IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

| | |
|---|---|
| Ronald Brossart,<br>Employee,<br>vs.<br>SMSC Gaming Enterprise,<br>Employer,<br>and<br>Berkley Risk Administrators Company,<br>Administrator. | Court File No. WC-700-11-VSH |

**Memorandum Opinion and Order**

**Introduction**

This Court's review in workers'-compensation appeals is very limited. We may hear only appeals concerning "legal issues," and can make "no further review of factual decisions made by a hearing examiner."[1] Thus, to prevail, an appellant must demonstrate that the hearing examiner made an error of law. If the court finds such an error, it may reverse or modify the decision or remand the matter back to the hearing examiner for additional factual determinations.[2]

[1] SMSC Workers' Compensation Ordinance, § F.8.
[2] *Id.*

Under the Community's Workers' Compensation Ordinance, no benefits are allowed for injuries caused by pre-existing conditions. In this case, the employee, Ronald Brossart, alleges that the error the hearing examiner committed was finding that Brossart suffered from a pre-existing condition that caused his injury when "there is no medical evidence from before [the date of injury] documenting that the Employee was suffering from any type of pre-existing condition."[3] He also provides some new chiropractic records not in the record below, which he contends demonstrate that the Hearing Examiner improperly rejected the opinion of his chiropractor. The Gaming Enterprise contends that under the Community's Workers' Compensation Ordinance, the existence of a pre-existing condition can be proved by pre- or post-injury evidence, and that the Hearing Examiner correctly found that both were present in this case.[4] And although the Gaming Enterprise concedes that this Court could remand this matter to the Hearing Examiner to consider the additional evidence Brossart included on appeal, it argues that the new evidence doesn't help Brossart's case in any event.[5] The Court concurs with the Gaming Enterprise that pre-injury evidence of a pre-existing condition was not necessary under the Ordinance, and finds that because Brossart neglected to supply the Hearing Examiner with the records on which he now relies, the Hearing Examiner's decision must be affirmed.

**Factual Background**

Mr. Brossart has been employed at the Gaming Enterprise since 2003, and was working as a valet attendant on March 11, 2011. On that day, he was getting into a vehicle and felt a sharp pain in his low back. He reported his injury to his supervisor and sought

[3] *See* Employee's Brief at 7.
[4] *See* Respondents' Brief at 7.
[5] *Id.* at 5.

treatment that same day at the Shakopee Dakota Clinic. The note from that office visit says "'onset 3-4 day (history of) pain in the left lower pack. Worse today constant 9/10 pain.'"[6]

A few days later, Brossart had an MRI at the St. Francis Regional Medical Center Emergency Department, and—as the hearing examiner found—"the findings indicate[d that] the Employee has degenerative changes in his lumbar spine."[7] Brossart saw a physician's assistant at the Shakopee Dakota clinic several times, and on March 21, 2011, the P.A. reported that "Ronald has evidence of spondylosis and degenerative disc disease at multiple levels of his lumbar spine which is known to cause pain, nerve root inflammation, disc bulging, herniation, spinal stenosis and associated disability."[8] Shakopee Dakota Clinic chiropractor Shirley Himanga also included in her notes of a March 28, 2011 visit with Mr. Brossart that she "advised him that djd [degenerative joint disease] is normal but usually progresses consistently and not only in certain segments, he's had previous injury that has caused spine to djd faster and progress slower."[9]

Brossart also saw another chiropractor, Dr. Cole Lucier, who opined that Mr. Brossart's injury was work-related, but the Hearing Examiner rejected Lucier's opinion because it did not state how many times he had seen Brossart, did not contain any medical history of Brossart, and did not reference Brossart's MRI results or an x-ray that Brossart had undergone.[10] Based on the evidence in the record, the Hearing Examiner concluded that Brossart had a pre-existing condition that caused or contributed to his injury and affirmed the Administrator's denial of coverage.

---

[6] Hearing Examiner's Findings and Order at 2 (quoting clinic note).
[7] *Id.*
[8] March 21, 2011 "Response to WC for Medical Opinion" from David Collins, P.A.
[9] March 28, 2011 Office Visit note from Shirley Himanga, D.C.
[10] Hearing Examiner's Findings and Order at 3-4.

On appeal, Brossart submits additional documents from Dr. Lucier that detail several visits to Dr. Luicier's office (although they do not specifically reference the MRI or x-ray results).[11] In his appeal to the Hearing Examiner, Brossart included only the summary report from Dr. Lucier, and Brossart offers no explanation for why the more detailed records he now provides were not submitted to the Hearing Examiner. The Hearing Examiner sent a letter to Brossart outlining the documents contained in the record he received from the Administrator and gave Brossart three weeks to "provide additional records, reports, documents, statements, or anything else to support or explain [his] claim."[12]

**Analysis**

Brossart's first argument, that the Hearing Examiner's decision should be reversed because the record contains no pre-injury records of a pre-existing condition, is easily disposed of. The Ordinance excludes coverage for injuries, disabilities, or medical treatment caused or necessitated by a pre-existing condition "including but not limited to a degenerative condition, established by medical evidence *pre- or post-injury*, . . .."[13] So it does not matter that the records on which the hearing examiner relied to find a pre-existing condition were created after Brossart hurt his back while working as a valet on March 11, 2011.[14] Post-injury evidence can, as a matter of Community law, establish the existence of a pre-existing condition that precludes coverage.

---

[11] A note from an April 6, 2011 visit simply contains a vague reference to "radiographic analyses[] and other test results."
[12] April 19, 2011 letter from Hearing Examiner to Brossart.
[13] Ordinance at § C.3.n (emphasis added).
[14] Brossart also argues that the Hearing Examiner erred by not taking proper account of the fact that Brossart was injured in the course of his employment. Brossart Brief at 7-8. But the Hearing Examiner made a specific finding that Brossart "sustained an injury to his lumbar

Brossart's second argument, that Dr. Lucier's records demonstrate that Brossart's injury was not caused by a pre-existing condition, must also fail. Brossart notes in his brief that "a review of the Hearing Examiner's file indicated that only the [Lucier's] report and not the records contained in Exhibit I [i.e., the more detailed clinic-visit notes] were considered by the Hearing Examiner."[15] What that means, however, is that despite the fact that the Hearing Examiner gave Mr. Brossart an opportunity to provide "additional records, reports, documents, statements, or anything else to support or explain [his] claim,"[16] the records on which he now wishes to rely were not in the record before the Hearing Examiner.[17] And Brossart provides no reason for his failure to supply them to the Hearing Examiner before his time to do so expired nor any reason for the Court to order the Hearing Examiner to consider them now.

"This Court has ruled on several occasions that a claimant who fails to make her factual case to the [h]earing [e]xaminer cannot use the appeal process to get a second bite at the apple."[18] Furthermore, the Court can only remand matters to a hearing examiner if it determines that the factual record is inadequate. Here, the Hearing Examiner made specific findings to support his conclusion that Mr. Brossart's injury was caused or aggravated by a pre-existing condition,[19] and particularly in the absence of any argument from Brossart about why the new evidence was not submitted to the Hearing Examiner or why it should be

---

spine on March 11, 2011, and this injury occurred in the course and scope of his employment at the SMSC Gaming Enterprise." Hearing Examiner's Findings and Order, Finding 5.

[15] Employee's Brief at 9.

[16] April 19, 2011 Letter from Hearing Examiner to Ronald Brossart.

[17] The Hearing Examiner filed the record of the appeal with the Court on June 28, 2011 and certified that the parties were being served with copies at the same time.

[18] *Kloeppner v. SMSC Gaming Enterprise*, 5 Shak. T.C. 137, 141 (May 17, 2009) (internal citations omitted).

[19] Hearing Examiner's Findings and Order, Findings 8, 10, 12-14.

considered now, the Court declines to remand this matter to the Hearing Examiner to consider Dr. Lucier's notes.[20]

Accordingly, the decision of the hearing examiner is AFFIRMED and Brossart's appeal is DENIED.

So ordered.

January 4, 2012

Vanya S. Hogen, Judge

[20] *Cf. Hanka v. The Hardware*, 343 N.W.2d 46 (Minn. Ct. App. 1984) (remanding unemployment-compensation appeal to Commissioner of Economic Security where appellant employee had attempted to introduce evidence but had been denied the ability to do so and Commissioner's findings were not reasonably supported by evidence).