SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

GERALD WENDORFF, **HF No. 124, 2008/09**

Claimant,

v. **DECISION**

CUSTER COUNTY,

Employer,

and

SDML WORKER'S COMPENSATION FUND,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The Parties have submitted this matter to the Department of Labor for a Decision without a hearing, based upon stipulated medical records and deposition testimony of Claimant and Dr. Anderson. Claimant, Gerald Wendorff is represented by Dennis W. Finch. Employer and Insurer, Custer County and SDML Workers Compensation Fund, are represented by Michael S. McKnight.

Issues:

This case presents the following legal issues:

1. Whether the work related injuries of June 5, 2008 and July 3, 2008 was a major contributing cause of Claimant's impaired right shoulder and need for treatment.

2. Whether Claimant provided timely notice of his June 5, 2008 work injury to Employer?

Facts:

Based upon the stipulated medical records and deposition testimony of Claimant and Dr. Anderson, the following facts are found by a preponderance of the evidence:

1. Gerald Wendorff (Claimant) is single and has lived in Custer, South Dakota, since September of 2007. He currently lives with his girlfriend, Mariann.

2. Claimant has done auto body work off-and-on throughout his adult life.

3. Claimant worked for Steele Collision from the fall of 2007 until he quit in the spring of 2008.

4. Claimant was hired by Custer County (Employer) on May 7, 2008, to spray weeds.

5. Claimant's rate of pay while working for Employer was $9.50 per hour.

6. In addition to spraying weeds, Claimant assisted with prairie dog control, as weather permitted, and performed occasional maintenance work on Employer's equipment.

7. Claimant voluntarily ended his employment with Employer in March of 2009 when he started his own weed spraying business.

8. On or about June 5, 2008, Claimant injured his right shoulder while working for Employer. The injury occurred while he was winding up a spray hose, slightly smaller than a garden hose, which was attached to Employer's truck.

9. Claimant first sought treatment for his alleged June 5, 2008 injury from Dr. Mike Koehn, a chiropractor located in Hot Springs, South Dakota, on June 12, 2008.

10. Following Claimant's June 12, 2008, appointment with Dr. Koehn, Claimant notified his supervisor, Bill Kirsch, of his shoulder injury for the first time. At that time, Claimant advised Kirsch that he needed to rest and, would not be coming to work the next day, Friday, June 13, 2008.

11. Claimant returned to work after his injury on Monday, June 16, 2008. When Claimant returned to work, he took it easy and just did paperwork for two to three weeks. During that time period, Claimant's shoulder pain did not resolve.

12. On Sunday, June 22, 2008, Claimant was seen by Dr. Joleen E. Falkenburg at the Custer Regional Hospital Emergency Room complaining of right shoulder pain. Falkenburg's medical records indicate that Claimant reported that his right shoulder had "been bothering him maybe two weeks, possibly even up to four weeks. Initially he felt like he woke up and just slept on it wrong, but then it seemed to be quite severe and now he has not even been able to move it hardly."

13. Dr. Falkenburg's June 22, 2008 medical records state findings of considerable bone spurring and arthritic change which indicated signs of "shoulder impingement syndrome." Falkenburg treated Claimant with a cortisone injection, and prescribed oral anti-inflammatories and pain medication.

14. On or about July 3, 2008, while working for Employer, Claimant further injured his right shoulder when he shifted gears while driving Employer's truck which had a four-speed manual transmission. After the injury, Claimant continued driving the truck to and from town and then assisted in changing a transmission filter. Claimant later went home because his shoulder hurt too much to continue working that day.

15. After leaving work on July 3, 2008, Claimant was seen by Dr. Terry Graber, a family practitioner in Custer. Graber provided Claimant with a sling, which Claimant used throughout the weekend. Graber later determined that Claimant most likely had a right rotator cuff tear and referred him to Dr. Papendick at Black Hills Orthopedics.

16. Claimant was seen by Dr. Dale Anderson, a board-certified orthopedic surgeon, for an evaluation on August 13, 2008. Following that evaluation, and Anderson's review of Claimant's right shoulder MRI, he concluded that Claimant was suffering from a large rotator cuff tear in his right shoulder. Due to the size and nature of Claimant's rotator cuff tear, Anderson determined that Claimant's rotator cuff injury has been present in his shoulder for several years. In addition, Anderson identified, "AC joint arthritis and a defect in the humeral head that would suggest an old dislocation of [Claimant's] shoulder."

17. Dr. Anderson assessed what he felt to be the percentage of contribution to Claimant's rotator cuff tear from the pre-existing condition and the work-related injuries on June 5 and July 3, 2008. He opined that there was a 75% contribution from pre-existing and a 25% contribution from the work related injuries.

18. On December 5, 2008, Claimant was examined by Dr. Richard J. Farnham. In addition to the physical examination of Claimant, Farnham performed a review of Claimant's medical records dating back to August 31, 2001.

19. Dr. Farnham's medical records review revealed that Claimant has a history of low back and right sciatica pain secondary to a prior work injury on March 1, 2004. At that time, Claimant was injured while working for Mankato Heintz Pontiac-Cadillac Dealership in Mankato, MN.

20. Claimant's medical records also indicate that he sustained a right shoulder injury in a motor vehicle accident on June 21, 1971.

21. Dr. Graber noted in his clinical records of October 22, 2008: "I explained to Mr. Wendorff that I agree that probably there was some degeneration taking place in his shoulder before the final injury that led to the MRI identified tear."

22. Based on Dr. Anderson's examination of Claimant and his review of Claimant's MRI, Anderson opined that neither of Claimant's June 5, 2008 and July 3, 2008

injuries are a major contributing cause of Claimant's condition and need for treatment. This opinion was based on the fact that Claimant had an obvious pre-existing pathology in his shoulder and his June and July 2008 injuries were relatively mild. Anderson concluded that Claimant needed surgery on his right shoulder due to his pre-existing rotator cuff tear, irrespective of the June 5, 2008, and July 3, 2008 incidents.

23. Based on Dr. Farnham's examination and records review, Farnham also opined that Claimant's June 5, 2008 and July 3, 2008 injuries are not a major contributing cause of Claimant's rotator cuff tear.

24. Claimant describes his current complaint as difficulty lifting objects above his head, due to pain in his right shoulder. Despite this complaint, Claimant testified during deposition that his right shoulder pain has improved since the summer of 2008. At this time, Claimant has discontinued all rehabilitation and exercise relating to his shoulder injury.

25. Additional facts may be discussed in the Analysis of this Decision.

Analysis:

Causation:

In his case, Claimant seeks compensation for the June 5, 2008 and July 3, 2008 injuries of his right shoulder. Claimant has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 777 N.W.2d 363, 367 (SO 2010); Day v. John Morrell & Co., 490 N.W2d (SD 1967). 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.

SDCL.62-1-1 (7).

The South Dakota Supreme Court has noted that there is a distinction between the use of the term "injury" and the term "condition" in this statute. See *Grauel v. South Dakota Sch. of Mines and Technology*, 2000 SD 145, ¶ 9. "Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result." Id. Therefore, "in order to prevail, an employee seeking benefits under our workers' compensation law must show both: (1) that the injury arose out of and in the course of employment and (2) that the employment or employment related activities were a major contributing cause of the condition of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." Id. (citations omitted).

In addition, "[t]he 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). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 NW2d 586, 593 (citation omitted).

In the Orth case, the Supreme Court dealt with a case in which an expert attributed 50% of the Claimant's disability of a pre-existing condition and 50% to work-related activities. Id. at ¶ 36. The Court stated that, "[a] claimant does not need to prove that the work injury was 'the' major contributing cause, only that it was 'a' major contributing cause, pursuant to SDCL 62-1-1 (7)." Id. at 42. The Court then determined that the work related activities which caused 50% of Claimant's condition was a major contributing cause of the Claimant's disability.

In this case, Dr. Anderson attributes 75% of Claimant's rotary cuff tear to a pre-existing condition and 25% to the June 5, 2008 and July 3, 2008 work injuries. When considering such cases, the Department cannot make a determination of causation based solely on percentages. That determination must also consider other circumstances involved in each case. An incident causing 25% of an individual's disability in one case may constitute a major contributing cause of that disability, while in another case it does not.

Dr. Anderson opined that neither of Claimant's work injuries were a major contributing cause of his need for treatment. The Department agrees with that conclusion. Indeed, Dr. Anderson's assessment that Claimant needed surgery on his right shoulder due to

his pre-existing rotator cuff tear, irrespective of the June 5, 2008, and July 3, 2008 incidents tends to support that conclusion.

Claimant relies on Dr. Graber's October 22, 2008 medical notation to support his position. In that note he states, "that probably there was some degeneration taking place in his shoulder before the final injuries that lead to the MRI identified tear."

The persuasiveness of Dr. Graber's statement does not rise to level required for Claimant to meet his burden of proof. While the statement may infer that the work injuries played a larger role in Claimant's rotator cuff tear than does Dr. Anderson's opinion, the statement is indefinite as to how large a role they played. In addition, Dr. Graber's does not explain the reasons for the inference made in the statement. It must also be noted that Dr. Graber does not have the expertise in the field of orthopedics that Dr. Anderson has as an orthopedic surgeon.

Notice:

Employer and insurer argue that Claimant did not give timely notice of his June 5, 2008 injury to Employer, thereby, barring an award of compensation in this case. Notice in workers; compensation cases is governed by SDCL 62-10. That statute provides:

> An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three business days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show: (1) The employer or the employer's representative had actual knowledge of the injury; or (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three business-day period, which determination shall be liberally construed in favor of the employee.

SDCL 62-7-10.

Claimant has the burden of proving that he provided timely notice of his injury or that his employer had actual knowledge of the injury. Westergren v. Baptist Hospital of Winner, 1996 SD 69, ¶ 16, 549 NW2d 390, 395.

Claimant was injured on June 5, 2008. Claimant did not seek treatment for this injury until June 12, 2008. Claimant admitted during his deposition that he failed to notify his supervisor, Bill Kirsch, of his June 5, 2008 shoulder injury until after his June 12, 2008 appointment with Dr. Koehn, seven days later.

Based on these facts, it is clear that Claimant failed to give notice of his injury to Employer within three business days. Consequently, compensation for the June, 2008 injury is prohibited.

Evidence exist that notice requirement of the July 3, 2007 injury was fulfilled. However, there are no facts in the record to separate the medical consequences of the June 5, 2008 injury from the July 3, 2008 injury. Therefore, even if the combined effects of the two injuries constituted a major contributing cause of Claimant's right shoulder condition, Claimant's failure to provide timely notice for the June 5, 2008 injury also dooms any claim for the July 3, 2008 injury.

Conclusion

Claimant has failed to demonstrate by a preponderance of the evidence that work-related injuries were a major contributing cause of his need for the medical treatment of his right shoulder rotator cuff tear. Claimant also failed to show that he provided timely notice of his June 5, 2008 injury to Employer. Counsel for Employer and Insurer shall submit proposed Findings of Fact, Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Claimant shall have an additional 20 days from the receipt of Employer and Insurer's Proposed Findings of Fact and Conclusions of Law to submit objections/Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer and Insurer shall submit such stipulation together with an Order.

Dated this 24th day of January, 2011.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge