

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

**THOMAS VANSTEENWYK,
Claimant,**

HF No. 225, 2003/04

v.

DECISION

**BAUMGARTNER TRESS AND
LANDSCAPING,
Employer,**

and

**FARMERS INSURANCE GROUP,
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 April 2, 2008, in Sioux Falls, South Dakota. Russell Janklow represented Claimant. Eric C. Blomfelt represented Employer/Insurer. Claimant and Dr. Richard Farnham testified live. The Department took official notice of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Issue:

Is Claimant entitled to compensation for a specific medical impairment and if so, in what amount?

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

Claimant worked as a landscaper and laborer for Baumgartner Trees and Landscaping (Employer). He suffered a serious crush injury to his leg on April 30, 2004, while attempting to attach a bucket to the front of a skid loader. VanSteenwyk v. Baumgartner Trees & Landscaping, 2007 SD 36, ¶ 2, 731 NW2d 214. Claimant sought workers' compensation benefits. Employer/Insurer denied the claim on the grounds that Claimant had engaged in willful misconduct under SDCL 62-4-37. Id. ¶ 1. The parties agreed to bifurcate the issues and addressed the issue of willful misconduct first. Id. The Department of Labor (Department) concluded that Employer failed to meet its burden of proving that Claimant's willful misconduct proximately caused his injury. Id. Employer appealed the Department's ruling to the Circuit Court, which affirmed. Id. The Supreme Court also affirmed. Id. The Supreme Court decision was handed down

on April 11, 2007, nearly three years after Claimant's injury. Employer/Insurer then began paying Claimant's medical bills.

Immediately following the injury, Claimant was taken to Avera McKennan Hospital where he underwent emergency surgery. Shortly thereafter, he was transferred to the Mayo Clinic in Rochester, Minnesota. Claimant was hospitalized in Rochester for approximately one month and underwent multiple surgeries. After his release, Claimant returned to Mayo Clinic for follow-up care and subsequently participated in physical therapy at the Orthopedic Institute of Sioux Falls. All told, Claimant's treatment and follow-up care consisted of more than a dozen surgeries.

Claimant's injury is still visible despite all of the treatment. Claimant has a major indentation and scar measuring five to seven inches on the right side of his right leg and a similar, although slightly smaller, indentation and scar on the left side of his right leg. The front of his right leg also sticks out further than it should.

Claimant has difficulty using his right leg. Claimant's leisure activities have been adversely affected. For example, hunting has been more difficult since the accident. In addition, some types of work bother him as well as using certain tools and devices. For example, Claimant is not comfortable standing on a ladder for extended periods of time. Kneeling also causes his leg to "go numb".

Claimant is currently employed by Sewer Duck, Inc. Sewer Duck is an independent contractor that engages in wastewater collections for several municipalities, including Aberdeen, South Dakota, where Claimant currently resides. Claimant has been friends with the owner of Sewer Duck for years. Generally, Sewer Duck tries to assign driving duties to Claimant because of his physical limitations. In addition, Claimant is rarely asked to work in confined-spaces.

Is Claimant entitled to compensation for a specific medical impairment and if so, in what amount?

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

SDCL 62-1-1.2 defines "impairment":

For the purposes of this chapter, impairment shall be determined by a medical impairment rating, expressed as a percentage to the affected body part, using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, fourth edition, June 1993.

SDCL 62-4-6 governs specific medical impairments and provides, in relevant part:

For injuries in the following schedule, an employee shall receive in addition to compensation provided by §§ 62-4-1, 62-4-3, and 62-4-5.1, compensation for the following further periods, subject to the limitations as to rate and amounts fixed in § 62-4-3, for the specific medical impairment herein mentioned, but may not receive any compensation under any other provisions of this title:

.....
(16) For the loss of a leg, or the permanent and complete loss of its use, one hundred twenty-five weeks of compensation;

.....
(22) In all cases in the above schedule under this section, if the medical impairment is partial and permanent, the compensation shall bear such relation to the maximum amount for complete and permanent loss as defined in this section as the medical impairment bears to the complete loss;

.....
(24) For permanent disfigurement, or permanent disability resulting from injury to any part of the body not hereinbefore listed, compensation for that portion of three hundred twelve weeks which is represented by the percentage that such permanent partial disability or permanent disfigurement bears to the body as a whole.

SDCL 62-1-15 provides:

In any proceeding or hearing pursuant to this title, evidence concerning any injury shall be given greater weight if supported by objective medical findings.

Claimant retained the services of Dr. Daniel G. MacRandall, a Board certified orthopedic surgeon, to assess any permanent impairment he suffered from the crush injury. Dr. MacRandall performed an impairment rating on October 10, 2007, at Claimant's request. Dr. MacRandall examined Claimant and reviewed Claimant's medical records and test results. In his report, Dr. MacRandall diagnosed Claimant with:

1. Three and one-half years status post crush injury with compartment syndrome, right lower extremity, status post decompressive fasciotomy with decompressive debridements times 11 and skin grafting right lower leg.
2. Flexion contracture, right ankle, 15 degrees secondary to contractures and adhesions secondary to #1.

Dr. MacRandall opined that Claimant had reached maximum medical improvement approximately one year post surgery.

Dr. MacRandall further opined in his report:

The AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, American Medical Association, was used for this impairment rating. Table 2,

page 13/280, Class II impairment of 20% whole body is combined with page 3/78, table 42, Ankle Motion Impairment, 6% moderate whole body equals, using the Combined Value Charts on page 322, a total combined permanent partial impairment of 25% whole person secondary to the skin disorder and motion impairment of the right ankle from the injury of April 30, [2004].

Dr. MacRandall further opined regarding Claimant's "Work Capacity":

Because of the ongoing sensitivity and easy bruisability of the right leg and the fact that he continues to have pain and limitation, it would be my recommendation that a formal Function[al] Capacity Evaluation be done by a licensed physical therapist to evaluate, if needed, what his exact limitations would be as far as work status. It is my opinion at this point that without that examination he would be limited to alternating between sitting and standing to comfort for that right leg and it would be beneficial that he have more of a sit-down type job than a standing, walking and climbing job because of the impairment in his right leg, which is permanent at this point.

Dr. MacRandall concluded by offering the following:

It would be my recommendation that Mr. VanSteenwyk be seen by, as originally recommended by Dr. Greendyke, a plastic surgeon for consideration of revision of the anterior skin graft area particularly. He also may benefit from consideration of aggressive stretching and physical therapy to that very tight contracted tendo Achilles on the right and possibly bracing if the physical therapy is successful. If not, he may need some consideration of tendo Achilles lengthening to try to get his ankle up to at least neutral dorsiflexion.

Dr. MacRandall's opinions were based upon "reasonable medical probability and are totally independent of the requesting agent." Dr. MacRandall's opinions are well-founded and are persuasive.

Dr. Richard Farnham examined Claimant on February 25, 2008, at Employer/Insurer's request. Dr. Farnham performed a physical examination and reviewed Claimant's medical records and test results. Dr. Farnham's report includes:

MEDICAL DIAGNOSIS/CLAIM ALLOWED CONDITION:

Crush injury right lower extremity, below-the-knee with compartment syndrome and status-post irrigation and debridement and fasciotomy of the anterolateral and medial compartments of the right lower extremity with repair of muscle bellies and delayed split thickness skin graft to right lower extremity medial and lateral fasciotomy sites with healing.

Regarding Claimant's permanent partial impairment, Dr. Farnham opined in his report:

Utilizing the *American Medical Association Guides to the Evaluation of Permanent Impairment* (Fourth Edition), with respect to the musculoskeletal system, Chapter 3, and specifically with respect to the lower extremities, pages 75 → 93 and Chapter 13, The Skin, pages 279 → 280, there are several official criteria utilized to determine an accurate impairment rating. Those criteria include limb length discrepancy, gait derangement, muscle atrophy, manual muscle testing, range of motion (knee and ankle), joint ankylosis, arthritis, amputations, skin loss and peripheral nerve injuries. I shall address each of these criteria:

.....

Therefore, in summary, examinee VanSteenwyk has impairment of the right lower extremity, below-the-knee, with respect to decreased range of motion of the right ankle (3% WPIR), skin loss with status-post split thickness skin graft (9% WPIR), and peripheral superficial sensory nerve impairment over the [medial] and lateral fasciotomy scars (2% WPIR) for a combined impairment rating of 14% whole person impairment relative to the above recommended claim allowed condition.

Therefore, in summary, I am recommending a 14% whole person impairment rating relative to the crush injury to the right lower extremity with subsequent medial and lateral fasciotomies and split thickness skin graft which did occur as a result of recorded DOI of April 30, 2004.

Dr. MacRandall's opinions are accepted as more persuasive than Dr. Farnham's opinions. Dr. MacRandall is a Board certified surgeon who treats patients. Dr. Farnham is not. Dr. Farnham's testimony at hearing was not persuasive. His strained interpretation of the *AMA Guidelines, Fourth Edition*, is rejected. Dr. Farnham obviously misunderstood Dr. MacRandall's recommendations for further treatment in that Dr. Farnham opined that the plastic surgery recommended by Dr. MacRandall was for cosmetic purposes only. Dr. MacRandall's recommendation for a plastic surgeon consult was to increase Claimant's range of motion and not for cosmetic purposes. Dr. Farnham's opinions are rejected. Claimant established by a preponderance of the evidence that he is entitled to permanent partial disability benefits pursuant to Dr. MacRandall's findings of a twenty-five percent whole person impairment.

SDCL 62-4-10 provides:

All compensation provided for in §§ 62-4-3 to 62-4-7, inclusive, shall be paid in installments at the same intervals at which the wages or earnings of the employee were paid at the time of the injury. However, if this is not feasible, then the installments shall be paid weekly.

Prejudgment interest shall be assessed from the date Claimant reached maximum medical improvement, April 30, 2005. Claimant was entitled to an impairment rating as of that date and should have been paid his permanent partial disability benefits after

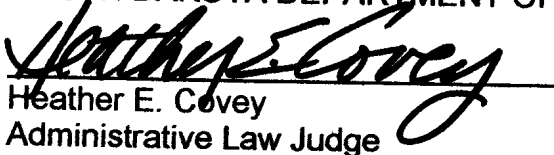
that impairment rating. Claimant is entitled to payment of PPD benefits in a lump sum plus the prejudgment interest because these benefits are due and owing.

Based on the foregoing analysis, Claimant's request for workers' compensation benefits is granted.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 14th day of October, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR


Heather E. Covey
Administrative Law Judge