

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

**WILLIAM ESTES,**  
Claimant,

**HF No. 217, 2004/05**

v.

**DECISION**

**TRIPLE K TIRE,**  
Employer,

and

**MILWAUKEE INSURANCE COMPANY,**  
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 December 13, 2007, via the Dakota Digital Network between Pierre and Rapid City, South Dakota. Michael J. Simpson represented Claimant. Daniel E. Ashmore represented Employer/Insurer.

**Issue:**

Is Claimant's work injury of February 7, 2000 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 was 46 at the time of hearing. He was born and raised in Sturgis, South Dakota. He graduated from high school in 1979 and then went to work doing road construction before he joined the Marine Corps in 1981. He was a mechanic, operator of heavy trucks in the Marines and served until 1985. After being discharged from the Marines, he went to work at a manganese mill, then worked in an auto repair shop doing automotive repairs in New Mexico, and then began work at Employer in 1991. He worked at Employer as a mechanic doing auto repairs. He stayed at Employer until 2003, when he left to go to work as a "parts man" Integrity Ford in Spearfish.

When Claimant was in the Marines, he participated in rodeo as a bull rider. He was a bull rider for close to 10 years while he was in the service and then for about a year afterwards when he was working in New Mexico. Prior to bull riding in the Marines he had never ridden bulls. He was in around 20 competitions a year while he was in the Marines and about five or six competitions after he left the Marines. Claimant suffered

injuries caused by riding bulls, but never received medical treatment for a low back injury from riding bulls.

Prior to his work injury, Claimant received some chiropractic treatments for low back pain. In May of 1999, Claimant sought treatment for low back pain from Dr. Welsh, who assessed musculoskeletal back pain. The back pain resolved. There are no other references to low back pain in Claimant's medical records prior to February 2000.

The parties agree that Claimant sustained an "injury" arising out of and in the course of his employment on February 7, 2000. The work injury was ultimately diagnosed as an L4-5 disc herniation by Dr. Ganz, a neurosurgeon, who on April 11, 2004, performed a right L4 hemilaminotomy and microdiscectomy. After the surgery, Claimant participated in physical therapy. Claimant reported no recurrence of his right lower extremity pain although he did complain of occasional, minimal stiffness in his low back. Claimant returned to work and eased back into his regular mechanic duties.

Dr. Mark Simonson performed an impairment rating on November 7, 2000. Dr. Simonson gave Claimant a ten percent whole person impairment. At that time, Claimant reported his pain as rated between 3 and 7 out of ten. Claimant reported that his pain was 75% from his back and 25% from his leg. Claimant also reported neck and arm pain.

The medical evidence demonstrates that Claimant's back pain never went away after his surgery. Claimant's back pain has gradually worsened over the years and he received periodic treatments and tests. The medical evidence also demonstrates that Claimant's significant back pain started with the February 7, 2000, work-related injury. Claimant's back pain has been carefully evaluated by multiple physicians. He has undergone multiple diagnostic procedures and treatments, including physical therapy, home lumbar traction, prescription medications, a TENS unit, and multiple injections.

Other facts will be developed as necessary.

**Is Claimant's work injury of February 7, 2000 a major contributing cause of his current condition and need for treatment?**

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

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.

There is no dispute that Claimant suffers from a preexisting condition in his low back diagnosed as degenerative disc disease. “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 Claimant’s degenerative disc disease at L3-4 is a preexisting condition that did not develop within the occupational setting.

Claimant must present expert medical testimony to establish the necessary causal connection between the 2000 work injury and his current condition and need for treatment, as “the field is one in which laymen are not qualified to express an opinion.” Hanten v. Palace Builders, 558 NW2d 76, 1997 SD 3 (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). The Department finds that this causation question presents a question to which laymen are not qualified to express an answer or opinion. 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).

In support of his burden, Claimant offered the expert medical testimony of Dr. Steven Goff, a physiatrist who works for the Veterans Administration. Dr. Goff opined that Claimant’s February 2000 work injury is and remains a major contributing cause of his current condition and need for medical treatment. Dr. Goff based his opinions on his treatment and examinations of Claimant. Dr. Larkins opined that Claimant’s February 2000 work injury is not a major contributing cause of his current condition and need for treatment. Dr. Larkins based his opinions on a discography and the history provided in the medical records.

Dr. Goff explained the discography procedure:

And basically how that test works is that under imaging a needle is inserted into a disc space and a dye is injected. And that does several things. Number one, the dye outlines what that space looks like. And number two, it creates pressure in

that space. And so they look at, "What does that disc look like? Does it look like a normal shape? Does it look like it's degenerated? And they ask, "Does this reproduce pain?"

Dr. Goff explained the theory of what the discography procedure reveals:

And the theory there is - - and I'll use that word "theory" because there is a difference of opinion about the accuracy of that test. But the theory is that if the pain that they experience during the injection reproduces closely the pain that they have been experiencing, then it means that disc is the problem.

Dr. Goff opined that discography is the best test to determine whether the source of a patient's pain is a disc, but it is correct only two out of three times. Claimant's discography was performed by Dr. Simonson at the request of Dr. Rand Schleusener, and showed an abnormal disc at L3-4 with concordance (reproduction of symptoms) and non-concordant findings at L4-5 and L5-S1.

There is no dispute that Claimant's work-related injury of February 2000 injured his L4-5 disc. Testing in 2000 revealed that Claimant had already developed degenerative disc disease at L3-4. Dr. Goff explained his causation opinion:

I think you can't ignore the fact that symptom wise he did not have symptoms prior to this injury. So my opinion would be you cannot dismiss the injury as insignificant. Because his symptoms started on that date. And what I'm saying what happened is he sustained another injury to the chain, to the link. He injured either another link or he injured a link that was already a problem to the point that he had symptoms. So in that light, it contributed substantially to that fact.

Dr. Goff opined that it is a mistake to consider the discography as conclusive evidence that the majority of Claimant's symptoms and need for treatment are attributable to his degenerative disc disease at L3-4. Dr. Goff found that Claimant's current symptomatology is low back pain on the right side with a little right hip pain. Dr. Goff based his causation opinion on the fact that the facet injections he performs at L3 through L5 relieve Claimant's symptoms. Dr. Goff could not opine as to what specific structure in Claimant's back is causing his pain, just that the pain could be coming from the disc at L4-5 or the facets at or near that level as well.

Dr. Larkins testified:

Q: Why is it difficult to separate where his pain is coming from, from which level of the spine?

A: I think there's two big things that bother me about this case. One is Ganz operates at L4-5 and then in his contemporaneous records - - granted, I know what Mr. Estes says - -, but you know, based on the records that Dr. Ganz says, you know, but he really did get good improvement in his overall condition. You know, there's two or three follow-ups that make it sound like Ganz is right on the money with what he did at L4-5.

And then the second thing that is the confounding issue regarding the discography. That's the other problem; you know, that he's really concordant at a level that didn't seem to be in play at the initial onset of this. That's sort of what I was driving at.

Dr. Larkins explained the condition of Claimant's back at both the L4-5 and at L3-4 levels:

Both of the levels are very degenerated, you know. There's loss of height of both disc spaces. There's no question that Mr. Estes has discogenic back pain, so that puts it in that category, so you've got to really start looking at that, that whole entity. So then you get an MRI and you have two levels that are very degenerated. So the next test to try to figure out which one is the pain generator, you pick the one that he was operated on, the one that looks bad, and then the control, and then you apply the discography. That's what I was trying to get at with how you never make those judgments in isolation to use that test. It's always in conjunction with the way someone looks or the absence of neurologic exam features, an MRI that's suggestive, other clinical history items. You put that all together.

And I think that what you're reading is you're looking at what the canal looks like, and that's not really where the action is with this. Radicular complaints are not the bulk of what he's talking about. He has very real pain that is coming from the discs somewhere. And the decision you have to make is what levels you would or would not fuse, if that's what you were going to do, to address that.

Dr. Larkins agreed that Claimant's radicular pain is due to the L4-5 level. Dr. Larkins testified:

Q: And is it your opinion then, Doctor, that, based on this discography, that 100 percent of his pain is due to L3-4 and zero is due to L4-5, or is it different?

A: Well, you know, in the report, the way he puts it in here, he says there's a 65-percent chance of - - you know, however he puts it about L3-4, you know, I think that L3-4 has got to be the generator because, you know, he had really nonconcordant pain at L4-5. So if you're relying on that then, if that's your medical evidence and within medical certainty, you'd have to say it's L3-4 because that's all we have to go on.

Dr. Larkins found that Claimant's "biggest and most real complaint was about his low back pain." Dr. Larkins did not consider that Claimant's low back pain is more right-sided, whereas, Dr. Goff found that Claimant's low back pain is mostly on his right side. Dr. Goff considered the non-central nature of Claimant's pain to be significant in diagnosing what is causing the pain. Dr. Goff explained:

If you look at the back of a person, it's dead center. And if you ask him where they hurt, they won't say it hurts to the right or left. They'll say it hurts in the middle. When it radiates it tends to be a diffuse pattern because it's involving the whole disc, so it tends to be more of a diffuse spread; facet pain, nerve root pain, ligament pain, muscle pain, SI pain, all tend to be one side or the other and you can clearly delineate that historically. When I get that history, then I'll suspect more facet than I will disc. And it can be hard for people to tell because you're talking about maybe an inch of movement here. So it can be very difficult for people to localize.

Both Dr. Goff and Dr. Larkins are qualified, competent, and experienced medical practitioners. Dr. Goff's experience as a physiatrist is treating people in pain. His opinions thoroughly addressed Claimant's pain complaints and history. Dr. Goff has treated Claimant numerous times over a number of years. Dr. Larkins' specialty is neurological surgery. He treats people who have problems that can be treated with surgery. Dr. Larkins examined Claimant one time. Dr. Larkins' opinions rely almost entirely on the results of one test, the discography. Dr. Goff's explanation of how the discography should be used in evaluating Claimant's particular situation is more persuasive. Claimant's problem is not a problem that can be treated with surgery. Dr. Goff treated Claimant with injections that were both treatment and diagnostic. Dr. Larkins does not currently perform those injections. Dr. Goff's opinions on the subject of pain control and causation in Claimant's case are more persuasive than Dr. Larkins are. Dr. Goff's opinions are accepted and Dr. Larkins' are rejected. Based upon the opinions of Dr. Goff, Claimant has met his burden to demonstrate that his February 2000 injury is and remains a major contributing cause of his current condition and need for treatment.

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

Dated this 20<sup>th</sup> day of August, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey  
Administrative Law Judge