SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

GWEN SCHINDLER **HF No. 173, 2002/03**
Claimant,

v. **DECISION**

COUNTRY MEDIA
Employer/Self-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 December 1, 2004, over the Dakota Digital Network. Claimant, Gwen Schindler (Claimant), appeared personally and through her counsel, John Hughes. Richard Travis represented Employer/Self-Insurer Country Media.

Issues:

1. Whether Claimant's injury is work-related and compensable?
2. What is the nature and extent of Claimant's work-related disability, if any?

Facts:

The parties stipulated to the following at the beginning of the hearing:

1. The foundation of all medical and chiropractic records;
2. Claimant's indemnity rate is $192.00 per week;
3. If the claim is compensable, Claimant's permanent partial disability rating at the time of the hearing was 10%; and
4. Claimant's health insurance plan asserts a subrogation claim of $45,469.56 for medical expenses incurred by Claimant after January 21, 2002.

Claimant is 61 years old and has worked all of her life. She grew up on a dairy farm, helping her family with milking cows and harvesting hay. She married a dairy farmer and helped him with similar chores. She and her husband currently operate a "cow/calf" operation in Whitewood, South Dakota. Both have maintained outside employment off and on during the thirty years they have lived in Whitewood. Claimant participated in the cow/calf operation on a daily basis, helping feed the livestock, lifting bales of hay and "pulling calves" when necessary during calving season. Claimant has also worked as a custodian at Rapid City Regional Hospital.

Claimant has suffered intermittent back pain for forty years. She began treating with a chiropractor, Dr. Josh Biberdorf, in April of 1999. Dr. Biberdorf diagnosed Claimant with spondylolisthesis at L5-S1, which is a condition where the L5 vertebra is not in proper

alignment with the S1 vertebrae. He treated Claimant approximately 40 times between April 22, 1999, and January 11, 2002, for low back pain, sciatic pain, and thoracic pain.

Claimant began working for Employer in November of 2001. On or about January 21, 2002, Claimant was moving a large cart full of paper while in the course of her employment. The wheels on the heavy cart did not operate as she anticipated and she twisted her back while maneuvering the cart and felt an immediate onset of pain in her back. Her pain extended from her shoulder blade area to her tailbone. She reported her injury to her supervisor. She was seen by Dr. Biberdorf on January 23, 2002. Dr. Biberdorf took Claimant off work from January 22, 2002, to January 28, 2002. Dr. Biberdorf performed a variety of modalities and treatments, which helped Claimant's pain. Claimant quit her employment on April 22, 2002.

By mid-October of 2002, Dr. Biberdorf released Claimant from his care and opined that she could return to her previous level of activity. On November 11, 2002, Claimant experienced the pain again after light activity. She returned to Dr. Biberdorf, who treated her until June of 2003.

Dr. Steven Eckrich, an orthopedic surgeon, conducted an independent medical examination of Claimant on February 17, 2003. Dr. Eckrich confirmed Dr. Biberdorf's diagnosis of spondylolisthesis and diagnosed Claimant with "diffuse idiopathic skeletal hyperostosis" or DISH, which is a specific type of arthritis. Dr. Eckrich described DISH symptoms as "diffuse back pain with diminished range of motion that tends to get worse over the course of years." Dr. Eckrich opined that Claimant's DISH preexisted the January 21, 2002, incident. He explained:

> I think that the incident which occurred in January of 2002 may have been the event that I described before that sometime happens that leads to the diagnosis or the making of the diagnosis of DISH, akin to the straw that broke the camel's back, if you will. Although, she had this event and she did develop back pain by the time I had seen her, and I think the incidents that happened before and after are probably more related to the underlying arthritic condition than anything else.

Dr. Eckrich did not approve of Dr. Biberdorf's treatment of Claimant's condition and opined that Claimant had not yet reached maximum medical improvement after the January 21, 2002, injury. He explained his opinions in his IME report of February 17, 2003:

> In my opinion, Ms. Schindler has a history of an acute myofascial injury on top of, and [sic] underlying, arthritic process in her back. The radiographic appearance of this is consistent with diffuse idiopathic skeletal hyperostosis (DISH), and I think her significant diminished range of motion can be attributed to that diagnosis. Based upon the patient's history, as she presented it to me, it does appear that she has had on again, off again back pain for quite some time. I think that the symptoms that she is describing now are probably more related to the underlying degenerative condition, rather than the episode which occurred on

> 1/22/2002. In my opinion, the treatment that she did have for that injury was inadequate. She received now over a year of chiropractic treatment. I think that she has not had instruction in a stretching and strengthening program for her back and this would be vital to maximize the strength of her back, and likely would result in decreased recurrent episodes. In my opinion, a physical therapy evaluation and program directed toward a home program of strengthening/conditioning would be appropriate. In my opinion, she has not attained maximal medical improvement because of the lack of this treatment regimen. In my opinion, further chiropractic treatments are not indicated, at least within the context of her on-the-job injury.

Dr. Eckrich repeated his opinion in a letter to Katie Ballard of Intracorp on June 4, 2003. He stated, "[I]t was my opinion that Ms. Schindler likely had an acute myofascial injury on top of an underlying arthritic process in her back . . . It was my recommendation that she start a physical therapy program directed toward a home program of strengthening and conditioning." Claimant did not complete a program of physical therapy as recommended by Dr. Eckrich. Employer apparently denied any further treatment after October of 2002.

Dr. Larry Teuber, a neurosurgeon, examined Claimant on April 8, 2003. Dr. Teuber did not examine any of Claimant's medical records made prior to his examination. Dr. Teuber noted that Claimant reported constant low back pain and pain and tingling in both of her legs. Dr. Teuber diagnosed Claimant with "early grade 2 spondylolisthesis at L5-S1 level" and disk bulging at three levels in the lumbar spine. Dr. Teuber opined that none of these conditions was causing Claimant's symptomatology as of the date of the examination. Based upon his examination of Claimant, the history given to him, and his review of the radiology films, Dr. Teuber diagnosed "mechanical low back pain arising from spondylolisthesis at L5-S1." On October 20, 2003, Dr. Teuber performed surgery on Claimant. Claimant's symptoms were better after surgery.

On June 18, 2004, Dr. Brett Lawlor, a physician with The Rehab Doctors in Rapid City who specialize in physical medicine, pain clinic services, and electrodiagnostics, performed an impairment rating examination of Claimant. He diagnosed Claimant with "history of L5-S1 fusion and back pain with L5-S1 radiculopathy." Dr. Lawlor gave Claimant a 10% whole person impairment.

Issue One

Whether Claimant's injury is work-related and compensable?

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 her injury and her 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:

> "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; 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.

There is no dispute that Claimant suffers from a preexisting condition, diagnosed as stenosis, degenerative lumbar disc disease, spondylosis, and spondylolisthesis degenerative and also DISH. "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." Byrum v. Dakota Wellness Foundation, 2002 SD 141, ¶15. (citing Grauel v. South Dakota School of Mines, 2000 SD 145, P8, 16-17, 619 N.W.2d 260, 262-265.) The parties do not dispute that those conditions preexisted Claimant's injury and did not develop within the occupational setting.

Dr. Teuber opined that the spondylolisthesis was "one of the contributing causes" of Claimant's symptomatology, but explained:

> Well, in no short answer, unfortunately, we know she had a spondylolisthesis. It was a preexisting condition anatomically. It was not considered to be significantly symptomatic. As a result of the specific activity and the activity that we have identified is the activity on January 21, '02, that caused the minimally symptomatic spondylolisthesis to become symptomatic.
>
> What that means is that the spondylolisthesis had been present all along, although it had not been causing her any significant symptoms. When she engaged in this activity on January 21 of '02, <u>it caused some sort of additional injury to the spondylolisthesis</u>, that which is not identifiable on the x-rays <u>and resulted in her becoming significantly symptomatic.</u>
>
> So the question of whether the spondylolisthesis was causing her symptoms, the answer has to be yes. But it's also - - <u>the other cause</u>, and more so, <u>is the specific activity that caused the spondylolisthesis to become symptomatic.</u>

(emphasis added). Dr. Teuber's opinion is "exclusively provided by the history." At his deposition, Dr. Teuber was made aware that Claimant had reported back pain off and on for a period of forty years, that Claimant had started chiropractic treatments on April 2, 1999, and that Claimant had received forty treatments between April 2, 1999, and January 11, 2002. Despite these facts, Dr. Teuber maintained his opinion that the incident at work was a major contributing cause of Claimant's condition before surgery. He explained:

> We all recognize that she had an underlying anatomic condition, and we all recognize that she had been treated for [a] low back condition over many years. But we also should recognize that she continued to work and was gainfully employed and was largely not restricted until that particular event which started the whole cascade of worsening of symptoms and eventually required her to have surgery.

Dr. Eckrich opined that Claimant's treatment after the January 21, 2002, incident, until August of 2002 was "directly a result of the incident itself." Dr. Eckrich opined that Claimant's treatment after October of 2002 was related to her preexisting condition and not to the work incident. He opined, "[T]he previous underlying condition is the major source of her discomfort rather than the injury which occurred in January of 2002."

Dr. Eckrich did not agree with Dr. Teuber's opinion that the work incident caused her to develop significant clinical symptoms of spondylolisthesis. He explained in his deposition testimony:

> I think that the time that has elapsed from her original injury to the apparent development of the symptoms which resulted in this surgery are [sic] so great that I have a hard time accepting the fact that that incident, a year and a half later or more, resulted in the need to finally have surgery for it.

Dr. Eckrich's opinions are contrary to those opinions he expressed after conducting the IME of Claimant. In his report, Dr. Eckrich opined that Claimant had not received appropriate treatment from the injury and had not reached maximum medical improvement from the January 21, 2002, injury. At his deposition, he opined that the time that elapsed since the injury was too great to make a connection. He did not explain the change in his opinions. Furthermore, Dr. Eckrich used the improper standard of "the major contributing cause" instead of "a major contributing cause."

Dr. Teuber's opinions are accepted as more persuasive than those expressed by Dr. Eckrich. As Claimant's treating physician, he actually treated Claimant over a period of time. His expert opinions take into consideration Claimant's treatment history. Dr. Eckrich's opinions are rejected because of their contradiction and because he used too great a standard for causation. "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 has met her burden to demonstrate that she suffered a compensable injury that combined with her preexisting conditions to cause and prolong her disability, impairment, and need for treatment and that her condition is compensable because her work-related injury is and remains a major contributing cause of the disability, impairment and need for treatment.

Issue Two

What is the nature and extent of Claimant's work-related disability, if any?

Employer conceded that if Claimant's condition is compensable, she is entitled to payment of all reasonable and necessary medical expenses in conformance with the provisions of SDCL 62-4-1. Employer also conceded that Claimant is entitled to permanent partial disability benefits in the amount of 10% to the whole person. Employer argued that Claimant is not entitled to temporary total disability benefits because she failed to meet her burden of proof.

SDCL 62-1-1(8) provides this definition of temporary disability, total or partial: "the time beginning on the date of injury, subject to the limitation set forth in 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first." SDCL 62-4-2 provides:

> No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the seven days waiting period is met, benefits shall be computed from the date of the injury.

Dr. Biberdorf took Claimant off work from January 22, 2002 to January 28, 2002, indicating that she could return to "full duty" work **on** January 28, 2002. Claimant was not incapacitated from working for seven days. Claimant acknowledged that no medical

provider had told her that she could not work. It was her own decision when she left employment on April 22, 2002. Without further medical documentation that Claimant was incapacitated from working for seven consecutive days, Claimant cannot be awarded temporary total disability benefits.

In summary, Claimant suffered a compensable injury on January 21, 2002. She met the requirements of SDCL 62-1-1(7)(b) to demonstrate the compensability of her need for surgery. She is entitled to payment[1] for all reasonable and necessary medical expenses and permanent partial disability benefits as assessed by Dr. Lawlor. She has not met her burden to show entitlement to temporary total disability benefits.

Claimant 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. Employer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto 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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 28th day of June, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge

[1] Both parties acknowledged the subrogation claim of the insurance carrier that paid for the surgery.