

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

**CALVIN BOSWORTH,**

**HF No. 173, 2008/09**

**Claimant,**

**v.**

**DECISION**

**P.I.E INC.,  
and  
CONTINENTAL WESTERN  
INSURANCE COMPANY**

**Respondents,**

**v.**

**MIDWEST FAMILY MUTUAL  
INSURANCE COMPANY,  
Third-party Respondent.**

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 September 24, 2010 at 9:00 am MT in Rapid City, South Dakota. Attorney, Mr. Dylan A. Wilde represents Claimant, Calvin Bosworth (Claimant). Attorney, Ms. Christina L. Klinger represents Respondents, P.I.E. Inc. (Employer) and Continental Western Insurance Company (Continental Western). Attorney, Mr. Daniel E. Ashmore represents Third-Party Respondent, Midwest Family Mutual Insurance Company (Midwest Family).

**ISSUE:**

The issue before the Department is whether Claimant's April 13, 2007, work-related injury is a major contributing cause of his condition that required the ACDF procedure?

**FACTS:**

Claimant has been a licensed journeyman electrician since 1989. Claimant has been employed as an electrician since 1989. Claimant worked full time for Employer since March 2005 and on an as-needed basis prior to March 2005. Employer is owned by Claimant's sister and brother-in-law.

On April 13, 2007, Claimant was working for Employer on an electrical project that was typical for Claimant's work for Employer. Claimant was on a ladder performing overhead work when the ladder moved. To avoid falling, Claimant jumped off the ladder from a height of about four feet. Claimant was still hanging onto the overhead conduit and pipes when he jumped and kicked away from the unstable ladder. When Claimant landed on the ground, he heard a pop in his upper back followed by a sharp pain. The pain went down his neck, under his shoulder blade and into his right arm.

Claimant notified Employer immediately about the accident. Employer filed a workers' compensation claim after Claimant reported the accident. The workers' compensation insurer for Employer, Continental Western Insurance Company, accepted the claim arising from the April 13, 2007 incident. Claimant went to his chiropractor, Dr. Jerrid Goebel, to address the pain. Between April 16, 2007 and June 8, 2007, Claimant saw Dr. Goebel five times. Claimant's symptoms did not improve with the visits to Dr. Goebel.

After April 13, 2007, on an increasing basis, Claimant let Employer know that his shoulders, neck and back still hurt and that he had pain radiating into his right arm. Employer gave Claimant less strenuous jobs to perform and jobs considered to be light duty. This restriction was not ordered by a doctor, but was agreed upon by Employer due to Claimant's symptoms. Employer would not let Claimant perform any heavy lifting or digging. In September 2008, Employer told Claimant to telephone Continental Western and see if his April 13, 2007 injury file could be reopened. Continental Western requested that Claimant see a medical doctor and not a chiropractic doctor. Prior to

April 13, 2007, Claimant did not have a significant amount of pain in his back, neck, shoulder or arms. Claimant had been in a car accident in 1997, but had no intervening symptoms.

Claimant saw his primary care physician, Dr. Constance Stock on September 29, 2008. Dr. Stock referred Claimant to The Rehab Doctors, and more specifically, Dr. Timothy Watt, a neurosurgeon who specializes in post-accident rehabilitation. Claimant's initial consultation with Dr. Watt was on October 8, 2008. Dr. Watt recommended physical therapy for Claimant with the Rehab Doctors.

After an initial consultation and treatment with the physical therapist, Claimant sustained an injury to his lower back on November 15, 2008. Treatment for this lower back injury was approved of and covered by Midwest Family, Employer's workers' compensation insurer on November 15, 2008. However, Claimant's upper back pain continued to worsen and had not alleviated over time. Dr. Watt had given Claimant a number of stretching exercises and other conservative treatments for his upper back and neck.

Dr. Watt was concerned that Claimant's neck injury was not improving. On November 19, 2008, just a few days after the lower back injury, Dr. Watt was seeing Claimant for the 2007 neck injury. Dr. Watt notes on November 19, 2008, "He comes in having seen the Rehab Doctors and starting physical therapy. It says it really did not help him any. At this point, he notes if he extends his neck or straightens his upper back, his right arm immediately goes completely numb with shooting pains down the right arm. He is continuing to have pain in the shoulder and the back of his neck. In the interim, he has hurt his low back and is having low back pain and pain going down the left leg, which is a new separate complaint. " Dr. Watt took Claimant off work due to his neck and cervical spine injury.

Dr. Watt notes that Dr. Stock was treating Claimant for the lower back injury and that Dr. Watt had not yet been consulted on the lower back. After MRI's were taken of Claimant's back, it was determined that Claimant suffered from a large herniated disk at

L4-5 with radiculopathy as a result of the November 15, 2008 injury; and “significant disk herniations at C5-6 and C6-7” with cervical radiculopathy with element of spinal cord compression. Dr. Watt did not want to surgically treat the lumbar herniation until the cervical herniations were addressed. On December 17, 2008, Dr. Watt notes his concerns with putting Claimant under general anesthesia with the herniations in his cervical back.

Dr. Watt recommended that Claimant undergo an ACDF (Anterior Cervical Disc Fusion) procedure at cervical spine levels C5-6, and C6-7. Dr. Watt contacted Continental Western to request that the ACDF procedure be authorized. Continental Western denied the procedure. On December 24, 2008, Dr. Watt wrote a letter to the Nurse Case Manager regarding Claimant’s neck injury. In that letter, Dr. Watt detailed how he came to find the cervical herniations and that he believed the April 2007 injury was the cause of the cervical and thoracic herniations.

Continental Western later authorized the ACDF procedure and the surgery was performed on March 31, 2010. Continental Western has brought this action against Midwest Family for reimbursement of the medical benefits paid to Claimant since February 28, 2008, the date that Midwest Family started covering Employer’s workers’ compensation insurance. Continental Western was the insurance carrier for Employer prior to February 28, 2008.

Further facts may be developed in the analysis.

### **ANALYSIS:**

The issue in front of the Department is narrow in scope. Claimant received a work-related injury on April 13, 2007. Claimant then suffered a work-related low back injury on November 15, 2008. Claimant required an ACDF procedure for his cervical spine. The question to be answered with this hearing is whether the April 13, 2007 injury was the cause of the injury that required the ACDF procedure.

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).

Claimant initially treated for the 2007 injury with chiropractor, Dr. Goebel, for a number of weeks in April 2007 and again in June 2007. Dr. Goebel did not take any x-rays of Claimant’s spine. Dr. Goebel’s notes indicate Claimant had some improvement in reported pain. Claimant did not seek medical treatment for his back again until September 2008, despite his having upper back, neck, and shoulder pain on an ever increasing basis. Employer gave Claimant easier tasks to perform and had him supervising more than performing manual labor. Employer put Claimant on light-duty work without a doctor’s recommendation, because that’s all Claimant could handle without feeling pain. Claimant’s right arm was falling asleep on a regular basis. Claimant had trouble sleeping and lying down.

In September 2008, Employer was tired of Claimant complaining about his back and neck pain. They instructed Claimant to telephone Continental Western and inquire as to how to reopen his claim for benefits. Continental Western instructed Claimant to see a medical doctor and not a chiropractor.

On September 29, 2008, Claimant saw Dr. Stock for his back. Dr. Stock referred Claimant to Dr. Watt. The first exam by Dr. Watt took place on October 8, 2008. Dr. Watt ordered a thoracic and cervical spine MRI, which was taken on that same date. Board Certified Radiologist, Dr. Stephen Pomeranz, read the MRIs. The C4-5 level showed a right-sided disc herniation; the C5-6 level and a C6-7 level both showed a

broad central disc herniation with the C5-6 herniation impinging on the anterior aspect of the cervical cord. The T1-2 level also showed a broad central disc herniation.

After reading Claimant's x-rays, the MRI, and a physical exam, Dr. Watt referred Claimant to The Rehab Doctors clinic for physical therapy on the interscapular pain, and other conservative treatment for his upper back. Dr. Watt notes that Claimant's pain through his scapular region and radiating from his shoulder into his right arm, originates with the cervical herniations and not the thoracic herniation. Dr. Stephen Wisniewski, a doctor with The Rehab Doctors clinic also saw Claimant for a couple of appointments.

On November 15, 2008, Claimant suffered another injury while in the course of his work for Employer. This injury affected his lower back, specifically a left sided disc herniation at the L4-5 spinal level. Dr. Stock initially saw Claimant for the lower back as he had gone into the emergency room on Sunday, November 16, 2008. Claimant followed up with Dr. Stock on November 19, 2008. She referred Claimant to Dr. Watt. Dr. Watt saw Claimant that same day, November 19. Claimant had not worked since November 15, and Dr. Watt took Claimant off work for an indefinite period of time because of his lumbar injury coupled with his ongoing cervical problem. Dr. Watt recommended that a microdiscectomy be performed on the L4-5 level. Since Claimant also had serious issues with his cervical spine, it was Dr. Watt's recommendation that the surgeries on Claimant's lumbar and cervical spine be done at the same time.

Continental Western sent Claimant to Dr. Wayne Anderson for an Independent Medical Exam, which took place on December 9, 2008. Dr. Anderson is Board Certified in Occupational Medicine. By his own report, he has spent the better part of the last 25 years studying the causation of injuries, specifically work-related injuries. To conduct the IME, Dr. Anderson conducted a physical exam, and reviewed Claimant's history and medical records. Dr. Anderson is of the opinion that Claimant suffers from degenerative disc disease that is long-term. He also gave the opinion that the result of the April 2007 accident was mid-thoracic myofascial pain which had completely alleviated over time. He opined, by a reasonable degree of medical certainty, that the cause of the cervical

disc herniations was the degeneration of Claimant's back. Moreover, the herniations, according to Dr. Anderson, were not acute, but likely happened over a period of months or years. Due to this opinion by Dr. Anderson, Continental Western denied Dr. Watt's request for the ACDF procedure to be performed on Claimant.

In his written opinion, Dr. Anderson did not seem to give weight to the fact that Claimant also complained of cervical and radiating pain and not just mid-thoracic pain when treating with Dr. Goebel. Part of Dr. Anderson's reasoning was that Claimant did not seek medical treatment between the last treatment with Dr. Goebel in June 2007 and his going to Dr. Stock in September 2008. However, during those intervening months, Claimant was not performing his work as before; he was doing light-duty work. Claimant was also complaining about his pain on a fairly regular basis to Employer (his sister and brother-in-law). That information was also not contained within Dr. Anderson's report. Dr. Anderson gave the opinion that a cervical herniation at multiple levels would have caused much greater pain than what Claimant exhibited in April through June, 2007.

Midwest Family had Claimant see Dr. Grant Shumaker with CNOS (Centers for Neurosurgery, Orthopedics, and Spine) on February 25, 2010 for an Independent Medical Exam. Dr. Shumaker is Board Certified in neurosurgery and pain management. He has been performing workers compensation evaluations and IMEs for about 20 years including the area of causation of injury and condition. Dr. Shumaker evaluated the medical history and records of Claimant, as well as making a physical exam of Claimant.

Like Dr. Anderson, Dr. Shumaker gave the opinion that Claimant has degenerative disc disease and has likely been suffering from this since 1997. This disc disease was noted by a medical practitioner on a neck x-ray that was taken after a motor vehicle accident in 1997. However, Dr. Shumaker also notes that Claimant had no intervening issues with his back or neck from 1997 until April 2007. As Dr. Shumaker explained, the disease only made Claimant more susceptible to suffering an injury or herniation; the disease itself, did not cause the herniation or injury to occur. He further notes that after

treating with Dr. Goebel in June 2007, Claimant's symptoms in his upper back and neck were intermittent, but never completely resolved or went away. Dr. Shumaker noted that the complaints of scapular pain are consistent with an injury at the C6-7 level.

By a reasonable degree of medical certainty, Dr. Shumaker is of the opinion that the April 2007 work-related injury was the cause of Claimant's herniated cervical disks and the ultimate need for the ACDF surgery. Dr. Shumaker agrees with many of Dr. Anderson's findings, including the fact that Claimant's cervical herniations were likely not acute broad herniations, such as Dr. Watt observed in 2008. However, Dr. Shumaker does say that the injury in April 2007 likely disrupted the space between the vertebrae at the C5-C7 levels, to the point where the herniations increased over the intervening 15 months to where surgery was required.

In regards to pre-existing conditions affecting liability for workers' compensation injuries, the South Dakota Supreme Court has written:

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).

In a letter dated December 24, 2008, to the nurse case manager for the April 2007 injury, Dr. Watt gave the opinion that the April 2007 incident caused the cervical herniations. Dr. Watt, again on February 17, 2010, in a letter to Claimant's attorney, stated within a reasonable degree of medical certainty, that the accident on April 13, 2007 caused the cervical herniations and subsequent pain in the upper back, neck, shoulders, and arm.

The evidence, as supported by both Dr. Watt and Dr. Shumaker, show that cervical herniations and resulting radiating and neurologic pain were the reason for the ACDF surgery. These cervical herniations were caused by the April 13, 2007 injury. The work-related injury that Claimant suffered on April 13, 2007 is a major contributing cause of the condition that required the ACDF surgery.

Counsel for Midwest Family 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 Continental Western shall have an additional 20 days from the date of receipt of Claimant and Midwest Family'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 8<sup>th</sup> day of March, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR

          /s/ Catherine Duenwald            
Catherine Duenwald  
Administrative Law Judge