SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DWAIN ORTH,
Claimant,

HF No. 270, 2001/02

v.

DECISION

STOEBNER & PERMANN CONSTRUCTION, INC.,
Employer,
and

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
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 January 29, 2004, in Sioux Falls, South Dakota. Claimant, Dwain Orth, (hereafter Claimant), appeared personally and through his counsel, A. Russell Janklow, with Ronald A. Parsons, Jr., on the briefing. J.G. Shultz represented Employer Stoebner & Permann Construction, Inc., and Insurer American Family Mutual Insurance Company (hereafter Employer/Insurer).

Issues:

1. Whether Claimant's back condition is compensable under SDCL § 62-1-1.
2. Whether Claimant provided notice pursuant to SDCL § 62-7-10.
3. Whether Claimant is permanently, totally disabled under the "odd-lot" doctrine.

Facts:

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

Claimant was born in Scotland, South Dakota, on February 22, 1942. He has lived in South Dakota all his life. Claimant has worked continuously since his high school graduation in 1960. He has worked many physically demanding jobs.

From 1972 through 1976, Claimant worked for Cargill Grain Elevator of Scotland. His job duties sometimes required heavy lifting. Claimant experienced low back pain on occasion and sought chiropractic treatments while employed with Cargill.

From 1976 through 1988, Claimant worked for Scotland Redi-Mix. Claimant's job duties included driving a concrete delivery truck and performing general maintenance and

carpentry work. In 1978, Claimant sustained a work-related injury to his ankle, which was treated as compensable. Claimant fully recovered from the ankle injury. During his employment with Scotland Redi-Mix, he would periodically experience low back pain and seek chiropractic treatment.

From 1989 through 1994, Claimant performed general carpentry work for Slaba Construction in Tripp, South Dakota. Claimant sometimes experienced low back pain that caused him to seek chiropractic treatment. Claimant sought treatment for low back pain from Dr. Merkwan in Tyndall, South Dakota, on or about August 2, 1993, after slipping on a roof while carrying a bundle of shingles.

In March of 1994, Claimant started working for Employer. Employer is a construction company founded, owned, and operated by Keith Stoebner and Steven Permann. Mr. Permann and Claimant knew each other through different construction jobs. Mr. Permann and Mr. Stoebner played an active, hands-on, role in their business and often worked side-by-side with their employees.

Claimant performed a number of tasks while working for Employer that required Claimant to bend, lift, kneel, or stoop. Sometimes he was required to lift between 40 and 50 pounds. He often performed tasks such as trim and finish work that did not require heavy lifting.

Claimant worked ten-hour days, five days a week and was physically able to perform just about any job task that Employer required. Then, in 1996, Claimant's low back pain began to limit the activities he was able to perform. Claimant asked his employers for lighter duty work and reduced hours due to back pain. Despite reduced hours and lighter duty, Claimant continued to experience worsening back pain.

On May 15, 2001, Claimant went to the emergency room for what he thought was a kidney stone. Claimant's emergency room notes indicate that when he was admitted, he "denied[d] straining [his] back." X-rays and tests revealed no kidney problems. The X-rays did suggest degenerative changes throughout Claimant's spine could be the source of his pain.

Following his visit to the emergency room, Claimant did not work for several weeks. On May 30, 2001, Claimant began treating with Dr. Stotz, a chiropractor in Scotland, South Dakota. Dr. Stotz examined Claimant and his X-rays and noted the degenerative changes throughout Claimant's spine. Claimant continued to treat with Dr. Stotz through June, 2001. Dr. Stotz told Claimant on June 8, 2001, that he could return to work so long as he limited his activities and avoided heavy lifting.

In addition to Dr. Stotz, Claimant treated with Dr. Gail Benson of Sioux Falls on June 6, 2001. Claimant reported to Dr. Benson in his initial visit that his low back pain started 20 years ago and had become gradually worse over time.

Claimant continued to treat with Dr. Stotz for back pain. His pain became so bad that on July 17, 2001, Claimant quit his job with Employer, stating that he "couldn't do the work

anymore." Claimant told his Employer that his back pain was caused by "degenerated discs and wore [sic] out."

Claimant's low back pain continued after he stopped working and, in spite of the extensive treatments he has received, his condition continues to deteriorate. Claimant treated with Dr. Benson and a number of other physicians, including Dr. Walter Carlson, a colleague and partner of Dr. Benson's. Dr. Carlson opined that Claimant had exhausted all surgical options. Dr. Carlson also found that Claimant was intolerant to anti-inflamatories and non-steroidal medications. He opined that Claimant's condition could be stabilized, but not to an employable level. Claimant filed for, and was awarded, Social Security Disability Insurance Benefits.

During one of Claimant's visits to Dr. Benson, prior to September 2001, Dr. Benson told Claimant that he had probably not gotten his back condition from sitting behind a desk. Claimant and his wife both understood Dr. Benson's statement to mean that Claimant's condition may have been caused by the physical nature of the work he had done throughout his lifetime. Despite notice that this condition may be work related, Claimant did not relay this information to Employer until May 20, 2002.

On or about May 20, 2002, Employer received a South Dakota Employers First Report of Injury Form notifying it that Claimant was seeking workers' compensation benefits. This was the first time Employer became aware Claimant was claiming to have sustained a work-related injury. Mr. Stoebner was surprised when he received Claimant's Report of Injury Form. In his shop, he and Mr. Permann had put up a poster notifying employees that they must promptly report any injuries they received while working. Claimant had not work for Mr. Stoebner since July of 2001, and although Mr. Stoebner recalled Claimant's back had sometimes limited his work activities, Claimant had never told him or Mr. Permann that the injury had been caused while working. Claimant never submitted a doctor's slip or note to Employer indicating that he had injured his back at work. Employer/Insurer had never received any medical bills from the "doctoring" Claimant alleges to have undergone for his back during the time he was employed with Employer.

Mr. Stoebner completed the First Report of Injury Form as best he could with the knowledge he had about Claimant's physical condition. Mr. Stoebner was not sure when Claimant might have sustained an injury because none was ever reported until almost ten months after Claimant's employment ended and Claimant had complained of back pain throughout his employment.

On April 29, 2003, Dr. Richard Farnham conducted an Independent Medical Examination (IME) on Claimant. Dr. Farnham studied Claimant's medical records and physically examined Claimant. Dr. Farnham diagnosed Claimant with "mechanical low back pain due to multi-level intervertebral disk degeneration and non-traumatic, congenital grade I-II spondylolisthesis of L5 on S1 with low back pain."

Issue One

Whether Claimant has a compensable injury under SDCL § 62-1-1(7)(b).

Claimant "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "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). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL § 62-1-1(7) defines "injury" or "personal injury" as:

> "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
>
> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment.
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> (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.

Claimant suffers from degenerative disc disease and has a history of low back pain. As in Day, the Department is unqualified to "express an opinion" on the causation of Claimant's disabling condition. In an effort to prove a causal nexus between his alleged injury and his employment, Claimant relies upon the opinion of Dr. Carlson, expressed in a letter dated March 5, 2002. This letter does not meet Claimant's burden. Dr. Carlson's letter of March 5, 2002, clearly states that he cannot determine a causal relationship between Claimant's employment and his degenerative disc condition:

> We recently reviewed all the records of [Claimant]. After reviewing the history and all other [data] available to us, it is not possible for me to determine which of the patient's work related activities or the patient's pre-existing degenerative changes are the major contributing cause of his disability impairment and the need for medical treatment. If we are asked in the future to apportion this, we would give it a 50% to the pre-existing degenerative problems and 50% to the work related issues.

Dr. Carlson's opinion demonstrates that Claimant suffers from a pre-existing condition, but fails to meet Claimant's burden under SDCL § 62-1-1(7)(b). "Medical testimony to the

effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under workers' compensation." Guthmiller v. South Dakota Dept. of Transp., 502 N.W.2d 586, 588 (S.D. 1993). Dr. Carlson's opinion fails to establish that Claimant suffered an injury arising out of and in the course of his employment. This letter fails to establish that Claimant suffered an injury that combined "with his pre-existing disease or condition to cause or prolong [his] disability, impairment, or need for treatment." This letter also fails to establish that Claimant's "employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment" in combination with his preexisting condition.

Dr. Farnham's opinions support a conclusion that Claimant's current condition is not compensable. Dr. Farnham opined that Claimant's condition "is not work-related and is a function of time and the aging process and past history of tobacco use for 30 years from age 16 to age 46 by clinical history. The spondylolisthesis is congenital in nature and is well defined in the orthopedic literature as a medical condition causing low back pain." Dr. Farnham also opined that Claimant's "employment related activities at [Employer]'s were not a major contributing cause of his disabling condition." Dr. Farnham further opined that Claimant's conditions were "pre-existing" and non-work-related. He opined that Claimant's work activities did not combine with the pre-existing conditions "to either temporarily exacerbate or permanently aggravate those conditions in order to cause low back pain."

Claimant has failed to meet his burden to prove that he suffered a compensable work-related injury. Issues Two and Three will not be addressed in light of Claimant's failure to prove causation of his condition. His Petition for Hearing must be dismissed.

Employer/Insurer 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. Claimant shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto 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/Insurer shall submit such Stipulation. Employer/Insurer shall also submit a Final Order in accordance with this Decision.

Dated this 16th day of August, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge