

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**RANDY KASUSKE,**

**HF No. 175, 2000/01**

**Claimant,**

**DECISION**

vs.

**FARWELL, OZMUN, KIRK & CO.,**

**Employer,**

and

**GREAT AMERICAN INSURANCE COMPANIES,**

**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 October 22, 2003, in Sioux Falls, South Dakota. Randy Kasuske (Claimant) appeared personally and through his attorney of record, Brian L. Radke. Rick W. Orr represented Employer/Insurer (Employer).

**ISSUES**

1. Is Claimant's current condition causally related to the 3/21/83 injury?
2. Has Claimant suffered a physical change of condition sufficient to allow him to reopen his claim?
3. Is the alleged change of condition causally related to the 3/21/83 injury?
4. If so, does the alleged change of condition entitle Claimant to any additional benefits?
5. Under SDCL 62-7-33, does Claimant have to show a substantial change in earnings?

**FACTS**

1. At the time of the hearing, Claimant was forty years old.
2. On March 21, 1983, Claimant suffered a compensable injury to his low back while working for Employer. Claimant lifted a 75 pound tote box and felt pain in his lower back going down his left leg.
3. Dr. Gail Benson, an orthopedic surgeon, treated Claimant and diagnosed a ruptured disc at L5-S1.
4. Claimant received extensive medical treatment for his back injury, including four surgeries. Employer paid for Claimant's workers' compensation benefits.
5. Claimant also received treatment from Dr. Richard Salib, an orthopedic surgeon in Minneapolis, MN.

6. On January 14, 1987, Dr. Salib opined that Claimant “has a failed back surgery syndrome following chemonucleolysis, laminotomy and posterolateral fusion.”
7. In between his surgeries, Claimant was able to work for approximately a year and a half. Claimant has not worked since 1987.
8. Claimant has been on social security disability since 1988.
9. In late 1988 and early 1989, Claimant was diagnosed with chronic pain syndrome.
10. Dr. Salib opined that Claimant was at maximum medical improvement in April 1989.
11. Claimant underwent a functional capacities evaluation (FCE) in the summer of 1989. Claimant’s activities were very limited due to his low back and leg pain. For example, Claimant can only sit for eight minutes at a time for a maximum of one to two hours a day, cannot stand in once place, can only walk for twelve minutes at a time for a maximum of two to three hours a day, can only carry fifteen pounds and cannot bend, stoop, climb or kneel.
12. On November 28, 1989, Claimant’s vocational analyst, William Tucker, opined in a report that “it is clear that [Claimant] cannot perform competitive full-time work.”
13. In April 1990, Claimant filed a Petition for Hearing with the Department. Claimant alleged he had “suffered total disability since the 21<sup>st</sup> day of September, 1987, by reason of said injury on the 21<sup>st</sup> day of March, 1983, and he will continue to suffer 100% disability for the balance of his life.”
14. On February 20, 1992, the parties entered into a Compromise Agreement. The Department approved the agreement on February 21, 1992.
15. In the agreement, Employer disputed the nature and extent of Claimant’s alleged disability and entitlement to further benefits. In exchange for payment of a lump sum, Claimant released all past, present and future claims against Employer, including his claim for permanent total disability benefits and benefits under the odd lot doctrine.
16. Claimant’s right to pursue future medical expenses was specifically left open in the agreement. Employer reserved the right to contest whether the medical expenses were reasonable, necessary or medically related to Claimant’s 1983 injury.
17. Claimant’s 1990 Petition for Hearing was dismissed with prejudice upon approval by the Department.
18. At the time Claimant entered into the agreement, he suffered from continuous low back pain and pain into in his left leg. Claimant did not suffer from other back pain. More specifically, Claimant did not experience pain above his low back or experience pain on his right side.
19. At the time Claimant entered into the agreement, he knew he was permanently and totally disabled. Claimant admitted he could not work and would not be able to work for the remainder of his life. In addition, Claimant knew that he had released Employer from any further workers’ compensation claims related to his low back, except for future medical expenses. Claimant knew that he had experienced severe pain since 1983. Claimant knew that his pain neither had improved nor would get any better. Claimant also knew that his low back pain and left leg pain might get worse.

20. Claimant did not seek any further medical treatment for his back from October 1989 through April 1996.
21. In 1996, in addition to his lower back pain, Claimant began to experience pain in his upper back, shoulders, arms and hands and experience headaches.
22. On April 17, 1996, Claimant saw Dr. Hollis Nipe for an examination related to his social security disability benefits. Dr. Nipe noted that Claimant "has got a very unusual mottled appearance in his back." Dr. Nipe questioned whether Claimant had developed a reflex sympathetic dystrophy. Dr. Nipe recommended that Claimant seek another opinion about his condition.
23. Claimant sought treatment from Dr. Benson and also Dr. Robert Ross, his family physician. Dr. Ross eventually referred Claimant to Dr. Engelbrecht, a rheumatologist in Rapid City.
24. Dr. Engelbrecht examined Claimant in September 2000 and indicated that Claimant was "probably developing myofascial pain syndrome, which is slowly evolving into a full-fledged fibromyalgia." Dr. Engelbrecht stated, "[Claimant's] area of breakdown in the back, which is due to that old injury and where he has had fusions, etc., certainly is a source of chronic severe pain that could lead to a local pain syndrome. It is not unusual for us to see these situations that evolve into a more widespread fibromyalgia."
25. Dr. Engelbrecht referred Claimant to see a rheumatologist closer to his home. Claimant began treating with Dr. Joseph Fanciullo, a rheumatologist in Sioux Falls, in August 2002. Claimant sees Dr. Fanciullo approximately once every three months.
26. In January 2001, Claimant filed a Petition to Reopen with the Department. Claimant alleged:

That since the Agreement was entered and approved by the Department of Labor and Management, Claimant's physical condition has substantially changed as follows:

- 1) Claimant's work-related condition progressed or deteriorated;
  - 2) Claimant's symptomatology worsened to the point of becoming disabling in nature;
  - 3) Claimant developed new and more serious features; and
  - 4) Claimant failed to recover within the time originally predicted.
27. On February 18, 2002, Dr. Richard Farnham, an occupational medicine physician, performed an independent medical examination (IME) of Claimant. Claimant complained to Dr. Farnham of swelling of both hands, right and left shoulder pain, low back pain radiating into his left lower extremity, muscle tightness of the left side of his upper back and headaches.
  28. Dr. Farnham, based upon his examination and medical records review, opined that Claimant's medical condition has not changed substantially since the time he entered into the agreement in 1992. More importantly, Dr. Farnham opined that Claimant's 1983 injury is not a contributing factor to his current pain complaints.
  29. After Dr. Farnham issued his IME report, Employer ceased payments for Claimant's medical expenses.

30. In March 2002, Claimant saw Dr. Robert Van Demark, an orthopedic surgeon, for pain complaints in his hands. Dr. Van Demark found that Claimant did not have reflex sympathy dystrophy. In addition, Dr. Van Demark concluded that Claimant's hand problems were not caused by myofascial pain syndrome.
31. Dr. Mark Vener, an orthopedic surgeon, saw Claimant in April 2003 for an evaluation of his left shoulder pain. Dr. Vener diagnosed Claimant with "mild impingement" and a possible cyst in his left shoulder. Dr. Vener did not express an opinion that these conditions were related to the 1983 injury.
32. Claimant has the same limitations now as identified by the FCE in 1989. The only changes now are that Claimant suffers from additional pain in his arms, upper back, shoulders, hands and headaches.
33. Other facts will be developed as necessary.

## ISSUE

### IS CLAIMANT'S CURRENT CONDITION CAUSALLY RELATED TO THE 3/21/83 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). Claimant sustained a work-related injury on March 21, 1983. "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).

Claimant's current condition consists of additional pain in his arms, upper back, shoulders and hands and headaches. Claimant "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. Based on the date of injury, Claimant must show that his employment was a contributing factor to his injury. Gilchrist v. Trail King Indus., 2000 SD 68, ¶ 7. Claimant's belief that his complaints are causally related to his injury is insufficient. "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).

Claimant saw several physicians for his pain complaints. Claimant offered opinions from these physicians in attempt to establish that his current condition is causally related to his 1983 injury. Claimant submitted the medical records by stipulation as if by affidavit. The only deposition received into evidence was that of Dr. Farnham.

Dr. Engelbrecht saw Claimant one time in September 2000 and diagnosed Claimant with probable myofascial pain syndrome, possibly evolving into fibromyalgia. On October 1, 2001, Dr. Engelbrecht wrote to Claimant's counsel and stated, "I really cannot say with certainty when the myofascial pain syndrome actually started. There may have been elements back over many years and it is just impossible to say with any certainty." In addition, Dr. Engelbrecht concluded, "I have no insight as to when his

condition may have changed significantly. The only history we had was in 1996 he began having considerably more discomfort and then, of course, we were seeing him with the myofascial pain picture.”

Nearly three years later, after seeing Claimant for only one examination, Dr. Engelbrecht responded to several questions posed by Claimant’s counsel. In letters dated June 10, 2003, and June 30, 2003, Dr. Engelbrecht concluded that “the work related back injury that [Claimant] suffered was a contributing cause to the development of fibromyalgia.” Yet, when Dr. Engelbrecht saw Claimant in 2000, he did not specifically diagnose fibromyalgia. Dr. Engelbrecht diagnosed Claimant as “probably developing myofascial pain syndrome.” Dr. Engelbrecht acknowledge that Dr. Fanciullo was addressing the possibility of Claimant having fibromyalgia. Dr. Engelbrecht stated, “I would have to defer to Dr. Fanciullo in regard to the specific question as to whether or not he would meet classification criteria for fibromyalgia at the present time.” (emphasis added).

Dr. Fanciullo is one of Claimant’s main treating physicians. When Dr. Fanciullo first saw Claimant on August 20, 2002, he diagnosed Claimant with “[p]robable fibromyalgia.” During this initial evaluation, Claimant inquired into the relationship of his current complaints and his 1983 injury. Dr. Fanciullo stated in his medical record:

The patient and his wife had multiple questions, as to whether or not this was work related or at least caused by his injury. I have advised him that first, with respect to fibromyalgia, I am not even 100% sure [of] the diagnosis at this point and even if I were sure we do not know what causes fibromyalgia in general, so it is impossible for me to relate fibromyalgia to a specific injury.

(emphasis added). Dr. Fanciullo continues to treat for his current pain complaints. Throughout the course of his treatment of Claimant, Dr. Fanciullo has not changed his opinions. More specifically, Dr. Fanciullo did not opine that Claimant’s current condition is causally related to the 1983 work injury.

Claimant also relied upon Dr. Ross’ medical records and statements contained therein. Dr. Ross opined that Claimant’s medical condition “has not changed since 1985. He continues to have chronic pain, which is partially controlled with medications. The degree of his disability seems to be the same since 1985.” Dr. Ross later opined in a letter dated May 9, 2003, that Claimant’s 1983 back injury was a contributing factor to the myofascial pain syndrome and fibromyalgia. Dr. Ross’ opinions are entitled to little weight. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). “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). Dr. Fanciullo, the rheumatologist who has treated Claimant the most, opined that it is impossible to relate fibromyalgia to a specific injury. Dr. Ross’ opinions are contrary to those expressed by Dr. Fanciullo and are rejected.

Dr. Farnham conducted an IME on February 18, 2002. Dr. Farnham is a board certified forensic examiner, board certified in forensic medicine and a board certified disability analyst. Prior to the IME, Dr. Farnham reviewed Claimant’s medical records and various radiological studies. Dr. Farnham took a history from Claimant and

performed a physical examination. Prior to his deposition testimony, Dr. Farnham reviewed records and reports from Dr. Fanciullo, Dr. Ross and Dr. Engelbrecht.

Dr. Farnham opined the 1983 injury is not a contributing cause of Claimant's current complaints. Dr. Farnham opined Claimant did not have reflex sympathetic dystrophy relative to his upper extremities. Dr. Farnham acknowledged that Dr. Van Demark's evaluation also indicated that Claimant did not have RSD. Dr. Farnham opined Claimant did not have fibromyalgia or myofascial pain syndrome.

Dr. Farnham's opinions have sufficient foundation and are reliable, credible and persuasive. Dr. Farnham's opinions demonstrate that Claimant's 1983 injury is not a contributing cause of his current condition. Claimant failed to bring forth specific medical evidence to support his burden of proving that his current condition is causally related to his 1983 injury. When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger, 565 N.W.2d at 85. Due to the outcome of this issue, there is no need to address the remaining issues. Claimant's Petition to Reopen must be dismissed with prejudice.

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 30<sup>th</sup> day of April, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp  
Administrative Law Judge