SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CHRIS MULLEN,
Claimant,

HF No. 68, 2006/07

v.

DECISION

LEHMAN TRIKES USA, INC. and ACUITY,
Employer/Insurer,

and

ROBB'S INC.-GROCERY and TRI-STATE INSURANCE OF MINNESOTA,
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. Brad J. Lee represented Claimant. Eric C. Blomfelt represented Employer/Insurer Lehman Trikes USA, Inc. and Acuity (Lehman). Christina L. Fischer represented Employer/Insurer Robb's Inc.-Grocery and Tri-State Insurance of Minnesota (Robb's).

Pursuant to a Prehearing Order entered by the Department on September 25, 2007, the issues presented at hearing were:

1. Whether [Lehman] should have immediately paid Claimant's claim pursuant to SDCL 62-7-38.
2. Should [Lehman] be required to pay medical providers directly or should those payments be processed through Claimant's counsel?
3. Did Claimant suffer an Aggravation or a Recurrence?
4. Did Claimant suffer an injury arising out of and in the course of his employment?
5. What, if any, interest is owed on payments made to Claimant by [Lehman]?

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 NW2d 720 (SD 1992); Phillips v. John Morrell & Co., 484 NW2d 527, 530 (SD 1992); King v. Johnson Bros. Constr. Co., 155 NW2d 183, 185 (SD 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353, 358 (SD 1992).

Whether [Lehman] should have immediately paid Claimant's claim pursuant to SDCL 62-7-38.

SDCL 62-7-38 provides:

> In cases where there are multiple employers or insurers, if an employee claims an aggravation of a preexisting injury or if an injury is from cumulative trauma making the exact date of injury undeterminable, the insurer providing coverage to the employer at the time the aggravation or injury is reported shall make immediate payment of the claim until all employers and insurers agree on responsibility or the matter is appropriately adjudicated by the Department of Labor pursuant to this chapter.

On September 11, 2003, Claimant suffered a compensable, work-related injury to his low back while employed at Robb's. Claimant was off work for about a week after the injury. Claimant treated with Shawn Stinton, D.C. Dr. Stinton referred Claimant to Dr. Rand Schleusener, a neurosurgeon in Rapid City, after about eight weeks. Dr. Schleusener diagnosed Claimant with a disk bulge at L5-S1 and some disk desiccation at L4-5, along with radiating right leg and buttock pain. Claimant received injections, physical therapy, and medications. Dr. Schleusener placed Claimant at maximum medical improvement (MMI) and released Claimant to work full time on March 19, 2004.

Claimant treated with Dr. Stinton on September 9, 2004 and November 11, 2004, for low back symptoms. In January 2005, Claimant began working for Lehman as a conversion tech. Claimant did not seek any relevant medical treatment until June 16, 2006, when he presented to Dr. Stinton with neck tightness and soreness, some headaches, and low back pain from standing on concrete at work. Claimant's symptoms resolved after treatment.

Claimant again treated with Dr. Stinton for low back discomfort on August 3, 2006, while working 10-12 hour days preparing for the annual Sturgis bike rally. After one treatment, Claimant was able to return to his normal work duties and his back felt fine.

On August 11, 2006, Claimant arrived at Lehman at approximately 7 a.m. That morning Claimant installed by himself rear differentials on two Harley-Davidson Sportsters. Later that morning Claimant went to inspect the bolts underneath a motorcycle that was on a lift, two and one-half to three feet off the ground. Claimant had to get on one knee and hunch over to look underneath the motorcycle. It is an awkward position and it put pressure on Claimant's low back. Claimant was unable to get up from that position because his back "caught" and he felt excruciating pain. Claimant properly notified his supervisor of his injury.

On August 14, 2006, Claimant sought medical treatment for his condition with Dr. Stinton. Dr. Stinton recognized that Claimant's back was beyond his help. On August 17, 2006, Dr. Stinton referred Claimant to Dr. Tim Watt, a Rapid City neurosurgeon. Claimant underwent decompression and fusion surgery on September 16, 2006. Dr. Watt stated in his medical report, "To a reasonable degree of medical certainty I am confident that the back problem necessitated his decompression and fusion surgery on 9-15-06, was employment related."

On August 14, 2006, Claimant contacted Stacy Gray, the Controller for Lehman, to fill out a First Report of Injury Form. After Ms. Gray refused to complete the form, Claimant contacted the Department of Labor. The Department of Labor advised that a form should be filed.

On October 2, 2006, Lehman denied Claimant's worker's compensation claim alleging Lehman lacked information that Claimant suffered a work-related injury. No benefits had been paid at this point. Claimant sought legal counsel. A Petition for Hearing was filed with the Department of Labor on November 15, 2006. Lehman answered the Petition, denying Claimant's claim for benefits and denying that he suffered an injury.

The elements of SDCL 62-7-38 are met by these facts and the evidence presented. Lehman's arguments are rejected. Lehman (Acuity) should have immediately paid Claimant's claim pursuant to SDCL 62-7-38.

Should [Lehman] be required to pay medical providers directly or should those payments be processed through Claimant's counsel?

On October 2, 2006, Lehman issued a written denial of Claimant's claim for workers' compensation benefits under the guise Lehman lacked information that showed Claimant suffered a work-related injury. This denial caused Claimant's personal health insurer, Wellmark Blue Cross/Blue Shield, to have to cover Claimant's medical expenses – totaling over $80,000.00. Although Wellmark agreed to cover Claimant's medical expenses, Claimant had to pay hundreds of dollars in out-of-pocket expenses through co-pays, co-insurance, and deductibles.

Lehman maintained its denial until it began paying disability benefits in December 2006. It had still not paid any of Claimant's medical expenses. On February 21, 2007, despite these facts, counsel for Lehman issued a letter to counsel for Claimant claiming, "[Lehman] is following SDCL 62-7-38 and making payments until the matter is settled." On April 17, 2007, counsel for Lehman reaffirmed his position that Lehman was paying for Claimant's medical benefits pursuant to SDCL 62-7-38 and that it would pay those bills pursuant to the fee schedule through Corvel Corporation. In June and July 2007, Claimant's medical providers did receive payment from Lehman, but according to the reduced fee schedule.

Claimant asserts that Lehman should be required to pay Claimant's medical expense to him through his law firm without benefit of the reduced fee schedule pursuant to SDCL 62-1-1.3 and Wise v. Brooks Construction Services, 2006 SD 80, 721 NW2d 461. SDCL 62-1-1.3 states in relevant part:

> If an employer denies coverage of a claim on the basis that the injury is not compensable under this title due to the provisions of subsection 62-1-1(7)(a), (b), or (c), such injury is presumed to be nonwork related for other insurance purposes, and any other insurer covering bodily injury or disease of the injured

> employee shall pay according to the policy provisions. . . . If it is later determined that the injury is compensable under this title, the employer shall immediately reimburse the parties not liable for all payments made, including interest at the category B rate specified in 54-3-16.

The South Dakota Supreme Court, in Wise, provided:

> If Employer had accepted responsibility for Wise's injury they would have been entitled to the benefits of the fee schedule. Because they denied Wise's claim, Wise, not Employer, incurred the expense of his treatment and surgery. An employer cannot deny coverage and then, once a claimant has incurred expenses, only pay the expenses it chooses according to the medical fee schedule. An employer loses its access to the medical fee schedule when it denies coverage. Therefore, under SDCL 62-1-1.3, the medical fee schedule is not applicable in this case. Thus, Employer is liable for the full amount of the medical expenses incurred by Wise.

Id. at ¶ 38. The court then noted that payment of those expenses through Wise's "attorney is commonly done and is contemplated by statute." Id. at ¶39 (citing Lagge v. Corsica Co-op, 2004 SD 32, ¶ 38, 677 NW2d 569, 578). Lehman is required to pay Claimant's medical expenses through Claimant's counsel's law firm without benefit of the medical fee schedule.

Did Claimant suffer an Aggravation or a Recurrence?

The South Dakota Supreme Court explained the aggravation/recurrence question, stating:

> The distinction between the meaning of these two concepts is gray. Enger v. FMC, 1997 SD 70, ¶ 17, 565 NW2d 79, 84. "'If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second.'" Id. (quoting 9 Arthur Larson, Larson's Workmen's Compensation Law § 95.23.)
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> Causation must be established to a reasonable medical probability, not just a possibility. Enger, 1997 SD 70 at ¶ 18, 565 NW2d at 85. When the medical evidence is not conclusive, the claimant has not met the burden of showing causation by a preponderance of the evidence. Id.
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> The core issue in this case is whether Kubal's disability was a recurrence or an aggravation of the injury she reported in February 1990. In making this determination there are certain guidelines. To determine that an injury was an aggravation of a prior episode, the evidence must show: 1) a second injury as that term is used in this jurisdiction; and 2) that this second injury contributed independently to the final disability. Paulson v. Black Hills Packing Co., 1996 SD

> 118, ¶ 12, 554 NW2d 194, 196. To determine that the second episode was a recurrence of the prior injury the evidence must show: 1) there have been persistent symptoms of the injury; and 2) no specific incident that can independently explain the second onset of symptoms. Id. Because an injury is a subjective condition, an expert opinion is required to establish a causal connection between the incident or injury and disability. Day v. John Morrell & Co., 490 NW2d 720, 724 (SD 1992).

Truck Ins. Exch. v. CNA and Dodson Ins. Group, 2001 SD 46, ¶¶18-20.

The medical evidence demonstrates that Claimant suffered an aggravation or cumulative trauma to his low back as a result of his work related activates at Lehman Trikes. Drs. Lawlor, Watt, and Stinton opine that Claimant suffered some sort of injury while working at Lehman. The medical opinions of Claimant's treating physicians are accepted. Employer/Insurer offered the opinions of Dr. Gregory Reichhardt to dispute Claimant's claim. Dr. Reichhardt's opinions are rejected. The record is clear that Dr. Reichhardt did not have or consider enough of Claimant's relevant medical records to provide a persuasive opinion. Dr. Lawlor, Dr. Watt, and Dr. Stinton each treated Claimant, understood his medical situation and offered reasoned, careful, and sound medical opinions. Claimant suffered no persistent symptoms of his injury at Robb's. Claimant suffered an aggravation of his low back condition on August 11, 2006.

Did Claimant suffer an injury arising out of and in the course of his employment?

"A claimant who wishes to recover under South Dakota's Workers' Compensation Laws must prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of the employment." Fair v. Nash Finch Co., 2007 SD 16, ¶ 9, 728 NW2d 623, 628 (quotations and citations omitted). "The injury arose out of the employment if: 1) the employment contributes to causing the injury; 2) the activity is one in which the employee might reasonably engage; or 3) the activity brings about the disability upon which compensation is based." Id. at ¶ 10 (quotations and citation omitted). "An employee is acting in the course of employment when an employee is doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment." Id. at ¶ 11 (internal quotations and citations omitted).

The medical opinions of Claimant's treating physicians are accepted. Dr. Reichhardt's opinions are rejected as stated above. Claimant's employment contributed to causing his injury because he was at work inspecting and assembling motorcycles at the time of the injury. This activity was one in which the employee might reasonably engage because it was part of his duties. Claimant's treating doctors agree that the activity brought about the disability upon which Claimant's claim for compensation is based, namely his low back injury and need for surgery. Employer/Insurer's arguments that Claimant did not suffer an injury arising out of and in the course of his employment are rejected. Claimant did suffer an injury arising out of and in the course of his employment with Lehman.

What, if any, interest is owed on payments made to Claimant by [Lehman]?

Claimant has prevailed in his claim for worker's compensation benefits. Claimant is entitled to penalties and interest for late disability payments. Lehman must reimburse Claimant for his medical expenses plus interest from the date of this decision through his counsel's law firm.

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within 14 days from the date of receipt of this Decision. Counsel for Robb's and Lehman's shall have 14 days from the date of receipt of Claimant'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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 8th day of August, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge