

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

ALBERT PAVLINAC,

HF No. 115, 2013/14

Claimant,

v.

DECISION

**GRAYCOR INDUSTRIAL
CONSTRUCTORS, INC.,**

Employer,

and

ACIG INSURANCE COMPANY,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. William E. Coester, Attorney at Law, represents Claimant, Albert Pavlinac (Claimant). J. G. Shultz, of Woods, Fuller, Shultz & Smith, P.C., represents Employer and Insurer, Graycor Industrial Construction, Inc. and ACIG Insurance Company (Employer and Insurer). This case was submitted to the Department of Labor on a stipulated record, specifically, Claimant's depositions, medical records, State Farm claims file, Statement of Eric Olson, and Statement of Claimant.

ISSUES:

Whether Claimant's work related injury incident on May 31, 2013, while employed with Employer, was a major contributing cause of the current injury or condition alleged to be suffered by Claimant?

Whether past and future medical expenses associated with Claimant's right wrist injury are compensable?

FACTS:

1. After graduating from high school Albert Pavlinac (Claimant) worked for Bethlehem Steel as a laborer, water blaster, sand blaster, and hydro blaster for about eight to ten years. Eventually, Claimant began working in construction.
2. Claimant worked for Jaehn Construction West, in Las Vegas, Nevada, for about seven years as a commercial superintendent. Claimant then worked for Cartmill

Rodgers, in Las Vegas, Nevada, for about five years as a commercial superintendent. In 2009, Claimant left Las Vegas, Nevada, and moved to Milbank, South Dakota. In late 2010 or early 2011, Claimant began working for MCC Construction, as a commercial superintendent, in Antler, North Dakota for about a year. Claimant then worked for Hutton Construction, in Cleveland, Ohio as a commercial superintendent for almost a year.

3. On September 5, 2012, Claimant began working for Dallas Hanson Construction Co. as a project estimator. Claimant's job was to get all the prices for the commercial project together. Claimant as an estimator was required to do a lot of writing.
4. On September 28, 2012, while driving to work Claimant stopped to assist another driver who was having car trouble.
5. While working under the hood of the vehicle, the other driver inadvertently let the hood of her vehicle drop on Claimant's right wrist causing an injury.
6. Within a few hours of Claimant's injury he went to Ortonville Area Health Services for treatment and saw Allan E. Ross, MD, who ordered x-rays of Claimant's right wrist. Ross' initial assessment was a wrist contusion. X-ray reportedly showed "what appeared to be an old navicular fracture, formal reading pending." Claimant was placed in a thumb spica splint, given Toradol, and Hydrocodone.
7. The September 28, 2012, x-ray impression was mild to moderate degenerative changes of the wrist in this patient with scapnolunace dissociation. No fractures identified.
8. New x-rays of Claimant's wrist were taken on October 4, 2012; again "no definite navicular fracture is seen. There is a small triangular density in the soft tissue at the polar aspect of the wrist laterally unchanged. There is narrowing of the radiocarpal joint space. Stable examination of the right wrist from September 28, 2012."
9. On October 11, 2012, Claimant went to Glacial Lakes Orthopedics where he saw Dr. Casey Johnston. Johnston evaluated Claimant. Johnston noted, "Examination of his wrist reveals that he is very hesitant to allow any examination. Even light touch causes him to react with significant pain and apprehension. This is mostly over the radial side of his wrist. He is non-tender over the scapholunate interval. He is very tender over his right radial styloid and over the scaphoid. I am unable to elicit any Watson's scaphoid shift or any other maneuvers because he will not allow me to touch him secondary to pain. He has good sensation of the thumb. His thumb motor function is alright. The remainder of his hand examination is unremarkable. He has no significant bruising, swelling or other deformities." Johnson also noted "x-rays from late September

and from October 4, 2012, show that he has early stage SLAC wrist with radioscaphoid arthritis and some degenerative changes in his lunate proximally and dorsally. He probably had a chronic scapholunate ligament injury. He has some small fleck avulsion over the scaphoid that is quite distal and volar to the scaphoid itself. I am not sure what this represents or if this is part of an acute injury pattern. The remainder of his wrist looks normal. His distal radius is without fracture.”

10. An MRI scan was done on October 15, 2012, which showed:
 - 1) Nondisplaced fracture involving the proximal pole of the scaphoid.
 - 2) Findings concerning for partial tear of both the scaphotrapezium and scapholunate ligaments.
 - 3) Soft tissue swelling in the dorsal radial of the wrist overlying the scaphoid and radial styloid.
 - 4) Moderate osteoarthritis of the radial scaphoid articulation.
11. On October 25, 2012, Claimant returned to see Dr. Johnston for continued evaluation of his right wrist and for MRI test results. Dr. Johnston noted “he continues to have significant pain over the radial portion of his wrist.” Johnston referred Claimant to a hand surgeon, Dr. Jason Erpelding at Sanford Medical Clinic in Fargo, North Dakota.
12. On November 8, 2012, Dr. Johnston notes, “I spoke with Dr. Erpelding about the patient and he recommended conservative treatment, at least initially because he does have significant arthritis changes in his wrist as well as some edema around the proximal pole of the scaphoid, possibly a fracture. He has been in a splint. He has had no change in his symptoms. He is currently not working.” Johnston recommended that Claimant wear his splint and begin a physical therapy program for desensitization.
13. Dr. Johnston noted that “On exam today he still has pain out of proportion to his underlying injury.” X-rays of November 8, 2012, show:
 - 1) Nondisplaced fracture of the carpal navicular.
 - 2) There is a small triangular-shaped bone fragment projected at the volar.
 - 3) Mildly increased scapholunate interval of 2.8 mm suggesting possible disruption of the scapholunate ligament.
14. On December 20, 2012, Claimant returned to see Dr. Johnston for a follow up appointment. Claimant had been in physical therapy and was having some relief as well as some relief from his cortisone injection. Johnston noted, “On examination today, he still hesitates to allow me to examine him fully. He is able to tolerate light touch now.” Johnston noted his impression as “12 weeks status posed right SLAC wrist with end-stage radioscaphoid arthritis.”

15. On January 24, 2013, Claimant saw Dr. Johnston for a re-evaluation. Johnston's note states "He continues to have some sharp pains over the radial side of his wrist, however in general, he feels like he is improving quite a bit." The note states "Examination today reveals that he is still tender to palpation over the distal radio ulnar joint. The rest of his examination is really unchanged. His hypersensitivity has gotten dramatically better." Claimant was returned to activities as tolerated and was advised to "progress with a home therapy program". Johnston's note states, "I had a long discussion with the patient regarding the degenerative nature of his wrist problem. At some point, I think he will need to have surgery which will need to be done by a hand surgeon. . . . If he continues to have problems, I would refer him to a hand surgeon."
16. Dr. Johnston released Claimant to work without restrictions on January 24, 2013.
17. On January 30, 2013, Amanda Heinrich, Physical Therapist noted that she spoke with Claimant on the phone regarding his follow up appointment with Dr. Johnston. The note states "He states that Dr. Johnston has released him from therapy." Claimant reported that Dr. Johnston did suggest referral for a surgical consult, but Claimant "refused, stating that he does not want surgery on his wrist."
18. After Claimant's physical restrictions were lifted on January 24, 2013, he contacted Dallas Hanson Construction Co., Claimant was informed they were laying employees off and there was no work available for him.
19. Claimant is a member of the Carpenter's Union, Local 531. The Union placed Claimant with Graycor Services, Inc. (Employer), working as a journeyman carpenter at the Big Stone Power Plant, Big Stone City, South Dakota, beginning early May 2013.
20. On May 31, 2013, while working for Employer, Claimant and another worker were moving four inch solid steel anchor rods with nuts and washers onto a pallet when Claimant's hand slipped and the anchor fell, pinching his right wrist between the anchor on the pallet and the anchor he was moving. The anchor weighed 250-300 pounds.
21. At the time of Claimant's accident, Employer was insured by ACIG Insurance Company (Insurer) for purposes of workers' compensation.
22. Claimant notified Employer immediately about the accident. Claimant was taken to the nurse's station.
23. The safety director transported Claimant to the Emergency Room at Ortonville Hospital for treatment and saw Allen E. Ross, MD, who ordered x-rays of Claimant's right wrist. Ross' initial assessment was a wrist injury. The x-rays

showed evidence of old injury but no acute injury. Claimant was placed in a thumb spica splint, given a prescription for hydrocortisone, and told to follow up in 3-4 days. Ross authorized him to "return to work on 6/01/13 with restriction of lifting no more than 15 pounds with right arm for 4 days."

24. Claimant had follow up appointments with Dr. Ross on June 4, and June 7, 2013. Claimant remained on work restrictions. On June 7, 2013, Ross diagnosed Claimant with a wrist contusion.
25. Claimant returned to see Dr. Ross on June 13, 2013, for a follow up. During this visit, he reported "he was improving with his work restrictions however yesterday he had to shovel and rake to do concrete work yesterday. Last night he had much more pain and discomfort. The pain has continued today. He also describes a burning sensation that radiates up his forearm." The notes state "He is tender to palpitation over the distal radius, snuffbox and base of the thumb. He has more pain with ulnar deviation of the wrist."
26. The x-ray report of June 13, 2013 states "The scapholunate interval is stable at 2.7 millimeters. No bone erosion or destruction is seen. No acute fracture is seen."
27. On June 13, 2013, Dr. Ross ordered an MRI of Claimant's right wrist. On June 20, 2013, Claimant had an MRI scan from Ortonville Area Health Services, done on his right wrist. The MRI states, "The current study reveals disruption of the scapholunate ligament and widening of the scapholunate space (4.5 millimeters). There is complete joint space loss between the radial styloid and scaphoid with a 4 millimeter subchondral cyst in the proximal pole of scaphoid. Osteophytes are seen at the radial styloid and distal pole of the scaphoid and there is marrow edema linear low signal abnormalities are seen to suggest an occult fracture. There is soft tissue swelling along the dorsum of the distal carpal along the radiocarpal joints with small joint effusions."
28. On July 1, 2013, Claimant saw Timothy M. Zoellner, MD, at the Orthopedic Institute in Sioux Falls. Zoellner's notes state "He has had referrals to multiple doctors who could not help him and ultimately here on a day when our wrist and hand trained specialist is gone. He has very limited motion in all planes. CMS is grossly intact. X-rays show avulsion of the scaphoid, MRI confirms that." Zoellner placed Claimant on restrictions of "off work until seen by Dr. Curd."
29. On July 8, 2013, Claimant went to the Orthopedic Institute where he saw R. Blake Curd, MD/sks, for evaluation of his right wrist. Curd states "He is a 46-year old carpenter who was working at the Big Stone power plant and was in his usual state of health until the 31st of May when an approximate 250lb steel rod crushed him between another steel rod. He had immediate pain and soreness. He describes the pain as 8-9 on a scale of 10. It has continued to bother him and has become somewhat painful for the last six weeks or so. He has had no

treatment to-date other than being placed in a splint by Dr. Zoellner. He has been off work since his evaluation with Dr. Zoellner.” Curd stated “he has quite a dramatic pain response. He has pain out of the splint in his right wrist with almost any attempts at motion including flexion, extension, supination and/or pronation. I reviewed his radiographs in AP and lateral projections, which show evidence of scapholunate diastasis, dorsal intercalated segmental instability and radioscaphoid arthrosis consistent with a SLAC wrist.”

30. On July 8, 2013, Dr. Curd noted “I would recommend that we get his pain under better control. I have recommended an evaluation with a pain specialist. After we see his pain come down, we can start to discuss the options for treatment for his underlying scapholunate advanced collapsed wrist pattern. Follow up with me after his pain clinic evaluation.”
31. On July 8, 2013, Claimant underwent an occupational therapy evaluation.
32. On July 8, 2013, Dr. Curd released Claimant to return to work with limitations of no use of right arm.
33. On July 9, 2013, Claimant tried to return to work, but was not let into the power plant. Claimant spoke to the safety person at the gate, who then called the safety director. The safety director was informed the Claimant was returning to work with the restriction of no use of right arm. Claimant was told Employer wanted his doctor note and that he would be called later.
34. Claimant returned home. Claimant contacted Employer and was informed by Sharon Williams, that with no use of his right arm he would not be able to return to work.
35. On July 13, 2013, Employer/Insurer denied coverage of Claimant’s workers’ compensation claim.
36. Claimant did not have any further treatment for his wrist injury, including keeping his appointment with Dr. Brunz the pain specialist, because he could not afford treatment.
37. On January 8, 2014, an Independent Medical Exam was performed by William H. Call, MD, at the request of Employer/Insurer. Dr. Call issued a report dated January 15, 2014. Dr. Call is a fellowship-trained, board-certified orthopedic hand and upper extremity tertiary sub-specialist surgeon with 34 years of experience. Dr. Call noted “Currently the only evidence-based diagnosis present as a result of the acute injury claimed on May 31, 2013 is a right wrist contusion. The patient has evidence of end-stage, pre-existent SLAC wrist on the right side, which is not related to any injury of May 31, 2013. It was clearly present previously, identified with the workup of the non-work-related injury of September 28, 2012; and did, in fact, pre-exist that contusion injury as well.”

38. Dr. Call further noted “Currently, the patient should be allowed to work with no use of his right upper extremity, no work off the ground, and no operation of hazardous machinery. Currently such restrictions are necessary not as the result of any work-related contusion, but rather as the result of the underlying non-work-related, pre-existent, end-stage SLAC wrist.”
39. On June 23, 2014, Dr. Curd wrote a letter to Employer/Insurer’s attorney. Dr. Curd reviewed Dr. Call’s IME report in order to offer his opinion as Claimant’s treating orthopedist. Dr. Curd indicates that “at the time I saw Mr. Pavlinac he clearly had evidence of scapholunate advanced collapse wrist arthrosis. I have reviewed Dr. [Call’s] office note and agree with the majority of what he states within it. I think Mr. Pavlinac did indeed have a scapholunate advanced collapse wrist injury that predated the stated work injury. The changes seen radiographically are chronic.”
40. On August 18, 2014, Dr. Call wrote a letter to Employer/Insurer’s attorney. Dr. Call reviewed Dr. Curd’s report of June 23, 2014. Dr. Call indicated “I can now finalize my opinions with respect to causation. I continue to hold strongly to my conclusions expressed in my report of January 15, 2014.” Dr. Call agreed with Dr. Curd’s conclusions, stating “the only evidence-based diagnosis present as a result of the acute injury claimed on May 31, 2013, was a right wrist contusion which resolved.” Dr. Call noted “The end-stage preexistent SLAC wrist condition on the right side was not related to the contusion of May 31, 2013. It was clearly present previously, identified with a workup of a non-work-related injury of September 28, 2012, and did, in fact, pre-exist that contusion injury as well. [T]here is no objective evidence in the imaging studies identified above for any pathology associated with the contusion injury of May 31, 2013, no treatment is necessary for that injury.”

Additional facts may be developed in the issue analysis below.

Analysis:

Causation:

The Department’s first inquiry is whether Pavlinac’s work injury on May 31, 2013, is a major contributing cause of his current condition. Pavlinac, as the Claimant, has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry, Inc.*, 777 N.W.2d 363, 367 (SO 2010); *Day v. John Morrell & Co.*, 490 N.W.2d (SD 1967). The employee’s burden of persuasion is by a preponderance of the evidence. *Caldwell v. John Morrell & Co.*, 489 NW2d 353,358 (SD 1992). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. *Enger v. FMC*, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL 62-1-1(7) defines “injury” or “personal injury” as:

[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:

- (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.

SDCL.62-1-1 (7)(b) (emphasis added). The South Dakota Supreme Court has noted that there is a distinction between the use of the term “injury” and the term “condition” in this statute. See *Grauel v. South Dakota Sch. of Mines and Technology*, 2000 SD 145, ¶ 9. “Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result.” *Id.* Therefore, “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.” *Id.* (citations omitted).

“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.” *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992). “No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition.” *Darling v. West River Masonry, Inc.*, 2010 SD 4, ¶¶11-13, 777 NW2d 363, 367. A medical expert’s finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.*, 443 NW2d 5, 6 (SD 1989). See also *Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, ¶21, 653 NW2d 247, 252-53 (quoting *Day*, 490 NW2d at 724) (Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers] compensation statutes.). Instead, [c]ausation must be established to a reasonable medical probability[.] *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶19, 624 NW2d 705, 709.

It must first be noted that Claimant suffered a non-work related pre-existing injury, pain, and other problems with his right wrist before May 31, 2013. When on September 28, 2012, Claimant stopped on his way to work to assist another driver who was having car trouble and the hood of the other vehicle drop on Claimant’s right wrist causing severe pain. Claimant treated with Dr. Johnston for this injury until January 24, 2013, at which

time Claimant was still experiencing ongoing pain in his right wrist. According to Dr. Johnston's notes from January 24, 2013, Claimant "continues to have some sharp pains over the radial side of his wrist..." Dr. Johnston discussed with Claimant the degenerative nature of his right wrist problem and opined that Claimant would at some point need to have surgery for the problem.

The evidence clearly indicates that an injury "arose out of and in the course of employment" on May 31, 2013, when Claimant's right wrist was pinched between two 250-300 pound anchors. "Even if there is no dispute that a claimant 'suffered an initial work-related injury, that injury does not automatically establish entitlement to benefits for her current claimed condition.' Rather, a claimant must establish that such injury 'became a major contributing cause of her current claimed condition.'" *Vollmer v. Wal-Mart Store, Inc.*, 2007 SD 25, ¶14, 729 NW 2d 377, 382 (quoting *Haynes v. McKie Ford*, 2004 SD 99, ¶17, 686 NW2d 657, 661) (emphasis omitted). To determine whether that injury is a major contributing cause of Claimant's current medical problems, medical opinions must be considered.

In this case, Claimant has offered no medical opinions that a work-related injury is the cause of his current medical condition. Claimant contends that the scapholunate space widened between November 8, 2012 and June 19, 2013 from 2.8 mm, to 4.5 mm, with no intervening reason other than the injury on May 31, 2013. On the other hand, Dr. Curd and Dr. Call have opined that the only evidence-based diagnosis present as a result of the acute injury claimed on May 31, 2013, was a right wrist contusion which resolved, and that the injury is not a major contributing cause of Claimant's current medical condition.

Dr. Curd indicated that the Claimant clearly had evidence of scapholunate advanced collapse (SLAC) wrist arthrosis at the time Dr. Curd treated him. Dr. Curd also agreed with Dr. Call's opinion that "The end-stage preexistent SLAC wrist condition on the right side was not related to the contusion of May 31, 2013. It was clearly present previously, identified with a workup of a non-work-related injury of September 28, 2012, and did, in fact, pre-exist that contusion injury as well. [T]here is no objective evidence in the imaging studies identified above for any pathology associated with the contusion injury of May 31, 2013, no treatment is necessary for that injury." Both Dr. Curd and Dr. Call believe that any medical complaints that Claimant continues to endure are related to his pre-existing, non-work related injury and degenerative condition. Under these facts, Claimant has failed to meet his burden of proof. Employer/Insurer is not responsible for the payment of any further medical bills.

Conclusion

Claimant has failed to demonstrate by a preponderance of the evidence that his May 31, 2013, injury is a major contributing cause of his current right wrist pain and need for continuing medical treatment. Counsel for Employer and Insurer shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision, within twenty (20)

days from the date of receipt of this Decision. Counsel for Claimant shall have an additional twenty (20) days from the date of receipt of Employer and Insurer's Findings of Fact and Conclusions of Law to submit objections thereto or to submit their own 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 in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 30th day of October, 2015.

SOUTH DAKOTA DEPARTMENT OF LABOR
AND REGULATION

/s/ Sarah E. Harris

Sarah E. Harris
Administrative Law Judge