SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

THOMAS CERNEY, **HF No. 175, 2003/04**

Claimant, **DECISION**

vs.

SOIL & WATER CONSERVATION DISTRICT,

Employer,

and

TRI-STATE INSURANCE,

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 April 7, 2005, in Pierre, South Dakota. Thomas Cerney (Cerney) appeared pro se. Comet Haraldson represented Employer and Insurer (Employer).

The Prehearing Order, entered on March 14, 2005, identified the following issues to be presented at hearing:

1) Medical expenses;
2) Whether Claimant's claim is barred by res judicata and collateral estoppel;
3) Whether Claimant's claim is barred by the statute of limitations as set out in SDCL 62-4-4, 62-7-35.1 and 62-7-35.3;
4) Compensability;
5) Causation; and
6) SDCL 62-7-33 (change of condition).

In its post-hearing brief, Employer withdrew its defense of whether Claimant's claim is barred by res judicata and collateral estoppel. Employer also withdrew its defense requesting application of SDCL 62-7-35.3.

FACTS

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

Cerney suffered a work-related injury on May 7, 1981, while working for Employer. Claimant's injury was described as follows:

> On May 7, 1981, while sitting on a tree planter, planting trees, the tree planter struck a strip of sod causing it to come to an abrupt halt. The Claimant's back struck a metal bar located behind his seat.

After a hearing with the Department in September 1983, Cerney's injury was determined to be compensable and he was awarded medical expenses and permanent partial disability benefits based on a 20% whole person impairment rating. Insurer paid these benefits to Cerney.

After the hearing, Cerney sought additional medical treatment and ultimately had spinal fusion surgery in July 1984. Cerney was able to continue working after his injury. Cerney completed a program at Mitchell Vo-Tech where he was trained as a chef. Cerney worked for a while as a chef and at some point, operated a catering business. Claimant also maintained other employment. Prior to this hearing, Cerney worked at Capital Motors as a service advisor in the service department.

Cerney stated that he has been in pain for the past 20 years. He testified, "I just assumed since there was some deterioration that was a normal process. There was no specific point in time that it was any better, just decreasingly worse." Cerney stated that for the past five years, his low back pain started to spread up and down throughout his body. Specifically, Cerney noticed the increased pain while working in his catering business.

Dr. Donald Frisco, a physiatrist who is board certified in physical medicine, performed an independent medical examination of Cerney on May 16, 2002. Dr. Frisco also issued a written report on the same date. Dr. Frisco reviewed Cerney's medical history from 1981 until 2000. Dr. Frisco noted Cerney had fusion surgery in 1984, but there was a non-union. Dr. Frisco found it significant that Cerney had smoked as much as two packs of cigarettes per day for over twenty years. Dr. Frisco opined that Cerney's smoking history contributed to the non-union of his fusion. As Dr. Frisco stated, "smoking is a serious factor in the development of non-unions."

After his examination, Dr. Frisco's impression of Cerney's condition was as follows:

1. Bilateral L5 pars defect.
2. Grade 1 spondylolisthesis L5 on S1.
3. History of back contusion.
4. Status post failed PLIF at L5-S1.
5. Right SI joint pain and dysfunction.

Dr. Frisco recognized that Cerney has had back pain dating back to May 1981. However, Dr. Frisco opined that none of Cerney's back conditions were causally related to the May 1981 back injury. Dr. Frisco testified, "I can state with a reasonable degree of medical certainty that the original injury is no longer a contributing factor to his current symptoms."

On April 14, 2004, Cerney filed a Petition for Hearing with the Department. Cerney requested certain benefits including, reinstatement of the medical coverage on his back, a second opinion at Insurer's expense, a disability rating for his current condition, a monetary settlement and attorney fees and costs. At the hearing, Cerney presented no unpaid medical bills, offered no estimates of projected future medical

expenses, and presented no medical opinion that his present condition is casually connected to his work injury. Cerney admitted the same in his post-hearing brief dated May 2, 2005.

ISSUE

WHETHER CERNEY'S MAY 7, 1981 INJURY IS A CONTRIBUTING FACTOR TO HIS CURRENT CONDITION?

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). Claimant sustained a work-related injury on May 7, 1981. "The law in effect when the injury occurred governs the rights of the parties." Westergren v. Baptist Hosp. of Winner, 549 N.W.2d 390, 395 (S.D. 1996). Therefore, Claimant "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. The causation requirement does not mean that Claimant must prove that his employment was the proximate, direct, or sole cause of his injury. Claimant must show that his employment was a contributing factor to his injury. Gilchrist v. Trail King Indus., 2000 SD 68, ¶ 7. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

There is no real dispute that Cerney has experienced back pain for years. However, Cerney did not present any medical evidence that his current condition is causally related to the May 1981 work-related injury. As required by statutes and case law, Cerney must show that his employment is a contributing factor to his current condition. Without any medical evidence, Cerney cannot sustain his burden.

Employer relied upon the opinions expressed by Dr. Frisco in his report and deposition. Dr. Frisco credibly opined that Cerney's original injury is no longer a contributing factor to his current symptoms. Dr. Frisco's opinions have the appropriate foundation and are accepted.

Cerney failed to establish by a preponderance of the evidence that his May 1981 injury is a contributing factor to his current condition. Based on this determination, there is no need to address the other issues identified by the Prehearing Order. Because his current condition is not causally related to his May 1981 injury, Cerney is not entitled to any benefits. Claimant's request for workers' compensation benefits is denied and his Petition for Hearing must be dismissed with prejudice. This Decision based on a hearing before the Department of Labor may be appealed by a party in interest to Circuit Court and the South Dakota Supreme Court as provided by law.

Employer 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. Claimant shall have ten days from the date of receipt of Employer's proposed 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, Employer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 17th day of May, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge