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

KEVIN HAYES, **HF No. 159 08/09**
Claimant,

v. **DECISION**

ROSENBAUM SIGNS & OUTDOOR ADVERTISING, INC.,
Employer,

and

ACUITY,
Insurer,

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation 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, in Rapid City, South Dakota. Claimant, Kevin Hayes, appeared personally and through his attorney of record, Michael J. Simpson. Charles A. Larson represented Employer, Rosenbaum Signs & Outdoor Advertising, Inc., and Insurer, Acuity.

Issues

1. Res Judicata
2. Causation and Compensability
3. Medical Expenses

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

Kevin Hayes (Claimant or Hayes) has a history of low back problems over the last several decades. Hayes has a history of juvenile disc disease and degenerative disc disease. Hayes sustained a work related injury while working for the postal service in 1989, and underwent a multilevel fusion surgery in 1991. His treatment was covered under a federal workers' compensation claim and he continues to receive federal disability benefits at the present time because he was unable to return to his job with the postal service. While he continued to have problems and take medication for his pain, he was eventually able to go back to return to the workforce.

Hayes began working for Rosenbaum Signs & Outdoor Advertising, Inc. (Rosenbaum or Employer) in May 2005, as a sign installer. On March 27, 2007, he was injured at work when a boom truck malfunctioned. Hayes was in the bucket of a ladder truck when the boom malfunctioned, causing the bucket to hit a truck. Hayes sought treatment with Dr. Christopher Dietrich at The Rehab Doctors. He initially presented with pain in his upper back and shoulder blades, and was diagnosed with a thoracic strain. He later complained of low back pain as well. Over the years, Dr. Dietrich has prescribed physical therapy, multiple injections and pain medication for his back and leg pain.

In February of 2011, Hayes left Rosenbaum because he was experiencing difficulties preforming his job duties due to pain[1]. After leaving Rosenbaum, Hayes went to work for Rapid City Landfill as an Operator II, running bailers, loaders, and other equipment. At the time of the hearing, Hayes had taken a leave of absence from his job due to the death of his step-son and his resulting depression.

Hayes filed the present Petition with the Department of Labor and Regulation seeking medical care and treatment relating to his 2007 injury. Hayes currently experiences pain in his low back as well as his left leg and foot. He does not seek indemnity benefits.

Other facts will be developed in the Analysis below.

Res Judicata
Whether Employer/Insurer is precluded from denying this claim based upon Dr. Segal's report and testimony, based on the principals of res judicata.

After the 2007 injury, Employer/Insurer treated the claim as compensable and paid for medical treatment. On October 4, 2007, Hayes was seen by Dr. Dale Anderson for an independent medical examination (IME). Based on Dr. Anderson's report, Employer/Insurer denied further medical treatment. Hayes filed his petition for hearing with the Department on May 13, 2009. On March 30, 2010, Employer/Insurer deposed Dr. Anderson. At his deposition Dr. Anderson testified that at that time, Claimant's low back condition and need for treatment was 50% causes by his pre-existing low back fusion in 1991 and 50% by his 2007 work injury. Based on Dr. Anderson's deposition testimony, Employer/Insurer filed an Amended Answer on July 30, 2010, admitting that Claimant's work activities were a major contributing cause for his current need for medical treatment for low back pain. As a result of this admission, the Petition for Hearing was dismissed without prejudice on August 3, 2010.

On May 2, 2011, Hayes saw Dr. Nolan Segal for an IME at the request of Employer/Insurer. Dr. Segal conducted a physical examination and records review and prepared a report. In his report,

[1] Hayes claimed that it was becoming more difficult to perform his duties, however he was not taken off work by his physician. At the time he left Rosenbaum he was still fulfilling all his work duties without accommodations.

Dr. Segal opined that Hayes suffered a low back strain and a mild mid and upper back strain on March 27, 2007, but that his ongoing back problems were due to a long standing chronic condition dating back to the late 1980's. Dr. Segal later testified at his deposition that any low back strain would have fully resolved by November of 2007 and that 100% of his current back problems were attributable to Hayes' pre-existing problems. Based on Dr. Segal's opinions that the 2007 work injury was not a major contributing cause of Claimant's current condition, Employer/Insurer again denied further medical treatment. Hayes filed a new petition for hearing.

Claimant contends that Employer/Insurer had a chance to litigate whether Claimant's condition was merely a temporary sprain of his low back in the prior litigation but did not; therefore that issue is barred by the doctrine of res judicata. Claimant concedes that Employer/Insurer can argue a change in condition or new intervening injury to his back after the admission of the claim in 2010.

Workers' compensation awards are res judicata as to all matters considered unless the Department has reserved continuous jurisdiction over one or more questions." *Herr v. Dakotah, Inc*., 2000 SD 90, ¶24, 613 NW2d 549, 554 (citations omitted). In claims involving res judicata, The Supreme Court has established four factors to consider :

(1) Was the issue decided in the former adjudication identical to the present issue;
(2) Was there a final judgment on the merits
(3) Are the parties in the two actions the same or in privity; and
(4) Was there a full and fair opportunity to litigate the issues in the prior adjudication?

Id. 2000 SD 90, ¶25, (citing *D.G. v. D.M.K.*, 1996 SD 144, ¶27, 557NW2d 235, 240; *Springer v. Black*, 520 NW2d 77, 79 (SD 1994)).

With regard to the first factor, the issues are not identical. At the time of the dismissal, Employer/Insurer admitted that Claimant's condition in 2010 was a major contributing cause of his condition. This admission does not preclude Employer/Insurer from denying benefits in the future if there comes a time when it believes that that the employment related injury no longer remains a major contributing cause of the current condition and need for treatment. "Even if there is no dispute that a claimant suffered an initial work-related injury, that injury does not automatically establish entitlement to benefits for [his] current claimed condition. Rather, a claimant must establish that such injury became a major contributing cause of her *current* claimed *condition*." *Vollmer v. Wal-Mart Store, Inc*., 2007 SD 25 ¶ 14, 729 NW2d 377 (citations omitted). The issue that is now before the Department is whether the Claimant's March 27, 2007, work related injury remains a major contributing cause of his current condition and need for treatment at the time Employer/Insurer issued its most recent denial.

As to the second factor, there was not a final judgment on the merits. The matter was dismissed in 2010 without prejudice because there was no issue in controversy at the time. A dismissal without prejudice is not adjudication on the merits. The third factor is satisfied, as the parties are the same, however for res judicata to apply, all four factors must be satisfied. Finally, as to the

fourth factor, it was not possible to litigate Claimant's current condition and need for treatment in 2012 at the time the matter was dismissed in 2010, therefore there was not a full and fair opportunity to litigate the issues.

Employer/Insurer is not precluded from denying this claim based upon Dr. Segal's report and testimony, because the elements of res judicata have not been established. To hold otherwise would discourage Insurers from accepting otherwise compensable claims at the onset of injury for fear that they would be held accountable for worker's compensation benefits into perpetuity, even when a time comes that the work related injury no longer remains a major contributing cause of a Claimant's condition.

Causation and Compensability
Whether Claimant's work related injury is and remains a major contributing cause of his current condition and need for treatment pursuant to SDCL 62-1-1(7)(b).

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must 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); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520. A claimant must also establish that his work-related injury is a major contributing cause of his current claimed condition and need for treatment. *Darling v. West River Masonry, Inc.*, 2010 SD 7 ¶11, 777 NW2d 363.

In this case, it is not disputed that Hayes sustained an injury arising out of and in the course of his employment on March 27, 2007. The question before the Department is whether that injury is and remains a major contributing cause of his current condition and need for treatment. Hayes has a history of past workers' compensation injuries as well as preexisting medical conditions. The Supreme Court addressed causation where the Claimant has preexisting medical conditions or injuries in *Orth v. Stoebner & Permann Construction, Inc.*,

> This causation requirement does not mean that the employee must prove that his employment was the proximate, direct, or sole cause of his injury; rather the employee must show that his employment was a contributing factor to his injury.
>
> If the injured claimant suffers from a preexisting disease or condition unrelated to the injury, and the injury combines with the preexisting condition to cause or prolong disability, impairment, or need for treatment, the injury is compensable only if the claimant can prove that his employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.

Id. 2006 S.D. 99,¶ 32-33, 724 N.W.2d 586 (citations omitted);SDCL 62-1-1(7)(b).

> In applying the statute, we have held 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 his employment. We have further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

In support of his burden, Claimant relies upon the medical opinion of his treating physician, Dr. Dietrich. Dr. Dietrich is a pain specialist with Rehab Doctors in Rapid City and he is board certified in Physical Medicine, Rehabilitation and Pain Medicine. In 2009, Dr. Dietrich offered his opinion in a letter to Claimant's counsel,

> While Mr. Hayes did have a previous history of lumbar fusion, he was able to pursue recreational activities and occupational activities with no significant limitations or exacerbations, and his level of function was quite high. On March 27, 2007, the breaking of the crane bucket and the fall resulted in a significant jarring/loading injury to his low back resulting in Mr. Hayes' increase in symptoms, pain, new pathology and significant decrease in function. Specifically, his ability to pursue recreational activities and to pursue his usual and customary work duties were significantly altered on that date.
>
> For this reason, without any evidence to the contrary, I believe Mr. Hayes March 27, 2007, work injury is a major contributing cause of his current condition and need for ongoing medical treatment

In another letter to Claimant's counsel, Dr. Dietrich opined on October 2, 2012 as to Hayes' current condition,

> I do believe within a reasonable degree of medical certainty that Mr. Hayes' work injury from 2007 is and remains the reason for his current symptoms. He was functioning, working at a high level and doing reasonably well until the March 27, 2007, work injury with a flare and onset of back and leg pain. This has been the need for his continues/ongoing treatment and cause and aggravation of the preexisting conditions.
>
> Since that date of injury, he has continued with consistent symptoms and difficulties that have resulted in a significant decrease in function and limitations in his work duties and abilities.
>
> For this reason, I believe that Mr. Hayes' March 2007 work injury is a major contributing cause of his current condition and need for ongoing medical treatment.

Employer/Insurer offered the opinion of Dr. Segal, a board certified orthopedic surgeon, with over 30 years of experience. Prior to forming his opinion, Dr. Segal personally examined Hayes

and took his medical history. Dr. Segal also reviewed medical records from 1990 to the present time. Dr. Segal testified by deposition on November 6, 2012. He opined to a reasonable degree of medical certainty or probability that,

> [His] current problems, in my opinion, are 100 percent due to what clearly is a long-standing pre-existing condition. Mr. Hayes had a two level fusion surgery, he had a history of adjacent level disease for which he had extensive treatment well prior to 2007, and his complaints, radiologic studies and treatment would be consistent with this long-standing problem. There was nothing to indicate that the March 26, 2007 incident resulted in any type of structural injury to his lower back, so certainly based on the records he had a strain, he had some treatment, and it appeared that he actually was doing fairly well for significant periods of time, and that he had some ongoing treatment and injections certainly after 2010, which would be consistent with his pre-existing condition and not as a result of the injury of March 2007.

Employer/Insurer argues that Dr. Segal is in a better position to opine on causation as he has the benefit of the patient's entire medical record dating back to 1990 and can get a better picture of what is going on with the patient. Employer/Insurer argues that Claimant was inconsistent with his history to his treating doctors and therefore Dr. Segal's opion was based on a more solid foundation than that of Dr. Dietrich, the treating physician. Employer further argues stress from events in Claimant's life have caused increased pain and symptoms.

The evidence must not be speculative, but must be precise and well supported. No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition. Expert testimony is entitled to no more weight than the facts upon which it is predicated. *Darling v. West River Masonry, Inc.*, 2010 SD 7 ¶12-13, 777 NW2d 363 (citations omitted). Dr. Dietrich's opinions are based on his understanding that prior to 2007 Hayes was functioning at a high level without restrictions and that his symptoms coincide with the date of injury. To prevail on a claim for workers' compensation, a Claimant must do more than prove that an injury sustained at the workplace preceded the medical problems for which he is now seeking treatment. *Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130 ¶20, 653 NW2d 247. "When presented with medical expert testimony, Department is 'free to accept all of, part of, or none of, an expert's opinion.'" *Wagaman v. Sioux Falls Construction*, 1998 S.D. 27, 576 N.W.2d 237(Citing *Hanson v. Penrod Constr. Co.*, 425 N.W.2d 396, 398 (S.D. 1988).The Department is not persuaded by Dr. Dietrich's opinion. A comprehensive review of Hayes' medical records shows that he had consistent complaints of pain, including instances of low back pain and lower extremity pain that predated the 2007 injury. The evidence also reflects that here were other factors other that caused Hayes increased pain and to no longer pursue recreational activities, including his increased stress and depression. It is also clear from the records that Hayes had significant restrictions and limitations in place prior to 2007. Although Hayes routinely exceeded those limitations at work does not necessarily mean that he was not in pain or doing reasonably well prior to 2007. The Department accepts Dr. Segal's opinion as to Hayes' current condition, as it was based on a more comprehensive evaluation of his condition before and after 2007.

Based on the medical evidence presented, Claimant has failed to prove by a preponderance of the evidence that his work related injury on March 27, 2007, remains a major contributing cause of his current condition and need for treatment.

Medical Expanses
Whether Claimant is entitled to reasonable and necessary medical expenses pursuant to SDCL 62-4-1.

Because the Claimant has failed to meet his burden to show that this work related injury is and remains a major contributing cause of his current condition complained of and need for treatment, it is unnecessary for the Department to address the issues of medical expenses.

Conclusion
Employer/Insurer 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 Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit 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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 17th day of April, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ *Taya M. Runyan*

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Taya M. Runyan
Administrative Law Judge