

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

PAM DOUGLAS,

HF No. 43, 2013/14

Claimant,

v.

DECISION

**LESTER HOSPITALITY, d/b/a
RUSHMORE PLAZA HOLIDAY INN,**

Employer,

and

FIRST DAKOTA INDEMNITY COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on August 19, 2014, in Rapid City, South Dakota. Claimant, Pam Douglas was represented by Michael J. Simpson. The Employer, Lester Hospitality d/b/a Rushmore Plaza Holiday Inn and Insurer, First Dakota Indemnity Company were represented by Charles Larson.

Legal Issues:

The legal issue presented at hearing is stated as follows:

Whether a work-related injury on or about January 7, 2013, is a major contributing cause of Douglas' need for two lower back surgeries and related medical expenses?

Facts:

The Department finds the following facts by a preponderance of the evidence:

1. Pam Douglas (Douglas or Claimant) was a 52 year old woman at the time of the hearing who worked at the Rushmore Plaza Holiday Inn (Employer) from 2001 until September of 2013. She started out busing tables in the restaurant. She then worked in housekeeping until 2005, when she began working in "Holicare". In Holicare, she went from room to room checking to make sure everything

worked and if it didn't she would fix it. Her duties included changing light bulbs, replacing outlets and switches, fixing furniture, plumbing and making other repairs in the rooms.

2. On or about January 7, 2013, Douglas was re-caulking a bathtub in one of the rooms. She first had to cut out the old caulking with a utility knife. The old caulking was very hard and it took a lot of effort to cut it. She twisted wrong while applying a lot of pressure and felt what she thought was a muscle pull in her lower back and upper butt.¹
3. Douglas continued to work after the January 7th incident, although she had pain in her buttock area. Her pain was intermittent and varied between medium and severe depending on what she did.
4. On the morning of February 3, 2013, Douglas felt a pain in her low back that woke her out of her sleep.² The pain was severe and felt like nothing that she had ever experienced before. The pain was located across her lower back. She got up out of bed and went upstairs to the kitchen and by the time she got upstairs the pain was shooting down her right leg into her toes.
5. February 3, 2013 was a Sunday and Douglas was not scheduled to work that day.
6. Douglas went to Black Hills Urgent Care on the morning of February 3, 2013, and was seen by a physician's assistant (PA). The PA noted "sudden onset back pain on the right starting in the buttocks. Told me it woke her up at 6:00 a.m. with the symptoms. Radicular symptoms down the leg." Douglas was prescribed medications.
7. On February 4, 2013, Douglas was seen by Dr. Schaeffer at the Rapid City Medical Center. Schaeffer noted "50 year old female who awoke yesterday with low back pain, in the middle and going across low back, radiating down right leg. Notes that she has developed numbness in right calf." Schaeffer also noted "for the last month has had some intermittent 'muscle pain' in right cheek." Schaeffer prescribed additional medications and noted "if pain not improving over the next couple weeks or if you develop worsening symptoms, then call for x-ray and MRI of low spine."
8. On February 13, 2013, Schaeffer saw Douglas again, noting she continued to have right calf numbness and pain which radiates down the back of her thigh, lateral calf and into the fourth and fifth toes on the right side. Schaeffer noted "has been unable to work since last week as she is unable to stand for more than

¹ There was some confusion about the exact date of the incident because it took Douglas several weeks before she understood the significance of the event.

² She later told Dr. Segal and Dr. Monasky that she experienced that pain after rolling over in bed.

2-3 minutes at a time." Schaeffer referred Douglas to the physical therapy center and asked her to follow up in one week.

9. On February 14, 2013, Douglas was seen at the Physical Therapy Center and reported once again that she had an onset of right low back pain and right lateral thigh pain radiating down to her right foot on February 3, 2013. The therapist also noted "she had noticed a mild backache for several weeks prior to that, but symptoms increased that day." The therapist noted that her signs and symptoms were consistent with a herniated disk affecting the right S1 nerve root.
10. On February 20, 2013, Douglas was seen again by Dr. Schaeffer who noted that a February 15th MRI showed a "moderately large disk herniation causing central canal and right lateral recess stenosis at L4-5." Douglas told Dr. Schaeffer that "in early January, she was working at the Rushmore Plaza Holiday Inn. She was kneeling in a bathtub to cut out old caulking. Twisted, developed pain in her right buttock. She thought it was a pulled muscle and that it would resolve with time, so she didn't seek evaluation. She was able to tolerate the discomfort with an occasional twinge until the a.m. of 2/3/13 when she woke up with excruciating discomfort."
11. Douglas was then referred to Dr. Monasky. Dr. Monasky has been a practicing neurosurgeon for 21 years and practices general neurosurgery, doing approximately 70 percent spine cases and 30 percent brain surgery. He is board certified as a neurosurgeon. Monasky testified during deposition that in his practice he has seen thousands of patients who presented to him with herniated disks in their low back. He testified that in taking histories from all of those patients he had gained an expertise on what causes herniated disks and what does not.
12. On March 4, 2013, she saw Dr. Monasky's PA. She gave the history of twisting her back at work on approximately January 7, 2013, thinking it was a pulled muscle, "off and on felt pain", "February 3rd woke up with severe low back pain when she got up pain went down back of right leg to right foot."
13. On March 11, 2013, she saw Dr. Monasky who noted that she had good pain relief for two days after her steroid injection but that her pain was now radiating into her right calf and foot and was severe. Dr. Monasky noted "she has had the pain in the back and the legs since January 1, 2013. She denies any specific traumatic incident but feels it is from the cumulative effects at her current job where she performs manual labor." Dr. Monasky also wrote that Douglas had a "two month history of back and right leg pain." Monasky noted that Douglas could not stand more than two minutes, had difficulty sleeping at night, and that her MRI scan showed a herniated L4 disk in the midline and to the right of the midline with marked compression of the right L5 exiting nerve root. Monasky discussed performing a discectomy at L4-5 and noted that she was leaning toward having the procedure done.

14. On May 14, 2013, Monasky noted that Douglas had injured herself on January 7, 2013, "and this is when she developed the right leg pain. Her back pain got worse after rolling over in bed on February 3, 2013." Monasky noted that her pain was intractable and had not responded to conservative treatment and that she would like to undergo surgery.
15. On June 14, 2013, Dr. Monasky performed a discectomy of Douglas' L4-5.
16. Douglas initially had a good result from her June 14th surgery but then her right leg pain returned and she underwent a second surgery on November 22, 2013.
17. Douglas was released to go back to work after the second surgery in January of 2014.
18. On May 1, 2013, Douglas was seen by Dr. Nolan Segal, an orthopedic surgeon. Dr. Segal stopped doing any major surgeries three or four years ago and when he did do surgeries he performed shoulder cases, hips, and knees. He has not performed any spinal surgeries since approximately 1994.
19. Dr. Segal performed an independent medical examination of Douglas at the request of First Dakota Indemnity Company (Insurer) who was Employer's insurer. Douglas gave Dr. Segal a history of kneeling down in a bathtub and twisting wrong and developing pain in her right buttock on January 7, 2013. She reported to Dr. Segal that she initially thought she had just pulled a muscle and just continued to work. According to Segal's report, she told him that on February 3, 2013, she was in bed and rolled and developed severe low back pain. She states she could hardly walk so she went to the doctor and was seen at Urgent Care.
20. Dr. Segal noted that she had a significant right L4-L5 disk herniation with radicular symptoms. He wrote in his report "her findings are consistent with an acute injury and not suggestive of a chronic degenerative process." He further found that "from an objective standpoint, she has an obvious right sided disk herniation with neural element impingement at the L4-L5 level on MRI."
21. Dr. Segal also noted in his report that "her current physical examination findings are consistent with the above." Segal also found that "if the history given by Ms. Douglas is accurate, she likely did sustain at least a small right L4-L5 disk herniation with right buttock pain on January 7, 2013." Segal further found that "[S]he, however, then rolled in bed and clearly the disk herniation became significantly larger and symptomatic on February 3, 2013. In this regard, her work activities would contribute independently to the disability, impairment, and need for treatment."

22. Dr. Segal states in his report that "regarding the need for surgery, it would not be solely due to the January 7, 2013, work injury." Segal noted that surgery was a medically appropriate option at this time but that "clearly, however, she rolled in bed on February 3rd, resulting in a significant increase in the disk herniation and this resulted in a significant increase in symptoms leading to the need for surgery." Segal noted that "I find absolutely no evidence of symptom magnification, malingering, secondary gain, or functional overlay" and that "her subjective complaints are not proportionate to objective findings or her radiologic studies."
23. On May 8, 2013, Dr. Segal responded to an inquiry from the claims adjuster concerning causation. He concluded "based on the available information, therefore, it is correct that were it not for her rolling in bed on February 3, 2013, the surgery would likely not be necessary as she developed severe pain and significant radicular symptoms on February 3, 2013."
24. Based on Dr. Segal's opinion the Insurer denied responsibility for the back surgery and for any workers' compensation benefits.
25. Douglas' attorney sent Dr. Monasky, Dr. Segal's report and asked him for his opinions regarding causation. On August 29, 2013, Monasky wrote "I disagree with Dr. Segal's assessment that Pam incurred a significant worsening of the ruptured disk while rolling over in bed." Monasky wrote that the history he took was that her back pain got worse after rolling over in bed on February 3rd, not her leg pain. Monasky noted that Douglas "underwent surgery specifically due to the leg pain which was caused by pressure on the right fifth lumbar nerve root." He explained that "it is extremely unlikely that merely rolling over in bed is a traumatic enough event to cause an acute disk rupture." He wrote "I do not doubt that rolling over in bed may have caused a muscle strain which increased the patient's back pain, especially in light of the fact that Pamela was becoming increasingly deconditioned due to the leg pain from her January injury." Monasky concluded "it takes great speculation and imagination to conclude that rolling over in bed caused a large acute disk rupture."
26. Dr. Monasky's response stated "it is my opinion that the patient's episode of rolling over in bed on February 3rd, though it may have increased her back pain, did not increase her leg pain and therefore did not affect the underlying pathology of an acute ruptured fourth, fifth lumbar disk whose symptoms appeared in January 2013 directly as a result of the patient's work injury." Monasky testified that her history of kneeling and twisting to the right and pulling the caulking out and having an onset of pain into her right buttock was "certainly not incompatible with her diagnosis" because "the majority of ruptured disks that I have seen in my career, the overwhelming majority have occurred with some type of strenuous effort on the part of the person. Either they are lifting, they're pulling, they're bending, they're twisting." He testified that usually it is "something that puts rotational forces as well as translational forces upon the spine."

27. During his deposition, Dr. Monasky was told about her symptoms in her right buttock and then the onset of severe back pain and then right leg pain on February 3rd and asked what he thought happened. He testified that "the incident at work was "the beginning of the symptom complex that she had. Clearly that was the more traumatic of the two events, the bending over and twisting, pulling the caulking in the tub versus her simply rolling over in bed." Monasky further testified that he had seen other patients who had injuries to their disks that caused buttock pain and then over the course of weeks or months it progresses down the leg to where it becomes a full-fledged herniation. Monasky testified "that's very common. In fact, I would say that's probably more the rule than the exception." Monasky opined within a reasonable degree of medical probability that the January 7, 2013, work injury is a major contributing cause of Douglas' low back condition which he treated with surgery. He further testified that her recurrent herniated disk which required a second surgery in November of 2013 was one of the risks of her first surgery.
28. During his deposition, Dr. Monasky disagreed with Dr. Segal's "bed rolling opinion" because "merely rolling over in bed I consider a very atraumatic event. And in my experience, it's much more likely that the increased pain she was experiencing that morning was merely the natural result of the progression of her ruptured disk that she sustained that both myself and Dr. Segal agree that she sustained on January 7, 2013."
29. Dr. Monasky testified with regards to Douglas' failure to "connecting the dots" between her January 7, 2013, incident and the onset of leg pain a month later. Dr. Monasky stated that it was not an uncommon scenario and something he had seen happen. Monasky explained "if there is a mild or moderate event that occurs in a patient's life, I would say it's very common that they don't realize at the time but, in retrospect, they connect the dots and they may ascribe a certain event to the initial causation of their symptoms."
30. Additional facts will be discussed in the analysis below.

Analysis:

Douglas, as the claimant in this workers' compensation case, has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353, 358 (SD 1992).

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

SDCL 62-1-1 (7).

The South Dakota Supreme Court has noted that there is a distinction between the use of the term “injury” and the term “condition” in this statute. See Grauel v. South Dakota Sch. of Mines and Technology, 2000 SD 145, and ¶ 9. “Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result.” Id. Therefore, “in order to prevail, an employee seeking benefits under our workers’ compensation law must show both: (1) that the injury arose out of and in the course of employment and (2) that the employment or employment related activities were a major contributing cause of the condition of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.” Id. (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). “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., 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted).

This case turns, in part, on whether the factfinder determines that the incident on January 7, 2013, as described by Douglas, actually occurred or not.³ The Department believes that the incident did occur as described. The Department reaches this conclusion for several reasons. First and foremost, the Department found Douglas’ testimony to be credible. Her testimony was straightforward and consistent with the incident described to both Dr. Monasky and Dr. Segal.

Next, Douglas has had 13 years of schooling, roughly the equivalent of a high school education, and she did not appear, at the hearing, to be very sophisticated about medical conditions in general and neurological conditions in particular. As such, it is unlikely that she could knowingly fabricate a scenario that contained the type of “rotational and translational forces on the spine” that Dr. Monasky describes as the cause of the overwhelming majority of disk herniation cases.

³ Dr. Segal’s deposition and Employer and Insurer’s brief expressed some doubt that the January 7, 2013 incident occurred.

In addition, references to Douglas' "muscle pain" in her "right cheek" appear in her medical history as early as February 4, 2013, this is long before she could identify the traumatic event that caused the February 3rd pain. This suggests that the event on January 7th occurred. Had the January 7th incident been fabricated to support a workers' compensation claim, she would not have still been confused about the cause of her February 3rd pain, in mid-March.

Finally, if the incident had been fabricated by Douglas it is likely that she would have chosen a date that would have immediately preceded the February 3rd onset of pain, rather than choosing a date nearly a month prior to it.

Despite Employer and Insurer's criticism of Douglas' inability to "connect the dots" between the January 7th incident and the events of February 3rd, the Department finds it understandable that it took some time for her to associate the two events. As stated before, Douglas was unsophisticated with regards to her medical condition. She assumed that an injury that could cause the type of pain she experienced on February 3rd had to have occurred commensurate to the onset of her pain. It simply did not occur to her that the pain could have been caused by an incident nearly a month prior to the onset of the pain. In addition, the pain she experienced on January 7th and February 3rd were different. The one felt like a muscle pull in the buttock; the other felt like nothing she had experienced before. Dr. Monasky stated "if there is a mild or moderate event that occurs in a patient's life, I would say it's very common that they don't realize at the time but, in retrospect, they connect the dots and they may ascribe a certain event to the initial causation of their symptoms."

Dr. Monasky opined that the more traumatic incident on January 7th was a major contributing cause of Douglas' radicular pain and need for surgery. Dr. Segal acknowledges that the January 7th incident likely caused a disk herniation, but opined that Douglas' act of rolling over in bed was the cause of her need for surgery. The Department finds Dr. Monasky's rationale to be the more persuasive.

Dr. Segal's opinion that the atraumatic act of rolling over in bed, rather than the more forceful twisting and pushing that took place on January 7th was the cause of her need for surgery seems to be at odds with his own finding. Dr. Segal concludes in his report; "Her findings are consistent with an acute injury and not suggestive of a chronic degenerative process." The Department agrees with Dr. Monasky's testimony that the January 7th incident was clearly "the more traumatic of the two events." It is also fair to infer that the episode on February 3rd would likely not have occurred but for the January 7th injury.

The Employer and Insurer argue that Dr. Monasky played word games in his deposition while discussing the difference between the buttocks and the leg. The Department disagrees. When that testimony was reviewed, it appears to the Department that Dr. Monasky made no distinction between the buttocks pain and leg pain because he understood them to be the same symptom, "radicular pain". Consequently, while dictating his notes he used leg pain as opposed to distinguishing between buttock and

leg pain. It must be understood that Dr. Monasky had the advantage of hindsight when dictating his notes. He already knew that the herniation existed. Therefore, he understood that the buttocks pain was, in fact, radicular.

Employer and Insurer's argument that Douglas' smoking may have caused the herniation also falls short of the mark. Dr. Monasky testified that smoking causes degenerative changes but not herniations. While severe degeneration can add to the likelihood of a disk herniation, Dr. Segal makes clear in his report that the herniation was not due to a degenerative process.

Dr. Monasky was wrong in his correspondence to Douglas' attorney when he stated that Douglas did not experience a worsening of her leg pain during the February 3rd episode. However, this error does not discredit his entire rationale. It does not matter to the Department whether the episode on February 3rd was due to a "natural progression" of the herniation or was an exacerbation of the herniation that both doctors acknowledge occurred on January 7th. In either case, the Department finds that the work-related injury that occurred on January 7, 2013, was a major contributing cause, if not the major contributing cause, of Douglas' need for two lower back surgeries.

It is also noteworthy that Dr. Monasky has vastly more experience treating disk herniations and expertise than does Dr. Segal. He also has the advantage of being Douglas' treating physician.

Conclusion:

Douglas has sustained her burden of showing that a work-related injury that occurred on or about January 7, 2013, was a major contributing cause of her need for two lower back surgeries. Therefore she is entitled to all medical expenses related to those surgeries and related temporary total disability benefits.

Douglas shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Douglas' Findings of Fact and Conclusions of Law to submit Objections and/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, Douglas shall submit such stipulation together with an Order consistent with this Decision.

Dated this 6th day of February, 2015.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge