

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

MARK DENNIS MCQUAY

HF No. 137, 2004/05

Claimant,

v.

DECISION

FISCHER FURNITURE,

Employer,

and

ACUITY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The parties have litigated or reached agreement on most of the issues involved in this case. The sole legal issue remaining was heard by Donald W. Hageman, Administrative Law Judge on December 15, 2009, in Rapid City, South Dakota. Mark Dennis McQuay (Claimant) was represented by Dennis W. Finch. Charles A. Larson represented Fischer Furniture (Employer) and Acuity (Insurer).

Issue:

This case deals with the following legal issue:

Whether an injury suffered on October 22, 2002, while working for Employer is a major contributing cause of Claimant's current lower back condition?

Facts:

1. Claimant was born on August 28, 1976.
2. Claimant completed the tenth grade. He did not graduate from high school.
3. Claimant began smoking in the sixth grade. Claimant was in the sixth grade during the 1987 and 1988 school year. In 2003, Claimant smoked 2

packs of cigarettes per day and would switch between cigarettes and chewing tobacco. Claimant continued to smoke until 2007.

4. Nicotine is poison to the bone. Smoking leads to disc space loss. Smokers have a high risk factor for joint and spine problems. Nicotine use also accelerates degenerative disc disease.
5. Claimant worked for Employer in Employer's warehouse where he cut carpet and vinyl remnants for customers and installers. As part of his duties, Claimant was required to move rolls of carpet and linoleum within the store. Claimant's job involved heavy lifting.
6. Claimant suffered a compensable injury while working for Employer on October, 22, 2002 when a vinyl remnant fell and struck Claimant on the back of the head. The impact of the remnant knocked Claimant to his knees.
7. Prior to the accident on October 22, 2002, Claimant had not experienced any problems with his neck or back. Immediately following the accident, Claimant experienced soreness in his neck and lower back.
8. On October 23, 2002, Claimant saw Dr. Wayne Anderson upon the recommendation of Employer. During that exam Claimant complained of neck and lower back pain.
9. On October 30, 2002, Claimant had a follow-up visit with Dr. Anderson. During that visit, Claimant complained of low back pain on the right side. Anderson's records indicate "low back has good range of motion with some tenderness on the right at the L2-L3 area. Anderson describes Claimant lower back condition during that visit as lumbar strain.
10. Dr. Anderson referred Claimant to Dr. Simonson at the Rehab Doctors. Claimant reported to the Rehab Doctors on December 8, 2002 that he had some shooting pain in the arch of his right foot.
11. Dr. Anderson treated Claimant again on December 12, 2002. The assessment indicated "low back pain with right L-5 radiculopathy." An MRI was ordered to evaluate right lumbar issues.
12. Claimant had an MRI performed at Black Hills Imaging Center. Dr. Zavitz read that MRI and drafted a report dated December 9, 2002 indicating that Claimant had a "normal MRI of the lumbar spine." The MRI showed normal alignment and conus. The disc spaces were normal and there was no disc herniation, significant canal stenosis, focal nerve root compression and no evidence of compression on the L5 nerve root.

13. On December 23, 2002, Dr. Simonson's records state that Claimant's "lower back is doing much better."
14. On January 2, 2003, ProMotion records indicate that Claimant's back pain was "resolving" and that improvement was "significant."
15. On January 3, 2002, Dr. Simonson indicated in his records that Claimant had "significant improvement in lower back symptoms. Mr. McQuay tells me his lower back continues to do much better than it had previously."
16. On January 23, 2003 Claimant had physical therapy at ProMotion. The records indicate that Claimant had no complaints about his lower back.
17. Dr. Simonson indicated in his records on January 24, 2003, that Claimant's lower back was "doing well" and "doing great."
18. Claimant's medical records do not indicate that he suffered from any lower back pain between January 24, 2003 and August 5, 2005.
19. Employer and Insurer discontinued Claimant's workers' compensation benefits after March of 2004.
20. On August 5, 2005, Claimant saw Dr. Dietrich. Dietrich's records indicate that Claimant complained of "lower back pain and left foot pain." Dietrich's records also state that Claimant had been "evaluated for lower back and foot pain in 2002 and 2003", but that the pain had "resolved."
21. On October 4, 2005, Claimant sought treatment from Dr. Lassagard. During that visit, medical records indicate that Claimant complained of radiating pain in his left leg over the last several months.
22. Claimant had a second MRI on October 7, 2005 which was read by Dr. Saffell. That MRI showed several disc protrusions in his lumbar spine that had not appeared in the 2002 MRI.
23. There is no record that Claimant was treated for lower back pain between October 2005 and August 2007.
24. Claimant saw Dr. Watt on August 8, 2007. During that visit, Claimant complained of lower back pain.
25. A third MRI was performed on August 8, 2007. Dr. Luther indicated that this MRI showed a "new protrusion left L4-5."
26. Dr Luther conducted an examination of Claimant and reviewed Claimant's medical records. Dr. Luther reviewed the 2002, 2005 and 2007 MRIs.

After this review, Luther found significant differences between the 2002 and 2005 MRIs. He indicated that the 2005 MRI showed evidence of a disc bulge at L4-5 that was not present on the 2002 image.

27. Dr. Luther is the only physician, of those who provided opinions in this case, to comparatively reviewed Claimant's 2002, 2005 and 2007 MRIs.
28. Dr. Luther opined within a reasonable degree of medical certainty or probability that Claimant's October 22, 2002 injury did not remain the major contributing cause of Claimant current lower back problems after January of 2003. Luther opined that Claimant did not suffer a permanent impairment as a result of the October, 2002 injury.
29. Dr. Dowdle did a records review of Claimant's medical records. After that review, Dowdle opined within a degree of medical probability that Claimant's October 2002 work injury did not remain a major contributing cause of his current lower back condition since 2005
30. Dr. Dietrich only reviewed Claimant's 2007 MRI. After that review Dietrich opined that Claimant's October 22, 2002 injury was a major contributing cause of Claimant's current back problem. Dietrich's opinion was based, in part, on the fact that there is no record of and intervening injury since the 2002 accident.
31. Claimant testified at the hearing. Claimant testified that he never had pain on his right side or in his right leg. He testified that his lower back pain has always radiated to his left side and that the pain has continuous since the October 22, 2002 injury. Claimant's testimony was not credible. His testimony conflicts with a substantial amount of medical evidence, provided to several medical providers, that Claimant's initial lower back pain radiated to his right side and that that pain was "resolved" by January of 2003.
32. Additional facts may be discussed in the analysis portion of this decision.

Analysis:

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 "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]" "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 Stores, Inc., 2007 SD 25, ¶14, 729 NW2d 377, 382. (citations omitted) (quotations omitted).

The testimony of medical professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion. Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶34, 724 NW2d 586.

In applying the statute, we have held a worker’s 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 [her] 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).

There is no dispute that Claimant suffered a compensable work-related injury to his lower back on October 22, 2002. The question posed by this case is whether the October, 2002 injury is a major contributing cause of the lower back problems Claimant has suffered since August of 2005. The answer to that question has prompted conflicting medical opinions.

Dr. Luther has opined that Claimant’s 2002 injury is not a major contributing cause of his current lower back pain. Dr. Dietrich opines that it is. Dr. Luther’s medical opinion is the more persuasive.

First, Dr. Luther is the only physician to comparatively review the images from Claimant’s 2002, 2005 and 2007 MRIs. His opinion is based on the objective findings of all three MRIs.

On the other hand, Dr. Dietrich has only viewed the 2007 MRI image. He only reviewed the reports of the other two MRIs which are subjective interpretations of those medical practitioners. Luther observed significant differences between the 2002 and 2005 MRIs. He found several lumbar protrusions on the 2005 MRI which did not appear on the 2002 image.

Dr. Luther’s opinion is also consistent with Claimant’s medical records which indicate that he suffered a lower back strain which cause pain predominantly on his right side and down his right leg. His lower back pain diminished and was resolved in January of 2003. Then Claimant was not treated for lower back pain

again until August of 2005, when his lower back pain was predominantly on his left side and leg.

Finally, Dr. Dietrich's opinion is based on the fact that there were no reported intervening injuries. However, this assumption is dependant entirely upon Claimant's dutiful reporting of those injuries. Claimant's diligence in reporting such injuries is suspect.

Claimant's testimony that his lower back pain has always been on his left side and down his left leg clearly contradicts the bulk of medical documentation. Claimant's recollection of intervening injuries cannot be expected to be more accurate. Claimant has failed to show by a preponderance of the evidence that his October 22, 2002 injury was a major contributing cause of his lower back pain since January of 2005.

Conclusion:

Employer and Insurer shall submit Proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days after receiving this Decision. Claimant shall have an additional 20 days from the date of receipt of Employer and Insurer's Proposed Findings of Fact and Conclusions of Law to submit Objections and/or 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 consistent with this Decision.

Dated this 27th day of July, 2010.

 /s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge