

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

ROBERT HAROLD SWENSEN,

HF No. 61, 2002/03

Claimant,

DECISION

vs.

BERNARD PROPERTIES,

Employer,

and

CINCINNATI INSURANCE 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. A hearing was held before the Division of Labor and Management on August 10, 2004, in Yankton, South Dakota. Robert Harold Swensen (Claimant) appeared personally and through his attorney of record, Douglas R. Kettering. Heith R. Janke represented Employer/Insurer (Employer) at the hearing. Following the hearing, Michael F. Tobin represented Employer. The sole issue presented was causation.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence.

At the time of the hearing, Claimant was forty-one years old and lived in Mission Hill, South Dakota, with his brother. Claimant grew up in the Yankton area. Claimant dropped out of high school when he was sixteen years old and joined the National Guard. After basic training, Claimant returned to the Yankton area and started working for ALCOA Extrusion. Claimant worked there for six years as a laborer. Claimant next worked for Gregg Motor Company. Claimant worked there for five years as a service technician and car detailer. Claimant then moved to Sioux Falls and worked for Rick Boyer Automotive as a mechanic for two years. Claimant returned to Yankton and started working for Mr. Clean as a general assistant. On July 1, 1997, Claimant was hired by Yankton Motor Company as the manager of the detail shop. Claimant worked at Yankton Motor Company through January 2002. On March 1, 2002, Claimant, through Job Service, began working for Employer as a carpenter. Claimant worked for Employer for two weeks.

Claimant has a history of problems with his stomach and ulcers. Claimant has had four surgeries for this condition, including a procedure to remove his gallbladder and a procedure to remove a portion of his stomach. In addition to his stomach problems, Claimant has an extensive history of problems and injuries with his neck, shoulders and back. In 1980 or so, Claimant was involved in car accident where he

was “thrown across [a] van.” After the accident, Claimant required medical treatment, including several visits to a chiropractor.

During his employment with Mr. Clean, Claimant was injured when he fell on some ice and hurt his shoulder. Claimant treated with two different physicians for this condition and went through physical therapy as well. The physical therapy was of limited value to Claimant as his employment with Mr. Clean required him to lift heavy objects. This caused Claimant to continually regravate his shoulder problems.

While he worked for Yankton Motor Company, Claimant sustained several injuries, including an injury on January 5, 2001, to his arm and back after he fell on some ice. That same day, Claimant went to the Sacred Heart Hospital emergency room and was examined by Dr. John Jerstad. Claimant explained that he fell on some ice and had pain in his neck, low back, right shoulder and lower left leg. Dr. Jerstad diagnosed Claimant with a right shoulder, neck and lumbar spine contusion.

Claimant also testified the stress of his job with Yankton Motor Company caused spasms and pain for which he received medical treatment and care from his family physician, Dr. James Kerr. For example, Claimant saw Dr. Kerr on April 10, 2001, with complaints of low back pain. Dr. Kerr noted, “[Claimant] presented to my office with chief complaint of low back pain, which is actually high lumbar.” On July 11, 2001, Claimant reported to Dr. Kynan Trail, his physician for his stomach problems, that he had numbness in his arms and severe headaches. Claimant also saw Dr. Kerr on July 13, 2001, “with chief complaint of back, neck pain and headaches off and on recently because of back and neck pain.” Dr. Kerr noted that Claimant had muscle spasms and provided massage treatment. Dr. Kerr eventually referred Claimant to Dr. Swift, a bone and joint specialist, for surgery on his shoulder and neck. For some reason, this surgery was never performed and Claimant’s neck, shoulder and back problems persisted.

Claimant also reported an injury on January 8, 2002, while working for Yankton Motor Company. Claimant lifted a car seat and felt pain in the area of an incision from a recent stomach surgery. Claimant was terminated from his position on January 15, 2002. On February 11, 2002, Claimant saw Dr. Trail to discuss abdominal issues. In addition, Claimant complained of “some right hand numbness when he turns his head and raises his arm.” The medical note showed that Dr. Trail recommended “at least six months of strenuous physical therapy for [Claimant’s] right arm. He said he is going to talk to Dr. Kerr about this.” Claimant denied that Dr. Trail told him about the physical therapy sessions.

Claimant started working for Employer on March 1, 2002. Claimant was hired as a temporary employee to perform construction work on a remodeling project in an old department store in downtown Yankton. On March 13, 2002, Claimant was operating a drum sander and had to move some sheets of plywood out of his way. As he picked up the plywood sheets, he felt a pop in the middle of his upper back in the area between his shoulder blades and experienced immediate radiating pain. Claimant stated, “[t]here was sharp pain directly in the middle of my shoulder blades. My arm was bothering me, my shoulder was bothering me, and I couldn’t lay down, couldn’t hardly sit in a vehicle or sit because it would be too much pain.”

Claimant told his supervisor, Colleen Meyers, that he felt a pop in his back. Meyers suggested that Claimant go see her chiropractor, Dr. Larry Jones. Claimant made an appointment and saw Dr. Jones on March 14, 2002. Dr. Jones wrote in his

medical note, “[Claimant] came into my office with severe pain in the upper back. He has been sanding floors downtown at the old [F]antle building and he claims that was the cause of his pain. He also stated that he lifted some plywood today while working at the old [F]antle building, this may have worsen [sic] his symptoms.” Dr. Jones noted that Claimant had extreme pain, “especially in the right upper thoracic and right shoulder area.” Dr. Jones had little success in trying to adjust Claimant due to the severity of his pain. Dr. Jones recommended Claimant use heat and pain medication for relief.

Claimant returned to work on March 14th and did light painting for a while and was then sent home. Claimant did not return to work for Employer and has been unemployed ever since. Claimant did not have any low back pain complaints after the March 13th injury.

Despite his complaints of persistent pain, Claimant did not seek additional medical treatment for ten days. Claimant went to the emergency room in Yankton on March 24, 2002, due to neck and shoulder pain. The medical note indicated, “the pain started approximately 1 week ago in a gradual level and has steadily increased since that time. He states the pain started in his neck and then moved to his shoulder eventually progressing down his right arm. He states that he has the sensation of less strength in his right arm. He denies any history of trauma recently however he did have an accident where he fell on the ice about 3-4 years ago and he landed on his shoulder.” Claimant was diagnosed with a right shoulder strain with muscle spasm. Claimant was given pain medication and encouraged to follow up with Dr. Kerr.

Claimant saw Dr. Kerr on March 28, 2002. Dr. Kerr wrote:

[Claimant] presents to us with [right] shoulder/back pain, rhomboideus, trapezoid muscle over the [right] shoulder, less in the shoulder joint. In reviewing his records this patient has had neck and back pain since 7/01. Shoulder pain has been present since 2/01. He doesn't recall specific incident that started this. He's had some hand numbness now and pain in the entire [right] upper extremity. . . . He recalls falling on the ice about 4-years ago and was seen by Dr. Wiggs. It was ascertained at that time that there was no permanent problem at that time. Last week he lifted something and since then he's had difficulty.

Dr. Kerr assessed Claimant with right shoulder and back pain that had been “consistent for past 2-[months]. Worsening with recent exercise.” Dr. Kerr prescribed conservative treatment, including physical therapy.

Claimant started physical therapy on April 3, 2002. The physical therapist noted in the assessment that Claimant had “pain in the right upper extremity but pain does not seem to be related to rotator cuff involvement or radiating symptoms due to a disk pathology.” Claimant participated in a total of eight physical therapy sessions, but did not receive any benefit from the sessions.

On May 4, 2002, Claimant was admitted to the hospital for neck and right arm pain. An MRI revealed Claimant had a disc herniation at C5-6 and at C6-7. Claimant was discharged from the hospital on May 7, 2002, and continued with conservative treatment. Claimant's pain complaints persisted. Another MRI on February 4, 2003, confirmed Claimant had cervical disc herniations and Dr. Kerr referred Claimant to a neurosurgeon.

Dr. Thorir Ragnarsson saw Claimant on February 19, 2003. Dr. Ragnarsson evaluated Claimant for persistent long-standing neck pain, radiating arm pain and numbness as well as low back pain and left leg radiating pain. Dr. Ragnarsson took the following history from Claimant:

[H]is symptoms started March 13, 2002 when he was working with a heavy machinery [sic] sanding a floor with a drum sander and had to move sheets of plywood. In doing so he felt the onset of pain in his neck and into the right shoulder and arm. He describes having this feeling that something popped in his shoulder. This pain persisted and quickly became intense causing him severe neck pain and pain radiation into the right shoulder, right arm, and on into the forearm and hand. This was associated with numbness of the right hand and forearm. He also had some left arm numbness intermittently and also low back pain and left leg radiating pain and numbness.

Dr. Ragnarsson specifically noted, “[Claimant] denies having had previous problems with his neck or lower back prior to this incident in March of [2002].”

Dr. Ragnarsson reviewed the MRI and concluded “this study shows a large right lateral C6-7 disc herniation with severe neuroforaminal compromise and C7 nerve root compression . . . and a small paracentral left-sided disc protrusion” at C5-6. Dr. Ragnarsson noted that Claimant had gone through an extensive and prolonged period of conservative treatment, which had not resolved his symptoms. Therefore, Dr. Ragnarsson recommended Claimant undergo an anterior C5-6 and C6-7 discectomy and interbody fusion with plating. Dr. Ragnarsson also recommended Claimant have an MRI of his lumbar spine to try to identify the cause of his low back and left leg radiating symptoms. Dr. Ragnarsson performed the fusion surgery on April 8, 2003.

Dr. Ragnarsson continued to treat Claimant following the fusion surgery. As of July 2004, Dr. Ragnarsson noted that Claimant responded quite well to surgery and that the weakness in Claimant’s arm had resolved, the numbness is better and that his pain was mild. However, Claimant continued to complain of low back pain. On February 17, 2004, an MRI of Claimant’s lumbar spine was performed, which showed a L4-5 disc herniation relatively small on the left side. Dr. Ragnarsson opined that Claimant needed a microdiscectomy at the L4-5 level on the left side. Dr. Ragnarsson performed this procedure on April 29, 2004.

At Employer’s request, Dr. Jeff Luther performed an independent medical examination of Claimant on April 29, 2003. Dr. Luther opined Claimant suffered a shoulder strain on March 13, 2002, but that he reached maximum medical improvement (MMI) a few weeks after the incident. Dr. Luther concluded, based upon Claimant’s preexisting symptoms, the March 13th injury was not a major contributing cause of his need for cervical fusion surgery.

ISSUE

WHETHER CLAIMANT’S MARCH 10, 2002, INJURY IS A MAJOR CONTRIBUTING CAUSE OF HIS CONDITION?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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 medical evidence must indicate more than a possibility that the incident caused the disability.” Maroney v. Aman, 565 N.W.2d 70, 74 (S.D. 1997). Claimant’s burden is not met when the probabilities are equal. Hanten v. Palace Builders, Inc., 558 N.W.2d 76 (S.D. 1997). SDCL 62-1-1 states, in part:

(7) “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 [.]

(emphasis added). “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).

Dr. Kerr testified live at the hearing. Dr. Kerr was familiar with Claimant’s condition and acknowledged that he had symptoms of neck, shoulder and arm pain prior to the March 13, 2002, injury. Even though Dr. Kerr was Claimant’s treating family physician, Dr. Kerr did not have an opinion as to the causation of Claimant’s cervical herniations and need for two surgeries. Dr. Kerr could not opine to a reasonable degree of medical probability that the March 13, 2002, injury was a major contributing cause of Claimant’s condition. In addition, Claimant offered the deposition of Dr. Jones. As with Dr. Kerr, Dr. Jones did not opine that Claimant’s injury with Employer was a major contributing cause of his condition.

Claimant relied upon the opinions expressed by Dr. Ragnarsson to establish that his work with Employer was a major contributing cause of his condition and need for two surgeries. However, Dr. Ragnarsson’s opinions are insufficient to meet Claimant’s burden of persuasion.

Dr. Ragnarsson is a board certified neurosurgeon. Dr. Ragnarsson opined that Claimant’s condition was related to his work-related activities. Dr. Ragnarsson stated, “[n]ow, the history [Claimant] provided to me related - - regarding the onset of these symptoms is very consistent with the type of activity precipitating or leading to the kind of problem he was suffering with.” Dr. Ragnarsson opined Claimant’s low back herniation was related to the March 13, 2002, injury. He stated, “[w]ith the same information provided by [Claimant], it is my conclusion also, as it was with the ruptured disks in his neck, that the ruptured disk in the lower back, within a reasonable degree of medical certainty, are related to his activity - - or work-related activity, as best can be determined.”

Dr. Ragnarsson, when expressing his opinions, relied solely on Claimant's history of the symptom development. Dr. Ragnarsson stated, "[t]he information that I have to rely on to tie those two events together is the injury in March of 2002 and the MRI scan and findings later on is his history, the information he provided to me that his symptoms started that day when he was doing those activities, and his description and outlining of the symptoms he had." In his discussions with Dr. Ragnarsson, Claimant denied ever having any previous problem with his neck or low back. In fact, Claimant failed to provide Dr. Ragnarsson with a truthful history of his prior neck, back and shoulder problems.

Dr. Ragnarsson was unaware of Claimant's preexisting symptoms of prior neck, shoulder and back pain. Even after being informed that Claimant had preexisting symptoms, Dr. Ragnarsson testified that his "conclusion is still based on [Claimant's] information that the symptoms he started having after the injury in March of 2002 were related to that."

Dr. Ragnarsson's opinions lack foundation and must be rejected. 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). Dr. Ragnarsson's opinions are solely based on Claimant's incorrect and misleading information that he never had any previous problems with his neck, shoulders or low back. Claimant's statements to Dr. Ragnarsson are completely inconsistent with the well-documented medical evidence showing Claimant had long-standing problems with his neck, shoulder, arm and back. Dr. Ragnarsson based his opinions on incorrect facts; therefore, his opinions are flawed. In addition, Dr. Ragnarsson's opinions must be rejected because they do not meet the requisite standard of establishing that Claimant's work activities were a major contributing cause of his condition and need for two surgeries.

Employer relied upon the opinions expressed by Dr. Luther in his deposition. Dr. Luther is board certified in internal medicine and emergency medicine and a board certified independent medical examiner. Dr. Luther concluded that the incident of March 13, 2002, caused Claimant to have a simple shoulder strain and that Claimant reached MMI within a few weeks after the injury. In addition, Dr. Luther was fully aware of Claimant's longstanding history "of radicular symptoms that have progressed to the point that it culminated in medical necessity for cervical disc fusion."

Based upon his review of the medical records, Dr. Luther concluded that Claimant had long-standing complaints of back, neck and hand pain and numbness prior to the incident in March 2002. Dr. Luther opined Claimant's work incident of March 13, 2002, was not a major contributing cause of Claimant's current condition and need for two surgeries. Dr. Luther explained his opinion was based "on symptoms that he had prior to [the incident on March 13, 2002] . . . and that the work-related incident in my opinion was not a major contributing factor, that it was, in fact, due to a preexisting condition." Dr. Luther was fully aware of Claimant's medical history and treatment for his neck, arms and back. Dr. Luther's opinions are well-founded and are accepted.

Claimant failed to establish by a preponderance of the evidence that his work injury for Employer was a major contributing cause of his condition and need for two surgeries. Claimant's Petition for Hearing must be dismissed with prejudice.

Employer shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Claimant shall have ten days from the date of receipt of Employer's proposed Findings and Conclusions to submit objections 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 shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 10th day of February, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge