SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

SCOTT PESICKA **HF No. 174, 2007/08**

Claimant,

v. **DECISION**

SAPA EXTRUTIONS, INC.,

Employer,

and

TRAVELERS COMPANY, INC.,

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. A hearing was held before Donald W. Hageman, administrative law judge on January 13, 2010, in Yankton, South Dakota. Scott Pesicka appeared pro se. Michael McKnight resented Employer and Insurer.

Issues:

This case presents two legal issues:

1. Whether an injury allegedly suffered while working for Employer is a major contributing cause of Claimant's current back condition?

2. Whether Claimant gave timely notice of his alleged work injury to Employer as required by SDCL 62-7-10?

Facts:

Scott Pesicka (Claimant) alleges that he injured his back while working for Sapa Extrusions, Inc. (Employer) during the night shift on July 15-16, 2008. At the time of the alleged injury, Employer was insured by Travelers Company, Inc. (Insurer). Claimant now seeks compensation for unpaid medical bills.

Claimant sought treatment for his back from Dr. Cammock on July 21, 2008. He then saw Dr. Fitzgerald, chiropractor on July 25, 2008. Claimant continued treatment with Dr. Fitzgerald for some time after his initial visit. The medical

records of both Dr. Cammock and Dr. Fitzgerald were admitted into evidence at the hearing. Dr. Fitzgerald also testified at the hearing.

Dr. Cammock's notes during Claimant's July 21, 2008 visit indicate the Claimant told Cammock that Claimant's lower back pain "started when he overworked it extruding metal at work." Dr. Fitzgerald's records for Claimant's July 25, 2008 records state: "He's not sure what brought it on. He thinks it's just overworked." Neither Dr. Cammock nor Dr. Fitzgerald offers a medical opinion about the cause of Claimant's back pain in their medical records. Dr. Fitzgerald also did not offer an opinion during his testimony.

Analysis and Decision:

The first question posed by this case is whether a work-related injury during the July 15-16, 2008 night shift is a major contributing cause of Claimant's current back pain. Questions of causation in workers' compensation cases are governed by SDCL 62-1-1 (7). 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.

The general rule is that the 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 Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967). "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).

"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., 724 NW2d 586, 593 (S.D. 2006) (citation omitted).

In this case, neither Dr. Cammock nor Dr. Fitzgerald offered an opinion about the cause of Claimant's current back condition. Even Claimant was unsure of the cause during his office visit on July 25, 2008, contradicting the theory he had voiced to Dr. Cammock a few days earlier. Under these facts, Claimant has failed to meet his burden of proof. Employer and Insurer are not responsible for the payment of Claimant's outstanding doctor bills.

In light of this decision, there is no need to consider the second issue as stated above. Counsel for 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 an\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 8th__ day of June, 2010.
SOUTH DAKOTA DEPARTMENT OF LABOR
_____/S/ Donald W. Hageman__
Donald W. Hageman
Administrative Law Judge