

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

KELLY J. BAIER,

HF No. 64, 2004/05

Claimant,

DECISION

vs.

DEAN KURTZ CONSTRUCTION, INC.,

Employer,

and

BITUMINOUS INSURANCE COMPANIES,

Insurer,

and

MID-CENTURY 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. Jon J. LaFleur represented Kelly J. Baier (Claimant). Patricia A. Meyers represented Employer and Insurer Bituminous Insurance Companies (Bituminous). Eric C. Blomfelt represented Employer and Insurer Mid-Century Insurance Company (Mid-Century).

During a telephonic conference held on January 9, 2006, the parties agreed to submit the outstanding issues on the record. The parties identified two issues to be decided, including the application of the last injurious exposure rule and apportionment. The parties also agreed the record consisted of the following:

- 1) Deposition of Claimant;
- 2) Deposition of Stacie Baier;
- 3) Affidavit of Mike McGrath;
- 4) Deposition of Dr. Greg Reichhardt;
- 5) Affidavit of Dr. Greg Reichhardt;
- 6) Deposition of Dr. Mark Harlow;
- 7) Deposition of Dr. Jeff Luther;
- 8) Claimant's Medical Records/Billings;
- 9) The Department's hearing file; and
- 10) The briefs submitted by the parties.

After reviewing the evidence presented, it was unnecessary to hear oral arguments from the parties. Based upon a thorough review of the medical evidence presented, Claimant sustained two separate and distinct injuries, one to his low back in

1999 and a cumulative trauma injury to both hips in 2004. The credible medical evidence demonstrated that Claimant's work for Employer was a major contributing cause of his cumulative bilateral hip injury. Therefore, Bituminous is responsible for Claimant's current workers' compensation benefits.

FACTS

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

1. Employer was insured for workers' compensation insurance with Mid-Century from October 1, 1998, until October 1, 1999.
2. Employer was insured for workers' compensation insurance with Bituminous from February 1, 2003, to the present.
3. At the time the parties presented the issues to the Department, Claimant was forty-seven years old and had worked in the construction industry since 1976.
4. In 1987, Claimant started working for Employer as a carpenter's helper. Claimant initially performed carpentry work and later worked as a lead man and as a job foreman.
5. Claimant performed physically demanding labor throughout his employment with Employer.
6. Sometime around 1994, Claimant began to experience intermittent episodes of back discomfort and back spasms.
7. Claimant went to the emergency room on at least two occasions for treatment and pain medication due to his back pain.
8. Claimant did not miss any work for Employer due to these intermittent problems.
9. On September 24, 1999, Claimant suffered a work-related injury to his low back while dragging a heavy bollard. At the time of the incident, Claimant felt only a stabbing pain in his low back going down his right side.
10. Claimant's chief complaint was the pain in his low back. Claimant acknowledged he suffered from some discomfort in his right hip and right leg. Claimant stated, "I think, you know, more what - - you know, I did have pain in my right hip and I had stabbing pain down my back over my rear and down my hip, yes. I would say that would be - - you know, it's just hard to - - you know, I never ever thought that my hips were, you know, bad and I guess I never had any reason to."
11. Claimant's wife, Stacie Baier, confirmed that Claimant's pain complaints were related all to his lower back. She testified, "[h]e didn't complain about his hips to me. It was just all the lower back. He was - - when he walked, it just looked like he was in pain from his back." Stacie also stated that occasionally Claimant walked "just bent over a little bit because his back would hurt at certain times."
12. Dr. Allen Nord was Claimant's primary care physician, but Claimant chose to seek medical treatment from Dr. Larry Teuber, a neurologist in Rapid City.
13. Claimant saw Dr. Teuber on September 28, 1999. Claimant complained of "low back pain [and] right leg pain." Dr. Teuber noted, "[h]e describes a constant, aching low back discomfort, with intermittent shooting pain through the posterior aspect of his right thigh. Denies any significant left leg discomfort. Denies paresthesias, numbness, weakness or hyperesthesia."

14. Claimant's neurological exam was normal. Dr. Teuber stated, "[h]e has mechanical discomfort in the right hip and low back, however. I have reviewed his plain spinal x-rays, these are unremarkable. My impression is that Mr. Baier is suffering from mechanical low back discomfort."
15. Dr. Teuber ordered an MRI of the lumbar spine. The MRI, performed on September 29, 1999, showed "[m]ild facet arthritis at L4-5 [and] [s]mall left paramedian disc herniation of T10-11 that does not appear to be causing cord or focal nerve root compression."
16. On September 30, 1999, Dr. Teuber wrote to Dr. Nord and stated the MRI "demonstrates degenerative disc changes, but nothing severe in terms of nerve root compression."
17. Dr. Teuber concluded that Claimant was not a surgical candidate and referred Claimant to Dr. Brett Lawlor, a physiatrist in Rapid City, for further evaluation of Claimant's low back pain.
18. Claimant began treating with Dr. Lawlor on October 8, 1999. Dr. Lawlor diagnosed mechanical low back pain secondary to degenerative disc disease and degenerative joint disease of the lumbar spine.
19. Dr. Lawlor recommended a course of conservative treatment for Claimant, including ibuprofen, muscle relaxants and physical therapy specifically to address "the stiffness that he has in the spine."
20. Dr. Lawlor provided treatment only for Claimant's mechanical low back pain and did not provide any treatment for Claimant's right hip.
21. On October 14, 1999, Claimant saw Geoffrey Bonar, P.T., for a physical therapy evaluation and treatment. Bonar noted that Claimant's primary complaint was discogenic back pain, but that Claimant had "some intermittent right posterolateral hip pain described as an ache as well."
22. Bonar concluded that Claimant's primary problems included "discogenic back pain, significant loss of mobility through the lumbar spine particularly in extension and myofascial tightness through the hip flexors, rotators and hamstrings."
23. Bonar agreed that a course of physical therapy was appropriate for Claimant and Claimant participated in the recommended physical therapy sessions.
24. Despite the conservative treatment, on December 20, 1999, Dr. Lawlor noted that Claimant continued to have significant mechanical low back pain. Dr. Lawlor stated, "[w]e have tried extensive conservative treatment, including facet and epidural injections, physical therapy, relative rest and gradual progression in activity, but he continues to have back pain that radiates into the right buttock. I have reviewed his MRI, which reveals a degenerative disk at L4-5. I think this is likely the cause for his ongoing pain complaints."
25. Dr. Lawlor recommended that Claimant undergo IntraDiscal Electro Thermal (IDET) therapy in order to treat the symptomatic L4-5 disc.
26. Claimant underwent a provocative discography on January 4, 2000. The results showed a "[s]ymptomatic degenerative L4-5 disc that precisely reproduced the patient's usual discogenic low back pain."
27. Based upon the results of Claimant's discography, Dr. Lawlor performed the IDET procedure on January 27, 2000.
28. Claimant received excellent results after the IDET procedure. Claimant's low back pain and stiffness significantly decreased. Claimant stated, "I actually came

- out pretty good. I - - you know, since then until 2004, you know, I've experienced some spasms in my back, but overall I would say that, you know, the surgery worked pretty well for me."
29. On March 16, 2000, Bonar noted that Claimant had "some significant tightness in his hip rotators, his hamstring flexibility has significantly improved from his previous visits." Claimant was instructed to continue with home exercises.
 30. Claimant discontinued physical therapy sessions after April 28, 2000.
 31. Claimant underwent another MRI on May 11, 2000, which showed "[n]o change from 9-29-99. No evidence for any focal disc herniation or spinal stenosis. Some degenerative changes of L4-5 and L5-S1 as described."
 32. On May 24, 2000, Dr. Lawlor opined that Claimant was at maximum medical improvement and assigned a five percent whole person impairment. In addition, Dr. Lawlor provided Claimant with the following permanent restrictions: "20 pound lifting maximum. He needs to limit his bending and twisting at the waist and limit the amount of work he does squatting to an occasional basis. He needs to change positions from sitting, standing and walking every 45 minutes."
 33. Mid-Century paid Claimant all workers' compensation benefits owed as a result of the 1999 low back injury.
 34. In 2000, Employer promoted Claimant to project superintendent. Claimant engaged in physical labor while working as a project superintendent, but was able to work within his restrictions.
 35. From 2000 to 2004, Claimant's hips gradually started to bother him.
 36. Claimant did not suffer a specific injury to his hips. Rather, the discomfort in both of Claimant's hips gradually increased to the point where in 2002, Claimant specifically began to notice that he was losing motion and flexibility from his hips down into his legs. Claimant testified, "[i]t seems like it was gradual and, you know, from 2002 to 2004 is when I really felt like I was becoming disabled."
 37. Stacie also noticed considerable changes in Claimant's posture beginning in approximately 2002. Stacie testified between 2002 and 2004 is when Claimant started to look "disabled" to her.
 38. On May 12, 2004, Claimant saw Dr. Nord for a routine physical examination. Claimant complained of "chronic bilateral hip pain, right worse than left." Claimant informed Dr. Nord that "[t]his has been slowly but steadily getting worse and causes him discomfort in his active job."
 39. Dr. Nord ordered x-rays, which showed "[a]dvanced changes of degenerative joint disease affecting both hips."
 40. On May 25, 2004, Dr. Nord referred Claimant to an orthopedic surgeon due to his significantly advanced degenerative joint disease of both hips.
 41. Claimant filed a First Report of Injury with Employer on May 26, 2004.
 42. On July 19, 2004, Claimant saw Dr. Mark Harlow, an orthopedic surgeon who specializes in hip and knee replacement surgery.
 43. Dr. Harlow obtained x-rays of Claimant's hips, which showed "end stage degenerative arthritis, which shows bone-on-bone contact and osteophyte formation involving both hips."
 44. Dr. Harlow recommended that Claimant undergo bilateral hip replacement surgery.

45. Dr. Harlow opined that Claimant's low back injury in 1999 was not related to his bilateral hip arthritis. Dr. Harlow opined that Claimant's strenuous work activities were a major contributing cause of his need for bilateral hip replacement surgeries.
46. Dr. Jeff Luther, who specializes in internal medicine and emergency medicine, performed an independent medical examination (IME) of Claimant on August 6, 2004. Dr. Luther reviewed Claimant's medical records and examined Claimant.
47. Dr. Luther concluded "more than likely he had a component of the hip problems with his back pain that was concomitant. Therefore, it is my opinion that apportionment of responsibility is appropriate in this case."
48. Dr. Luther opined, "[t]here is a significant relationship to the back injury in 1999, (50%) which required him to maintain lordosis in a forward flexed position; this would alter his station and gait, and compounded with his occupation, (25%), that required him to wear a tool belt throughout the years, and a idiopathic degenerative process, (25%), that has contributed to the development of this advanced degenerative arthritis that is seen in both hips in this 46-year-old otherwise healthy male."
49. Dr. Luther agreed that Claimant's "best course of treatment would be to proceed with bilateral hip arthroplasties."
50. Dr. Harlow performed a right total hip arthroplasty on August 31, 2004, and a left total hip arthroplasty on October 12, 2004.
51. Claimant remained off work from the end of August through January 2005.
52. Dr. Greg Reichhardt, who is board certified in physical medicine and rehabilitation and in electrodiagnostic medicine, reviewed Claimant's medical records and issued a report dated October 4, 2005.
53. Dr. Reichhardt noted that Claimant had low back pain and discogenic pain that improved after the IDET procedure. Dr. Reichhardt concluded that Claimant did not suffer from an injury to his hips in 1999.
54. Dr. Reichhardt opined that Claimant's "hip problems represent a separate and distinct problem which was likely caused by a combination of his individual susceptibility/genetic and his ongoing work activity in the construction trades. His work in the construction trades would have represented a cumulative trauma disorder rather than a specific injury."
55. Other facts will be developed as necessary.

ISSUE

WHICH INSURER IS RESPONSIBLE FOR CLAIMANT'S WORKERS' COMPENSATION BENEFITS?

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 183, 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).

Claimant suffered a separate and distinct injury to his low back in 1999. Even though Claimant experienced some hip symptoms, Dr. Lawlor focused solely on Claimant's discogenic low back pain and did not provide any treatment to Claimant's

hips. Ultimately, Dr. Lawlor performed the IDET procedure to relieve Claimant's discogenic low back pain. After the surgery, Claimant had excellent results and his low back pain and stiffness significantly diminished.

From 2000 through 2004, Claimant experienced problems with his hips culminating with bilateral hip replacement surgeries in 2004. Claimant did not suffer a specific injury to his hips, but his pain and symptoms increased over time, especially from 2002 through 2004 when both Claimant and his wife noticed he looked and felt "disabled."

The South Dakota Supreme Court "has approved an award of 'compensation to claimants, even though they cannot prove any specific trauma, if they prove a history of injury to the body that occurs in the normal course of employment.'" Horn v. Dakota Pork, 2006 SD 5, ¶ 16 (citation omitted). Therefore, Claimant must prove by a preponderance of medical evidence that his employment related activities were a major contributing cause of his bilateral hip condition. SDCL 62-1-1(7)(a). "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 evidence necessary to support an award must not be speculative, but rather must 'be precise and well supported.'" Horn, 2006 SD 5 at ¶ 14 (citation omitted). 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).

Dr. Harlow's testimony was offered through his deposition taken on March 18, 2005. During his nineteen years of practice, Dr. Harlow has performed thousands of hip replacement surgeries. Dr. Harlow possessed specialized training and superior experience as an orthopedic surgeon. Dr. Harlow confirmed that Claimant had end stage degenerative arthritis in both hips. Dr. Harlow recommended bilateral hip replacement surgeries due to "the amount of discomfort that he was having in conjunction with the appearance of his x-rays and given the fact that he had had a trial of conservative measures, including anti-inflammatory pills and activity modification, including a scaling back of his work responsibilities, we discussed the - - the option of proceeding with hip replacement surgery and that's what we ultimately agreed to do."

Dr. Harlow opined that Claimant's bilateral hip condition was a result of cumulative trauma to his hip joints. Dr. Harlow explained, "[m]y opinion is that for such a young man to have advanced degenerative arthritis of his hips, that there had to be some element of trauma to lead him to that problem for such a young age." Initially, Dr. Harlow testified that Claimant's work activities for Employer since 1987 were a contributing factor to Claimant's bilateral hip condition. Dr. Harlow explained:

I believe it's a contributing cause; that the level of one's activity definitely has an impact on the status of one's physical health and well-being. I am not able to say that it's a major or the principal contributing cause to the arthritic process, because I don't know if he was an avid hiker, biker, mountain biker, skydiver. I have no knowledge of his outside activities to say that this was a major or principal contributing factor. It was a contributing factor. Certainly if he had worked at a bank and sat at a desk all day, I don't think he would have had this extent of arthritis at age 46. But it's very difficult, if not impossible, for me to quantify the component of his work that led to his problem at age 46.

Dr. Harlow confirmed that “it is true that [Claimant’s] profession has led to the potentialization or the worsening of his arthritis and is a contributing factor to his present status. That’s what I just said. It definitely contributes but I don’t know if I can quantify the amount of his arthritis that is referable to his work.”

Later, Dr. Harlow clarified his opinion and testified:

Q: Well, are you saying that the work activities was [sic] not the sole cause but it was a major contributing cause?

A: I think it’s reasonable to say that the nature of his work, as physically demanding as it is, potentiated [sic] his present status, but again, quantifying, if you’re saying major, I presume you mean in the majority, and can I say that this is 51 percent the case. It’s impossible for me to say that. I cannot.

Q: Well, I don’t know that major means 51 percent or not, but what I want to know is whether, in your opinion, based upon a reasonable medical probability, that it was a major contributing cause to the hip condition that he suffered at age 46.

A: Yes, it is. There’s no question that the nature and the strenuous aspects of his work are going to take their toll on his body.

(emphasis added). Dr. Harlow concluded that Claimant’s work activities since 1987 would cause cumulative trauma to Claimant’s hip joints.

Dr. Harlow opined that Claimant’s low back injury in 1999 was not a factor that contributed to his hip deterioration. Dr. Harlow explained, “[Claimant] asked if there was a way to connect those two [the low back injury and cumulative bilateral hip injury] and I think that they’re separate and distinct problems, probably both related to the nature of his work. It’s very physically demanding type of work that he did, but the fact that his back was problematic would not necessarily lead to arthritic changes in his hips.” Dr. Harlow recognized that Dr. Luther opined Claimant’s hip problems were related to his low back injury in 1999. Dr. Harlow commented, “I can’t logically explain that. I don’t subscribe to that theory necessarily. I know plenty of people who have lower back problems and no hip problems and vice versa, there are plenty of people who have arthritic hip joints but no lumbar spine disease, so it’s difficult for me to connect the dots on that and draw a connection of causation.”

Dr. Harlow also opined that Claimant’s strenuous construction work activities were a major contributing cause of his need for bilateral hip replacement surgeries. Dr. Harlow testified:

Q: Do you have an opinion, based upon a reasonable medical probability, as to whether the work activity after October of 2000 was a major contributing cause to the deterioration of the hips and the need for hip surgery?

A: Yes. The nature of the work from the time he started until the time we did the surgery all contributed to the failure of his hip joints.

Dr. Harlow acknowledged Claimant made pain complaints about his right hip during his treatment for low back pain in 1999 and 2000. Dr. Harlow stated, “it is sometimes very

difficult to ascertain what is pain related to a bad hip and what is pain related to a bad back. They can often masquerade as one versus the other.” Despite these symptoms, Dr. Harlow maintained that Claimant’s bilateral hip condition was a separate problem from his low back injury in 1999 and that Claimant’s work activities were a major contributing cause of the bilateral hip condition.

Dr. Luther was deposed on September 29, 2005, to provide testimony and opinions concerning the IME and report he generated on August 6, 2004. Based upon his review of Claimant’s medical records and Claimant’s physical examination, Dr. Luther opined there was “a significant relationship” between Claimant’s back injury in 1999 and his degenerative hip disease. Dr. Luther stated, “25 percent of the responsibility is due to Kelly’s occupation. 50 percent was due to his prior back injury. And a best guess estimate of 25 percent due to a degenerative process that may - - which was idiopathic, may have occurred irrespective of those other histories.”

Essentially, Dr. Luther opined that fifty percent of Claimant’s problems were related to the forward flexed position caused by Claimant’s need to compensate for pain from the 1999 low back injury. Dr. Luther explained his opinions:

Q: Did Mr. Baier, walking in a tilted forward position, did that cause the problems with his hips?

A: I think it contributed to that. And again, I think that’s in a compensatory - - that compounded with the other histories, I think, contributed to his hips wearing out as early as they did at age 46.

Q: So is what you’re saying, then, if Mr. Baier had not walked tilting forward, he wouldn’t be having these problems?

A: I - - that is part of my supposition. I believe that if there were not the injury that he had sustained in 1999, that he wouldn’t have the degree of arthritis that we’re seeing in both of his hips. Again, that compounded by other variables as well, including, you know, he worked in the heavy construction trade carrying a tool belt around his waist. And we know that they’re up and down scaffoldings and uneven surfaces and probably injuries that are occult or ongoing that are not memorable events. But I think it’s a culmination of all of those things that resulted in that.

Q: But yet you were able to apportion 50 percent of the reason to him walking in a tilted forward - - or maintaining lordosis in a forward flexed position; is that right?

A: That’s correct.

Q: So you’re saying that him leaning forward was a greater cause of his need for hip surgery than degenerative arthritis and his work in the construction industry wearing a tool belt throughout the years?

A: Yes. And that was not an arbitrary designation. To me, that was a - - in my opinion, that was a significant event that occurred. The treatment that was required after that, including the IDET procedure and his visits from his providers, indicated to me that this was a significant process that was ongoing. The reason that he walked in that forward position, which contributed to the degeneration of the hips, was because of an injury [to his low back] that he had sustained.

Dr. Luther's opinions ignored the fact that Claimant received excellent results from the IDET procedure.

Dr. Luther could not opine on whether Claimant suffered a trauma to his hips when he injured his back in 1999. In addition, Dr. Luther assumed that Claimant's back pain or back problems started with the back injury in 1999. Dr. Luther did not take into consideration that Claimant experienced back problems prior to 1999. Finally, Dr. Luther agreed that Claimant's work activities were a major contributing cause to his need for hip surgery.

Dr. Reichhardt performed a review of Claimant's medical records and issued a report dated October 4, 2005. Dr. Reichhardt provided testimony through his deposition taken on October 27, 2005. Dr. Reichhardt's practice is focused on treatment of musculoskeletal injuries, but he does not perform surgeries. Dr. Reichhardt evaluates patients with muscle, bone and joint problems, including hip and back problems.

Dr. Reichhardt reviewed Claimant's medical records, Claimant's deposition, Dr. Luther's IME, Dr. Harlow's deposition and Dr. Luther's deposition. Prior to his deposition, Dr. Reichhardt had not reviewed Claimant's physical therapy records. Following the deposition, Dr. Reichhardt reviewed the physical therapy records and provided in an Affidavit that his "observations, conclusions and opinions set forth in [his] reports and deposition have not changed."

Dr. Reichhardt recognized that Claimant had low back pain and discogenic pain that improved after the IDET procedure. Dr. Reichhardt testified:

A: The issues that were salient to his diagnosis of discogenic pain include the fact that he had facet injections and did not have improvement with those injections which would exclude the facet joints as being likely pain generators in regards to his low back pain.

Now, also he had provocative discography which was positive for a symptomatic degenerative disk at the L4-5 level.

And the third issue that's of particular importance in regards to his diagnosis of discogenic pain is that he underwent the IDET procedure which only treats discogenic pain. And he had significant improvement of his symptoms with that.

And so it's very likely that his pain generator was discogenic pain given all three of those factors.

Q: Okay. When you say it's likely it was discogenic pain, by doing so are you ruling out any other causes?

A: That also rules out the hip as being the primary pain generator for his symptoms at that time. And it also excludes the sacroiliac joint, the muscles, [and] ligaments as being potential causes for pain.

Now the lumbar spine has a lot of different potential pain generators. And determining the specific pain generator in a lot of instances can be difficult. But I think in this case, given the testing that he had, given the response to treatment that he had, it's pretty clear that he had discogenic pain.

Based upon his medical records review, Dr. Reichhardt opined that Claimant's hip problems and his need for bilateral hip replacement surgeries were unrelated to his

low back injury in 1999. Dr. Reichhardt opined, Claimant's hip problems "represent a separate and distinct problem which was likely caused by a combination of his individual susceptibility/genetic and his ongoing work activity in the construction trades. His work in the construction trades would have represented a cumulative trauma disorder rather than a specific injury." Dr. Reichhardt further opined "[t]o a reasonable degree of medical probability, it's unlikely that his back injury in 1999 has been a major contributing factor, either directly or indirectly, to his hip arthritis."

Dr. Reichhardt could not opine as to when Claimant's hip arthritis began to develop, but indicated that it was a gradual process that progressed over time. Dr. Reichhardt concluded that Claimant's bilateral hip arthritis was caused, in part, by "[h]is ongoing work activities in the construction trades." Dr. Reichhardt testified:

Q: And is it your opinion that his work activity is not a major contributing factor to his hip arthritis?

A: I do feel that his work activities on an ongoing basis and a cumulative trauma basis are contributing factors to his hip arthritis.

Q: But not a major contributing factor?

A: It's my opinion that it is a major contributing factor and responsible for 50 percent of his condition - - or 50 - - excuse me - - 50 percent responsible for his condition.

Dr. Reichhardt explained that construction work is a recognized risk factor for developing hip arthritis. Dr. Reichhardt explained his opinions:

Q: Now, you've also stated in your report that the cause of his hip arthritis was 50 percent due to his work, the cumulative trauma that you mentioned, and 50 percent due to a predisposition to hip arthritis. Can you explain how you arrived at those conclusions?

A: It is known that hip arthritis relates to an individual's predisposition, an individual's genetics, something that somebody carries with them throughout their entire life. It's also known that challenging work activities, such as the construction-type work that he was doing, can contribute to hip arthritis.

Now, the - - now, work and physical loads and stress outside of specific traumatic events are, perhaps, somewhat less common contributing factors than they are in, say, knee arthritis, but they are known contributing factors to hip arthritis.

And in his case, it's likely that both contributed to his hip arthritis. It's unlikely that there are any other significant contributing factors. And in that case, I think that it's appropriate to consider them equal contributing factors.

Dr. Reichhardt agreed with Dr. Harlow that Claimant's work activities were a major contributing cause of his need for bilateral hip replacement surgeries.

Dr. Reichhardt was aware that Dr. Luther attributed fifty percent of Claimant's bilateral hip problems to his forward flexed posture. Dr. Reichhardt disagreed with Dr.

Luther's opinions. Dr. Reichhardt stated, "[i]t is unlikely that any postural abnormalities would have resulted in any significant change to his hip degeneration." Dr. Reichhardt explained:

It's clear from the medical notes that he did not have a forward flexed posture associated with his back pain. And he apparently developed that to a more significant degree or may have completely developed that after his back condition had substantially improved. So it's unlikely that his forward flexed posture was caused by his back pain. In addition, it's unlikely that his hip arthritis was caused by his forward flexed posture.

Dr. Reichhardt testified:

Q: Were you able to determine whether his discogenic pain that you diagnosed was a reason or a cause that he was in a forward flexed posture during the times you identified?

A: I was able to determine whether or not his back pain was a contributing factor to his forward flexed posture. And it's unlikely and medically probable - - or it's unlikely, to a reasonable degree of medical probability, that his back pain played any role in his forward flexed posture.

Dr. Reichhardt concluded, "[i]t's more likely that he was leaning forward in response to his hip arthritis than as a result of his back pain" as the forward flexed posture is more common with hip arthritis.

Dr. Luther, Dr. Harlow and Dr. Reichhardt were well aware of Claimant's condition and need for treatment. However, the opinions expressed by Dr. Harlow and Dr. Reichhardt are more persuasive and are entitled to more weight than those opinions expressed by Dr. Luther. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 N.W.2d 396, 398 (S.D. 1988). Dr. Harlow's opinions and Dr. Reichhardt's opinions are well thought out, well-founded, logical and are accepted.

Claimant established by a preponderance of the medical evidence that his low back injury in 1999 was not related to his bilateral hip condition. The medical evidence established that Claimant's bilateral hip condition was a cumulative trauma that resulted in the need for surgery in 2004. Claimant's condition is compensable because "[a]n employee does not have to have an accident or experience any trauma to his person before a medical condition will qualify as a compensable injury. It is sufficient that the disability was brought on by strain or overexertion incident to the employment, though the exertion or strain need not be unusual or other than that occurring in the normal course of employment." Schuck, 529 N.W.2d at 899. Even though Claimant did not suffer from an identifiable injury, the credible medical opinions showed that Claimant's work activities were a major contributing cause of his bilateral hip condition and need for surgery. Claimant established by a preponderance of the medical evidence that his work activities were a major contributing cause of his bilateral hip condition and need for surgery.

“When a disability develops gradually . . . 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.” *Id.* at 900. See *a/so* SDCL 62-1-18. Bituminous was Employer’s insurer at the time Claimant’s bilateral hip injury resulted in the need for treatment. The medical evidence demonstrated that Claimant’s low back injury in 1999 did not independently contribute to Claimant’s current disability. Therefore, Bituminous is responsible for Claimant’s workers’ compensation benefits related to Claimant’s bilateral hip condition and need for treatment. Apportionment is inapplicable to this case. Claimant’s request for attorney’s fees is premature and cannot be addressed at this time. The Department shall retain jurisdiction over the issue of extent and degree of Claimant’s disability, if any.

Claimant and Mid-Century shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Bituminous shall have ten days from the date of receipt of Claimant’s and Mid-Century’s proposed Findings and Conclusions to submit objections 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 and Mid-Century shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 7th day of June, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge