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

TIMOTHY ANDREWS, **HF No. 141, 2006/07**

Claimant,

v. **DECISION**

RIDCO, INC.,

Employer,

and

TWIN CITY FIRE INSURANCE, HARTFORD ACCIDENT & INDEMNITY COMPANY AND INTRACORP.

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This matter was heard by Donald W. Hageman, Administrative Law Judge on August 16-18, 2011, in Rapid City, SD. Claimant, Timothy Andrews is represented by Mark Koehn and Scott Armstrong. Employer, Ridco, Inc., and Insurer, Twin City Fire Insurance, Hartford Accident & Indemnity Company, are represented by Richard Travis.

Issues:

This case presents the following legal issues:

1. Whether Andrews' March 4, 2005, work related injury is a major contributing cause of his need for medical treatment after March 6, 2006?

2. Whether Andrews is entitled to any Temporary Total Disability (TPD) or Temporary Partial Disability Benefits (TPD)?

3. Whether Andrews is entitled to Vocational Rehabilitation Benefits, or in the alternative Permanent Total Disability Benefits (PTD)

Evidentiary Ruling:

During the hearing, the Department admitted Exhibit 25 into evidence over the objection of the Claimant. Exhibit 25 is a 1988 decision by the South Dakota Department of Labor in which Timothy Andrews was the Claimant. Employer and Insurer introduced the exhibit to impeach Andrews' present claim.

Upon reflection, the Department hereby, reverses that evidentiary ruling. The black letter law is that "prior bad acts" are not admissible to prove the character of a person. Rule 404(b). There are exceptions to this rule. However, two factors weigh heavily against admission of the exhibit. First, much time has passed since the earlier case. More than 16 years passed between the 1988 decision and the injury in this case; twenty years passed between the two injuries. Second and more importantly, the prejudicial nature of the evidence outweighs any probative value it may have.

Facts:

The following facts are found by a preponderance of the evidence:

Background and Injury:

1. Timothy Andrews (Andrews) began working as a gold polisher in 1988. He was employed by Ridco, Inc. aka Riddle's (Ridco) from 1998 to 2005.

2. Andrews suffered a compensable work-related injury to his neck and back on March 4, 2005, while employed by Ridco.

3. Twin City Fire Insurance, Hartford Accident & Indemnity Company (The Hartford) insured Ridco for purposes of workers compensation during all time relevant to this case.

4. There was no definitive event which caused Andrews' work injury. Instead, Andrews' symptoms increased gradually over the months leading up to March 4, 2005, due to the repetitive nature of his work.

5. Andrews has not worked since March 4, 2005.

Treatment:

6. Andrews first sought medical treatment with Dr. Lembke on March 7, 2005. She referred Andrews to Dr. Duchene, an orthopedist, for shoulder pain.

7. On March, 21, 2005, Andrews saw Dr. Duchene, who diagnosed Andrews with "[r]ight shoulder scapular dyskinesia with trapezial pain" and "right shoulder pain that is worse with repetitive twisting that is involved with his work…" Dr. Duchene scheduled Andrews to be seen on an as needed basis. He did not schedule a follow up appointment.

8. In addition to seeing Dr. Duchene, Andrews treated with Dr. Clinch, a chiropractor on March 21, 2005. Dr. Clinch diagnosed Andrews with a neck and shoulder injury. Dr. Clinch provided chiropractic treatment and scheduled Andrews for further treatments.

9. During a follow up treatment, Dr. Clinch examined Andrews and completed a radiology report. Clinch noted signs of osteophytes at C5-C7 and decreased disc height at C6-C7.

10. Dr. Clinch continued to treat Andrews over the next several weeks with varying degrees of success.

11. On June 6, 2005, Dr. Clinch's records indicate a worsening of Andrews' condition. Three months post-injury, Dr. Clinch's assessment remained relatively unchanged, "no obvious changes in the neck, upper back, and shoulder area."

12. The Hartford sent Andrews to Dr. Lawlor for a consult with option to treat. Lawlor examined Andrews on June 8, 2005. Lawlor's diagnosis included neck and arm pain, possible carpal tunnel syndrome and atypical blackout spells. Dr. Lawlor ordered an MRI, which was conducted on June 13, 2005. The MRI showed a disc herniation at C7-T1 with some right nerve root compression.

13. On October 6, 2005, Dr. Lawlor examined Andrews and issued a five percent whole person impairment rating.

14. On March 30, 2006, Dr. Anderson, an occupational physician, performed an independent medical examination (IME) of Andrews on behalf of Ridco and The Hartford. Based on Dr. Anderson's report from that examination, The Hartford discontinued the payment of any additional medical treatment for Andrews.

15. Dr. Clinch continued to treat Andrews on a fairly consistent basis through October 25, 2006, when he noted Andrews' subjective complaints as, "left side hurts like the other side now, everything I do physically hurts much more." Clinch noted that, "these conditions are getting worse by 75%."

16. On October 24, 2007, Andrews began treatment with Stephen Frost, M.D., and Troy Nesbit, M.D., of the Pain Management Center at Rapid City Regional Hospital, for chronic pain. Dr. Frost and Dr. Nesbit began treating Andrews with trigger point injections for his pain.

17. Drs. Frost and Nesbit provided treatment for Andrews' pain over the course of the next 15 months except for a four-month interruption due to The Hartford's failure to provide Andrews' health insurance carrier with documentation of its refusal to take responsibility for additional treatments.

18. On July 24, 2008, Dr. Anderson performed a second IME of Andrews.

19. Andrews' last treatment with Drs. Frost and Nesbit took place on January 30, 2009. Since that time, Andrews has been without medical treatment despite ongoing pain.

Work Restrictions:

20. On March 7, 2005, Dr. Lembke excused Andrews from work for March 7-9, 2005.

21. On March 11, 2005, Dr. Egon Dzintars, who practices with Dr. Lembke, issued a note which states: "[Andrews] has a shoulder injury, has appt. with BH Orthopedics 3-21-05." Dzintars' notes do not mention anything about Andrews' ability to work.

22. On March 21, 2005, Dr. Duchene did not issue any work restrictions or order Andrews off work. On the same day, Dr. Clinch completed an Attending Doctor's Return to Work Recommendation whereby Dr. Clinch indicated that "patient is totally incapacitated at this time."

23. On April 4, 2005, Dr. Clinch released Andrews back to sedentary work. On April 18, 2005, Dr. Clinch changed Andrews' restrictions to light duty. These restrictions remained unchanged until July 1, 2005, when Dr. Clinch increased his restrictions back to sedentary work due to a setback in Andrews' recovery. Clinch's work restriction orders were provided to Ridco and, on the basis of those restrictions, Ridco indicated that it could not accommodate Andrews' physical restrictions.

24. For the period of June 8 to June 22, 2005, Andrews was taken completely off work by Dr. Lawlor pending the MRI results. On June, 22, 2005, Lawlor issued a work restriction which provided "max lift 10 lbs.; change position for sitting-stand-walk every 30 minutes, avoid static neck flexion and occasional overhead activity."

25. Dr. Lawlor saw Andrews again two days later and issued revised work restrictions. Those restrictions removed the thirty minute requirement for changing positions, but were otherwise the same.

26. Employer did not have a bona fide job that Andrews was capable of, prior to July 5, 2005.

27. Based on the restrictions issued by Dr. Lawlor on June 29, 2005, Employer and Nurse Case Manager Klara Parks determined that Andrews could return to Employer to perform a box sorting job. Employer and Insurer notified Andrews via letter to return to work on July 5, 2005. Andrews did not receive that memo until July 6, 2005.

28. Andrews did not appear at work on July 5, 2005, and his employment was terminated about a week later.

29. After receiving the memo requiring Andrews to appear at work on July 5, 2005, he did not contact the employer.

30. On October 6, 2005, Dr. Lawlor established Andrews' work restrictions of "maximum lift of 30 pounds and push/pull maximum of 60 pounds. He is to limit his work overhead to an occasional basis. He is ok to sit, stand and walk frequently, but needs to change positions every hour as necessary."

31. The parties stipulated at hearing that the compensation rate in this case is $257 per week.

32. The Hartford paid TTD to Andrews for the period of March 10, 2005 through May 12, 2005, before discontinuing his benefits.

Vocational Rehabilitation request:

33. The parties stipulated that Andrews was making $9.10 per hour at the time of his injury.

34. Dr. Clinch, Dr. Lawlor and Dr. Frost have all testified that Andrews cannot return to his work as a jewelry polisher.

35. On October 20, 2006, Andrews requested vocational rehabilitation benefits in a letter to Ridco. He followed up with a similar letter to The Hartford on November 15, 2006.

36. In Andrews' October 20, 2006, letter, he referenced the medical opinions of both Dr. Guse and Dr. Lawlor that Andrew was unable to return to work as a jewelry grinder/polisher.

37. At hearing, Andrews made a prima facie showing that he cannot find suitable, substantial and gainful employment.

38. Andrews asks that Ridco and The Hartford provide benefits while Andrews pursues a two year program to becoming a photographer. Bruce Rogers, a rehabilitation counselor, testified at hearing that the compensation rate for photographers is $8.81 per hour.

Medical Opinions:

39. On March 30, 2006, Dr. Anderson performed the first of his two IMEs on behalf of The Hartford. Based on a review of Andrews' medical records including the MRI results showing a disc herniation and nerve root compression, Dr. Anderson opined that Andrews suffered from work related myofacial pain to his trapezius area. However, Dr. Anderson opined that no further treatment was necessary after March 6, 2006, for Andrews' neck pain.

40. On July 24, 2008, Dr. Anderson saw Andrews and conducted a second IME. Anderson opined in his IME report that Andrews' current pain was due to the multi-level degenerative disease of the cervical spine. Anderson also opined that Andrews' injury of March 4, 2005, was not a major contributing cause of Andrews' current condition. Finally, Anderson opined, that Andrews' March 4, 2005, injury was not a major contributing cause of any medical treatments undertaken by Andrews after March 30, 2006.

41. During his testimony at hearing, Anderson reaffirmed his opinions in his reports.

42. Dr. Clinch, Dr. Lawlor and Dr. Frost all testified at hearing or during deposition that Andrews' March 4, 2005, work-injury was a major contributing cause of his current cervical pain and need for continued treatment. All three provided their opinions within a reasonable degree of medical certainty. All three doctors testified that the basis of their opinion was the fact that Andrews' pain has been consistent and continuous since the time of the injury. All three doctors also testified that it was their professional opinion that the pain from Andrews' work-injury has become chronic.

43. Additional facts may be discussed in the analysis below.

Analysis:

Causation

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 (SD 2010); Day v. John Morrell & Co., 490 N.W.2d (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).

"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). "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 N.W. 2d 586, 593 (citation omitted).

Ridco and The Hartford rely on Dr. Anderson's opinion that Andrews' pain as of March 6, 2006, was work-related but required no additional treatment, and that Andrews' pain as of July 24, 2008 was not work-related. Andrews relies on the opinions of three treating doctors, Dr. Clinch, Dr. Lawlor and Dr. Frost, that his current cervical pain is work-related and that continued treatment is necessary.

It is undisputed that Andrews' cervical pain on March 4, 2005, was work-related. The three treating doctors conclude that Andrews' current pain is still work-related because the symptomology of his condition, i.e., cervical neck pain, has been consistent and continuous since the injury in 2005.

Dr. Anderson concludes that Andrews' work-related soft tissue pain in 2005 has resolved because Andrews has not worked since 2005. Consequently, Andrews' current pain is caused by his degenerative disc disease. The treating doctors counter this opinion by explaining that Andrews' original pain has not resolved because it is now chronic.

Workers compensation cases are not decided on the basis of which party can line-up the most doctors in support of their position. Likewise, the opinions of treating physicians is not automatically deemed superior to the opinions of non- treating physicians. Nevertheless, in this case, it is persuasive that three treating doctors with diverse practices reach the same conclusion based on the same criteria. It is also generally accepted that treating physicians are more familiar with the claimant's injuries, symptoms, and response to treatment.

In view of the above, the Department finds that the three treating doctors' opinions are the more persuasive. Andrews has shown by a preponderance of the evidence that his 2005 work-related injury is a major contributing cause of his current cervical neck pain and his continuing need for treatment.

As a matter of clarification, Andrews has not shown that that his disc herniation at C7-T1 was caused by his work injury. He has also not shown that his cervical pain became chronic as a result of The Hartford's denial of responsibility for further treatment.

TTP and TPD

The Department must next consider whether Andrews is entitled to temporary total disability benefits (TTD) or temporary partial disability benefits (TPD). It has been acknowledged by both parties that Andrews' work-related injury occurred on March 4, 2005. Andrews saw Dr. Lembke on March 7, 2005, who removed him from work March 7-9, 2005. Andrews saw Dr. Dzintars on March 11, 2005. Dr. Dzintars made no reference to Andrews' ability to work. Andrews saw both Dr. Duchene and Dr. Clinch On March 21, 2005. Like Dr. Dzintars, Dr. Duchene made no reference to Andrews' ability to work. However, Dr. Clinch indicated that Andrews was "totally incapacitated." Dr. Clinch excused Andrews from work from March 21, 2005 until June 4, 2005.

Ridco and The Hartford argue that Andrews was not excused from work by a doctor between March 9 and March 21, 2005. Consequently, Andrews is not entitled to TTD until March 21, 2005, because Andrews did not meet the seven day waiting period requirement of SDCL 64-4-2 until March 21, 2005. That statute states:

> No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the seven day waiting period is met, benefits shall be computed from the date of the injury.

SDCL 62-4-2.

While a doctor's excuse is the best evidence of total incapacity, other factors can be considered. Andrews' pain became progressively worse over several months prior to March 4, 2005. Dr. Lembke removed him from work March 7-9, 2005. Particularly in light of the fact that Dr. Clinch stated that Andrews was totally incapacitated on March 21, 2005. The fact that Dr. Dzintars and Dr. Duchene did not excuse Andrews from work is more likely due to the fact that the subject was not discussed during those exams, rather than a miraculous recovery and relapse. Indeed, if a recovery had occurred, Dr. Dzintars and Dr. Duchene should have issued a work release or restrictions. None were issued. Therefore after considering all the facts the Department concludes that Andrews was totally disabled between March 4, 2005 and June 4, 2005, and is entitled to TTP during that period.

Andrews was then released back to work with various restrictions from March 4, 2005 until June 8, 2005. During this time, Employer did not have a bona fide job that Andrews was capable of performing.

SDCL 62-4-3 discusses TPD. That provision states:

> If, after an injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if the employee has been released by the employee's physician from temporary total disability and has not been given a rating to which § 62-4-6 would apply, the employee shall receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3, equal to one-half of the difference between the average amount which the employee earned before the accident, and the average amount which the employee is earning or is able to earn in some suitable employment or business after the accident. If the employee has not received a bona fide job offer that the employee is physically capable of performing, compensation shall be at the rate provided by § 62-4-3. However, in no event may the total calculation be less than the amount the claimant was receiving for temporary total disability, unless the claimant refuses suitable employment.

SDCL 62-4-5.

Ridco and The Hartford acknowledge that Andrews is entitled to TPD at the TTD compensation rate from April 4, 2005 until June 8, 2005 and again from June 22, 2005 until July 5, 2005. They also agree that Andrews is entitled to TTD from June 8, 2005 until June 22, 2005 when Dr. Lawlor took Andrews off work pending MRI results. However, Ridco and The Hartford dispute that Andrews is entitled to disability benefits after July 5, 2005, when Andrews failed to appear for the box sorting position.

Dr. Clinch and Dr. Lawlor both testified that Andrews was not capable of performing the box sorting job offered by Ridco. Absent any testimony to the contrary from a physician, the Department concludes that the job was not a suitable bona fide position. Consequently, Andrews is entitled to TPD at the TTD compensation rate from July 5, 2005 until October 6, 2005 when Dr. Lawlor examined Andrews and issued a five percent whole person impairment rating.

Andrews argues that he is entitled to TPD until the date he receives the payment for the impairment rating, rather that the date the rating was done. The Department disagrees. SDCL 62-1-1 (8) states that benefits continue until "the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first." Likewise, SDCL 62-4-3 states that benefits continue during the time the employee "has not been given a rating." Neither of these statutes suggests that the payments go beyond the attainment of the rating.

To the extent necessary, the Department's letter decisions of April 9, 2009 and February 15, 2011 as related to Andrews' eligibility for TTP are modified or superseded.

Vocational Rehabilitation:

Andrews seeks vocational rehabilitation benefits to become a photographer. SDCL 62-4-5.1 controls whether an injured employee is entitled to rehabilitation benefits. The South Dakota Supreme Court has determined that SDCL 62-4-5.1 sets forth the following five requirements which must be met before a claimant is entitled to vocational rehabilitation benefits:

1. The employee must be unable to return to his usual and customary line of employment;

2. Rehabilitation must be necessary to restore to the employee suitable, substantial, and gainful employment;

3. The program of rehabilitation must be a reasonable means of restoring the employee to employment;

4. The employee must file a claim with his employer requesting the benefits; and

5. The employee must actually pursue the reasonable program of rehabilitation.

Beckman v. John Morrell & Co., 462 N.W.2d 505, 507 (S.D. 1990) (citing Cozine v. Midwest Coast Transport, Inc., 454 N.W.2d 548 (S.D.1990)).

There is no dispute that Andrews meets the first requirement of the test. Dr. Clinch, Dr. Lawlor and Dr. Frost all testified that he is unable to return to his jewelry polishing position.

The second requirement is met if rehabilitation is necessary to restore Andrews to suitable, substantial and gainful employment.

Employment is considered suitable, substantial, and gainful if:

> (1) It returns the employee to no less than eighty-five percent of the employee's prior wage earning capacity; or
>
> (2) It returns the employee to employment which equals or exceeds the average prevailing wage for the given job classification for the job held by the employee at the time of injury as determined by the Department of Labor and Regulation.

SDCL 62-4-55. Andrews wage as a jewelry polisher was $9.10 per hour. 85% of $9.10 is $7.73 per hour. Consequently, $7.73 per hour is deemed suitable employment. At hearing, Andrews made a *prima facie* showing that he was unable to find suitable employment within his restrictions:

> [O]nce a claimant has made a prima facie showing that he or she cannot find suitable, substantial and gainful employment, the burden shifts to the employer to show that the claimant would be capable of finding such employment without rehabilitation."

Cozine at 554.

In this case, Ridco and The Hartford failed to show that Andrews was capable of finding suitable employment without rehabilitation. Ridco and The Hartford's vocational expert, Bruce Rogers, testified at hearing. In preparation for his testimony, Rogers prepared a market survey listing of jobs that he determined Andrews could perform. When presented with an updated version of Andrews medical restrictions during cross-examination, Rogers removed a number of those jobs from the list. When asked about the remaining jobs, the most that he could offer was that the jobs were worth considering or warranted further investigation. This testimony falls short of showing of the burden required to show that suitable work is available without rehabilitation. Consequently, Andrews meets the second requirement of the test.

The third requirement is that the program of rehabilitation is a reasonable means of restoring the employee to employment. Ridco and The Hartford argue that the photography program that Andrews seeks is not reasonable. They contend that they are not required to provide Ridco with a college education or "elevate his position in life." The Department rejects these arguments. First, the course is a two year program designed to teach Andrews how to become a photographer. This falls far short of a four year degree granting college education. Second, the wage scale for photographers is $8.81 per hour. This hardly elevates Andrews' station in life above the $9.10 per hour he was making as a jewelry polisher.

Ridco and The Hartford also argue that the photography program is not justified based on a cost-benefit analysis. The Department also rejects this argument. It is difficult to visualize any vocational rehabilitation program that would fare well in a straight cost-benefit analysis when trying to justify a $7.73 per hour job. The medical restrictions imposed in this case also distort the feasibility of a straight cost-benefit analysis. The Department deems the photography program to be a reasonable means of restoring Andrews to the work force.

The fourth requirement of the test is that Andrews file a claim with his employer requesting the benefits. Ridco argues that Andrews' October 20, 2006, request for benefits were insufficient to constitute a claim for purposes of this requirement. While it is true that the requests contained

little information, it did provide notice to Ridco of his request. The statute requires nothing more. Andrews met the fourth requirement of the test.

There is also no evidence that Andrews is not prepared to participate in the photography program as required by the statutory test. Andrews is entitled to vocational rehabilitation benefits related to his participation in the photography program.

PTD

Andrews only requested permanent total disability as an alternative to vocational rehabilitation benefits. In light of the above determination, PTD will not be considered here.

Conclusion:

Counsel for Claimant shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Employer and Insurer shall have an additional 20 days from the receipt of Claimant's 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 Claimant shall submit such stipulation together with an Order.

Dated this _25th_ day of April, 2012.

__?s? Donald W. Hageman_____
Donald W. Hageman
Administrative Law Judge