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

JASON KLINKNER, **HF No. 31, 2013/14**

Klinkner,

v. **DECISION**

LAMONT COMPANY, INC.,

Employer,

and

MIDWEST FAMILY MUTUAL INSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This matter was heard by Donald W. Hageman, Administrative Law Judge, on April 22 and 23, 2015, in Aberdeen, SD. Claimant, Jason Klinkner, was represented by Kara C. Semmler. Employer, Lamont Company, Inc. and Insurer, Midwest Family Insurance Company were represented by J. G. Shultz.

Issues:

This case presents the following legal issues:

1. Whether Klinkner has recovered from his injury of April 4, 2012, such that the injury is no longer a major contributing cause of any treatment needed by him?

2. Whether Klinkner is entitled to payment of Permanent Partial Disability benefits (PPD)?

Facts:

The following facts are found by a preponderance of the evidence:

1. In April of 2012, Jason Klinkner (Klinkner) worked for Lamont Company Inc. (Lamont).

2. On April 4, 2012, Klinkner was operating a skid steer loader on a job site. When he exited the loader, he fell forward about four to five feet, catching himself on the ground with his left hand and injuring his left wrist and thumb.

3. Immediately after Klinkner's fall on April 4, 2012, he sought medical treatment at the Avera St. Luke's emergency room in Aberdeen, SD. X-rays were taken showing a possible fracture and Klinkner was instructed to refrain from any work which involved his left wrist and arm until he received further treatment.

4. In the weeks following his injury, Klinkner saw Dr. Miller at Orthopedic Surgery Specialists in Aberdeen, SD and additional X-rays were taken along with an MRI.

5. On April 9, 2012, Klinkner sent a text message to his supervisor at Lamont, telling him that he would be "[o]ut of work for 10 to 14 days; surgery Wednesday at 10 to remove the bone chip; he said I should be fine to work within 2 weeks from today."

6. There is no mention of a "bone chip" in Klinkner's medical records, and he admitted at hearing that his physicians did not find a "bone chip."

7. During the evaluation of April 9, 2012, PAC Sharon Snyder mentioned nothing about "surgery" or removing Klinkner from work "for 10 to 14 days." Instead, PAC Snyder returned Klinkner to work with "R-handed duty only; [n]o use of L-hand; follow-up with Dr. Miller scheduled on April 11, 2012."

8. Dr. Miller removed Klinkner from work on April 11, 2012, until after his MRI on April 23, 2012.

9. Klinkner sent a text to Lamont following the MRI, telling him that "the [doctor] that did the MRI said things look fine and [my doctor] should put me back to work from what he sees."

10. Contrary to Dr. Miller's orders, Klinkner "didn't return for follow-up after the MRI." Instead, he returned to work at Lamont Company and did not seek further medical treatment for almost three months.

11. Klinkner continued to work for Lamont Company until early-July, 2012. During those months, Klinkner's supervisor and co-worker, Jason Myhre, testified that Klinkner never complained of any pain or other problems, either in his left hand/wrist or otherwise. Myhre observed Klinkner using tools, digging holes with shovels and post-hole diggers, prying off old siding, and many other job duties. There were no signs that Klinkner was favoring his left hand or otherwise experiencing any problems with his left hand/wrist.

12. Chris Lamont, Klinkner's supervisor, terminated Klinkner's employment on July 9, 2012, because Klinkner's job attendance was unreliable. There was no mention of a hand problem during the discussion surrounding Klinkner's termination. Later that same day, at 11:16 AM, Dr. Miller saw Klinkner for the first time since he underwent his MRI in April. Because of his complaints of pain, Dr. Miller took Klinkner off work indefinitely.

13. Klinkner had two surgeries on his left hand/wrist, the first on September 18, 2012 (first dorsal compartment release), and the second on October 20, 2012 (Neurolysis

of the left superficial radial nerve). Insurer covered both of those surgeries despite the fact that there were no objective medical findings to support the surgeries.

14. Insurer paid Klinkner TTD benefits up to January, 2014.

15. Following the second surgery, Klinkner continued to tell his surgeon, Dr. Miller, that "he is unable to do any kind of work yet because he can't even grasp a shovel or hold a rung of a ladder." Based on these reports from Klinkner, Dr. Miller released him from work until Dr. Curd authorized Klinkner to return to work with restrictions on March 18, 2013.

16. It was not until after Klinkner's second surgery that he first began to complain of not being able to move his thumb.

17. At the same time Klinkner was telling Dr. Miller he was "extremely limited and he [felt] that he [was] unable to work," he had obtained a job with David Meyer.

18. In the spring of 2013, Klinkner was referred by his treating physicians to Dr. Curd at Orthopedic Institute in Sioux Falls. Klinkner first saw Dr. Curd on March 18, 2013. At this time, Klinkner had completely recovered from the second surgery which was performed in October of 2012, and had engaged in significant physical therapy, yet he complained that his thumb did not move more than just a slight twitch. After the March 18, 2013, appointment, Dr. Curd modified work restrictions slightly. Specifically, Dr. Curd restricted Klinkner's work to "no climbing ladders, paperwork only, with left hand." As a result of the modified work restrictions, Klinkner contacted Lamont seeking work consistent with those restrictions. He did not receive any reply from Lamont.

19. Klinkner saw Dr. Curd again on or about May 8, 2013. At that time, Dr. Curd ordered an MRI and an electron diagnostic study. Dr. Curd was not able to determine the cause for Klinkner's condition nor was he able to suggest a treatment plan to improve the mobility of Klinkner's left thumb. Dr. Curd continued Klinkner's "light office work" work restriction for the left hand and recommended a functional capacity evaluation on or about September 14, 2013. Klinkner attended the functional capacity evaluation. Klinkner's performance at the functional capacity exam was consistent with medical examinations conducted by his treating physicians.

20. Klinkner worked for David Meyer throughout 2013 and into early-Spring of 2014, engaging in snow removal, lawn mowing, hanging cabinets and doors, trim work, and other construction tasks. Some of the snow-removal work involved a pick-up truck with a mounted blade, but Klinkner also extensively drove a Kubota four-wheeler vehicle. The Kubota required Klinkner to steer the vehicle with his left hand while operating joystick controls with his right for the snow-blower. Klinkner never displayed any trouble with any of these demanding job duties and he never said he "could not use his thumb."

21. While Klinkner was working for Meyer, he stole thousands of dollars from him over the course of the summer of 2013. Meyer maintained charge cards for use in making business purchases, including (1) a charge account at Ken's Fairway and (2) a

contractor's charge card with Menard's. Meyer authorized his employees, including Klinkner, to use the Ken's account to purchase diesel fuel for company equipment. The Menard's card was to be used for supplies needed for projects on which Meyer's crew was engaged. Klinkner, however, used both accounts to purchase substantial amounts of personal items including, groceries, steaks, sodas/snacks, live bait, camping supplies, etc.

22. Meyer testified that he never authorized Klinkner or any other employee to use the charge accounts for anything but company purchases.

23. At hearing, Klinkner testified that he took the money from Meyer's credit accounts because he "was in a financial hardship" and that his ongoing TTD benefits of $497 per week "didn't cover all [his] bills." However, at that time Klinkner stole the money, he was receiving both TTD benefits from Insurer and wager's from Meyers. In addition, during the summer of 2013, around the time he was working for David Meyer, Klinkner also took a job with Lenling Construction where he was around $6,000 over about two months.

24. While employed for Lenling, Klinkner did everything asked of him, including estimating, sweeping, digging, using tools, and driving equipment like a skid steer. When Klinkner's discovery deposition was taken on September 23, 2013, he testified that he was incapable of driving a skid-steer loader that summer due to his thumb problems.

25. On July 31, 2013, a surveillance video was taken of Klinkner's activities. Klinkner's activities on the video occurred as part of Klinkner's employment with Lenling Construction. The video showed:

    - Klinkner is seen to walk around while using his left hand to carry tools, a shovel, a post-hole digger, and other items, sometimes swinging these and/or dragging them on the ground

    - Klinkner actively used his left hand as part of his job duties, including shoveling, digging post holes, and driving a skid-steer loader smoothly

    - At one point, Klinkner is seen to hold his phone with both hands and use his thumbs to operate the touch screen without awkward positioning of his hands

    - Throughout the video, Klinkner performs every aspect of a demanding construction job, all smoothly and with no observable signs of pain, discomfort, or awkward body posturing.

26. At the hearing, after becoming aware that there was a surveillance tape showing him driving a skid-steer, Klinkner changed his testimony stating that he could drive a skid-steer loader in 2013, but only on flat ground.

27. Despite the heavy activities shown on the surveillance, during the same time frame, Klinkner complained to Dr. Curd of continuing problems with "weak grip, a burning dysesthetic over the dorsal aspect of his hand, and poor function."

28. In addition to his work for Lenling and David Meyer, Klinkner has held numerous other jobs since April 4, 2012:

    - Spring of 2014: employed by Valvoline as a pit worker changing oil and filters; position required use of tools and manipulation of car parts.

    - Spring of 2014: employed as a pin chaser at Village Bowl; job duties included extricating bowling pins and balls stuck in the pin-placer and ball-return machinery.

    - Summer of 2014: employed for as-needed delivery of auto parts for Advanced Auto Parts; required driving and carrying delivered items.

    - Summer of 2014: employed for as-needed work as a runner/driver for Harms Heating & Cooling; required driving and carrying delivered tools/items.

    - Present employment: Klinkner is currently employed full time as a runner and fill-in worker for Harms Heating & Cooling; job duties include loading equipment, delivery driver, and assistance with installation/repair projects.

29. At hearing, Dr. Bruce Elkins testified with regards to the surveillance video, "[I]f you have a thumb that's nonfunctional and you have to basically use just your fingers, you would expect some type of compensation with grip. . . . [a]nd I didn't see any signs of compensation for a nonfunctional thumb." Dr. Elkins is a board-certified practitioner of occupational medicine who has received extensive medical training in vocational medicine, body posturing, and physical compensation techniques.

30. The Village Bowl, manager, Donna Weig testified at hearing that Klinkner never mentioned anything during his interview or throughout his brief employment about problems with his left hand/thumb. Had Klinkner mentioned any such problems, Ms. Weig would not have hired him given the demands of the job. A pin chaser is required to use both hands for the majority of his job duties involved with operating and repairing the machinery for the bowling alley. Virtually all of the service calls require two-handed work. After his first paycheck, Klinkner asked Ms. Weig to give him more hours so that he could have more income. When Village Bowl could not offer more hours, Klinkner walked away during a work shift and never returned.

31. On December 17, 2013, Klinkner saw Dr. Westbrook for the purpose of an impairment rating examination. At that time, Klinkner had already worked most of the jobs detailed above, and he testified at the hearing that he worked for David Meyer during the winter of 2013-14. When Klinkner saw Dr. Westbrook on December 17, 2013, he told her that he was not working and that he had not worked since April 4, 2012, the date of the injury.

32. In performing her impairment rating, Dr. Westbrook was provided false medical history by Klinkner. She also had not reviewed the surveillance footage from July 31, 2013.

33. On or about January 6, 2014, Employer and Insurer obtained an independent medical examination, which was conducted by Dr. Bruce Elkins, M.D., MPH. Dr. Elkins issued a report, which was based on a records review, a video provided by Employer and Insurer and questions provided by Employer and Insurer.

34. Dr. Elkins found that, "[t]here is no objective evidence of an ongoing injury or sequelae from the reported 04/04/2012 incident." In particular, Dr. Elkins concurred with Dr. Westbrook that Klinkner does not have ongoing CRPS/RSD. Dr. Elkins' report is dated January 6, 2014.

35. Over the last three years since his injury, all of Klinkner's treating physicians have agreed that there are no objective medical findings to explain his left-thumb issue:

> Despite normal nerve conduction studies and electromyelographic studies, the patient continues to have persistent pain. At this point, I am unsure of the etiology of the patient's pain. [Dr. Heloise Westbrook]
>
> I can't find any real physical findings that correlate with the amount of pain that he is having. [Dr. Patrick Miller]
>
> At this point I cannot explain physiologically Mr. Klinkner's difficulty in utilizing his left thumb. I cannot explain its functional loss and I do not have a definite treatment plan for him to regain function in his thumb. [Dr. R. Blake Curd]

36. Before and after Klinkner's two left-hand surgeries, the physicians found no atrophy, deformity, swelling, or other objective signs of problems.

37. The medical evidence establishes a troubling pattern with Klinkner's use of narcotic pain medications since April 4, 2012. On multiple occasions, Klinkner would get prescriptions for opioids/narcotics from his main treater and then visit the ER and/or urgent care repeatedly within days.

38. On August 29, 2014, Dr. Dixon Gage wrote this medical report:

> Given the chronic pain history, I performed a query on the South Dakota prescription monitoring program. Since 7/29/14, patient has gotten 118 hydrocodone tablets and 120 oxycodone tablets. It appears that 4 different providers have provided his prescriptions. . . . The patient has also had various evaluations by urgent care/ED and has gotten several narcotic prescriptions. . . . I did not provide a [prescription] of narcotics from the [emergency department].

39. On October 12, 2012, Dr. Howard Burns reported with regards to an ER visit by Klinkner:

> It looks like he is a heavy opiate user, obtaining prescriptions from multiple practitioners and some very large prescriptions for opiates according to a record we have in the [emergency department] from him, also using some different spellings of his name at times. . . . With his opiate history, I am not going to give him any opiates here. . . .

40. Additional facts may be discussed in the analysis below.

Analysis:

Injury:

> In a workers' compensation dispute, a claimant must prove all elements necessary to qualify for compensation by a preponderance of the evidence. The fact that an employee may have suffered a work-related injury does not automatically establish entitlement to benefits for his current claimed condition. The claimant must establish that his work-related injury is a major contributing cause of his current claimed condition and need for treatment.
>
> A claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty. Causation must be established to a reasonable degree of medical probability, not just possibility. The evidence must not be speculative, but must be "precise and well supported."

Darling v. West River Masonry, Inc., 2010 SD 4, ¶¶ 11- 12 (internal citations omitted).

"[The] Department is not required to accept the testimony of the claimant and is free to choose between conflicting testimony." Kennedy v. Hubbard Mining Co., 465 N.W.2d 792, 796 (S.D. 1991). "[W]here the claimant's subjective experience of pain is central to the issue of whether recovery is warranted, the credibility of the claimant is always at issue." Schneider v. South Dakota Dept. of Transp., 2001 S.D. 70, ¶ 14, 628 N.W.2d 725, 729. Where a claimant lacks credibility and "the opinions of [his] expert witnesses regarding [his] condition were based in large part on what [he] told them, the opinions of those experts lack an adequate foundation. . . . Experts do not determine credibility." Johnson v. Albertson's, 2000 S.D. 47, ¶ 25, 610 N.W.2d 449, 455.

In this case, there is no objective medical evidence to support Klinkner's contention that he cannot move his left thumb or that he is suffering any pain in his hand. The only source of evidence available to Klinkner's doctors, or to the Department, that these conditions exist is the sole "word" of Klinkner. And Klinkner's credibility in this case is highly suspect.

Klinkner has lied on numerous occasions during his medical treatment and throughout these proceedings. On April 9, 2012, Klinkner sent a text message to his supervisor at Lamont, telling him that he would be out of work for 10 to 14 days because he was having surgery on his had to remove a bone chip. However, during the doctor's appointment on that day, there was no mention of a bone chip or surgery and he was not taken off work until two days later. On December 17, 2013, Klinkner told Dr. Westbrook that he had not worked since his injury on April 4, 2012. In reality, he had worked numerous jobs, some quite

strenuous. Then, Klinkner testified during a prehearing deposition that he was unable to drive a skid-steer due to the condition of his hand. Then at hearing, after being confronted with a surveillance tape showing him driving a skid-steer, he changed his testimony stating that he could only drive it on level ground.

Klinkner worked continuously from April 23, 2012 until July 9, 2012, the day he was terminated, without complaint or difficulty. The Department finds it more than coincidental that on that same day he returns to the doctor's office for the first time since March 23rd with complaints. It is obvious that the sole purpose of Klinkner's return to the doctor's office was to secure Temporary Total Disability benefits (TTP). Then Klinkner continued to procure TTD benefits by lying to his doctors, while at the same time, working numerous jobs.

Klinkner's theft of his Employer's money and his opiate use do not bear directly on his truthfulness. However, the theft does reflect on his overall honesty and his excessive opiate use may reveal the motivation for his attempts to secure benefits to which he was not entitled.

The opinions offered by Klinkner's treating physician must be rejected because they were based in large part on Klinkner's description of his symptoms and the Department does not find those histories to be credible. The Department also finds Dr. Elkins' opinion which was based on his records review and his observation of the surveillance tape to be well grounded.

Based on the evidence, the Department is convinced the Klinkner's work injury was likely resolved as of March 23, 2012, and was certainly resolved as of January 6, 2014, the date of Dr. Elkins' report.

Based on the discussion above, the Department finds that Klinkner has not met his burden of proof and that he has recovered from his injury of April 4, 2012, such that the injury is no longer a major contributing cause of any treatment needed by him, if any.

PPD:

Dr. Westbrook gave Klinkner an impairment rating on December 17, 2013. The Department is now in the position in this case where it must reject Dr. Westbrooks conclusions during that examination. "The value of the opinions of an expert witness is no better than the facts upon which they are based. It cannot rise above its foundation and proves nothing if its factual basis is not true." Schneider v. SD Dept. of Transportation, 2001 S.D. 70, ¶ 16, 628 N.W.2d at 730.

Dr. Westbrook's determination was based in large part on Klinkner's descriptions of his pain, his contention that he could not move his thumb and his statement that he had not worked since the injury. Thus, her determination was based on information that was either false or not credible. She also did not have the benefit of seeing the surveillance tape of Klinkner working.

On the other hand, Dr. Elkins' did observe the surveillance tape and conclusions regarding that tape are well grounded. Dr. Elkins' opinion was also based on the fact that there are not objective medical findings to indicate why the thumb does not move.

While it is true that benefits have been awarded in some case base on purely subject finds, such as pain. However, in those cases the pain is frequently attributed to a chronic region pain syndrome and more importantly the claimant complaints are credible. In this case, neither of those factors exists. In addition, there is a mechanical component involved in this case, the movement of Klinkner's thumb. It is difficult to imagine that the loss of a mechanical function would not be accompanied by objective findings. Klinkner has not met his burden of proof on this issue.

Conclusion:

Employer and Insurer shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision and, if desired, Proposed Findings of Fact and Conclusions of Law, within 20 days of the receipt of this Decision. Klinkner shall have an additional 20 days from the receipt of Employer and Insurer's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Employer and Insurer shall submit such stipulation together with an Order.

Dated this 30th day of October, 2015.

/s/ Donald W/ Hageman
Donald W. Hageman
Administrative Law Judge