Zimmerman reviewed copies of plain film x-rays from December 17, 2024, through February 17, 2025, and performed a physical examination. Dr. Zimmerman concluded Claimant sustained right calcaneal and right first metatarsal fractures, treated operatively. Dr. Zimmerman recommended restrictions and additional treatment, including the CT scan ordered by Dr. Yang. Dr. Zimmerman opined the prevailing factor causing Claimant's fractures was the accident occurring September 22, 2022.

The ALJ found:

The claimant's testimony about a traumatic accident in September, 2022 was refuted by the supposed witnesses, Sheila Rogoza and Abby Heller, and by the history of injury recorded by Dr. Yang. The preponderance of the evidence showed there was no September, 2022 traumatic injury as the claimant alleged. The question of whether the claimed injury arose out of and in the course employment was therefore moot.

The same evidence regarding whether the injury occurred also showed the claimant failed to provide timely notice of the injury as required by K.S.A. 44-520.¹⁰

⁸ P.H. Trans., Cl. Ex. 5 at 11.

⁹ *Id.*

¹⁰ ALJ Order (Aug. 21, 2025) at 2.

PRINCIPLES OF LAW AND ANALYSIS

Claimant contends she suffered a personal injury by accident while working on September 22, 2022. Claimant argues she did not consider the act of walking to be an inciting event when meeting with Dr. Yang. Further, Claimant claims she provided timely notice of her injury to Respondent. Claimant argues Ms. Rogoza was aware of the incident during her shift, and Ms. Heller's affidavit should carry no weight as it is not a sworn statement.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues the ALJ's finding Claimant failed to meet her burden of proving a personal injury by accident rests partially on the ALJ's credibility determination, which is entitled to deference by the Board. Additionally, Respondent argues substantial and competent evidence in the record supports the finding Claimant failed to provide timely notice of an injury.

K.S.A. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 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.

1. Did Claimant meet her burden of proving she sustained a personal injury by accident?

The ALJ found the evidence showed there was no September 2022 traumatic injury. Claimant testified she felt a sharp pain in her leg while walking in the course of her employment. Claimant was simply walking and felt pain. Claimant did not ask Respondent to send her to a doctor, nor did Claimant ask or file for workers compensation benefits.

Claimant's testimony conflicts with the evidence presented by Ms. Rogoza and Ms. Heller. Ms. Rogoza testified Claimant complained about a cramp in the back of her calf. Ms. Heller denied any knowledge of a work-related injury. The testimony of Ms. Rogoza and Ms. Heller, coupled with Dr. Yang's initial note stating Claimant reported pain for six months without any inciting events, supports a finding Claimant did not suffer a work-related injury in September 2022 as alleged.

The undersigned finds Claimant failed to meet the burden of proving, by a preponderance of the credible evidence, she suffered a traumatic injury on September 22, 2022.

2. Did Claimant provide timely notice of her injury to Respondent?

K.S.A. 2022 Supp. 44-520, states, in part:

(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.

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.

...

(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.

Claimant filed an application for hearing on May 27, 2025, claiming an injury by accident occurring on September 22, 2022. Claimant testified she told Ms. Rogoza she hurt her foot while working and that Ms. Rogoza and Ms. Heller taped her right leg on the date of the alleged event. Ms. Rogoza denied Claimant told her about a work-related accident. Ms. Rogoza testified Claimant told her she had a cramp in her leg. Ms. Heller denied any knowledge of a work-related accident or taping Claimant's leg, although Ms. Rogoza testified Ms. Heller offered tape for Claimant's leg cramp. Casual conversations about pain or symptoms have been held insufficient to satisfy proof of notice.¹¹ The undersigned finds Claimant's conversations with Ms. Rogoza and Ms. Heller did not constitute notice under the Act.

The first evidence of notice is found when Claimant spoke to Robin Brown after she was taken off work on December 19, 2024, by Dr. Yang, over two years after the alleged date of accident. The weight of the evidence does not support a finding Claimant gave notice of an injury, including the time, date, place, and particulars of the injury. At most, the record supports a finding Claimant told Ms. Rogoza she had a cramp in her leg.

The undersigned finds Claimant failed to meet the burden of proving she gave proper notice within 20 calendar days as required by K.S.A. 2022 Supp. 44-520.

DECISION

WHEREFORE, it is the finding, decision, and order of the undersigned Board Member the Order of ALJ Kenneth J. Hursh dated August 21, 2025, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2025.

SETH G. VALERIUS
BOARD MEMBER

¹¹ See *Camp v. Bourbon County*, No. 104,784, 2012 WL3135512 (Kansas Court of Appeals unpublished opinion filed July 27, 2012); see also *Gardner v. Certaineed 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]).

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c: Via OSCAR

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Hon. Kenneth J. Hursh, Administrative Law Judge