SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JAMES GERLACH, **HF No. 210, 2004/05**

Claimant, **DECISION**

v.

STATE OF SOUTH DAKOTA,

Employer and Insurer.

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 May 3, 2006, in Pierre, South Dakota. James Gerlach (Claimant) appeared personally and through his attorney of record, Kit McCahren. Christina Fischer represented Employer and Insurer (Employer). The issues presented, as identified by the Prehearing Order entered on January 31, 2006, were TTD, PPD, PTD, medical expenses and causation.

FACTS

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

1. At the time of the hearing, Claimant was forty-nine years old and has lived in Pierre since 1970.
2. Claimant received his GED in 1974 and later attended Anoka Vo-Tech in Anoka, Minnesota, for two years pursuing a degree in horticulture.
3. Claimant's employment history including working as a laborer, cook and furniture mover. Claimant also operated a bar and restaurant for several years.
4. Claimant began working for Employer in November 1998 as a groundskeeper with the Buildings and Grounds Department. Claimant's employment involved duties primarily associated with maintaining the capitol grounds. Claimant periodically performed other tasks, including moving furniture, pouring concrete or laying sod. On most days, Claimant worked with Kevin Johnson.
5. Prior to September 2003, Claimant experienced pain and problems with his low back. Claimant also had a long history of face and neck problems. When he was younger, Claimant was affected several times by Bell's palsy on both sides of his body. Claimant has prolonged tinnitus in the left ear with some hearing loss. Claimant also had his spleen surgically removed.
6. In the late 1980s, Claimant fell off a ladder and he landed across the ladder with his low back. The injury did not bother Claimant much at the time.
7. On July 17, 2002, Claimant saw Dr. Thomas Huber complaining of pain developing in his low back that was getting worse. His pain was "referable to the low back in the sacral and parasacral areas." Dr. Huber stated, "[i]t is a problem

where he is immobile for a long time such [as] sitting and tries to get up it is stiff and it is sore and then will radiate around both sides for a little bit until he is walking around and then it will 'loosen up' a little bit and then the pain will get less." Claimant did not have radicular symptoms or lower extremity weakness.

8. Dr. Huber diagnosed Claimant with low back pain and ordered an MRI of the lumbar spine. The MRI was unremarkable as it showed minor spondylosis with no evidence of significant disc pathology.
9. On June 3, 2003, Claimant saw Dr. Jeff Monroe, chiropractor, for low back pain. Dr. Monroe noted, "Jim reports with grade 2/4 pain on the left, grade 1/4 on the right in the lumbosacral paraspinal area with radiation to the sacroiliac areas bilaterally. He has had low back pain on and off for a 'long time' which was recently aggravated."
10. Dr. Monroe diagnosed Claimant with a "mild residual lumbosacral strain and subluxation of sacrum." Dr. Monroe performed a chiropractic adjustment and instructed Claimant on stretching and icing at home.
11. Claimant saw Dr. Monroe again on June 10, 2003 and reported he felt about the same as he did on his last visit. Dr. Monroe followed the same treatment plan.
12. On June 13, 2003, Claimant saw Dr. Darrell Plumage, an internist, for his routine yearly VA examination. Dr. Plumage noted Claimant was "[p]ositive for low back pain, a 6 to 7 out of 10 at times."
13. Claimant saw Dr. Monroe on June 17, 2003, and reported he was feeling a little better. Dr. Monroe performed another adjustment and instructed Claimant to return on an as-needed basis.
14. On July 7, 2003, Claimant saw Gloria Bartlett, LPN, for a preventative medicine screening. Claimant informed Bartlett "he has arthritis in his lower back" and rated his pain as a 6 on a scale from 1 to 10.
15. On September 4, 2003, Claimant and Johnson were moving chairs and tables as part of their work duties for Employer. Claimant pulled on a stack of chairs and "wrenched [his] back." Claimant "felt a pull in [his] back" and mentioned to Johnson that he hurt his back.
16. Claimant and Johnson completed the work assignment and returned to the shop where Claimant appropriately reported the incident to his supervisor.
17. The next day, September 5, 2003, Claimant went to Dr. Monroe as his low back pain was increasing. Dr. Monroe stated, "Jim reports with grade 4/4 pain bilaterally in the L3-S1 paraspinal area with radiation to the gluteal and piriformis, posterior thigh and calf and feet. He experiences 'tingling' and 'numbness' in the feet. He attributes the symptomatology to an episode of stacking chairs into the back of a pickup during the course of his employment."
18. Dr. Monroe assessed Claimant with a moderate lumbar strain.
19. Dr. Monroe adjusted Claimant's L5 vertebra and recommended icing and stretching exercises at home. Dr. Monroe noted that Claimant's prognosis was "good barring relapses from normal ADL's."
20. On September 8, 2003, Claimant returned to see Dr. Monroe, who noted that Claimant had "decreased symptomatology in the legs and most of his discomfort is restricted to the low back on the left side." Dr. Monroe continued with treatment of adjustments, electrical muscle stimulation, icing and stretching exercises at home.

21. On September 18, 2003, Dr. Monroe noted Claimant was doing better, "however he has a constant low grade ache which is aggrevated [sic] by his ADL's and employment duties." Dr. Monroe assessed Claimant with mechanical low back pain in addition to the mild to moderate residual lumbar strain.
22. On October 14, 2003, Dr. Monroe noted that "Jim feels quite well today with a residual grade 1/4 pain bilaterally in the L4-S1 paraspinal area without peripheral radiation. He is able to perform his daily activities adequately and is able to perform his employment duties adequately." Dr. Monroe concluded that Claimant's mechanical low back pain was improved.
23. Dr. Monroe stated:

> I told him his problem will be a long-term management problem w.r.t. habits during his daily activities and other recommendations which will keep his low back healing long-term and keep him from being easily injured or having relapses.
>
> I believe Jim has good structural integrity but over time has developed joints which are slightly worn and can be aggravated and become painful although there seems to be no obvious structural damage such as fractures, frank dislocations, obvious disk problems or neurologic deficits.

24. Claimant's condition continued to improve.
25. On October 28, 2003, Dr. Monroe stated, "[h]e still has a constant low-grade ache and is being careful, both in his employment and at home, to apply ergonomics which prevent undue strain and exacerbation of his pain." Dr. Monroe instructed Claimant to continue with his home exercises.
26. Dr. Monroe noted, "Jim seems happy with his progress and we tell him if he manages the situation correctly he can eventually learn to keep the pain to a minimum and still be able to perform all of his employment and home duties as he wishes. Barring any relapses or serious exacerbations, Jim should be able to recover reasonably and function normally although he can expect occasional episodes of pain."
27. On October 31, 2003, Dr. Monroe found that Claimant had "continuing low grade pain in the low back on a regular basis without any obvious symptomatology in the extremities." Claimant was also "walking essentially normally with his normal slight forward list."
28. Dr. Monroe instructed Claimant to return for treatment as-needed. Dr. Monroe stated, "I have counseled Jim on treatment alternatives and told him that with the forming of proper ergonomic and physical activity habits he can remain in reasonable comfort with occasional need for treatment in times of relapse. He seems content to manage his low back as he presently is."
29. On November 19, 2003, Claimant saw Dr. Plumage for complaints related to dyspepsia, seasonal depression and smoking cessation. Claimant smoked approximately one to two packs of cigarettes per day. Claimant did not make any complaints of back pain to Dr. Plumage during this appointment.
30. Claimant did not receive any further treatment for his low back until March 2004.

31. On March 11, 2004, Claimant returned to see Dr. Monroe with mild to moderate low back pain. Dr. Monroe noted, "[d]uration is about one to two days, before that he has been feeling quite well since his last visit in October of 2003."
32. Dr. Monroe found that Claimant did not have lower extremity symptomatology and that he did "not recall a specific precipitating incident regarding his recent increase in pain."
33. Dr. Monroe assessed Claimant with a mild residual lumbar strain and treated with an adjustment, electrical muscle stimulation and icing as needed.
34. Claimant returned to see Dr. Monroe on March 18, 2004. Claimant felt better from his last visit. Dr. Monroe noted, "Jim is making good progress considering the degenerative nature of his lower lumbar spine and can be expected to need occasional, however infrequent, care in the future."
35. During the spring and summer of 2004, Claimant experienced an increase in low back pain while performing work activities for Employer. During this time, Claimant also began to experience leg weakness. Claimant rode a tractor in order to perform his job duties. After riding on the tractor all day, Claimant felt clumsy when he got off because his hips, butt and legs "were just numb."
36. Claimant sought medical treatment from Dr. Monroe due to increased pain and weakness.
37. On April 29, 2004, Dr. Monroe noted, "Jim reports with an exacerbation of his previously improving condition. He had pain on the left in the L3-S1 area grade 3/4, and on the right grade 2/4. He has occasional pain radiation into the thighs and legs bilaterally. He was doing very well until about 2 weeks ago when he was riding frequently on a piece of equipment at his place of employment and began to become symptomatic again. Pain has been increasing over the last couple of weeks and is severe enough to interfere with his normal sleep pattern and his normal daily activities."
38. Dr. Monroe assessed Claimant with a mild to moderate residual lumbar strain. Dr. Monroe performed an adjustment and recommended Claimant use ice at home as needed.
39. On May 5, 2004, Claimant returned to see Dr. Monroe complaining of "'gimping around' and says it is impossible for him to do work on the tractor as he is accustomed." Dr. Monroe noted that Claimant had "grade 3/4 pain across the L3-S1 paraspinal area with frequent radiation down his legs and associated leg weakness."
40. Dr. Monroe recommended Claimant undergo an MRI due to persistent low back problems.
41. An MRI of Claimant's lumbar spine was performed on May 5, 2004, which was unremarkable and showed no evidence of encroachment or herniation.
42. On May 10, 2004, Claimant returned to see Dr. Monroe with low back pain and "a mild ache radiating to the left thigh and leg." Dr. Monroe noted that Claimant's low back pain was better with rest and was made worse "by using his back for extended periods of time." Dr. Monroe recommended a TENS unit for Claimant.
43. On May 11, 2004, Dr. Monroe wrote to Lynn Job, Employer's Workers' Compensation Administrator, and stated, "I believe the visits to date are all related to Jim's occupational injury or an exacerbation thereof as the symptomatology and diagnosis are essentially the same and congruent in time."

44. On May 14, 2004, Claimant saw James Hardwick, PA-C for Dr. Plumage. Claimant complained of lower left side back pain with some occasional left leg weakness. PA Hardwick ordered physical therapy for Claimant.
45. From May 17, 2004, through June 4, 2004, Claimant participated in a course of physical therapy for his low back pain. He was discharged to a home exercise program because he was doing quite well.
46. Claimant saw Dr. Plumage on June 2, 2004, who diagnosed mechanical low back pain and prescribed Flexeril.
47. Claimant returned to see Dr. Monroe on July 21, 2004. Claimant reported an aching sensation in his thighs, but he did not have numbness or weakness in his lower extremities. Dr. Monroe performed an adjustment and recommended Claimant return as-needed.
48. On August 4, 2004, Claimant saw Dr. Plumage for left back pain and pain over the left SI joint. Dr. Plumage stated, "[d]oes not appear to be any evidence of neurologic dysfunction extending down the leg. He notes recent chiropractic treatment having caused some worsening of the pain; however, it is stabilized at present. It is causing a marked disability with his functioning at work. He is employed as a grounds keeper for the State of South Dakota; riding in little carts all day long does make his pain worse and weakness when he tries to ambulate from them. I am unable to find any significant dysfunction today."
49. Dr. Plumage assessed Claimant with sacroiliitis and injected the left SI joint. Dr. Plumage considered a referral to rheumatology if Claimant's condition did not improve.
50. On August 25, 2004, Claimant followed up with Dr. Plumage for left back pain with bilateral lower extremity pain. Claimant complained to Dr. Plumage for the first time that he had developed some leg weakness. Claimant indicated his pain was made worse by sitting or riding his motorcycle. Dr. Plumage noted, "[Claimant] describes a weakness involving the upper and lower extremities now. Gotten significantly worse during his time at the bike rally."
51. Dr. Plumage assessed Claimant with left back pain with bilateral lower extremity numbness and weakness. Dr. Plumage referred Claimant to a neurologist as he was "[u]ncertain as to where to proceed." Dr. Plumage stated, "[w]ill try another course of prednisone taper; however, I am not finding significant inflammation or even reproducible discomfort. Await additional neurology input."
52. Dr. Plumage also ordered a whole body bone scan, which was conducted on September 1, 2004. The whole body bone scan was negative.
53. On September 2, 2004, Dr. Plumage saw Claimant again due to progressive weakness. Dr. Plumage stated, "he has been seen on August 4, 25, 26, and again today. Symptoms have been progressing. He notes that in August he was able to load and move his motorcycle to the Sturgis Bike Rally. Pain became progressive over the week. Describes the pain as a left lateral leg pain and left hip pain quite severe in nature." Dr. Plumage continued, "[o]n exam, we find nothing; however, when walking down the hallway he did have an episode of weakness and was unable to ambulate additionally until a rest of about three to four minutes."

54. Dr. Plumage continued to assess Claimant with back pain and weakness, but again, was "[u]ncertain as to what [to] make of the overall progressive weakness."
55. On September 7, 2004, an MRI was performed of Claimant's brain, which was normal.
56. Also on September 7, 2004, Dr. Robert MacLachlan, neurologist, saw Claimant for a consultation regarding low back stiffness, pain and leg weakness. Dr. MacLachlan reviewed Claimant's history and performed an examination. Dr. MacLachlan noted that Claimant had full range of motion of the cervical spine, lumbar spine and of his lower extremities. Dr. MacLachlan also reviewed Claimant's brain MRI and the May 2004 lumbosacral MRI, both of which were normal.
57. Dr. MacLachlan concluded, "[t]he patient's neurological examination is normal. The [MRI] study of the brain and lumbosacral spine are unremarkable, though I cannot entirely exclude the possibility of a mass or plaque in the cervical thoracic spine which is responsible for his leg symptoms."
58. Dr. MacLachlan recommended Claimant undergo an MRI of the cervical spine and if the study was normal, that Claimant be referred for physical therapy.
59. On September 8, 2004, Claimant saw Dr. Steven Goff for an evaluation of his back pain. Dr. Goff reviewed Claimant's history and performed an examination.
60. Dr. Goff stated:

> He gives a history of last fall injuring his back. He said at the time he was unloading chairs or pulling on some stacks of chairs, and he felt something in his left low back, and he developed left low back pain, which has been present with him ever since. The pain has been anywhere from moderate to severe; however, up until a month or so ago, he said he did continue to work. Up until then, the pain was the main issue. His pain did not radiate. It tended to be worse if he sat wrong, moved wrong, twisted, lifted and so on. It was relatively better in a sitting position if he leaned towards the right, taking the weight off of the left pelvis. Lying down was not well tolerated either. Then about a month ago he said he received an injection into the area. He thought it was cortisone. For several days, his pain felt better. Following that, he developed some unusual symptoms with what he called a feeling of vibration intermittently in his legs. He had problems with position changes and felt unbalanced, even though he had no head symptoms. He had trouble walking around.

61. Following the examination, Dr. Goff concluded, "I cannot connect the leg symptoms that [Claimant] explains with the back pain directly. I am not sure what is generating his back pain either. It seems mostly sacroiliac; however, I could not confirm this."
62. Dr. Goff recommended that Claimant follow up with a neurologist "and make sure that there is nothing intraspinal, producing these unusual leg symptoms."
63. On September 10, 2004, an MRI of the cervical spine was performed, which showed "[m]ild posterior disc bulge of C6-7 with the possibility of some very mild

cord abutment without evidence of nerve root displacement. No herniated discs, critical central canal stenosis, or other definite abnormalities are seen."

64. On September 14, 2004, Dr. Luther performed a medical records review of Claimant's medical history. Based upon his review of Claimant's medical records, Dr. Luther was unable to conclude whether Claimant's employment was a major contributing cause of the low back pain and need for treatment beginning again in March 2004. Dr. Luther stated:

> It was mentioned that the patient was at his pre-injury status by Dr. Monroe. However, on his last visit in 10/31/03, Dr. Monroe states that the patient is slowly showing stability of his symptoms neither showing great improvement nor not getting any worse. He was instructed on stretching exercises and according to the record he was not seen again until 03/11/04. Given that time-frame it would be my opinion [that] this patient more than likely sustained a new and independent injury, however this would be nearly impossible to state with a reasonable degree of medical certainty. However there is information that the patient achieved a plateau and reached pre-injury status.

65. Dr. Luther recommended Claimant's "best course of treatment would be a lumbar stabilization, through physical therapy, which he apparently has already completed."
66. On September 28, 2004, Claimant went to the emergency room at Sioux Valley Hospital in Sioux Falls. Claimant complained of chronic back pain, worse since May 2004. Dr. Christopher Carlisle examined Claimant and noted that Claimant was ambulating with a cane and appeared to have a limp in his gait.
67. Claimant decided to use a cane due to his balance problems. No doctor prescribed the cane for Claimant to use.
68. Dr. Carlisle referred Claimant to Breakthrough Pain Relief Clinic in Sioux Falls for possible SI joint injection and to discuss pain management issues.
69. On September 29, 2004, Dr. Victoria Gerhart, specialist in pain management at the Breakthrough Clinic, assessed Claimant's low back pain, balance problems and leg weakness. Dr. Gerhart stated, "[t]he evaluation showed that there were areas of nerve, muscle and joint dysfunction contributing to the pain and discomfort that [Claimant was] experiencing." Dr. Gerhart performed a left SI joint injection, prescribed medication and recommended ten sessions of physical therapy.
70. Claimant participated in the physical therapy sessions "with excellent progress in objective findings as well as related personal goals."
71. On October 25, 2004, Dr. Gerhart recommended that Claimant return to work with a 50 pound lifting restriction. Dr. Gerhart also had Claimant continue with physical therapy.
72. Between September 2004 and January 28, 2005, Claimant participated in thirty-four physical therapy sessions and nine chiropractic sessions at the Breakthrough Clinic.
73. Claimant returned to work on October 26, 2004, and "noticed a significant decrease in discomfort overall."

74. Claimant's symptoms were much improved until mid-November 2004 when he reported increased bending, lifting and twisting at work associated with decorating for Christmas.
75. On November 29, 2004, Dr. Gerhart recommended Claimant stop working. Dr. Gerhart noted, "[Claimant] took huge step back in past week or two because of legs - more coordination not pain. Pain not main issue now."
76. Claimant returned to see Dr. Monroe on December 14, 2004. Dr. Monroe stated, "Jim reports in very unstable condition, he denies all pain, however he has an extremely difficult time standing and an extremely difficult time walking." Dr. Monroe thought Claimant needed a more extensive neurological work-up.
77. On December 16, 2004, Dr. Luther performed an independent medical examination (IME) of Claimant. Dr. Luther examined Claimant and reviewed his medical records. Dr. Luther noted that Claimant's "main symptoms appear to be focused around the weakness and an inability to control his legs."
78. Dr. Luther testified:

> As I recall his examination, he did not appear to have any antalgia, that's an abnormal gait when he walked, at least what I had visualized. He was cooperative and did not appear to be in any distress. And I really did not come up with any substantial objective findings on my physical examination, other than Mr. Gerlach was unable to heel walk, he was unable to what we refer to as dorsiflex or lift the toe up to walk on the heels. That's a common test that we do to assess strength and he said he was unable to do that because he had weakness in his leg. And he was unable to do tandem gait, which is just basically walking, and he would list from side to side and had subjective balance problems for which I did not have an objective answer for.

79. Based upon his evaluation, Dr. Luther did not have a medical explanation for Claimant's weakness and inability to control the lower extremities and agreed that a second neurological opinion was appropriate.
80. Dr. Luther opined that further chiropractic and physical therapy would not be medically necessary, but recommended that Claimant continue with his exercises at home.
81. Dr. Luther opined:

> It is my medical opinion based upon a reasonable degree of medical certainty that [Claimant's] occupational injury [in September 2003] is not a major contributing factor to the symptoms that he has at this point. My opinion is based on the fact that he has had negative imaging studies including normal MRIs. His injury would have been most consistent with a lumbar strain or sprain, and in my opinion there would have been ample recovery time, and that the patient would be at maximum medical improvement for his [September 2003] industrial injury.

82. On December 22, 2004, Dr. Gene Koob, a neurologist in Sioux Falls, examined Claimant to assess his gait abnormalities. After reviewing Claimant's medical

history and physical examination, Dr. Koob assessed Claimant with lumbosacral discomfort with secondary radiation of pain into his legs. Dr. Koob found "no evidence of neurologic damage at this time."

83. Dr. Koob concluded, "[t]here was no evidence of spinal cord, nerve, or nerve root phenomena. With the ability to do his Romberg and tandem walking and the normality of studies done in the lying down position, as well as the normal exam of the muscles and reflexes, there is no evidence on the clinical exam of any type of neurologic injury in this individual."
84. Dr. Koob stated, "I did carefully review the MRIs that were provided to me. Those of the cervical spine do show posterior bulging of C6-7. There is no cord effacement and no abnormalities of the nerve roots seen. The MRI of the thoracic spine shows no lesions. The MRI of the lumbosacral spine shows no lesions and the MRI of the brain shows no lesions. The nerve conduction studies have been somewhat variable, but they would not specifically be related to a back injury in his symptom complex." Dr. Koob recommended strengthening exercises for Claimant's back and legs and a course of therapy designed to improve his coordination and balance.
85. In his medical records, Dr. Koob did not provide an opinion as to the causation of Claimant's condition.
86. Dr. Luther had the opportunity to review Dr. Koob's records and other lab results. Dr. Luther opined that "further treatment would not be related to [Claimant's] 9/4/03 injury. Based on my evaluation and Dr. Koob's evaluation, there is no physiologic or organic reason for his ongoing symptoms." Dr. Luther reiterated that Claimant needed only a home exercise program and that he was at maximum medical improvement (MMI) as related to the September 2003 injury.
87. On January 19, 2005, Dr. Gerhart performed a second left SI joint injection.
88. Claimant was discharged from physical therapy due to lack of progress on January 28, 2005.
89. On February 3, 2005, Brian Malone, PT, conducted an initial evaluation to assess Claimant for further physical therapy sessions. PT Malone noted Claimant's "current problems are not back pain but severe leg pain, weakness, dizziness, unsteadiness, and poor balance." PT Malone concluded, "I am unsure of plan of care secondary to the patient's severely complex history and unsure of treatment secondary to no true diagnosis. It is hard to give a prognosis when there is no diagnosis."
90. Claimant participated in another six sessions of physical therapy.
91. Claimant returned to see Dr. Plumage on February 11, 2005, to discuss further options related to his intermittent right back pain with ataxia. Dr. Plumage referred Claimant for an appointment with a pain management specialist.
92. On February 16, 2005, Dr. Plumage completed a Physician's Evaluation form for the South Dakota Retirement System (SDRS) (also referred to as an SDRS Form D-2). On the SDRS Form D-2, Dr. Plumage stated that Claimant's diagnosis was "1) chronic pain; 2) ataxia; [and] 3) weakness." The form asks, "Under what conditions or with what accommodations, if any, could this patient perform his or her usual duties?" Dr. Plumage responded, "None, he has pain & ataxia associated [with] limited exertion. Unknown etiology." Dr. Plumage also indicated that Claimant had been disabled since August 2004.

93. Dr. Gerhart also completed a Physician's Evaluation SDRS Form D-2 on February 16, 2005. Dr. Gerhart noted, "[Claimant] experiences significant aggravations & flare-up [with] bending, lifting, twisting, carrying & prolonged standing/walking." The SDRS Form D-2 asked, "If the condition is due to injury or sickness arising out of patient's employment, check here." Dr. Gerhart checked the box, "Yes." There is no foundation for this opinion.
94. Dr. Mark Simonson, a physician at the Rehab Doctors in Rapid City, reviewed Claimant's medical records on February 23, 2005, to assess pain and balance issues. Dr. Simonson also took a history from Claimant during the appointment, but did not perform a physical examination.
95. Dr. Simonson noted that Claimant had "an extensive and complicated history of, what he reports as, a back related injury and problems ever since which includes pain, paresthsias, gait imbalance and weakness in the lower extremities. This has been extensively evaluated at this point."
96. Dr. Simonson diagnosed Claimant with "[l]ower extremity and lower body pain and paresthesias, complaints of ataxia and weakness, etiology unclear."
97. Dr. Simonson stated, "[a]s I frankly discussed with Mr. Gerlach and his wife, after review of his outside records, I do not have any further insights as to what may be the problem here. I agree with Dr. Plumage's thoughts about getting into the Mayo Clinic. Any further evaluation could be in the form of more extensive neurologic consultation, and I would definitely recommend [a] complete psychiatric evaluation."
98. Dr. Koob completed a Physician's Evaluation SDRS Form D-2 on March 3, 2005. Dr. Koob indicated that Claimant's diagnosis was "[l]umbosacral discomfort with secondary radiation of pain into his legs/previous radiculopathy/complaints of unsteadiness and balance." Dr. Koob also checked the box "Yes" to indicate that Claimant's condition "is due to injury or sickness arising out of patient's employment." There is no foundation for this opinion.
99. Dr. Simonson also completed a Physician's Evaluation SDRS Form D-2 on March 7, 2005. Dr. Simonson stated that Claimant's diagnosis was "unknown to me – complaints of pain and numbness and balance difficulties. I recommended evaluation elsewhere."
100. On March 7, 2005, Claimant went to the Emergency Department at Mayo Clinic for a "second opinion" due to progressive weakness and unsteadiness. Dr. Peter Smars concluded Claimant's problems were beyond the scope of the Emergency Department and arranged for an appointment with an internist.
101. On March 8, 2005, Dr. John Paat, an internist, reviewed Claimant's medical history and performed an examination to evaluate his gait difficulties. Dr. Paat's physical examination of Claimant was unremarkable.
102. Dr. Paat diagnosed Claimant with "[l]ower extremity symptoms including paresthesias, altered gait." Dr. Paat stated, "[i]n the absence of a mechanical cause, we discussed the possibility of an underlying peripheral neuropathy."
103. Dr. Paat recommended Claimant undergo additional testing and consultations with other specialists at Mayo Clinic.
104. As part of the battery of testing, Dr. Shelley Cross, neurologist, consulted with Claimant to assess his gait abnormality. Dr. Cross took an extensive history from Claimant and performed a physical examination. Dr. Cross stated, "I questioned

myself about whether there might be an element of la belle indifference, but I am not really convinced about this." Dr. Cross could not make a neurological diagnosis and stated, "[t]his does not look like a recognizable neurological abnormality."

105. Claimant followed up with Dr. Paat on March 18, 2005, after the additional testing and consultations. Dr. Paat noted that Claimant's "extensive work up remains indeterminate. His initial presentation related to back pain, however, there [are] no significant findings that would specifically account for all his current symptoms and degree of disability."
106. Dr. Paat discharged Claimant and suggested a repeat evaluation in three to four months. Dr. Paat did not and could not proffer an opinion as to the causation of Claimant's condition.
107. Claimant returned to see Dr. Plumage on April 7, 2005. Dr. Plumage noted:

> He has recently completed his evaluation with the Mayo Clinic again without significant findings. Was felt that the injury was certainly work-related in nature. The onset was acute following the initial back injury and then subsequent exacerbations. Would have to agree. He has seen various neurologists and physical therapists with conflicting opinions. Being here throughout the entire course, I also feel that it is related to work injury and then subsequent exposure causing progressive difficulties. Continues with intermittent ambulatory difficulties and chronic pain.

108. Dr. Plumage assessed Claimant with chronic pain syndrome and gait abnormalities. Dr. Plumage prescribed medication and advised Claimant to pursue various avenues of additional training.
109. On April 22, 2005, Dr. Plumage saw Claimant and found that after "starting [Claimant] on the prednisone and Neurontin combination [he] has felt remarkably better."
110. On April 29, 2005, Dr. Plumage noted that Claimant no longer had "significant improvement on his medications." Claimant preferred to "continue the way things are going."
111. On May 27, 2005, Dr. Plumage saw Claimant again and noted, "[h]e has had intermittent and continuously progressive symptomatology. Notes that his balance is worse than it has been in the past. He has been evaluated by three neurologists, last being at the Mayo Clinic. They have recommended only just conservative followup." Dr. Plumage also concluded that "[s]ymptoms of ataxia continue. He has intermittent periods of weakness and pain. Pain appears to be the least of his problems at the present."
112. On June 21, 2005, Claimant saw Dr. John Tulloch, neurologist, in Minneapolis, Minnesota, for an assessment of his balance problems. During the physical examination, Dr. Tulloch noted:

> As this gentleman walks, he employs a cane. He has a marked right list and tilt as he walks. He does not use the cane in functional fashion, i.e. he does not bear weight on it. Although he has a considerable lean and weaves a bit back and forth, he does not fall. He can hop on each foot

> independently. He can walk backwards. He can walk forwards in tandem fashion.

113. Dr. Tulloch concluded:

> Mr. Gerlach appears for a fourth opinion concerning his various symptoms. His gait problems are rather dramatic, but he has no abnormalities on neurologic exam to explain the gait problems . . . Prior electrophysiologic testing has really not suggested a peripheral neuropathy. His autonomic testing abnormalities at the Mayo Clinic might suggest a small fiber disorder. I do not see how a small fiber neuropathy would account for his major symptom of gait disturbance, however. He has had a lot of treatment for chronic pain, but he exhibited very few pain behaviors in the office and, at present, he is not on a pain control regimen. I cannot think of any additional useful diagnostic measures. Although he has received much physical therapy I suggest more therapy concentrating specifically on this gentleman's gait complaints to see if therapy could provide any help. In answer to this gentleman's principal question as to what his diagnosis might be, I am unable to provide a definitive response. I do not believe we will find an organic neurologic condition.

114. On October 31, 2005, Dr. Gerhart opined Claimant had a seven percent whole person impairment taking into account "both the gait disorder and the pain disorder." Dr. Gerhart's impairment rating was incomplete. Dr. Gerhart did not indicate what version of the AMA Guides to Evaluation of Permanent Impairment she used to determine Claimant's whole person impairment and Dr. Gerhart did not explain how she derived the rating.
115. Claimant has not experienced any improvement of his condition and has been unable to return to work since the end of November 2004.
116. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT'S CURRENT CONDITION IS CAUSALLY RELATED TO HIS SEPTEMBER 2003 WORK-RELATED INJURY?

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). Under SDCL 62-1-1(7), Claimant must establish he suffered an injury arising out of and in the course of his employment, and, by medical evidence, establish that his employment or employment related activities were a major contributing cause of his condition. "'Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained.'" Wise v. Brooks Constr. Serv., 2006 SD 80, ¶ 17 (citations omitted). "'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.'" Id. (citations omitted). "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). "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).

The medical evidence established Claimant suffered a compensable, work-related injury in September 2003. Dr. Luther opined Claimant's work was a major contributing cause of his low back strain in September 2003. Dr. Luther concluded Claimant received appropriate chiropractic treatment for this condition in September and October 2003. At the end of October, Claimant had low grade pain in his low back with no radiation in the lower extremities. Dr. Monroe expected that Claimant "should be able to recover reasonably and function normally although he can expect occasional episodes of pain." Claimant continued to work for Employer and did not receive treatment for his low back from November 1, 2003, through March 11, 2004. In February 2004, Dr. Monroe indicated to Employer that he had not seen Claimant in quite a while. Dr. Monroe stated, "[i]f he has not returned because he is feeling well, then I would say he has reached pre-injury status."

The dispute here is whether Claimant's current condition is causally related to the September 2003 work-related injury. In the spring and summer of 2004, Claimant experienced an increase of back pain while performing his job duties. During this same time frame, Claimant began to experience new symptoms of gait difficulties and lower extremity weakness. Claimant did not experience these symptoms after the September 2003 work-related injury. Beginning in August 2004, the focus of Claimant's treatment shifted from low back pain to the problems associated with gait abnormalities and leg weakness. Several physicians noted that pain was not Claimant's main issue, but his main complaints concerned problems with his legs and balance.

Claimant has seen a myriad of physicians, many of them specialists, regarding his subjective complaints. Not one qualified physician has provided a diagnosis for Claimant's subjective complaints. Dr. Plumage was unable to determine a diagnosis for Claimant's subjective complaints and "was uncertain what to make of the overall progressive weakness." Dr. Goff could not connect Claimant's leg symptoms with the back pain. Dr. Goff was also unsure as to what was generating Claimant's back pain. Dr. Simonson had no insights to offer as to what may be causing Claimant's problems. Claimant was evaluated by several different medical professionals at the Mayo Clinic. No definitive diagnosis was made. Dr. Paat opined that while Claimant's initial presentation related to back pain, there were no significant findings that would account for all of Claimant's current symptoms and degree of disability. Dr. Tulloch could not provide a definitive response as to what Claimant's diagnosis might be and did not believe his symptoms were as caused by an organic neurological condition.

Claimant offered no affidavits or deposition testimony into evidence. The parties stipulated to receipt of Claimant's medical records into evidence. In most instances, each physician's qualifications are unknown. At best, the medical records indicate only the specialty of the physician. Claimant relied upon various opinions expressed by Dr.

Plumage, Dr. Gerhart, Dr. Koob and Dr. Monroe in the medical records. Employer relied upon the live testimony of Dr. Luther presented at the hearing.

Dr. Luther is a self-employed independent physician and medical exam specialist with over twelve years of experience. Dr. Luther is the medical director and sole proprietor of workFORCE Occupational Health Services. Dr. Luther is Board Certified in Internal Medicine and Emergency Medicine. Dr. Luther is also a certified Independent Medical Examiner and a certified Medical Review Officer. Dr. Luther is certified in evaluation of disability and impairment ratings by the American Association of Disability Evaluating Physicians and is certified in interpretation of functional capacity evaluations. Dr. Luther's practice focuses on treating acute industrial workers' compensation injuries. Dr. Luther spends approximately twenty-five percent of his time performing IMEs and disability and impairment ratings.

Prior to testifying at the hearing, Dr. Luther generated three reports based on his examination of Claimant and based on his various reviews of all of Claimant's medical records. Dr. Luther found it significant that, throughout Claimant's extensive treatment, he could not find a "clear cut diagnosis for any of [Claimant's] maladies." Dr. Luther noted that various physicians had "impressions, and those impressions were chronic low back pain, sacroiliitis and references to subjective complaints, not so much an objective diagnoses, it was all impressions really." Dr. Luther explained it is very difficult to determine causation without being able to determine a diagnosis. Dr. Luther testified:

> We have to first assess the subjective complaints. The subjective complaints drive our workup and that workup includes gathering as much objective evidence as you possibly can, and that can be anything from a blood draw to diagnostic surgery. And in Mr. Gerlach's case, there was rather extensive workup trying to assess the reason for his coordination, he was referred to as having ataxia. The workup included systematic workups to rule out things such as metabolic problems, infectious disease problems, neurological disorders such as multiple sclerosis, among others, and none of which was ever discerned out or objectively assessed.

Dr. Luther added it is hard to give a prognosis when there is no diagnosis because "unless you know what you are dealing with, you will have a difficult time forecasting return to baselines, impairments, disabilities, functional capacity, et cetera."

When Dr. Luther examined Claimant in December 2004, Dr. Luther could not discern "any substantial objective findings upon my physical examination, other than Mr. Gerlach was unable to heel walk, he was unable to what we refer to as dorsiflex or lift the toe up to walk on the heels." Dr. Luther found that Claimant "was also unable to do tandem gait, which is just basically walking, and he would list from side to side and had subjective balance problems." Again, Dr. Luther did not have an objective answer for Claimant's problems.

Dr. Luther noted that the Claimant was evaluated extensively at the Mayo Clinic. The initial impression of Claimant's condition at the Mayo Clinic "included the possibility of an underlying movement disorder[.]" But, it was found that "the patient's clinical picture and physical findings were inconsistent." Dr. Luther also reviewed Dr. Cross' findings. Dr. Luther found it significant that there were no objective neurological findings noted on the examination. In addition, Dr. Cross noted there were some balance

problems, but she "really could not describe those." Dr. Cross wondered if there was some la belle indifference. Dr. Luther explained:

> In my impression of - - you don't see that term used very much. It's basically a descriptor that they are not quite sure what is going on. There is a line that hasn't been crossed yet between what's functional or nonorganic and what is something that is real, and they are not quite there yet.

Dr. Cross performed an extensive workup of Claimant's condition and she could not deduce a reason for his subjective complaints. Dr. Luther agreed with the findings from the Mayo Clinic. Dr. Luther acknowledged Claimant's initial complaints related to back pain. However, there were "no significant findings that would specifically account for all of his current symptoms and degree of disability."

Based upon his examination of Claimant and review of all of Claimant's medical records, Dr. Luther opined:

> [I]t is my medial opinion, based upon a reasonable degree of medical certainty, that his occupational injury is not a major contributing factor to the symptoms that he has at this point. And my opinion was based on the fact he's had imagining studies, including normal MRI scans . . . his injury would have been most consistent with a lumbar strain or sprain, and in my opinion, there would have been ample recovery time and that the patient would have been at maximum medical improvement for his industrial injury.

Dr. Luther opined there is no further treatment needed for Claimant regarding the September 2003 incident.

Dr. Luther could not find a medical reason for Claimant's pain complaints. Dr. Luther testified:

> [A]s I had indicated, the mechanism of the injury, the original injury described by Mr. Gerlach as occurring originally would have been consistent, in my opinion, with some sort of a soft tissue strain, whether it was in the ligaments, into a tendon, the sacroiliac joint, all of which had been entertained. It's difficult to identify [a] pain generator in the lumbar spine. That's why our workup will consist of all that we do and that's plain X-rays, imaging, electrodiagnostic studies, all trying to discern out what is causing a person's pain. We are looking for an objective pathology because that's what we want to find so we can fix something. When a patient is left with residua that is described as subjective pain without objective findings, that then is left, in my opinion, to the individual's perception, the individual's capacity, from which we can measure objectively, and once that is done, then we can place them back into the work environment. If they are left with pain, sometimes we have to conclude, and as frustrated as the patient is, that there's nothing more we can do.

Dr. Luther further testified:

Q: Have you been able to determine based on all of these records and your interview whether Mr. Ger - - have you been able to ascertain causation of Mr. Gerlach's - -

A: No, I have not, and that opinion again is based on what we know as far as all the imaging studies, the lack of response to treatments, including I understand now he's on Lyrica, which is a medication indicated for neuropathic pain, and apparently is not helping him. Those all lead me to believe that all the investigative studies and attempts at finding a diagnosis have been exhausted and there isn't an objective explanation for those complaints.

Dr. Luther acknowledged that Claimant suffered from pain after riding on equipment at work in the spring of 2004 and that he has treated continuously since that time. But, Dr. Luther could not opine on Claimant's causation as he stated, "all I can say is that an event could have caused a condition, that's all I can say." Dr. Luther could not determine whether Claimant sustained a new injury in 2004 or if he suffered an aggravation of the September 2003 injury. Dr. Luther opined, "I think it would be impossible to say one way or another, given the time frame and lapse of any documentation that I could review objectively." Dr. Luther testified:

Q: Dr. Monroe found he began to become symptomatic again after riding on the equipment.

A: Again.

Q: Right. So that would - - if it's again, would that lead you to conclude that that would be an aggravation of the original injury?

A: I still think that's superfluous inasmuch as you can't discern out objectively when he says his pain started again. He had back pain that was antecedent to the April injury. I don't know if it's a continuation of that discomfort that was in the documents or not.

Q: But there was a distinct injury in September of '03 that was witnessed by a coworker.

A: I concede that, yes.

Q: There was continuing obvious pain to the coworker through '04.

A: Until October of '03. The last documentation we have from Dr. Monroe had indicated that he still had pain and that they were going to - - I'm surmising out of what Dr. Monroe was trying to relate at that last visit, that if he had ongoing pain, then he would come back and he would be evaluated. And in the correspondence between Ms. Job and Dr. Monroe, when she specifically asked basically was he at his preinjury status, he was unable to tell that as well because there was no treatment required.

Dr. Luther continued:

Q: So today you can't offer an opinion as to whether the '04 conditions were a new injury on aggravations of the prior injury?

A: Nor can I conclude that it's related to an injury that dated back to the 1980s. I think it's the same weight in terms of trying to assess that

> information. If you look at the record, again it drops off. The records that I had seen back even June 13th of '03, Dr. Plumage had seen him for a health maintenance physical and the review of systems, which is something we gather for the overall process, he had indicated that he was having low back pain at a level of six to seven over ten at times and that even prior to that when he had saw Dr. Huber on July 17th, 2002, that he was seen for pain in his low back, which has been getting worse. I don't know if that injury is a significant or major contributing factor to his current condition, nor could I say the September 2003 or what had happened in April of 2004.

Ultimately, Dr. Luther could not opine that Claimant's work was a major contributing cause of any injury or condition beginning in the spring of 2004.

Claimant relied upon opinions expressed by Dr. Plumage, Dr. Gerhart, Dr. Koob and Dr. Monroe. None of these physicians specifically opined that Claimant's work was a major contributing cause of his current condition. On the Physician's Evaluation SDRS Form D-2, Dr. Gerhart and Dr. Koob each opined that Claimant's "condition is due to injury or sickness arising out of patient's employment[.]" SDCL 3-12-142 provides, "[a]n application for disability benefits pursuant to this chapter [Retirement System], any associated evidence and documents, and the disability determination and decision related thereto shall be inadmissible and nondeterminative for any associated proceeding relative to Title 62." Even though the parties stipulated to the foundation of all of Claimant's medical records, the SDRS Physician's Evaluation forms are inadmissible and cannot be used in this workers' compensation proceeding.

In addition, Dr. Gerhart's and Dr. Koob's opinions lack foundation. Dr. Koob never expressed any opinion as to the causation of Claimant's condition in his one medical record from December 2004. Similarly, Dr. Gerhart did not opine as to the cause of Claimant's condition in her treatment records. Neither Dr. Gerhart nor Dr. Koob fully reviewed all of Claimant's medical records. Dr. Gerhart's and Dr. Koob's opinions are rejected.

In April 2005, Dr. Plumage opined Claimant's injury was work-related. Dr. Plumage stated:

> He has recently completed his evaluation with the Mayo Clinic again without significant findings. Was felt that the injury was certainly work-related in nature. The onset was acute following the initial back injury and then subsequent exacerbations. Would have to agree. He has seen various neurologists and physical therapists with conflicting opinions. Being here throughout the entire course, I also feel that it is related to work injury and then subsequent exposure causing progressive difficulties. Continues with intermittent ambulatory difficulties and chronic pain.

Dr. Plumage's opinion lacks foundation. No physician at the Mayo Clinic "felt that the injury was certainly work-related in nature." The physicians at Mayo Clinic could not and declined to determine the nature of Claimant's condition, let alone the cause. In addition, when Claimant treated with Dr. Plumage, his complaints related to increasing weakness and balance problems in the lower extremities. These complaints were

different than the symptoms Claimant experienced after the September 2003 injury. Dr. Plumage's opinion is rejected.

On May 11, 2004, Dr. Monroe wrote to Employer that, "I believe the visits to date are all related to [Claimant's] occupational injury or an exacerbation thereof as the symptomatology and diagnosis are essentially the same and congruent in time." Dr. Monroe last treated Claimant on December 14, 2004. Dr. Monroe did not review all of Claimant's medical records, including his extensive diagnostic workup at the Mayo Clinic. Dr. Luther could not determine the basis for Dr. Monroe's opinion except to say that he assumed Dr. Monroe based his opinion for causation on Claimant's subjective pain complaints. Dr. Luther explained:

> Q: [C]an you say with a reasonable degree of certainty what caused Mr. Gerlach to have that pain of riding on the tractor?
> A: No, I cannot. I don't know if it's a degenerative condition again related to his prior injury predating the September [2003] injury or if it was something new or independent.

Dr. Luther stated:

> Q: [A] work injury would appear to be a major contributing factor to his treatment starting again in April 29th of 2004.
> A: Well, I can't say that objectively or within a reasonable degree of certainty either. There was an event in time he got on a tractor. This implies to me that if he was doing that well, then he may have been at maximum medical improvement before - - or after Dr. Monroe had seen him in October, indicating that he was pain free or had no symptoms and now he has recurrence of symptoms. Again, I'm trying to convey that even going back to June of 2003 when Mr. Gerlach had indicated to Dr. Plumage that he was having back pain, there was not an event in time that was specific, other than what the patient is saying, that he has been riding on a piece of equipment. Is that mechanism sufficient to cause a new and independent condition that has started the treatment from that date to in perpetuity? I can't say that with a reasonable degree of certainty based on these other histories.

The opinions expressed by Dr. Luther are more persuasive and are entitled to more weight than the unexplained and unsupported opinions expressed solely in the 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). Based on a full and complete analysis of Claimant's voluminous medical records, Dr. Luther's opinions are well-founded, well-reasoned, fully explained, and logical and are accepted. In light of Dr. Luther's credible opinions and testimony, Dr. Monroe's opinion is rejected.

Claimant failed to establish by a preponderance of the evidence that his current condition is causally related to the September 2003 work-related injury. As such, it is

unnecessary to address the remaining issues. 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 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 9th day of March, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge