

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

KENNETH T. MCKENNA,

HF No. 172, 2002/03

Claimant,

DECISION

vs.

MINERVA'S,

Employer,

and

FARMER'S INSURANCE GROUP,

Insurer,

and

MINNEHAHA COUNTRY CLUB,

Employer,

and

DAKOTA TRUCK UNDERWRITERS,

Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management on January 25, 2005, in Sioux Falls, South Dakota. Kenneth T. McKenna (Claimant) appeared personally and through his attorney of record, Thomas J. Farrell. Steven J. Morgans represented Employer Minerva's and Insurer Farmer's Insurance Group (Farmer's). Michael S. McKnight represented Employer Minnehaha Country Club (MCC) and Insurer Dakota Truck Underwriters (Dakota Truck). The outstanding issues were aggravation/recurrence and notice.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence:

1. At the time of the hearing, Claimant was nearly forty years old and resided in Sioux Falls.
2. Claimant has worked in the restaurant industry since 1993.
3. In 1997, Claimant started working at Minerva's as a sauté cook.

4. Shortly thereafter, Claimant was promoted to the morning supervisor. Claimant was responsible for opening the restaurant and preparing the line to serve lunch.
5. On November 2, 1998, Claimant suffered an injury to his low back while taking a five or six pound tray of hamburger off the top shelf in the walk-in cooler. Claimant felt "a terrible pinch" in his lower back, heard a popping noise and experienced immediate pain.
6. Farmer's was the insurer on the risk at the time of the November 1998 injury.
7. Prior to November 2nd, Claimant never experienced any significant problems with his back. The only episode documented in Claimant's medical records was a May 1991 visit to his family doctor that referenced "[l]ow back, nonspecific." Claimant was instructed to follow-up with medical care if no improvement. Claimant did not seek further treatment for his low back until after the November 1998 work-related injury.
8. Claimant sought medical treatment on November 4, 1998, at a Sioux Valley Clinic. Beth Amdahl, PA-C, diagnosed Claimant with a low back strain and prescribed anti-inflammatory medication and muscle relaxants.
9. On November 11, 1998, Claimant saw Dr. Christine Brandner, chiropractor, for an evaluation. Dr. Brandner recommended a course of conservative chiropractic treatment, but instead, Claimant elected to pursue physical therapy as recommended by PA Amdahl.
10. Claimant returned for further treatment on November 13, 1998. PA Amdahl noted Claimant was "still having trouble with his lower back, still more on the left side, some pain radiating to his knee at times now."
11. On November 25, 1998, Claimant saw Dr. Scott Ecklund, a physician at the Sioux Valley Clinic. Dr. Ecklund noted that Claimant continued to experience persistent back pain. In addition, Claimant now had pain "that's going down into his buttock and actually extending all the way down the leg to the heel area."
12. Dr. Ecklund assessed Claimant with low back pain with radiculopathy, which "most likely represents a left sided disc herniation at the L4-L5 disc level."
13. Dr. Ecklund prescribed a back brace for Claimant, ordered an MRI and continued with physical therapy and medications.
14. The MRI, taken on December 1, 1998, showed "two small central disc protrusion L4-5 without spinal stenosis or nerve root compression."
15. Claimant received an epidural block on December 3, 1998.
16. On December 9, 1998, Dr. Ecklund noted that Claimant's symptoms were significantly improved with physical therapy and the epidural block. Dr. Ecklund released Claimant to return to work and instructed Claimant to wear his back brace with no lifting over twenty pounds.
17. On December 22, 1998, Dr. Ecklund noted that Claimant was feeling significantly better, but that he continued to have a chronic backache with some numbness and tingling going down into his left leg and left foot.
18. On January 12, 1999, Dr. Ecklund indicated that Claimant's condition was improving, but he continued to have persistent pain. Dr. Ecklund referred Claimant to see Dr. Greg Alvine, an orthopedic surgeon.
19. On February 5, 1999, Claimant saw Dr. Alvine for an evaluation of his persistent low back and left leg pain. Dr. Alvine noted that Claimant's "back pain is

- considerably better at this point but, again, he is worried about it going out again. He still has days where his back is very painful, however.”
20. Dr. Alvine diagnosed Claimant with low back pain with recent radiculopathy and degenerative disc at L4-5 with central disc protrusion.
 21. Dr. Alvine recommended a course of conservative treatment, including medication and home exercises.
 22. Claimant returned to see Dr. Alvine on September 14, 1999. Dr. Alvine noted that Claimant was doing reasonably well, but that he continued to experience some back stiffness and pain. Dr. Alvine recommended that Claimant continue with the home exercises and pain medication. Dr. Alvine indicated that if Claimant's symptoms worsened or became more debilitating, he would consider discograms and a fusion.
 23. In summary, in 1998 and 1999, in order to treat his low back condition, Claimant took various medications, used a brace and heating pad, received chiropractic care, physical therapy, ultrasound and electrical stimulation, had an epidural injection, performed home exercises and followed work restrictions.
 24. Despite all of this treatment, Claimant's back problems continued.
 25. After the epidural in December 1998, Claimant received temporary relief from his back pain. The epidural alleviated Claimant's pain for six to eight months, but he continued to have back discomfort. Claimant explained, “there was always some discomfort there. I wouldn't say that I was in - - well, I'll call it excruciating or a lot of pain.”
 26. Claimant did not receive any further medical treatment for his low back from September 14, 1999, until June 7, 2001, but continued to take medication for his back problems.
 27. Claimant's employment with Minerva's ended in the spring of 2000.
 28. Claimant started working for MCC in May 2000 as a sauté cook.
 29. Claimant was promoted to the kitchen manager shortly after he began working for MCC. Claimant's duties included ordering, hiring and firing, scheduling and unloading supplies off delivery trucks, including lifting thirty to fifty pound boxes.
 30. There was no particular incident that happened at MCC in which Claimant injured his back.
 31. Claimant's back problems continued and became progressively worse over time.
 32. Claimant experienced continued episodes of pain that were not brought on by any specific incidents at home or at work.
 33. On June 7, 2001, Claimant returned to the Sioux Valley Clinic because of his persistent back pain and problems. Claimant saw Dr. Lornell Hansen, who recommended a course of conservative treatment.
 34. Even though Claimant did not seek medical attention for almost two years, he continued to experience discomfort in his low back. Claimant was not in “excruciating or a lot of pain,” but he was never pain free.
 35. Claimant continued to see either Dr. Hansen or Dr. Ecklund for his persistent low back pain.
 36. On November 13, 2001, Dr. Ecklund noted that Claimant “is having a flare-up again of his lumbar disc diseases. He has got radiation down into that right buttock now all the way down to the knee posteriorly. No specific injury, but he does do a fair amount of lifting at work.”

37. Dr. Ecklund ordered another MRI and an epidural block.
38. On November 20, 2001, the MRI showed a small central disc herniation at L4-5 level. These findings were similar to the previous MRI from December 1998.
39. Claimant was referred to Dr. Mark Fox, a neurosurgeon.
40. Dr. Fox examined Claimant on January 3, 2002. Dr. Fox noted that Claimant reported that "he was basically pain-free for the past few years." This statement is inconsistent with other medical records in which Claimant reported he continued to suffer from low back pain.
41. Dr. Fox compared the two MRIs and stated, "there does not appear to be any significant worsening and perhaps some diminution in the size of the L4 disk."
42. Dr. Fox recommended surgery.
43. On January 30, 2002, Dr. Jerry Blow, who specializes in physical medicine and rehabilitation, performed a review of Claimant's medical records and issued a report.
44. Dr. Blow opined Claimant had suffered an aggravation of his underlying condition when he returned for medical treatment in June 2001. Dr. Blow concluded, "it would appear that his daily activities at work with his current employer [MCC] certainly would be the major contributing cause for his current pain complaints."
45. Dr. Blow also opined, "[i]f he had ongoing symptoms for the last two years, I would feel we were dealing with the original injury, but since he has had virtually no symptoms for the last two years, it would appear that this is not simply a progression of his underlying disease, but an aggravation."
46. On February 6, 2002, Dr. Fox performed a lumbar laminectomy and discectomy at the L4-5 level.
47. Claimant remained off work for approximately five weeks and then he returned to work.
48. After the February 6, 2002, surgery, Claimant felt "miserable." Claimant testified, "I was in a lot of pain, and I didn't feel that the surgery helped me at all."
49. Claimant was eventually referred to Dr. Peter Johnson for an evaluation of his chronic low back pain. Dr. Johnson recommended continued exercises and medication.
50. Claimant was also referred to Dr. Wilson Asfora, a neurosurgeon, for an evaluation of his low back pain with radiculopathy.
51. On October 2, 2002, Dr. Asfora stated, "I believe the source of this patient's low back pain is the L4-5 level where there is significant degenerative disc disease, narrowed disc space, loss of disc signal, epidural fibrosis, a swollen left L5 nerve root, and some residual disc protrusion. Some of this patient's low back pain may also originate from the L5-S1 disc space where there [are] also some degenerative changes."
52. Dr. Asfora prescribed a L4-5 facet joint block. However, the injection significantly increased Claimant's back pain.
53. Dr. Asfora then recommended additional surgery.
54. Dr. Asfora performed a L4-5 discectomy and a L4-5 posterior lumbar interbody fusion with autograft bone and Danek cages on March 14, 2003.
55. Claimant remained off work for a period of time.
56. Claimant continues to experience persistent low back pain.

57. Dr. Asfora recommended physical therapy and at the time of the hearing, Claimant continued to participate in physical therapy three times a week.
58. On July 29, 2004, Dr. Wayne Anderson, board certified in occupational medicine, performed a medical records review of Claimant's file and generated a report.
59. Dr. Anderson opined that Claimant's low back problems were a recurrence of his November 2, 1998, work-related injury at Minerva's.
60. Claimant continues to work for MCC as the kitchen manager.
61. Claimant was a credible witness at the hearing. This is based on his consistent testimony and on the ability to observe his demeanor at the hearing.
62. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT'S BACK CONDITION IS A RECURRENCE OR AN INDEPENDENT AGGRAVATION OF HIS ORIGINAL WORK-RELATED INJURY?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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). In order to meet this burden of proof, it is necessary that Claimant provide medical evidence. Enger v. FMC, 1997 SD 70, ¶ 18.

The last injurious exposure rule applies when dealing with successive injuries. This rule states:

When a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation.

Titus v. Sioux Valley Hosp., 2003 SD 22, ¶ 12. The question to resolve is "whether the successive injury is a mere recurrence or an independent aggravation of the first injury." Id. at ¶ 13 (citation omitted). "In successive injury cases, the original employer/insurer remains liable if the second injury is a mere recurrence of the first. If the second injury is an aggravation that contributed independently to the final disability then the subsequent employer/insurer is liable." Enger, 1997 SD 70, ¶ 13 (citation omitted).

To find that the second injury was an aggravation of the first, the evidence must show:

1. A second injury; and
2. That this second injury contributed independently to the final disability.

Paulson v. Black Hills Packing Co., 554 N.W.2d 194, 196 (S.D. 1996). To find that the second injury was a recurrence of the first injury, the evidence must show:

1. There have been persistent symptoms of the injury; and
2. No specific incident that can independently explain the second onset of symptoms.

Id. The “contribution of the second injury, however slight, must be to the *causation* of the disability.” Enger, 1997 SD 70, ¶ 17. It is necessary to examine whether “a significant occurrence, amounting to an independent contribution to the final disability, causes an onset of increased or new symptoms.” Id.

In order to determine whether Claimant suffered a recurrence or an independent aggravation, it is necessary to examine the medical opinions. Dr. Blow was deposed on June 21, 2004, and his deposition was received into evidence. Dr. Anderson’s opinions were received into evidence through his Affidavit.

Dr. Blow specializes in physical medicine and rehabilitation. Dr. Blow did not examine Claimant, but performed a review of the medical records that were available in 2002. Specifically, Dr. Blow reviewed records from PA Amdahl, Dr. Brandner, Dr. Ecklund, Dr. Alvine, Dr. Hansen and Dr. Fox. Dr. Blow also reviewed diagnostic testing including both the December 1998 and the November 2001 MRI of the lumbar spine. Dr. Blow did not review either of Claimant’s two depositions.

Dr. Blow recognized that Claimant sustained the initial low back injury on November 2, 1998. Dr. Blow acknowledged that in 2001, Claimant was experiencing “symptoms very similar to his previous symptoms with radiculopathy.” In addition, Dr. Blow agreed that the 2001 MRI revealed no change when compared to the 1998 MRI.

Based upon his review of Claimant’s medical records, Dr. Blow opined that Claimant suffered an aggravation of his low back condition while working at MCC. Dr. Blow based this opinion solely on his understanding that Claimant was pain-free for nearly two years after the November 1998 injury. Dr. Blow admitted this was the “key fact” for the basis of his opinion. Dr. Blow also concluded that if Claimant had ongoing symptoms from 1998 to 2001, then Claimant’s condition would be a recurrence of the original injury.

In July 2004, Dr. Anderson performed a review of Claimant’s medical records. Specifically, Dr. Anderson reviewed medical records from Sioux Valley Hospital, PA Amdahl, Dr. Ecklund, Dr. Brandner, Dr. Alvine, Dr. Hansen, Dr. Sorenson, Dr. Fox, Dr. Johnson and Dr. Asfora. Dr. Anderson also reviewed all diagnostic testing and Dr. Blow’s deposition. In addition, Dr. Anderson had the benefit of reviewing Claimant’s second deposition.

In his report, Dr. Anderson opined:

It is my opinion that Mr. McKenna’s low back problems are a recurrence of his work related injury, which occurred November 2, 1998. On that date, while working at Minerva’s, he had an acute low back problem and was subsequently found to have disk disease with radiculopathy at L4-5 and L5-S1. He treated for a number of months and then from the time period of September 14, 1999 until June 7, 2001, he did not see physicians regarding his back. Mr. McKenna states in his deposition that he maybe went for a period of 6-8 months without low back symptoms.

There is much discussion regarding him telling Dr. Fox that he had been symptom free for two years. Dr. Fox's visit was January 3, 2002 and in fact, Mr. McKenna had seen Dr. Hansen on [June] 7, 2001 for low back pain 6 months prior. Therefore, the statement regarding him being symptom free for a period of two years does not make sense. Additionally, I find no acute injury while working for Minnehaha Country Club. I do understand that Mr. McKenna was working as the kitchen manager and that he did perform the typical kitchen duties, which would include lifting 30-50 pounds as is stated in Dr. Hansen's record.

My reasons for believing this is a recurrence and not an aggravation are because Mr. McKenna did not experience a new work related event, he had preexisting objectively identifiable problems with the L4-5 and L5-S1 interspace with radiculopathy. His symptoms subsequent to the employment at the Minnehaha County [sic] Country Club are extremely similar to the symptoms he experienced in 1998 and epidurals were performed both times. Mr. McKenna, by his statements and his deposition, experienced only an approximate 6-8 month time period where he was symptom free.

What I believe to have occurred is that Mr. McKenna experienced the expected degeneration of his lumbar spine over time as does occur once the annulus has been disrupted as it was in Mr. McKenna's case in 1998.

Dr. Anderson opined Claimant sustained a recurrence of his 1998 injury and the 1998 injury is the cause of his need for surgeries and resulting condition. Dr. Anderson concluded Claimant suffered a recurrence because in 2001, Claimant's symptoms were persistent and similar to the 1998 symptoms and that there was no specific incident at MCC that would explain the onset of the symptoms.

The evidence showed that Claimant had persistent symptoms after his November 1998 work-related injury. Prior to this injury, Claimant had no noteworthy back problems. Yet after the injury, Claimant experienced persistent and significant problems with his low back. Claimant received substantial therapy and consistently took medications for his back pain. Claimant underwent an epidural in December 1998. Claimant received some temporary relief from this injection. However, once the effects of the epidural wore off, his back discomfort returned and eventually increased to unbearable pain. Once Claimant's pain level significantly increased, he returned for further medical treatment in June 2001. Claimant's testimony that he continued to experience discomfort in his low back during the two years he did not seek medical treatment was credible.

In addition, there was no specific incident that can independently explain the onset of Claimant's increased back symptoms in June 2001. Claimant consistently and credibly testified there was no specific incident, either at home or at MCC, that caused his back pain to worsen. Claimant's medical records documented there was no specific incident at MCC. In addition, Claimant made no connection to his back pain and the work he was doing at MCC. For example, after Dr. Asfora recommended additional surgery, Claimant completed a South Dakota Employer's First Report of Injury on January 7, 2003. Claimant acknowledged that his current employer was MCC, but he

did not identify a specific injury that occurred at MCC. Rather, Claimant referred back to the November 1998 injury at Minerva's as the source of his back problems.

The medical evidence demonstrated that Claimant suffered a recurrence of the November 1998 original work injury. This is based on Dr. Anderson's credible and persuasive testimony. "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 N.W.2d 396, 398 (S.D. 1988). Both Dr. Anderson and Dr. Blow are well-qualified to opine on whether Claimant suffered a recurrence or aggravation. But, Dr. Anderson's opinions are more persuasive than those opinions expressed by Dr. Blow. Dr. Anderson had the opportunity to review Claimant's second deposition and recognized that Claimant had persistent symptoms after the November 1998 injury. In addition, Dr. Anderson recognized that the symptoms Claimant had in 2001 were "extremely similar to the symptoms he experienced in 1998."

Claimant's back condition is the result of a recurrence of his November 1998 work-related injury. Claimant had persistent symptoms after the injury and there was no specific incident at MCC that explained the second onset of symptoms in June 2001. Dr. Anderson's well-reasoned opinions demonstrated that Claimant's suffered a recurrence and that his condition was the natural progression of his initial 1998 injury.

Farmer's is responsible for any benefits owed to Claimant. Dakota Truck is not liable for any benefits as Claimant did not suffer an aggravation of the November 1998 work-related injury. MCC must be dismissed from this claim. Therefore, it is unnecessary to address the issue of whether Claimant provided timely notice to MCC. The Department shall retain jurisdiction over the issue of what workers' compensation benefits are due to Claimant.

Counsel for Dakota Truck shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Counsel for Claimant and Farmer's Insurance Group shall have ten days from the date of receipt of Dakota Truck's Findings and Conclusions to submit objections or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, counsel for Dakota Truck shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 31st day of August, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge