SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

TERRY L. MEYER,
Claimant,

HF No. 50, 2004/05

v.

DECISION

OLYMPIC WALL SYSTEMS,
Employer,

and

ST. PAUL MERCURY INS. CO.,
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. Claimant appeared personally and through his counsel, Terry Sutton. Daniel R. Fritz represented Employer/Insurer.

Issues:

1. Whether Claimant's current condition is compensable pursuant to SDCL 62-1-1(7).
2. Whether the medical treatment prescribed by Claimant's treating physician, Dr. Greg Alvine, is reasonable and necessary under SDCL 62-4-43 and ARSD 47:03:05:05.
3. Whether Claimant's claim is barred pursuant to SDCL 62-4-46.
4. Whether Claimant's claim is barred pursuant to SDCL 62-4-37[1] or that part of SDCL 62-4-43 which provides:

> If the injured employee unreasonably refuses or neglects to avail himself of medical or surgical treatment, the employer is not liable for an aggravation of such injury due to such refusal and neglect and the Department of Labor may suspend, reduce or limit the compensation otherwise payable.

Facts:

Claimant is alleging that he injured his low back on April 7, 2003, and he is seeking medical benefits for a low back injury and condition. Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

1. Claimant suffered a low back injury in 1984 while working for the Spies Corporation. He received medical treatment and missed approximately 30 days of work.

[1] This issue was added in post-hearing briefing. No objections are on record and the same factual background applies to both SDCL 62-4-37 and 62-4-43.

2. Claimant suffered a low back injury on March 1, 2002, while working for CBM Foods. Claimant sought and received medical treatment for this injury. Dr. Jeff Luther prescribed physical therapy and was concerned that Claimant had a herniated lumbar disc. Dr. Luther restricted Claimant to clerical work with no lifting greater than 20 pounds. Claimant failed to follow through with Dr. Luther's treatment recommendations and never returned to Dr. Luther. Dr. Luther diagnosed a thoracic/lumbar strain/sprain.
3. After his employment with CBM Foods ended on March 11, 2002, Claimant worked installing sheetrock for several months in 2002 with another employer.
4. Claimant made contact with Employer about working as a sheetrock "taper" in January or early February 2003. Claimant was interviewed briefly by Todd Tilberg for this position with Employer. Claimant was hired by Employer in February 2003.
5. Shortly after Claimant began working as a sheetrock taper for Employer, Employer required him to fill out a health questionnaire entitled "Employee Questionnaire Re: Pre Existing Conditions". The Questionnaire included the following information, "This information is to help us place you so you can work for us without impairing your health or physical condition. We want to safeguard you and fellow employees."
6. Claimant reported falsely on this questionnaire that he had no prior low back injuries.
7. Claimant reported falsely on this questionnaire that he had never filed a workers' compensation claim.
8. At the time of his interview with Todd Tilberg, Claimant did not mention to Tilberg that he had suffered a low back injury, necessitating medical treatment and physical restrictions in March of 2002.
9. Claimant had worked previously as a sheetrock taper and knew the physical demands of such a position.
10. Based upon his responses on the Employee Questionnaire, Claimant was retained by Employer as a sheetrock taper.
11. Claimant worked consistently for Employer as a sheetrock taper until April 7, 2003.
12. On April 7, 2003, Claimant suffered an injury when he was moving a piece of sheetrock. He was carrying a piece of sheetrock that weighed about 125 pounds when it hit something overhead and jarred Claimant's neck and back.
13. Claimant sought medical attention from Dr. Sarah Reiffenberger for this injury, complaining mostly of pain between his shoulder blades. Dr. Reiffenberger ordered x-rays of Claimant's chest and thoracic spine, but none of his lumbar spine.
14. Dr. Reiffenberger referred Claimant to Dr. Gail Benson, an orthopedic surgeon in Sioux Falls, South Dakota.
15. Dr. Benson did not treat Claimant for a low back injury.
16. Dr. Benson referred Claimant to Dr. Robert Suga, also an orthopedic surgeon. Dr. Suga diagnosed cervical stenosis and bilateral carpel tunnel problems and found both were unrelated to the April 7, 2003, incident.

17. On July 23, 2003, Claimant sought medical treatment from Dr. Reiffenberger for "severe" low back pain. Dr. Reiffenberger noted that Claimant had complained of low back pain prior to July 23, but that it had recently become severe and Claimant had begun to have "left leg radicular pain."
18. On September 17, 2003, Dr. Richard Farnham conducted an examination pursuant to SDCL 62-7-1. Dr. Farnham interviewed and examined Claimant. Dr. Farnham issued a report addressing Claimant's complaints of neck pain, numbness in both hands, headaches and mid back pain.
19. On April 2, 2004, Claimant began treating for his low back pain with Dr. Greg Alvine.
20. Dr. Alvine saw Claimant four times and recommended that Claimant undergo a discogram.
21. Claimant did not disclose to Dr. Alvine that he had suffered prior low back injuries and pain.
22. On April 24, 2004, Dr. Farnham conducted a second examination pursuant to SDCL 62-7-1. Dr. Farnham specifically addressed Claimant's complaints of low back pain and opined to a reasonable degree of medical probability that the incident of April 7, 2003, was not a major contributing cause of Claimant's low back problems.
23. Claimant testified falsely at his deposition that he had not made a worker's compensation claim prior to April of 2003.
24. Claimant testified falsely at his deposition that he had not suffered any low back problems prior to April of 2003.
25. Claimant testified falsely at his deposition that he had never sought medical treatment for his low back prior to April of 2003.
26. Other facts will be developed as necessary.

Issue One

Whether Claimant's current condition is compensable pursuant to SDCL 62-1-1(7).

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).

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:

> 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.
>
> (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 "must establish a causal connection between his injury and his employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. In support of his burden, Claimant offered the deposition testimony of Dr. Greg Alvine. Dr. Alvine testified that based upon what Claimant told him about his low back injury, the incident of April 7, 2003, was a major contributing cause of Claimant's condition. However, Dr. Alvine was not made aware of Claimant's 1984 low back injury and treatment or Claimant's 2002 low back injury and treatment. Dr. Alvine's opinions carry little weight and do not meet Claimant's burden to demonstrate causation under SDCL 62-1-1(7). 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). Claimant admitted that he did not tell Dr. Alvine about his prior low back pain and injuries. Dr. Alvine's opinion was primarily based upon Claimant's history, which was incomplete. Dr. Alvine testified that a patient's history is crucial in opining on causation of a condition. Dr. Alvine's opinions must be rejected.

Dr. Mitchell A. Johnson examined Claimant on August 12, 2004. His records reveal that he was "certainly in agreement with Dr. Alvine" that Claimant should have a discography for further evaluation. Dr. Johnson also opined, "It does appear from the patient's history, as given to me as well as to Dr. Alvine as well as previously with my partners, Dr. Benson and Dr. Suga, that none of these symptoms were present prior to his work injury." A review of the medical records in this matter reveals Claimant's prior low back injuries and treatments. Dr. Alvine, Dr. Johnson, Dr. Benson, and Dr. Suga were not

given these records to consider. "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). Claimant offered no other medical opinions to support his claim and the medical records, standing alone with out explanation, do not meet his burden. Claimant did not meet his burden to show that he sustained a compensable low back injury or low back condition under SDCL 62-1-1(7).

Dr. Richard Farnham, who conducted two examinations of Claimant, and performed a review of Claimant's medical records and history, opined that the incident of April 7, 2003, was not a major contributing cause of Claimant's low back condition. Claimant urges the Department to reject Dr. Farnham's opinions because he failed to diagnose Claimant's "alleged pre-existing" low back condition during his first examination. Claimant's argument is rejected. Dr. Farnham addressed Claimant's complaints of "neck soreness, numbness in both hands, frequent headaches, and mid back discomfort." Claimant did not complain of low back pain to Dr. Farnham. Dr. Farnham's September 17, 2003, report reveals that Claimant failed to disclose his prior workers' compensation claims and his prior low back injuries. Dr. Farnham opined that Claimant suffered a work-related "dorsal spine sprain/strain" that had resolved. Dr. Farnham opined that none of Claimant's other conditions were related to his work for Employer.

Dr. Farnham's second report specifically addressed Claimant's complaints of "neck problems, numbness in arms and hands getting worse, some discomfort in mid-back, and low back and legs getting worse." Dr. Farnham's report reveals that Claimant again denied previous workers' compensation claims. Dr. Farnham diagnosed:

> This claimant has progressive degenerative changes of the lumbosacral spine evidence on MRI scan of December 2, 2003 which are degenerative in nature and which progress as a function of time and which are not the result of the workplace injury of April 7, 2003. These degenerative changes of the lumbosacral spine are pre-existing in nature and would not have developed as a result of the mechanism of injury as described by the claimant as having occurred on the date of injury.

Dr. Farnham's opinions do not support Claimant's burden. Claimant's treating physicians were not made aware of his prior low back injuries and their opinions do not support a finding that Claimant's work injury of April 7, 2003 is and remains a major contributing cause of his low back condition. Claimant failed to show that his low back condition is compensable under SDCL 62-1-1(7).

In support of his claim that his carpal tunnel syndrome and his cervical condition are compensable, Claimant offered his medical records. Dr. Alvine treated Claimant's low back complaints, nothing else. Dr. Suga provided an opinion that Claimant's employment activities for Employer were not a major contributing cause of Claimant's

carpal tunnel syndrome or his cervical condition. Dr. Farnham opined that Claimant suffered a "dorsal spine sprain/strain" which has resolved. Claimant has failed to establish that any of his physical conditions at issue herein are compensable under SDCL 62-1-1(7).

Issue Two

Whether the medical treatment prescribed by Claimant's treating physician, Dr. Greg Alvine, is reasonable and necessary under SDCL 62-4-43 and ARSD 47:03:05:05.

The only medical treatment recommended by Dr. Alvine at this time is the performance of a discogram. Employer/Insurer do not dispute that the discogram is a reasonable and necessary treatment for Claimant's low back condition, but disagree that his low back condition is compensable. Claimant's low back condition has been found not compensable, therefore, any medical treatment for his low back condition is not Employer/Insurer's responsibility.

Issue Three

Whether Claimant's claim is barred pursuant to SDCL 62-4-46.

SDCL 62-4-46 states as follows:

> A false representation as to physical condition or health made by an employee in procuring employment shall preclude the awarding of worker's compensation benefits for an otherwise compensable injury if it is shown that the employee intentionally and willfully made a false representation as to his physical condition, the employer substantially and justifiably relied on the false representation in the hiring of the employee, and a causal connection existed between the false representation and the injury. The burden is on the employer to prove each of these elements.

In support of its burden, Employer/Insurer offered Employer's "employment file" on Claimant and the testimony of Dean Sands, a branch manager for Employer in Sioux Falls, as well as the testimony of Dr. Farnham.

Claimant held the position of carpenter/taper, which is a "very physical job." Claimant had prior experience sheet rocking and had at one time been self-employed as a sheet rocker. Claimant, despite knowing the physical requirements of sheet rocking and having been given the opportunity to disclose his prior low back injuries, intentionally and willfully made a false representation as to his physical condition. He specifically denied in writing that he had suffered a back injury in the year preceding his employment. He specifically denied having made a workers' compensation claim for a low back injury. Claimant intentionally and willfully made false representations as to his physical condition. Based upon Sands' testimony, Employer substantially and justifiably

relied on these false representations in retaining Claimant in his position and allowing him to work as a carpenter/taper.

Claimant's prior injuries involved a lifting injury to his thoracic/lumbar area and resulted in specific lifting restrictions. Claimant alleged an injury to his thoracic/lumbar area on April 7, 2003. Claimant's treating physicians related Claimant's low back symptoms to this incident, but did not have the benefit of his prior treatment records. Employer/Insurer relied upon the opinions of Dr. Richard Farnham for its argument that there is a "causal connection" between Claimant's misrepresentation and Claimant's condition, if compensable. Dr. Farnham opined that Claimant did not suffer an injury to his low back during the April 7, 2003, incident. His opinions do not support a finding of a causal connection between Claimant's misrepresentation and Claimant's injury. Claimant's claim is not barred by SDCL 62-4-46.

Issue Four

Whether Claimant's claim is barred pursuant to SDCL 62-4-37[2] or that part of SDCL 62-4-43 which provides:

> **If the injured employee unreasonably refuses or neglects to avail himself of medical or surgical treatment, the employer is not liable for an aggravation of such injury due to such refusal and neglect and the Department of Labor may suspend, reduce or limit the compensation otherwise payable.**

Claimant's treating physicians were not made aware of his 2002 injury and treatment and therefore, no medical opinion exists as to any aggravation caused by Claimant's failure to follow through with the recommended treatment subsequent to his 2002 injury. The medical evidence is not sufficient to support a finding that Claimant's failure to follow through with the recommended treatment subsequent to his 2002 injury aggravated his condition.

Regarding Employer/Insurer's claim of willful misconduct under SDCL 62-4-37, the medical evidence is not sufficient to find that Claimant's injury is due to willful misconduct. Claimant's treating physicians were not made aware of Claimant's low back condition or limitations prior to his 2003 injury and did not opine on or consider this issue. Furthermore, Dr. Farnham clearly diagnosed Claimant's low back condition as degenerative and not related to his physical activities. Claimant's claim is not barred pursuant to SDCL 62-4-37 or 62-4-43.

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 Employer/Insurer's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a

[2] This issue was added in post-hearing briefing. No objections are on record and the same factual background applies to both SDCL 62-4-37 and 62-4-43.

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 21st day of September, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge