

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUTCHINSON)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

ALAN ANTHONY ARMSTRONG,
Claimant-Appellant,

vs.

LONGVIEW FARMS, LLP,
Employer-Appellee,

and

**TRAVELERS PROPERTY AND
CASUALTY,**
Insurer-Appellee.

CIV. 18-15

MEMORANDUM DECISION

AND ORDER

FILED

OCT 22 2018

Doreen L. Winick
HUTCHINSON COUNTY CLERK OF COURTS
FIRST JUDICIAL CIRCUIT COURT OF SD

This matter came before the Court on Anthony Armstrong's ("Armstrong") appeal from the Final Decision by the South Dakota Department of Labor & Regulation, Division of Labor and Management (the "Department"). The case was heard by Joseph Thronson, Administrative Law Judge (ALJ), on October 25, 2017 and an Order entered on February 1, 2018. A hearing was held before this Court on July 30, 2018. All sides have also presented various briefs and submissions prior to the hearing. Claimant is represented by James D. Leach, Attorney at Law. The Employer/Insurer is represented by Rebecca Mann of Gunderson, Palmer, Nelson & Ashmore, LLP. After having considered the submissions, exhibits, and the various briefs, the Court issues the following memorandum decision.

FACTS

Armstrong is 50 years old with a 15 year history of working with hogs prior to suffering his current injury. He began working for Employer in 2009, caring for young pigs and raising

them. On March 31, 2016 Armstrong injured his left knee at work. He had fallen and experienced great pain in the knee and was unable to return to work. He was taken to the hospital in Scotland, South Dakota. On April 5, 2016 he was seen by Dr. Adler, who recommended a complete knee replacement. Employer denied coverage for the surgery, determining that the injury was pre-existing.

Armstrong has previously injured his knee in Texas in the 1990s, from which no medical records exist, and again in 2005 while employed by Schwartz Farms, Inc. At that time he was seen by Dr. Swift of Yankton and was treated for and diagnosed with osteoarthritis in his left knee. He was advised to undergo a bilateral knee replacement but opted not to. His then employer denied further treatment, defining the osteoarthritis diagnosis as a pre-existing condition not related to his work injury. Armstrong has had issues with the knee continually since then, as set forth in his medical history.

Having been denied workers' compensation coverage by Employer, Armstrong relied on private health insurance and underwent a double knee replacement in May 2016. Dr. Adler performed this surgery. The surgery on his right knee is not at issue here, but went as well as was expected. However, Armstrong developed an infection in his left knee and underwent a total of three surgeries on this knee. Not getting the desired results, he was referred to Mayo Clinic of Rochester, MN, who recommended a fourth surgery. At this time he was no longer working for Employer, did not have private health insurance, and could not afford this surgery. No fourth surgery has been performed, and Armstrong suffers from this knee injury to date, wears a brace at all times, and suffers pain and mobility issues rendering him unable to perform the type of work he could do prior to his knee surgery.

Armstrong filed his claim for workers' compensation benefits on January 17, 2017. He relied on the testimony of Dr. Adler, who performed his surgeries, and determined that his March 31 injury was a major contributing factor to his disability. Employer relied on Dr. Bissell, who determined that the March 31 injury was not a major contribution cause of Armstrong's condition due to severe preexisting osteoarthritis in the left knee. After hearing, his claim was denied, resulting in this appeal.

STATEMENT OF LEGAL ISSUES

1. Whether the ALJ erred when he concluded that Armstrong's injury did not independently contribute to his disability under SDCL 62-1-1(7)(c)?
2. Whether the ALJ erred when he concluded that Armstrong's injury was not a major contributing factor of his disability under SDCL 62-1-1(7)(b)?
3. Was the allowing of a leading question Employer asked Dr. Bissell proper, and did it cause any prejudice to Armstrong at hearing?

STANDARD OF REVIEW

The standard of review in an administrative appeal is governed by SDCL 1-26-36. The Court gives deference to the agency on factual matters, applying the clearly erroneous standard of review. *Watertown Co-op. Elevator Ass'n v. South Dakota Dept. of Rev.*, 2001 S.D. 56 ¶ 10. However, any "construction of a statute is a question of law. Therefore, the decisions of the administrative agency . . . are fully reviewable." *Nash Finch Co. v. South Dakota Dept. of Revenue*, 312 N.W.2d 470, 472 (1981) (internal citations omitted). The standard of review that this Court should exercise here is de novo. In an administrative appeal, questions of fact are reviewed under the clearly erroneous standard, whereas questions of law are reviewed de novo. *Brown v. Douglas School Dist.*, 650 N.W.2d 264, 267 (S.D. 2002). However, when the agency

bases its factual decision on documentary evidence, such as depositions, then the proper standard of review on appeal is de novo. *Vollmer v. Wal-Mart Store, Inc.*, 729 N.W.2d 377, 382 (S.D. 2007). In *Vollmer*, all medical testimony was given through depositions. *Id.* Therefore, the medical evidence on causation was considered “anew.” *Id.*

Here, all medical evidence was given through depositions, exhibits, and medical records. *Vollmer* and *Brown* are controlling. The parties conceded this at oral argument. Since questions of law and factual determinations based on documentary evidence are reviewed under the de novo standard, as is the case here, this Court will apply the de novo standard in this appeal.

1. Whether the ALJ erred when he concluded that Armstrong’s injury did not independently contribute to his disability under SDCL 62-1-1(7)(c)?

Under subsection c, Armstrong must meet a three-part test. One, he must show that he had a subsequent compensable work injury and two, that the current injury combined with the pre-existing, compensable injury. Armstrong suffered an injury in 2005, but he has not established that it was a compensable injury, in that it was not shown to be the cause of his osteoarthritis, and evidence supports that. Employer claimed that the 2005 injury was not compensable, alleging it to be a pre-existing condition as evidenced by a letter from his prior employer refusing to pay for treatment. Armstrong did not contest this at the time. If there was no compensable prior work injury, then Armstrong cannot establish causation under this subsection.

Even if the case was made by Armstrong that the 2005 injury was a compensable injury, Armstrong has not shown that three, the subsequent March 2016 injury contributed independently to his need for treatment for his prior injury. No credible medical evidence suggests otherwise. Dr. Bissell testified to the contrary. Armstrong was advised of his need for

knee replacement well in advance of the March 2016 injury, as early as 2005. His records indicated bone-on-bone contact in the knee and that he suffered pain as a result of his osteoarthritis since well before the March 2016 injury. Armstrong argues that his ability to work prior to the March 2016 injury and subsequent inability to work after proves that injury independently contributed to his condition, but this is not medical evidence, and “causation must be established to a reasonable medical probability, not just a possibility. When medical evidence is inconclusive, the claimant has not met the burden of shown causation.” *Truck Ins. Exch. v. CNA*, 624 N.W.2d 705, 709 (S.D. 2001). There was no explanation by Armstrong, and it is his burden to provide such, as to how his injury contributed independently to his condition, especially considering he was diagnosed with a need for a knee replacement and osteoarthritis pre-injury. The ALJ determination on this question was correct.

2. Whether the ALJ erred when he concluded that Armstrong’s injury was not a major contributing factor of his disability under SDCL 62-1-1(7)(b)?

Armstrong also argues that subsection b provides for coverage as his March 2016 knee injury was a major contributing cause of his condition and need for knee surgery. The record shows that both doctors who saw Armstrong testified on this issue. Dr. Bissell argued that Armstrong’s osteoarthritis was not attributable to acute injury, and instead was degenerative and chronic. He stated that his medical records showed multiple instances of ongoing osteoarthritis, was symptomatic, and future knee replacements likely, determinations all made well in advance of March 2016.

While Dr. Adler’s conclusion was contrary, he too supported Dr. Bissell, indicating that he met the criteria for a total knee replacement ten years ago, and that the day before the injury in March 2016 he qualified for surgery, although hedging on the question of whether such surgery

was needed. Dr. Adler felt Armstrong's ability to tolerate pain negated the need for surgery, differentiating that from qualifying for surgery.

The ALJ determined that the weight of the evidence establishes that Bissell's testimony was persuasive and that Armstrong's pain and immobility were primarily due to years of severe and degenerative osteoarthritis. While no deference is to be given to the ALJ's findings as the review is de novo, this Court finds the facts supporting the ALJ's decision equally persuasive. Armstrong has not met his burden to establish that his work injury was a major contributing cause of his disability. The ALJ determination on this question was correct as well. Having found in favor of Employer on issues 1 and 2, the question of whether the infection in Armstrong's knee following the March 2016 surgery is compensable is answered as well. Side effects of a non-compensable injury are also not compensable, therefore the infection, and any treatment stemming from it, is not compensable.

On appeal Armstrong raised new authority. The ALJ did not have the opportunity to consider what, if any effect, the recent case *Hanson v. Big Stone Therapies, Inc., et al.*, 2018 S.D. 60 (July 25, 2018) may have on his determinations. However, as this is a question of law, and a de novo review, this Court is competent to do so. *Hanson* is an interesting case, with an outcome that injects reality into causation questions in negligence cases. *Hanson* is a medical malpractice case in which the defendant asserted that plaintiff had failed to produce sufficient expert opinion evidence of causation to withstand summary judgment. The Supreme Court disagreed. The concurring opinion contains significant language that on its surface supports Armstrong's position in this case on causation. It held "Immediate outward manifestation of symptoms that naturally follow from an accident constitute the usual grounds for holding expert opinion unnecessary [to prove causation]." In the same paragraph, it cites *Brown v. Baker*, 672

N.E.2d 69, 71 (Ill. Ct. App. 1996), stating that “[I]f a plaintiff suffers a cut in an accident, the jury can readily determine without expert testimony that the accident caused the cut.” However, *Hanson* is a negligence case, not a workers’ compensation case. The standards that must be met regarding causation in workers’ compensation cases are set out in statute and in a long line of settled case law, and medical evidence is required for such determinations. *Hanson* does not apply.

3. Was the allowing of a leading question Employer asked Dr. Bissell proper, and if not did it cause any prejudice to Armstrong at hearing?

At hearing Dr. Bissell was asked by counsel for Armstrong if the only theory that supported the conclusion that Armstrong could no longer do the work he was able to do pre-March 2016 injury was because that injury caused a disability which prevented him from doing such work, and answered in the affirmative. Counsel for Employer then rehabilitated her witness with a leading question over objection, offering an alternative theory, with which Dr. Bissell agreed. The ALJ overruled the objection and allowed the answer to stand. The particulars of the exchange are well set out in the record.

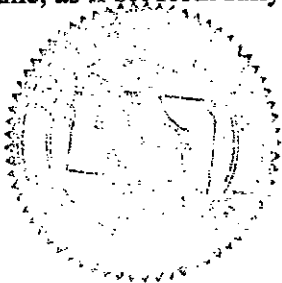
It is well settled that allowing leading questions is discretionary. However, whether a leading question is proper is also a question of law reviewed de novo in this case. This Court has reviewed the entirety of the exchange and finds that the objection should have been overruled. If that finding is erroneous, this Court finds that allowing the question in no way prejudiced Armstrong. Any effect on credibility of Dr. Bissell was evident regardless of the objection. This Court finds such effect on credibility to be minimal, if there was any at all. Dr. Bissell was asked a summarization of his already offered testimony on the facts which led him to conclude that Armstrong’s injury was not a major contributing factor regarding his condition. The information

produced by the leading question was already in the record by the prior testimony of Dr. Bissell. The contradiction he made was also in the record. The objection was properly overruled and if the question was improper the response provided no prejudice to Armstrong.

CONCLUSION

The Court finds that Armstrong's injury did not independently contribute to his disability under SDCL 62-1-1(7)(c). The Court further finds that Armstrong's injury was not a major contributing factor of his disability under SDCL 62-1-1(7)(b). Finally the Court finds that allowing the leading question Employer asked Dr. Bissell was proper, and such did not cause any prejudice to Armstrong at hearing.

It is therefore ORDERED that the Administrative Law Judge's decision is UPHELD in all respects, and counsel for Employer is instructed to prepare any necessary findings and conclusions and any orders putting this decision into effect, and incorporating this decision in the same, as if set forth fully therein.



Dated this 22nd day of October, 2018.

BY THE COURT:

Hon. Patrick T. Smith, Circuit Judge
First Judicial Circuit, Davison County

ATTEST:
Clerk of Courts

By:

Deputy