

Claimant was employed by the respondent as an assistant shear operator from June 30, 2000, until he was terminated for excessive absenteeism on January 22, 2001. The claimant alleges that his regular job duties while working for the respondent from November 27, 2000, until his last day worked of January 19, 2001, injured his neck causing claimant to suffer pain and headaches.

Claimant testified he first had symptoms of lightheadedness on November 27, 2000, while he was operating a forklift from a standing position. At the time claimant felt the lightheaded symptoms, he was neither involved in an accident nor was he performing any type of strenuous work. Claimant testified that he had not experienced lightheadedness before this incident.

The next day claimant went on his own to the emergency room at Wesley Medical Center (Wesley) in Wichita, Kansas. Claimant provided Wesley with a history of headaches, nausea, ringing in ears, and problems sleeping. The emergency physician's medical note indicates claimant also gave a history of "No Injury." Claimant was released with a prescription to help him sleep and to follow up with an appointment to a doctor of his choice.

Claimant was then seen for follow up treatment on three other occasions by physicians at the Wesley Family Practice Center. The only time Wesley Family Practice Center's medical records indicate that claimant made complaints connected with his work activities was during his last visit on February 1, 2001. In that medical record, claimant gave a history of heavy lifting at work and that any lifting with his left arm exacerbated the pain in his neck. The February 1, 2001, visit was after respondent terminated claimant for excessive absenteeism on January 22, 2001. During both the December 5, 2000, and the January 17, 2001, visits claimant made to Wesley Family Practice Center, he gave a history of neck pain for several months.

During claimant's preliminary hearing testimony, he was asked whether he injured his neck at work. Claimant answered, "I didn't know what was causing it." Claimant was further questioned as to whether he was aware of having sustained any injury. Claimant replied, "No, I wasn't."

After claimant's visit to the emergency room on November 28, 2000, claimant testified he provided his supervisor Kenny Rogers with a prescription sheet indicating a medication was prescribed to help him sleep. The prescription sheet was admitted into the preliminary hearing record and only indicates that the medication Ambien was prescribed for a sleeping aid. The prescription sheet does not indicate that claimant's sleeping problem had any connection with an injury at work. Claimant also testified that his supervisor Kenny Rogers, warehouse supervisor Ron Bye and branch manager Jody Bye all knew about claimant's work-related neck injury.

Jody Bye, respondent's branch manager, also testified at the preliminary hearing. Ms. Bye had reviewed claimant's personnel file before she testified. Ms. Bye testified there was not a prescription sheet in claimant's personnel file. If claimant would have given his supervisor, Mr. Rogers, that type of a record, then Mr. Rogers would have given it to Ms. Bye to file in his personnel file. Ms. Bye also testified that Mr. Rogers never notified her that claimant was claiming a work-related injury and further claimant never notified Ms. Bye that he was claiming a work-related injury before his termination. The first notice Ms. Bye received that claimant was claiming a work-related injury was through a letter from claimant's attorney after claimant's termination.

The Board concludes that claimant, at this juncture of the proceedings, has failed to meet his burden of proving he suffered an accidental injury that arose out of and in the course of his employment with respondent. The Board finds it is difficult to believe claimant's testimony because of inconsistencies and the conflicting testimony of respondent's branch manager Jody Bye. Claimant first describes his symptoms as lightheadedness while operating a forklift at work on November 27, 2000. At that time, however, claimant suffered no trauma as he testifies that the lightheadedness came on just as he was standing driving the forklift. By the time he saw a doctor the next day, claimant gave a history of headaches, neck pain, nausea, ringing ears and blurred vision. He failed to give a history of injury to the doctor.

Claimant did not give a history of any activity at work causing increased neck pain until his last visit on February 1, 2001, to the Wesley Family Medical Center, after respondent had terminated claimant on January 22, 2001. Additionally, claimant testified he provided his supervisor with a prescription sheet and he notified his supervisor along with Jody Bye that he was suffering neck pain and headaches because of a work-related injury. But Ms. Bye testified that the prescription sheet was not in the claimant's personnel file and that she had no knowledge that the claimant was claiming a work-related injury until she received a notice from claimant's attorney after claimant's termination.

In regard to the timely notice issue, if claimant had proven he injured his neck while performing his regular work activities each and every day until his last day worked January 19, 2001, then timely notice was given branch manager Jody Bye within 10 days of January 19, 2001, through the letter that claimant's attorney sent to respondent after claimant's termination. But the timely notice issue is moot because the claimant failed to prove the accident arose out of and in the course of his employment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Nelsonna Potts Barnes' April 3, 2001, preliminary hearing Order that denied claimant's request for compensation benefits, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2001.

BOARD MEMBER

c: Brian R. Collignon, Wichita, Kansas
Terry Torline, Wichita, Kansas
John David Jurcyk, Lenexa, Kansas
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director