

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JASON PENDEGRAFT,

HF No. 71, 2000/01

Claimant,

DECISION

vs.

HY VEE, INC.,

Employer,

and

CGU HAWKEYE-SECURITY DES MOINES,

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 June 11, 2003, in Sioux Falls, South Dakota. Claimant appeared personally and through his attorney of record, Steven K. Rabuck. Comet H. Haraldson represented Employer/Insurer.

ISSUES

1. Causation.
2. Medical expenses.
3. TTD.
4. IME fee.

FACTS

1. At the time of the hearing, Claimant was twenty-five years old.
2. Claimant graduated from high school in 1997. During high school, Claimant worked for Employer and Best Buy. After he graduated, Claimant worked for Cellular One.
3. Claimant started working again for Employer on May 5, 1998. Claimant worked as a "specials supervisor." Claimant made sure that items on sale during the week were fully stocked.
4. On May 30, 1998, Claimant injured his back. While Claimant was unloading boxes of potato chips off pallets, some bundles of sugar fell off an adjacent stack. One bundle of sugar, weighing approximately twenty-five pounds, hit Claimant in the chest and Claimant fell backwards, hitting his low back on a metal cart.
5. Claimant's back was sore after the incident and he had a bruise on his low back.
6. Claimant properly reported the incident to his supervisor on June 2, 1998.
7. Claimant sought medical treatment from Dr. James Oakland, his family physician, on June 3, 1998. Dr. Oakland found upon examination, "[Claimant]

- has a contusion at the L2-L3 area. X-ray is negative for fracture. Neuro and vascular are intact. Straight leg raise is negative. Heel walk and toe walk all intact.” Dr. Oakland diagnosed a contusion of the lumbar spine.
8. Claimant returned to the clinic on June 10, 1998. Claimant was seen by Dr. Timothy Donelan, who noted that no contusion remained. However, Dr. Donelan referred Claimant for an orthopedic examination due to further x-ray results showing “a fracture of the L5 facet” and “mild spondylolysis at L5 as well.”
 9. Claimant saw Dr. Gail Benson, an orthopedic surgeon, on June 11, 1998. Dr. Benson reviewed x-rays, which showed “a wedge-shaped L5 vertebra with grade I spondylolisthesis at L5-S1.” Dr. Benson ordered an MRI.
 10. The MRI, taken on June 15, 1998, showed “Grade I spondylolisthesis [at L5-S1] secondary to bilateral L5 spondylolysis.” In addition, the MRI indicated “narrowing and desiccation of the L5-S1 disc with a small central disc protrusion.”
 11. On June 17, 1998, Claimant went to the emergency room at McKennan Hospital “complaining of severe bilateral low back pain with radiation down both legs along with some numbness in both legs.” Dr. Daniel Kangley noted that Claimant was at home “on the couch, getting up from the couch when he felt a pop in his low back.” Dr. Kangley reviewed Claimant’s history and the June 15th MRI and diagnosed Claimant with severe back pain with radiculopathy.
 12. Claimant was admitted to the hospital for conservative care and was discharged on June 20, 1998.
 13. On July 15, 1998, Dr. Benson released Claimant to light duty work for four hours per shift, four to five days per week.
 14. Claimant returned to work for Employer. Claimant testified he attempted to work, but any activity caused back pain.
 15. On July 29, 1998, Dr. Benson stated, “[Claimant] is about 50% improved. He is moving much better. He is getting some actual lordosis back in his back. Negative straight leg raising tests. No neurologic deficits.” Dr. Benson was “very pleased” with Claimant’s progress and released Claimant to “[w]ork four hours a day for two weeks and then full-time light duty.” Dr. Benson concluded in his note, “I will look at him again in about a month.”
 16. Claimant did not return to see Dr. Benson for treatment for his back until May 19, 2000. In addition, Claimant did not receive medical treatment for his back from any other provider from August 1998 until he saw Dr. Benson in May 2000.
 17. As per Dr. Benson’s orders, Claimant was released to return to full-time light duty work on August 12, 1998. But, on August 11, 1998, Claimant terminated his employment with Employer. Claimant testified he quit because his back “couldn’t take the work anymore.” However, Claimant advised Employer on his Notice of Resignation that his reason for quitting was that he “found other job.” On Employer’s Employee Termination Report, Claimant’s reason for separation was listed as “other employment.” Claimant did not mention his back condition as a reason for quitting on his Notice of Resignation or on the Termination Report.
 18. From August 1998 through May 2000, Claimant worked for various employers such as Unicef, O’Hara Masonry, an electronics firm and Muth Electric.
 19. At O’Hara Masonry, Claimant worked as a “hod carrier” and performed general masonry work. Claimant loaded and unloaded bricks and carried bricks to the

- bricklayers. While performing this job, Claimant would carry or lift weights of fifty to sixty pounds.
20. Claimant quit working for O'Hara Masonry because his back "started getting sore from doing the activity." In fact, after Claimant performed this job for a while, he experienced sharp pains in his back going down into his right leg.
 21. Claimant worked for an electronics firm for several months performing data entry. Claimant quit working for this employer because "there [was] a lot of like twisting . . . I know the cause was because my back hurt, but I don't know if it was because I was sitting too long or if I was twisting. I'm not sure. I just know my back was - - was starting to give me troubles."
 22. Claimant then worked for Muth Electric as an "electric apprentice." Claimant performed electrical work and was required to lift various boxes of equipment and spools of wire weighing up to fifty pounds.
 23. Claimant quit working for Muth Electric because of his back condition.
 24. In May 2000 Claimant attended a ten week course at Southeast Area Votech to become a heavy equipment operator. He later worked at Myrl & Roy's Paving for three months as a heavy equipment operator.
 25. During August 1998 and May 2000, Claimant maintained his physical activities including playing volleyball, bowling, weightlifting and working as personal trainer. In February 1999, Claimant severely sprained his ankle while playing volleyball.
 26. Claimant testified that between August 1998 and May 2000 he continued to experience back pain. He stated:

Well, I would have better days and not. I got to the point where I started getting used to the pain and, you know, do other activities. As far as, you know, working and starting back to my job field, what I know best, you know, some days it would be a little sorer than others. I would feel like - - because of my back pain, I would be maybe bending over more, whatever, and, you know, getting - - getting a sore back.

But basically, it was sharpness in the back, numbness down the right leg, getting up to 2000 where it was getting really bad. There was swelling again. Throughout the two years, there was a - - there was three or four times it would swell, and I would have no idea where the swelling would come from. The days before I didn't have any vigorous activity, did not lift. It just started swelling.

27. Claimant testified that he did not think that his back completely healed after the incident while working for Employer.
28. Claimant returned to see Dr Benson on May 19, 2000, with persistent back pain.
29. Despite the assertion that he suffered from continuous back pain, Claimant testified he did not return to see Dr. Benson until May 2000 because "[Dr. Benson] said that there was nothing I could do, you know, before the two years basically because of my current - - he wanted to wait the two years because he didn't - - he wanted to play it conservatively." Dr. Benson's medical records from 1998 do not contain any such treatment recommendations. As previously stated, the last time Claimant saw Dr. Benson in July 1998, Dr. Benson stated "I will look at him again in about a month."

30. Between the summer of 1998 and May 2000, Claimant treated with Dr. Oakland on twenty-four occasions. After June 1998, Dr. Oakland's medical records do not contain references to Claimant's back pain or that Claimant sought medical treatment for back pain.
31. On May 19, 2000, Dr. Benson ordered an MRI, which showed "[l]arge central and right paracentral disc extrusion L4-5, worsened in the interim with distortion of the thecal sac and possible irritation of the right L5 root. Stable Grade I anterior spondylolisthesis L5-S1 with a broad central disc herniation. Bilateral foraminal stenosis is also seen which is largely unchanged."
32. Claimant saw Dr. Benson on June 6, 2000. Dr. Benson noted that Claimant "has a large central and right paracentral disc extrusion at L4-5. It has worsened since his last MRI scan." Dr. Benson recommended Claimant undergo a microdiscectomy.
33. Claimant continued to experience back pain and returned to see Dr. Benson on September 20, 2000, with "increasing pain in his right hip and leg." Dr. Benson once again advised Claimant to undergo a microdiscectomy. Dr. Benson concluded in his medical note, "[i]t is my impression that this is the result of his injury at Hy-Vee when he was pinned against a cart by a falling bag of sugar."
34. Dr. Benson performed the microdiscectomy at L4-5 on September 22, 2000.
35. Dr. Benson took Claimant off work for three months. On December 28, 2000, Dr. Benson returned Claimant to full-time light duty work until March 8, 2001.
36. Claimant returned to see Dr. Benson on May 9, 2002. Dr. Benson stated Claimant "is now over a year and a half since his microdiscectomy at L4-5 for a large disc herniation. He had some symptoms after surgery but about 50% to 75% of his symptoms went away. Over the last three to four months his symptoms have been gradually returning to his low back, right hip and leg down to his toes. His pain is constant. At times rather debilitating."
37. Dr. Benson ordered another MRI, which showed no recurrent disc herniation. Dr. Benson concluded that Claimant's "persistent sciatica and back pain misery are related to his spondylolisthesis at L5-S1." Dr. Benson recommended a Gill laminectomy and fusion of the lumbosacral spine.
38. Claimant has not undergone any further medical treatment for his low back.
39. Claimant currently lives in California and is self-employed as an actor.
40. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT'S WORK-RELATED INJURY ON MAY 30, 1998, IS A MAJOR CONTRIBUTING CAUSE OF HIS CURRENT CONDITION AND NEED FOR TREATMENT?

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 "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. SDCL 62-1-1 states, in part:

(7) "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

- (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]

"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).

Dr. Benson opined in his medical note from September 20, 2000, that Claimant's herniated disc and need for surgery was the result "of his injury at Hy-Vee when he was pinned against a cart by a falling bag of sugar." In his affidavit, Dr. Benson opined that Claimant's work injury was a major contributing cause of his current condition.

Employer presented Dr. Michael Smith's deposition testimony. Dr. Smith is a board certified orthopedic surgeon whose practice is restricted to those patients with cervical spine abnormalities. However, Dr. Smith explained, he evaluates patients "with all facets of lumbar, cervical and thoracic disease."

Dr. Smith performed an independent medical examination (IME) of Claimant on May 23, 2002. Dr. Smith reviewed Claimant's medical records and the first report of injury dated May 30, 1998. Dr. Smith also reviewed the June 1998 MRI, which showed that Claimant had degenerative changes at L4-5 and that he had preexisting lumbar spondylolisthesis at L5-S1. Dr. Smith explained that spondylolisthesis is "a defect in the lower portion of the back that results in the one vertebral body shifting slightly in front of another typically acquired early on in childhood." Dr. Smith opined that spondylolisthesis is not a work-related condition, but is a preexisting condition.

Dr. Smith noted the 1998 MRI also showed Claimant had a small central disc protrusion. Dr. Smith explained the significance:

Well, it basically suggests that [Claimant] had some preexisting degenerative disc disease which sometimes on MRI scans are read as protrusions. Protrusions just mean bulging of the disc. He had degenerative disc disease with narrowing of his disc spaces. And it's absolutely typical to have what are called protrusions as a result of these degenerative changes.

In May 2000, Claimant's MRI showed that he had a herniated disc. Dr. Smith described the difference between a bulging disc and a herniated disc:

Well, a bulging disc is felt to be either consequences of degenerative disc changes, sometimes the annulus which is like the rubber tire casing of the disc just bulges backwards.

An extruded disc is where there's actual movement of disc material through a crack in the casing of the disc into the spinal canal. And that's why I

indicated there appeared to be a marked change between the June '98 and the 2000 MRI.

Dr. Smith opined to a medical degree of probability that Claimant's work injury in May 1998 was not a major contributing cause of the herniated disc diagnosed in June 2000. Dr. Smith testified:

He then went on, you know, down the road a couple years later to have a large disc herniation with severe radiculopathy. And it is unlikely that based on the objective evidence that existed back in May and June of '98 that that set of events would have led him to, in the natural course of things, to develop a disc herniation. It's for that reason that something unrelated is most responsible for his disc herniation.

Dr. Smith opined there was nothing on the 1998 MRI to suggest or prove that the May 1998 incident caused a herniated disc at that time. Dr. Smith opined Claimant suffered from a herniated disc between August 1998 and May 2000, when he returned to see Dr. Benson.

Dr. Smith understood that Claimant quit working for Employer in August 1998 and then performed "heavy manual labor thereafter." Dr. Smith explained the significance of Claimant's work history in relation to his back condition, "[w]ell it's significant in the sense that if he had had a substantial problem with his back as of May 1998 he would not have been capable of performing those fairly heavy labor activities in the ensuing two years." Claimant did not seek medical treatment for his back from August 1998 through June 2000. Dr. Smith noted this demonstrated that Claimant was well enough and strong enough to perform heavy manual labor after August 1998.

Dr. Smith opined that Claimant's May 1998 injury was a "temporary condition." He explained, "[Claimant] certainly had a period of time after this contusion that he seemed to have increased back and leg symptoms. But those appear, based on the information I have, to have resolved." Dr. Smith's opinions were supported by the fact that Claimant did not seek medical treatment for his back for over eighteen months and that he was able to perform heavy labor during this period of time. Dr. Smith opined, "[i]t is clinically inconsistent that a large disc herniation would have allowed him to be as active in the physical arena as he had been for the ensuing two years." Further, Claimant did not complain of any back pain when he did seek medical treatment for non-work related conditions.

As compared to Dr. Smith's opinions, Dr. Benson's opinions are not persuasive. Dr. Benson did not have a complete history of Claimant's physical activities from August 1998 through May 2000. Dr. Benson was provided a sketchy summary of Claimant's work history and duties. In addition, Dr. Benson did not review the medical records from Dr. Oakland. Dr. Benson was not aware Claimant treated with Dr. Oakland for various ailments and never complained of back problems, despite his various physical activities. 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). In comparison, Dr. Smith had the opportunity to review fully Claimant's medical and work history, in particular the time during 1998 and

2000, and had a good understanding of this information. Dr. Smith's opinions are well-founded and are more persuasive. The medical evidence established that Claimant's work injury in May 1998 was not a major contributing cause of his herniated disc diagnosed in June 2000.

Based on the foregoing analysis, Claimant failed to establish by a preponderance of the medical evidence that his work-related injury in May 1998 is a major contributing cause of his current condition. Claimant's request for payment of certain medical expenses and TTD benefits is denied. Claimant's Petition for Hearing must be dismissed, with prejudice.

Finally, Employer raised the issue of whether Claimant should reimburse Employer for a \$650 cancellation fee. Claimant was scheduled to attend the IME on July 5, 2001. Claimant missed this appointment due to "stomach problems." Claimant advised his attorney his attorney that he was unable to attend the IME appointment due to his illness. Employer was charged a \$650 cancellation fee. Claimant eventually submitted to an IME in May 2002. Claimant will not be required to reimburse Employer for the cancellation fee. Claimant had a valid reason for failing to attend the IME. Employer's request for Claimant to pay the \$650 cancellation fee is denied.

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 8th day of January, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge