U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY T. McNATT and DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, Utah

Docket No. 97-804; Submitted on the Record;
Issued April 14, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained a recurrence of disability on or after July 7, 1995[1] causally related to his accepted November 6, 1990 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On November 6, 1990 appellant, then a 43-year-old industrial engineer, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that his acute back strain of lower lumbar area was due to twisting his back when he slipped while going up the stairs. The Office accepted that appellant's claim for lumbar strain, pain right shoulder/arm and herniated nucleus pulposus (HNP) at C5-6, with C5-6 and C6-7 diskectomy/fusion was causally related to his November 6, 1990 employment injury.

On June 3, 1991 appellant filed a recurrence of disability commencing December 5, 1990 causally related to his November 6, 1990 employment injury, which the Office accepted on March 2, 1992 and amended to include pain, right shoulder and arm. The Office also accepted his claim for HNP at C5-6, with C5-6 and C6-7 diskectomy/fusion.

The Office authorized surgery to repair a rotator cuff tear in appellant's right shoulder which occurred June 8, 1994.

Appellant was awarded a schedule award for an eight percent loss of use of his right arm on November 12, 1994.

On August 29, 1995 appellant filed a recurrence of disability due to his November 6, 1990 employment injury commencing July 3, 1995.

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[1] On his recurrence form appellant noted the date of recurrence as "March 7, 1995" and "July 3, 1995" in response to question 20. It appears that appellant did not follow the instructions in question 12 to put the month, day and year and instead put the day, month and year.

In a letter dated November 22, 1995, the Office acknowledged appellant's claim for a recurrence and noted that appellant reported a reinjury on July 3, 1995. The Office advised appellant that if this injury took place at work, it would represent a new injury and he should file a new injury claim.

In a report dated December 12, 1995, Dr. Marlan J. Haslam, an attending Board-certified orthopedic surgeon, noted the history of appellant's employment injury on February 11, 1991, that in February 1994 he diagnosed a rotator cuff tear, right shoulder and performed surgery on June 8, 1994. Dr. Haslam noted that appellant had been doing well until "he reached behind the seat of his car in July of 1995, and experienced pain in the right shoulder with snapping sensation, increased numbness and tingling into the right upper extremity." Dr. Haslam also noted that his repair of appellant's torn rotator cuff "probably broke loose with the activity of reaching over the back of the seat." Dr. Haslam diagnosed a torn rotator cuff due to appellant reaching over into the back of the car and that the tear "had torn loose at the previous suture site."

In a medical note dated March 5, 1996, Dr. Haslam opined that the surgery performed in November 1995 was directly linked to appellant's employment injury of February 11, 1991. In support of his opinion, Dr. Haslam noted that the initial injury required surgery and that the second surgery would not have been necessary "had there not been an initial injury and initial surgery."

By decision dated February 21, 1996, the Office denied appellant's claim for a recurrence of disability. In denying the claim, the Office noted that appellant reinjured his right shoulder while attempting to lift an empty propane tank out of the back seat of his truck while off work and that this was a new injury. The Office also noted that Dr. Haslam gave a different date for the date of the recurrence of disability.

The Office denied appellant's request for modification of the prior decision on March 29, 1996. In the attached memorandum, the Office found Dr. Haslam's opinion insufficient as he failed to consider the intervening event of appellant lifting an empty propane can in arriving at his conclusion.

On May 3, 1996 the Office denied appellant's request for an oral hearing.

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

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.[2]

It is an accepted principle of workers' compensation law, and the Board has so recognized, 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

[2] *William J. Cantrell*, 34 ECAB 1223 (1983).

employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.[3]

In discussing how far the range of compensable consequences is carried once the primary injury is causally connected with the employment, Professor Larson notes in his treatise:

> "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 original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury."[4]

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.[5] If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury.[6] If further complication flows from the compensable injury, *i.e.*, so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable under the circumstances, the condition is compensable.[7]

The issue, therefore, is whether appellant's rotator cuff tear which occurred on July 7, 1995 and was surgically repaired in November 1995, is compensable as a "direct and natural" result of his accepted February 11, 1991 employment injury and was not due to an intervening cause.

In the present case, the Office accepted that appellant sustained lumbar strain, pain in his right shoulder and arm, HNP at C5-6 with C5-6 and C6-7 diskectomy fusion and June 8, 1994 a rotator cuff tear repair. In a report dated December 12, 1995, Dr. Haslam noted that appellant had been doing well until "he reached behind the seat of his car in July of 1995 and experienced pain in the right shoulder with snapping sensation, increased numbness and tingling into the right upper extremity." Dr. Haslam diagnosed a torn rotator cuff due to appellant reaching over into the back of the car and that a suture "had torn loose at the previous suture site." In a subsequent note dated March 5, 1996, Dr. Haslam opined that appellant's second surgery was causally related to his initial injury. While Dr. Haslam's opinion supports a causal relationship between

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[3] Larson, *The Law of Workers' Compensation* § 13.00; *John B. Knox*, 42 ECAB 193 (1990).

[4] Larson at § 13.11.

[5] *Id. at* § 13.11(a); *see also Dennis J. Lasanen*, 41 ECAB 933 (1990).

[6] Larson at 13.12(a); *see Howard S. Wiley*, 7 ECAB 126 (1954).

[7] *Robert W. Meeson*, 44 ECAB **** (1993).

appellant's lifting a propane can and the rotator cuff tear, there is a factual discrepancy in Dr. Haslam's date of the original employment injury.[8]

Applying the principles noted above, the Board notes that the Office denied the claim on the basis of an independent intervening cause. The Office failed to provide any reasoning for its finding that there was an intervening cause nor did the Office determine whether appellant's activity in reaching behind the seat of his car to lift a propane can was reasonable in light of his preexisting condition. On remand, the Office should discuss whether appellant's activity was reasonable in light of his preexisting condition as well as provide reasons again for its finding of an independent intervening cause regarding the torn suture and lifting the propane can in light of Dr. Haslam's opinion that appellant's rotator cuff tear was causally related to his original injury. Dr. Haslam's reports constitute sufficient evidence in support of appellant's claim to require further development of the record by the Office.[9] As the case is being remanded to the Office for further development of the evidence, the issue of whether appellant was properly denied an oral hearing becomes moot.

The decisions of the Office of Workers' Compensation Programs dated May 3, March 29 and February 21, 1996 are hereby set aside and the case is remanded to the Office for further development in accordance with this decision and order.

Dated, Washington, D.C.
April 14, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] Dr. Haslam in his reports noted the history of appellant's employment injury as occurring on February 11, 1991. Appellant's injury occurred on November 6, 1990.

[9] *See John J. Carlone*, 41 ECAB 354 (1989).