

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
WORKERS' COMPENSATION**

MICHAEL ANDERSON,
Claimant,

vs.

LAKOTA IMPROVEMENT,
Employer,

and

ACUITY INSURANCE COMPANY
Insurer,

and

PHILIP LAMPERT, d/b/a BLUE BELL
LODGE AND RESORT,
Employer,

and

CONTINENTAL WESTERN INSURANCE
COMPANY,
Insurer.

HF No. 172, 2005/06

AMENDED DECISION

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held in this matter on November 7, 2007. Attorney Michael J. Simpson of Julius & Simpson, LLP, represents Claimant, Michael Anderson (Claimant). Attorneys Jeremy Nauman and Eric Blomfelt of Blomfelt and Associates, P.C., represent Employer, Lakota Improvement and Insurer, Acuity (Lakota). Attorney Robert Anderson of May, Adam, Gerdes, & Thompson LLP, represents Employer, Philip Lampert and Insurer, Continental Western Insurance Co. (Blue Bell).

ISSUES:

(1) Whether the injury sustained by Claimant in September 2004 was a major contributing cause of Claimant's disc herniation?

(2) Whether Claimant's injury of September 2005 was a recurrence or independent aggravation of the injury sustained in September 2004 or a second independent injury?

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Michael Anderson vs. Lakota Improvement and Acuity Ins. Co., and Blue Bell Lodge and Resort and Continental Western Ins. Co.

(3) Whether Blue Bell or Lakota is liable for Claimant's medical costs and disability benefits resulting from the 2005 incident?

FACTS:

1. Claimant is a 49 year old man with a work history in the construction industry.
2. Claimant had no history of low back pain or treatment prior to his initial injury in September 2004.
3. On September 16, 2004, Claimant was employed by Lakota. Claimant sustained a work related injury at approximately 9:30 or 10:00 am on September 16, 2004.
4. Claimant was bent at his waist pushing metal pins into erosion mats on the side of the highway. After about 1 ½ hours of placing pins, Claimant experienced severe and intense pain in his lower back.
5. Claimant's injury in 2004 was sudden and severe. Claimant could not walk or stand after suffering the injury. A co-worker drove Claimant home.
6. Claimant reported to the emergency room on September 20, 2004 in Hot Springs, South Dakota.
7. Claimant was prescribed rest and conservative treatment for his injury.
8. On September 27, 2004, Claimant saw Dr. Raymond for low back pain that "now radiates down the back of the left leg, all the way to the knee."
9. Dr. Eckrich, a board certified orthopedic surgeon, examined Claimant on November 3, 2004. Dr. Eckrich noted that Claimant's low back and left leg pain occurred after he bent over at work. Claimant's pain came on suddenly in his left lower back and from the buttock down to the left knee.
10. Dr. Eckrich ordered an MRI of Claimant's lumbar spine for further diagnosis.
11. The radiologist, Dr. Saffell, noted Claimant had some degenerative disk changes throughout the mid and lower lumbar spine. He also noted the "most significant appearing abnormality at L5-S1 with broad-based left posterolateral disk protrusion." He opined that this protrusion displaced the left S1 nerve root posteriorly and might affect the left L5 nerve root.
12. Dr. Eckrich also read the MRI. He noted the potential herniated disk paramedian to the left at L5-S1. He noted that the herniation would be in a position to compress the S1 nerve root and not the L5.
13. Dr. Eckrich ordered a lumbar epidural steroid injection from which Claimant received some relief. Claimant also participated in physical therapy.
14. On February 2, 2005, Dr. Eckrich released Claimant from scheduled treatment and opined that Claimant had reached maximum medical improvement. Claimant was released from all work restrictions. Claimant continued to have symptoms on occasion.
15. Claimant's 2004 injury at Lakota was treated as compensable and Lakota paid the medical expenses and the temporary partial disability payments owed to Claimant.
16. Claimant returned to work in February 2005.

17. Claimant worked as a laborer at construction companies during May, June, and July of 2005. Claimant would occasionally have pain radiating from his buttock down his left leg. The pain symptoms increased in frequency.
18. On August 12, 2007, Claimant began working for Blue Bell as a horse wrangler. Claimant rode horses, took people on horseback tours through Custer State Park and cleaned the stables.
19. On September 7, 2005, Claimant reported sudden onset of pain in his low back. Claimant was at work in the horse barns and was bent over preparing to lift a shovel of manure when his back went out.
20. Claimant reported to Blue Bell that his back symptoms were the result of an old injury that occurred the previous year.
21. Blue Bell was notified of the incident on September 10, 2005.
22. At the time of his pain onset on September 2005, Claimant was unable to stand upright due to the low back pain.
23. Claimant's pain in September 2005 was the same as his pain in September 2004.
24. Claimant was seen by Joanne Roggow, PA-C, on September 12, 2005. She prescribed pain medication and no bending, stooping, or lifting.
25. On November 22, 2005, Claimant was seen by Dr. Wayne Anderson for an independent medical examination. Dr. Anderson is board certified in occupational medicine and family medicine. He has been performing IME's for 15 years.
26. Dr. Wayne Anderson reviewed Claimant's medical history and records and performed an exam. He diagnosed Claimant with an L5-S1 herniated disk with current discogenic pain.
27. Dr. Wayne Anderson opined that Claimant's injury in September 2005 was not an acute injury but the symptoms of September 2005 related to the injury of September 2004. Dr. Anderson's opinion is that the September 2005 incident did not contribute independently to Claimant's current symptoms.
28. Lakota requested Claimant undergo an independent medical exam by Dr. Dale Anderson. This IME was performed on February 21, 2006. Dr. Dale Anderson physically examined Claimant and reviewed Claimant's full medical history.
29. Dr. Dale Anderson opined that the disk herniation did not occur in September 2004. Dr. Dale Anderson gave the opinion that Claimant suffered from a muscle strain which caused him pain and made it unable for Claimant to work. Dr. Anderson bases his opinion on the fact that Claimant responded positively to an epidural steroid injection and physical therapy.
30. Dr. Dale Anderson opined that Claimant suffered an independent muscle strain in September 2005, "if there is no evidence of progression of the herniated disc identified on the MRI scan in 2004." Dr. Dale Anderson recommended that Claimant undergo another MRI, another epidural steroid injection and continued physical therapy.
31. On March 27, 2006, Claimant underwent a second lumbar spine MRI at Black Hills Imaging Center upon referral by Dr. Wayne Anderson.
32. Dr. Wayne Anderson conducted a second IME of Claimant on April 18, 2006. Claimant reported to Dr. Anderson that his back aches all the time and that his leg symptoms occur one to two times per week.

33. Dr. Wayne Anderson reviewed the updated MRI and reported that it was essentially unchanged from the previous MRI. Dr. Anderson opined that Claimant has multi-level disk disease and that his "current complaints are due to his L5-S1 interspace with the foraminal stenosis and radicular pain involved with that."
34. On December 1, 2005, Blue Bell denied Claimant's claim as it was a recurrence of the 2004 injury. Claimant did not receive any medical treatment from September 2005 to August 2006.
35. Claimant returned to Dr. Eckrich in August 2006. Dr. Eckrich opined that Claimant's current condition was "clearly an exacerbation of his original injury" of September 2004. Claimant's condition had deteriorated to the point that he has objective findings of a left S1 radiculopathy from a herniated disk.
36. On September 12, 2006, Dr. Eckrich performed a L5-S1 hemilaminectomy and microdiscectomy on the left.
37. Dr. Eckrich's surgical notes indicate that "[i]t was obvious that the traversing S1 nerve root was deviated laterally due to the disk which was paramedian to the left at [L5-S1]." The removal of disk material allowed the nerve root to lie "more medial and obviously not displaced as far laterally as it was upon entering the area."
38. Claimant's post-operative MRI indicated scarring around the nerve root around the area of surgery. Dr. Eckrich prescribed a transforaminal nerve root injection at L5-S1.
39. Claimant's leg pain continued and Dr. Eckrich recommended a second surgery. On January 25, 2007, Dr. Eckrich performed a second surgery which was successful in alleviating Claimant's pain.
40. Dr. Eckrich released Claimant from his care on May 2, 2007.
41. Dr. Eckrich gave Claimant a permanent partial impairment rating of 10%.
42. In April 2007, Lakota requested Dr. John Dowdle perform a medical records review of Claimant.
43. Dr. Dowdle opined that Claimant suffered from degenerative disk disease and that neither work incident in September 2004 or September 2005 was a major contributing factor of the herniation of Claimant's disk and his subsequent need for surgery.
44. Dr. Dowdle and Dr. Wayne Anderson disagree with Dr. Dale Anderson that Claimant suffered from muscle strain injuries. Dr. Wayne Anderson's opinion is based upon the fact that epidurals do not alleviate muscle strain but discogenic pain and compressive neuropathy.
45. Dr. Wayne Anderson, Dr. John Dowdle, Dr. Steven Eckrich, and Dr. Dale Anderson provided their opinions based on a reasonable degree of medical certainty.
46. Claimant's compensation rate for the September 2004 injury is \$312.31 per week.
47. Claimant's compensation rate for the September 2005 injury is \$122.96 per week.
48. Other facts will be developed as necessary.

ANALYSIS & DECISION:

ISSUE ONE: Whether the injury sustained by Claimant in September 2004 was a major contributing cause of Claimant's disc herniation?

Claimant has the burden of proving all facts essential to sustain an award of compensation. *King v. Johnson Bros. Constr. Co.*, 155 N.W.2d 182, 185 (S.D. 1967). 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). In order to meet this burden of proof, it is necessary that Claimant provide medical evidence. *Enger v. FMC*, 1997 SD 70, ¶ 18. The Supreme Court has long held, that to prove causation:

[T]he 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Orth v. Stoebner & Permann Const., Inc., 724 NW2d 586, 593 (S.D. 2006) (citations omitted). "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 [.]'" *Id.* (citations omitted).

In this case four doctors, three certified in orthopedics and one certified in occupational and preventative medicine, have given their opinions on Claimant's injury, all to a reasonable degree of medical probability or certainty. Dr. Eckrich, who was Claimant's surgeon and who saw Claimant after both injuries, was deposed on March 9, 2007. Dr. Wayne Anderson, who performed two independent medical exams on Claimant on behalf of Blue Bell, was deposed on March 6, 2007. Dr. Dale Anderson, who performed an IME on behalf of Lakota, was deposed on January 3, 2007. Dr. John Dowdle, who performed an IME on behalf of Lakota, was deposed on July 9, 2007.

The initial injury happened in September 2004. While working for Lakota, Claimant was bent at the waist pushing metal landscaping pins into the ground. After working for about an hour and a half, Claimant experienced sharp pains in his lower back, left buttock, and down his left leg. Claimant was so debilitated by the pain he was unable to stand or walk. Following the September 2004 incident, Claimant's MRI showed evidence of disk herniation and compression of the nerve root. Three of the four doctors who were deposed for this case agree that Claimant suffered pain due to a compressed nerve at L5-S1 resulting from a bulging or herniated disk.

Prior to the injury in September 2004, Claimant did not have any symptoms of back or leg pain. Claimant had no prior back injuries. The MRI does show evidence of degenerative disk disease. Both Dr. Wayne Anderson and Dr. Steven Eckrich are of the opinion that a

major contributing cause of Claimant's injury was his work performed for Lakota on September 16, 2004.

Under South Dakota law, insofar as a workers compensation claimants pre-existing condition is concerned[,] we must take the employee as we find him. *St. Luke's Midland Regional v. Kennedy*, 653 NW2d 880, 884 (S.D. 2002). If a compensable event contributed to the final disability, recovery may not be denied because of the pre-existing condition, even though such condition was the immediate cause of the disability. *Id.* (quoting *Elmstrand v. G & G Rug & Furniture Company*, 77 SD 152, 155, 87 NW2d 606, 608 (1958)). [Claimant's] age and degenerative spinal condition may have made him more susceptible to a work-related injury while working for [Employer], but this does not alter the compensability of his claim.

Orth v. Stoebner & Permann Const., Inc., 724 N.W.2d 586, 597 (S.D. 2006).

Claimant was likely to be more susceptible to major back injury, but it does not change the fact that Claimant's work for Lakota was a major contributing cause of his herniated disk. Both Dr. Eckrich and Dr. Wayne Anderson opined that because Claimant had no symptoms prior to the September 2004 injury, that Claimant's work was a major contributing cause of his back injury. Claimant has proven that the injury of September 2004 was a major contributing cause of his disk herniation for which he received treatment.

ISSUE TWO: Whether Claimant's injury of September 2005 was a recurrence or an aggravation of the injury sustained in September 2004 or a second independent injury?

Claimant eventually was treated with epidural injections following the initial injury. These injections gave Claimant some relief. Claimant did not see a doctor for approximately seven months following the epidural steroid injections. However, Claimant continued to suffer from intermittent pains in his left leg and lower back. These pains increased in frequency and intensity. Claimant suffered another incident on September 7, 2005 when he was working for Blue Bell as a horse wrangler. Claimant was bent over preparing to fill a shovel when he experienced the exact same pain that he had following the incident in September 2004.

Claimant was seen by a PA-C five days after the incident in 2005. Claimant was prescribed pain medication and muscle relaxants. Claimant was placed on continuing work restrictions. At the request of Blue Bell, Claimant was seen by an independent medical examiner on November 22, 2005. Dr. Wayne Anderson diagnosed a L5-S1 herniated disk. Dr. Wayne Anderson opined that the herniation was visible on Claimant's 2004 MRI and therefore, the 2005 incident did not contribute independently to the current symptoms and need for treatment.

The last injurious exposure rule applies when dealing with successive injuries. This rule states:

When a disability develops gradually, or when it comes as a result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation.

Titus v. Sioux Valley Hosp., 658 N.W.2d 388, 390 (S.D. 2003). Blue Bell did not authorize Claimant to see Dr. Eckrich until July 14, 2006. Blue Bell made payments to Claimant based upon SDCL 62-7-38, as Claimant claimed a recurrence of the preexisting injury. Blue Bell reserved the right to seek reimbursement from Lakota.

The question to resolve is “whether the successive injury is a mere recurrence or an independent aggravation of the first injury.” *Id.* at ¶13 (citation omitted). “In successive injury cases, the original employer/insurer remains liable if the second injury is a mere recurrence of the first. If the second injury is an aggravation that contributed independently to the final disability then the subsequent employer/insurer is liable.” *Enger v. FMC*, 565 N.W.2d 79, 84 (S.D. 1997).

Dr. Wayne Anderson, a board certified family medicine and occupational medicine physician, has given the opinion, based upon a reasonable degree of medical certainty, that the incident in 2005 was a recurrence of Claimant’s original injury from 2004. The 2006 MRI (prior to the surgery) was essentially the same as the 2004 MRI. The disk herniation at L5-S1 was still present and Claimant was suffering from pain caused by the disk herniation compressing the nerve.

Dr. Eckrich, a board certified orthopedic surgeon, was the surgeon who saw Claimant after both incidents. Dr. Eckrich stated that the incident in 2005 was “clearly an exacerbation of the original injury which occurred in 2004. That his symptoms were the same, and his physical exam findings had actually progressed.” Dr. Eckrich’s medical opinion, based upon a reasonable degree of medical certainty, is that Claimant suffered a herniated disk in 2004 and that that injury initiated symptoms which continued in 2005.

Dr. Dale Anderson, a board certified orthopedic surgeon, saw Claimant for an IME. Dr. Anderson diagnosed a muscle strain and that this was the cause of Claimant’s pain. Dr. Eckrich agreed that a muscle strain could go hand in hand with a herniated disk, but that the herniation was causing the pain, not the muscle strain. Furthermore, Dr. Dale Anderson’s diagnosis was rejected by both Dr’s Wayne Anderson and John Dowdle. Dr. Dale Anderson’s opinion is rejected as unpersuasive.

Dr. John Dowdle, a board certified orthopedic and spinal surgeon, performed a medical records review of Claimant. Dr. Dowdle is of the opinion that Claimant’s injury was caused by degenerative disk disease and was not a product of Claimant’s work. Dr. Dowdle believes that Claimant was suffering from degenerative disk disease for probably 10 years

prior to the onset of his back pain in 2004. That may be the case, however, Dr. Dowdle's opinion fails to acknowledge that Claimant's herniation was acute and occurred while Claimant was working. Dr. Dowdle's opinion is rejected as unpersuasive.

To find that the second injury was an aggravation of the first, the evidence must show:

1. A second injury; and
2. That this second injury contributed independently to the final disability.

Paulson v. Black Hills Packing Co., 554 NW2d 194, 196 (S.D. 1996).

To find that the second injury was a recurrence of the first injury, the evidence must show:

1. There have been persistent symptoms of the injury; and
2. No specific incident that can independently explain the second onset of symptoms.

Id.

The "contribution of the second injury, however slight, must be to the *causation* of the disability." *Enger*, 1997 SD 70, ¶17 (emphasis in original). It is necessary to examine whether "a significant occurrence, amounting to an independent contribution to the final disability, causes an onset of increased or new symptoms." *Id.*

The first prong of the two-prong test for injury recurrence has been met. Claimant's initial injury caused back pain and pain that radiated down Claimant's left leg. In the six months following Claimant's initial treatment, Claimant continued to have symptoms. Claimant continued to suffer from pain in his left leg as well as "jolts" or "twinges" of pain. These symptoms became increasingly more frequent prior to the second incident in September 2005.

Dr. Wayne Anderson opined that Claimant's 2005 incident did not contribute independently to Claimant's current symptoms. Dr. Anderson is of the opinion that the injury in September 2004 was a major contributing cause of Claimant's need for back surgery. Dr. Anderson read and compared the MRI taken in 2004 to the MRI taken in 2006. He determined that the MRI's were essentially the same, that Claimant had a small herniated disk at L5-S1 that was causing his pain. The evidence shows the incident at Blue Bell in 2005 did not increase the disk herniation.

After the 2004 incident, Dr. Eckrich was of the opinion that Claimant's pain was caused by the S1 nerve being impinged by the small disk herniation at spine level L5-S1. Dr. Eckrich again saw Claimant in 2006 following the September 2005 incident. At that time, Dr. Eckrich was of the opinion that Claimant's current symptoms were from an exacerbation of the initial 2004 injury. Dr. Eckrich did not believe that Claimant had suffered another independent injury or that the incident in 2005 contributed independently to his current condition. Dr. Eckrich dictated notes from the surgeries he performed upon Claimant. The notes clearly support Dr. Wayne Anderson and Dr. Eckrich's opinions of the nature of

Claimant's pain and their opinions are adopted by the Department. The evidence supports the conclusion that the pain that Claimant suffered in 2005 and subsequent surgeries in 2006 and 2007 were the result of a recurrence of the September 2004 injury.

ISSUE THREE: Whether Blue Bell or Lakota is liable for Claimant's medical costs and disability benefits resulting from the 2005 incident?

Pursuant to SDCL 62-7-38, Blue Bell provided coverage for Claimant after the September 2005 incident, for medical costs and disability benefits. Blue Bell clearly reserved their right to seek reimbursement from Lakota for any benefits or expenses paid. Claimant's 2004 injury at Lakota is and remains a cause of Claimant's disability. The incident in 2005 was a recurrence of Claimant's injury.

Lakota remains liable for the workers compensation liability benefits and medical bills incurred by Claimant. Blue Bell is entitled to reimbursement from Lakota. Claimant is entitled to disability benefits paid at the rate of \$312.31 per week.

Counsel for Blue Bell and Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Lakota shall have an additional 20 days from the date of receipt of Claimant and Blue Bell's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated this 6th day of May, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald
Administrative Law Judge