

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD R. BISHOP and U.S. POSTAL SERVICE,
POST OFFICE, Louisville, KY

*Docket No. 98-1060; Submitted on the Record;
Issued March 20, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant met his burden of proof in establishing that he sustained a recurrence of disability, due to his August 10, 1982 employment injury, beginning January 1, 1997.

The Office of Workers' Compensation Programs accepted appellant's claim for a herniated nucleus pulposus at L5-S1 and anxiety and depression. Appellant underwent surgery consisting of a lumbar laminectomy at L5 and discectomy at L5-S1 on August 30, 1982. Appellant went on disability retirement on June 19, 1986 and on May 29, 1993 returned to work for three hours a day as a modified postal clerk. He received compensation based on his loss of wage-earning capacity.

On March 14, 1997 appellant filed a claim for a recurrence of disability, Form CA-2a, alleging that on January 1, 1997 he sustained a recurrence of disability of the July 30, 1982 employment injury. Appellant stopped working on December 31, 1996 and has not worked since that date. He stated that he had severe back, leg and hip pain and it was in same area "as before."

By letter dated June 23, 1997, the Office informed appellant that more evidence was necessary to establish his claim including a narrative report from his treating physician explaining the causal relationship between his current condition and herniated disc at L5-S1.

In a statement dated July 21, 1997, appellant stated that on January 1, 1997 he bent over to put a hair dryer in the drawer when a sharp pain hit him in his lower right side of his back traveling across his lower back. He stated that a few minutes later when he was in the bathroom and turned to go out the pain hit him in the left lower back as if he "was stabbed" there and knocked the breath out of him.

Appellant submitted medical reports to support his claim. In a letter dated July 30, 1997, Dr. Bruce A. Snider, a Board-certified psychiatrist and neurologist, stated that appellant was being treated for anxiety and depression related to his back pain worsening of January 1997. In a letter dated July 16, 1997, appellant's treating physician, Dr. Luis F. Pagani, a Board-certified psychiatrist, neurologist and emergency medical specialist, opined that appellant's current condition was an L2-3 disc herniation and his previous injury, a herniated disc at L5-S1, made him more prone to other lumbar problems. In a report dated July 25, 1997, Dr. Gary A. Shearer, a Board-certified family practitioner, stated that appellant was having exacerbation of his back and pain with radiculopathy. He stated that appellant's present exacerbation of his back pain in January 1997 was directly related to his 1982 employment injury and that appellant was totally disabled from January 1 through May 12, 1997. Dr. Shearer recommended that appellant work only two hours a day.

By decision dated August 7, 1997, the Office denied the claim, stating that the evidence of record failed to establish that the claimed recurrence and the L2-3 medical condition were causally related to the approved injury.

By letter dated August 21, 1997, appellant requested a written review of the record and submitted additional medical evidence. In a report dated September 8, 1997, Dr. Snider stated that appellant's left leg numbness and increased low back pain "occurred spontaneously related to a nonworking incident" in January 1997. He stated that appellant's symptoms were documented by a magnetic resonance imaging (MRI) scan and electromyogram (EMG) studies at the time. Further, Dr. Snider stated that medical research and his clinical experience "supports increased risk to spinal damage due to prior spinal injury" as in appellant's case. He opined that there was "most likely" a causal relationship between appellant's reinjury of January 1997 and the July 1982 employment injury.

In a report dated September 11, 1997, Dr. Shearer stated:

"[Appellant's] recent exacerbation of lumbosacral pain is directly related to his 1982 back injury. It is a well-known medical fact that given a disc injury, at any level, that this contributes to problems developing at the disc level above and below the injured disc.

"Therefore any problems at any level of [appellant's] lumbosacral area [are] directly related to the injury of early 1980's. Please note that his MRI of the lumbar area shows worsening of his back condition."

In a report dated September 13, 1997, Dr. Pagani noted that on January 1, 1997 appellant was at home, that he was walking and turned left to go into the bathroom when he had the sudden onset of pain in the back with radiation to the left leg. He stated that review of the MRI scan revealed a previous problem at L5-S1 in addition to a new problem at the level of L2-3 in the form of a herniated disc, central and left sided. Dr. Pagani stated:

"Since he did not have any injury or significant event at home other than normal walking, it is my opinion that there was an aggravation of his back condition and that is related to predispositions in patients who have had previous disc

degeneration and back surgery to have additional herniations at other levels of the lumbar spine as in his case. It appears that he was totally disabled between January 1 and May 14 or May 15, 1997 and as far as I know he has now returned to work and has probably returned to baseline.”

By decision dated December 2, 1997, the Office hearing representative affirmed the Office’s August 8, 1997 decision.

The Board finds that the case is not in posture for decision.

An individual who claims a recurrence of disability, due to an accepted employment-related injury, has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.¹ When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty.² As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.³ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁴

It is an accepted principle of workers’ compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee’s own intentional conduct.⁵ In discussing how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment, Professor Larson states:

“When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of ‘direct and natural results’ and of claimant’s own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the

¹ *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

² *George DePasquale*, 39 ECAB 295, 304 (1987); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

³ *Carlos A. Marrero*, 50 ECAB ____ (Docket No. 96-2186, issued October 19, 1998).

⁴ *See Nicolea Brusco*, 33 ECAB 1138 (1982).

⁵ *Larson, The Law of Workers’ Compensation* § 13.00; *Charlotte Garrett Smith*, 47 ECAB 562, 564 (1996).

original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.”⁶

Thus, it is accepted that once the work-connected character of any condition is established, the “subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.”⁷

In the present case, in his September 13, 1997 report, Dr. Pagani opined that appellant had an aggravation of his back condition on January 1, 1997, which caused his L2-3 disc herniation. He stated that the L2-3 disc herniation resulted from the work-related L5-S1 disc herniation and related surgery, which had predisposed appellant to further disc injury. In his September 11, 1997 report, Dr. Shearer opined that appellant’s recent exacerbation was directly related to his 1982 back injury because his prior disc injury contributed to his developing a problem at another disc level. This was consistent with his July 25, 1997 report in which he opined that the January 1997 exacerbation of appellant’s back was directly related to his 1982 employment injury. Dr. Pagani’s and Dr. Shearer’s reports suggest that the incident, which occurred on January 1, 1997, was a natural consequence of the August 2, 1982 employment injury but are not sufficiently rationalized to establish that appellant’s current condition is work related. The Office should, therefore, refer appellant with the statement of accepted facts and the medical records for an opinion by an appropriate physician to address whether the January 1, 1997 incident of appellant of either bending to put a hair dryer in a drawer or turning to leave the bathroom or both, which resulted in an L2-3 herniated disc was the result of a consequential injury or a new nonwork-related traumatic injury. The physician should address whether the January 1, 1997 incidents were considered normal use of appellant’s back and whether the new disc herniation was the natural consequence of the L5-S1 disc herniation. Upon such further development as the Office deems necessary, the Office shall issue a *de novo* decision.

⁶ *Id.* at § 13.11.

⁷ *Id.* at 13.11(a); *see also* *Stuart K. Stanton*, 40 ECAB 859 (1989).

The decisions of the Office of Workers' Compensation Programs dated December 2 and August 7, 1997 are hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, D.C.
March 20, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member