

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

HAROLD KEITH STODDARD,

HF No. 170, 2003/04

Claimant,

DECISION

v.

K-MART CORP.,

Self-Insured Employer.

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 25, 2006, in Rapid City, South Dakota. Keith Stoddard (Claimant) appeared personally and through his attorney of record, Dennis W. Finch. Sandra Hoglund Hanson represented Self-Insured Employer (Employer).

The issues presented at hearing, as identified by the Prehearing Order entered on January 12, 2006, were causation and nature and extent of disability. At the hearing, the Department retained jurisdiction over the issue of outstanding medical expenses.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence.

At the time of the hearing, Claimant was sixty-two years old and lived in Black Hawk, South Dakota. Claimant graduated from high school in 1961 and attended South Dakota State University (SDSU) for three years and one quarter. While at SDSU, Claimant studied mechanical engineering and maintained a 3.8 grade point average. Claimant did not graduate from SDSU. In December 1964, Claimant left SDSU to take over the operation of his parents' ranch south of Kadoka. Claimant's parents were involved in a serious motor vehicle accident and Claimant returned home to manage the family's cow/calf operation.

In February 1971, Claimant moved to Spearfish to work for New York Life Insurance Company selling life insurance, annuities and health insurance out of his home. In July 1974, Claimant moved to Sioux Falls to work for AO Smith Harvestore in sales. Within sixty days, Claimant was promoted to sales supervisor. While working for Harvestore, Claimant supervised fifteen to eighteen employees and handled an annual budget of five to six million dollars. In June 1983, Claimant left Harvestore to return to the family ranch because of his father's failing health. Claimant worked on the ranch until November 1990. Claimant then moved to Rapid City where he worked for Prudential Insurance Company as a registered investment advisor for five years.

In July 1995, Claimant went on Social Security Disability due to major depression, personality disorders and degenerative disc disease. Claimant had to leave his employment at Prudential because of his serious mental health problems. Claimant's depression was so severe that he "just couldn't function." Claimant has

been receiving Social Security Disability since July 1995, except during the months when he was incarcerated.

In 1997, Claimant worked in sales for a short period of time for the Independent Order of Foresters (IOF), a fraternal life insurance company. While working for IOF in April 1997, Claimant was moving some desks and injured his low back. Claimant sought medical treatment from Dr. Bill Lee, chiropractor, and ultimately saw Dr. Larry Teuber, neurosurgeon. Dr. Teuber diagnosed Claimant with low back pain and bilateral leg pain, left greater than right. X-rays taken on April 21, 1997, of Claimant's lumbar spine showed degenerative disc disease at L4-5 and L5-S1. Claimant participated in a course of physical therapy and ultimately, Dr. Teuber found Claimant did not have a surgical problem. Claimant worked for IOF until he was asked to resign from his position.

In late 1997, Claimant worked for Green Tree Financial assisting clients finance mobile homes. Claimant was let go from this position after approximately one month. Claimant was unemployed from January 1998 until May 2002. During part of this period of time, Claimant was incarcerated. In March 1998, Claimant was charged with grand theft and had to serve some jail time and then received a suspended imposition of sentence. In January 2000, Claimant was charged with DWI, which was a violation of his suspended imposition of sentence. Claimant has been incarcerated in Yankton and the South Dakota State Penitentiary, Unit C, in Sioux Falls. Claimant was released for the final time on November 27, 2001.

Claimant suffers from alcohol addiction and has received treatment for alcohol abuse in the past. In addition, Claimant has a lengthy history of suffering from chronic low back pain and has been diagnosed with degenerative lumbar disc disease. In 1981, Claimant injured his back while digging up a tree root in his backyard. Claimant was hospitalized for traction for six days. On May 23, 1994, Claimant underwent an MRI of the lumbar spine because of pain in his low back and left leg. The MRI showed "[s]ome dehydration of the discs at L4-5 and L5-S1 otherwise normal MRI of the lumbosacral spine."

Claimant received extensive treatment for low back and leg pain after his injury in 1997. For example, Claimant received chiropractic treatments from Dr. Lee from June 19, 1997, through November 13, 1997, sometimes two to three times per week. In February 1998, Dr. Teuber suspected Claimant had "an underlying degenerative facet arthropathy and likely referred somatic type of discomfort into the leg." Dr. Teuber referred Claimant to a physiatrist. Claimant saw Dr. Mark Simonson in February 1998 for low back and left lower extremity pain. Claimant received sacroiliac joint injections in February, March, April, May and August 1998. In June 1998, Claimant was assessed with a five percent whole person impairment rating. Claimant continued to complain of low back pain and received narcotic pain medication.

In July 2000, Claimant saw Dr. John Lassegard, his family physician since August 1999, indicating he had been having "a lot of problems with low back pain." Claimant continued to treat with Dr. Lassegard and take narcotic pain medication. In November 2000, Claimant slipped in the shower and hit his low back. Claimant saw Dr. Matthew Simmons at Black Hills Neurology for chronic low back pain. An MRI was taken, which showed some degenerative disc disease at L4-5 and L5-S1 unchanged from 1998. Claimant was referred to physical therapy and continued taking narcotic pain medication.

Claimant was incarcerated for a period of time and returned to see Dr. Lassegard in December 2001 for continued complaints of low back pain with L5 radiculopathy. An MRI in April 2002 revealed degenerative disc disease and a small disc herniation at L4-5 that was central and did not appear to be compromising nerve roots. Dr. Lassegard referred Claimant to Dr. Edward Seljeskog, neurosurgeon, for low back and left leg pain. Again it was determined that Claimant was not a surgical candidate. Claimant continued taking narcotic pain medication for his low back pain.

Claimant began working for Employer in early May 2002. Claimant was hired after the Human Resources Manager witnessed Claimant assisting a couple who were looking at grills in the garden shop area. Claimant made the sale and the Human Resources Manager offered Claimant a job. Claimant accepted the position and started working for Employer on a part-time basis selling lawn and garden furniture. Claimant initially earned \$6.00 per and then quickly received two raises. The manager who hired Claimant was transferred to a different store and the new manager removed Claimant from the garden center, cut his hours and "put [him] to work as a pack mule."

Claimant suffered an injury on September 8, 2002. Claimant was stocking shelves with Halloween candy and bent over to pick up a box of Reese's Pieces weighing approximately forty-eight pounds. As he picked up the box, Claimant felt an immediate sharp pain in the left side of his back with pain radiating all the way down his back into his toes. The pain "literally brought tears to [Claimant's] eyes." Claimant properly reported the incident to Employer. At the time of his injury, Claimant earned \$6.50 per hour. Employer paid Claimant workers' compensation benefits through December 30, 2003.

Claimant testified that between September 8, 2002, and September 16, 2002, he went to the emergency room due to his back pain. There is no record of an emergency room visit between those dates. Claimant did return to see Dr. Lassegard on September 16, 2002, for low back pain. Dr. Lassegard noted:

He describes an injury on the 8th of September when he was at work at K-Mart, picking up a box of candy. He felt his back "popped." He immediately felt severe pain on the left side of his lumbar area. He experiences pain radiating down his left lower extremity past his knee. The pain is in the lateral portion of his thigh, past his knee. He has numbness and tingling in his lateral 2 toes. He has been out of work since then and brings in workman's [sic] compensation forms. He has been taking double of the Flexeril because it really hurts. His back feels tight and he has been taking the Hydrocodone 3-4 times a day.

He has no other injury. Previously he had problems with his back on the left side, but that was a dull ache and now it is a sharp pain that sometimes knocks him to the floor. He has never had anything like this before. He points out that, at the workplace, his human resources staff member made sure he had a 20-pound weight lifting maximum and Keith says that he has been trying to tell them at work that he cannot lift like that and will not. He was previously to be a salesman, but they are making him be a shelf stocker.

Dr. Lassegard took x-rays of Claimant's lumbar spine, which showed "normal disk spaces of his neuroforamina except perhaps L5/S1, but that may be the angle of the x-

ray. Some calcification in the abdominal aorta. Disk spaces appear maintained. Normal bony alignment except perhaps for mild decreased lumbar lordosis in the upper lumbar spine.”

Dr. Lassegard assessed Claimant with a “[l]ow back injury with symptoms of L5 radiculopathy with abnormal neurologic exam.” Dr. Lassegard also assessed Claimant with “[h]istory of degenerative disk disease with a history of small disk herniation L4/L5 central and did not appear to be significantly compressing the nerve root on MRI 4/24/02. Now with worsening symptoms.” Dr. Lassegard ordered another MRI of Claimant’s lumbar spine, refilled his pain medication and referred Claimant to Dr. Stuart Rice, neurosurgeon. Dr. Lassegard also took Claimant off work “until cleared by neurosurgeon.”

In a September 17, 2002, letter, Insurer posed the following question to Dr. Lassegard, “What is the diagnosis? Is it a work-related condition from 9/8/02? Please explain the mechanism of injury.” On September 19, 2002, Dr. Lassegard responded to Insurer, “Lumbar strain with possible herniated disc. Yes, it is work related from 9/8/[0]2. Back injury from lifting at work.”

An MRI was performed on September 20, 2002, which showed “L4-5: A mild broad-based bulging disk causes minimal flattening of the anterior subarachnoid space but no significant foraminal encroachment. This is unchanged from the previous study. L5-S1: No significant spinal or foraminal stenosis.” The MRI findings were “unchanged since 4/24[/02].”

Claimant saw Dr. Rice on September 25, 2002, for an evaluation of left lower extremity pain. Following the examination, Dr. Rice diagnosed Claimant with acute left L5 radiculopathy. Dr. Rice recommended that Claimant undergo an EMG of the left lower extremity to confirm left L5 radiculopathy. Dr. Rice also recommended an epidural steroid injection. Dr. Rice wrote the following to Dr. Lassegard on September 25, 2002:

As you know Keith has been suffering from persistent left lower extremity pain in the L5 distribution for the past two and a half weeks. Interestingly, his MRI does demonstrate a subtle finding of a disc bulge at L4-5 with the L5 nerve root appearing to be interposed between disc material and the facet joint. The compromise of the left L5 nerve root appears to be only mild and as such, I am hopeful that we will be able to obtain substantial sustained relief with conservative measures only.

The EMG study on October 16, 2002, was essentially normal. Dr. Rice recommended physical therapy and refilled his narcotic pain medication. On October 21, 2002, Dr. Rice found that Claimant’s left leg pain had resolved and he was experiencing primarily low back pain. On October 28, 2002, the physician’s assistant for Dr. Rice wrote in a letter to Jerry Gravatt, case manager for Stubbe & Associates, that Claimant “has a long history of [low back pain with] left leg pain. His current exacerbation is related to a work related injury.” Claimant participated in physical therapy until January 2003.

On January 6, 2003, Claimant reported to Dr. Rice that he had persistent low back pain and left leg pain. Dr. Rice recommended an intrathecal CT scan of the lumbar spine. The CT scan was essentially normal. Dr. Rice recommended that

Claimant could return to work on a light-duty basis. Due to Claimant's persistent low back pain, Dr. Rice referred Claimant to a pain clinic and discontinued care.

On January 28, 2003, Claimant saw Dr. Rand Schleusener for a second opinion. Claimant reported to Dr. Schleusener the initial episode of pain began when he was lifting at work and "[h]e said he had very little if any pain prior to that. He says he did have a past history of some back problems and was given some work restrictions." Dr. Schleusener did not think surgery was an option for Claimant.

Dr. Rice released Claimant to go back to work in March 2003 with restrictions of less than sedentary, lifting no more than ten pounds and no more than twenty hours of work per week. Claimant attempted to return to work for Employer. On his first day back Claimant was directed to put security tags on a cart load of jeans. Claimant described his return to work:

Well, there got to be a point where I had to move something. Well, I had to pick up one of those boxes, and I swear the darned things had to weigh 60, 70 pounds. And I had already stopped twice - - and this is within an hour, I had already stopped twice and went back to my locker and gotten more muscle relaxer and pain medication because I was hurting so bad. And finally I just went back in the break room and I just sat on the floor for about a half hour and I just finally - - I went up to Terry McMeekin's office and I said, "Terry, I just can't handle this. I'm going home."

Claimant went home and his back was swollen. Claimant had his companion, Marilyn Durante, take him to the emergency room. There was no record from an emergency room visit for Claimant for February or March 2003.

On April 22, 2003, Dr. Jerry Blow, physiatrist, performed a records review of Claimant's medical records. Dr. Blow concluded:

After carefully reviewing the records, it would appear that given the fact that the patient had a normal intrathecal CT, an MRI that revealed no significant change from his previous MRIs of his back in 1998, 11/14/00, 09/25/01, and 09/20/02. There isn't a significant structural lesion that is amenable to surgery. Dr. Rice has requested that he have a diskogram done at multiple levels. My understanding that the purpose of doing a diskogram is to determine a level for possible surgery. In reviewing the chart thus far, it would not appear that he is a candidate for surgery based on Dr. Schleusener's evaluation of 01/28/03. That is in addition to a negative EMG study and no response to an epidural block. In reviewing the history, perhaps a referral to a physiatrist would be appropriate to assess him based on the description of pain that [he] has had.

Dr. Blow recommended Claimant be weaned off the narcotic medications and that he be released to sedentary level work "just two hours every other day for a week and then 2 hours daily, then 4 hours, 6 hours and 8 hours."

Dr. Simonson examined Claimant on May 16, 2003. Dr. Simonson noted Claimant's symptoms were very similar to the symptoms he experienced in 1998, including low back pain radiating into his left leg. These symptoms were helped by joint injections. Dr. Simonson diagnosed Claimant with chronic low back pain and

recommended repeat sacroiliac joint injections. Dr. Simonson also informed Claimant that his narcotic pain medication, OxyContin, was not in his best interest and advised Claimant that he would not provide him with narcotic medications. Dr. Simonson indicated that Claimant could return to work with a lifting restriction of ten pounds and working only five hours per day.

On May 21, 2003, Dr. Rice wrote to Claimant and reiterated that he was not a surgical candidate. Dr. Rice stated, “[a]s we have completed your workup and have not found any lesion or problem which can be corrected via surgical approach, we proceed in a different direction, specifically chronic pain management.” Dr. Rice also stated, “[a]t the present time, however, I do not believe that I can be of any further assistance to you.”

On June 9, 2003, Claimant received a left sacroiliac joint injection. Dr. Simonson noted on June 26, 2003, Claimant had a good response to the injection and prescribed a sacroiliac belt and decreased Claimant’s OxyContin. Claimant attempted a second return to work for Employer on July 2, 2003. Claimant stood at the entrance as a greeter, handing out fliers or distributing carts. Claimant stood on the concrete floor for four hours with no breaks or no place to sit down. Claimant could not tolerate the work. That was the last day Claimant worked for Employer.

On July 10, 2003, Claimant reported to Dr. Simonson that his attempt to return to work significantly increased his pain. Dr. Simonson noted Claimant did not receive a benefit from the sacroiliac belt. Dr. Simonson recommended a trial of an epidural steroid injection and indicated he would consider a discogram if Claimant did not receive a benefit from the injection. Dr. Simonson stated, “I suspect he does have ongoing discogenic pain.”

Dr. Brett Lawlor performed the epidural steroid injection on July 14, 2003. Claimant did not receive any benefit from the injection and Dr. Simonson requested approval for Claimant to undergo a discogram. The procedure was approved and on August 5, 2003, Dr. Simonson performed a provocative lumbar discography. Dr. Simonson found that L4-5 and L5-S1 were his pain generators. Dr. Simonson found that at “L4-5, 8/10 to 9/10 level pain reported 90% similar to his usual pain. At L5-S1, 10/10 pain reported to be 100% the same as his usual pain.” A CT scan of the lumbar spine after the discogram showed “[c]ontained disc protrusion at L4-5 impresses on the anterior aspect of the thecal sac, but does not appear to impinge on individual nerve roots.”

On August 20, 2003, Dr. Simonson directed that Claimant needed to follow up with Dr. Rice as he originally ordered the discogram. In addition, on this date, Dr. Simonson discharged Claimant from his care due to issues with OxyContin. On August 25, 2003, Dr. Rice wrote a final letter to Stubbe & Associates. Dr. Rice indicated the discogram results demonstrated a non-surgical pain problem. Dr. Rice concluded, “after all testing of his lumbar spine has been complete; we do not find any particular structural cause for which there is a surgical option. As such, I believe that chronic pain management is his only alternate, and as you know this is not something of which our office deals with.” Dr. Rice stated he would not schedule any further appointments with Claimant.

Claimant continued to receive refills for OxyContin through Dr. Lassegard’s office. On September 2, 2003, Dr. Lassegard released Claimant to return to work, but instructed Claimant to avoid bending and lifting over ten pounds. Dr. Lassegard also

referred Claimant to Dr. Steven Frost, anesthesiologist, for treatment of chronic low back pain. On October 7, 2003, Claimant saw Dr. Frost, who recommended that Claimant undergo an IDET procedure. Dr. Frost also stated, "I see no contraindication in the current OxyContin dose." Claimant did not return to see Dr. Frost.

Claimant continued to receive workers' compensation benefits from Employer through most of 2003. In late 2003, Claimant was advised that Employer wanted him to go to Sioux Falls for an independent medical examination (IME) by Dr. Blow. Claimant did not have a valid driver's license at the time and had no way to get to Sioux Falls. Later, Claimant advised Employer he would be willing to undergo an IME in Sioux Falls as one of his sons was getting married in Sioux Falls on November 8, 2003. Claimant arranged to get a ride with another son traveling from Casper, Wyoming. Claimant was scheduled for an IME on November 6, 2003.

Claimant did not attend the IME because he got sick and was admitted to the Rapid City Regional Hospital from November 6 through November 11, 2003. On November 6, 2003, Dr. Blow reviewed Claimant's medical records. Dr. Blow noted Claimant underwent a diskogram, which "revealed pain at L4-5 and L5-S1 that was graded at 8-10 at L4-5 and 9-10 at L5-S1." These study results indicated Claimant would not be a surgical candidate. Dr. Blow concluded:

After careful review of the medical records, I have come to the following conclusions. Dr. Simonson, who performed the diskogram, did not recommend an IDET in August of 2003. In June, Dr. Rice felt that he was not a surgical candidate prior to doing the diskogram and following the diskogram continued to recommend that he was not appropriate for surgical intervention. Patient additionally has had preexisting condition of low back pain and an MRI that did not show significant changes from 2000 to his current MRIs.

....
Patient subsequently has been treating since September of 2002 and has had intrathecal CT, follow-up MRIs of 04/25/02 and 09/20/02, diskogram in the summer of 2003, nerve conduction studies that were normal, and an unremarkable bone scan. Patient has had physical therapy. They have recommended some attempts at return to work, and he does have a job description. He lifts up to 10 pounds occasionally.

....
I believe that he does need to be weaned off his pain medications.

....
I think that an IDET procedure would not be indicated as it has not been recommended by his neurosurgeon or his physiatrist.

....
He is currently taking OxyContin. He does need to be weaned off that. He has been demonstrating some drug seeking behavior based on the review of Dr. Simonson's notes.

....
He certainly is capable of doing the work at K-mart in the job description that I have here today. Patient would have a preexisting condition that would fit DRE Lumbosacral Category II based on his MRIs and his seeking out medical care. . .

He had a preexisting minor impairment of 5% whole-person, so had no increase in impairment.

.....

In terms of permanent restrictions, his permanent restrictions would be to avoid lifting. At this point he would fit sedentary to light level duty work in terms of his abilities; however, over time I think that once he returns back into the workforce and participates in a regular exercise program that he could probably progress to a light to medium level duty work. At this point given that he is 60 years old and has degenerative disc disease, I think that sedentary to light level duty work is appropriate, and that is what is available at his current employer. Initially, 4 hours a day is certainly appropriate; however, in time he should be able to progress to full time. I would suggest that he should be able to do that over a 3-month period of time. He also should be able to wean off his medications in a 3-month period of time as well.

Dr. Blow did not offer any opinions as to the causation of Claimant's condition. On December 30, 2003, Employer notified Claimant by letter that his workers' compensation benefits were terminated and stated, "Dr. Blow performed a records review from the medical records supplied and determined that you could work with restrictions. Based on his review and no medical documentation that continued to deem you to be totally disabled we are disputing payment of additional benefits as of 11/6/03."

Claimant continued to complain of low back pain and take OxyContin. Claimant treated with Dr. Lassegard through the end of 2004. Claimant began seeing Dr. Allen Nord, board certified family practitioner, on January 14, 2005. Dr. Nord was Claimant's treating physician at the time of the hearing. From a history provided by Claimant, Dr. Nord noted that Claimant had chronic back pain "for about 2 to 3 years. He has undergone aggressive further evaluation through pain clinics with injections and eventually has been started on OxyContin." Dr. Nord requested that Claimant provide his medical records from Dr. Lassegard, but this was not done. Dr. Nord did not review Claimant's prior medical records and did not personally speak with Dr. Lassegard. Dr. Nord concluded, "[a]fter a long discussion, I feel that it would be appropriate for us to continue to allow him to be on OxyContin 40 mg b.i.d." Claimant sees Dr. Nord approximately once a month and Dr. Nord continues to prescribe OxyContin for Claimant's low back pain.

Dr. Wayne Anderson performed an IME of Claimant on May 27, 2005. Dr. Anderson examined Claimant and reviewed all of his medical records. Dr. Anderson assessed Claimant with chronic low back pain with possible left L5 radiculopathy. Dr. Anderson opined Claimant's work injury in September 2002 does not remain a major contributing cause of his current condition.

Claimant experiences significant, constant pain on a daily basis. On an average day, Claimant rated his pain as a five, on a scale from one to ten, with medication. Claimant takes a significant amount of pain medication, including 10 milligrams of Flexeril at night, 40 milligrams of OxyContin every eight hours, and 5 milligrams of Valium every eight hours. Other facts will be developed as necessary.

ISSUE

WHETHER THE INJURY ON SEPTEMBER 8, 2002, REMAINS A MAJOR CONTRIBUTING CAUSE OF CLAIMANT'S CURRENT CONDITION?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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). SDCL 62-1-1(7) defines what constitutes a compensable injury. This statute provides:

[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.

SDCL 62-1-1(7). The South Dakota Supreme Court has noted 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).

Employer did not contest the occurrence of an event at Claimant's work on September 8, 2002. The evidence established Claimant suffered an injury at work as he lifted a box of candy. Claimant felt an immediate sharp pain in his low back with pain radiating down into his toes. Both Dr. Lassegard and Dr. Rice opined Claimant suffered a work-related injury. The evidence established Claimant's employment contributed to causing the injury. Therefore, Claimant suffered an injury arising out of and in the course of his employment on September 8, 2002.

Employer contested whether the September 8, 2002, injury is and remains a major contributing cause of Claimant's condition. The evidence presented established that Claimant suffered from a preexisting condition of degenerative disc disease. The evidence also established that this preexisting condition did not develop within the occupational setting. As such, Claimant must establish by a preponderance of medical evidence that his employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment. SDCL 62-1-

1(7)(b). “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). “The evidence necessary to support an award must not be speculative, but rather must ‘be precise and well supported.’” Horn v. Dakota Pork, 2006 SD 5, ¶ 14 (citation omitted). Claimant “must introduce medical evidence sufficient to establish causation by a preponderance of the evidence.” Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

Claimant offered Dr. Nord’s testimony through his deposition taken on January 17, 2006. Dr. Nord is board certified in family practice and has been practicing in Rapid City since 1980. Dr. Nord treats patients with back pain and problems “almost everyday.” Dr. Nord first treated Claimant on January 14, 2005, for chronic low back pain and assumed the role of Claimant’s primary care physician as of that date. Dr. Nord testified:

Well, Mr. Stoddard was at the time I saw him first on the 14th of January, ’05, taking OxyContin, which is a very potent narcotic medication. He was taking it - - the dose was 40 milligrams twice a day. This is a medication that we use usually for chronic, unrelenting pain and it’s frequently used for people with chronic low back pain.

Dr. Nord continued to prescribe OxyContin for Claimant. Dr. Nord stated, “[i]t was my feeling that he was getting relief from this medication, that there was no easy alternative to it, and that continuing would have been the most medically appropriate thing to do.”

Dr. Nord described the history he received from Claimant on the first visit:

We got a background history that Mr. Stoddard had chronic low back pain, that he had been followed by another physician, and that he - - Mr. Stoddard wanted to change his care to us and we assumed his care as a primary care physician that day.

Dr. Nord understood that Claimant had treated for quite some time with Dr. Lassegard and that Claimant had been evaluated by a pain clinic. Dr. Nord also had a medical note from one of Claimant’s emergency room visits. Otherwise, Dr. Nord did not review any of Claimant’s medical records and did not know of Claimant’s extensive treatment history for his low back condition.

Dr. Nord was asked to give opinions based on the following:

Q: Doctor, I have a series of questions I want to ask you regarding your opinions in this matter. There is a work injury that occurred on September 8, 2002, at K-Mart which was described in Dr. Lassegard’s records, which you apparently haven’t seen, so I’ll just quote from his note of September 16, 2002. “He describes an injury on the 8th of September when he was at work at K-Mart picking up a box of candy. He felt his back popped,” in quotation marks. “He immediately felt severe pain on the left side of his lumbar area. He experiences pain radiating down his left lower extremity past his knee.” And then, again, although you haven’t apparently seen it,

Dr. Stuart Rice, who is a Rapid City neurosurgeon - - I assume you're acquainted with Dr. Rice?

A: I am.

Q: - - saw Keith on September 25, 2002, a few days later, and states: "He has been treated conservatively but apparently two and one half weeks ago in a work accident as noted in the P.A.'s description he did suffer acute severe left lower extremity pain."

Assuming that those statements of history are correct - - and I want you to assume that they are - - do you have an opinion within a reasonable degree of medical probability as to whether that injury described was a major contributing cause of Mr. Stoddard's chronic low back pain?

A: It's my assumption that that is the cause of his low back pain and I think that that's a reasonable assumption.

Q: And also do you have an opinion within reasonable medical probability that the major - - that a major contributing cause of his need to use OxyContin as prescribed by Dr. Lassegard and then you for this chronic pain, that this work injury I've described is a major contributing cause for that need?

A: Yes, I think so.

Q: Although I may have asked you this earlier, the work restrictions that you outlined on July 5, 2005, in your note, do you have an opinion within reasonable medical probability as to whether this chronic low back pain is a major contributing cause of those restrictions?

A: It is the cause.

Dr. Nord also opined Claimant's pain was chronic and he will need to continue with narcotic pain medication. Finally, Dr. Nord opined Claimant's chronic low back pain was very debilitating and that Claimant "should avoid activity that requires heavy lifting or activity that causes significant pain."

Dr. Nord did not review Claimant's prior medical records before assuming treatment of Claimant. Dr. Nord received a history from Claimant. Dr. Nord testified:

He came to me for ongoing care of his chronic pain syndrome and it was not my assumption or concern to reassess his medical problem at that time. My job on that day was to help him with his medications and to assimilate his other medical issues, including diabetes.

The only history Dr. Nord obtained was from Claimant. Claimant reported to Dr. Nord "that he'd had low back pain for two to three years." Dr. Nord was not aware that Claimant had an extensive history of back pain and received treatment from various medical providers. Dr. Nord was not aware of the result from previous x-rays and MRIs that showed Claimant had degenerative disc disease at L4-5 and L5-S1. Dr. Nord did not know that the MRIs showed a small disc herniation at L4-5 prior to his work injury in September 2002. Dr. Nord was unaware that the September 2002 MRI was unchanged from an MRI prior to his work injury. Dr. Nord knew only that Claimant received

treatment from a pain clinic for low back pain and that Claimant had been followed by a pain specialist and received injections.

Dr. Nord's opinions lack foundation as he did not review any of Claimant's medical records. 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). Dr. Nord's opinions are rejected. In addition, Dr. Lassegard and Dr. Rice's opinions expressed in the medical records must be rejected because neither doctor opined Claimant's injury in September 2002 remains a major contributing cause of his current condition.

Employer offered Dr. Anderson's opinions through his Affidavit. Dr. Anderson is board certified in family practice and in occupational medicine and is a certified independent medical examiner. Dr. Anderson examined Claimant in May 2005 and took a history from Claimant. Unlike Dr. Nord, Dr. Anderson reviewed all of Claimant's medical records, including his extensive treatment records prior to the September 2002 injury. In his May 27, 2005, report, Dr. Anderson opined:

Question 1: Does Mr. Stoddard's injury at K-mart while moving a box of candy on or about September 8, 2002 remain a major contributing cause of his current condition?

Response 1: No. Mr. Stoddard clearly had significant problems degenerative in nature and disk herniations of his low back dating back to at least May 1994. He had an MRI performed April 25, 2002, about four and a half months prior to the claimed injury date, which revealed a central disk protrusion at L4-5 impressing on the thecal sac. He also had facet joint degenerative disease at that time. Also prior to this time, he had multiple episodes of complaints of pain into his left lower extremity. He underwent another MRI twelve days following the claimed injury date. The interpretation of this MRI states, "This is unchanged from his previous study."

Dr. Anderson further explained, "[i]t is my opinion what [Claimant] experienced in September 2002 was a recurrence of chronic degenerative disk disease." Dr. Anderson also opined Claimant was at MMI and that his impairment rating had not changed from June 1998. Finally, Dr. Anderson opined Claimant "needs no treatment due to the September 8, 2002 incident. The current treatment he is receiving is for his chronic degenerative disease of his lumbar spine."

Dr. Anderson's opinions are persuasive and entitled to more weight than any opinion expressed in the medical records. Dr. Anderson completed a comprehensive review of all of Claimant's medical records. Dr. Anderson was familiar with Claimant's lengthy history of degenerative disc disease, the extensive diagnostic testing that Claimant underwent to address his condition and the various treatment modalities attempted to alleviate Claimant's chronic low back pain. After careful consideration of all this information, Dr. Anderson opined that Claimant's work injury in September 2002 does not remain a major contributing cause of his current condition. Dr. Anderson's opinions are accepted as well-founded and credible.

Claimant failed to establish by a preponderance of the evidence that the injury on September 8, 2002, remains a major contributing cause of his current condition. Based upon this ruling, there is no need to address the issue of the extent and degree of Claimant's disability. Claimant's Petition for Hearing must be dismissed with prejudice.

Employer shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Claimant shall have ten days from the date of receipt of Employer's proposed Findings and Conclusions to submit objections 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, Employer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 27th day of April, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge