

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MONA R. WIEDENBECK and DEPARTMENT OF VETERANS AFFAIRS,
LOUGARIS MEDICAL CENTER, Reno, NV

*Docket No. 99-153; Submitted on the Record;
Issued June 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that she sustained a recurrence of disability commencing August 15, 1997, causally related to her November 19, 1987 accepted employment injuries.

The Office of Workers' Compensation Programs accepted that on November 19, 1987 appellant, then a 34-year-old licensed practical nurse, sustained lumbar strain, a disc bulge at L2-3 and a herniated nucleus pulposus at L4-5 while trying to contain a combative patient. She did not return to work and on March 21, 1988 she was placed on the periodic rolls for receipt of wage-loss compensation. On May 31, 1988 appellant was referred for vocational rehabilitation.

In 1989 appellant accepted a job as a warranty clerk and cashier at an auto care center until it was bought out in 1990. On March 19, 1990 she accepted a position as a secretary but was laid off in October 1990. Thereafter appellant worked as an office manager/bookkeeper until September 1993. She continued to receive compensation for loss of wage-earning capacity.

In an August 15, 1997 emergency room report, Dr. Donald L. McGee, a Board-certified emergency medicine specialist, noted that appellant presented him with complaints of back pain. He noted appellant's history of disc derangement dating from 1987, but that: "Last night [appellant] had the sudden onset of pain when she was doing some relatively minor lifting." He diagnosed "Acute exacerbation of chronic back pain," but did not note any related period of disability. The report, however, indicates that appellant was unemployed at the time of the lifting incident.

By report dated September 29, 1997, Dr. Patrick S. Herz, a Board-certified orthopedic surgeon and appellant's treating physician, noted that her condition related to the November 19, 1987 injury "never did fully clear up, but indicated: "Seven weeks ago she aggravated her back pain with a lifting injury." Dr. Herz diagnosed "Subacute back strain syndrome."

On January 21, 1998 the Office advised appellant that the new event in August 1997 was considered to be a new injury and therefore broke the chain of causation, such that compensation for a recurrence of disability was not payable.

By report dated February 8, 1998, Dr. Herz stated: “[Appellant’s] present condition is secondary to her prior industrial injury. There is no new injury to my knowledge that explains her ongoing symptoms and she continues to suffer from aggravation of her old injury.”

On February 17, 1998 appellant filed a claim for recurrence of disability commencing August 15, 1997, causally related to her November 19, 1987 injuries. She indicated that her recurrence was actually an aggravation and described its circumstances as follows: “I have chronic degenerative disc disease caused from [the] original injury. Over the years my back has weakened. All I did was put something in the trunk of my car. I went to close the trunk and could not move.”

By decision dated February 17, 1998, the Office rejected appellant’s claim for recurrence of disability finding that the evidence of record was not sufficient to establish that her current condition was caused by the original injury without intervening cause. The Office found that the evidence failed to establish the relationship between the original injury and the current medical condition because it considered the August 1997 incident, when she was putting something in the trunk of her car, which preceding the aggravation or worsening of her condition, to be a new injury, despite her physician’s and her own opinions.

By letter dated July 23, 1998, appellant, through her representative, requested reconsideration of the February 17, 1998 decision.

In support appellant submitted a February 8, 1998 letter from Dr. Herz which stated:

“[Appellant] was seen by me on [September 29, 1997] and as well [January 5, 1998]. Her present condition is secondary to her prior industrial injury. There is no new injury to my knowledge that explains [appellant’s] ongoing symptoms and she continues to suffer from aggravation of her old injury. I expect her to go through ‘ups and downs’ in the future with her condition and flare-ups would not be uncommon.”

In an April 16, 1998 report, Dr. Herz stated:

“I have reviewed x-ray findings as well as MRI [magnetic resonance imaging scans]. [Appellant’s] new films of office visit [September 29, 1997] in addition to disc space narrowing at L5-S1 do show mild motion segment instability at L3-4. This was not present previously. She did have disc bulging at L3-4 on the MRI [scan] in February 1988 but no instability that was known. There [is] little else to explain [appellant’s] ongoing difficulty at this time other than the industrial injury of 1988. It is not opinion [sic] that the lifting injury she described in September 1997 was enough to have resulted in all of her problems at this time and the motion segment instability that I see. I think this has gradually developed over a period of years secondary to the disc pathology noted in 1988 on the MRI scan.

[Appellant's] history is that her back pain never did fully clear up and recover, and she has been symptomatic ever since 1988. I therefore feel that her present condition is the result of her 1988 industrial injury.”

By letter dated July 1, 1998, Dr. Herz stated:

“It remains my opinion that [appellant's] present complaints and condition is secondary to industrial injuries that have occurred in the past. Specifically, I do not feel that the lifting episode described from January 1998 are [sic] the source of her ongoing problems. I stated clearly in the record that [appellant] never did fully recover from her prior industrial problem and has remained symptomatic ever since. The simple lifting injury described could not have caused motion segment instability and would not explain the chronicity of her symptoms. I would expect a simple lifting injury to clear within a few weeks to a month of the time of the injury and this has not been the case in this incident. I feel this is a reoccurrence [sic] and a continuation of her industrial disorder and should be considered under workmen's [sic] compensation rules at the present time.”

By decision dated September 1, 1998, the Office denied modification of its February 17, 1998 decision finding that the evidence submitted in support of the request was insufficient to warrant modification. The Office found that the August 15, 1997 lifting incident constituted an independent intervening, superceding cause which interrupted the chain of causation.

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

An individual who claims a recurrence of a medical condition or disability due to an accepted employment 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. 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 affecting or disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹ Where no such rationale is present, medical evidence is of diminished probative value.² Causal relationship is a medical issue and can be established only by medical evidence.³

Further, the Office defines a recurrence as “a spontaneous return or increase of disability due to a previous injury or occupational disease without intervening cause.”

It is also 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

¹ *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a)(1998).

² *Michael Stockert*, 39 ECAB 1186 (1988).

³ *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

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. As noted by Larson in his treatise on workers' compensation once the work-connected character of any injury has been 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 and so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances.⁴

In the instant case, however, it is not clear that appellant experienced an intervening injury on August 15, 1997 when she was lifting something into the trunk of her car and experienced back pain. As a result, a recurrence of total disability commencing on that date, causally related to her accepted 1987 back injuries may have occurred.

The Board notes that the contemporaneous medical evidence of record diagnosed "acute exacerbation of chronic back pain," causally related to the August 15, 1997 lifting incident, but identified no disability therefrom. The later medical evidence of record acknowledged that appellant had experienced an incident of back pain in the fall of 1997 after lifting. However, Dr. Herz's reports after his initial September 29, 1997 examination, during which he diagnosed "subacute back strain syndrome," attribute appellant's condition to her original employment injuries and not to the August 1997 lifting incident. In fact, he specifically states that he felt the "September" 1997 lifting incident was not enough to have resulted in all of appellant's present problems including motion segment instability. Dr. Herz opined that the lifting episode in 1997 was not the source of appellant's ongoing problems. He further opined that appellant's newly diagnosed L3-4 motion segment instability "developed over a period of years secondary to the disc pathology noted in 1988," that the lifting incident described could not have caused motion segment instability and would not explain the chronicity of appellant's symptoms. Dr. Herz opined that any lifting incident injury in 1997 would have cleared within a few weeks, but that appellant's condition in July 1998 was a recurrence and a continuation of her originally accepted employment injuries.

Proceedings under the Federal Employees' Compensation Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁵ This holds true in recurrence claims as well as in initial traumatic and occupational claims. In the instant case, although none of appellant's treating physician's reports contain rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that she sustained a recurrence of total disability at some point subsequent to August 15, 1997, or experienced disabling residuals which required her to leave her federal employment, causally related to her November 19, 1987 injuries, they constitute substantial, uncontradicted evidence in support of appellant's claim and raise an uncontroverted inference of causal relationship between her allegedly disabling

⁴ See A. Larson, *The Law of Workers' Compensation* § 13.11(a)(1993).

⁵ *William J. Cantrell*, 34 ECAB 1223 (1983).

complaints and periods of disability and her original traumatic injuries, that is sufficient to require further development of the case record by the Office.⁶ Additionally, there is no opposing medical evidence in the record.

The case, therefore, will be remanded to the Office for a creation of a statement of accepted facts and the composition of specific questions to be resolved, to be followed by a referral to an appropriate specialist for a rationalized medical opinion as to whether appellant experienced a recurrence of disability at some point after the intervening August 15, 1997 lifting injury, causally related to her 1987 accepted employment injuries.

Consequently, the decisions of the Office of Workers' Compensation Programs dated September 1 and February 17, 1998 are hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.
June 16, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁶ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); see also *Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).