

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JIM GILLASPIE,
Claimant,

HF No. 95, 2006/07

v.

DECISION

ZARECKY'S MIDWEST CONSTRUCTION,
Employer,

and

ALLIED INSURANCE,
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, in Pierre, South Dakota. Claimant appeared personally and through his attorney of record, Michael J. Simpson. Richard L. Travis represented Employer, Zarecky's Midwest Construction and Insurer, Allied Insurance.

Issues

1. Causation and compensability pursuant to SDCL 62-1-1(7)
2. Medical expenses pursuant to SDCL 62-4-1

Facts

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence.

Claimant, Jim Gillaspie (Gillaspie) was 47 years old at the time of hearing. He has worked in construction, driving truck, farming and ranching, carpentry, and at the time of hearing he was employed as a salesperson at CarQuest.

In 1984, Gillaspie was involved in a truck accident. Gillaspie was taken to a Wyoming emergency room where X-rays were taken and he was released. Gillaspie was off work for approximately two months following the truck accident. Claimant sustained injuries to his back, ribs, and possibly his kidney.

Following his recovery from the truck accident, Gillaspie returned to work driving truck. Gillaspie's later work history was comprised of general labor including heavy lifting and

physically demanding work. Gillaspie occasionally suffered from back pain which he treated with periodic chiropractic treatments and over the counter pain relievers. Chiropractic adjustments generally reduced his symptoms and heavy work increased his symptoms. From 1984 to 2004, Gillaspie did not miss work due to his back pain.

In July of 2003, Gillaspie began working for Zarecky's Midwest Construction. Gillaspie did some carpentry work, but primarily did concrete work, setting forms, tying rebar with wire, and moving dirt with shovels.

On April 2, 2004, Gillaspie saw Dr. Richardson at Medical Associates Clinic in Pierre. Gillaspie presented with low back pain. Dr. Richardson diagnosed low back pain with bilateral leg numbness and recommended a MRI of the low back. The MRI was done April 7, 2004 which revealed a small disc protrusion centrally at L5-S1 and a minor bulge to slight protrusion present at L4-5, with the remainder of the discs being normal.

On December 6, 2004, while working at a job site, Gillaspie was moving a spool of streetlight wire from the side of a pickup around to the tailgate where the wire was to be cut. The spool was about a foot and a half in diameter, two feet long and weighed approximately 100 pounds. Gillaspie rolled it up against his chest, stepped back, turned around and walked around the truck to put the spool on the tailgate. After he set the spool of wire down, Gillaspie did a little more work, but his back began to hurt so bad that he could not get up and down any more. Gillaspie left work to see Dr. Merlin Bennett, a chiropractor, for back pain. Dr. Bennett noted that Gillaspie had pain in his low back and buttock with some pain going down his legs to just above the knee. Following his chiropractic adjustment, Gillaspie returned to work.

After work on December 6, 2004, Gillaspie went home where he informed his wife that his back was hurting. After sitting in a recliner at home for a short time, Gillaspie was unable to get up without assistance. That evening, Gillaspie went to the emergency room at St. Mary's Healthcare Center where he saw Dr. Mikel Holland. Dr. Holland diagnosed a lumbosacral sprain. Gillaspie was given medications and Dr. Holland advised follow up with his chiropractor. Gillaspie was also given a note from the doctor stating that he was not to return to work that week.

On December 13, 2004, Gillaspie saw Dr. Richardson for continued low back pain. Richardson recommended physical therapy, continued chiropractic care, and medication. Dr. Richardson ordered an MRI on December 28, 2004 which revealed spondylosis of L4- L5 and L5-S1 with a moderate posterior disc bulge at L5-S1. Richardson referred Gillaspie to Dr. Thomas Ripperda, a physiatrist at Avera McKennan Rehabilitation Associates in Sioux Falls.

Gillaspie saw Dr. Ripperda on January 26, 2005. Dr. Ripperda recommended an epidural steroid injection, physical therapy, and a trial of a TENs unit. On February 16, 2005, Gillaspie returned to Dr. Ripperda. Dr. Ripperda felt that the epidural steroid

injection drastically improved his symptoms and continued to recommend physical therapy and recommended a second epidural steroid injection. On March 2, 2005, Dr. Ripperda participated in a conference call with Gillaspie to discuss his condition. Gillaspie noted that his pain was improving and was becoming very similar to prior episodes of pain. Gillaspie also reported to Dr. Ripperda that he was taking two Vicodin at night and that his symptoms increased with work.

On March 24, 2005, Gillaspie saw Dr. Ripperda in person. Gillaspie had returned to work with restrictions of no lifting greater than 30 pounds. Gillaspie noted that while doing his work duties he had an increase in low back pain with some radiation of pain down his right leg and numbness. Gillaspie reported his back pain as being a 6 to 8 out of 10. Dr. Ripperda continued with work restrictions that included no lifting, carrying or pushing greater than 30 pounds, no prolonged bending, and no lifting with the action of twisting.

Another conference call was held between Gillaspie and Dr. Ripperda on April 14, 2005. Gillaspie reported overall improvement and Dr. Ripperda planned to decrease his work restrictions to no lifting greater than 50 pounds. Dr. Ripperda stated that he felt Gillaspie would be at maximum medical improvement and able to perform all his duties of employment in four to six weeks.

May 5, 2005, was Gillaspie's last appointment with Dr. Ripperda. Gillaspie reported that he no longer had radiating symptoms in his lower extremities and had been doing his full time duties at work. Gillaspie noted his pain was 5 out of 10 and continued to take 1 to 2 Vicodin. Dr. Ripperda removed all work restrictions at that time and recommended continued use of a TEN's unit, periodic Tylenol, and chiropractic intervention.

Gillaspie returned to Zarecky's full time when Dr. Ripperda removed all his work restrictions. After a short time back at work, Gillaspie voluntarily terminated his employment. His reason for leaving was because he was doing mowing jobs at Zarecky's and wanted to do carpentry work. Gillaspie was hired at Marshall Erdman doing carpentry work where he also received a higher rate of pay.

Gillaspie and his family later moved to Philip. Gillaspie worked for Haakon County driving truck, working on equipment and maintaining roads. He continued working for Haakon County for several years before moving back to Pierre with his family.

On September 23, 2005, while living in Philip, Gillaspie went to the Philip Health Clinic for a check up. He presented with congestion, but also related to the doctor his history of low back pain and occasional radiation of the pain to his right leg. Gillaspie reported that his condition occasionally will get worse and is exacerbated by work.

On October 18, 2005, Gillaspie saw Dr. Holman at the Philip emergency room. Gillaspie's chief complaint was low back pain. Gillaspie reported to Dr. Holman that he

had been driving tractor in road ditches at a sloped angle the previous day and that Vicodin and the TEN's unit could not control the pain. Dr. Holman prescribed Demerol and Flexeril. On October 21, 2005 during a follow up appointment with Terry Henrie, PA, at the Philip Clinic, physical therapy, stretching exercises, and use of anti-inflammatory medication were recommended.

On March 3, 2006, Gillaspie began treating with Dr. C.C. Klopper, a general practice physician at Philip Health Services Clinic. His practice includes among other things, treatment of individuals with back and neck pain and associated problems. Dr. Klopper reviewed Gillaspie's history of back pain. Dr. Klopper noted that Gillaspie had numbness in both legs and down to his feet bilaterally. Following a physical examination and review of the December 28, 2004 MRI, Dr. Klopper recommended another MRI and gave Gillaspie a prescription for Percocet.

Gillaspie returned to Dr. Klopper on April 10, 2006 complaining of low back pain radiating down his legs and numbness of both legs down to his knees bilaterally. Dr. Klopper ordered an MRI on April 14, 2006 that revealed mild disc dehydration and mild disc bulging at L4-L5 and disc degeneration with broad-based midline disc protrusion which impress on the ventral thecal sac. Again on November 3, 2006, Gillaspie returned to Dr. Klopper complaining of low back pain radiating down his legs. Dr. Klopper diagnosed chronic low back pain radicular in nature. Dr. Klopper continued to prescribe Flexeril and Percocet. Gillaspie continued to seek treatment for low back pain at the Philip Health Services Clinic until moving back to Pierre.

From 2007 to present, Gillaspie began treating at the Oahe Valley Health Center for his low back pain. Gillaspie was diagnosed with a prolapsed intervertebral disc. Dr. Imran R. Khawaja treated Gillaspie several times and refilled Gillaspie's prescription for Percocet. Dr. Khawaja also recommended that Gillaspie see an orthopedic doctor and have another MRI.

Other facts will be developed as necessary.

Analysis

Issue 1 Causation and Compensability

The general rule is that a claimant has the burden of proving by a preponderance of the evidence 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 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 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.

It is undisputed that on December 6, 2004, Gillaspie suffered from a work related injury to his low back arising out of and in the course of his employment with Zarecky's Midwest Construction when he lifted a 100 pound spool of streetlight wire from the back of a truck while performing his job at Zarecky's Midwest Construction.

When a preexisting condition factors into a compensability question, subsections (b) and (c) under SDCL 61-1-1(7) must be considered.

While both subsection (b) and subsection (c) deal with preexisting injuries, the distinction turns on what factors set the preexisting injury into motion; if a preexisting condition is the result of an occupational injury then subsection (c) controls, if the preexisting condition developed outside of the occupational setting then subsection (b) controls.

Horn, 2006 SD 5, ¶20, 709 NW2d 38, 43. (citations omitted) To make a claim under subsection (c), Claimant is required to show that he had a preexisting work related compensable injury, disability, or impairment. *Id.* at ¶25.

Gillaspie contends that the truck accident in 1984 was a compensable work related injury and therefore, subsection (c) would apply requiring that Gillaspie show only that the work related incident on December 6, 2004, contributed independently to the disability, impairment or current need for treatment. Claimant testified at the hearing that he was working in Lusk, Wyoming for a Nebraska employer at the time of the truck accident and that he sustained injuries to his back, ribs, and possibly his kidney. While it was documented in his medical history taken by various doctors that he was involved in a truck accident in 1984, Gillaspie was unable to obtain any medical records of his specific injuries¹ nor was Gillaspie able to produce a first report of injury or any

¹ Gillaspie offered the affidavit of Rebecca Hopkins, legal assistant for Julius & Simpson, L.L.P. stating that she did attempt to obtain Gillaspie's medical records from 1984. Through her search she determined that the information had been destroyed as per the hospital's records retention policy. The hospital where

documentation from Gillaspie's former employer or insurer that support Gillaspie's argument that the 1984 accident and resulting injury was treated as a compensable work related injury. Gillaspie has the "burden of proving by a preponderance of the evidence all facts essential to sustain an award of compensation." *Id.* at ¶14. Gillaspie has failed to establish by a preponderance of the evidence that he suffered a preexisting work related compensable injury, disability or impairment, therefore subsection (c) does not apply in to the facts of this case.

Gillaspie had a history of low back pain dating back many years. Gillaspie saw Dr. Merlin Bennett and Dr. Curt Kuehl for periodic chiropractic adjustments to treat his low back pain. Prior to December 6, 2004, Gillaspie also saw Dr. Michael Richardson for back pain at which time he diagnosed low back pain and ordered an MRI. The MRI revealed a disc protrusion centrally at L5-S1 and a minor bulge to slight protrusion present at L4-5. At the hearing Gillaspie testified that he had a long history of low back pain dating back to the truck incident in 1984. He testified that when he would experience back pain, he would go to the chiropractor for an adjustment and that would relieve his pain. Gillaspie's credible testimony at hearing along with Gillaspie's medical records, which were submitted at hearing as a joint exhibit, establish by a preponderance of the evidence that Gillaspie did have a preexisting back condition. Therefore subsection (b) applies to the facts of this case.

SDCL 62-1-1(7)(b) provides that when an injury combines with a preexisting 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.

In applying the statute, we have 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 [her] employment. We have further said South Dakota law requires [claimant] to establish 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). With respect to proving causation of a disability, the South Dakota Supreme Court has stated,

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. Unless its nature and effect are plainly apparent, an injury is a subjective

Gillaspie sought treatment, Lusk Hospital, which is currently called the Niobrara Health and Life Center, produced a patient index which stated that Gillaspie was seen in 1984. The treating physician, Dr. Miller was deceased and his records were no longer available.

condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, 724 NW2d 586 (citations omitted).

In support of his burden, Gillaspie relied on the opinion of Dr. Klopper who treated Gillaspie at the Philip Health Services Clinic. Dr. Klopper's opinion was submitted via affidavit along with his medical records. Dr. Klopper reviewed Gillaspie's previous medical records including the MRI results that showed mild disc bulging at L4-L5 and mild disc protrusion at L5-S1 with possible involvement of the exiting nerve root. Dr. Klopper stated that based on his review of the medical records, Gillaspie seemed to experience "a substantial change in the severity of his low back pain since the December 6, 2004 work injury." Dr. Klopper stated that based on his review of the medical records and his own notes, following the December 6, 2006 work related injury, Gillaspie continually suffered from moderate to severe low back pain radiating into his right leg.

Dr. Klopper opined to a reasonable degree of medical probability that "Gillaspie's December 6, 2004 work injury caused the disc abnormalities [seen on the MRI] described above, and have resulted in his current low back and leg pain and need for treatment." Dr. Klopper stated that it was his opinion that the work related injury on December 6, 2004, is and remains a major contributing cause of his current condition and need for treatment. Dr. Klopper went on to state that it was his opinion that Gillaspie's subjective complaints including severe back pain, leg pain, difficulty standing, walking, lifting, and bending, are consistent with the objective medical findings, specifically the disc abnormalities at L4-L5 and L5-S1, as documented by MRI scans.

Dr. Klopper's opinions are rejected. "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. Klopper based his opinion on the three MRI scans that were taken before the work related injury on April 7, 2005, after the work injury on December 28, 2004 and later on April 14, 2006 when Gillaspie began treating with Dr. Klopper. He concluded that the injury on December 6, 2004 was the type of injury that caused the disc abnormalities seen on the later scans. Dr. Klopper failed to acknowledge that Gillaspie's low back pain improved during his treatment with Dr. Ripperda and continued physical therapy. After he was released from Dr. Ripperda's care, Gillaspie continued to work in several manual labor positions including returning to work at Zarecky's, Marshall Erdman doing carpentry work that included occasional heavy lifting, and Haakon County.

On September 23, 2005 Gillaspie had sought medical treatment for sinus congestion at Philip Health Services Clinic. At that appointment, Gillaspie told the doctor that he had occasional back pain that was intermittent in nature, and increased with work. This

description was consistent with the description of Gillaspie's back pain prior to the December 6, 2004 work related injury. Gillaspie did not seek medical attention specifically for low back pain until October 18, 2005; some 5 months after Dr. Ripperda had released Gillaspie from his care. Dr. Klopper's opinion that Gillaspie was in continuous moderate to severe low back pain radiating into his right leg following the December 6, 2004 work related injury is inconsistent with the medical records.

Employer/Insurer relied on the testimony of Dr. Ripperda, a physiatrist who specializes in the field of physical medicine and rehabilitation. Dr. Ripperda's opinions were provided through his deposition testimony. Prior to his deposition testimony, Dr. Ripperda reviewed the complete set of medical records, the Affidavit of Dr. C.C. Klopper, and the hearing transcript.

Gillaspie was referred to Dr. Ripperda after the December 6, 2004 work injury. Dr. Ripperda was Gillaspie's treating physician. At the time he was treating Gillaspie, Dr. Ripperda considered the work injury on December 6, 2004, a major contributing cause of the condition and need for treatment up to May 5, 2005, at which time Gillaspie was released from care and all work restrictions were removed. Dr. Ripperda opined with a reasonable degree of medical probability that Claimant's work related back injury had essentially resolved and that Gillaspie had recovered to a prior level of functioning, a prior level of pain control. Dr. Ripperda testified that Gillaspie had attained a "baseline" which he defined as a situation where,

[A] patient having had previous symptoms prior to an injury, whether it be intermittent nature or - - constant, and the goal of a treatment strategy in somebody that has previous or preexisting pain is to try to get them back to that previous level of discomfort.

Dr. Ripperda based his opinions in part because Gillaspie's symptoms were consistent with the symptoms he was experiencing prior to December 6, 2004, and in part on the fact that Gillaspie's radiating leg symptoms had resolved in May 2005. Gillaspie was able to return to full time, full duty work all consistent with returning to baseline function, base line symptoms. Dr. Ripperda opined to a reasonable degree of medical probability that the cause of Gillaspie's current condition is his degenerative lumbar spondylosis.

The opinions expressed by Dr. Dr. Ripperda are well-founded, well reasoned and are more persuasive. This credible opinion establishes that Gillaspie's work related injury was not a major contributing cause of his current low back condition.

Based upon the medical evidence presented, Gillaspie has failed to meet his burden to demonstrate that his work related injury is and remains a major contributing cause of the disability, impairment, or need for treatment. Therefore, it is unnecessary to address the issue of medical expenses. Claimant's Petition for Hearing must be dismissed with prejudice.

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 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 3rd day of February, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

Taya M. Dockter
Administrative Law Judge