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

RODNEY REITENBAUGH **HF No. 171, 2008/09**

Claimant,

v. **AMENDED DECISION**

MINNEKAHTA MASONRY,

Employer,

and

STATE FARM INSURANCE COMPANIES,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This matter was heard by Donald W. Hageman, Administrative Law Judge on December 6, 2011, in Rapid City, SD. Claimant, Rodney Reitenbaugh is represented by Margo Tschetter Julius. Employer, Minnekahta Masonry and Insurer, State Farm Insurance Companies, are represented by J. G. Shultz.

Issue:

This case presents the following legal issue:

Whether Rodney Reitenbaugh's 2003 injury is and remains a major contributing cause of his current cervical spine condition?

Facts:

The following facts are found by a preponderance of the evidence:

1. In 1988, Rodney Reitenbaugh (Claimant) was involved in a serious motorcycle accident. Claimant suffered a fractured right femur and a dislocated left hip. In addition, Claimant suffered a mild head injury. A cervical spine x-ray was performed, which showed a widening of the C6-7 interspace but did not indicate a definite associated bony fracture. Claimant experienced soreness after the accident.

2. Claimant began working for Minnekahta Masonry (Employer) in 2002 to assist with residential and commercial masonry contracts.

3. Employer was insured by State Farm Insurance Companies (Insurer) for purposes of workers' compensation during all time relevant to this case.

4. On November 26, 2003, Claimant was injured while working. He was carrying a rock when he slipped on a sheet of ice, fell, and landed on his back. Claimant twisted as he fell to keep the rock from landing on him.

5. Following the accident on November 26, 2003, Claimant was examined at the Fall River Clinic complaining of back pain and right hip pain. An x-ray of Claimant's thoracic and lumbar spine showed "[n]o fracture or vertebral narrowing; left ribs reveal no obvious fracture; right hip shows significant degenerative changes."

6. Claimant had not been experiencing any neck pain prior to his 2003 fall.

7. Claimant returned to the Fall River Clinic for a follow up visit on December 3, 2003 when he reported his hip pain had resolved but he continued to have pain between the shoulder blades and mid-back area.

8. Claimant first saw Dr. Rand Schleusener, an orthopedic surgeon, on December 9, 2003. Schleusener ordered an MRI of Claimant's spine.

9. Claimant underwent an MRI of his cervical spine on January 5, 2004. The radiologist report stated:

> C6-7 demonstrates degenerative. There is some facet joint degenerative disease with approximately 2 mm of anterior subluxation of C6 with respect to C7, as well as some mild osteophyte. This extended more left than right and there was mild narrowing of the left neural foramen. There may be impingement of the left C7 nerve root.

10. In a medical note dated January 6, 2003, Dr. Schleusener described the degenerative changes to Claimant's mid-cervical spinal region as "minor". Schleusener did not recommend surgery at that time. Schleusener referred Claimant to Dr. Lawlor and Dr. Simonson for evaluation and treatment Claimant's neck and back pain.

11. Claimant underwent a series of treatments involving physical therapy, chiropractic treatment and a pain management regimen over the next several years.

12. On August 25, 2004, Dr. Wayne Anderson performed an independent medical examination (IME) on behalf of the Insurer. Anderson indicated that Claimant had reached maximum medical improvement.

13. After Dr. Anderson's IME, Employer and Insurer accepted Claimant's 2003 injury as compensable and entered into a Compromise and Settlement Agreement in 2005, whereby Employer and Insurer agreed to pay Claimant a lump sum for a five percent impairment rating for Claimant's low back and a five percent cervical/thoracic impairment rating. Under the Agreement, Claimant maintained

the ability to seek payment of future medical expenses, other than chiropractic care, with the caveat that Employer and Insurer may contest whether future medical expenses are medically and causally related to Claimant's 2003 incident.

14. In April of 2005, Claimant was involved in a motor vehicle accident. Claimant rolled his vehicle approximately two miles from his house. Claimant had been drinking prior to the accident and was intoxicated. Claimant's vehicle rolled multiple times end to end and side to side. Claimant was not wearing his seatbelt and was found in the back seat of the vehicle with his head pinned between the seat and the doorpost. Claimant was knocked unconscious for a couple of minutes and was not able to get out of the vehicle on his own. Claimant had to be extricated from the vehicle and was placed on a board with a stabilizing neck collar. An x-ray of Claimant's cervical spine did not identify a fracture. Claimant was certain he suffered at least one broken rib, stating he can push on the rib and feel it move. Claimant denied x-rays of the ribs and was prescribed pain medication to assist with the associated pain.

15. Claimant was involved in a fight outside of a sports bar in 2005 with his wife's ex-husband, Everett. Claimant described Everett as a large man, being approximately 6'3'', 300 pounds. Claimant testified that Everett "gave him a horizontal elbow strike to the chest" and knocked him down. Claimant testified that he got up and hit Everett in the face. He stated that Everett went down and Claimant hit him a couple more times and left."

16. In December 2007, Claimant got into an argument with Mark Haffner, a patron at a bowling alley and bar in Hot Springs. Claimant and Haffner began arguing because Claimant was standing in front of a television that Haffner was attempting to watch. Claimant turned to leave, but when he thought Haffner was about to make another comment, Claimant "head butted" Haffner in the temple. Claimant "head butted" Haffner so hard Haffner was knocked off his barstool and temporarily rendered unconscious.

17. On June 11, 2007, Claimant hurt his back while working for H&R Sprinklers. Claimant was working on his knees, stood up, and felt excruciating lumbar pain. An MRI showed a non-compressive central and left lateral recess protrusion at L5-S1 with subtle annual tear. Claimant sought payment for medical expenses related to this injury from Insurer.

18. Claimant was involved in a physical altercation in February of 2009 in Deadwood, South Dakota. Claimant was arrested for disorderly conduct after engaging in a fight outside of a casino. The arresting officer testified that he found Claimant on the ground actively engaged in a fight that he had to break up.

19. Facts 14-18 will be referred to as "intervening events" in the remaining facts and analysis.

20. Dr. Anderson conducted a second IME of Claimant in July of 2010. In his examination Dr. Anderson diagnosed four conditions, (1) L5-S1 facet

arthropothy; (2) L5-S1 degenerative disk disease with annular tear; (3) low thoracic pain, history of possible cord compression; and (4) cervical pain with cervical degenerative disk disease. Dr. Anderson also opined that Claimant's November 2003 injury was a major contributing cause of Claimant's current condition and that the intervening events were not playing a role in his present medical condition.

21. Shortly after Dr. Anderson's IME, Insurer agreed to pay for Claimant's medical expenses and reimburse him for unpaid medical expenses arising out of a 2007 lumbar injury caused by the incident described in Fact 17.

22. Claimant returned to Dr. Schleusener on December 12, 2010 complaining of continued neck pain, mid-back pain, low back pain, shoulder pain, cramping in the arm, radiating right leg pain. Dr. Schleusener ordered a cervical spine MRI. The pain drawings on December 2, 2010, were very similar to those when Dr. Schleusener first saw Claimant in2004.

23. Claimant returned to Dr. Schleusener on December 21, 2010, to go over the MRI scan. The cervical MRI showed a left sided disc herniation at C6-7. Shceusener recommended anterial cervical diskectomy and fusion at C6-7 for Claimant's neck pain.

24. Claimant sought payment for the treatment of the C6-7 herniation from Insurer alleging that his need for treatment was caused by his 2003 injury. Insurer denied liability for the treatment alleging that the herniation was caused by an intervening cause.

25. Dr. Schleusener testified by deposing on March 20, 2011. In that testimony he opined that the 2003 work injury remained a major contributing cause of Claimant's need for surgery. His opinion was based on the fact that Claimant's pain has remained consistent since 2003. He also indicated that Claimant's 2004 cervical MRI showed abnormalities at C6-7. He indicated that the herniation was a bigger version of the abnormality at C6-7 in the 2010 MRI.

26. At the request of the Employer and Insurer, Dr. Raymond Emerson, an orthopedic surgeon conducted a records review of Claimant's cervical spine condition. He did not conduct a physical examination of Claimant. In a report dated July 20, 2011, Emerson stated that he could not conclude within a reasonable degree of medical certainty what the cause of Claimant's neck and upper extremity symptoms were.

27. In a second report dated September 12, 2011, Dr. Emerson stated:

> The only soft objective change that I can see is a slight increase in the C6-7 disk protrusion comparing the cervical MRI scans from 2004 and 2010. As I am not a musculoskeletal radiologist, I would have to defer to someone of that sub specialty to confirm.

28. After being provided information about Claimant's intervening events, Dr. Emerson testified that he was unable to determine whether the traffic accident or physical altercations in which Claimant had been involved, played any role in his present condition.

29. During Dr. Emerson's deposition testimony, he admitted that the treating physician was in a better position than he, to determine the diagnoses and recommend treatment of Claimant after having examined him repeatedly.

30. Additional fact may be discussed in the analysis below.

Analysis:

Causation:

Claimant has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 777 N.W.2d 363, 367 (SD 2010); Day v. John Morrell & Co., 490 N.W.2d (SD 1967). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

There is no dispute that Claimant had pre-existing degenerative changes of his cervical spine at the time of his 2003 work injury. As such, Claimant's burden of proof is dictated by SDCL § 62-1-1(7) (b) which states:

> If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.

"The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted).

In this case, Claimant relies on the medical opinions' of Dr. Schleusener and Dr. Anderson. Employer and Insurer rely on the opinion of Dr. Emerson. Dr. Schleusener and Dr. Anderson have opined within a reasonable degree of medical certainty that Claimant's 2003 work injury remains a major contributing cause of his current neck pain. On the other hand, Dr. Emerson was unable to state with any certainty what the cause of Claimant's neck symptoms were.

Employer and Insurer argue that Claimant failed to meet his burden of proof in this case. The Department disagrees. While it is true that Employer and Insurer do not have the burden of proof in this case, the fact that Dr. Emerson cannot state with

certainty that the work injury was not as a major contributing cause of Claimant's pain means that his testimony does little to counter the forceful opinions of Dr. Schleusener and Dr. Anderson.

In particular, the Department finds Dr. Schleusener opinion rational, persuasive and supported by the facts. Schleusener based his opinion on the fact that Claimant had a sudden onset of symptoms after his 2003 fall and those symptoms remained constant and unchanged to the present. In addition, the 2004 MRI taken after the fall indicates an abnormality at level C6-7. Schleusener suggests that this abnormality was a structural injury which was response for Claimant's pain. That abnormality has grown in the intervening years into a herniation which he can now treat surgically.

The fact is that Claimant's pre-existing condition and the intervening events may have and likely did play a significant role in Claimant's C6-7 abnormality growing into a herniation. However, there is also sufficient evidence to show that the 2003 injury remains a major contributing cause of Claimant's current neck pain. "A claimant does not need "to prove that the work injury was 'the' major contributing cause, only that it was 'a' major contributing cause, pursuant to SDCL 62-1-1(7)."" (internal citations omitted.) Orth v. Stoebner & Permann Construction, Inc., 2006 S.D. 99, ¶ 21., 724 N.W.2d 586. In this case Claimant has met that burden. Dr. Emerson also admitted during his testimony that Dr. Schleusener was in a better position to diagnose Claimant's condition than he was.

Employer and Insurer contend that the herniation did not exist in 2004. Consequently, it must have been caused be an intervening event. On its face, this is a reasonable assertion. However, there is no medical evidence that any of the intervening events had any significant or lasting impact on Claimant's neck pain. In addition, after considering the intervening events, Dr. Anderson still opined that the 2003 injury remained a major contributing cause of Claimant's current neck pain. Even Dr. Emerson was unable to state with certainty that the intervening events played any role in Claimant's current condition. When Dr. Schleusener was confronted with the possibility that intervening events may have caused the herniation, he stated:

> Even though there may have been other, and there is every day, there's daily trauma that occurs to your body just by getting up and walking down the hall, the fact is that I'm basing my opinion on this gentleman's symptoms. He points directly to this one specific event that started all this pain.

Employer and Insurer argue that Dr. Schlesinger's medical opinions should be rejected because it is based solely on the fact that Claimant's pain began at the time of the injury. They then cite several South Dakota Supreme Court cases they believe support their position. The Department also rejects this argument because the Employer and Insurer misconstrue both the facts of this case and thereby miss the distinction of this case from those.

One of the cases cited by Employer and Insurer is Grauel v. SD School of Mines and Technology, 2000 SD 145, 619 N.W.2d 260. In that case, the claimant had pre-existing osteoarthritis in his knee. One day as he was walking to his next duty at work, he felt

his knee "pop" and he experienced pain. The Court found that the only causal connection between the claimant's symptoms and his work was the fact that his pain first occurred there. The Court concluded that this was insufficient to sustain an award of benefits.

In this case, there is more causal connection than the coincidental occurrence of pain at work. Here, the Claimant fell while carrying a rock which was the obvious source of his pain. In addition, as stated above, the 2004 MRI showed an abnormality at C6-7 which evidences the damage caused by the fall. These facts are sufficient to show a causal link between the work activity and the pain.

Employer and insurer also cite Jewett v. Real Tuff,Inc., 2011 S.D. 33. In that case, the claimant also suffered from pre-existing osteoarthritis in his knee when he injured it at work. The claimant first experienced pain when the knee "popped" while he was lifting corral panel to turn it. The claimant underwent arthroscopic surgery to remove a "loose body" from the knee. After the surgery, the pain remained. The Court found that the Department did not error when it found that Jewett's work injury had been treated by the surgery and that it was no longer a major contributing cause of his pain. .

The Jewett case is also distinguishable from this one. First the claimant underwent surgery to correct the damage caused by the work injury. That has not happened here. While the 2004 MRI showed damage to the C6-7 level, surgery was not an option at that time. In addition, Jewett's osteoarthritis was found to be "advanced" at the time of his surgery. In this case, Dr. Schleusener describes Claimant as having "minor" degenerative disc disease after viewing Claimant's 2004 MRI and was at a loss indicated that he could not see what was anything that would be causing Claimant's pain.

Finally, Claimant cites Rawls v. Coleman Frizzell, Inc., 2002 SD 130, ¶ 20, 635 N.W.2D 247, 252. In that case, the claimant's failure to meet her burden was based in part, on her credibility and inconsistent history. Despite Dr. Emerson's complaints about the inadequacy of the medical records in this case, the Department finds them sufficient to support Dr. Schleusener and Dr. Anderson's conclusions. As such, Claimant is entitled to treatment for his cervical pain.

Reasonable and Necessary Treatment:

While not addressed in the parties post-hearing briefs, another issue lies just below the surface in this case. Whether the surgery recommended by Dr. Schleusener, is necessary and reasonable. This issue arises because Dr. Emerson opined that surgery was not the best course of treatment here, suggesting, instead, more conservative treatments.

The South Dakota Supreme Court sets forth the burden of showing reasonable and necessary treatment. "It is in the doctor's province to determine what is necessary or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper." Engel v. Prostrollo Motors,

2003 SD 2, ¶ 32, 656 NW2d 299, 304 (SD 2003)(quoting Krier v. John Morrell & Co., 473 NW2d 496, 498 (SD 1991). The Employer and Insurer did not meet that burden here.

In this case, the treating physician is in the best position to recommend the proper course of treatment. While Dr. Emerson did not recommend surgery, he admitted that Dr. Schleusener was in a better position to recommend treatment. While Claimant must ultimately decide if he wants the surgery, he is free to choose that option if he wishes.

Conclusion:

Claimant has met his burden of showing that his 2003 work injury is and remains a major contributing cause of his current cervical spine condition. Claimant shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Employer and Insurer shall have an additional 20 days from the receipt of Claimant's Findings of Fact and Conclusions of Law to submit Objections, 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 Claimant shall submit such stipulation together with an Order.

Dated this 19th day of June, 2012.

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