

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY HALLIBURTON)	
Claimant)	
)	
VS.)	
)	
FARMLAND INDUSTRIES)	
Respondent)	Docket No. 245,118
)	
AND)	
)	
WAUSAU UNDERWRITERS INS. CO.)	
Insurance Carrier)	

ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's Award dated May 10, 2001. The Board heard oral argument on November 20, 2001, by telephone conference.

APPEARANCES

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Garry W. Lassman of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties requested the matter be remanded to the Administrative Law Judge if the Board determined claimant suffered an accidental injury arising out of and in the course of employment and gave timely notice. In addition, respondent admitted claimant had made timely written claim.

ISSUES

The Administrative Law Judge determined claimant suffered accidental injury arising out of and in the course of his employment on June 19, 1996. However, compensation was denied because the Administrative Law Judge further determined claimant did not provide timely notice.

The claimant raised the following issues on review: (1) whether the Administrative Law Judge erred in determining the claimant failed to give proper notice of his injury; (2) whether the claimant suffered personal injury by accident arising out of and in the course of employment with the respondent; (3) whether the claimant is entitled to temporary total disability benefits; and, (4) nature and extent of claimant's disability, if any.

The respondent raised the following issues on review: (1) whether the claimant met with personal injury by accident arising out of and in the course of employment; (2) whether notice was given; and, (3) nature and extent of claimant's disability, if any.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant alleged he suffered an injury at work on June 19, 1996. On that date a thunderstorm with lightning was moving into the area of the refinery and claimant ran outside to close a large valve. Claimant testified he felt a twinge through his shoulder blades while closing the valve.

The claimant sought treatment with his personal physician on June 24, 1996. Jerome E. Block, M.D., testified claimant complained of pain in the neck that started on the 22nd of the month with a history that two weeks ago he was wrestling with his brother, who grabbed him in a headlock, forcing his head down. The doctor then sent claimant a letter which contained a copy of his office notes and requested claimant to advise the doctor if there was any disagreement or to contact the doctor if there were any questions.

The doctor further testified:

Q. (By Mr. Phalen) He had told you he had much trauma to his neck; is that right?

A. That's what he told me.

Q. And you really didn't go into a specific history; is that right?

A. Oh, no, that's not right. If that would have been there, he would have told me that. I mean if he came in to me I didn't -- He would have told me, I believe, that this all started after he worked at the refinery and the weather and the valve and so on, and he didn't mention any of that. It's not that I

didn't ask him. He would have volunteered it, if that really happened, when I saw him. He just told me about his brother and the headlock.¹

Claimant testified that when he went to the doctor he had called his temporary supervisor, Jim Rogers, and told him he had hurt himself during the shutdown and had to go see what was wrong.

Jim Rogers testified that while serving as temporary supervisor he did not recall claimant telling him that he had injured his neck or shoulder on the job. He further noted the procedure would have been to make note of it and report it to the nurse.

Claimant testified he talked to the plant nurse within two weeks of the incident and she referred him to the doctor in Bartlesville, Oklahoma. Linda Snurbusch, the plant nurse, testified claimant had told her about the altercation with his brother. She testified claimant called seeking advice about his neck problems and she gave him the telephone number of a doctor in Bartlesville, but she assumed the injury was from the scuffle with his brother. Ms. Snurbusch did not recall claimant ever reporting a June 1996 work-related job injury. She noted had that occurred she would have arranged for the medical appointment.

Dr. Block had referred claimant to Harold Goldman, M.D., a neurologist. An MRI revealed a disk protrusion at C4-5, C6-7 and herniation at C5-6. Claimant was taken off work. Claimant returned to work within his restrictions and attended computer training for a couple of weeks in October 1996. Claimant then left work for nonwork-related surgery. Claimant had been advised on July 30, 1996, that his leave of absence which started on June 24, 1996, was being charged to Family Medical Leave Act.

After claimant had been off work for approximately seven months, the human resources director, Jan Summers wrote claimant on January 10, 1997, inquiring about his medical status. She thought claimant was off work because of injuries due to the altercation with his brother. The claimant called Ms. Summers on January 14, 1997, and no mention was made of a work-related accident during the conversation.

CONCLUSIONS OF LAW

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence

¹Deposition of J. E. Block, M.D., dated November 17, 2000, at 20-21.

that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award of compensation by proving the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.²

The persuasive evidence in this matter does not support claimant's contention that he suffered an injury arising out of and in the course of his employment on June 19, 1996. The failure to advise his treating physician of the alleged work-related incident, defeats claimant's claim for compensation. When claimant sought treatment he referred to the altercation with his brother but no mention was made of any work-related incident. Claimant then obtained medical treatment and was placed on leave pursuant to the Family Medical Leave Act. His supervisor, the plant nurse and the human resources personnel all testified claimant never advised them he had sustained a work-related accident. It was not until after the issue of his termination arose that claimant finally made a claim for a work-related accident. This claim was approximately one year after the alleged date of accident.

The Board is not unmindful of the testimony of Ron Stotts and Linda Gillespie that claimant had mentioned an incident at work with the valve. However, the Board finds the testimony of his personal physician and the previously mentioned personnel more persuasive. Accordingly, the Administrative Law Judge's determination claimant suffered a work-related accident is reversed. The Board finds claimant has not proven by a preponderance of the credible evidence that he suffered an injury on June 19, 1996, arising out of and in the course of his employment with the respondent.

In addition, the Board agrees with and adopts the Administrative Law Judge's finding claimant failed to timely notify the respondent that he suffered a work-related injury on June 19, 1996. K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a

²Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

As noted by the Administrative Law Judge, neither claimant's acting supervisor, the plant nurse nor the human resources director were notified claimant had suffered a work-related accident. The contemporaneous medical note of claimant's personal physician did not contain any reference to a work-related injury. The Board agrees with and adopts the Administrative Law Judge's finding claimant did not make timely notice.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated May 10, 2001, is modified to reflect claimant did not suffer an accidental injury arising out of and in the course of his employment and affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of June 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: William L. Phalen, Attorney for Claimant
- Garry W. Lassman, Attorney for Respondent
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Workers Compensation Director