

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT**

ROD PADGETT,

HF No. 156, 2010/11

Claimant,

v.

DECISION

JEFF HOUSER,

Employer/Subcontractor,

And

REGENCY CSP VENTURES, LP,

Contractor/Principal,

and

FIREMAN'S FUND INSURANCE,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on October 11, 2012, in Rapid City, South Dakota. Claimant, Rod Padgett, was represented by James D. Leach. The Employer/Subcontractor, Jeff Houser, and Contactor/Principal, Regency CSP Ventures, and Insurer, Fireman's Fund Insurance, were represented by J. G. Shultz.

Legal Issues:

The legal issues presented at hearing are as follows:

1. Whether Rod Padgett suffered an injury arising out of and in the course of his employment on February 18, 2011?
2. Whether a work-related injury on February 18, 2011, was a major contributing cause of Rod Padgett's current condition?
3. Whether Rod Padgett gave his employer timely notice of a work-related injury suffered on February 18, 2011?

4. Whether Rod Padgett is entitled to Temporary Total Disability Benefits (TTD) from February 18, 2011 to the present?
 - a. What was Rod Padgett's average weekly wage on February 18, 2011?
5. Whether Rod Padgett is entitled to medical treatment and expenses for a work-related injury he suffered on February 18, 2011?
 - a. Whether surgery on Padgett's back is reasonable and necessary?
 - b. Whether the collateral source rule is applicable in this case?

Background:

The background of this case is as follows:

1. Rod Padgett (Padgett) is 51 years old at the time of the hearing. He did not complete high school but received a G.E.D. He served in the military 30 years ago.
2. All of Padgett's past work has required physical labor.
3. In February 2011, Padgett lived with a roommate, Steve Wipf (Wipf) in a trailer house in Sturgis, South Dakota. Padgett paid rent to Wipf who owned the trailer house.
4. Jeff Houser (Houser) operated a small construction business that installed tile and wood floors, and carpeting. Padgett was employed by Houser from February 12 through February 18, 2011.
5. Houser was performing work for Regency CSP Ventures who operated the State Game Lodge (State Game Lodge) in Custer State Park during all times relevant to this case. The State Game Lodge contracted Houser to install tile in the bathrooms in the motel portion of the Lodge.
6. Padgett did not own a vehicle at the time. Therefore, Houser, who lived in Spearfish, South Dakota, picked up Padgett on February 12, 2011, in Sturgis, then drove to the State Game Lodge. The two then stayed on the State Game Lodge property throughout the work week.
7. Houser had liability insurance, but was not insured for workers' compensation. The State Game Lodge was insured for workers' compensation by Fireman's Fund Insurance (Fireman's Fund).
8. Houser testified that he hired Padgett as an independent subcontractor at \$10 per hour to install some base tile and do some caulking. He testified that

- Padgett presented himself as a contractor, with experience in framing, who was in business with his roommate Steve Wipf (Wipf). Houser testified that he told Padgett that as a subcontractor, Padgett needed to provide him with a certificate of insurance because the State Game Lodge required it.
9. Padgett contradicts Houser's testimony. Padgett testified that he never told Houser that he was a contractor and that he was hired at \$14 per hour.
 10. Houser paid Padgett with personal checks from the account of Houser's girlfriend, Robin Nicoll. The checks do not have Houser's name or the name of his business on them.
 11. Padgett testified at hearing that on February 16 or 17, 2011, he traveled with Houser from the State Game Lodge to Rapid City in Houser's pickup where they picked up 10-15 boxes of tile from Syverson Tile & Stone. He stated that they then returned to the State Game Lodge but did not unload the entire tile from the pickup.
 12. Syverson Tile & Stone's records indicate that a load of tile was picked up for the State Game Lodge on February 14 and February 17, 2011.
 13. Padgett testified that on Friday, February 18, 2011, Houser and he again traveled to Rapid City in Houser's pickup. On the trip, the pickup still contained 8-10 boxes of tile which had not been unloaded. In Rapid City, they picked up carpet at Rude Transportation and delivered it to the Ramkota Hotel on North Lacrosse Street.
 14. Rude Transportation's records indicate that the carpet was loaded and left the facility at 3:10 p.m.
 15. After delivering the carpet to the Ramkota, Padgett testified that he and Houser returned to the State Game Lodge. Padgett started to unload tiles from Houser's pickup. He slipped on a small patch of ice on a stair and fell and hurt his back at about 4:00 p.m.
 16. Padgett testified that after unloading the tile, Houser and he returned to Sturgis via Highway 79 to Rapid City then proceeded to Sturgis. He said that he asked Houser to take him to the emergency room in Rapid City. However, Houser drove past Rapid City Regional Hospital, telling Padgett that he had a "time crunch." Padgett stated that Houser told Padgett that he could go to the Sturgis emergency room.
 17. Houser disputes Padgett's testimony. He stated that Padgett was not injured while employed by him. Houser denies that that Padgett and he traveled to Rapid City on February 16 or 17, 2011 to pick up tile. He testified that the

- State Game Lodge provided the tile and that he did not know where the tiles were purchased at that time.
18. Houser further testified that Padgett and he left work early on February 18, 2011. Houser testified that Padgett and he travel to Rapid City, that they picked up carpet at Rude Transportation, that they delivered the carpet to the Ramkota Hotel, and then traveled directly to Sturgis. Houser stated that he dropped Padgett off at his trailer house in Sturgis at about 3:50 p.m. and that he then traveled to his home in Spearfish.
 19. Padgett's roommate Wipf testified that he was leaving for work when Houser dropped off Padgett at the trailer house. At that time, Wipf was working at Shotgun Willie's, a strip club, in Rapid City. Wipf stated that he did not speak to Padgett before he left but may have waved at him. Wipf stated that he usually left for work between 5:35 and 5:50 p.m.
 20. Dan Torres (Torres) worked for Custer State Park in February 2011. Torres testified that he gave jeep rides, but worked part-time sheet rocking and painting at the State Game Lodge during the re-model of the motel.
 21. Torres testified that he used the State Game Lodge truck and trailer to pick up tile at Syverson's. He testified that he, Tom Calhoun, and Houser unloaded the tile and that Padgett did not assist. He stated that they used a hand cart to move the tile and that there was no need to use any steps.
 22. Torres also testified that the State Game Lodge cleared the snow from the parking lot and walk ways when it snowed. He also testified that the weather was nice during the week that Padgett worked. He stated the temperatures reached the 40s and 50s during the day and that there was no snow or ice.
 23. At 8:37 p.m. on the evening of February 18, 2011, Houser called Wipf's cell phone and left a message that he would not be picking Padgett up for work because he would not be needing Padgett's services any longer. Houser testified that he tried to call Padgett but did not get an answer, so he called Wipf instead. He stated that he fired Padgett because he did not provide him with the promised certificate of insurance that Houser had requested from him.
 24. At 1:36 p.m., Padgett was seen at the Sturgis Regional Hospital Emergency Room. The nurse's note indicates that Padgett came in complaining about lower back pain from a fall he had at work yesterday while carrying tile.
 25. Charles Lewis, D.O., reported that Padgett "presents to the emergency room with a history of having tripped going up some steps at work yesterday. At that time he was carrying 50 to 60 pounds of tiles and fell forward."

26. Dr. Lewis testified that Padgett's back injury was consistent with the type of fall that Padgett described.
27. Dr. Lewis treated Padgett from February 19, 2011 until he saw Dr. Wittenberg in May of 2012. His only course of treatment was to prescribe pain medication because workers' compensation was not provided.
28. Dr. Wittenberg, a Rapid City neurosurgeon, saw Padgett on May 2012. His records indicate a date of February 18, 2011, as the date of injury and that Padgett fell at work. He also ordered an MRI.
29. After the MRI, Dr. Wittenberg saw Padgett on June 13, 2012, and recommended a right L4-5 "lami/disc" (laminectomy/discectomy).
30. Dr. Nolan M. Segal, an orthopedic surgeon, conducted an independent medical evaluation (IME) of Padgett on September 20, 2012. In Segal's report, he states that Padgett has multi-level degenerative disc disease. He identifies some inconsistent symptoms and states that Padgett's complaints exceed objective findings. However, he states that if an injury occurred, it is a major contributing cause of his current condition.
31. Additional facts will be discussed in the analysis below.

Analysis:

Evidentiary Matters:

There are two evidentiary matters that should be discussed before proceeding with the rest of the analysis. First, Houser, the State Game Lodge and Fireman's Fund (collectively, "Respondents") have asked the Department to take notice of Google and MapQuest maps and driving time estimates that they attached to their post-hearing brief. The Department agrees with Padgett. It would be improper for the Department to consider this evidence without providing him with an opportunity to counter it. In addition, the testimony regarding the routes is scant. There is no evidence with regard to Houser's driving speed, traffic and road conditions. Consequently, the driving times could vary from the estimates and the timelines presented by the parties are all rough estimates at best. The only time presented with any degree of accuracy is the time provided on Rude Transportation's shipping list and there is no foundation with regard to how that time was documented. Therefore, the Department will not take notice of the Google and MapQuest evidence.

The second matter is the cell phone records. Respondents introduced that evidence to support the timeline that Houser provided for the trip from the State Game Lodge to Sturgis and the Department concedes that the evidence on its face does appear to do so. However, Mr. Leonardo, a Verizon store manager, testified that the evidence indicated the billing area where the tower picking up the call is located but that it does

not necessarily indicated the location from which the calls were made. This point was demonstrated by the fact that calls apparently made from Custer State Park were picked up by a tower within the Deadwood billing area. Consequently, the Department will give this evidence very little weight.

Pivotal Issue:

Many, if not all, of the issues in this decision rise or fall on whether Padgett suffered a work-related injury on February 18, 2011. On large part, that determination hinges on whether Houser's or Padgett's version of events is true. Padgett has the burden of proof with regards to this issue as he does with all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 2010 SD 4, ¶ 11, 777 NW2d 363, 367.

Veracity:

The relationship between Houser and Padgett by the time of the hearing was bitter and hostile. This is evidenced by the fact Padgett, in addition to filing this claim, filed a claim for unpaid wages, which may or may not have merit, and a claim alleging asbestos exposure, in which the merits are dubious. Likewise, Houser's anger was demonstrated when he filed a 100.5 million dollar pro se lawsuit against Padgett, Padgett's attorney and Tom Calhoun; the merits of which are equally dubious. It is clear that both parties are angry enough to be less than truthful in this case.

Houser's Testimony:

The reason provided by Houser for firing Padgett at first seemed suspect. Houser testified that he hired Padgett as a subcontractor. As such, Padgett was required to provide him with a certificate of insurance and he failed to do so. Therefore, he let Padgett go. It seemed suspicious because Padgett was not working in the capacity of subcontractor. Padgett worked for an hourly wage. He had no expertise or background installing base tile; his background was in framing. Houser exercised total control over Padgett's work and related activities. Padgett used Houser's tools. Under these circumstances Houser's liability insurance would have covered any damage caused by Padgett's negligence.

On the other hand, while Houser is apparently proficient at laying tile and flooring. He appears somewhat unsophisticated about some financial and legal aspects of operating a business. For example, he did not have a business account; he wrote checks on his girlfriend's personal checking account. He did not provide workers' compensation coverage for his employees. He issued neither a W-2 nor 1090 form to his employees for IRS purposes. Finally, he thought that the Department of Labor & Regulation provided liability and workers' compensation insurance for the individual that he hired from its day labor roles.

On the other hand, there are plausible reasons for some of Houser's beliefs. The use of "independent contractors" as a source of labor is fairly common in the construction industry. These "independent contractors" are then deemed self-employed by the IRS and the contractor is not required to withhold income tax, Social Security and Medicare. The contractor is also not responsible for paying a portion of the employees Social Security obligation. Many contractors also believe that they are not required to provide these individuals with workers' compensation or unemployment insurance coverage. This may or not be true depending on the level of control the contractor exercises over them. The contractor typically is required to issue and report wages paid to these individuals on a 1090 form for IRS purposes.

In addition, subcontractors sometimes do have liability exposure independent of any coverage that the contractor may have. See, Thompson v. Mehlhaff, 1998 SD 69, 698 NW2d 512. It is also true that some privately owned temporary service companies employ those workers on their roles. In those situations, the temporary service company provides these employees with workers' compensation and unemployment coverage.

Because of these factors, it is more likely failed to understand the distinction between an "independent contractor" and subcontractor". It is also likely that the State Game Lodge did require proof of liability insurance by all subcontractors, not fully understanding, or care to understand, the actual working relationship which existed between Houser and Padgett.

Another incident arose during Houser's testimony, which tends to make the Department believe Houser's version of events. At the moment in time, during Houser's cross-examination when he first realized that the cell phone records showed a call made by him in Custer State Park as originating in Deadwood. There was a genuine look of "surprise" and "confusion" on his face. It was clear from his expression that up until that moment, he believed that the cell phone records would verify the timeline corresponding with his version of events.

Padgett's Testimony:

The problems with Padgett's testimony were different in nature from those in Houser's. First, Padgett's version of events is simply not plausible. There was no reason for Houser to travel from Custer State Park to Rapid City on February 18th without unloading the tile first.

According to Padgett, Houser and he made a trip from Custer State Park and back to the Park on February 17, 2011 to pick up tile. Then on the 18th, they made the same round trip between the State Park and Rapid City to pick up and deliver carpet at the Ramkota without first unloading the tile. Consequently, after delivering the carpet, they were required make yet another trip from Rapid City to Custer State Park to unload the tile, just to turn around again and travel to Rapid City on their way back to Sturgis.

That is a total of five trips between Custer State Park and Rapid City in two days when only three were required. Houser may not have all the financial aspects of running a business, but he certainly has enough organizational skills to operate a viable business. It would have made far more sense for Houser to either unload the tile before traveling to Rapid City to pick up the carpet, or leave the tile in the pickup over the weekend, allowing him to travel directly from Rapid City to Sturgis. This is particularly true, if as Padgett testified, Houser was in a "time crunch".

There is also no reason why Houser would have taken Padgett along on either the trip to pick up the tile or the trip to pick up the carpet. He was not needed. The store manager at Syverson's said that a warehouse worker helped load the tile and when he was gone, she helped. Likewise, Grady Thomas testified that Padgett did not help load the carpet and there were others at the Ramkota who helped unload the carpet there.

Next, Padgett testified that he asked Houser to take him to the Rapid City Emergency Room, but was told by Houser that he could go to the hospital when they got back to Sturgis. If that is true, why did Padgett not wave Wipf down when he got home and ask Wipf to take him to the emergency room? Or if that was not possible, why did Padgett not ask Wipf to take him to the emergency room when Wipf got home from work? Wipf testified that he got home about 4:30 a.m. and did not go to bed until about 6:00 a.m. and Padgett testified that he was in a lot of pain and got very little sleep that night. Yet, he waited until 1:30 p.m. to go to the hospital after Wipf woke up.

Finally, Padgett's testimony contains many inconsistencies. Some of these can be explained away as Padgett attempts in his post-hearing briefs. Never-the-less, several inconsistencies remain that cast doubt on Padgett's veracity.

First, Padgett testified during his deposition on September 13, 2011, that they picked up the tile at Altimate Flooring on February 18, 2011. He also stated that he had written down the location at the time. Then in an email dated March 7, 2011, that Padgett sent to Houser's attorney, he again reiterated that they picked up the tile at Altimate Flooring. When confronted with documentation that the tile was purchased at Syverson Tile on February 17, 2011, Padgett changed both the date and location of where the tile had been picked up. At the hearing, Padgett stated that they picked up the tile at Syverson's on February 16 or 17, 2011.

Next, Padgett told his treating physician on February 19, 2011, that he fell forward while going up some stone steps. At the hearing he testified that he had fallen on his back. It is unlikely that the doctor would have documented this fact incorrectly because the mechanism of the fall can be important in the evaluation of an injury.

Third, Padgett stated in his wage claim that the walk ways at the State Game Lodge had not been cleared and that he slipped on the ice from uncleared walk ways. During his deposition, Padgett stated that he slipped on ice and that there was a "lot of ice"

throughout the area that had not been cleared. This testimony was refuted by Dan Torres.

Torres' testimony was unbiased and credible. He testified at hearing that the State Game Lodge always cleared the snow from its parking lot and walk ways. He stated that the weather was nice during the week that Padgett allegedly fell. He said that the temperature was in the 40s and 50s and that there was no snow in the area. The exhibit from the National Oceanic and Atmospheric Administration corroborates Torres' testimony. Those records indicate temperatures of 46, 49, 51 and 51 degrees on consecutive days that week. While it's true that the temperatures reached freezing overnight, those highs are more than sufficient melt any remaining ice and snow.

Finally, the Department had the opportunity to observe Padgett as he changed his testimony at the hearing. During cross-examination Padgett attributed the errors in his deposition testimony, in part, to the fact that he had taken prescription pain medication prior to his deposition. Then when confronted with his own testimony during the deposition that he had only taken Aleve that day, Padgett changed his story stating that he had taken Aleve or Tylenol which was purchased over the counter. The Department found the ease with which Padgett changed his story without a hint of shame or remorse troubling, when Padgett had been caught in what can only be described as a "blatant lie". After watching this exchange, it was difficult for the Department to consider any of Padgett's assertions as being credible.

Alternative Theories:

Padgett argues that Respondents have not demonstrated that his back condition was caused by any event other than the one he alleges. He argues that there was no construction remodeling projects in progress at the trailer and he did not have a vehicle to travel anywhere else.

The Department has no doubt that Padgett has a back condition. It would also concede that he may have aggravated his degenerative back issues in a fall. But Padgett's arguments pre-suppose two facts which may or may not be true. The first is that the injury could only occur at a construction site. The second is that Padgett was unable to walk anywhere. The fact that Padgett did not have a vehicle could suggest that he walks a great deal, because it was his only means of personal transportation. He had from late afternoon on February 18, 2011 until 1:30 p.m. on February 19th to injure his back.

He could have slipped and fallen on a sidewalk in Sturgis. Unlike the State Game Lodge, there may have been snow and ice on the sidewalks in Sturgis. He could have fallen on the steps of Wipf's trailer house or in the bathtub. The point is, as Respondents argue, the burden is Padgett's. Darling, 2010 SD 4 at ¶ 11. In this case, he has failed to meet that burden.

Conclusion:

All things considered, the Department finds that Houser's version of events on February 18, 2011, is more likely than not, the truthful version. Padgett has failed to meet his burden of showing that he suffered an injury arising out of and in the course of his employment on February 18, 2011. This determination precludes the necessity for the Department to consider any of the remaining issues in this case.

Counsel for Respondents shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision and if desired Proposed Findings of Fact and Conclusion of Law, within 20 days of the receipt of this Decision. Counsel for Claimant shall have an additional 20 days from the receipt of Respondent's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Counsel for Respondents shall submit such stipulation together with an Order.

Dated this 15th day of March, 2013.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge