SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

TERRY MCKEE, **HF No. 179, 2006/07**

Claimant,

v. **DECISION**

DALE R. JAMES,
d/b/a/ JAMES STEEL ERECTION,

Employer,

and

CONTINENTAL WESTERN GROUP,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Dennis W. Finch of Finch Maks, Prof. L.L.C., represents Claimant, Terry L. McKee (Claimant). Comet Haraldson of Woods, Fuller, Shultz & Smith P.C., represents Employer, Dale R. James dba James Steel Erection (Employer), and Insurer, Continental Western (Insurer). A hearing was held in the matter on August 14, 2008 in Yankton, South Dakota. Testifying at the hearing were Claimant, Vonnie Dawson, Micah James, Dale James, Tashina Hughes, and Dr. Richard Farnham.

ISSUES

1. Was Claimant's employment with Employer a major contributing cause of Claimant's medical condition?

2. What is the nature and extent of Claimant's disability?

3. Whether Claimant should be compensated for medical expenses related to the December 2006 injury?

FACTS

Claimant is a 47-year-old male living in Murdo, South Dakota. Claimant attended school in White River, South Dakota and attained his 12-grade education. He is currently employed as a meat cutter for Murdo Family Foods, a local grocery store.

Prior to working for Employer, Claimant was a trustee at the SD State Penitentiary for 6 months due to a felony conviction for ingestion of a controlled substance. As a trustee, Claimant worked for the SD Game, Fish & Parks Department. Claimant performed physical outdoor labor. On one occasion, Claimant pulled some stomach or rib muscles on the right side. Claimant was given "pain pills" for treatment of his pulled muscle. Prior to being a trustee, Claimant worked at the local co-op in White River. While employed at the co-op Claimant injured his upper back while changing a tire. Claimant made a full recovery from the upper back injury.

In 2006, Claimant began working for Employer as a laborer. Employer's business is that of building and erecting steel buildings. On or about December 8, 2006, Claimant was working for Employer in Armour, South Dakota putting up steel columns and beams for a building. Claimant informed Employer on December 11, 2006 that he was injured or had severe back pain due to heavy lifting at work. Employer told Claimant to work light-duty for a couple of days to rest his back. Employer filed a first report of injury on December 14. Claimant chose to begin medical treatment with Dr. Thomas Stotz, a chiropractor with First Chiropractic Center in Yankton, on December 14, 2006. Dr. Stotz's initial diagnosis was that of a strained left intercostal muscle.

Claimant reported to Dr. Stotz that he first noticed his back pain four or five days previous to the first visit, after putting in a long day of lifting heavy steel beams. Claimant noticed the pain while driving home from work. Claimant reported that over the next few days, after the initial symptoms started, the pain continually worsened.

Dr. Stotz initially released Claimant from work on December 14 pending further evaluation on a later date. Claimant remained off work while in treatment with Dr. Stotz. Dr. Stotz treated Claimant until December 23, 2006. Claimant was scheduled to see Dr. Stotz on December 27 but failed to appear at the appointment due to moving from the Yankton area to White River. Claimant told Employer that he moved to White River because he was being put on house arrest. Claimant later testified that he was not put on house arrest, but suspected that his niece was going to report a parole violation to his parole officer. Employer made light duty work available for Claimant if released to work. Claimant testified at hearing that he no longer wanted to work for Employer and would not accept a light duty job. Claimant voluntarily quit his job with Employer.

On December 22, 2006, a representative for Insurer interviewed Claimant telephonically regarding his injury. In unsworn testimony, Claimant told Insurer, "Well it happened a couple of weeks ago, you know, and I'm not sure exactly what happened, but it just kept getting worse and worse and never, pretty soon I can hardly get out of bed. I tore some muscles in that side of my rib cage, put my back out in one place, in the middle of my back, but it's been two weeks, I guess, I finally had to go to the doctor, I think it was about the eighth, Wednesday, I think, a week before last Wednesday."

Claimant reported to the Mellette County Health Clinic in White River on January 16, 2007 with complaints of back pain. Claimant spoke to the physician's assistant on duty, Marilyn Seymour, PA, and told her that it hurt to take a deep breath. Ms. Seymour

prescribed a rib belt for Claimant to use, as well as telling him to relieve the pain through over the counter pain medication.

On January 30, 2007, Employer and Insurer requested that Claimant see Dr. Wayne Anderson for an evaluation. Dr. Anderson, in his deposition, said that Claimant told Dr. Anderson that the injury occurred on December 14, 2006. Claimant reported to Dr. Anderson that he had immediate left-sided pain in his back. “There was a pop and a numbing sensation that went around the side of his chest into his ribs.” Dr. Anderson restricted Claimant to lifting a maximum of 20 pounds. Dr. Anderson allowed Claimant to return to a job that met those restrictions.

Claimant underwent an MRI of the thoracic spine on January 30, 2007. Dr. Stephen J. Pomeranz read the MRI and found “cervical spondylosis” at spine level C5-6 and a “left paracentral protrusion” at his spinal level T9-10. The protrusion at T9-10 “indents the thecal sac without cord compression or central canal stenosis.” Dr. Anderson recommended Claimant undergo an injection for the disk protrusion. On February 21, 2007, Dr. Brett Lawlor performed a selective nerve root block injection to alleviate Claimant’s pain. On February 26, Claimant telephoned Dr. Lawlor’s office and reported a significant increase in pain at the injection site. On March 1, 2007, Dr. Anderson released Claimant from all work until he was seen by Dr. Lawlor. Dr. Anderson released Claimant from work because he did not have a job, not because he was incapable of working. Dr. Anderson maintains that Claimant could have worked with lifting restrictions. During the visit, Claimant reported to Dr. Anderson that the back pain is the same or worse and extends laterally into his chest. Claimant also reported that both hands have developed numbness. Dr. Anderson prescribed Lyrica and Lidoderm Patches to control pain.

On March 9, 2007, Claimant entered into an eight-week court ordered substance abuse rehabilitation program at a half-way house. Claimant was required by the sentencing criminal court to go through the half-way house program, if he was not employed. Claimant was scheduled to end the program on or about May 4, 2007. Claimant did not work while in this program. Claimant did not participate in any physical activities while at the half-way house. Claimant did not see any medical providers for treatment during this time.

On April 4, 2007, Claimant saw Dr. Richard Farnham in Sioux Falls, who performed an independent medical exam on Claimant, at the request of Employer and Insurer. Dr. Farnham performed a records review and a physical examination of Claimant. Claimant told Dr. Farnham that the injury occurred on Monday, December 11, 2006 when Claimant attempted to move a steel beam. He prepared a report for Employer and Insurer regarding Claimant’s injury. Dr. Farnham presented live testimony at the hearing in this matter.

Dr. Farnham, in his report, was of the medical opinion that Claimant’s subjective complaints were not supported by the objective medical findings or tests, such as the MRI of the thoracic spine. Dr. Farnham reports that Claimant had a “full and functional

active range of motion of the thoracic spine." Dr. Farnham also remarked that Claimant did not verbalize pain or discomfort during the physical examination or show by facial grimacing or physical "guarding" that Claimant was in pain during the exam. Dr. Farnham recognized that Claimant does have degenerative changes in his spine and should be given restrictions for work, but he is of the opinion that the restrictions should not be as limiting as those given by Dr. Anderson.

Dr. Farnham's conclusions were premised in part on a prior similar incident. In July 2000, Claimant underwent a cervical MRI at the request of Dr. Larry Teuber. The results of the MRI did not correspond to Claimant's subjective pain complaints. Dr. Farnham is of the professional medical opinion that Claimant is neither impaired nor disabled because of the work-related injury reported in December 2006.

Claimant returned to the Mellette County Health Clinic on May 31, 2007. Claimant presented with symptoms of pain in his back and numbness in both hands. The physician's assistant prescribed pain medication and a muscle relaxant to Claimant and instructed him to return to his neurosurgeon. Claimant returned to the Clinic on July 26, 2007 for a change in prescription. Dr. Anora Henderson remarked in her notes that Claimant was tender in the mid-back region around T6 or T7, as well as around T9. Claimant had some mild muscle spasm between the shoulder blades. It was noted that Claimant could not produce any radicular symptoms that day but subjectively reported that radicular pains do occur. Dr. Henderson noted that Claimant's "upper extremity strength [was] excellent." Dr. Henderson changed Claimant's pain medication and asked Claimant to try a rib belt for the pain. On August 9, Claimant telephoned Dr. Henderson and informed Dr. Henderson that the new pain medication was not working.

On November 30, 2007, Claimant was seen by Dr. Jay Schindler at the Pain Management Clinic at Rapid City Regional Hospital. Dr. Schindler administered a select nerve transforaminal epidural steroid injection and prescribed pain medication. At the follow-up appointment on January 15, 2008, Claimant informed Dr. Schindler that for about 2 days, he experienced significant resolution of his pain in his midback and his left chest pain. Dr. Schindler prescribed a repeat MRI of Claimant's back and pain medication.

On January 24, 2008, Dr. Schindler saw Claimant in a follow-up after the MRI. Dr. Schindler noted that Claimant suffers from a T9-10 left sided disk rupture. Dr. Schindler noted that Claimant must stop smoking prior to a diskectomy being performed. Claimant was sent to physical therapy for 4-6 weeks. Claimant was not prescribed any pain medication except over the counter pain relievers.

On February 21, 2008, Claimant reported to St. Mary's Healthcare Center in Pierre for physical therapy. The therapist noted Claimant had pain and decreased mobility at T3, 4, and 5 as well as T9 and 10. Claimant and the therapist set short and long-term goals for Claimant that Claimant agreed to work towards. Claimant returned to the therapist for treatment on February 28, March 4, 7, 11, 14, 18, 20, and 25, April 4, 14, and May 1, 2008. Claimant was released from physical therapy on May 21, 2008 as

Claimant's goals had been met by the physical therapy. The therapist noted that Claimant had improved 100% and that he had returned to performing most activities of daily living (ADL's). Claimant had limited tenderness at T9-10 and his pain was nearly gone for an extended period of time. Claimant testified at hearing that he takes up to 10 Ibuprofen tablets per day as he is still in constant pain.

Employer and Insurer offered as evidence a digital video recording of Claimant's activities, as videotaped by a private investigator on June 1, 2007. This digital video recording shows Claimant, without assistance, picking up and moving a twin-size metal bed frame, twin box spring, and twin mattress from the back of a pickup truck and into a house. Claimant picked up each item separately and moved them into the house. Claimant and another person then picked up and moved a full-size mattress into the house. Claimant did have assistance to move the full-size mattress. The day prior to this taping, Claimant reported to the PA at the Mellette County Health Clinic that he needed pain medication, as he was in constant pain, that his hands were numb, and that the pain extended around his left chest area. Dr. Anora Henderson's PA prescribed Darvocet, a narcotic pain medication, and Flexeril, a muscle relaxant.

Additional facts will be developed during the Analysis.

ANALYSIS & DECISION

Was Claimant's employment with Employer a major contributing cause of Claimant's medical condition?

The causation statute applicable at the time of Claimant's injury in mid-December 2006, SDCL §62-1-1(7), defines injury as follows:

> "Injury" or "personal injury," only 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 Claimant has the burden of proving their injury under the above statute. The South Dakota Supreme Court has interpreted this statute on numerous occasions. Recently, the Supreme Court wrote:

> To prevail on a workers compensation claim, a claimant must establish a causal connection between [her] injury and [her] employment. That is, the injury must have its origin in the hazard to which the employment exposed the employee while doing [her] work. *Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, 20, 653 NW2d 247, 252 (citation omitted) (alteration in Rawls). Employees need not prove that their employment activity was the proximate, direct, or sole cause of their injury, only that the injury arose out of and in the course of employment. SDCL 62-1-1(7). And, an injury is not compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.] SDCL §62-1-1(7)(a); *Caldwell v. John Morrell & Co.*, 489 NW2d 353, 358 (SD 1992) (citations omitted).

Vollmer v. Wal-Mart Store, Inc., 2007 SD 25, ¶13, 729 NW 2d 377, 382 (footnote omitted).

> "The burden of proof is on [Claimant] to show by a preponderance of the evidence that some incident or activity arising out of [his] employment caused the disability on which the worker's compensation claim is based." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. This level of proof "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." Id. To meet his degree of proof "a possibility is insufficient and a probability is necessary." *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

Employer and Insurer make the argument that Claimant has not met his burden of proof that his injury was caused by work-related activity. There argument is premised on the fact that Claimant is not credible in relating how he was injured or whether he is still in pain. "[W]here the claimant's subjective experience of pain is central to the issue of whether recovery is warranted, the credibility of the claimant is always at issue." *Id.* at ¶14. (quoting *Lends His Horse, Jr. v. Myrl & Roy's Paving, Inc*., 2000 SD 146, ¶14, 619 NW2d 516; see also *Johnson v. Albertson's*, 2000 SD 47, 610 NW2d 449; *Wagaman v. Sioux Falls Const*., 1998 SD 27, 576 NW2d 237.)

Claimant presented live testimony at the hearing. Claimant testified that he was injured on December 8, 2006, the same date that Claimant gave to Insurer. Claimant informed Dr. Farnham that he was injured on December 11, 2006. The first report of injury form gives the date of the injury as the "week of Dec. 8th" and the time as "not known." Claimant testified at hearing that the injury occurred on December 8 at about 4 pm.

None of these renditions of the facts are the same as what Claimant told Dr. Thomas Stotz on December 14. Claimant told the different doctors and parties too many variations of how or when he was injured. Claimant's testimony regarding how he was injured is not credible.

Claimant's testimony regarding his pain is also not completely credible. Claimant's subjective reports of pain have some basis in the objective; a bulging disc at T9-10. However, the objective evidence also shows that Claimant does not have any atrophy of his upper body muscles. Claimant's upper body strength has not been affected by this bulging disc (something that Dr. Farnham expected to see if Claimant had been in severe pain and not working for 4 months). The report of the physical therapist in May 2008 shows Claimant's subjective reports of pain has lessened and that he had improved 100%. Conversely, during the hearing less than 3 months later, Claimant testified that he is in continuous pain and takes up to 10 ibuprofen tablets on a regular basis.

The Supreme Court has a "long standing precedent…[that a] claimant purporting to suffer from continuous and debilitating pain must be credible, and any medical diagnosis based on an inaccurate and incomplete medical history cannot insulate a claimant from the Department's findings." *Schneider* at ¶14. "The Department is not required to accept the testimony of the claimant and is free to choose between conflicting testimony." *Wagaman v. Sioux Falls Constr.,* 1998 SD 27, ¶29, 576 N.W.2d 237 242-43. It is settled law in South Dakota that "a party may not claim a better version of the facts than his prior testimony." *Parkhurst v. Burkel*, 1996 SD 19, ¶ 19, 544 NW2d 210, 214.

The opinions rendered by Dr. Anderson are also disregarded, as they are based upon inaccurate information. The case at hand bears remarkable similarities to *Schneider v. SD Dept. of Transportation*, 2001 SD 70, 628 N.W.2d 725. In *Schneider*, the claimant made numerous inconsistent statements regarding when he was injured and the manner in which he was injured. The statements given to treating medical providers was disregarded by the Department because the information given to them by the claimant was inaccurate and incomplete. The Supreme Court wrote, "The value of the opinion of an expert witness is no better than the facts upon which they are based. It cannot rise above its foundation and proves nothing if its factual basis is not true. In other words, medical testimony is only as credible as its foundation." *Id.* at ¶16 (internal citations omitted).

Based upon the above, Claimant has failed to meet his burden of proof and has not established a causal connection between his work and his medical condition. Claimant's employment with Employer was not a major contributing cause of Claimant's medical condition. The evidence does not prove with any probability that Claimant's medical condition arose out of or in the course of Claimant's employment with Employer.

What is the nature and extent of Claimant's disability?

Claimant makes the argument that he should be entitled to temporary total disability benefits. Dr. Stotz took Claimant off work on December 14, 2006. Dr. Stotz continued taking Claimant off work until Claimant left the area and stopped seeing Dr. Stotz. Claimant was taken off work until his next appointment which was scheduled for December 27, 2006. Claimant was not working when he saw the PA at the Mellette County Health Clinic, so the Clinic did not make any recommendations regarding work.

On January 30, 2007, Dr. Anderson released Claimant to work with lifting restrictions. After this release to work was made, Employer and Insurer contacted Claimant and offered him light duty work. Claimant was living in White River and not working at that time. Claimant did not return to work for Employer as he no longer wanted to work for Employer. No one turned Claimant into authorities for a parole violation, although it was the reason Claimant told Employer for his leaving town. Claimant's admission to the half-way house was because he was no longer employed.

The Supreme Court has adopted the "favored work" doctrine in determining whether claimants are entitled to workers' compensation benefits. "In general, a claimant who refuses favored (light duty) work, due to non-medical reasons, temporarily forfeits his right to compensation benefits." *Beckman v. John Morrell & Co.*, 462 N.W.2d 505, 509-10 (S.D. 1990). Employer testified that light-duty work was available for Claimant. The job would pay the same as full-duty but would meet the lifting restrictions. The Supreme Court wrote:

> The "favored work" doctrine, a judicial creation and term of art, imposes limits on claimants so as to "allow an employer to reduce or completely eliminate compensation payments by providing work within the injured employee's physical capacity." See *Pulver v. Dundee Cement Co*., 515 NW2d 728, 736 (Mich 1994). … [T]he "favored work" doctrine is implicated when an employee is given the opportunity to continue employment through "favored work" with his or her employer. If the employee refuses such "favored work," then, under the doctrine, the employer cannot be legally obligated to remit workers' compensation benefits to that employee, due to his or her refusal of such work.

McClaflin v. John Morrell & Co., 2001 SD 86, ¶14 n.5, 631 NW2d 180, 185 n.5. At

Dr. Anderson, in March 2007, removed Claimant from working altogether. Later that same month, Dr. Anderson clarified his recommendation to Claimant and Insurer. Dr. Anderson wrote that Claimant could work, if the work met the lifting restrictions. Dr. Anderson only took Claimant off work because Claimant was no longer working. Claimant did not seek work after being given the work restrictions by Dr. Anderson. Claimant returned to work in August 2007. Claimant's current work meets the restrictions given by Dr. Anderson.

The experts, Dr. Anderson and Dr. Farnham, agree that Claimant has a disability or medical condition and should be put on some work restrictions. Dr. Anderson put the work restriction at 20 pounds lifting restriction. Dr. Farnham recommends that Claimant may lift 50 pounds occasionally and there should be no excessive repetitive bending or twisting of the thoracolumbar spine. Neither of the experts is of the medical opinion that Claimant can not work now or could not work at any time in question.

Claimant is not entitled to receive temporary partial or temporary total disability benefits based upon his voluntary absence from the work force, when work was available for Claimant within his doctor's prescribed restrictions.

Whether Claimant should be compensated for medical expenses related to the December 2006 injury?

Employer and Insurer initially accepted Claimant's claim as compensable and paid some medical expenses. A Form 110 was filed with the Department. The Form 110 is an agreement regarding the rate of compensation. It contains the following disclaimer:

> This document does not constitute an agreement, stipulation, or release. This document does not affect the employee's right to seek benefits, including a change in the rate of compensation, **nor does it restrict the employer/insurer's right to deny any claim.** This form is meant to lead to an understanding between the parties regarding the rate of compensation.

DOL-LM-110 Revised 06/06/2003 (SD Form 110) (emphasis added). Claimant cites *Kermmoade v. Quality Inn*, 2000 SD 81, 612 N.W.2d 583, for the proposition that a DOL Form 110 or 111 is res judicata to the contents contained therein. The DOL-LM-110 has been updated since *Kermmoade* to include the above disclaimer. Res judicata does not attach to the contents of the SD Form 110 signed by Claimant, Employer, and Insurer.

Claimant chose Dr. Stotz with the First Chiropractic Center as his treating medical provider. Claimant stopped treatment with Dr. Stotz because he "didn't want to go." There was no reason or explanation given by Claimant why he stopped the chiropractic treatments. SDCL §62-4-43 specifically provides:

> If the injured employee unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment, the employer is not liable for an aggravation of the injury due to the refusal and neglect and the Department of Labor may suspend, reduce, or limit the compensation otherwise payable. If the employee desires to change the employee's choice of medical practitioner or surgeon, the employee shall obtain approval in writing from the employer.

SDCL §62-4-43. The record is devoid of any opinion from Dr. Stotz whether continued treatment with chiropractic care would have resulted in a better outcome for Claimant.

Nonetheless, Claimant also failed to seek approval from Employer prior to seeking care with the Mellette County Health Clinic. Under the provisions of SDCL §62-4-43, Claimant claim for prior and future medical expenses is denied.

In conclusion, Claimant's testimony was found to be not credible and is wholly rejected. It is the Department's determination that Claimant's employment with Employer was not a major contributing cause of Claimant's medical condition. Claimant is not entitled to receive temporary total disability benefits or temporary partial disability benefits. Claimant is not entitled to receive compensation for prior or future medical expenses.

Employer and Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within twenty (20) days from the date of receipt of this Decision. Claimant shall have twenty (20) days from the date of receipt of Employer and Insurer's proposed Findings and Conclusions to submit objections thereto or to submit its own 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 and Insurer shall submit such Stipulation along with and Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 13th day of February, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Catherine Duenwald
Administrative Law Judge