

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CHARLIE J. REISER,

HF No. 74, 2000/01

Claimant,

DECISION

vs.

BERENDSE & SONS PAINTING, INC.,

Employer,

and

AMERICAN STATES INSURANCE/SAFECO,

Insurer,

and

HUNT BUILDING CORPORATION,

Employer

and

TRAVELERS INSURANCE COMPANY,

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 March 27, 2003, over the Digital Dakota Network between Rapid City and Pierre, South Dakota. Claimant, Charlie J. Reiser, appeared personally and through his attorney of record, Dennis W. Finch. Courtney R. Clayborne represented Employer, Berendse & Sons Painting, Inc., and Insurer, American States Insurance/Safeco. Todd L. Brink represented Employer, Hunt Building Corporation, and Insurer, Travelers Insurance Company.

PROCEDURAL HISTORY

This matter first came before the Department on Cross Motions for Summary Judgment filed by Employer, Berendse & Sons Painting, Inc., and Insurer, American States Insurance/Safeco (Berendse) and Employer, Hunt Building Corporation, and Insurer, Travelers Insurance Company (Hunt Building). The issue presented before the Department was whether Claimant suffered a recurrence or an aggravation on July 13, 2000. The Department found that "Claimant suffered a recurrence of his 1994 work-related injury when he lifted the power washer on July 13, 2000." Based on this

determination, the Department found that Hunt Building was responsible for Claimant's workers' compensation benefits.

Hunt Building appealed the Department's Letter Decision of April 12, 2002, to the Sixth Circuit. Judge Lori Wilbur entered an Order Reversing Summary Judgment on December 9, 2002. Judge Wilbur stated in her Order that "genuine issues of [material] fact exist, requiring reversal of the Department's Summary Judgment." Judge Wilbur remanded this matter for a hearing.

Prior to hearing, the parties submitted an executed Stipulation and Agreement and agreed to the following:

1. That on or about September 21, 1992, Claimant sustained a work-related injury at the L5-S1 level of his low back, arising out of his employment at Singer Masonry. On or about December 22, 1994, Claimant, while in the scope of his employment with Hunt Building Corporation, was lifting two five-gallon buckets of drywall mud, and experienced an episode of low back pain. Claimant underwent a microdiscectomy on February 14, 1995, which improved a herniated disk at the L5-S1 level, and reduced his condition to that of post-laminectomy syndrome. These injuries and conditions were work related and compensable.
2. That on or about December 4, 1996, Claimant and Hunt Building entered into a settlement agreement which was approved by the South Dakota Department of Labor. Travelers Insurance Company is a successor in interest to Aetna Insurance Company, and along with Claimant, is entitled to any benefits and subject to any obligations under the settlement agreement that would otherwise inure to Aetna Insurance Company.
3. That on or about July 13, 2000, Claimant, while in the course and scope of his employment with [Berendse] & Sons Painting, was assisting in the lifting of a power washer, and experienced an episode of low back pain.
4. That Claimant was unable to work from and after the July 13, 2000 incident until April 16, 2001, due to the pain in his low back. On or about April 16, 2001, Claimant returned to full-time employment at or near his wage he was earning at the time of the July 13, 2000 incident.
5. That from and after the July 13, 2000 incident, Claimant has incurred the following medical expenses to date which include accrued interest and late charges:

James W. Schweitert, D.C.	7136.84
Express Collections re: Black Hills Surgery Center	1490.27
Hauge Associates re: BH Surg. Ctr. & Neurosurgical & Spinal Surg. Assoc.	1598.14
Rehab Doctors	1536.00
R.C. Regional Hospital (Black Hills Collection)	
Acct #16852238 for DOS 8/11/00	282.18
Acct #17110107 for DOS 11/15/00	241.53
BH Orthopedic & Spine Ctr. (Credit Collections)	168.44
High Plains PT	852.00
Radiology Associates (N. Central Credits)	<u>398.41</u>
Total	\$13,703.81

6. That the parties agree to waive foundation objections to the copies of the bills attached hereto describing the amount set forth in paragraph [five] above.
7. That, for purposes of this proceeding, the parties stipulate and agree that the charges described above were reasonably necessitated by Claimant's back pain following the July 13, 2000 incident, and that none of the parties will be required to present testimony or evidence as to the reasonableness of necessity of said charges. This stipulation and agreement, however, shall not be construed as a waiver of any right Berendse or Hunt [Building] would otherwise have to contest the reasonableness or necessity of any future medical or chiropractic charges.
8. That the parties stipulat[e] and agree that, if either Berendse or Hunt [Building] are found responsible for weekly compensation benefits for the period described in paragraph six above, the weekly compensation shall be as follows:
 - a. If Hunt [Building] is found responsible, the weekly benefit rate is \$266.15 per week; and
 - b. If Berendse [is] found responsible, the weekly benefit rate is \$273.47 per week.
9. That Hunt [Building] reserves the right to contest Claimant's claim for weekly compensation based upon the terms of the December 4, 1996 settlement agreement.
10. Claimant reserves the right to claim interest on any award of past weekly benefits.

FACTS

In addition to the facts agreed to by the parties as stated above, the Department finds the following facts, as established by a preponderance of the evidence.

1. On September 21, 1992, Claimant suffered an injury to his back while lifting concrete blocks. Claimant was employed by Singer Masonry at the time.
2. Claimant treated with Dr. Larry Teuber and was diagnosed with low back pain, left S1 radiculopathy and intervertebral disc displacement at L5-S1. Dr. Teuber recommended conservative treatment, including physical therapy, pain medication and work hardening.
3. On December 22, 1994, Claimant injured his back while working for Hunt Building. Claimant lifted two five-gallon buckets of drywall mud and felt pain in his back.
4. Claimant again sought treatment from Dr. Teuber. On February 14, 1995, Dr. Teuber performed a microdiscectomy at L5-S1.
5. On May 25, 1995, Dr. Teuber discharged Claimant from his care because Claimant "has done satisfactory postoperatively."
6. On May 30, 1996, and June 3, 1996, Claimant returned to see Dr. Teuber complaining of leg pain and low back discomfort.
7. An MRI showed "postoperative changes, but there is no evidence of infection, recurrent disc herniation, or residual disc herniation."
8. Claimant worked steadily for either Hunt Building or T & L Painting or Berendse from 1996 through July 2000.

9. Subsequent to his surgery in 1995, Claimant had recurrent episodes of low back pain. Claimant testified there was only a short period of time immediately after the surgery in 1995 where he was completely without pain.
10. Claimant always suffered from a dull ache in his back and his pain would “spike” depending upon his activity. Claimant experienced more pain in the mornings and his pain would decrease throughout the day as he became more active. However, Claimant always experienced a dull ache in his back.
11. Prior to July 2000, Claimant experienced a few episodes of severe back discomfort for which he sought medical treatment. For example, on April 10, 1997, Claimant saw Dr. Teuber with severe back discomfort after shoveling snow. Dr. Teuber diagnosed an acute low back strain and instructed Claimant to take it easy for a couple weeks.
12. Claimant suffered another acute low back strain in December 1997 after he lifted buckets and loaded his car. Claimant sought treatment from Dr. Teuber on December 24, 1997. Dr. Teuber noted that Claimant “has had discomfort in his leg occasionally. He has had occasional numbness in his leg. He is taking no medication as of yet. His medical condition is otherwise unchanged since last seeing him.” Dr. Teuber recommended Claimant take some pain medication and noted “that this will get better with time.”
13. On July 13, 2000, Claimant reported another episode of increased pain in his back while working for Berendse. Claimant assisted a coworker to lift a 200-pound power washer into the back of a pickup and Claimant experienced immediate pain in his lower back going down into his left leg.
14. Claimant did not experience any new symptoms or new pain after this lifting episode. Claimant stated his pain was similar to the pain he experienced after he injured his back while working for Hunt Building in 1994.
15. On July 7, 2000, Claimant had another MRI, which showed “left hemilaminotomy defect at L5-S1 consistent with previous surgery. Some postoperative scarring without any impingement on the thecal sac or nerve roots. Also noted is a very small focal disk protrusion centrally, altogether unchanged from previous MRI of 5/31/96.”
16. Claimant initiated chiropractic care on July 17, 2000.
17. Claimant started treating with Dr. Mark Simonson, a physiatrist in Rapid City, on September 9, 2000, for low back pain.
18. Claimant informed Dr. Simonson that after his back surgery in 1995, “he has had recurrent episodes of symptoms similar to those now.” Claimant told Dr. Simonson “that his current episode is different in that the pain is more intense, though the 12/24/97 [note] characterizes his pain as being ‘incapacitating’, and the 4/10/97 note characterizes his pain as being ‘quite severe’.”
19. Dr. Simonson stated, “[Claimant] presents with low back pain radiating into the left lower extremity. By review of his records, this does not appear significantly different from episodes that he has experienced in the past. His MRI is apparently no different than previous MRIs.”
20. Dr. Simonson diagnosed Claimant with left lumbosacral radiculitis and “[h]istory of left L5-S1 microdiscectomy with recurrent low back pain and variable lower extremity symptoms.”

21. Dr. Simonson discontinued chiropractic care and continued with physical therapy, pain medication and a steroid injection.
22. Claimant did not experience any significant relief. Dr. Simonson recommended a left L5-S1 transforaminal epidural. Claimant did not receive any benefit from the epidural. Dr. Simonson did not have any other treatment options and referred Claimant to Dr. Rand Schleusener, an orthopedic surgeon.
23. Dr. Schleusener examined Claimant on October 24, 2000. Dr. Schleusener also reviewed Claimant's medical records, including the MRIs from 1996 and 2000. Dr. Schleusener noted that Claimant "has continued reports of back pain and radiating leg pain from 1996 to 1998."
24. Dr. Schleusener diagnosed Claimant with an "irritated nerve root, probably from the L5-S1 disc."
25. Dr. Schleusener opined that Claimant's "symptoms are directly related to his original injury and surgery in 1995." Dr. Schleusener informed Claimant he could either live with his condition or consider a repeat microdiscectomy.
26. Claimant's current condition is the same as it was after the injury suffered by Claimant in 1994 while working for Hunt Building. Claimant continues to experience a dull ache in his back and more pain in the mornings. Claimant's pain will "spike," depending upon his activity.
27. Claimant was a credible witness. This determination is based on his consistent testimony at the hearing, his consistent history in the medical records and the opportunity to observe his demeanor at the hearing.
28. Other facts will be developed as necessary.

ISSUE

WHETHER THE JULY 13, 2000, INCIDENT AT BERENDSE WAS A RECURRENCE OR AN AGGRAVATION OF CLAIMANT'S DECEMBER 22, 1994, WORK-RELATED INJURY AT HUNT BUILDING?

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.

This is a successive injury case and 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 determining successive carrier responsibility in recurrence/aggravation disputes, the ‘burden of proving the causative effect of the second event is upon the initial carrier seeking to shift responsibility for the consequences of the original injury.” Truck Ins. Exchange v. CNA, 2001 SD 46, ¶ 28 (citations omitted).

In order to determine whether Claimant suffered a recurrence or an aggravation, it is necessary to examine the medical opinions. Dr. Simonson was deposed on January 17, 2001, and on February 3, 2003. Dr. Schleusener was deposed on February 14, 2001, and on February 11, 2003.

In his first deposition, Dr. Simonson opined that Claimant suffered a recurrence of his 1994 injury. Dr. Simonson recognized that Claimant had a history of low back surgery in 1995 and had “recurrent episodes of back and left lower extremity symptoms thereafter.” Dr. Simonson opined that the symptoms Claimant experienced after July 2000 were the same as those symptoms Claimant experienced after his back surgery in 1995. Dr. Simonson also opined that even though Claimant had periods of intermittent relief, he continued to suffer a recurrence of symptoms since the surgery in 1995. Dr. Simonson noted that the findings of the MRIs, performed in 1996 and 2000, were unchanged. Dr. Simonson opined that Claimant’s current condition was directly related to his back injury in 1994 and surgery in 1995.

In his second deposition, Dr. Simonson opined “I do believe that his lifting the power washer on 7/13/00 was an independent contributing cause for the problem for which I was seeing him on 9/6/00.” Dr. Simonson also concluded that the power washer incident in July 2000 independently contributed to Claimant’s need for medical treatment. Despite these conclusions, Dr. Simonson testified, “I believe that he injured his L5-S1 disk, and he’s had continuing symptoms ever since related to the initial injury or surgery or both.” Dr. Simonson recognized that Claimant had “an underlying L5-S1 disk problem that predisposes him to future problems.” Ultimately, Dr. Simonson testified, “I believe that he likely would not have had a problem lifting the power washer

had he not had a previous back injury and surgery and ongoing L5-S1 disk problem.” Dr. Simonson testified his opinion was supported by the fact that the MRI after the July 2000 lifting incident remained unchanged. Finally, Dr. Simonson testified the opinions he expressed in his first deposition had not changed.

Dr. Schleusener determined Claimant’s low back condition was related to the back injury in 1994 after Dr. Schleusener reviewed Dr. Teuber’s records and the MRIs performed in 1996 and 2000. Dr. Schleusener explained his opinion:

The rationale for my logic is this: Mr. Reiser has a long-standing history of back and left leg pain. When he had this surgery by Dr. Teuber in '95, he had continued pain even after his surgery that he told me didn't go away for several years, and he wasn't certain how long it was there, but he had it for a long, long time afterwards.

He does give it another history that he had this lifting episode with the washer. It doesn't sound like it was terribly traumatic, and then he gets the same symptoms that he reported from way back in '95 or '96.

We have the benefit in this gentleman of having one of the only objective tests we have, which is an MRI scan, after he had his surgery and after he had the episode with the power washer. And when you look at those objective findings of the MRI scan, they are essentially identical. There is a very, very tiny disc bulge underneath the nerve root that hasn't changed appreciably in those four or five years' time.

I think it's that nerve root that is causing his pain. I think that the power washer episode played a very minor role in bringing this out.

To put another way, if his back hadn't been in the condition that he was in and he had the power washer, would he have had the problem? No, probably not.

Now, when you asked the question about independently and being responsible for it, I think the vast majority of the reason that [Claimant] is having pain has to do with the surgery and the problem that he had from '96 and not related to the power washing lifting episode.

Dr. Schleusener opined that Claimant experienced the same back symptoms in 1996, the time he had the first MRI, and in 2000.

In his second deposition, Dr. Schleusener opined that the power washer incident “probably” contributed independently to Claimant’s need for treatment. However, Dr. Schleusener maintained that “the majority of his problem was due to his initial surgery and not due to lifting the power washer.” Dr. Schleusener did not change his opinion that Claimant’s symptoms were directly related to his original injury and surgery in 1995.

The opinions expressed by Dr. Simonson and Dr. Schleusener are persuasive and are accepted. These opinions establish that Claimant suffered a recurrence of his 1994 injury when he assisted in lifting the power washer in 2000.

In addition to the medical testimony, Claimant’s testimony supports the finding that he suffered a recurrence in July 2000. Claimant’s symptoms have been persistent since 1995. Although Claimant did not seek regular medical treatment, he continued to experience a dull pain in his low back and leg that would “spike,” depending on activity. Claimant has always experienced some type of back pain since his surgery in 1995.

Claimant did not suffer any different symptoms or pain after he helped lift the power washer, his pain was just more intense. Claimant experienced the same pain that he felt after his injury with Hunt Building in 1994. Claimant's current condition is the same as it was after he suffered his injury in 1994 while working for Hunt Building.

Under the tests set forth in Paulson, the totality of the evidence established that Claimant suffered a recurrence of his December 1994 work-related injury. First, Claimant did not suffer from a second injury while working for Berendse. It is true that Claimant experienced increased pain in his low back after he helped lift the power washer in July 2000. However, Claimant's low back pain symptoms were the same in 1994 and in 2000. Claimant's diagnosis remained the same after July 2000. Furthermore, Claimant's MRIs remained unchanged showing no sign of additional injury.

Second, the July 2000 incident did not contribute independently to Claimant's final disability. Claimant had persistent symptoms after the February 1995 surgery. Claimant always experienced a dull ache in his low back after the surgery and his pain would increase depending upon the activity. Even with treatment after the July 2000 incident, Claimant continues to experience a dull ache in his low back. The medical evidence established that the incident in July 2000 was not to the causation of Claimant's disability.

Based on the totality of the evidence, Claimant suffered a recurrence of his 1994 work-related injury at Hunt Building when he lifted the power washer on July 13, 2000, while working for Berendse. Claimant did not suffer a new injury in July 2000. The medical evidence supports a finding that the episode in July 2000 did not contribute independently to the causation of Claimant's current condition. Hunt Building failed to establish by a preponderance of the evidence that Claimant suffered an aggravation on July 13, 2000. Hunt Building is responsible for Claimant's workers' compensation benefits. Based on this decision, Berendse is dismissed from this claim.

Berendse 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 and Hunt Building shall have ten days from the date of receipt of Berendse'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, Berendse shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 25th day of August, 2003.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge