DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

TAYLOR HUGHES,
Claimant,

HF No. 56, 2017/18

v.

DECISION

DAKOTA MILL AND GRAIN, INC.,
Employer,

and

DAKOTA TRUCK UNDERWRITERS,
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 Joseph Thronson, Administrative Law Judge, on May 11, 2018, in Pierre, South Dakota. Claimant, Taylor Hughes, was present and represented by Brad Lee of Beardsley, Jensen, and Lee. Employer, Dakota Mill and Grain, Inc., and Insurer, Dakota Truck Underwriters, were represented by Charles Larson, of Boyce Law Firm.

ISSUE PRESENTED

I. WAS CLAIMANT'S JUNE 2016 INJURY A MAJOR CONTRIBUTING CAUSE OF HIS CURRENT CONDITION?

FACTS

Claimant, Taylor Hughes, was 30 years old at the time of the hearing. Claimant left school in the 9th grade to enter the work force. After leaving school, Claimant began

working for his father's company CCI. While there, Claimant, a general laborer, shoved and poured concrete, built rebar cages and caissons, and operated a front-end loader. While working with CCI, Claimant traveled extensively throughout the United States including Puerto Rico. Claimant testified that he left CCI because of extended periods of time away from home and a personality conflict with his father.

In 2008, Claimant began working at Zarecky's Midwest Construction in Pierre, South Dakota, where he performed tasks similar to those he performed with CCI. Claimant then went to work for Rose Construction, also located in Pierre. Claimant was employed for Rose for three years doing general construction and operating heavy machinery. Claimant testified that employees also performed tasks on the owner's ranch when construction work was slow.

In 2010, while Claimant was working for Rose Construction, he first began suffering back pain. Claimant underwent a lumbar microdiscectomy in January of 2011, but the pain in Claimant's back soon returned. An MRI revealed that a cyst had grown over the surgery spot which required doctors to perform another microdiscectomy in August of 2011.

Claimant's condition improved significantly over the next several months and Claimant started work at Christensen Hog Farm in 2012. Shortly after starting at the hog farm, Claimant returned to work with Rose Construction. Claimant then left to take a job with ELM Locating in March of 2013. The job required a great deal of travel around the state which caused stress on Claimant's marriage and Claimant returned to Pierre in June 2016. Claimant then began working for Clearly Building Corp. Claimant

left that job in October of 2016 and went to work for Scott Fencing in Ft. Pierre. However, this job required Claimant to work long hours which again put strain on his marriage. Claimant then took a job delivering vehicle parts for NAPA in December 2016.

Claimant began work for Employer, Dakota Mill and Grain, in early 2017. Claimant's duties there included unloading trucks and dumping them into grain bins or train cars. Due to the mechanization of the unloading process, Claimant was responsible for making sure belts and machinery were adequately lubricated and working properly. Claimant also performed a number of side projects including pouring concrete and landscaping. While working for Dakota Grain and Mill, Claimant routinely worked between 50-60 hours per week.

Prior to beginning his job with Employer, Claimant was required to take a physical. The physical exam form reported Claimant had no symptoms and Claimant testified that he was feeling "100 percent" at the time he began working for Employer.

At the time of his injury, Claimant had been working on a project at Employer's building for approximately two weeks. Claimant was removing a concrete floor in order to move a number of above-ground pipes underground to allow vehicles to drive over them. Claimant first used a concrete saw to cut the concrete into chunks and used a jack hammer to break them up. Claimant then moved several landscaping bricks in place to so that trucks could drive over the area. Claimant was also required to dig down four feet in order to cut off and cap the pipes that had been sticking out of the

ground. Finally, Claimant built a dirt ramp to allow vehicles to access the area. Claimant did all of this while also performing his regular duties for Employer.

Claimant testified that on June 22, 2017, he was operating a Bobcat to place landscaping blocks in place and build the ramp. The Bobcat had no shock absorption system which caused Claimant to bounce around a great deal. Claimant exited the Bobcat and fell, and felt a pain in his back. Claimant informed Jeremy Hand, the regional manager, and Brittany Huber, the office manager, that he was sore and requested to take some time off to recuperate. Hand told Claimant that as they were slow, it would not be a problem for Claimant to take some time off and rest. Claimant left work around noon and went home. Claimant took a nap, and then returned to work a few hours later. He requested to do light work around the building for the rest of the day. After work, Claimant went home and rested.

The next day, Claimant again performed light work including sweeping and reorganizing the warehouse. While Claimant continued to experience some pain, he did not initially report his pain as a work-related injury. Claimant did not work over the following weekend. He attended Oahe Days in Pierre where he saw a concert, visited friends, and attended a bull riding event.

The following Monday, June 26, Claimant rose and got ready to return to work. He testified that around 7 AM, he attempted to get up and his legs collapsed. Claimant could not get up and his breathing was labored. He then slowly made his way to his phone and called his mother. Claimant's mother then took Claimant to the emergency room. Claimant told doctors of his activities on June 22 including jack hammering,

landscaping, and plumbing work. On June 29, Claimant went to Employer and filled out a first report of injury. Claimant alleges that he did not appreciate the seriousness of his injury when he first requested to go home and rest on June 22. It was only after consulting doctors that he considered that his pain was related to a work injury.

Claimant consulted Dr. James MacDougall on July 25, 2017, and again on October 24. Claimant also received an MRI in 2017 which showed a herniated L4-5 disc. However, Dr. MacDougall opined that the herniated disc was not necessarily due to his injury but could be the result of a long-term degenerative disc disease. Dr. MacDougall described the herniation as a "slight change or slight enlargement of the protrusion of bulge of the disc that was there previously…" Dr. MacDougall did opine that Claimant's June 22 injury was a major contributing cause of his disability, basing this conclusion on the fact that Claimant had been symptom free for several months before the onset of severe pain in Claimant's back and legs on June 26. The fact that Claimant had taken and passed a physical prior to beginning his work with Employer was also significant in Dr. MacDougall's eyes.

Employer/Insurer hired Dr. Grant Shumaker to conduct an independent medical examination on Claimant. Dr. Shumaker had been practicing medicine for 20 years prior to examining Claimant. Dr. Shumaker disagreed with Dr. MacDougall's opinion that Claimant's injury was a major contributing cause of his disability. Dr. Shumaker examined MRI's of Claimant's spine from 2010 and July 2012 and noted the L4-5 was already showing signs of deterioration. Dr. Shumaker opined that such a progression would be expected for a person with a degrative spinal condition. Dr. Shumaker also remarked that, given Claimant gave different details about the cause of his back pain

made it difficult for him to conclude that a work-related injury on June 22 caused Claimant's condition. Specifically, Dr. Shumaker noted that, according to the 1997 NIOSH guidelines, there is no evidence that jackhammering, or driving could cause spinal problems. Dr. Shumaker also focused on June 26 as the significant date as this is when Claimant first experienced pain.

Q: And you state that because of the lack of onset of pain until four days later was a significant fact. Why is that significant to you?

A: Presumably his disc actually herniated on 6-26 when he stood up from a bent position. That's when there was a physical structural change triggering the pain, triggering him seeking medical attention.

ANALYSIS

I. WAS CLAIMANT'S JUNE 2016 INJURY A MAJOR CONTRIBUTING CAUSE OF HIS CURRENT CONDITION?

The standard for establishing eligibility for workers compensation benefits is well established:

> In short, in order to prevail, an employee seeking benefits under our workers' compensation law must show *both:* (1) that the *injury* arose *out of* and *in the course* of employment and (2) that the employment or employment related activities were a *major contributing cause* of the *condition* of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a *major contributing cause* of the disability, impairment, or need for treatment.

Grauel v. S. Dakota Sch. of Mines & Tech., 2000 S.D. 145, ¶ 9, 619 N.W.2d 260, 263 (Citing SDCL 62-1-1(7)(a)-(b); *Steinberg v. S. Dakota Dep't of Military & Veterans Affairs,* 2000 SD 36, ¶ 29, 607 N.W.2d 596, 606.)) (Emphasis original). In order to

recover benefits, a claimant must prove, by a preponderance of the evidence, that the above prerequisites have been met.

A. Arising Out of Employment

Employer/Insurer argue that Claimant's current condition was not the result of a work-related injury because he cannot point to a single incident as the cause of his disability. Employer/Insurer points out that Claimant's description of his injury changed over time. Initially, Claimant did not inform Employer that he fell from a Bobcat, but rather reported only that his back hurt and he would like some time off to recuperate. Claimant admitted he did not want to report his injury as a work-related accident at the time because he did not consider it serious. It was only after four days that Claimant began suffering from extreme pain and an inability to stand that he disclosed the fall from the Bobcat. Claimant also admitted during cross examination that he was not operating a jackhammer on June 22. There is also a dispute as to when Claimant stated the pain in his back began. The medical records from Claimant's June 26, 2017 emergency room visit indicate Claimant stated the pain started that day. However, at the hearing, Claimant stated that the records were wrong and that he told the treating physician that his back pain started on June 22. Claimant also did not inform the doctor at the emergency department of the fall from the Bobcat.

Recovery of workers compensation benefits does not require a claimant to prove a single injury. Rather, the South Dakota Supreme Court has held that a work-related injury may be cumulative in nature.

> However, this Court has previously acknowledged an employee need not have an identifiable accident or experience trauma to her person before a medical condition

> will qualify as a compensable injury. "It is sufficient that the disability 'was brought on by strain or overexertion incident to the employment, though the exertion or strain need not be unusual or other than that occurring in the normal course of employment.'"

Westergren v. Baptist Hosp. of Winner, 1996 S.D. 69, ¶ 24, 549 N.W.2d 390, 397 (internal citations omitted).

Here, it is possible that Claimant could have suffered a cumulative injury based on his activity during the two weeks prior to his injury. The record shows that Claimant was engaged in various strenuous tasks during that time including, jackhammering cement, lifting heavy objects, and operating a Bobcat from which Claimant fell. However, Claimant's expert, Dr. James MacDougall's testimony does not clearly attribute Claimant's condition to any of the work he had done in the weeks leading up to June 22. It is undisputed that Claimant suffered from a preexisting back condition at the time of his injury. Dr. MacDougall admitted that it is possible that the Claimant's herniated disc could have been caused by a degenerative condition:

Q: And what can cause that progression, wear and tear?

A: Wear and tear, age, new injury or no injury.

Q: And it wouldn't be uncommon for that disc to bulge at L4-5 to continue to progress over the years?

A: It would be common for that to happen, yes.

Q: And as that disk continues to progress, it could cause pain and symptoms?

A: It could, yes.

Later on, Dr. MacDougall admitted that he was unaware of what had caused the increase in the bulge of Claimant's L4-5 disk over time:

Q: As far as what caused the increase, is there any way to know from 2012 to 2017 what caused the increase?

A: No, as I said earlier, it can be progression of the degenerative process, it can be related to injury that accelerates that.

Finally, Dr. MacDougall admitted that a number of factors could have resulted in Claimant's current condition:

Q: What about did his disk – is that what caused his disk to herniate?

A: The disk bulge at L4-5 being larger could have been a result of injury or falling or overuse or just progression of disease.

In contrast, Employer/Insurer relied on the testimony of Dr. Grant Shumaker. Dr. Shumaker opined that Claimant's condition was caused not by a work injury but rather as a result of a chronic degenerative back condition. Dr. Shumaker agreed that three years of work without any documented cases of back problems would be significant. However, Dr. Shumaker also indicated that, in his opinion, Claimant's bulging disc was not caused by a workplace injury, but that a herniated disc can increase over time.

Q: Is there evidence of a traumatic event here from the [2017] MRI?

A: There is no evidence of a traumatic event.

Q: Now, it says that the disc herniation has mildly increased in size.

A: Correct.

Q: So if we're talking about five years—almost five years from the 2012 MRI, would you expect to see a mild increase in the disc herniation over the course of five years?

A: That would be a typical expected change.

It was also Dr. Shumaker's opinion that neither jackhammering nor driving could have caused herniation of Claimant's L4-5 disc. In addition, Dr. Shumaker hypothesized that the herniation was caused on June 26, 2017.

Q: And you state because of the lack of onset of pain until four days later was a significant fact. Why is that signification to you?

A: Presumably his disc actually herniated on 6-26 when he stood up from a bent position. That's when there was a physical structural change triggering the pain, triggering him seeking medical attention. That's well documented on the 6-26 and 6-27 notes.

Q: But you state in your report that given the lack of onset of pain until four days after the apparent alleged exposure. So it was significant to you that for the four-day period he didn't experience pain; is that correct?

A: That's correct.

Both Dr. MacDougall and Dr. Shumaker agreed that Claimant suffered from a preexisting back condition. As early as 2012, Claimant suffered a bulge in his L4-5 disc. While the bulge become worse in 2017, Dr. MacDougall could not say for sure that this bulge was evidence of an injury. "This court has recognized that worker's compensation

laws are remedial in character and are entitled to a liberal construction. However, this rule of liberal construction applies only to the law, not to the evidence offered to support a claim, and does not permit a court to award compensation where the requisite proof is lacking." *Wold v. Meilman Food Indus., Inc.,* 269 N.W.2d 112, 116 (S.D. 1978) (Internal citations omitted). The Department finds that Claimant has failed to prove by a preponderance of the evidence that his disability was caused by a work place injury.

b. Major Contributing Cause

Even if Claimant was able to meet his burden of persuasion that his condition was caused by a workplace injury, this alone is not sufficient for recovery of workers compensation benefits. Claimant must also show that a work-related injury was a major contributing cause of a disability or condition. The Supreme Court has previously stated, "a cause which cannot be exceeded is a major contributing cause."

Orth v. Stoebner & Permann Const., Inc., 2006 S.D. 99, ¶ 42, 724 N.W.2d 586, 596

During depositions, Employer/Insurer posed a hypothetical to Dr. MacDougal and asked him to assign percentages to the respective causes:

Q: So I'm going to ask a hypothetical, this is completely made up, okay? If we were to attribute 40 percent of Mr. Hughes's current problems to his work activities and 60 percent, attribute those to his smoking history, preexisting degenerative disc disease, other genetic factors, if that's true, and I'm not saying it is, would you say that the 40 percent work-related cause is a major contributing cause to his current problems and need for treatment?

Mr. Lee: I'm going to object as improper hypothetical and already asked and answered. Go ahead and answer if you can.

A: I would.

A forty percent cause does not meet this threshold because sixty percent of Claimant's condition was caused by other factors; any of which could have exceeded forty percent. Claimant argues that this hypothetical asked Dr. MacDougall to come up with a percentage when there was no evidence in the record to support one. Dr. MacDougall is board certified orthopedic surgeon with decades of experience treating patients with orthopedic problems. Claimant would have the Department accept Dr. MacDougall's testimony that Claimant's injury was a major contributing cause of his disability but disregard his testimony about attributing a percentage to that same injury. Claimant cannot have it both ways. If Dr. MacDougall is qualified to establish that an injury is a major contributing cause of Claimant's injury, so too is he qualified to apportion it.

While Dr. MacDougall did state that Claimant's injury was a major contributing cause of his disability, his explanation of how it was is not persuasive. The basis for Dr. MacDougall's opinion was that his symptoms began after June 22.

Q: So, Doctor, your opinion that the work activities were a major contributing cause to his current issues and need for treatment, what is that based on, what factors?

A: It's based on the patient's statements and the patient's statements were that he was asymptomatic with regard to his back and his legs for a significant period of time proper to these events at work… it is also my opinion he had a pre-existing disease in his back.

No physical change in Claimant's L4-5 disc can be attributed to a workplace injury. When these facts are taken into consideration, Dr. MacDougall's reliance on

Claimant's account of when his pain began is too subjective to establish that it was a major contributing cause of his current condition. Even if Claimant's disability was as a result of a workplace injury, Claimant has not established by a preponderance of the evidence that a workplace injury was a major contributing cause of his current condition.

CONCLUSION AND ORDER

Counsel for Employer/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. Claimant shall have an additional 20 days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this 21st day of September, 2018.

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Joe Thronson
Administrative Law Judge