

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

MICHAEL MULDER,
Claimant,

HF No. 67, 2008/09

v.

DECISION

SMITH PLUMBING, INC.,
Employer,

And

**GENERAL CASUALTY INSURANCE
COMPANY,**
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation 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, in Pierre, South Dakota. Claimant, Michael Mulder appeared personally and through his attorney of record, James E. Carlon. Charles A. Larson represented Employer, Smith Plumbing, Inc. and Insurer, General Casualty Insurance Company.

Issues

1. Causation and Compensability
2. Nature and Extent of Disability, Retraining
3. Medical Expenses

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

At the time of the hearing, Michael Mulder (Mulder) was 40 years old. In 2006 he lived in Pierre, South Dakota and worked as a commercial plumber for Smith Plumbing.

On June 28, 2006, Mulder was working a job for Smith Plumbing in Ipswich, South Dakota at the high school. Mulder was attempting to loosen a pipe fitting overhead with a 24 inch pipe wrench. He used his body to gain additional leverage, and when the fitting broke loose, Mulder testified that he felt instant pain from his neck to his mid back.

He finished his work for the day and went home. The next day Mulder experienced pain, numbness and tingling in his arms, hands and fingers. Mulder saw Dr. Jeffrey Wolff, a chiropractor in Gettysburg, South Dakota. Dr. Wolff took him off work and prescribed treatment including alternating hot and cold as well as use of a TENS unit. Mulder continued to treat with Dr. Wolff for several months and was released to return to work with restrictions in August of 2006.

In August of 2006, Mulder was referred to Dr. Mitchell Johnson at the Orthopedic Institute in Sioux Falls, SD. Dr. Johnson diagnosed an acute cervical sprain and degenerative disc disease. Dr. Johnson recommended continued chiropractic care and a strengthening exercise routine.

Mulder returned to Dr. Johnson in September 2006. Dr. Johnson reviewed his MRI which revealed no signs of disc herniation, instability or fracture. Dr. Johnson also noted there was no nerve root impingement or spinal cord impingement. He concluded that Mulder was not a surgical candidate and referred him to a physiatrist. Dr. Johnson returned Mulder to work with restrictions as of September 25, 2006.

On October 18, 2006, Mulder saw Dr. Stuart Rice, a neurosurgeon at the Spine Center at Rapid City. Dr. Rice noted that Mulder had full strength in his upper extremities and had normal range of motion of the cervical spine. He also noted that a review of Mulder's MRI was normal. Dr. Rice diagnosed a cervical strain and recommended continued conservative treatment. Dr. Rice also concluded that Mulder was not a surgical candidate and would benefit from continued activity restriction that could be gradually lessened, as well as physical therapy and home exercise.

Mulder saw Dr. Jeff Luther on October 25, 2006, for an independent medical evaluation (IME) at the request of Employer/Insurer. Dr. Luther diagnosed myofascial pain syndrome of the cervical spinal muscles. He recommended aggressive physical therapy and believed that Mulder's prognosis would be excellent with such a course of treatment. Dr. Luther further concluded that Mulder could begin to lift his restrictions and increase his activities to full time and full duty over a period of weeks. Dr. Luther stated that a home cervical traction unit would be beneficial and should be used in conjunction with physical therapy.

Mulder returned to Dr. Luther for a follow up appointment on November 30, 2006. Dr. Luther noted significant improvement in Mulder's pain and headaches. Dr. Luther recommended continued physical therapy, pain medications, and that Mulder continue to increase work hours to 8 hour days with continued restrictions.

Mulder saw Dr. Luther for another follow up on December 29, 2006. At this appointment Dr. Luther released Mulder to full duty and placed him at maximum medical improvement (MMI). He noted that although Mulder still had some symptoms with neck extension, he didn't feel Mulder would benefit from further treatment and instructed him

to continue with a home exercise program. Dr. Luther assigned a 5% whole person impairment rating.

Mulder returned to Dr. Luther on February 15, 2007. Mulder had not been able to return to work since his last appointment due to a hernia surgery, which was unrelated to his work injury. Mulder was eventually laid off as Smith Plumbing no longer had any work available when he was released to work. Mulder presented with increased neck pain and headaches. Dr. Luther indicated that this was not a surgical issue, and recommended more physical therapy and prescribed a TENS unit. Dr. Luther noted that "his case was complicated by the fact that we were unable to get in a trial of work hardening with activity restrictions because he was convalescing from hernia surgery. This may have caused a set back through deconditioning." Dr. Luther indicated Mulder was capable of working, and restricted overhead lifting to 25 pounds.

Mulder completed a functional capacity evaluation (FCE) on August 7, 2007. Mulder was able to complete all the tasks and it was determined that he would work at a heavy work level. The occupational therapist who administered the FCE noted, "His perception of his ability to work is poor, especially in light of his activity level. His overall profile suggests he is able to work but is likely to complain while doing so. This does present some psychophysical limitations."

On September 18, 2007, Mulder saw Dr. Jerry Blow, a physiatrist with Sioux Falls Physical Medicine and Rehabilitation, at the request of Employer/ Insurer for an IME. Dr. Blow indicated that "it is clear to me that patient's work activity on 6/28/06 is a major contributing case for his current pain complaints and for his care from 6/28/06 to present including patients unfortunate persistent neck pain, headaches, and intermittent upper extremity numbness and tingling". Dr. Blow went on to state that the treatment Mulder had received including chiropractic care, cervical MRI, physical therapy, and treatment with Dr. Luther and Dr. Johnson were reasonable and necessary.

On December 11, 2007, Mulder was referred to Dr. Steven Akeson, a psychologist for an evaluation due to his chronic pain resulting from his 6/28/06 injury. Dr. Akeson noted that Mulder exhibited some signs of converting emotional issues into physical symptoms, which was an unconscious process and that there was no indication that Mulder was a malingerer. Dr. Akeson's notes state that Mulder would benefit from therapy which focuses on pain management strategies.

Mulder completed a second FCE on March 26, 2008. Mulder was again able to complete a majority of the tasks and it was determined that he would work at a heavy work level. The occupational therapist who administered the FCE again noted, "His perception of his ability to work is poor, especially in light of his activity level. His overall profile suggests he is able to work but is likely to complain while doing so. This does present some psychophysical limitations."

On December 7, 2009, Mulder saw Dr. James L. Benoist at Denver Pain Management. Dr. Benoist prescribed pain medication and scheduled a follow up visit so that Dr. Benoist could review Mulder's prior medical records. Mulder's treatment with Dr. Benoist included facet injections and pain medications.

Mulder was scheduled for an IME with Dr. Henry J. Roth on February 10, 2010. Upon the advice of his attorney, Mulder did not attend this appointment. Although he was unable to examine Mulder, Dr. Roth conducted a complete medical record review and assessment and provided a report dated May 17, 2010. Dr. Roth opined that the June 28, 2006, work incident was not a major contributing cause of Mulder's current condition and that he had no work restrictions or permanent impairment. Dr. Roth also testified by deposition in this matter.

Analysis

Causation and Compensability

The first question briefed by the parties is whether Claimant sustained a compensable injury arising out and in the course of his employment that remains a major contributing cause of his current condition and need for treatment pursuant to 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. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that he sustained an injury "arising out of and in the course of the employment." SDCL §62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520. The claimant must prove that "the employment or employment-related activities are a major contributing cause of the condition complained of." SDCL§ 62-1-1(7).

It is not disputed that on June 28, 2006, Mulder sustained a work related injury. Employer/Insurer initially accepted the injury as compensable and paid benefits and medical bills related to Mulder's treatment. The issue remains whether the work related injury remains a major contributing cause of Mulder's current condition and need for treatment.

South Dakota law requires [claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted). With respect to proving causation of a disability, the South Dakota Supreme Court has stated,

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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, 724 NW2d 586 (citations omitted).

The medical evidence supports that Claimant sustained a work related injury on June 28, 2006, and that for a period of time after he required treatment. The MRI shows that there was objective evidence of injury. Claimant argues that Dr. Blow's opinion from September 2007 shows that his work injury is a major contributing cause of his condition. While that may have been the case in 2007, Dr. Blow has not examined Mulder in over 3 years and offered no opinion as to his current condition and need for treatment.

Under South Dakota workers compensation laws a Claimant must show that the injury continues to be a major contributing cause of his current condition and need for treatment. Since Employer/Insurer denied Claimant's treatment, there has been no medical expert that has offered an opinion that Claimant's current condition and needed treatment is due to the 2006 work injury. Claimant was released to full duty with no restrictions in December of 2006. Dr. Benoist, the most recent treating physician did not offer an opinion as to the causation of Mulder's current condition in his records.

Most recently, Dr. Henry J. Roth conducted a records review at the request of the Employer/ Insurer upon which Employer/Insurer relies. Dr. Roth was unable to conduct an examination of Mulder because Mulder didn't attend the scheduled IME, therefore he conducted a thorough review of all Claimant's medical records and previous IME and FCE results.

Dr. Roth testified that Mulder's June 28, 2006, work event was not a major contributing cause of his current need for treatment, he went on to say,

He is no longer experiencing any symptoms or difficulties as a result of a strain or a sprain that may have occurred on the date in question. I'm not able to ascertain that even the symptoms then are a reflection of the activities performed at the time. But assuming they are, reasonable medical expectation is for these symptoms to resolve in a short period of time without attention.

Based upon the evidence presented, Claimant failed to meet his burden to show that the 2006 work related injury remains a major contributing cause of his current condition and need for treatment. Causation and Compensability is a threshold issue that must be

met for Claimant to be entitled to worker's compensation benefits. Although Causation is a threshold issue, the Department will address the remaining issues.

Nature & Extent of Claimant's Disability

Claimant alleged in the pleadings and throughout the litigation that he is permanently and totally disabled. The standard for determining whether a claimant qualifies for odd-lot benefits is set forth in SDCL §62-4-53, which provides in part:

An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

There are two recognized ways that Claimant can make a prima facie showing that he is entitled to benefits under the odd lot doctrine. *Eite v. Rapid City Area Sch. Dist.*, 2007 SD 95, ¶21, 739 NW2d 264, 270.

First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment within claimant's limitations is actually available in the community. A claimant may show obvious unemployability by: 1) showing that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category, or 2) persuading the trier of fact that he is in the kind of continuous severe and debilitating pain which he claims.

Second, if the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or regulated to the odd-lot category, then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has made reasonable efforts to find work and was unsuccessful. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant. Even

though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

Id. (quoting *Wise*, 2006 SD 80, ¶28, 721 NW2d at 471 (citations omitted)).

Claimant failed to address this issue in his brief. At the hearing, he did not present any evidence that he was in continuous, severe and debilitating pain. Claimant has no restrictions that prohibit him from working and two FCE have shown he is capable of heavy duty work. Claimant failed to show that he was obviously unemployable.

Claimant did not present any evidence of a good faith work search or any vocational testimony that work was unavailable or that a search would be futile. At the hearing, Claimant admitted that he had not looked for work in any way since October of 2007. Claimant has failed to show that he has made reasonable efforts to find work and was unsuccessful. Based on the evidence presented, Claimant did not establish a prima facie case that he is permanently disabled.

Claimant further argued that he is entitled to retraining. Claimant failed to address this issue in his brief. Furthermore, Claimant failed to submit any evidence or expert vocational testimony that retraining would be feasible or beneficial. Claimant failed to show that he is entitled to any retraining program.

Conclusion

The evidence presented fails to meet the burden of proof necessary to sustain a claim for workers' compensation benefits. Claimant's petition for hearing is hereby denied.

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Claimant shall have fifteen (15) days from the date of receipt of Employer/Insurer'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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 9th day of June 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ Taya Runyan

Taya M. Runyan
Administrative Law Judge

