

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

BRAD GIBSON,

HF No. 76, 2010/11

Claimant,

DECISION

v.

**HUMAN SERVICES CENTER, STATE OF
SOUTH DAKOTA,**

Employer and Self-Insurer.

The above-entitled matter came on for hearing before Catherine Duenwald, Administrative Law Judge, Division of Labor and Management on April 2, 2013. Attorney Michael D. Bornitz represented Claimant, Brad Gibson (Claimant). Attorney Robert B. Anderson represented Employer and Insurer, Human Services Center, State of South Dakota (Employer). The parties have agreed to a bifurcated hearing and the issue presented related only to "causation." The Department, having taken into consideration all pleadings, exhibits, depositions, and post-hearing arguments, does hereby make this Decision.

ISSUE: Was the April 24, 2010 work-related injury a major contributing cause of Claimant's need for surgery and current condition?

FACTS:

Claimant is employed as a counselor at the Human Services Center in Yankton, South Dakota. On April, 24, 2010, while assisting another counselor to physically restrain a patient, Claimant injured his back. Claimant felt immediate back pain.

Claimant initially sought treatment with Dr. Marlin Braun, D.C. at the Back and Nerve Center in Yankton. The initial report is that Claimant suffered left low back pain that radiated into his lower left side. Dr. Braun took Claimant off work for two days. Dr. Braun continued with conservative treatments until Claimant felt normal. On May 18, 2010, Claimant reported that he no longer felt symptoms of the incident. He was released by Dr. Braun at that time as he had reached MMI or maximum medical improvement.

In July 2010, Claimant went to the Yankton Medical Clinic and saw Dr. David Barnes, M.D. He reported pain in his left lower back and hip that ran down the back of his leg and radiated into his groin. Claimant told the Clinic that this was the same pain that he experienced in April. Claimant did not report any intervening accidents or injuries that could explain the pain from occurring except the April injury.

Claimant initially treated conservatively with pain medication. An MRI was performed on Claimant in early August 2010. The MRI showed Claimant suffering from disc herniations at L4-5 and L5-S1. Claimant was given an epidural injection, which only helped for a few

days. He requested a referral to CNOS in Dakota Dunes, South Dakota. Claimant saw Dr. Grant Shumaker and Sandra Shumaker, ARNP. Dr. Shumaker recommended a discectomy surgery, but would not perform the surgery without preauthorization from Employer. Dr. Shumaker referred Claimant back to the Siouxland Surgery Center Pain Clinic in Dakota Dunes, SD.

Dr. Jeremy Poulson, saw Claimant at the Siouxland Surgery Center, Pain Clinic. He treated Claimant's pain conservatively for a few weeks. Claimant was prescribed a TENS unit and administered four steroid epidural injections and a pain block. These treatments did not take away Claimant's pain. Dr. Poulson noted that further injections were not approved. He wrote, "[Claimant] has received four steroid injections over the past month and a half for which he was received minimal to no relief. I certainly believe that he is a surgical candidate..." Claimant was eventually referred to Dr. Mitchell Johnson at the Orthopedic Institute in Sioux Falls. Dr. Johnson performed a discectomy on Claimant on October 19, 2010. The surgery was successful. After undergoing physical therapy, Claimant returned to work on December 7, 2010. Claimant no longer is working with his temporary restrictions.

Claimant had a prior reported back injury that was not work-related. Claimant treated in January 2010 at the Yankton Medical Clinic. On January 1, 2010, Claimant reported to Dr. David Barnes that he had fallen down several stairs in his home and landed on his backside. An x-ray taken of Claimant's back at that time did not reveal any issues with the bony structures of Claimant's spine; Dr. Barnes said the x-ray was "unremarkable." Claimant did not miss any work from that incident and the condition resolved.

ANALYSIS:

Whether Claimant's work-related injury is a major contributing cause of Claimant's back condition and subsequent need for surgery?

The Supreme Court is clear on who has the burden of proof for causation cases. They have stated, "The claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability." *Wise v. Brooks Const. Ser.*, 2006 SD 80, ¶17, 721 NW2d 461, 466 (internal citations omitted). They have written:

In a workers' compensation dispute, a claimant must prove all elements necessary to qualify for compensation by a preponderance of the evidence. ... A claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty. Causation must be established to a reasonable degree of medical probability, not just possibility. The evidence must not be speculative, but must be precise and well supported.

The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed

condition because the field is one in which laypersons ordinarily are unqualified to express an opinion. No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition. SDCL 62-1-1(7). Expert testimony is entitled to no more weight than the facts upon which it is predicated.

Darling v. West River Masonry, Inc., 2010 SD 4, ¶11-13, 777 NW2d 363,367 (citations and quotes omitted). Furthermore, the Court has opined on the “level of proof” that must be shown by a claimant.

“The burden of proof is on [Claimant] to show by a preponderance of the evidence that some incident or activity arising out of [his] employment caused the disability on which the worker’s compensation claim is based.” *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. This level of proof “need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence.” *Id.* To meet his degree of proof “a possibility is insufficient and a probability is necessary.” *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

On September 7, 2010, Dr. David Barnes gave the medical opinion that the back injury, for which he treated Claimant in January 2010, was not likely a major contributing cause of Claimant’s need for surgery. He wrote, “[w]hile [the December 2009 incident] may have predisposed him to his injury at work three months later, it would appear to me at least in reviewing the notes that his injury then would be a major contributing portion that ultimately lead to his need for surgery and what all that entailed.”

Likewise, Claimant’s doctor at the Pain Clinic, Dr. Jeremy Poulson, MD, gave the opinion that the April 2010 injury was a major contributing cause of Claimant’s need for surgery.

On May 11, 2011, Dr. Marlin Braun, D.C., the chiropractor Claimant initially saw in April 2010 explained how Claimant’s eventual surgery for a herniated disc is related to the April 24, 2010 work in injury. He wrote:

It is my opinion that the injury of April 24, 2010 caused a subluxation (misalignment) and apparently a small tear to the outside (canvas-like) portion of the involved disc(s). The chiropractic care that Brad received corrected the subluxation and related postural abnormalities. This gave Brad very dramatic, albeit temporary, relief of symptoms as evidenced by his 5/18/2010 re-exam. However, as time passed, the small disc tear worsened and the inner disc material began to bulge outward (herniate) and create nerve impingement. The end result being the resulting enlarging disc bulges and the need for surgical intervention.”

At the time Claimant initially saw Dr. Braun, Claimant was experiencing radiating symptoms from his back into his leg and groin area. These were the same symptoms that Claimant experienced in July 2010, when he returned to the Yankton Medical Clinic for treatment of symptoms.

On June 28, 2011, Claimant's surgeon, Dr. Mitchell Johnson, D.O., gave a similar opinion as his other doctors. He wrote that Claimant's symptom pattern including both back and leg pain was "consistent with a radiculopathy or pinched nerve from a disc herniation, which an MRI did ultimately corroborate." He stated that it was his opinion that Claimant's "injuries and his need for treatment are the direct result of his work injury on 4/24/10." Dr. Johnson, in a trial deposition taken on March 14, 2012, corroborated Dr. Braun's opinion as to how Claimant seemingly was at MMI within a few weeks and then increasingly worsened over time, with the same injury. Dr. Johnson testified and explained that a large part of Claimant's initial pain was due to inflammation. The other part of the pain is the herniation itself, as there is increased pressure on the particular nerve. The treatment modalities given to Claimant by Dr. Braun alleviated the inflammation and the pain. But because the herniation or disc bulge still existed, the pressure of the nerve was not relieved and the inflammation and pain symptoms recurred. Dr. Johnson's explanation is persuasive as it is in agreement with Dr. Braun's explanation, as well as the opinions of Dr. Poulson and Dr. Barnes.

On October 15, 2010, Dr. John Dowdle, M.D., a board certified physician with EvaluMed, examined Claimant in an Independent Medical Exam ordered by Employer. He gave the opinion that Claimant's condition and need for surgery was caused by the non-work related injury from December 2009. Dr. Dowdle is of the opinion that the injury at work was not a major contributing cause of Claimant's condition and need for treatment. Dr. Dowdle's opinion is based partially on the fact that Claimant did not mention radiating pain on his initial visit to Dr. Braun. On the intake form for Dr. Braun's office, Claimant clearly stated that his pain was radiating from his back into his left scrotal area. Dr. Dowdle did not ask Claimant about the fall at home and Claimant did not volunteer any information to Dr. Dowdle in regards to the previous injury. No history was taken by Dr. Dowdle in regards to the incident in which he later gave opinions.

Dr. Dowdle, was not familiar with Claimant's case and had not been privy to Claimant's full medical record prior to his deposition. During his deposition on May 16, 2011, Dr. Dowdle testified that he had not seen Claimant's medical records from the Orthopedic Institute, or the Siouxland Surgery Center, Pain Clinic, along with the accompanying MRI film and reports. Furthermore, Dr. Dowdle did not receive a copy of the x-rays Claimant's doctor relied upon in January 2010, after the accident in his home. Dr. Dowdle had seen the x-ray report. Dr. Dowdle's exam and report were completed prior to Claimant's surgery but after Claimant was seen at the Siouxland Pain Clinic. Employer/Self-Insurer did not request an updated IME report prior to the deposition, taking into account the surgeon's records. Dr. Dowdle did say that he disagreed with the doctors who put the April incident as a major contributing cause of the July pain and the herniation. Dr. Dowdle testified that the x-ray in January did not reveal a herniation, but that the MRI in July did have a herniation. His explanation is that Claimant sustained a disc herniation sometime before July, but that his disc was not herniated at the time of the work-related injury in April.

