

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

**Craig Anderson,
Claimant,**

HF No. 44, 2002/03

v.

DECISION

**Larson Manufacturing Company, Inc.,
Employer,**

and

**Zurich North America,
Insurer.**

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL §62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Sioux Falls, South Dakota. Claimant, Craig Anderson appeared personally and through his attorney of record, Gary W. Schumacher. J.G. Shultz represented Employer, Larson Manufacturing Company, Inc. and Insurer, Zurich North America.

Issue

Causation and Compensability

Facts

Craig Anderson (Claimant) currently resides in Mount Vernon, South Dakota. Claimant has a history of several injuries to his right elbow. At the age of 19, Claimant sustained an injury to his right elbow when a cow kicked him in the elbow, causing it to fracture. After that incident, Claimant did not regain full extension in that arm. In 1989, Claimant sustained another injury to his right elbow during an incident at work. An object fell against Claimant's right arm, hitting him in the elbow.

On May 13, 2000, Claimant was at home when he felt his elbow pop and he experienced sharp pain in that elbow. Claimant reported that the pain occurred without specific injury or episode. Claimant sought treatment at the emergency room at the Brookings Hospital. X-rays taken showed degenerative changes in Claimant's right elbow and findings compatible with post traumatic injury appearing to be of nonacute origin. He was referred to Dr. Gail M. Benson who noted some spurring of the cornoid at the tip of the ulna and advised conservative treatment.

Claimant began working for Larson Manufacturing, Incorporated (Employer) in Brookings, South Dakota, in 1989. On October 22, 2001, Claimant was picking up extrusion wrap-around materials with his right arm, when he heard a pop and experienced pain in his right arm. Claimant reported his injury to his supervisor, Tim Houtman and a first report of injury was completed on October 22, 2001.

Claimant sought treatment for his injury with Dr. E. W. Filler at the Brookings Medical Clinic. Dr. Filler referred Claimant to Dr. Gail Benson at the Orthopedic Institute. X-rays taken were unremarkable except for a spur on the coracoid. Dr. Benson ordered a CT scan which revealed what looked like two loose bodies in the area of the radial head laterally on the joint adjacent to the humerus. Dr. Benson also noted spurring and joint space narrowing of the olecranon. Dr. Benson recommended an arthrotomy and debridement of the right elbow joint laterally. Claimant had surgery on November 15, 2001. Claimant returned to work with limitations on December 3, 2001.

Dr. Benson referred Claimant to Dr. R. Blake Curd when Claimant complained of numbness and tingling in his 4th and 5th fingers of his right arm. Dr. Curd ordered an ulnar nerve study which showed no electrophysiological evidence to indicate cubital tunnel syndrome. Dr. Curd eventually recommended an anterior submuscular ulnar nerve transposition to relieve Claimant's symptoms. Claimant had surgery on April 2, 2002.

After his surgery on April 2, 2002, Claimant still complained of a catching and popping sensation. Dr. Curd ordered an MRI which revealed postoperative changes consistent with ulnar nerve transposition and some evidence of osteoarthritis in the elbow. Dr. Curd again recommended surgical intervention. Claimant underwent right elbow surgery on June 18, 2002, including radial ulnar collateral ligament reconstruction and lateral epicondyle debridement among other things. Following surgery, Claimant still reported a popping sensation. On December 30, 2003, Dr. Curd noted that elbow arthroscopy could potentially help resolve the popping sensation, however he was reluctant to offer Claimant the arthroscopic procedure, as Claimant was just getting to the point where his elbow functioned well a reasonable amount of time. Dr. Curd also stated that Claimant would continue to have trouble with his elbow given his osteoarthritis. Dr. Curd recommended Claimant return in one year for an impairment rating.

Claimant returned to Dr. Curd on February 5, 2003, for a follow up. Claimant continued to complain of a popping sensation in the posterior aspect of his elbow. Dr. Curd referred Claimant to Dr. Tom D. Howey to see if an elbow arthroscopy with debridement would be appropriate. Dr. Howey diagnosed degenerative joint disease of the right elbow, early with symptoms consistent perhaps with loose bodies or scarification and/or chondromalacia or all of the above. Dr. Howey recommended an elbow arthroscopy as long as great care was taken to avoid the ulnar nerve on the medial side. Another option would be to do an arthrotomy to evaluate Claimant's elbow joint. Dr. Howey stated that it was certainly possible that the symptoms Claimant was having were due to his

arthritic degeneration. Dr. Howey further noted, “[Claimant] will not get any improvement with his arthroscopy and he understands that.” Dr. Curd met with Claimant for a follow up and informed Claimant he wasn’t certain whether arthroscopic evaluation would relieve his symptoms or not. Claimant elected to proceed with surgical intervention. Claimant underwent right elbow arthroscopy and radical debridement on May 1, 2003.

On June 6, 2003, Claimant returned to Dr. Curd for a follow up appointment. Dr. Curd noted that Claimant’s surgical pain was decreasing and his range of motion had improved, although not back to where it was prior to surgery. Claimant also complained of a popping sensation in his elbow, very similar to the way it acted before surgery. Dr. Curd stated in his notes, “I believe the only option left for Craig would be excision of his radial head. If this becomes necessary I do not believe that this would be a result of his work injury [.]”

On July 21, 2003, Claimant returned to Dr. Curd indicating that his elbow was feeling relatively decent. Claimant experienced occasional clicking, but there was almost no pain in the elbow whatsoever. Claimant returned to work without limitations on July 21, 2003. On October 8, 2003, Dr. Curd indicated that Claimant had reached maximum medical improvement (MMI) and assigned an impairment rating of 12% upper extremity.

On May 3, 2002, at the request of Employer/Insurer, Dr. David P. Falconer, a board certified orthopedic surgeon, with over twenty-five years of experience, completed a Medical Record Review. Dr. Falconer diagnosed preexisting osteoarthritis with a temporary symptomatic flare-up during a bending incident at work. Dr. Falconer opined that the work injury was not a major contributing cause of the need for surgery, as evidenced by Claimant’s CT scan which revealed moderately severe elbow arthritis only 10 days after the October 22, 2001 incident. Dr. Falconer opined that there was no basis for permanent disability associated with the October 22, 2001 injury.

On March 19, 2003 and February 6, 2003, Dr. Falconer issued follow up reports. After a review of additional medical records and depositions, Dr. Falconer again opined that Claimant’s work for Employer was not a major contributing cause of his impairment, disability, or need for treatment of his elbow. It is simply an exacerbation of an inevitable downhill deteriorating curse of elbow degenerative arthritis.

Claimant voluntarily quit his job with Employer in mid-July 2003. Other facts will be developed as necessary.

Analysis

Causation and Compensability

The general rule is that a claimant has the burden of proving all facts essential to

sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that he sustained an injury "arising out of and in the course of the employment." SDCL §62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520.

SDCL §62-1-1(7) provides that 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 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.

When a preexisting condition factors into a compensability question, subsections (b) and (c) under SDCL §62-1-1(7) must be considered.

While both subsection (b) and subsection (c) deal with preexisting injuries, the distinction turns on what factors set the preexisting injury into motion; if a preexisting condition is the result of an occupational injury then subsection (c) controls, if the preexisting condition developed outside of the occupational setting then subsection (b) controls.

Horn, 2006 SD 5, ¶20, 709 NW2d 38, 43. (citations omitted). It is undisputed that Claimant's osteoarthritis is a preexisting condition that did not develop within the occupational setting. Therefore subsection (b) applies to the facts of this case.

SDCL §62-1-1(7)(b) provides that when an injury combines with a preexisting 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.

In applying the statute, we have held a workers' compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [Claimant's] employment. We have further said South Dakota law requires

[claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted). With respect to proving causation of a disability, the South Dakota Supreme Court has stated,

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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, 724 NW2d 586 (citations omitted).

In support of his burden, Claimant relied on the opinion of his treating physician, Dr. R Blake Curd. Dr. Curd's testimony was present through his deposition. Dr. Curd testified to a reasonable degree of medical certainty,

Q: Would it be fair to say that the event, or that injury at work, combined with his preexisting disease to either prolong his symptoms or to prolong his need for treatment?

A: I think the event that he described in October of 2001, the elbow giving out and giving way, led directly to him seeking treatment with Dr. Benson and that he continued to be symptomatic from that point until I finished treating him and gave him his impairment rating on the date that occurred.

On cross examination, Dr. Curd testified as to the many variables that may have contributed to Claimant's condition,

Q: How much of a role does work play in that analysis, Doctor? Is there any way you can tell?

A: Just ongoing everyday, day to day work?

Q: Right.

A: Its extraordinarily difficult for me to make a determination about that, how much it contributes, independently, the day before—I think we're still talking about a point in time?

Q: We are.

A: I have no way that I can determine that with any reasonable accuracy.

When asked if the type of work Claimant did would worsen his preexisting arthritic condition over time, Dr. Curd testified,

I think someone that has an arthritic joint of any kind, use of any kind over a broad spectrum of years can lead to continued wear and tear of the elbow. And to say that the work environment accelerated that process in any measurable fashion compared to what he would have done if he had been a telephone operator, for instance, is difficult for me to determine.

A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, causation must be established to a reasonable medical probability. *Orth*, 2006 SD 99, ¶34, 724 NW2d 586. Dr. Curd's equivocal testimony is not sufficient to establish a causal link between Claimant's work related activated and his need for treatment. Dr. Curd also fails to establish to a reasonable degree of medical probability that the October 22, 2001 incident was a major contributing cause of Claimant's condition and need for treatment.

Employer/Insurer relied on the testimony of Dr. Falconer. Dr. Falconer's testimony was presented through his deposition. Dr. Falconer opined that the October 22, 2001 injury could not have contributed to Claimant's right elbow problems. Dr. Falconer testified to a reasonable degree of medical probability,

Q: Okay. Let me ask you about the causation as it appears at that point in time. At that point in October of 2001 can you tell us to a reasonable degree of medical probability whether this gentleman's elbow problems or I should say whether this gentleman's work at Larson Manufacturing was a major contributing cause of his elbow problems?

A: I can't see how, given that he has had a pre-existing injury before he was there, he has had a history of progressive elbow problems demonstrated as we have discussed here on the proceeding notes, and he had a light, normal use of the arm in a fashion that wouldn't in and of itself cause new or superimposed injury.

Although Dr. Falconer did not personally treat the Claimant, his conclusions are based upon a complete review to Claimant's medical records and objective medical evidence, including Claimant's prior elbow injuries, Claimant's well documented history of progressive right-elbow degeneration, and the lack of objective findings of an acute injury following the October 22, 2001 incident. Dr. Falconer's opined that "Claimant's work at Employer is not a major contributing cause of his impairment, disability or need for treatment of his elbow. The symptoms are simply an exacerbation of inevitable

downhill deteriorating course of elbow degenerative arthritis.” The Department accepts Dr. Falconer’s unequivocal opinion.

Based upon the medical evidence presented, Claimant has failed to meet his burden to demonstrate that he sustained a compensable injury arising out and in the course of his employment and that Claimant’s employment is and remains a major contributing cause of Claimant’s injury. Claimant’s request for benefits is denied.

Conclusion

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer’s proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 24th day of February, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

____/s/ *Taya M Dockter*_____

Taya M. Dockter
Administrative Law Judge