

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

MICHEAL SPECHT,

HF No. 91, 2019/20

Claimant,

v.

DECISION

CITY OF SIOUX FALLS,

Employer and Self,

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 Michelle Faw, Administrative Law Judge, on February 12, 2025. Claimant, Micheal Specht, was present and represented by Tom Wilka of Hagen, Wilka & Archer. Employer and Self-Insurer, City of Sioux Falls, was represented by Shane E. Eden of Davenport, Evans, Hurwitz & Smith.

Facts:

1. On July 20, 1981, Micheal W. Specht (Specht) was hired by the City of Sioux Falls (City) as a firefighter for the Sioux Falls Fire Department (SFFD¹). Specht passed pre-employment physical examination by the SFFD's designated physician and also passed all pre-hire physical agility tests.
2. From 1982 to 2007, Specht was examined and passed annual fitness for duty examinations conducted by the SFFD's designated physicians.

¹ Sioux Falls Fire Department later became Sioux Falls Fire Rescue. The Department will use SFFD for both for clarity purposes.

3. On October 16, 1989, Specht injured his back while on duty with SFFD. Specht was seen by SFFD's designated physician, Dr. Oakland, who referred him to Dr. Hoversten, an orthopedic surgeon.
4. On January 9, 1990, as a result of the work injury and resulting damage to his L5-S1 disks, Specht underwent a laminectomy with diskectomy. Specht returned to full duty work.
5. On November 23, 1994, Specht injured his back while on duty with SFFD. Dr. Hoversten performed a revisional surgery on his L5-S1. Specht returned to full duty work.
6. On December 4, 2006, Specht incorporated his wild land firefighting company, Dragon Fighters, Inc., an independent firefighting unit that serves to supplement federal, state, or local governmental agencies. Dragon Fighters has been in active operation since that time.
7. On October 28, 2007, Specht injured his back, left upper leg, left knee, and left lower leg while on duty for SFFD. Dr. Hoversten notes summarized the incident:

[Specht] was on call to the Thirsty Duck bar. A gentleman in a motorized wheelchair had the wheelchair run over [Specht's] left foot, pinning his thigh and knee in a hyperextended position and pushing him backward rather violently. He developed pain in the leg and hip within the next day or so. Unfortunately, it has persisted and has not gone away. It is bothering him a fair amount at work, although he continues to work and do his regular job.

Dr. Hoversten concluded that Specht's leg pain was referred pain from his lumbar spine and that Specht was suffering from spinal stenosis at L4-5 from degenerative disk disease and a bruise of the nerve to the right leg. An MRI revealed severe central and left foraminal stenosis at the L4-5 level.

8. On November 15, 2007, Dr. Hoversten recommended a decompressive laminectomy and spinal fusion at L4-5. Specht was directed to have an Independent Medical Examination (IME).
9. On December 17, 2007, the City's claims management company, RAS, required Specht to be examined by Dr. Dowdle, for an IME. Dr. Dowdle concluded that the October 28, 2007, work-related injury was a major contributing cause to Specht's current symptoms and his need for care and treatment. Dr. Dowdle further concluded that he found no evidence of any contributing or intervening causal factors in Specht's case. He concurred with Dr. Hoversten's conclusions about the need for treatment and surgery as reasonable and necessary.
10. On January 10, 2008, Dr. Hoversten performed a decompression laminectomy for spinal stenosis at L4-5, both left and right, and left-sided discectomy with fusion at L5 and L4.
11. On January 23, 2008, Dr. Hoversten saw Specht for a post-surgical evaluation. Specht reported that his leg pain was considerably better.
12. On February 11, 2008, Specht saw Dr. Hoversten and reported the pain in his leg was gone.
13. On May 1, 2008, after reviewing the job description, Dr. Hoversten determined that Specht was unable to perform the duties as a fire captain for the City and that his incapacity is permanent in nature.
14. On May 27, 2008, SFFD Medical Director, Dr. Van Balen, at the request of the City, performed a disability examination on Specht. He concluded that Specht is considered permanently and totally disabled and unable to perform the duties of a firefighter for the City.

15. On June 16, 2008, Specht was placed on permanent total disability retirement by SFFD.
16. In 2009, Specht moved to Wyoming. Specht was not receiving his annual physical examination as required by City ordinance to determine if he was still disabled because the City's human resources director had told him not to do so, as it was an unnecessary expense for the City.
17. On July 26, 2011, RAS authorized Dr. Roccisano to take over care from Dr. Hoversten. Specht had started feeling stiffness in his back and had requested RAS to find a doctor closer to where he was living. He was first referred to Dr. Goodman in Billings, Montana, but when Dr. Goodman did not want to take a new patient, he was sent to Dr. Roccisano.
18. Between October 2011 and December 2013, Specht received multiple L3-4 epidural spine injections.
19. On October 7, 2012, Dr. Roccisano wrote to RAS that he thought Specht's current need for treatment was related to the 2007 back injury.
20. On March 20, 2013, Dr. Nickels at Ortho Montana noted that Specht stated he was interested in surgery but wanted to wait until winter when things would slow down for him. Specht's pain at that time was noted as 0 out of ten.
21. On October 15, 2013, Dr. Roccisano recommended surgery at the L3-4 and L5-S1 levels.
22. On November 20, 2013, Dr. Peterson performed an IME of Specht at the request of RAS.

23. On February 6, 2014, Specht was seen by Dr. Roccisano who noted that he was not receiving lasting relief from the injections. Dr. Roccisano recommended L3-4 and right L5-S1 decompression.

24. On February 10, 2014, Dr. Roccisano performed a decompression laminectomy L3-4 with a right sided foraminotomy L5-S1. The City approved and paid for the surgery as a result of the October 28, 2007, injury.

25. On May 13, 2014, Dr. Roccisano determined Specht had reached maximum medical improvement (MMI), and he was released back to work without restrictions. Specht returned to work with Dragon Fighters.

26. Between May 2015 and October 2019, Specht was seen by Dr. Roccisano for multiple continuing care appointments that were paid for by the City as a result of the work injury.

27. On November 13, 2018, Specht told Dr. Roccisano that he does not have any pain in his back and that he had been working without any issue.

28. In July 2019, Specht experienced an acute pain event while at home.

29. On October 2, 2019, Specht was seen at Ortho Montana by Dr. Hollowell, Dr. Roccisano's PA-C. Specht reported a stabbing and aching pain in his left low back. She recommended an MRI.

30. On October 11, 2019, Specht was told by Sioux Falls Risk Management to use his own health insurance while RAS decided whether to pay for the MRI. However, that same day, RAS agreed to the MRI as a result of the October 28, 2007, work injury. RAS's representative asserted that Specht's back issue is related to his knee replacement that was caused by an injury while working for the school district. Specht has never been employed by a school district. At that

time, Specht's wife was employed by and insured through a Wyoming school district.

31. On October 14, 2019, Specht underwent an MRI which showed a left-sided disk herniation at L3-4 which correlates with his symptoms.

32. On October 22, 2019, Specht visited with Dr. Hollowell reporting leg pain that was limiting him and waking him up at night.

33. On November 25, 2019, Specht received a L3-4 epidural lumbar injection for treatment of his ongoing back issues. RAS approved payment for his injection as being related to the work injury. The injection only offered relief for one week. Specht returned to Ortho Montana reporting leg numbness and tingling and increased back clicking.

34. On December 20, 2019, Dr. Roccisano recommended a revisional surgery. The appointment with Dr. Roccisano was paid for by the City.

35. Between January 10, 2020, and March 25, 2020, the city paid for narcotic pain pill as continuing care for the work injury.

36. On January 17, 2020, Specht received an email from Sioux Falls Risk Management suggesting he use his own health insurance while RAS decided whether to pay for surgery.

37. On February 7, 2020, Specht received an email from RAS stating that the request for surgery was being reviewed, and he was welcome to use his own insurance at that time. Ortho Montana called RAS about how they need a denial to move forward with Tricare.

38. On February 27, 2020, Specht filed his Petition for Hearing with the Department of Labor & Regulation (Department).

39. On March 26, 2020, Dr. Roccisano performed revisional surgery on Specht's spine at L3-4 and L5-S1. Specht and his Tricare health insurance paid for the surgery, follow-up appointments and rehabilitation.

40. The City continues to pay Specht Permanent Total Disability payments every 2 weeks because of the October 28, 2007, injury.

Other facts will be determined as necessary.

Issues:

The issues presented at hearing were:

- a. Whether the October 28, 2007, work-related injury was a major contributing cause to the back surgery required in 2019; and
- b. Whether his work activities with Dragon Fighters contributed to the need for surgery.

Analysis:

Major Contributing Cause:

The Department will begin its analysis by considering whether the October 28, 2007, work-related injury was a major contributing cause to the back surgery required in 2019. The standard of proof for causation in a worker's compensation claim is a preponderance of the evidence. *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, ¶ 21, 938 N.W.2d 425, 430. Both parties have offered medical expert testimony. "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 value of the opinion of an expert witness is no better than the facts upon which they are based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Schneider v. S.*

Dakota Dep't of Transp., 2001 S.D. 70, ¶ 16, 628 N.W.2d 725, 730 (citations omitted).

The South Dakota Supreme Court has held that causation must be proven to “a reasonable degree of medical probability, not just possibility.” *Jewett v. Real Tuff, Inc.*, 2011 S.D. 33, ¶ 23, 800 N.W. 2d 345, 350.

Specht has offered the expert medical opinion of orthopedic surgeon, Dr. Roccisano. At his deposition on June 8, 2023, Dr. Roccisano opined that to a reasonable degree of medical probability, Specht’s 2007 injury and 2008 fusion were a major contributing cause of Specht’s need for the March 26, 2020, surgery. He further opined that if Specht had not had the injury and the fusion at L4-5 he probably would not have needed continued surgeries. He also stated that when a level is fused in a spine, the level above commonly has to take more force and do more motion which causes it to break down more rapidly than it would normally. He considered the timing of the fusion to be significant as he would be less likely to consider a fusion from decades before to correlate to new issues than one that occurred only a few years before.

He was asked about Specht’s employment with Dragon Fighters, and he stated that he believed Specht was retired. Although, in his notes from a November 13, 2018, appointment with Specht, he noted that Specht had been “working without issue.” Thus, it appears he was aware at some point that Specht was working. He was not aware of the physical activities Specht performed as part of Dragon Fighters. When provided a list of physical demands associated with wildlife firefighting, he confirmed that that type of physical activity can cause stress on the structures of the lumbar spine. He opined that more vigorous activity, heavy lifting, and twisting performed after a fusion puts you at higher risk. The City argues that the value of Dr. Roccisano’s opinion is eliminated by his lack of knowledge regarding key facts, such as Specht’s employment and activities

with Dragon Fighters. From 2014 to 2019, Specht acted as engine boss for Dragon Fighters. Specht asserts he was acting as supervisor, and he testified at hearing his main jobs are to coordinate with the chain of command, ensure his crew gets to where they are supposed to be, and that the duties are accomplished as assigned.

The City's medical expert, Dr. Jensen, reviewed Specht's records and provided his report on June 18, 2022. He concluded that Specht had ongoing degenerative condition of his lumbar spine and had developed an L3-4 herniated disk. He opined that Specht's work activities as a wildland fire fighter independently contributed to his progressive degenerative condition, the development of the herniated disk, and his need for treatment including surgery. He noted that Specht had been released to full duty with no restrictions by May 2014, and had reported no issues during his annual visits between 2014 and 2019. Dr. Jensen reviewed videos of Specht at work with Dragon Fighters. At his October 19, 2022, deposition, he was asked whether he saw Specht do anything in the video that would cause back injury. While he did not identify a specific incident, he opined that firefighting is a difficult job involving activities that cause stress on a spinal disk and increased risk for degenerative spinal problems in someone who already has degenerative issues. He concluded that the 2007 injury is no longer a major contributing cause of Specht's symptoms or need for treatment. He explained that the fact that the disk herniation happened twelve years after the work injury led him not to correlate the injuries. Additionally, the previous symptoms had been on the right side and the 2019 symptoms were left sided. Specht refers to his 1990 surgical report notes work which show work was done on both the left and right sides of the L5-S1 joint.

Dr. Jensen believed the disk herniation happened due to bad luck and that medical professionals do not know what causes most of them to occur. They occur

more frequently in a spine with degeneration than a spine that is completely healthy. He opined at his deposition on July 27, 2022, any time you have had a disk surgery there is increased risk of disk herniation, and that risk does not go away. He also stated that disk herniation itself may cause issues with degeneration over time. Dr. Jensen spoke about the risk of adjacent level disease with fusions. He stated instrumented fusions tend to create more adjacent level disease than the uninstrumented fusions. Specht fusion was uninstrumented.

Dr. Jensen knew of the physical requirements to be a federal firefighter, and he opined that while an exact mechanism of disk herniation could not be identified, it could be concluded to a reasonable degree of medical probability that Specht's work as a wildland firefighter contributed independently to that injury. Dr. Jensen also opined that the 2019 surgery that was performed at the same level was not addressing the same problem. He stated that the 2014 surgery was addressing degenerative stenosis while the 2019 surgery addressed a disk herniation. Dr. Jensen further opined that surgery for stenosis typically would not put someone at risk for a disk herniation.

After reviewing the medical expert opinion, the Department concludes that the October 2007 injury was a major contributing cause of Specht's need for treatment including the 2020 surgery. Dr. Roccisano was not aware of Specht's activities with Dragon Fighters. However, the Court has held that in a workers' compensation claim, the work incident does not need to be "the" major contributing cause but need only be "a" major contributing cause. *Hughes v. Dakota Mill Grain, Inc. and Hartford Insurance*, 2021 S.D. 31, ¶ 21, 959 N.W.2d 903. Dr. Roccisano's analysis that had Specht not had the injury and fusion he probably would not have needed continued surgeries is persuasive. The opinion is also supported by Dr. Jensen's testimony concerning the

increased risk for spinal injury, including herniation, after fusions. For these reasons, the Department is persuaded that Specht has met his burden of proving that the injury and fusion are a major contributing cause to his condition and need for treatment.

Contribution of Dragon Fighters to Specht's Need for Surgery

The Department will next consider whether Specht's work activities with Dragon Fighters contributed to the need for surgery. The Last Injurious Exposure rule requires analysis of "whether the successive injury is a mere recurrence or an independent aggravation of the first injury." *Titus v. Sioux Valley Hosp.*, 2003 S.D. 22, ¶ 13, 658 N.W.2d 388, 390. If the 2019 injury is a recurrence of the 2007 injury, then the City is liable, but if it was an aggravation that independently contributed to the condition or need for treatment then the employer at the time, Dragon Fighters, is liable.

To find that the second injury was an aggravation of the first, the evidence must show:

1. A second injury; and
2. That this second injury contributed independently to the final disability.

Id. ¶ 14.

To find that the second injury was a recurrence of the first injury, the evidence must show:

1. There have been persistent symptoms of the injury; and
2. No specific incident that can independently explain the second onset of symptoms.

Id. ¶ 15.

There is disagreement between the parties about the nature of Specht's activities with Dragon Fighters. Specht testified that of his 104 post-retirement deployments with Dragon Fighters, half were in his home state and involved burning ditches or pile of brush. All sixteen of his 2019 deployments were in Wyoming and for them, he acted as supervisor. Most were after the morning in July when he got out of bed and felt a pain in

his back. Ten were training fires set by Specht. Only two were large fires and Specht was not deployed to either of them. Of the approximately 68 deployments between 2014 and 2020, sixteen were prescribed burning or training incidents. Specht testified when he was the only one employed, the activity was not strenuous and for certain fires he did not need to get out of the truck as the vehicle itself sprays the water while he drives. The Department found Specht's testimony at hearing regarding the nature of his work with Dragon Fighters credible.

The City has not shown evidence of a specific second injury that occurred while working for Dragon Fighters. Under the Last Injurious Exposure rule, "[w]hen a disability develops gradually, or when it comes as a result of a succession of accidents, 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.* ¶ 12. The City points to the July 2019 incident at home where Specht experienced acute pain when, while getting out of bed, he turned and felt a stabbing pain in his lower back. Following that incident, the pain gradually became more frequent and increased in severity. As a result, he went to see Dr. Roccisano earlier than the time for his usual annual exams. Dr. Jensen testified at deposition that 75 percent of herniations do not require a specific injury, and the fact that he cannot identify a specific acute injury does not change his opinion that Specht's work with Dragon Fighters independently contributed to 2019 herniation. Dr. Jensen's assessment of the required duties of a wildland firefighter is based on the general list of requirements, but not on the specific nature of the work Specht actually performed. The City argues that the herniation was the culmination of Specht's five years of physical exertion working for Dragon Fighters.

Dr. Roccisano was unable to assess and provide an opinion of Specht's work activities. As stated above, Dr. Roccisano was not aware of the physical activities required of a wildland firefighter, and when asked, he confirmed that such physical activity would cause stress on the spine. He also was not provided with the specifics of the duties Specht was actually performing. He further opined that the more vigorous or heavy lifting and twisting performed after a fusion puts the patient at higher risk. He also could not remember having considered the question of whether Specht's activities with Dragon Fighters contributed independently to the need for surgery in 2020.

Regarding the criteria for recurrence, the City points to Dr. Roccisano's testimony and Specht's medical records to support the assertion that Specht did not experience the necessary persistent symptoms following the 2014 procedure. At deposition, Dr. Roccisano confirmed that Specht did not have any significant reports of symptoms. The City asserts that Specht's decision to see Dr. Roccisano on an annual basis was not based on the presence of symptoms but on his desire to keep his workers' compensation claim active.

Specht provided specific examples from his medical records to show that there were persistent symptoms. In all three reports from annual visits, the notes state Specht had occasional back pain. Additionally, the November 17, 2017, note mentions that Specht contributes the increase in his symptoms to his chronic knee pain, and the November 13, 2018, note states Specht reported that he did not have any pain in his back.

The Department is not persuaded that Specht's work with Dragon Fighters independently contributed to his need for treatment. Both doctors agreed that adjacent segment disease as well as an increased risk of further spinal injury including

herniations was possible after a spinal fusion. Specht's occasional back pain and eventual herniation are the result of the fusion and represent persistent symptoms sufficient to meet the requirements of *Titus*. There appears to be direct line of causation from the 2007 work injury and surgery to the 2014 surgery to the 2020 surgery. Specht has met his burden of proving that his work with Dragon Fighters did not independently contribute to his injury and that his 2007 work injury is and remains a major contributing cause of condition and need for treatment.

Specht shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision within thirty (30) days from the date of receipt of this Decision. The City shall have an additional thirty (30) days from the date of receipt of Specht's proposed Findings and Conclusions to submit objections thereto and/or to submit its own 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, Specht shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 29th day of July 2025.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION



Michelle M. Faw
Administrative Law Judge