

Claimant alleges he injured his low back while working for the respondent on Friday, September 14, 2001. On that date, claimant had been employed by respondent for five years as an electronic floor technician. Claimant worked second shift from 4:00 p.m. to 12:30 a.m. At around 10:30 p.m. on September 14, 2001, claimant testified he had completed preventive electrical maintenance on an overhead crane. As claimant was coming down from the crane, he swung off of a scissor lift and he slipped on oil and hydraulic fluid on the floor, fell caught himself and twisted his body. Claimant immediately felt a burning sensation in his right low back. Claimant completed the shift with continuing discomfort and pain in his low back.

Two of claimant's co-workers, David Klein and Alex Howard also testified at the preliminary hearing and another co-worker Carroll Behrhorst provided an affidavit. Mr. Klein and claimant car pooled to and from work together. After the September 14, 2001, work shift was completed, Mr. Klein testified claimant told him that he had hurt his back in an accident at work. It was claimant's turn to drive but because of his back pain claimant asked Mr. Klein to drive home.

Mr. Howard and claimant had their lockers next to each other at work. At the end of the September 14, 2001, work shift, Mr. Howard noticed that claimant had pain and discomfort in his back. Mr. Howard even helped claimant put his tools away in his locker because of the pain. Claimant also told Mr. Howard that he had hurt his back in an accident at work earlier in the shift.

Mr. Behrhorst worked directly with claimant and the two workers' desks faced each other. On September 14, 2001, Mr. Behrhorst also noticed claimant having pain and discomfort in his back as he sat down at his desk. Mr. Behrhorst asked claimant what was wrong and claimant told Mr. Behrhorst he had hurt his back earlier in the shift while getting off a scissor lift.

After claimant returned home following his September 14, 2001, work shift, claimant testified he went to turn off a light under a kitchen cabinet and a wasp came out and headed right at him. Claimant immediately stepped to the left to avoid the wasp and he immediately felt increased pain in his low back.

Claimant did not have to work over the weekend. He testified he rested over the weekend and thought his back would improve. Because his back continued to be symptomatic, claimant went on his own for medical treatment on Monday, September 17, 2001, before he reported to his work shift at 4:00 p.m.

Claimant saw Michael Souter, D.O. Dr. Souter took a history from claimant and claimant did not tell Dr. Souter that he hurt his back at work on September 14, 2001. Instead, claimant provided the history of avoiding the wasp at home and "Immediately felt

a pop in his back and he had instant pain.¹ Dr. Souter prescribed pain medication and referred claimant for an MRI examination on September 21, 2001.

Claimant returned to see Dr. Souter on September 24, 2001. Dr. Souter notified claimant that the MRI examination showed an extruded disc on the right at L4-5 and referred claimant to an orthopedic surgeon.

Claimant testified he did not notify respondent of the work-related accident until he found out the results of the MRI examination. Claimant testified that because he thought the injury was only a muscle strain, he did not want to involve respondent because his department had experienced a bad work accident record for the year. On cross examination, claimant also admitted that he realized, if he did not make a workers compensation claim, he would be liable for 20 percent of the medical treatment costs under his private health insurance coverage.

On September 27, 2001, claimant notified his supervisor he injured his back in a work-related accident on September 14, 2001. His supervisor then referred him to respondent's Central Medical and claimant was seen there on September 28, 2001. Central Medical examined claimant and imposed temporary restrictions on his work activities. Central Medical also referred claimant to orthopedic surgeon Robert Eyster, M.D.

Dr. Eyster first saw claimant on October 5, 2001. Dr. Eyster took a history from claimant and claimant related his low back and right leg pain to a September 21, 2001, work injury. Claimant also provided a history of previous back problems relieved in the past by chiropractic manipulations. Dr. Eyster diagnosed claimant with a large herniated and probably extruded L4-5 disc. Dr. Eyster referred claimant for epidural injections, prescribed medications and placed claimant in a physical therapy program. The doctor restricted claimant's work activities to no lifting over 20 pounds, no repetitive lifting over 15 pounds and no excessive forward bending or twisting.

Because claimant did not improve with conservative treatment, Dr. Eyster took claimant off work on January 8, 2002, and performed a laminectomy and disc excision at L4-5. Dr. Eyster released claimant to return to work with restrictions on May 8, 2002. Claimant took the restrictions to respondent but he did not return to work because he was given a layoff notice at that time. On June 19, 2002, Dr. Eyster determined claimant had met maximum medical improvement and released claimant with permanent work restrictions.

In an April 17, 2002, letter to claimant's attorney, Dr. Eyster opined, if co-workers were willing to testify and verify a work accident, that he would be more inclined to believe

¹ P.H., Cl. Ex. 5.

claimant suffered a work injury and the wasp incident was then an aggravation.² In another letter dated July 3, 2002, to the respondent's attorney, Dr. Eyster again opined that the etiology of whether claimant had a work-related injury was dependent upon whether he made it known to his co-workers that he had increased pain over the muscular irritation normally caused by the type of work that claimant and his co-workers daily experienced. Dr. Eyster went on to opine that the wasp incident was an aggravating situation but if he did suffer a work-related injury then the aggravation was to a preexisting condition brought on by his work activities.³

As noted, in this case, there is a major conflict between claimant's preliminary hearing testimony and the contemporaneous medical history claimant provided Dr. Souter, the first physician, claimant saw for his alleged work-related low back injury. The Board also finds significant that claimant admitted that when he found out he had a serious injury one of the motivating factors for him to report the injury as a work-related injury was to insure the medical bills were paid in full because he would have to pay 20 percent of the medical bills under the private health insurance policy. Here, the Board finds the credibility of the claimant is of utmost importance in deciding this case.

The ALJ had the opportunity to assess the claimant's credibility and simply did not believe the claimant. In fact, the ALJ made a specific finding in the preliminary hearing Order that claimant described an injury that occurred while he was at home through his personal physician only two days after the alleged work-related accident. The Board finds some deference should be given to the ALJ and therefore concludes that claimant failed to prove he suffered an accidental injury arising out of and in the course of his employment with respondent.

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Nelsonna Potts Barnes' July 23, 2002, preliminary hearing Order is affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

² P.H., Cl. Ex. 7.

³ P.H., Cl. Ex. 8.

c: David H. Farris, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation