

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

THOMAS R. KICKHAFER, JR.,

HF No. 141, 2008/09

Claimant,

v.

DECISION

PALACE MOTORS, INC.,

Employer,

and

**FIRST DAKOTA INDEMNITY
COMPANY,**

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This matter was heard by Donald W. Hageman, Administrative Law Judge on December 15, 2010, in Sioux Falls, SD. Claimant, Thomas R. Kickhafer, Jr., is represented by Luke M. Seifert. Palace Motors, Inc., Employer, and First Dakota Indemnity Company, Insurer, are represented by Michael S. McKnight.

Issues:

This case presents the following legal issues:

1. Whether Claimant's February 19, 2008 injury is a major contributing cause of Claimant's current lower back pain and continuing need for medical treatment?
2. Whether Claimant is entitled to temporary partial disability benefits and permanent partial disability benefits?

Facts:

The following facts are found by a preponderance of the evidence:

1. Thomas R. Kickhafer, Jr., (Claimant) was born on November 10, 1980.
2. Claimant currently resides in Big Lake, Minnesota with his wife, Marcy Rae.

3. Claimant has had lower back problems since he was a child. As far back as 1992, he complained intermittently for long periods of time about neck, upper back and lower back pain.
4. In 1997, Claimant sought medical treatment for low back pain. At that time, it was recorded that Claimant was experiencing "persistent problems with back pain", which was localized in his lower back "near his belt line."
5. In 2007, Claimant injured his upper and low back while working for Tenvoorde Ford in St. Cloud, Minnesota. At that time, Claimant also suffered related right leg pain.
6. On February 19, 2008, Claimant was employed by Palace Motors, Inc. (Employer) as an automotive detailer.
7. On February 19, 2008, Employer was insured by First Dakota Indemnity Company (Insurer) for purposes of South Dakota workers' compensation.
8. At the time of his injury Claimant had an average weekly wage of \$472.50.
9. While at work on February 19, 2008, Claimant slipped and fell while walking across Employer's parking lot. At that time, Claimant injured his lower back, which he reported to Employer the following day.
10. On February 20, 2008, Claimant sought medical treatment at Avera Queen of Peace in Mitchell, South Dakota.
11. Claimant underwent approximately one month of physical therapy following his February 19, 2008 slip-and-fall.
12. Claimant was released back to work without restrictions, by Avera Queen of Peace, full-duty, with Employer on March 20, 2008. At that time, nearly all of Claimant's symptoms had resolved and physical therapy reported Claimant was able to lift fifty pounds without difficulty.
13. After being released back to work on March 20, 2008, Claimant continued working for Employer as an automotive detailer until June 2, 2008.
14. On June 2, 2008, Claimant was laid-off by Employer due to lack of work.
15. Claimant had not received any treatment for his low back between March 20, 2008, and July 9, 2008.
16. On July 9, 2008, Claimant returned Avera Queen of Peace for treatment. Claimant complained of radiating pain in the lower right side and extremity. He was given restrictions of 15 pounds without bending, twisting, stooping, pushing, pulling.
17. On July 17, 18 or 19, 2008, Claimant moved from Parkston, South Dakota, to Big Lake, Minnesota. Claimant lifted boxes during the move.

18. Shortly after moving to Minnesota in July of 2008, Claimant began working for Morrie's Buffalo Ford in Buffalo, Minnesota as an automotive detailer.
19. Claimant began working for Integrity Bank Plus in Sartell, MN on May 1, 2009 and continues to be employed there through the date of hearing.
20. In addition to working for Integrity Bank Plus, Claimant anticipated graduating from St. Cloud Technical College in December of 2010, with a two-year associate degree in finance and credit.
21. Claimant has not missed seven consecutive days of work as a result of his injury.
22. On August 6, 2008 Claimant underwent an MRI scan at Suburban Radiology Consultants. The MRI's images revealed disc protrusion/extrusions caused narrowing of the lateral recesses of the L4-L5 and L5-S1 and were probably affecting the L5 or S1 nerve roots. Bilateral neuroforaminal narrowing at L5-S1 may have affected the L5 nerve roots. Moderate narrowing of the thecal sack at the L3-L4 and the L4-L5 levels were also noted.
23. At the request of Employer and Insurer, Dr. Richard C. Strand, a board certified orthopedic surgeon, performed an independent medical examination (IME) of Claimant on September 4, 2008. Based on his examination and review of Claimant's medical records and history, Strand opined to a reasonable degree of medical certainty that Claimant's "work incident of February 19, 2008 is not a major contributing cause to his current condition and need for further treatment."
24. Dr. Strand is of the opinion that Claimant reached maximum medical improvement as of March 20, 2008, and that Claimant is not in need of any further treatment relating to the February 19, 2008 incident.
25. Dr. Strand also opined that Claimant has no permanent impairment pursuant to the AMA Guides to Evaluation of Permanent Impairment, 4th Edition.
26. On October 14, 2009, Dr. Robert Wengler, a board certified orthopedic surgeon performed an IME of Claimant at the request of Claimant's attorney.
27. During the IME, Dr. Wengler's nurse practitioner recorded Claimant's medical history, as provided by Claimant. While providing that history, Claimant denied a history of back problems and chronic back pain.
28. Dr. Wengler did not personally read Claimant's past medical records; rather, he "perused" them.
29. Dr. Wengler gave Claimant a 13% disability rating using the AMA Guidelines, Fifth Edition.
30. Following the IME, Wengler opined that Claimant's disc herniations are a result of his February 19, 2008 injury.

31. Dr. Wengler testified that, at the time of Claimant's IME, he understood that Claimant's 2007 back injury was limited to his upper and mid back. His understanding was in error.
32. Dr. Wengler's medical opinion in this case is based on an incomplete and inaccurate medical history.
33. Employer and Insurer provided Claimant with workers' compensation benefits, paying for his initial medical expenses relating to his February 19, 2008 slip-and-fall but declined to pay for medical expenses or benefits since August of 2008.
34. In this case, Claimant seeks temporary partial disability benefits, permanent partial disability benefits and future medical expenses.
35. Additional facts may be discussed in the analysis below.

Analysis:

Causation:

In his case, Claimant seeks compensation for ongoing medical expenses from his February 19, 2008 slip-and-fall. 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). 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:

- (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
- (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.
- (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

SDCL.62-1-1 (7).

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). “A medical expert’s finding of causation cannot be based upon mere possibility or speculation. Instead, “[c]ausation must be established to a reasonable medical probability.” Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 NW2d 586, 593 (citation omitted).

“The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and prove nothing if its factual basis is not true.” Johnson v. Albertsons, 2000 SD 47, ¶ 25, 610 NW2d 449, 455. “

In this case, Dr. Wengler and Dr. Strand only examined Claimant once each. Consequently, a thorough knowledge of Claimant’s medical history is required before a sound medical opinion can be formulated. Dr. Wengler’s opinion is based on an incomplete and inaccurate history of Claimant’s lower back problems. Claimant denied chronic back pain when giving his medical history to Dr. Wengler’s assistance. Dr. Wengler also did not thoroughly read Claimant’s past medical records before formulating his opinion. Wengler was unaware that Claimant had lower back problems in 2007.

On the other hand, Dr. Strand’s medical opinion appears to be based on an accurate medical history. Therefore, the Department can only conclude that Dr. Strand’s opinion is also the more accurate. As such, the Department concludes that Claimant’s current lower back problems are not related to his February, 2008 injury and that he is not entitled to ongoing medical expenses from Insurer

Disability Benefits:

Claimant also seeks temporary partial disability benefits and permanent partial disability benefits. First it must be stated that causation of a disability, by a work-related injury is also necessary before Claimant can qualify for disability benefits. Here too, Claimant has failed to prove causation, as he did in the analysis above.

Next, SDCL 62-4-2 dictates that a claimant must be incapacitated by a work-injury for seven consecutive days before the claimant can qualify for temporary disability benefits.¹ Here, Claimant has not missed seven consecutive days of work since his injury and has not shown that he was incapacitated for seven consecutive days. Therefore, he does not qualify for temper partial disability.

Finally, SDCL 62-1-1.2 requires impairment ratings to be based on the AMA Guide to the Evaluation of Permanent Impairment, 4th Edition.² Claimant relies on Dr. Wengler's impairment rating. Wengler based his 13% impairment rating on the AMA Guide to the Evaluation of Permanent Impairment, 5th Edition, rather than the 4th Edition. Dr. Strand, who used the 4th Edition, evaluated Claimant with no permanent impairment. An award of permanent partial disability benefits cannot be made under these circumstances.

Conclusion

Claimant has failed to demonstrate by a preponderance of the evidence that his February 19, 2008 slip-and-fall is a major contributing cause of his current lower back pain and need for continuing medical treatment. Claimant also failed to show that he is entitled to any disability benefits. Counsel for Employer and Insurer shall submit proposed Findings of Fact, Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Claimant shall have an additional 20 days from the receipt of Employer and Insurer's Proposed Findings of Fact and Conclusions of Law to submit objections/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.

Dated this 26th day of August, 2011.

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

¹ SDCL 62-4-2 states "[n]o temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the seven day waiting period is met, benefits shall be computed from the date of the injury."

² SDCL 62-1-102 states, "For the purposes of this chapter, impairment shall be determined by a medical impairment rating, expressed as a percentage to the affected body part, using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, fourth edition, June 1993."