

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

SHANNON J. HAYES,

HF No. 37, 2008/09

Claimant,

v.

DECISION

**ACCURATE PLUMMING,
HEATING & SHEET METAL,**

Employer,

and

ACUITY,

Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held on 1, 2009, at Rapid City, South Dakota. James D. Leach, represented Shannon J. Hayes (Claimant) Daniel E. Ashmore represented Accurate Plumbing, Heating & Sheet Metal and Acuity (Employer and Insurer, respectively).

Issues:

Causation, SDCL 62-1-1(7).

Notice, SDCL 62-7-10.

Facts:

Based upon at hearing, the testimony, exhibits and record, the following facts are found by a preponderance of the evidence:

1. Claimant was employed by Employer as a plumber on July 21, 2008. At that time, Claimant worked 40 hours per week at a wage of \$18.00 per hour. The business is owned by Jerry Cook (Cook) and is located in Rapid City, South Dakota. Ron LaGasse was Claimant's immediate supervisor.
2. At the time of the hearing, Claimant was thirty-five years old.

3. On July 21, 2008, Claimant had worked for Employer for approximately five years and LaGasse had supervised Claimant for approximately three years. The two men had a good working relationship.
4. During the three year period that LaGasse supervised Claimant prior to July 21, 2008, Claimant complained about back pain on a nearly daily basis. To relieve the pain, Claimant sometimes laid on the ground and tried to stretch out his back; sometimes he took breaks.
5. Claimant did not file a workers' compensation claim with Employer prior to July 21, 2008. However, Claimant did suffer a non-work related skiing accident in which Claimant injured his clavicle.
6. On July 21, 2008, Claimant and LaGasse along with Employer's other employees met at Employer's shop at approximately 7:00 AM. The group typically met like this prior to traveling to the various job sites. On that day, Claimant and LaGasse traveled from the shop to their job site in LaGasse's work truck. The job site was a new house construction in Somerset. They arrived at approximately 8:00 a.m. The men's versions of what transpired after this conflict.
7. Claimant testified that LaGasse and he worked at the job site until 11:30 a.m. or 12:00 noon when they decided to break for lunch. Claimant stated that he was following LaGasse out of the house when he stepped from the floor of the house down 3 feet to the concrete garage floor. Claimant testified that he felt a severe pain in his lower back as he landed. He indicated that he had difficulty stepping up into the truck as they left for lunch. Once in the truck, Claimant stated that he told LaGasse that he had injured his back when he "stepped out of the house." After returning from lunch, Claimant testified that he tried to work but could not continue due to the pain. He then asked LaGasse to return him to the shop.
8. LaGasse testified that Claimant complained about his back hurting before they reached the job site on the morning of July 21, 2008. He stated that Claimant asked for a ride back to the shop about 9:00 or 9:30 a.m. due to Claimant's back pain. LaGasse stated that on the way back to the shop, Claimant told him that Claimant was going to try and run his medical bills through Cook's worker's' compensation because he could not afford to pay them himself. LaGasse testified that he told Claimant that filing a workers' compensation claim was not right because Claimant had not hurt his back at work. After dropping off Claimant at the shop, LaGasse informed Cook that Claimant may try to submit a false claim. LaGasse testified that Claimant never indicated to him during these conversations that Claimant had injured himself at the job site by stepping out of the house.
9. On the afternoon of July 21, 2008, Claimant called Cook and asked him where to go for medical treatment. Cook stated that he did not care but that he would try a chiropractor first. Instead, Claimant sought medical treatment at Urgent Care.

Claimant left Urgent Care without seeing a doctor after waiting for one and one-half hours.

10. On July 22, 2008, Claimant sought medical treatment at Community Health Center of the Black Hills. Claimant was attended by Jacqueline Garner, a certified nurse practitioner. Ms. Garner gave Claimant an injection and prescribed pain medication and physical therapy.
11. Claimant received physical therapy for his back at Regional Rehab Institute.
12. Claimant returned to Community Health Center on July 31, 2008, where he was attended by Dr. Kari Lund. Claimant reported feeling much better. Dr. Lund released Claimant to return to work.
13. Claimant's medical records indicate that Claimant injured his back at work. This information was provided by Claimant as part of his medical history.
14. Claimant returned to work on Tuesday, August 5, 2008, after convalescing for approximately two weeks. After his return, Claimant worked for about a month. During that time, Claimant did not talk about filing a workers' compensation claim until Claimant began receiving medical bills in the mail.
15. After Claimant began receiving medical bills for the treatment of his back pain, he told Cook that he needed the paperwork for filing for workers' compensation. Cook told Claimant that he would not submit Claimant's paperwork to the insurance company because Claimant was not injured at work. The conversation became heated. Claimant argued that Cook owed him that after working for him for 5 years.
16. As a result of Claimant's and Cook's dispute, Claimant quit his employment.
17. Employer did not complete a first report of injury or notify Insurer of the possibility of a workers' compensation claim.
18. At the time of the hearing, Claimant worked as a plumber for Western Mechanical in Torrington, Wyoming. LaGasse was unemployed but was waiting for a callback from Employer.
19. On August 22, 2008, Claimant filed a Petition for Hearing with the Department of Labor. Claimant seeks two weeks of temporary total disability and \$864.76 for billed medical expenses.
20. Based on the demeanor and testimony of the witnesses at the hearing, LaGasse's version of the events that transpired on July 21, 2008 is more credible than Claimant's version.

21. Other facts may be discussed in the analysis below.

Analysis

Causation

Claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967).

SDCL 62-1-1(7) defines "Injury" or "personal injury," only injury in workers' compensation cases as follows:

[O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

- (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
- (b) 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.
- (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

Claimant argues that the Department of labor (Department) should accept his version of the events of July 21, 2008, because his version is consistent with the medical records. While it is true that medical evidence is an essential component in Workers' compensation cases, the medical evidence here adds little weight to Claimant's testimony.

SDCL 62-1-15 states in part that, "evidence concerning any injury shall be given greater weight if supported by objective medical findings." In this case, Claimant's medical records indicate that he injured his back at work. However, that information was provided to the medical providers by Claimant as part of his medical history.

Consequently, this piece of evidence cannot be accurately described as “objective” as is required by the statute.

These medical records may substantiate a back injury. They may even support a hard landing as the cause of the injury. However, these medical records cannot conclude with any certainty that the injury occurred at work without the Claimant providing that information. The most that can be concluded from this evidence is that the story Claimant told the medical providers was consistent with the story he told at hearing.

The Department’s conclusion that LaGasse’s testimony was more credible than Claimant’s was not solely based on their demeanor at the hearing. LaGasse also had very little reason to lie. LaGasse supervised Claimant for three years. During that time, the two men had a good relationship. With this backdrop, it seems unlikely that LaGasse would fabricate his story without prompting from Cook. At that time, it was unknown whether Cook would see any financial gain from concocting a story. It was also unknown whether Cook was inclined to reward LaGasse for such an act. Second, it is equally unlikely that Cook did not entice LaGasse into fabricating his version of events with a *quid pro quo* because LaGasse was unemployed at the time of the hearing.

Claimant has failed to prove by a preponderance of the evidence that his back problems were work-related. In light of this determination, there is no need to consider the notice issue.

Conclusion

Counsel for Employer and Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Claimant shall have an additional 20 days from the date of receipt of Employer and Insurer’s proposed Findings of Fact and Conclusions of Law to submit objections or Claimant may submit 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 Employer and Insurer shall submit such stipulation together with an Order.

Dated this 11th day of June, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

Donald W. Hageman
Administrative Law Judge