August 29, 2003

Henry Kasdorf
5104 W 18th St.
Sioux Falls SD 57106

LETTER DECISION

Rick W. Orr
Davenport Evans Hurwitz & Smith
PO Box 1030
Sioux Falls SD 57101-1030

RE: HF No. 132, 2000/01 – Henry Kasdorf v. Gage Brothers Concrete and CNA

Dear Mr. Kasdorf and Mr. Orr:

I am in receipt of Employer/Insurer's Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment. I am also in receipt of Claimant's response thereto. The submissions of the parties regarding Employer/Insurer's Motion for Summary Judgment having been carefully considered, Employer/Insurer's Motion for Summary Judgment is granted.

ARSD 47:03:01:08 provides that the Department "shall grant summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The South Dakota Supreme Court has stated the standard of review for summary judgment:

> The moving party bears the burden of showing the absence of genuine issues of material fact. In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist. Mere allegations that are devoid of specific facts will not prevent the issuance of summary judgment. If no issue of material fact exists, then any legal questions may be decided by summary judgment. When determining whether a genuine issue of material fact exists, the evidence must be viewed most favorably to the non-moving party and reasonable doubts are to be resolved against the moving party.

Estate of Williams v. Vandeberg, 2000 SD 155, ¶ 7 (citations omitted).

Claimant filed the above-referenced hearing file on November 27, 2000, alleging an injury to his back, occurring May 15, 2000. Employer/Insurer admitted that an incident occurred, but denied the nature and extent of Claimant's claimed injury, disability and entitlement to benefits.

The original Scheduling Order was entered on January 22, 2002. The deadlines were continued due to Claimant's incarceration. On April 2, 2003, the Department entered a scheduling order, providing discovery deadlines, including Claimant's May 15, 2003, deadline to disclose and identify experts and experts' opinions and reports. Claimant did not meet this deadline. On June 11, 2003, Employer/Insurer filed its Motion for Summary Judgment based on Claimant's failure to disclose experts. Claimant responded by submitting Dr. Benson's records. Employer/Insurer objected to the admission of Dr. Benson's records into the record. The Department accepted the records of Dr. Benson as Claimant's expert disclosure. The Department allowed Claimant extra time in which to provide the affidavit of Dr. Benson in a letter dated July 29, 2003.

Employer/Insurer move for summary judgment based upon Claimant's failure to offer the opinion of a medical expert in the proper manner. Despite the Department's letter of July 29, 2003, Claimant has failed to offer the affidavit of Dr. Benson. Instead, Claimant has relied solely on the records of Dr. Benson.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Const. Co., 155 N.W.2d 193, 195 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

Claimant must establish that he suffered an injury arising out of and in the course of his employment. SDCL 62-1-1(7). Furthermore, no injury is compensable unless the employment related activities are a major contributing cause of the condition complained of. SDCL 62-1-1(7)(a).

On the issue of causation, Claimant must show that the injury and consequent disability arose out of a hazard to which Claimant was exposed to while working for employer. Bearshield v. City of Gregory, 278 N.W.2d 166 (S.D. 1979). It is Claimant's burden to establish a causal connection between his injury and his employment. Kester v. Colonial Manor of Custer, 571 N.W.2d 376 (S.D. 1997). "Where there is no obvious causal relationship the testimony of a medical expert may be necessary to establish the causal connection." Id. at p. 280 (quoting Howe v. Farmers Coop Creamery, 81 S.D. 207, 212, 132 N.W.2d 844, 846 (1965)).

Claimant must demonstrate "by a preponderance of the evidence that an employment activity 'brought about the disability on which the worker's compensation is based; a possibility is insufficient and a probability is necessary.'" Maroney v. Aman, 565 N.W.2d 70, 73 (S.D. 1997) (citations omitted). The causal connection between Claimant's alleged disability/entitlement to benefits and the alleged work-related injury must be established through the testimony of competent experts. Id. at p. 74.

The only expert medical opinion in the record is that of Dr. David Hoversten, who conducted an independent medical examination on behalf of Employer/Insurer. He opined that Claimant suffered a minor aggravation on or about May 15, 2000, but the incident is not a major contributing cause of any of Claimant's medical conditions. The medical records in this matter support Dr. Hoversten's opinion that Claimant has a long and extensive history of low back and similar complaints. Dr. Hoversten diagnosed Claimant with degenerative disc disease. He opined that the injury of May 15, 2000, is not a major contributing cause of this condition, that Claimant has no restrictions on his work activities related to the alleged injury, and that any need for medical treatment is unrelated to the injury of May 15, 2000. Even if Dr. Benson's records were considered, they do not contain evidence that would establish that Claimant's current condition is causally related to the alleged injury. The records of Dr. Benson do no refute Dr. Hoversten's opinions.

For the above reasons, Employer/Insurer's Motion for Summary Judgment is granted. Employer/Insurer shall submit a proposed Order consistent with this Decision by September 11, 2003.

After Employer/Insurer submits a proposed Order, Claimant shall have until September 29, 2003 to offer his objections to that proposed Order. After a final Order is entered, this matter may be appealed to the circuit court pursuant to SDCL 62-7-19, which states:

> Any employer or employee may appeal to the circuit court pursuant to chapter 1-26 from any final order or decision of the department of labor which arises under the provisions of this title. Upon any appeal under this section all intermediate orders or decisions affecting substantial rights may be reviewed.

Pursuant to SDCL 62-7-16:

> Any party to proceedings before the department may within ten days after service upon him of a decision of the department, as provided in § 62-7-13, file with the department a petition for a review of such decision. Upon the filing of such petition the secretary may in his discretion either deny such petition or direct that further hearing be had or additional evidence received, and in the event of such further hearing or of the receipt of additional evidence he may revise his decision in whole or in part or affirm the same. Notice of denial of such petition or any other order thereon shall be given as provided in § 62-7-13.

Sincerely,

Heather E. Covey
Administrative Law Judge