

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

**MORRIS P. STEELE,
Claimant,**

HF 109, 2003/04

v.

DECISION

**KELLY CALLANAN,
dba INTEGRITY PAINTING,
Employer, and**

**TRI-STATE INSURANCE COMPANY
OF MINNESOTA,
Insurer.**

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Jeffrey P. Maks, of Finch Bettmann Maks & Hogue, P.C. represents Claimant, Morris P. Steele (Steele). Timothy M. Engel, of May, Adam, Gerdes & Thompson L.L.P., represents Employer/Insurer.

Issues

Steele alleged a June 14, 2003, work-related low back injury which he contends led to the development of septic diskitis, a bacterial infection at the site of the low back injury. The issues are:

1. Whether Steele suffered an injury arising out of and in the course of his employment on or about June 14, 2003. And, if so:
2. Whether Steele's June 14, 2003, injury is a major contributing cause of his condition and need for treatment.

Analysis and Decision

Issue 1: Whether Steele suffered an injury arising out of and in the course of his employment on or about June 14, 2003.

Steele has the burden to prove by a preponderance of the evidence "all the facts essential to compensation." Grauel v. South Dakota Sch. of Mines and Technology, 2000 SD 145, ¶ 11, 619 NW2d at 263.

To recover workers' compensation benefits, Steele must first 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).

“Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained. Although a claimant must establish this causal connection, the employment need not be the direct or proximate cause of injury[.]” Grauel ¶11 (internal quotations and citations omitted).

“A possibility, however, is insufficient; a claimant must show a probability that his employment caused the injury.” Grauel ¶12 (citations omitted).

Steele worked for Employer in June 2003 as a painter’s helper. His work duties included scraping paint, moving ladders, keeping paint in the paint sprayer, and painting trim and fascia.

Steele testified credibly concerning an incident where he attempted to lift and move a ladder in the course of his employment on or about June 14, 2003. Steele remembered the date as June 14, because it was the day before his birthday.

Steele was working on a house-painting job for Employer. Near the end of the work day on June 14, he attempted to move a large fiberglass ladder off the deck of the house. The weight of the ladder caused him to twist to one side. He was in an awkward position lifting and handing the ladder eight to ten feet down off the deck of the house and felt a stabbing and burning in his lower back. He almost dropped the ladder as he handed it down to Employer and a co-worker, Chris Poole. At the time, he assumed he “pulled a muscle or something” and that it would better the next day. He described the sensation as if someone had struck him with a broomstick or “just pointed me with the end of it.”

Because of a miscommunication as to whether the crew would be working Sunday, June 15, Steele was the only one working that day. He showed up that morning and worked by himself for part of the day. His back was painful. Steele’s testimony concerning the June 14 injury is corroborated by the fact that it is consistent with his time card, which shows he worked a full day Saturday, June 14, and 3.5 hours on Sunday.

By Monday, June 16, Steele could not work because of his back pain. When his employer arrived to pick him up for work on Monday morning, Steele told him he would be unable to work because of his back. Steele told Employer he thought he injured it when he lifted a ladder. Steele did not work Tuesday or Wednesday due to continued pain. He still thought he had a “pulled muscle” and expected to get better.

Employer told Steele to go to the emergency room and he, Employer, would take care of it. Employer told Steele he did not want to report it to his workers’ compensation carrier, because he had only recently hired employees and obtained workers’ compensation insurance.

At this early date, both Steele and Employer were hoping and expecting Steele’s back condition was something minor.

Steele first sought medical treatment on June 19, 2003. His emergency room diagnosis was acute myofascial lumbar strain. He was released with pain medication and instructed to follow-up in a week with his family doctor.

Steele's testimony is corroborated by a June 19 Rapid City Regional Hospital emergency room medical note indicates Steele's chief complaint at that time was back pain with radiating bilateral leg pain. This note references an incident at work where Steele lifted a ladder and felt a twist.

The June 19 note is also consistent with Steele's testimony that, before the June 14 incident, he had never had back pain, had never injured his back before, and had never before sought medical treatment for any back condition.

After June 19, Steele did not work and limited his activities for several days. His back condition worsened. He again sought treatment on June 25, 2003, at the Rapid City Regional Family Practice Clinic. There he saw Dr. Joy Falkenburg, who ordered an MRI.

A June 26, 2003, MRI suggested the presence of acute diskitis at L3-4. Steele was immediately hospitalized.

While in the hospital, Steele was seen by Dr. Timothy Watt for a neurosurgical consultation. Dr. Watt recommended immediate surgery to decompress the involved nerve root and to reach a definitive diagnosis of the mass viewed on the MRI at the joint space. Surgery was performed on June 29, 2003. The post operative report confirmed the pre-operative diagnosis of diskitis.

Steele was discharged on July 2, 2003. However, his symptoms continued and worsened after discharge. He was readmitted on July 11, 2003, with low back pain and left leg symptoms. He was treated by during this second hospitalization by Dr. James M. Keegan.

Steele was eventually sent to the Mayo Clinic for additional evaluation and treatment of the persistent infection.

Employer's hearing testimony was less credible than Claimant's. He did not confirm or deny whether Steele suffered any injury on or about June 14, 2003. He testified that he could not recall Steele reporting an injury on either date. He testified that during the week in question people handed ladders up and down on the job "dozens" of times. Employer admitted that an employee injuring his back by lifting the 24' fiberglass extension ladder was "not a stretch by any imagination."

Employer also admitted that it was Monday or Tuesday when Steele told him his back was hurt. However he did not recall Steele telling him the injury happened at work.

After Steele's condition worsened, Employer visited him in the hospital on June 30, 2003, at which time Employer filled out the required First Report of Injury form.

The First Report of Injury prepared by Employer on June 30 reflects that Employer was notified of the work injury “Monday or Tuesday 2 or 3 days later[.]”

At the hearing, Employer testified as follows:

Q: So you would have been notified that Morris at least informed you that this may have occurred at work, correct?

A: Maybe. I don't recall. This Monday or Tuesday was the day that I went down to his house and he told me that he had - - his back was hurt. And he very well might have, but I don't recall it.

Q: And that would be consistent that he very well might have because you're indicating that this is a work-related injury.

A: Yeah.

Q: This is a First Report of Injury so it obviously concerns a work-related injury.

A: Yeah.

Q: You would agree with that?

A. I would agree with that. I am telling to the best of my recollection how it went.

In the same section of the First Report of Injury, Employer entered the name of a witness or witnesses, then obliterated this entry because: “I didn't see an injury occur on my job site and I know Chris didn't see an injury take place on my job site.” . . . “So I crossed that off because, you know, as far as I know, a guy just told me that he hurt his back on my job[.]”

“Chris” refers to Chris Poole, the other potential witness identified by both parties. His whereabouts were not known at the time of the hearing.

Employer was also questioned on cross examination concerning whether he had asked Steele not to file a workers' compensation claim on that Monday or Tuesday. Initially he testified, “I don't recall that. You know, I believe it would have stressed me out if he would have needed to.”

Employer was then asked to review Hearing Exhibit #10. This hearing exhibit is Insurer's narrative summary of an contact made early in its investigation. This entry concerns the Monday or Tuesday when Steele first notified Employer of his injury. It includes the following statement: “EE asked if he could ‘file comp against him’ ER told him he ‘wished he wouldn't’ as he was just a new business man.”

Employer then testified as follows:

Q: Does that refresh your recollection a little bit about whether you in fact asked him not to file?

A: Yeah. And I believe that it went just like that.

Q: So you did ask him not to file.

A: I think we talked about it. [“]Wished he wouldn't[”] I think summarizes that we talked about his back just being like a sprain or whatever, not being a major issue, which it turned into a major issue.

Steele established by a preponderance of the evidence that he suffered a work-related low back injury arising out of and in the course of the June 14, 2003, incident. His testimony is credible and corroborated by the record as a whole.

Issue 2: Whether Steele's June 14, 2003, injury is a major contributing cause of his condition and need for treatment.

Having established that he suffered an injury arising out of and in the course of his employment does not automatically establish Steele's entitlement to workers' compensation benefits.

SDCL 62-1-1(7)(a) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]"

Therefore, Steele must also establish that his injury is a major contributing cause of his current claimed condition, the septic diskitis, and any need for treatment. Haynes v. McKie Ford, 2004 SD 99, ¶ 17, 686 NW2d 657.

"'Condition' . . . is the loss produced by some injury; i.e., it is the result rather than the cause." Id., (citing Steinberg v. SD Dept. of Military and Veterans Affairs, 2000 SD 36, ¶10, 607 NW2d 596, 600 (citations omitted)).

"Where there is no obvious causal relationship the testimony of a medical expert may be necessary to establish the causal connection." Kester v. Colonial Manor of Custer, 1997 SD 127, ¶ 19, 571 NW2d 376 (citations omitted).

Steele must produce sufficient medical evidence to establish his initial low back injury is a major contributing cause of his diskitis.

The medical testimony was presented through the deposition of Steele's treating doctor, Dr. Keegan, and the deposition of Dr. Aristides P. Assimacopoulos, a doctor retained by Employer/Insurer. Additional medical evidence was submitted through an agreed collection of Steele's medical records.

Dr. Keegan, an infectious disease specialist, testified by and through his May 12, 2005, deposition. When Dr. Keegan first saw Steele, Steele had been admitted with the diagnosis of "septic diskitis, an infection of the disk space, with a particular bacteria called *Streptococcus mitis*." Steele had undergone surgery by Dr. Watt, a neurosurgeon, "to debride infected, devitalized tissue" and had been placed on antibiotics.

Within a week of Steele's discharge from the hospital after surgery, he had worsening pain symptoms and some new neurologic symptoms. Steele was then hospitalized for a second time. It was at this time that Dr. Keegan became involved in Steele's treatment.

Dr. Keegan first saw Steele on July 11, 2003. Dr. Keegan saw Steele each day during that second hospital stay. In the course of his treatment of Steele, Dr. Keegan also reviewed the medical records from and after June 19, covering Steele's earlier hospitalization, treatment and surgery.

Dr. Keegan opined that Steele's June 14, 2003, back injury is a major contributing cause of his development of septic diskitis.

The history initially provided Dr. Keegan was that Steele "had been moving a ladder when he turned wrong and felt a hot burning pain in his mid lumbar area[.] Steele had been bothered by this for about two weeks and it had developed in to severe pain radiating into his buttocks and right leg.

Dr. Keegan said, in order to make an assessment of Steele's case, he looked at "exposure to particular bacteria and susceptibility." Concerning "exposure", Steele had ongoing problems with periodontal disease, and "some . . . low-grade dental infections that would put him at risk of having increased amounts of this particular bacteria and other oral bacteria in his mouth and circulating in his bloodstream from time to time." As for "susceptibility", Dr. Keegan testified, "in the presence of an injury, now he has the increased inflammation in an area that would allow that transient bacteremia to seed in that area; whereas, he might not have . . . been susceptible for that type of infection previously without the injury."

In explaining the mechanism of the septic diskitis, and its relation to Steele's triggering back injury, Dr. Keegan testified, "you have increased numbers of white blood cells, neutrophils, inflammatory cells that go to that area with increasing frequency and increasing amount. And as you get more blood, more circulation, more inflammatory cells that are actually carrying those bacteria, then you have an increased susceptibility of that area being infected[.]"

Dr. Watt's post operative diagnosis was: "discrete free fragment of herniated disk at L3-4 with inflammatory granulomatous material and the epidural space L3-4 right." Dr. Keegan found it significant that Dr. Watt had identified a "discrete free fragment of herniated disk, which I think would cause ongoing inflammation and increasing susceptibility, in addition to the soft tissue inflammation that he would have potentially."

Dr. Assimacopoulos testified for Employer/Insurer by and through his April 20, 2005, deposition. He is board certified in infectious diseases. He performed a review of Steele's medical records provided him by Employer/Insurer. He could not identify the content of extent or these records at the time of his deposition. He did not personally examine Steele, and testified that he did not feel a personal examination was necessary.

Dr. Assimacopoulos did not have any details of Steele's work injury, other than the fact that Steele did not treat until some time after the date of the injury. He did not review Steele's deposition transcript.

Dr. Assimacopoulos opined that Steele's injury was not a major contributing cause of Steele's "sepsis and subsequent need for treatment" and that this injury "did not contribute to the subsequent infection."

Dr. Assimacopoulos did agree that bacteria spread via the bloodstream and "a severe injury can sort of serve as a good culture medium or a good spot for a bacteria that has got into the bloodstream to land and then subsequently cause a worse infection there." He also agreed that Steele's poor dentition was a likely source of the bacteria involved. However, in Steele's case, Dr. Assimacopoulos was of the opinion, based on the records he was provided, that Steele's injury was not serious enough to lead to a development of diskitis. Dr. Assimacopoulos determined Steele's injury was not severe enough because the records made available to him showed that Steele did not seek medical treatment for several days. He testified, "I think that you would have to have an injury severe enough that you probably would have to go lay [sic] down or perhaps be unable to move or experience leg weakness or something immediately after the injury or at least within . . . the next 24 hours, not be able to continue your usual activities."

Although Dr. Watt's post operative report indicated he had surgically identified and removed a disk fragment, Dr. Assimacopoulos disagreed with Dr. Keegan that an injury to the disk had led to the diskitis. Instead, he opined that the diskitis had damaged the disk.

On cross examination, Dr. Assimacopoulos was provided Steele's deposition for the first time. He admitted that it would be significant to his opinions to learn that Steele had worked only part of the day following his injury, and after that he had stayed home, unable to work until he eventually sought medical treatment:

Q: Mr. Steele's deposition testimony suggests while not actually bedridden, he was pretty darn close to that for a period of days, I think even going on to a week before getting in to the emergency room, so those facts would indeed be significant to your opinion?

A: Sure.

Although this additional information did not cause Dr. Assimacopoulos to change his opinion, it did lead him to admit that the existence of a more severe injury would present a "viable or theoretically plausible scenario. I don't know if you can call it even highly likely or possible because again, as I mentioned, if that were the case, this would happen a lot, and it doesn't happen [a lot]."

On his redirect examination, Dr. Assimacopoulos was asked to read pages 20 to 25 of Steele's deposition, and was then asked the following question and gave the following response:

Q: Is there anything in that testimony that would change your opinion?

A: Well, there is information here that I did not have when I did the original review and that was some of the information about the patient's complaints. He seems in this testimony here to have, you know, perhaps more severe back injury than one might expect based on the records I reviewed. Certainly he doesn't describe any

burning or pain down the back of his leg, you know, he describes perhaps pulling a muscle, which it sounds like from the mechanism of this injury certainly is a possibility. Unfortunately, you know, there is no MRI or anything upon which to look to see whether or not he actually had demonstrable damage to his disk. But his testimony does make it sound worse than what I reviewed.

Although Dr. Assimacopoulos still persisted in his opinion, he did acknowledge that he is not an expert in the area of disk injury and would defer to the orthopedic surgeon on that point. He reiterated his opinion that Dr. Keegan's theory was "plausible", but that Steele's work injury was not the "probable" cause of his need for treatment in this case.

It is Dr. Assimacopoulos' opinion that the diskitis preexisted the back strain incident and that the pain Steele felt on June 14 was not due to an injury that date but was due to the preexisting diskitis.

Dr. Keegan reviewed Dr. Assimacopoulos' deposition, and was asked specifically to address this opinion. Dr. Keegan disagreed with Dr. Assimacopoulos because of the particular bacteria involved. In his opinion, the *Streptococcus mitis* would not be expected to infect a disk space without a preexisting injury to those tissues: "[W]ith this particular bacteria, because it's not of high virulence, it would, in my experience, require an injury or a tissue that's susceptible to the bacteria causing the damage."

Dr. Keegan was also asked to address Dr. Assimacopoulos' opinion that the injury Steele suffered on June 14 was not severe enough to lead to the development of his septic diskitis. He answered by stating that Dr. Assimacopoulos had not had the opportunity of knowing, dealing with and treating Steele. Dr. Keegan testified:

I saw Mr. Steele as an incredibly stoic individual when he came in, and I saw him with a footdrop and quite significant pain. He downplayed all this pretty significantly. I was quite impressed with his demeanor, that he tried to stay positive and very polite and not complaining very much.

Dr. Keegan further testified:

My opinion is, there's a continuum and a combination of risk, as far as the higher the amount of bacteria present, the larger degree of inflammation may increase the risk. But there's still a risk if there's inflammation and there's circulating bacteria. If you go to 30 percent risk to 60 percent risk, there's still a risk of 30 percent. So I'm unaware of anybody to quantitate [sic] that any better than roughly saying there's a continuum.

Even without being able to quantify the risk when pressed on cross-examination to do so, Dr. Keegan persisted in his opinion that the June 14 incident was a major contributing cause of Steele's septic diskitis. He again stated that both the increased exposure to the bacteria and the susceptibility due to the injury "are significant factors and both are necessary."

Dr. Keegan's opinions are hereby accepted.

"The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Johnson v. Albertsons, 2000 SD 47, ¶26, 610 NW2d 449, 455 (citations omitted).

"The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true. It may prove little if only partially true." Id. (citing Podio v. American Colloid Co., 83 SD 528, 532, 162 NW2d 385, 387 (1968)).

The opinions stated by Dr. Assimacopoulos are hereby rejected.

Steele established by a preponderance of the evidence that he suffered a low back injury on June 14, 2003, that constitute a major contributing cause of his development of septic diskitis at L3-4 and his need for treatment.

Counsel for Steele shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Employer/Insurer shall have an additional 10 days from the date of receipt of Steele's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Steele shall submit such stipulation together with an Order consistent with this Decision.

Dated: February 17, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge