

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

**BRENDA LUNDGREN,  
Claimant,**

**HF No. 205, 2004/05**

**v.**

**DECISION**

**SHOWPLACE WOOD PRODUCTS, INC.,  
Employer,**

**and**

**RISK ADMINISTRATION SERVICES,  
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. Rollyn Samp represented Claimant, Brenda Lundgren. Michael S. McKnight represented Employer Showplace Wood Products, Inc., and Insurer Risk Administration Services (Employer/Insurer). The parties stipulated into evidence Claimant's medical records and records of medical expenses incurred. The parties agreed to forego the formal hearing process and submitted the evidence in this matter in written form.

**Issues:**

1. Did Claimant suffer an injury arising out of and in the course of employment?
2. Was Claimant's treatment for a cervical disc herniation compensable under SDCL 62-1-1(7)?

**Facts:**

1. Claimant is approximately 44 years old. She does not have a high school diploma, but has received one hundred twenty hours in nurse's aide training at a vocational school.
2. Claimant was employed with Employer at all relevant times hereto.
3. Claimant's supervisor in October of 2003 was Lisa Maxwell.
4. Ms. Maxwell has been a supervisor with Employer for over five years and had other prior supervisory experience.
5. Claimant reported an allegedly work-related injury to Ms. Maxwell on or about October 20, 2003.
6. Claimant had complained to Ms. Maxwell of neck pain prior to the report of injury on October 20, 2003.
7. On October 20, 2003, Claimant complained to Ms. Maxwell that she had been up since 3:00 a.m. the night before because she had pain in her neck area.

8. On October 21, 2003, Claimant complained to Ms. Maxwell that she had been up since 3:00 a.m. because she had pain in her neck area.
9. Claimant told Ms. Maxwell that she needed to go the chiropractor for neck pain.
10. Ms. Maxwell asked Claimant if her injury was work-related and Claimant responded that she was not sure what was causing her pain.
11. Ms. Maxwell sent Claimant to Employer's Human Resources Department.
12. Ms. Maxwell wrote some notes regarding Claimant's report of injury and later wrote down her recollection of the events surrounding Claimant's report of injury.
13. Employer could not verify Claimant's report of injury with her co-workers.
14. Following her report of injury, Claimant filled out a "Worker's Compensation Claimant's Report" for Employer. In this report, Claimant denied previous problems or treatments on her neck and left arm. Claimant also denied in this report that she had ever suffered any injuries, either work or non-work related before October 20, 2003. Claimant also denied that she had previously filed a worker's compensation report.
15. Claimant sought treatment from Dr. Dick Dondelinger, a chiropractor.
16. Claimant, dissatisfied with her condition, sought treatment from Dr. Paul Bunkers, a chiropractor. Dr. Bunkers evaluated and treated Claimant, but also ordered an MRI and referred her to a surgeon.
17. Claimant underwent anterior cervical fusion at C6-C7 on November 6, 2003, performed by Dr. Daniel Tynan.
18. On October 28, 2003, Claimant gave an oral statement to a representative of Employer/Insurer. Claimant again denied that she had prior work or non-work related injuries. Claimant again denied that she had filed for or collected on any previous worker's compensation claims.
19. Claimant admitted during her October 26, 2005, deposition, that she was not truthful while filling out the report for Employer. Claimant had no explanation for her dishonesty except to say that maybe she did not understand the questions.
20. When asked at her deposition about prior injuries or worker's compensation matters, Claimant admitted that she had whiplash in the late 1970's or early 1980's and that she received hundreds of chiropractic treatments, but denied that she had any other problems with her neck or left arm.
21. Cross-examination by Employer/Insurer's attorney revealed that Claimant had suffered the following injuries and undergone the following medical treatments prior to her October 20, 2003, report of injury:
  - a. Claimant fell and injured her head while working at Ag-Chem.
  - b. Claimant slipped and fell on the ice in 1989, which resulted in neck pain.
  - c. Claimant slipped and fell again in 1991.
  - d. On March 15, 1996, Claimant was diagnosed with cervical and lumbosacral sprain and strain following a fall at work.
  - e. Claimant hit her head on a 55-gallon drum while working for Ag-Chem and injured her head and neck.
  - f. Claimant fell down a half flight of stairs on August 3, 1998.
  - g. Claimant fell on the ice on December 30, 1998 and injured her neck, back, and low back.

- h. Claimant was involved in a motor vehicle accident on February 1, 1999. Claimant reported injuring her head and neck, and stated she had neck pain radiating to the back left wrist and two fingers.
  - i. On August 21, 2001, Claimant complained of neck pain and back pain with the pain radiating into both arms.
  - j. Claimant “conked” her head on a car door a few weeks prior to her alleged work-related injury.
  - k. Claimant hit her head on a forklift in May of 2005.
  - l. Claimant saw Dr. Lewis of Lewis Chiropractic at least once a month from March of 1996 to March of 1998.
  - m. Claimant treated with Dr. Moreau, a chiropractor, through 1998 and into 1999.
  - n. Claimant continued to treat at Dr. Moreau’s clinic through 1999 and into 2000 and 2001.
  - o. Claimant also treated with chiropractors Dr. Oldland and Dr. Friesner during this time.
  - p. Dr. Bunkers treated Claimant for neck pain on July 10, 2003, and September 12, 2003.
  - q. Claimant saw Dr. Dondelinger on October 3 and October 9, 2003 for treatment for headaches.
22. Claimant was off work from approximately October 20, 2003 to December 29, 2003, when she was released with lifting instructions. On February 6, 2004, Claimant was released unconditionally to return to work.
23. Dr. Jeff Luther performed a medical records review and issued a report on the causation of Claimant’s need for surgery.

### **Issue One**

#### **Did Claimant suffer an injury arising out of and in the course of employment?**

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).

This court has recognized that worker’s compensation laws are remedial in character and are entitled to a liberal construction. However, this rule of liberal construction applies only to the law, not to the evidence offered to support a claim, and does not permit a court to award compensation where the requisite proof is lacking.

Wold v. Meilman Food Industries, Inc., 269 N.W.2d 112 (SD 1978) (citations omitted).

To recover under worker's compensation, a claimant must prove by a preponderance of the evidence that she sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (SD 1992) (additional citations omitted). The worker's compensation scheme also requires that the claimant prove that 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. SDCL 62-1-1(7) (a)-(b); Norton v. Deuel Sch. Dist. #91-4, 2004 SD 6, ¶ 7.

Employer/Insurer urges the Department to find that Claimant did not sustain an injury arising out of and in the course of employment. Employer/Insurer argues that Claimant lacks all credibility and her testimony regarding the injury should be rejected and not used to support her assertion that she sustained a work injury. Claimant argues that her testimony was not lacking in credibility.

Claimant alleges that as she was installing a shelf in a unit, she turned her head, felt a pop in her neck, and suffered immediate onset of pain. She went to her supervisor, Ms. Maxwell, crying and asking to see a doctor. Ms. Maxwell sent her to Human Resources. Claimant thereafter went to Dr. Dondelinger. Claimant eventually underwent a cervical fusion at C6-C7 performed by Dr. Daniel Tynan, who did not testify or offer his opinions regarding the causation of the surgery.

Ms. Maxwell could not confirm Claimant's story with her coworkers. Ms. Maxwell testified that Claimant had complained to her about neck pain before the incident. Claimant's medical records reveal that Claimant has suffered prior instances of neck pain with radiculopathy. Dr. Luther's report demonstrates that he reviewed Claimant's prior medical records and found these previous complaints significant. Employer/Insurer disputes that any incident occurred at work and argues that Claimant cannot be believed when she says that she hurt herself at work on October 20, 2003.

Employer/Insurer presented considerable evidence regarding Claimant's credibility. Claimant did not tell the whole truth when she spoke to the claims adjuster, when she filled out the forms for Employer's Human Resource Department, or when her deposition was taken by Employer/Insurer. Claimant was evasive and not forthcoming with details when asked about her prior injuries. Although she attempts to explain this evasiveness by claiming ignorance, her credibility is damaged by her lack of candor in revealing past injuries. Her past medical history reveals that she has made insurance claims in the past. Her claim of ignorance to the meaning of Employer/Insurer's questions is dubious, at best.

SDCL 62-7-40 provides that "the finder of fact may reject all of the testimony of a witness" if it is found that the witness "knowingly swor[e] falsely to any material fact in the proceeding". No live testimony was offered by the parties, so the Department must determine credibility on the written record. When confronted with the omissions in her testimony, Claimant acknowledged her prior injuries. These prior injuries are material

facts because it has yet to be determined whether Claimant's need for surgery was caused by a work injury or was caused by her previous conditions. Claimant admitted eventually to these prior episodes, although continued to downplay their significance. The medical records were made available to the parties, so her lies did not hide her previous neck injuries and problems.

Despite her lack of candor about her prior neck problems, Claimant's descriptions of the incident and her symptoms to the medical providers are consistent, her supervisor corroborates Claimant's reporting of the alleged injury, and she underwent a cervical fusion surgery seventeen days after the report of injury, the Department finds that there was some sort of incident at work: Claimant was in too much pain to work, reported an injury, and wanted to go to the doctor. Given the record presented here, finding that she fabricated the entire story about hurting her neck at work and rejecting all of her testimony would be a harsh result not warranted here.

Whether the incident on October 20, 2003, was a *compensable injury* is a question best answered by an analysis of the medical records and the "a major contributing cause" tests provided by SDCL 62-1-1(7).

## Issue Two

### **Was Claimant's treatment for a cervical disc herniation compensable under SDCL 62-1-1(7)?**

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:

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.

The medical records demonstrate and Claimant admitted that she suffered from a longstanding pre-existing cervical pain, including pain associated with radiculopathy. “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 Claimant’s preexisting condition did not develop within the occupational setting. Therefore, SDCL 62-1-1(7)(b) is the appropriate causation test in this case. Claimant bears the burden to:

“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).

In support of her burden, Claimant presented the Department with her medical records and the opinion of Dr. Paul Bunkers, a chiropractor who treated her shortly after the injury and who referred for an MRI and a surgery consultation. Dr. Bunkers opined in a letter dated September 22, 2004:

It is my opinion beyond a reasonable degree of medical certainty based on the history and findings that Brenda’s injury is related to the work related problem on 10/20/2003.

Dr. Bunkers had treated Claimant on prior occasions. His prior records make no mention of a surgical consult or even a need for an MRI. After the incident, Dr. Bunkers performed orthopedic testing, requested an MRI, and upon receiving the results of the MRI, referred Claimant to a surgeon. The records from the surgeon indicate that surgery was immediately necessary. The surgeon did not opine on the causation of Claimant’s injury. Dr. Bunkers, when asked, opined that the injury is related to Claimant’s work.

However, it seems obvious that Dr. Bunkers overlooked Claimant’s “longstanding pre-existing history of cervical pain and documented evidence of radiculopathy” as that history was documented by Dr. Luther, a board certified physician. Dr. Bunkers’ opinion

that Claimant's injury "is related" to her work is not enough to sustain her burden under SDCL 62-1-1(7)(b). Specifically, Dr. Bunkers' opinions, when considered in conjunction with all of the medical records documenting her longstanding history of cervical neck pain and radiculopathy, as well as with her attempts to hide this previous condition, do not meet her burden under SDCL 62-1-1(7)(b). Before October 20, 2003, and the alleged incident, Claimant complained to her supervisor that she was suffering severe neck pain that interfered with her sleep. Dr. Bunkers' records do not show that he fully considered Claimant's prior condition. Furthermore, Dr. Bunkers failed to use the correct standard. The Department was not provided with a curriculum vitae or any description of Dr. Bunkers' methods used to come to his conclusion. His opinion and medical records are not persuasive and do not support a finding that Claimant met her burden of proof under SDCL 62-1-1(7)(b). Dr. Bunkers' opinion does not take into account Claimant's longstanding history of neck complaints and injuries and is rejected as lacking in foundation. 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).

In response to Claimant's claim of a compensable injury, Employer/Insurer offered the opinions of Dr. Jeff Luther. Dr. Luther conducted a medical records review at Employer/Insurer's request. Dr. Luther is a physician licensed by the State of South Dakota, Board Certified in Internal Medicine, Board Certified in Emergency Medicine, and a Certified Independent Medical Examiner through the American Board of Independent Medical Examiners. Employer/Insurer asked Dr. Luther to review Claimant's extensive medical records and address certain questions regarding her treatment, condition, and the causation of her condition. The question and answer set forth in Dr. Luther's undated report read as follows:

**Is the work injury on October 20, 2003, a major contributing cause of her current condition and need for treatment?**

I conclude no. It is very evident in this chart that this patient has a longstanding pre-existing history of cervical pain and also documented evidence of radiculopathy including: left arm pain, left elbow pain, numbness, and tingling into the extremity. This patient reported the injury on 10/20/03, but she had been seen as recent as 10/03/03 and 10/09/03 by a chiropractor for similar complaints.

Therefore, it is my medical opinion based on a reasonable degree of medical certainty, that this patient's condition was pre-existing and that the reason for pain and need for surgery is directly related to the pre-existing condition and not due to the reported work injury.

This completes my independent medical chart review. This review is based on charts, and the opinion was based on chart review only. I did not examine the patient. Any further records that come to light that are pertinent to this case, I would be happy to review those.

To form this opinion, Dr. Luther reviewed the following records:

Those supplied to me by Ms. Jocele Eubanks include first report of injury, operative note by Dr. Dan Tynan which included a C6-7 anterior cervical discectomy and fusion, placement of allograft and anterior plate with intra-operative SSET monitoring, also medical clearance note by Dr. Jeffrey Stenson. I have also reviewed extensive chiropractic notes dating back to the early 1990's.

Dr. Luther's report listed what he considered "pertinent excerpts and direct quotes from physicians." Dr. Luther also reviewed "a phone interview transcript of Ms. Jocele Eubanks and the patient." Dr. Luther described Claimant as "elusive" about her medical treatment prior to the incident of October 20, 2003, stressing that Claimant related her neck treatments exclusively to the treatment for migraines not neck pain, contrary to Dr. Luther's review of the records.

Dr. Luther has specialized training in independent medical examinations and emergency medicine. His analysis of Claimant's prior medical history and the medical records generated at the time of the alleged incident is thorough, methodical, and persuasive. His opinions call into question Dr. Bunkers' opinion and the foundation of that opinion.

After careful consideration of the medical opinions and the totality of the evidence offered in this matter, the Department finds and concludes that Claimant did not meet her burden of proof under SDCL 62-1-1(7)(b). The work incident did not cause an injury, did not combine with a preexisting disease or condition, did not cause or prolong her disability, impairment or need for treatment. Her need for treatment is not compensable because she has failed to show that her employment or any employment related injury is and remains a major contributing cause of her disability, impairment or need for treatment. Claimant's request for benefits is denied and her Petition for Hearing must be dismissed.

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 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 2<sup>nd</sup> day of April, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

---

Heather E. Covey  
Administrative Law Judge