

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

**JAMES R. WHITE CALF,**  
Claimant,

**HF No. 230, 2003/04**

**v.**

**AMENDED DECISION**

**CITY OF RAPID CITY,**  
Employer/Self-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 September 20, 2005, in Rapid City, South Dakota. Claimant, James R. White Calf (Claimant) appeared personally and through his counsel, Jeffrey P. Maks. Frank Driscoll represented Employer/Self-Insurer, City of Rapid City (City).

**Issue:**

Whether Claimant's low back condition is compensable under the South Dakota Workers' Compensation Law.

**Facts:**

Claimant arrived in Rapid City, South Dakota in August of 2002, searching for a new life, away from the hardships he had endured. He found work with City in its Sanitation Department in November of that same year. Claimant worked through the year and as is typical of employment with City, Claimant, as an initial part-time or seasonal employee, was laid off and required to resubmit his application for permanent employment.

On his written reapplication for employment, submitted in December of 2003, and upon the advice of the Director of the Landfill, Jerry Wright, Claimant disclosed his entire criminal history. Claimant was again hired to work in the Rapid City Landfill and he enjoyed his work there.

On January 13, 2004, Claimant was required to load old tires onto a trailer. Claimant attempted to lift a tire that was frozen to the ground and in the process, his feet slipped and he fell, landing forcefully on his backside. Claimant experienced an immediate onset of low back pain. He described it, "I had a pain go through me, on my butt, go up, and I didn't really think much of it." Claimant finished his work for the day. As he returned home from work, the pain in his left side where he had landed on his backside increased. In an effort to relieve this growing pain, he relaxed on his couch. Claimant's pain remained constant throughout the evening. Upon awakening the next morning, Claimant felt severe pain in his low back. His pain was so intense he had to roll over

and pull himself up out of his bed. Along with the pain in his low back, Claimant experienced a sense of numbness or loss of sensation in his left lower leg. The numbness extended from his knee to his ankle. Claimant's wife confirmed these events, describing Claimant as obviously suffering pain.

Despite his wife's admonishment that he should seek medical care for his low back pain, Claimant went to work on January 14, 2004. Unfortunately, he was a couple of minutes late and was not allowed to work that day because of his tardiness. Claimant was admittedly angry at being sent home from work and called his wife to let her know that he would not be working that day. Claimant returned home and attempted to rest his back by reclining. In addition to the low back pain and left lower leg numbness, Claimant also experienced weakness in his left lower leg, which caused his leg to "give out" on him. Claimant's wife confirmed these events as well.

Claimant sought medical attention on January 15, 2004, due to his low back pain and left lower leg symptoms. Claimant informed medical personnel that he had slipped and fallen on the ice while at work two days earlier. While at the emergency room, Claimant reported that his past medical history included lumbar disk disease and ruptured disk. Claimant recalled reporting this at the emergency room. Claimant remembered being told that he had arthritis or lumbar disk disease by a physician who treated him in the 1980's for multiple stab wounds many years earlier. Despite this diagnosis, Claimant never experienced low back pain or leg symptoms and never sought medical care for such symptoms prior to January 15, 2004. The medical evidence revealed no treatment endured by Claimant for low back pain, lower extremity numbness, or lower extremity weakness.

Following his examination at the Rapid City Regional Emergency Room, a CT scan was ordered. Claimant could not undergo an MRI because of metal fragments in his right arm as the result of a shooting incident. Medical personnel at the emergency room advised Claimant that he was not to return to work until he was evaluated by Rand Schleusener, M.D., an orthopedic surgeon.

On January 16, 2004, Claimant returned to the hospital for the prescribed CT scan, which revealed distinct impingement on the left traversing SI nerve root at the L5-S1 disk level secondary to degenerative spurring as well as some possibly chronic disk herniation on the left.

On January 29, 2004, Claimant was finally able to see Dr. Schleusener. Claimant informed Dr. Schleusener that his symptoms began after he fell at work. Following his exam and a review of the CT results, Dr. Schleusener concluded that Claimant was suffering from an acute L4 radiculopathy. Dr. Schleusener referred Claimant for EMG testing with Dr. Mark Simonson. Dr. Schleusener further ordered that Claimant not work until re-evaluated.

On February 11, 2004, Claimant received a written denial of further medical care from City's worker's compensation administrator. The basis for the denial was that

Claimant's "recent employment activities were not a major contributing cause of your condition as required by SDCL 62-1-1(7)(a)." Because of this denial, his inability to pay for the appropriate treatment on his own, and his painful and debilitating condition, Claimant, as a military veteran, sought medical care at the Fort Meade V.A. Hospital.

Claimant was first seen at Fort Meade specifically for his low back condition on February 18, 2004. Because of the medical process used by the V.A., Claimant was first seen by a primary care physician, John Finn, M.D., who referred Claimant to a specialist, Steven Goff, M.D. When Claimant saw Dr. Goff on March 16, 2004, Claimant informed him of the nature of his fall at work. Dr. Goff referred Claimant to Jorge H. Johnson, M.D. Dr. Johnson saw Claimant on June 16, 2004. Claimant informed Dr. Johnson of the nature of his injury at work. Dr. Johnson referred Claimant to the Omaha V.A. for a surgical consult.

In October of 2004, Marco Marsella, M.D., examined Claimant. Claimant informed Dr. Marsella of the nature of his injury at work. Dr. Marsella recommended a left sided L5-S1 discectomy. Claimant had surgery on October 22, 2004. Dr. Finn and Dr. Goff provided Claimant's follow-up care. In January 2005, after he completed a course of physical therapy, Claimant was returned to work with restrictions, namely light duty, a maximum lift or weight limit of 15 pounds and limited repeated bending of his back.

Claimant and his wife were both credible witnesses. Claimant's history and description of the work-related injury were entirely consistent. The medical evidence demonstrated that his symptoms have been consistent. The medical evidence offered little support for a finding that Claimant's injury and symptoms were not as he alleged. The medical evidence offered no proof that Claimant previously suffered with similar symptoms in his low back and left lower extremity.

Other facts will be developed as necessary.

### **Whether Claimant has a compensable injury under SDCL 62-1-1(7).**

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).

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).

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.

In support of his burden to demonstrate by medical evidence that the slip and fall of January 13, 2004, caused his injury and need for surgery under the standard set forth in SDCL 62-1-1(7), Claimant offered his medical records and the deposition testimony of Dr. Goff.

The medical evidence and Dr. Goff's opinions established that Claimant suffered an injury while at work on January 13, 2004, when he slipped and fell forcibly onto his backside. The injury was a disk herniation causing impingement of a nerve root. Dr. Goff testified, "[t]he history is consistent with an event involving the disk, sudden onset." Dr. Goff explained that Claimant had a disc condition, possibly a herniation, before he fell, but the fall caused the nerve root impingement and resultant symptoms. He explained:

Q: So then based upon your education, experience and training, your actual treatment of the patient, your physical exam and findings, the results of diagnostic testing, the history provided to you, as well as to others, do you have an opinion, with a reasonable degree of medical probability, whether the work event or injury that he described on January 13 of '04 serves as a major contributing cause of the low back condition that you treated and that was surgically treated ultimately in Omaha?

A: Yes.

Q: What is that opinion?

A: The injury reported, lifting the tire, was a major contributing factor to the disk herniation which resulted in the radiculopathy that he suffered from.

- Q: And in a physiological sense, if you could explain for us again the basis for that opinion in terms of the injury.
- A: A disk rupture occurs when a chunk of disk breaks free. Not only does it break free, but it extends from its usual confines that is within the disk space, enters into the intervertebral disk space and causes pressure on the nerves. In this case, that was event related. There was a force that occurred that stimulated this chunk of disk to break off and to break through the annulus, which normally contains it, and extend on into the nerve root space.
- Q: So it is the mechanics of the injury that precipitates the herniation of the disk itself?
- A: Right. What it actually is, if I might explain a little bit further, it is a sudden increase in pressure within a disk space. And a good analogy might perhaps be if you put an M&M between your two fingers and squeezed it. If you increase the pressure on the M&M, it's more likely to squirt out than if there is no pressure.
- Q: And that increased pressure, as you describe it, would correspond with symptoms?
- A: The involvement of the disk rupturing produces one set of symptoms. The involvement in the nerve root produces another set of symptoms. And he had both, so, yes.
- Q: Does some level of pre-existing degenerative disk disease or arthritis or osteoarthritis change or alter your opinions in the matter at all?
- A: No.
- Q: Why not?
- A: A natural event of aging is radiologic change. Which if you took x-rays of a hundred men 50 years old, they would all - - most of them, probably 90 percent of them, would have a diagnosis of degenerative spine disease. So that really doesn't mean anything.

The degree of degenerative spine disease contributes only in the degree of trauma required to cause a disk rupture to change. So, for example, in a younger person, they need more pressure to get the disk to rupture. And in an older person, with more degeneration, it requires less pressure. But the bottom line is, the rupture still comes from the increased intradiscal pressure.

Dr. Goff opined that "[t]he injury [Claimant] reported, lifting the tire, was a major contributing factor to the disk herniation which resulted in the radiculopathy that he suffered from." Dr. Goff opined that Claimant's underlying and preexisting degenerative disk disease contributed to the injury "only in the degree of trauma required to cause a disk rupture to change." Dr. Goff explained that Claimant suffered from a preexisting disk condition, but that that disk condition had not caused symptoms prior to the trauma of the fall in January 2004. Dr. Goff explained:

- Q: So when you indicate that you believe that a slip and fall that the Claimant alleges to have suffered on January 13, 2004, was a major contributing cause of his condition, what do you rely upon?
- A: Well, if you hurt one minute - - if you don't hurt one minute and you do something and you hurt the next minute, you have to be strongly suspicious that what happened in that minute had something to with it.
- Q: Okay.
- A: Particularly if it was a traumatic episode which is known to increase the pressure in the disk space. So to answer your questions, it's based on the history.

There is no dispute that Claimant suffered from a preexisting condition, diagnosed as degenerative disk 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, ¶ 8, 16-17, 619 N.W.2d 260, 262-65). The parties do not dispute that Claimant's degenerative disk disease is a preexisting condition that developed outside the occupational setting. The opinions of Dr. Goff support a finding that SDCL 62-1-1(7)(b) controls. To summarize Dr. Goff's opinions, Claimant's injury at work caused his preexisting disk condition to become symptomatic. Claimant's injury on January 13, 2004, combined with his preexisting condition to cause his symptoms and need for medical treatment.

When SDCL 62-1-1(7)(b) is applied, the evidence demonstrates that Claimant's fall at work is a major contributing cause of his injury, his subsequent symptoms, and his need for surgery. Dr. Goff provided the following testimony:

- Q: [By Mr. Maks] Does your opinion remain, within a reasonable degree of medical probability, that this work event serves, whether in combination with a pre-existing condition or not, as a major contributing cause of the condition that you saw, that you evaluated, and that was treated through the VA?
- A: Same opinion.
- ...
- Q: [By Mr. Driscoll] Doctor, you explained a great deal about what can happen, but the issue in this case is what did happen with this particular patient. With that in mind, are you going to hold with your opinion that he suffered a work-related injury on January 13, 2004, that was a major contributing cause of the condition for which he underwent surgery?
- A: Yes.

Dr. Goff's opinions are unrefuted expert medical opinions. His opinions, in conjunction with the credible testimony of Claimant and Claimant's wife, established that Claimant's

low back injury and resultant need for medical treatment, including surgery, are compensable under SDCL 62-1-1(7)(b).

Dr. Goff's expert medical opinions are persuasive, credible, and conclusive. The medical records contain no expert medical opinions, stated to the requisite degree of medical certainty, that contradict Dr. Goff's opinions and explanations. Without medical evidence and opinions to refute Dr. Goff's opinions and because the Department found Claimant and his wife were credible witnesses, City's argument that Dr. Goff's opinions are incorrect and not credible must fail.

Claimant has met each of his burdens by a preponderance of the evidence. Claimant met his burden to establish a causal connection between his injury and his employment. He met his burden to establish that he suffered an injury at work when he fell. He met his burden to establish that this work injury is a major contributing cause of his radiculopathy and need for surgery. Claimant met his burden to establish that his preexisting condition combined with his work-related injury to cause his need for treatment and the expert medical evidence established that Claimant's injury is a major contributing cause of his need for treatment, including the surgery in question. Claimant met his burden to establish that his low back condition and resultant lower extremity symptoms are compensable under SDCL 62-1-1(7)(b).

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. City shall have ten (10) days from the date of receipt of Claimant'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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 19<sup>th</sup> day of May, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey  
Administrative Law Judge