

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

MICHAEL MARTZ,

HF No. 68, 2010/11

Claimant,

v.

DECISION

**HILLS MATERIALS d/b/a
HILLS PRODUCTS GROUP, INC.,**

Employer,

and

**WESTERN NATIONAL MUTUAL
INSURANCE COMPANY,**

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on September 28, 2012, in Rapid City, South Dakota. Claimant, Michael Martz, was represented by Michael J. Simpson. The Employer and Insurer, Hills Materials d/b/a Hills Products Group and Western National Mutual Insurance Co. were represented by Eric C. Blomfelt.

Legal Issues:

This case presents the following legal issues:

1. Whether a work-related injury suffered by Michael Martz in 2002, while working for Hills Materials, is a major contributing cause of his current left shoulder condition?
2. Whether the Department of Labor & Regulation has the authority to grant common law relief to Martz under the doctrine of promissory estoppel?
3. Whether Michael Martz is entitled to relief under the doctrine of promissory estoppel?

Facts:

The Department finds the following facts by a preponderance of the evidence:

1. Michael Martz (Martz) injured his left shoulder while working at Homestake Mining Company (Homestake) in 2000. The claim was accepted as compensable by Homestake who was self-insured for purposes of workers' compensation. Homestake paid for surgery which was required by Martz along with additional medical expenses. Eventually Martz received an upper extremity impairment rating.
2. Martz then injured his left shoulder again while working for at McLaughlin Sawmill (Hills Material) in 2002. Western National Mutual Insurance Co. (Western National), who insured Hills Material for purposes of workers' compensation at the time of Martz's injury, paid Martz's initial medical bills and an additional 5% upper extremity impairment rating.
3. In late 2005, a dispute arose between the two insurers, Homestake and Western National concerning the continuing treatment of Martz's left shoulder condition. Homestake denied this claim based upon the opinion of Dr. Wayne Anderson that the 2002 injury contributed independently to his condition. Western National denied the claim based upon an independent medical evaluation (IME) report from Dr. Luther who indicated that the 2000 injury was the cause of his condition.
4. Martz hired a lawyer in early 2006, who wrote a letter to Western National asking them to pay for benefits based upon Dr. Anderson's opinion that the 2002 injury was the cause of Martz's condition. Dr. Anderson was the treating physician at that time. As a result of the attorney's letter, Western National paid for an additional impairment rating as well as unpaid medical bills. Western National continued to pay for medical bills in 2006, 2007, 2008, and 2009.
5. Meanwhile, the statute of limitations on the Homestake claim ran in November of 2007. Martz did not make a claim against Homestake because Western National had continued to pay for Martz's medical treatment at the time the statute of limitations ran.
6. In 2009, Western National revisited the question of Martz's continuing medical condition. Western National had another independent medical evaluation done by Dr. Blow. Blow opined that the injury Martz suffered at Homestake was the source of Martz's condition at that time.
7. Based on Dr. Blow's opinion, Western National once again denied coverage for treatment of Martz's left shoulder. This case followed.
8. Additional facts will be discussed in the analysis below.

Analysis:**Causation:**

Claimant contends that he is entitled to an award of workers' compensation benefits from Western National under the doctrine of promissory estoppel and because the 2002 injury was a major contributing cause of his current left shoulder condition. Promissory estoppel in South Dakota involves an equitable common law remedy. Durkee v. Van Well, 2002 S.D. 150, ¶ 13654 N.W.2d 807 (internal citations omitted). "[a]n essential element to equitable relief is the lack of an adequate remedy at law." McCollam v. Cahill, 2009 S.D. 34, 766 N.W.2d 171; Rindall v. Sohler, 2003 S.D. 24, ¶12, 658 N.W.2d 769, 772. Consequently, the Department must first determine whether Martz is entitled to benefits because his 2002 injury was a major contributing cause of his current condition as a matter of law before addressing the equitable issues involving promissory estoppel.

Martz, as the claimant, has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353,358 (SD 1992). Claimant's burden of proof is not sustained when the probabilities are equal, and it is the duty of the Department to deny compensation if Claimant fails his burden. King v. Johnson Bros. Canst. Co., 155 NW2d 183, 185 (SD 1967).

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

[O]nly 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.

SDCL 62-1-1(7).

The South Dakota Supreme Court has noted that there is a distinction between the use of the term “injury” and the term “condition” in this statute. See *Grael v. South Dakota Sch. of Mines and Technology*, 2000 SD 145, and ¶ 9. “Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result.” *Id.* Therefore, “in order to prevail, an employee seeking benefits under our workers’ compensation law must show both: (1) that the injury arose out of and in the course of employment and (2) that the employment or employment related activities were a major contributing cause of the condition of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.” *Id.* (citations omitted).

“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). “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. Stoenner & Permann Const., Inc.*, 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted).

In a letter dated October 25, 2005, Dr. Anderson opined that Martz’s 2002 injury contributed independently to his left shoulder condition. It appears that Anderson’s opinion was based on the fact that he gave Martz an additional 5% impairment rating after the 2002 injury.

On the other hand, Dr. Luther opined on July 25, 2005, that the 2002 injury was not a major contributing cause of his condition. Luther reached this conclusion in part because Martz had continuing and ongoing pain since his original injury in 2000 and Dr. Lawlor noted a MRI that revealed no significant changes following the 2002 injury.

Dr. Blow performed an IME in November of 2009. In a report dated November 9, 2009, Blow opined, like Dr. Luther had in 2005, that Martz’s current condition was the result of the 2000 injury and not the 2002 injury. The rationale for Dr. Blow’s opinion was also similar to Dr. Luther’s. In a deposition taken on January 10, 2010, Dr. Blow points to the following points in support of his conclusion: MRI findings were substantially the same after the 2002 injury; a lack of a new tear in 2002; EMG studies being the same; similar complaints of numbness and tingling throughout his left arm that abated but reappeared indicating a recurrence of the original injury; and Martz did not require any additional surgery after the 2002 injury.

The Department finds the opinions of Dr. Blow and Dr. Luther persuasive. Their conclusions are based on objective tests and imaging and are supported by the medical records. Although Dr. Anderson is the treating physician, his opinion contains very little

analysis. It seems that his opinion was based on the impairment rating that he assigned to Martz for the 2002 injury. However, he also does not provide a rationale that the 2002 injury was the source of the additional 5 % impairment. It is also worth noting that the additional 5% impairment rating was given in 2005 and much time has lapsed since then while the focus of this case must be on Martz's condition since November of 2009.

Martz is critical of Dr. Blow's opinion because he did not review some records by the Rehab Doctors and physical therapy during 2001. He also relies on Dr. Blow's testimony that the measurements from the second impairment rating would have been useful to his review. While the Department agrees that a review of those records may have been useful, it is not fatal to his opinion. Dr. Blow's overall review of medical records extend to records up through August 24, 2009, while Dr. Anderson's opinion in October of 2005 could only be based on his observations up until that time. All things considered, the Department finds that Martz failed to carry his burden of showing that his 2002 injury was a major contributing cause of his current condition.

Common Law Relief:

The Department must next determine whether it has the authority to grant common law relief to Martz under the doctrine of promissory estoppel. Hills Material and Western National argue that the Department does not have jurisdiction to grant an equitable common law remedy which is not authorized by statute.

The South Dakota Supreme Court has stated:

The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute.' Furthermore, '[an administrative agency] may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void.' An agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction. (internal citation omitted).

Maas v. Dept. of Commerce and Regulation, 2003 S.D. 48, ¶ 33, 661 N.W.2d 726.

An evaluation of past decisions appears to indicate that the South Dakota Supreme Court seems to make a distinction between common law jurisdiction and the agency's ability to utilize common law principles and remedies in its determination. For example, the Court has determined that the Department lacks jurisdiction to hear common law causes of actions such as breach of contract, wrongful termination, fraud and breach of fiduciary duty. Johnson v. Kolman, a Div. of Athey Products Corp., 412 N.W.2d 109, 112-113 (S.D. 1987).

On the other hand, the Court has recognized the authority of the Department to apply common law principles within the context of cases that the agency has jurisdiction to

hear, namely workers' compensation cases. In Larson v. Sioux Falls School Dist.# 49-5, 509 N.W.2d 703, 709 (SD 1993), the Court held that an employee's workers' compensation case was barred by res judicata, a common law principle. More recently, the Supreme Court addressed the common law doctrine of spoliation in a workers' compensation case. There the Court remanded the case to the Department because the "Department failed to properly consider the spoliation question." From this language the Department can only conclude that the South Dakota high court finds it appropriate for the Department to consider that common law remedy. By implication, it can be surmised that the Department also has the authority to consider the common law remedy of promissory estoppel within the context of a workers' compensation case.

In this case, the Department clearly has jurisdiction in to determine if Martz is entitled to worker's compensation benefits. Further, the Department finds that it has the authority to consider the common law remedy of promissory estoppel within the context of this case.

Promissory Estoppel:

The South Dakota Supreme Court set forth the following definition of promissory staple in Glimcher Supermall Venture, LLC v. Coleman Co., 2007 S.D. 98, 739 N.W.2d 815:

- (1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only [by] enforcement of the promise.

Id. at ¶ 291.

In this case, there is a real question whether a promise existed and, if so, what was the nature of that promise. The only real evidence that a promise was made by Western National are letters from Martz's attorney. First of all, those letters are hearsay. While they may be admissible and Western National's subsequent actions indicate that a promise of some type was made, the scope of that promise is uncertain. At best, the letters can only be interpreted to show that Western National would withdraw the denial that it had made and that it would pay the medical expenses in question at that time. The Department is unable to contuse from the letters or Western National's actions that it promised to pay any and all bills related to Martz's left shoulder into perpetuity. It simply would not make good business sense for it to do so.

Over time, medical conditions change. It is doubtful that Western National made a promise that would put it in a position where it could not respond to circumstances and facts which may come to light in the future. Consequently, the Department finds that Western National did not promise to continue paying all medical expense associated with Martz's left shoulder condition in the event that circumstances change or new facts are uncovered in the future.

The Department also finds that the second and fourth elements of the analysis set forth in Glimcher was not met in this case. Martz could not reasonably expect Western National to continue paying for medical expenses in the future should not fact or circumstances arise and should have anticipated such an eventuality. Likewise, Western National could not reasonably be expected to believe that Martz would not take precautions to protect his interests should circumstances change in the future.

It is unfortunate that Martz is left without recourse for a condition which was almost certainly caused by a work-injury. However, justice would also not be served by requiring Western National to continue paying for a claim for which it is not liable.

Conclusion:

In accordance with the analysis above, the Department holds that Martz failed to meet his burden of showing that his 2002 injury is a major contributing cause of his current condition of his left shoulder. The Department also finds that it has the authority to grant relief under the doctrine of promissory estoppel but that it would be inappropriate for it to do so here because the elements of promissory estoppel have not been met. This case is dismissed with prejudice.

Counsel for Hills Material and Western National shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision and if desired Proposed Findings of Fact and Conclusion of Law, within 20 days of the receipt of this Decision. Counsel for Martz shall have an additional 20 days from the receipt of Hills Material and Western National'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, Counsel for Hills Material and Western National shall submit such stipulation together with an Order.

Dated this 12 day of June, 2013.

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