SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DAVID LOUNSBERY,
Claimant,

HF No. 149, 2003/04

v.

DECISION

GEHL COMPANY,
Employer,

and

SENTRY INSURANCE,
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. A hearing was held before the Division of Labor and Management on November 3, 2004, in Salem, South Dakota. Claimant, David Lounsbery (Claimant) appeared personally and through his counsel, Michael E. Unke. Sandra K. Hoglund represented Employer Gehl Company, and Insurer Sentry Insurance (Employer/Insurer).

Issues:

1. Whether Claimant's work injury is and remains a major contributing cause of his current condition and need for treatment.

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

Claimant began working for Employer in March 2002. On July 24, 2003, Claimant experienced back pain after he struck his back against a piece of equipment. He experienced severe pain and numbness in his leg and foot. Claimant reported the injury to Employer. Employer/Insurer paid workers' compensation benefits through October 23, 2003, at which time they denied further responsibility for Claimant's low back condition.

Claimant has a long, complicated history of low back problems. His medical treatment for low back pain began on August 17, 1995, when he sought chiropractic treatment after an incident while working on a tractor.

In October of 1999, Claimant saw another chiropractor, Dr. Tieszen, five times for back pain. Dr. Tieszen referred Claimant to Dr. David Hoversten. Claimant related a history to Dr. Hoversten of back pain after a lifting incident on his father's farm. Dr. Hoversten

ordered an MRI, which revealed a disc protrusion at T7-8, as well as multilevel degenerative spondylosis.

On January 3, 2000, Claimant returned Dr. Hoversten for evaluation of increasing low back pain and left hip pain that radiated down from his left hip to his knee. Dr. Hoversten ordered an MRI, which showed a very large disc rupture at L5-S1 and a left L4-5 disk rupture. Dr. Hoversten recommended a diskectomy at those two levels. Claimant underwent this procedure on February 16, 2000.

After two months of physical therapy, Claimant returned to work on his farm. He was able to perform duties sufficient to harvest his crops. On August 28, 2000, Claimant returned to Dr. Hoversten with marked increased low back and left leg pain. Dr. Hoversten noted that Claimant experienced a sudden onset of pain, which radiated down his leg, while at work at Salem Tractor Parts. Claimant felt a jolt as a nut he was attempting to loosen suddenly gave way.

Dr. Hoversten ordered an MRI, which revealed bulging discs at L3-4, L4-5, and L5-S1. Dr. Hoversten opined that this was not a significant new problem, but more or less a degenerative process with slight recess stenosis. Claimant treated with cortisone blocks that were of no benefit.

Dr. Hoversten ordered a lumbar myelogram/CT scan when Claimant's pain continued to worsen. This procedure showed disc bulging at L3-4, the previous surgery at L4-5, spurring and disc protrusion at L5-S1, and conjoined left L4-5 and conjoined right L5-S1 nerve sleeves. Based on these results, Dr. Hoversten recommended a fusion surgery at the end of January 2001.

Claimant saw Dr. Jerry Blow for an independent medical examination (IME) on February 2, 2001. Dr. Blow opined that a work injury on August 24, 2000, coincided with a marked increase in low back pain and radicular pain and was an aggravation of back pain, but was not a current major contributing cause of Claimant's pain and need for surgery. Dr. Blow stated scar tissue was Claimant's reason for surgery, and the wrenching incident would merely have initiated his pain complaints. Dr. Blow stated Claimant's farming occupation could have been a contributing factor to his pain complaints, and the previous injury of November 1999, was a major contributing cause of his pain complaints. Dr. Blow then recommended physical therapy.

Claimant returned to Dr. Hoversten on March 5, 2001, continuing to complain of numbness and tingling in his left leg and indicating his pain was getting worse. Dr. Hoversten again recommended fusion surgery. Claimant went to the Sioux Valley Hartford Clinic to do a pre-op medical clearance for this surgery, but the surgery was delayed due to hypertension. Claimant applied for Social Security disability in 2001, citing back pain as a reason for disability.

Claimant sought medical treatment at Sioux Valley Hartford Clinic on May 21, 2003, for low back pain, as well as other conditions. He rated his pain as an eight on a scale of one to ten.

Claimant next sought treatment for the injury at issue in this matter. On July 24, 2003, Claimant returned to the Sioux Valley Hartford Clinic, relating a history of back pain after striking his back on a piece of equipment. An MRI revealed chronic changes of postoperative fibrosis and degenerative spondylosis, but no acute herniation. Claimant was again referred to Dr. Hoversten and saw him on July 30, 2003. Dr. Hoversten took Claimant off work for three weeks and recommended medication. He stated, "I do not think that a significant new injury has occurred, but rather we have an exacerbation in the preexisting problem."

Claimant returned to Dr. Hoversten on August 14, 2003. Claimant told Dr. Hoversten that two days prior he had been bending forward doing something down by his shoes and feet when he heard a loud pop and felt acute and severe pain radiating down his left leg. Dr. Hoversten recommended yet another MRI to determine whether a disk herniation had occurred.

The MRI was done on August 23, 2003. Dr. Hoversten stated that the MRI "demonstrate[d] no change over July and no change over the past 6 to 9 months. We have mild bulging of the 5-1 disk. We have some scar tissue on the left at 4-5. No recurrences, no fractures, no instabilities, and no significant changes." Dr. Hoversten continued, "I believe he has mild instability at the L5-S1 disk and that certain movement and activities will result in bruising of the nerve root." Dr. Hoversten recommended four more weeks off work, five weeks of physical therapy, and stated, "I believe this was simply an exacerbation of his prior symptoms without a permanent aggravation."

Claimant underwent physical therapy, which provided no relief, and returned to Dr. Hoversten. Dr. Hoversten recommended fusion surgery. He stated, "I do think the second injury has led to increased instability at the 5-1 level, and we are not getting significant improvement with conservative management since the injury, which occurred on August 12, 2003."

On October 17, 2003, Claimant was referred to Dr. Blow for another IME. Dr. Blow agreed with Dr. Hoversten's assessment and treatment plan. Dr. Blow also opined that "the major contributing cause" for Claimant's current pain complaints was the August 12, 2003 injury.

On November 25, 2003, Claimant underwent a discogram, which showed degenerative change at L3-4 and L4-5, along with Claimant's known 5-1 problem. Dr. Hoversten noted this was a three level problem in a laboring individual and recommended conservative treatment.

Claimant was referred by the Sioux Valley Hartford Clinic to Dr. Walter Carlson. Dr. Carlson saw Claimant on December 4, 2003, and reviewed the MRI findings. Dr. Carlson recommended medication and physical therapy. He ordered a discography and opined that Claimant was not a good candidate for surgery.

Claimant was referred by Sioux Valley Hartford Clinic to Dr. Wilson Asfora and Dr. Bryan Wellman. Dr. Asfora and Dr. Wellman reviewed Claimant's medical records and examined Claimant. Dr. Asfora and Dr. Wellman advised Claimant that surgery had only a fifty percent chance of providing significant pain relief. Claimant proceeded with a three-level fusion surgery, which did not decrease his pain.

Other facts will be developed as necessary.

Issue

Whether or not Claimant's work injury is and remains a major contributing cause of his current condition and need for treatment.

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 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

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

> "Injury" or "personal injury," only 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.

The South Dakota Supreme Court has noted, in its interpretation of this statue, a distinction between the use of the term condition and the term injury. Grauel v. South Dakota Sch. of Mines, 2000 SD 145, ¶ 9, 619 N.W.2d 260, 263 (citing Steinberg v. South Dakota Dep't of Military & Veterans Affairs, 2000 SD 36, ¶ 9, 602 N.W.2d 596, 599). "*Injury* is the act or omission which causes the loss whereas *condition* is the loss

produced by an injury, the result." Id. This distinction "place[s] a new burden on the worker to show that his employment related activities were a major contributing cause of his resulting *condition*." Id. Thus, Claimant bears the burden of proving 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.

There is no dispute that Claimant suffers from a preexisting low back condition. "While both subsection (b) and subsection (c) deal with preexisting injuries, the distinction turns on what factors set the preexisting injury into motion; if a preexisting condition is the result of an occupational injury then subsection (c) controls, if the preexisting condition developed outside of the occupational setting then subsection (b) controls." Byrum v. Dakota Wellness Foundation, 2002 SD 141, ¶15. (citing Grauel v. South Dakota School of Mines, 2000 SD 145, P8, 16-17, 619 N.W.2d 260, 262-265.) The parties do not dispute that Claimant suffered from a low back condition prior to his employment with Employer. The record does not indicate that the injury of July 23, 2003, combined with a "preexisting work-related compensable injury, disability, or impairment". Therefore, subsection (b) applies.

Employer/Insurer does not dispute that Claimant suffered an injury arising out of and in the course of his employment on July 23, 2003. They paid medical expenses and temporary total disability benefits to Claimant until October 2003. Employer/Insurer denied Claimant further benefits because no medical doctor opined that the July 23, 2003; injury remained a major contributing cause of Claimant's continuing condition, disability, or need for treatment.

Dr. Blow and Dr. Hoversten released Claimant to light duty in October 2003 and opined that Claimant's continuing back condition or disability was related to incidents or conditions that did not include the July 23, 2003 injury. After reviewing the medical records and examining Claimant, Dr. Blow opined that the August 12, 2003, incident was "the cause" of Claimant's continuing condition, rather than the July 23, 2003 injury.

Dr. Hoversten, who treated Claimant for low back problems from 1999 to 2003, opined that Claimant's condition was a continuation of his preexisting back problems, for which the July 23, 2003 and August 12, 2003 incidents served as temporary exacerbations. Dr. Hoversten opined that the two incidents did not change Claimant's condition, which had remained consistent over the prior 6 to 9 months.

In a letter dated March 8, 2004, Dr. Hoversten stated:

> I went back and reviewed my records and treatment of David, commencing November 3, 1999, through my last visit with him December 1, 2003.
>
> After review of all these records, it is my opinion that the non-work-related accident sustained on August 12, 2003, was not a major contributing factor to the client's current condition. This was a minor aggravation of a serious preexisting problem. The preexisting problem is status post rupture of disk, L4-5, and prior decompressive laminectomy, L 4-5 and 5-1, due to spinal stenosis. That procedure was performed on February 16, 2000. Progressive, unrelenting deterioration of David Lounsbery's back occurred from that date to the present. Consideration of further surgery was entertained, but he was found not to be a surgical candidate by my recommendation and investigation. I had recommended restrictions at work and conservative treatment.
>
> It is the chronic, progressive deterioration from the initial back injury and disk herniation on September 30, 1999, which is the major cause of his present problem. Two studies done following the injury of August 12, 2003, demonstrated no new or additional injury, it was my assessment that the August 2003 incident was a minor aggravation of the severe preexisting problem.

Claimant "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "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). 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). Claimant has not met his burden to demonstrate by a preponderance of the evidence that his work injury of July 23, 2003, is and remains a major contributing cause of his current condition and need for treatment. Dr. Hoversten, his treating physician at the time, found no permanent change in Claimant's condition as a result of the July 23, 2003, injury. Claimant's request for additional benefits must be denied.

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 6th day of June, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge