

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

**CAMERON SMITH,
Claimant,**

HF No. 28, 2010/11

v.

DECISION

**STAN HOUSTON EQUIPMENT CO.,
Employer,**

and

**UNITED FIRE & CASUALTY COMPANY,
Insurer,**

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation 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, in Rapid City, South Dakota. Claimant, Cameron Smith appeared personally and through his attorney of record, Michael J. Simpson. Michael S. McKnight represented Employer, Stan Houston and Insurer, United Fire & Casualty.

Issue

Causation and compensability of Claimant's cervical and thoracic injuries

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

At the time of hearing, Cameron Smith (Claimant or Smith) was 53 years old. He is employed at Stan Houston Equipment Company (Employer or Stan Houston) as a mechanic. His main duties include to maintenance and repair of everything that is sold at that location. He works on everything from forklifts to hand tools.

Smith had prior workers' compensation injuries including a broken arm in 1980 or 1981 and a whiplash injury to his cervical spine in 1981 while living in Sundance, Wyoming. Smith was treated for both of these injuries and has sought treatment on and off over the years for back problems.

In late November of 2008, Smith claims that he suffered a work related injury as a result of three incidents that took place while working for Stan Houston. Smith testified that he slipped on a ramp carrying a load of equipment and tools. Smith said he fell onto his knees and elbows. Smith stated that several days later, he was dragging some hose off a reel into a parking lot which resulted in back and shoulder pain. Finally Smith testified that while cleaning up from a job he was carrying a full load of tools and gear when he hit his head on an overhead garage door that was not completely open.

Smith reported each of these incidents to his supervisor, Lee Winchester. Together they decided to hold off on medical treatment to see if the pain would resolve on its own. When Smith still experienced problems in December 2008, Winchester recommended that Smith go see a chiropractor, Dr. Jeffrey Burns. They also decided that any treatment would be submitted to health insurance rather than workers' compensation because they believed Smith had not reported the claim in writing within three days so he would not be eligible for workers' compensation.

Smith first treated with Dr. Burns on December 15, 2008. He filled out an initial intake form prior to his adjustment. On that form Smith indicated that the reason for his visit was chronic pain from an old injury that occurred in 1981 while in Sundance, Wyoming. Smith reported to Dr. Burns that his pain radiated into both shoulders. He did not report any injury or event that brought on this pain, only that it was chronic.

Smith saw Dr. Stewart Rice, a neurosurgeon on January 26, 2009. Smith complained of neck pain with pain into his shoulders and down his arms with numbness in his hands and low back pain. Smith reported to Dr. Rice that his symptoms of neck pain began back in 1981 when he slipped and fell and had a whiplash type injury to his neck. Smith reported that he experienced neck pain off and on through the years, but that is gradually developed pain into his shoulders and arms. Smith told Dr. Rice that his pain had been present for approximately 1 year and had been gradually getting worse. Dr. Rice diagnosed bilateral shoulder pain without radiculopathy and intermittent low back pain. He recommended continued chiropractic management and noted that surgery was not indicated. Dr. Rice further recommended home exercise.

On March 10, 2009, Smith saw Dr. Lew Papendick, an orthopedic surgeon for his shoulder pain. Smith did not report the incidents that took place in November 2008. Dr. Papendick diagnosed "bilateral shoulder pain, medial border of the scapula, suggestive of C5 nerve root on the right, but MRI shows no significant impingement". He also noted hand numbness, tingling, and pain consistent with carpal tunnel syndrome. Dr. Papendick referred him back to Dr. Rice to treat his carpal tunnel.

On April 6, 2009, Smith filled out a first report of injury. He listed the date of injury as December 15, 2008, the date he first sought treatment with Dr. Burns. He indicated no specific injury, but rather that the pain got to be too much to ignore. Again on April 7,

2009, Smith filled out a first report of injury listing December 15, 2008 as the date of injury. Under description of injury he indicated "no specific injury, constant pain with use." On April 13, 2009, Smith filled out a subsequent first report of injury. He claimed injury to his right arm and shoulder.

Smith saw Dr. Wayne Anderson on July 9, 2009, for an independent medical examination (IME) at the request of Employer/Insurer. Dr. Anderson examined Smith and diagnosed bilateral carpal tunnel syndrome, interscapular pain of undetermined etiology, cervical spine degenerative disease with compression on the right C6 nerve root and possible right C6 radicular symptoms and bilateral shoulder pain. Dr. Anderson opined his work as a mechanic remained a major contributing case of his carpal tunnel syndrome and need for treatment, however he was unable to establish any causal relationship between Smith's current symptoms and the incidents in December 2008 and April 2009. He also noted that the cervical spine degenerative disease could certainly cause his low cervical and upper thoracic pain.

On August 4, 2009, Smith saw Dr. Robert MacLachlan at Black Hills Neurosurgery & Spine at the request of Dr. Wayne Anderson. Smith presented with shoulder blade and bilateral arm pain. Smith reported pain since April of 2009. Dr. MacLachlan diagnosed carpal tunnel syndrome and referred him to Dr. Dale Anderson to consider carpal tunnel release surgery. Dr. MacLachlan also diagnosed mid-thoracic and arm pain that appeared musculoskeletal in origin. Dr. MacLachlan noted that this did not appear to be surgical in nature and recommended prescription therapy and referred to Dr. Dietrich for pain management.

Smith did eventually have carpal tunnel surgery in 2010. Employer/Insurer have accepted the carpal tunnel injury and subsequent treatment as compensable and related to his work as a diesel mechanic. At issue in the case at hand is the cervical and thoracic issues which Employer/Insurer assert are not work related.

Smith saw Dr. Christopher Dietrich on March 4, 2010. Smith presented with a history of cervical degenerative disc disease, degenerative disc pathology, neck pain and bilateral arm pain. Smith did not report any specific injury that caused his pain. Dr. Dietrich diagnosed cervical degenerative disc disease, thoracic degenerative disc disease, neurogenic thoracic outlet syndrome, and thoracic kyphosis. Dr. Dietrich recommended conservative measures and continued to treat Smith. On August 2, 2012, Smith's lawyer contacted Dr. Dietrich and for the first time informed Dr. Dietrich of the work related incidents in November of 2008.

Other facts will be determined as necessary.

Analysis

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that he sustained an injury "arising out of and in the course of the employment." SDCL §62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520. SDCL §62-1-1(7) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]"

"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 NW2d 720, 724 (S.D. 1992). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." *Orth v. Stoebner & Permann Const., Inc.*, 2006 SD 99, ¶ 34, 724 NW2d 586, 593 (citation omitted).

In support of his burden, Smith relies on the deposition testimony of Dr. Christopher Dietrich. Dr. Dietrich, in his deposition testimony, opined that if Smith hit his head as he described in November 2008, that the incident was a major contributing cause of his disk herniation at C6-7 and resulting radiculopathy. Dr. Dietrich stated "I think that standing upright, sustaining a hit to the top of the head or an axial load that's hard enough or severe enough to knock you to the ground certainly could put force through the neck causing disk herniations here in the cervical spine." Smith further argues that Dr. Dietrich opined that Smith's neck injury caused his body to compensate by developing a guarded spasm position/posture which leads to neurogenic thoracic outlet syndrome.

Employer/Insurer relies on the deposition testimony of Dr. Wayne Anderson. Dr. Anderson testified that he did not think Smith suffered a significant injury in 2008. He testified, "he went to see his chiropractor not long after that and didn't even mention it, in fact he told Dr. Burns that he had had chronic pain for a long period of time and it seems one wouldn't ignore a significant event like that." Dr. Anderson further testified to a reasonable degree of medical probability that the fall on the ramp in 2008 was not a major contributing cause of Smith's current symptoms and complaints. He went on to explain,

A: Well, again, as I stated earlier, he saw his chiropractor, saw a number of physicians after that and doesn't really even mention it. Plus, his underlying diagnosis is thoracic myofascial pain or interscapular myofascial pain, which is not - I mean it's not a common cause of that condition.

Q: Was the fall on the ramp a major contributing cause to any impairment that he may have?

A: No.

Q: If we focus- - and turn our focus to the claim of striking his head on the garage door, do you have a clinical diagnosis as far as whether he sustained an injury during that event?

A: I am less certain about the garage door. He has - - and my opinion is it's not the cause of it, primarily because of the failure to report any of that to the physicians. But looking at it medically, he had - - he has cervical disk disease. After that occurred, he has an EMG showing a right C6 radiculopathy, which I had suspected on my exam. And certainly hitting your head on the garage door could create a disk problem in your neck and contribute to that radiculopathy. The problem with that is that's really not what his complaints are, his complaints are still more lower than that, quite a bit lower than that, down in the thoracic muscles.

Dr. Anderson testified that he did not doubt Smith's version of what happened in 2008, he testified that even if they did happen, it was still his opinion that those incidents did not remain a major contributing cause of Smith's condition and need for treatment. He stated,

My point is that if, in fact, one falls, injures something significant enough that its still causing problems- - where are we at? Two and a half years later, it didn't come on so slowly you don't mention it for six months.

While Dr. Anderson agreed that hitting his head could have caused a herniated disk at C6-C7, he still did not change his opinion and was not able to unequivocally state that in this case the incident in 2008 caused Smith's condition. He explained,

Q: Now Doctor, you were working under the assumption that there was this incident where he struck his head and as a result that caused the C6 protrusion. After reviewing the medical records, Doctor, does the fact that Mr. Smith is not mentioning any work-related conditions, is that significant at all to you in determining whether striking his head may have caused a herniation at C6.

A: Yes.

Q: Okay. Is there any way to tell when C6 herniated?

A: No.

Q: All right. The fact that Mr. Smith had indicated that there was no injury, no definitive events, that his pain was chronic and had been going on, is that significant at all in determination whether the striking of the head is a major contributing cause of - - for a cervical problem?

A: Yes.

Q: And how so?

A: It would indicate that it wasn't the event that caused it.

Dr. Dietrich did not know about the 2008 incidents until August 2, 2010, when counsel for claimant informed him of the three November 2008 events. Smith had never discussed these injuries with his physician, who would have been able to discuss those incidents in greater detail and fully understand the injury and resulting pain that Smith claims to have experienced after those injuries. Dr. Dietrich also was not made aware of Smith's previous chiropractic records until the day of his deposition.

Smith argues that he did not report the incidents that occurred in November of 2008, to any of his physicians because he was focused on getting treatment and not how he had been injured. He further argues that he did not disclose that information to his physicians because he was submitting the bills to his health insurance and not workers' compensation.

The Department must determine if Claimant suffered an injury arising out of and in the course of his employment that remains a major contributing cause of his condition and need for treatment. Based on his testimony and the opportunity to observe his demeanor at the hearing, Smith was a credible witness and the Department accepts that three incidents did in fact occur in 2008 while Smith was working for Employer. The issue at hand is not whether three incidents occurred in November of 2008, but whether the medical evidence supports a finding that the incidents of November 2008 resulted in a work related injury that remain a major contributing cause of Claimant's current condition and need for treatment.

Dr. Dietrich's treatment of Smith and later his opinion and testimony was based on the limited history given to him by Smith and later by Smith's attorney. The value of an opinion of an expert witness is dependent on and entitled to no more weight than the facts upon which it is predicated. It cannot rise above its foundation. *Podio v. American Colloid Co.*, 162 NW2d 385 (SD 1968). Because Smith did not disclose the work related incidents and his past history, Dr. Dietrich was unable to offer an unequivocal opinion as to causation of his outlet syndrome. His opinions were based on theories and assumptions offered by Claimant and his counsel as to how and when the injury occurred a significant period of time after Smith claims to have been hurt.

In applying the statute, the South Dakota Supreme Court has held a worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of employment. It must further be established by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary. *Gerlach v. State*, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

Regardless of the various diagnosis given by different physicians (thoracic outlet syndrome, chronic pain syndrome, pain related to disc problems in his neck and thoracic spine, etc.), based on the medical evidence presented, it is unclear exactly what the cause of his cervical and thoracic pain is. The experts agree that it was possible that hitting his head could be a major contributing cause of Smith's condition, however the facts remain that Smith had a history of previous injuries and treatment and the incidents in 2008 were not reported to any of his physicians to allow them to offer an opinion whether those incidents combined with Smith's previous work related injuries and condition to remain a major contributing cause of his current condition and need for treatment.

Claimant has failed to meet his burden to show by a preponderance of the evidence that he sustained a work related injury that remains the major contributing cause of his current condition and need for treatment. Claimant's request for workers' compensation benefits must be denied.

Conclusion

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within fifteen (15) days from the date of receipt of this Decision. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer'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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 4th day of May, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ Taya M. Runyan

Taya M. Runyan

Administrative Law Judge