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

LESTER BABINO, JR., **HF No. 181, 2010/11**

Claimant,

v. **DECISION**

PEOPLEASE CORP.,

Employer,

and

ARCH INSURANCE COMPANY,

Insurer.

A hearing in the above-entitled matter was on the April 23, 2014, before the Honorable Catherine Duenwald, Administrative Law Judge, South Dakota Department of Labor, Division of Labor and Management. Claimant, Lester Babino, Jr., was present with his attorney, Ronald L. Schultz. Employer, Peoplease Corp., and Insurer, Arch Insurance Company, were represented by their attorney, Rick W. Orr of the law firm Davenport, Evans, Hurwitz & Smith, LLP. The Department, having received and reviewed all evidence and argument in this case hereby makes this Decision.

ISSUES

1. Whether Claimant's work incident on January 28, 2008, while employed with Employer, was a major contributing cause of Claimant's injury or condition alleged to be suffered by Claimant?

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

3. Whether Claimant is entitled to temporary total disability compensation; and if so, how much?

4. Whether Claimant is entitled to payment of medical costs and future medical costs associated with the alleged injury?

5. Whether Claimant is entitled to interest on the unpaid compensation, both medical and indemnity?

6. Whether Claimant is entitled to reimbursement for costs associated with his alleged injury?

FACTS

At the time of hearing, Claimant was 52 years of age and living in Mansura, Louisiana. Claimant started his employment with Employer at Lake Norden, SD in September 2006. Claimant's job was to drive trucks from Lake Norden to Idaho.

On January 28, 2008, during bad weather, while driving on icy roads through the mountains near Rawlins, Wyoming, Claimant's truck jackknifed. This accident was reported to and investigated by law enforcement and emergency services. Claimant sought medical treatment at the emergency room in Rawlins, WY; x-rays were taken of his back and shoulder. Claimant was advised to follow-up with his physician when he returned to Lake Norden.

After returning to Lake Norden a few days later, Claimant filled out an accident report for Employer. He followed up with medical treatment at Sanford Health in Watertown, SD. Claimant's regular provider is the Veteran's Administration Health Care Services in Sioux Falls, SD. Claimant continued to work for Employer, performing the same work. Claimant did not miss any work for Employer after returning from Rawlins, WY. The medical provider from Sanford did not place any restrictions on Claimant's activities.

On June 11, 2008, Employer discharged Claimant as Employer's insurer would no longer provide coverage for Claimant's driving due to his driving record. Employer received notice of the underwriter's decision on April 21, 2008. Claimant had two accidents with Employer's trucks. Claimant moved to New Orleans, LA after his job separation. Claimant did not and has not looked for work since his separation from Employer.

MEDICAL REPORTS

According to the Sioux Falls Veterans Administration records, prior to the truck accident, in July 2007, Claimant reported that he was suffering from low back pain and a painful tooth. Claimant did not qualify for dental care and was told to seek a private dentist.

In 2007, the VA performed a straight leg raise on Claimant to assess his lower back pain. The medical notes read, "Does show negative straight leg raising for his back with no tenderness on palpation of his spinous processes or the SI joints nor did he have any costovertebral angle tenderness." Claimant was advised to take ibuprofen on an as-needed basis for his low back pain.

After the truck accident, the Rawlins, WY Emergency Room noted that Claimant came into the ER with low back pain and a toothache. The ER ordered x-rays of Claimant's low back. Findings were that Claimant had some disc space narrowing at L5-S1 and mild anterior osteophytic spurring at T12-L1. "There are no finds of acute fracture or malalignment." Claimant was given Vicodin for his back pain and a diagnosis of lumbar strain. The Sanford Health follow-up on February 1, 2008, indicated that Claimant's left lower back was hurting but was not radiating. Dr. Devine prescribed Tylenol as Claimant could not take the Vicodin and stay awake for work.

Claimant returned to the Sioux Falls VA HCS on March 22, 2008. His pain complaints were the same as in July 2007, except he now had an abscess on his tooth that was in pain. During this visit in March 2008, Claimant's report to the VA was that his back pain was intermittent and not currently hurting. He reported that his back pain was from a MVA (motor-vehicle accident) in January. Claimant also told the VA staff that the toothache was related to the same MVA. Claimant was given 40 tablets of hydrocodone to use on an

as-needed basis. The pain Claimant was having at that time (a 10 on the 1-10 pain scale) was reported by him as a headache and pain from his teeth. A couple days later, Claimant again came back to the VA as a walk-in patient. He wanted assistance with securing dental treatment and asked how to obtain pain medication when he depleted his supply. The VA staff noted in the medical file that Claimant's hydrocodone pill bottle still contained pills. There is no indication that Claimant was given any refills for his prescription for hydrocodone.

On July 29, 2008, after leaving the state and moving to Louisiana, Claimant was seen by Chiropractic Health Center and Holistic Health Care Services. Claimant visited the clinic seven (7) times. Claimant had complaints of low back pain, but he also reported significant pain in his upper back and shoulders. These complaints he also associated with the MVA in January 2008.

On September 17, 2008, Claimant continued treatment with the SE Louisiana Veterans HSC. He reported low back pain and left shoulder pain. He was referred to the Houston VA due to their specialty with orthopedics. Claimant then was referred to physical therapy, which he attended for a number of sessions. The VA doctors recommended surgery for Claimant which took place on May 12, 2011. His restrictions upon being discharged from surgery were: weight bearing as tolerated; lifting no more than 5 pounds for 1 months and 20 pounds for the following 2 months; walking, standing, and mobility as tolerate; no driving while taking meds; may return to work as tolerated within next month as long as no lifting of heavy weight.

Claimant treated at the Texas VA with Dr. Bruce Ehni, a licensed and board certified Neuro-Surgeon within the states of Texas and Louisiana. Dr. Ehni also teaches at the Baylor College of Medicine, Department of Neurosurgery. He testified to his findings via affidavit

and record. His letter to Claimant's attorney on July 25, 2013 detailed what he would testify to regarding Claimant's condition, with a reasonable degree of medical certainty. Dr. Ehni initially saw Claimant on February 18, 2009 for back and leg pain. A minimally invasive transforaminal lumbar interbody fusion of L5-S1 was performed on Claimant on May 12, 2011. Claimant continued to treat with the neurosurgery clinic until September 26, 2012, a year and a half post-operation. At that time Claimant reported he no longer had radicular leg symptoms, but did have some back pain and numbness along the lateral aspect of the left foot and little toe. Claimant was still taking hydrocodone for pain.

Dr. Ehni advised Claimant that he could return to work as his pain tolerated; that there was no medical reason for him not to be able to return to work. Dr. Ehni wrote that he discouraged the long term use of hydrocodone for pain. In regards to the causation of the injury, Dr. Ehni wrote, "It is not possible to say on the basis of the MRI that changes in his lumbar spine originated from the reported injury. It is possible to say that injury could have aggravated the preexisting condition as subjectively reported by the patient. There is no recognized permanent impairment but for limited range of back motion."

Dr. Ehni went on to write, "It is my opinion that the work injury suffered by Mr. Babino on January 28, 2008 was a contributing cause of his back condition along with degeneration, and that the accident injury on January 28, 2008 is 50% responsible for his back condition. On May 12, 2013, Mr. Babino reached MMI."

After Claimant reached MMI, Dr. Charles Murphy, a licensed and board certified orthopedic surgeon from Louisiana, assigned Claimant a 21% whole person impairment according to the Guides to the Evaluation of Permanent Impairment, 4th edition. This is based upon a failure of Claimant's L5-S1 fusion and ongoing pain symptoms. Dr. Murphy's report is based upon a reasonable degree of medical probability.

Dr. Ehni's July 25, 2013 letter was similar to Dr. Ehni's opinion of October 14, 2010. At that time, Dr. Ehni wrote a letter to officials with the VA regarding Claimant's care. This letter was reviewed by Employer and Insurer's expert, Dr. Richard Strand, when conducting his independent examination. Dr. Ehni concluded the letter with this statement, "It is not possible to say on the basis of the MRI what changes in his lumbar spine originated from the reported injury. It is possible to say hypothetically that were he historically free of his report of pain prior to the accident, and now in pain originating as documented immediately following the accident, that more probably than not, injury aggravated the preexisting condition and is the cause of the pain reported by the patient."

Employer and Insurer secured Dr. Richard Strand, a board certified Orthopedic Surgeon, licensed in Minnesota and South Dakota, to conduct an independent medical examination (IME) of Claimant and a medical records review. From the medical records, Dr. Strand concluded that the accident of January 28, 2008 was not a major contributing cause of Claimant's back pain and need for treatment. Dr. Strand concluded this by looking at and comparing the results of the scans taken of Claimant's back: the scans & films were taken January 2008, October 9, 2008, September 1, 2010, January 2012, and May 16, 2012. It does not appear that Dr. Strand had access to the medical records from the Sioux Falls VA from March 2008, when he performed the records review.

During the physical examination of Claimant on November 19, 2013, Dr. Strand made similar findings from his previous report. Claimant exhibited severe pain behaviors without any movement, during the exam. Dr. Strand was very suspect of Claimant's behaviors and reactions in response to the exam procedure. He indicated that there were signs of symptom magnification and severe pain behaviors. He did not change the conclusion of his previous report based upon his findings during the physical examination.

Dr. Strand testified at deposition that the x-rays from January 2008 showed mild narrowing of disc space between L5-S1 of Claimant's spine, which is a sign of degenerative disc disease. He compared that to the MRI taken in February 2009 at the Houston, TX VA. That MRI also showed signs of degenerative disc disease at L5-S1. He agrees with Dr. Ehni when Dr. Ehni wrote that *had* Claimant been free from back disease prior to the MVA, then the MVA would more likely be the cause of Claimant's back pain. But Dr. Strand points out that Claimant was *not* free from back pain prior to January 2008; that he suffered from ongoing lower back pain consistent with degenerative disc disease.

Dr. Strand testified what he observed during the physical exam. Claimant showed no signs of atrophy in his lower extremity, but did have "much giveaway testing of his heel and toe walking and giveaway with quadricept testing." When asked what that meant, Dr. Strand responded that the giveaway is "consciously letting the muscle go"; a "well-documented pain reliever. True weakness doesn't do that." He spoke about examining Claimant's straight leg raises while sitting and while in the "supine" position, or lying down face-up. "In the supine position, if I - - with his knee straight - - tried to lift his leg at all he screamed with pain, but in the sitting position, he had no pain. So it's another significant pain behavior." Dr. Strand related that Claimant got off the exam table himself without any problems or pain symptoms. "He had physical findings which are bizarre, non-psychologic, non-organic and signs of consciously trying to appear worse than he is based on findings on his exam."

Dr. Strand's opinion, as given in the deposition, is that Claimant suffered from a mild temporary back strain due to the MVA in January 2008. It is his opinion, by a reasonable degree of medical certainty, that the fusion surgery was not necessitated by the work-related MVA. The MVA was not a major contributing cause of Claimant's need for a back

surgery. Dr. Strand is of the opinion that because there was no significant injury to Claimant's back, caused by the MVA, Claimant did not suffer a permanent partial disability.

ANALYSIS

The causation statute, 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:
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> (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.
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> The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought;

SDCL §62-1-1(7). The Claimant has the burden of proving an injury under the above statute. The South Dakota Supreme Court has interpreted this statute on numerous occasions. Recently, the Supreme Court wrote:

> In a workers' compensation dispute, a claimant must prove the causation elements of SDCL 62-1-1(7) by a preponderance of the evidence. *Grauel v. S.D. Sch. of Mines & Tech*., 2000 S.D. 145, ¶11, 619 N.W.2d 260, 263. The first element requires proof that the employee sustained an "injury" arising out of and in the course of the employment. SDCL 62-1-1(7); *Bender v. Dakota Resorts Mgmt. Group, Inc.,* 2005 S.D. 81, ¶7, 700 N.W.2d 739, 742. The proof necessary for the second element ("condition") is dependent on whether the worker also suffered from a preexisting condition or a prior, compensable

> work-related injury. See SDCL 62-1-1(7). If the worker suffered from neither of these, the claimant must prove that the employment or employment related activities were a "major contributing cause" of the "condition" of which the employee complains. SDCL 62-1-1(7)(a). In cases involving a preexisting disease or condition, the claimant must prove that 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)(b); see also *Grauel*, 2000 S.D. 145, ¶9, 619 N.W.2d at 263 (citing SDCL 62-1-1(7)(a)-(b)).

Peterson v. Evangelical Lutheran Good Samaritan Society, 2012 S.D. 52, ¶20, 816 N.W.2d 843, 849-850.

The Supreme Court has further stated that "The claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability." *Wise v. Brooks Const. Ser.,* 2006 SD 80, ¶17, 721 NW2d 461, 466 (internal citations omitted). They have written:

> In a workers' compensation dispute, a claimant must prove all elements necessary to qualify for compensation by a preponderance of the evidence. … A claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty. Causation must be established to a reasonable degree of medical probability, not just possibility. The evidence must not be speculative, but must be precise and well supported.
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> The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition because the field is one in which laypersons ordinarily are unqualified to express an opinion. 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. SDCL 62-1-1(7). Expert testimony is entitled to no more weight than the facts upon which it is predicated.

Darling v. West River Masonry, Inc., 2010 SD 4, ¶11-13, 777 NW2d 363,367 (citations and quotes omitted) (emphasis added). Furthermore, the Court has written,

> "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.

"[A]n expert's opinion is entitled to no more weight than the facts it stands upon." *Jewett v. Real Tuff, Inc.,* 2011 S.D. 33, ¶29, 800 N.W.2d 345, 352. In this case, Dr. Strand had the whole medical record of Claimant, and did not review just a portion. Dr. Murphy and Dr. Ehni only reviewed those medical records post-accident. Dr. Strand reviewed the MRIs that pre-dated the accident and the MRIs and x-rays taken post-accident. There was not a significant difference in the degeneration of Claimant's spine post-accident. There was no disc herniation or acute (sudden) changes to Claimant's spine post-accident; there were only degenerative, chronic (long-term) changes to Claimant's back that were already occurring prior to the accident in 2008. There was little or no progression of degenerative changes between 2008 and the surgery in 2010. Dr. Strand gave the opinion that any degenerative changes seen on the x-rays taken just after the accident could not have been caused by the accident.

Dr. Ehni and Dr. Murphy do not give specific reasons, based upon the medical records, for their opinions on causation. For that reason, Dr. Strand's opinion is seen as being more persuasive than either Dr. Ehni or Dr. Murphy.

Claimant continued to work after the accident. The pain he reported at the VA in Sioux Falls was for his toothache, rather than a backache. At the time he was at the Sioux Falls VA in March 2008, he did not report any pain in his back, only his tooth. Claimant continued to work regular hours through June 2008. He did not start any continuous medical treatment for his back until after leaving work and moving to Louisiana. It is very likely that Claimant received a back strain from the accident. He received immediate treatment in Wyoming and follow-up treatment in Watertown. Those doctor appointments were covered by Employer and Insurer. However, Claimant did not suffer from the back

strain for an extended period of time. He stopped having pain in his back while still working for Employer.

Claimant has not shown that the work-related accident was a major contributing cause of his back pain, the subsequent back surgery, and absence from work due to complications of the surgery. The opinion of Dr. Strand was more convincing than the opinion of Dr. Ehni. Dr. Strand reviewed the total of the records both prior to and post-accident. Dr. Ehni had not reviewed the medical records from prior to the accident and was not made aware of Claimant's full history. Dr. Strand did not believe that Claimant suffered any permanent impairment from the accident besides some range of motion loss. This finding is consistent with Claimant's medical records. It is in opposite to Claimant's expert, Dr. Murphy, who gave Claimant a 21% whole person impairment rating. Claimant's own treating physician Dr. Ehni did not believe there was any permanent impairment to Claimant and did not give any permanent work restrictions.

The remaining issues brought to hearing are in regards to permanent impairment, temporary total disability, payment of medical costs and future medical costs, interest on the unpaid compensation. In light of the causation ruling, these issues are considered moot.

Conclusion

In conclusion, the Department finds that Claimant has failed to meet his burden of showing that the work-related accident of January 28, 2008 was a major contributing cause of Claimant's current condition and his need for back surgery. Employer and Insurer are not responsible for costs associated with Claimant's medical care after Claimant's initial follow-up appointment with the Watertown Sanford Clinic. Based upon the record presented to the Department, Claimant's case is Dismissed.

Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Claimant shall have an additional 20 days from the date of receipt of Employer and Insurer's Findings of Fact and Conclusions of Law to submit Objections and/or 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, Employer and Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this _____ day of January, 2015.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

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Catherine Duenwald
Administrative Law Judge