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

**STEVE SMALL,**
**Claimant,**

**HF No. 114, 2000/01**

**v.**

**DECISION**

**OLSEN IMPLEMENT, INC.,**
**Employer,**
**and**

**FEDERATED MUTUAL INSURANCE COMPANY,**
**and**
**JOHN DEERE INSURANCE,**
**Insurers.**

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. A hearing was held before the Division of Labor and Management on January 22, 2004, in Huron, South Dakota. Claimant, Steve Small (hereafter Claimant), appeared personally and through his counsel, Gary Schumacher with Marcene Smith on the briefing. Timothy A. Clausen represented Employer Olsen Implement, Inc., and Insurer Federated Mutual Insurance Company (hereafter Federated). Michael S. McKnight represented Employer Olsen Implement, Inc., and Insurer John Deere Insurance (hereafter John Deere).

**Issues:**

1. Did Claimant establish that he suffered a compensable injury as defined by SDCL 62-1-1(7)?
2. Did Claimant provide notice as required by SDCL 62-7-10?

**Facts:**

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence.

Claimant is 43 years old and has worked for Employer as a truck mechanic since March of 1990. He filed a Petition for Hearing alleging that he injured his low back at work on November 19, 1999, and April 10, 2000.

Claimant has a long and significant history of low back problems. In June of 1983, Claimant injured his low back while serving in the military. He was hospitalized for two

weeks due to low back pain with numbness radiating down his left leg. Claimant received a medical disability from the military because of this back injury.

Claimant continued to seek medical care for low back pain throughout the 1980's, receiving a diagnosis of a herniated disc with radicular pain. Claimant treated several times in the 1990's, receiving numerous injections and undergoing further testing, which revealed a herniation of the L4-5 disc.

By 1998, conservative treatment stopped relieving Claimant's pain and his medical providers were considering surgery. On September 7, 1998, Claimant sought care at an emergency room for low back pain. A September 22, 1998, CT revealed a herniation at L4-5 extending to the neuroforamen margins. In October 1998, Claimant saw a neurologist at the Veteran's Hospital, who noted that Claimant might have to have surgery for pain radiating into his left and right legs.

Despite his continuing back pain, Claimant continued to work as a mechanic for Employer. While at home on Thursday, November 18, 1999, Claimant rolled over in bed, felt a popping sensation, and experienced back pain. Claimant went to work the next day, but left early because of back pain. On Saturday, November 20, 1999, Claimant went to the emergency room, told his providers that he had rolled over in bed on Thursday, felt his back pop, and experienced back pain. Claimant was discharged and on Monday, he treated with Dr. John P. Sneden, his regular doctor. Claimant told Dr. Sneden about rolling over in bed and feeling a pop with subsequent pain. Dr. Sneden took Claimant off work for two weeks.

Claimant also sought care from the Veteran's Administration Medical Center (VA) after the November 18, 1999, incident. Claimant relayed the same information regarding the incident as he told the emergency room providers and Dr. Sneden. Dr. Rossing, Claimant's VA neurologist, prescribed exercises and a TENS unit for his back pain. Claimant did not perform the exercises or use the TENS unit as directed. Claimant did not follow up with Dr. Sneden after November 29, 1999.

Claimant returned to work on December 6, 1999, at which time he completed a First Report of Injury Form alleging that he had been injured while installing a clutch on November 19, 1999. Employer and its Insurer at the time, John Deere, treated his claim as compensable.

On April 15, 2000, Claimant filed a First Report of Injury form with Employer, alleging that on April 10, 2000, he suffered an injury while lifting a truck engine. Claimant listed no witnesses and indicated that on April 15, 2000 he reported the incident to Kirk Carr. Federated was the Insurer at that time and denied the claim.

Claimant sought care for low back pain with Dr. Sneden on April 17, 2000. Dr. Sneden's records do not record an incident at work that precipitated the pain. His records note that Claimant has suffered "ongoing" back pain, that he has seen doctors

at the VA and as of April 17, 2000, had an appointment with a neurologist for evaluation of his ongoing back pain.

Dr. Sneden referred Claimant to Dr. Alvine, who first saw him on April 25, 2000. Dr. Alvine recommended and performed back surgery on June 13, 2000. Claimant returned to work on June 30, 2000, and continues to work without any medical restrictions.

Claimant seeks worker's compensation benefits from Employer and Insurer Federated and/or John Deere for the June 13, 2000, surgery. Claimant alleges that he suffered compensable injuries on November 19, 1999, and on April 10, 2000, and that those alleged injuries caused his need for surgery.

**Claimant's testimony**

Claimant's testimony regarding his alleged injuries is not credible and is rejected in its entirety pursuant to SDCL 62-7-40. Claimant admitted that he testified falsely under oath at his deposition regarding his longstanding history of back pain. Although at hearing Claimant admitted that he testified falsely about his back pain history at his deposition, he continued to deny on cross-examination that he had suffered low back pain before November 19, 1999. His hearing testimony must be found not credible, based upon his continued denial that he suffered low back pain prior to November 19, 1999, as well as his attitude, demeanor and self-serving, unsupported testimony at hearing. His testimony changed dramatically from his deposition to his hearing testimony and from his direct testimony to the testimony he gave on cross-examination. For example, Claimant testified at his deposition that he did not remember telling anyone else at Olsen about the incident in April of 2000, except Mike Fenstra, yet at the hearing he alleged that his supervisor, Kent Hedge was present and was told of the injury shortly afterward. This is all contrary to the information he provided on the First Report of Injury form. Claimant listed no witnesses to the incident on the First Report of Injury, but added Mike Fenstra at his deposition and Kent Hedge at the hearing.

Furthermore, the medical records do not support Claimant's version of events and, instead, support a finding that Claimant continued to change his story about his pain. Claimant did not tell any of the three doctors who treated him in November of 1999 that he hurt himself at work; instead, the records reflect that he told them he hurt his back rolling over in bed on the 18th of November. Claimant did not mention a specific work incident to Dr. Sneden on April 17, 2000. The medical records and testimony do not support Claimant's allegations that he suffered new and different symptoms after the April 10, 2000, injury.

Other facts will be developed as necessary.

**Issue**

**Did Claimant establish that he suffered a compensable injury as defined by 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. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 193, 195 (S.D. 1967). The 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 "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22.

> 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. A [worker's] compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of employment. Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under worker's compensation statutes.

Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992) (citations 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).

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

> [O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment.
> (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

Claimant relied upon the testimony of Dr. Alvine and Dr. Sneden to meet his burden of proof. Dr. Sneden testified live at hearing. His testimony was credible. Dr. Sneden is board certified in internal medicine. Dr. Sneden first examined Claimant on November 9, 1998. Dr. Sneden did not treat Claimant's back pain beyond managing Claimant's medications. The Department did not allow Claimant to extract opinions from Dr. Sneden on the contribution Claimant's work or alleged work-related injury made to his disability, impairment, or need for treatment because Dr. Sneden's opinions on causation were not disclosed to John Deere or Federated before hearing as required by the Department's Scheduling Order and Prehearing Order.

Dr. Alvine is a board certified Orthopedic Surgeon and Spine Surgeon. He has practiced in Sioux Falls, South Dakota, for seven years. He performed a microdiscectomy on Claimant on June 13, 2000. Dr. Alvine opined:

> Well, again, I think that both these injuries were a major contributing cause to his back condition. I mean, he clearly stated he was doing fine before each one of them and then hurt his back. It happened to be at work. So I think they're both major contributing causes to his back condition.

Dr. Alvine did not consider Claimant's VA records, his other medical records, or his deposition testimony in opining on the causation of the condition for which he performed surgery. Dr. Alvine relied upon the history given to him by Claimant. Unfortunately, that history has been demonstrated to be unreliable. Dr. Alvine's records reveal that Claimant told him "he had been doing well over the past several years." Claimant's VA medical records directly contradict this. Because his opinions rests on the false statements made to him by Claimant and on an incomplete medical record, Dr. Alvine's opinions must be rejected. 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). Claimant has failed to demonstrate that he suffered a compensable work-related injury.

Furthermore, Dr. Wayne Anderson's opinions, relied upon by John Deere and Federated, are accepted. Dr. Anderson considered the entirety of the record and opined that neither alleged injury was a major contributing cause of Claimant's disability, impairment, or need for treatment. Dr. Anderson based his opinions on the entire record and found that:

> [Claimant] has a long, long history of back problems. Particularly, he had a - - apparently, had a herniated disc in the mid-'80's. By December 12th, 1994, he had imaging that showed a herniated disc at L4-5. By 1998, he had a herniated disc at L4-5, a bulging at L5-S1, and so he had a long history of back problems. Imaging studies that showed preexisting herniated discs and disc problems at the same levels that we're talking about now.

> After these two dates of injuries, he still had [a] herniated disc. His problem became symptomatic enough to require surgery and surgery was performed.

Dr. Anderson further explained:

> Q: The condition for which [Claimant] is treated by Dr. Alvine, was that the degenerative central spinal stenosis at L4-5?
> A: Yes.
> Q: And I believe it was defined as secondary to central and right paracentral disc which compressed the right L5 nerve root; is that right?
> A: Yes.
> Q: Is that correct?
> A: Yes.
> Q: And that was the condition for which he was operated; is that right?
> A: That's correct.
> Q: And how far back can we go in those records to find that condition diagnosed?
> A: Well, at least 1994, possibly 1985.
> Q: And is it unusual for a condition like that to be treated conservatively over a period of years?
> A: No.
> Q: And is that actually the recommended course?
> A: Yes.
> . . .
> Q: The symptoms that [Claimant] was describing to Dr. Alvine when Dr. Alvine started seeing him in the spring of 2000, were those symptoms any different than he had been describing to various treating physicians over the past 15-odd years?
> A: No.
> Q: And is that, in part, on what you base your opinion that neither incident that's the subject of this litigation are a major contributing cause to his condition?
> A: Yes.

Although Dr. Anderson testified that it was "possible" that Claimant suffered an acute injury on either November 19, 1999, or on April 10, 2000, he could not state to a reasonable degree of medical certainty whether either injury caused or contributed to Claimant's need for treatment. "Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under worker's compensation statutes." Day, 490 N.W.2d at 724.

Claimant's testimony is rejected. The opinions of Dr. Alvine are rejected. Claimant has failed to meet his burden to establish by medical evidence that he suffered a compensable work-related injury on either November 19, 1999, or April 10, 2000. Because Claimant cannot establish that he suffered a compensable work injury, the notice issue will not be addressed.

Federated and John Deere shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Claimant shall have ten (10) days from the date of receipt of Federated and John Deere's proposed Findings of Fact and Conclusions to submit objections thereto 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, Federated and John Deere shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 11th day of June, 2004

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge