

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

CINDY KENNEDY,
Claimant,

HF No. 210, 2002/03

v.

DECISION

M-TRON INDUSTRIES, INC.,
Employer,

and

THE TRAVELERS,
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 September 8, 2004, in Sioux Falls, South Dakota. Claimant, Cindy Kennedy (hereafter Claimant) appeared personally and through her counsel, Dennis W. Finch. Camela Theeler represented Employer M-Tron Industries, and Insurer The Travelers (hereafter collectively as Employer).

Issues:

1. Does Claimant's work-related injury remain a major contributing cause of her current disability?
2. Is Claimant entitled to permanent total disability benefits under the "odd-lot" doctrine?

Facts:

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

At the time of hearing in this matter, Claimant was 44 years of age and living in Volin, South Dakota. Claimant has lived in Volin for the past 11 years. She went through her sophomore year in high school. At age 26, she received a high school diploma by correspondence. Claimant has no formal education or special training beyond high school.

Claimant has been on Social Security Disability for approximately 10 years. During her adult life, Claimant worked as a nurse's aide in Texas and South Dakota. After moving back to South Dakota in 1988, Claimant worked at the Sunset Manor, a nursing home in Irene, South Dakota. She worked there approximately 2 years as a nurse's aide.

Claimant later worked for a nursing home in Wakonda, South Dakota, in the housekeeping and laundry department. While working as a nurse's aide and in her nursing home jobs, Claimant had no injuries other than a pulled muscle in her lower back, which only caused her to lose 1 day of work.

After leaving the nursing home job in Wakonda, Claimant worked for a period of time at Alumax in Yankton, South Dakota. At Alumax, Claimant was working in a paint line and doing a lot of heavy lifting. On that job, Claimant pulled a muscle in her arm and top part of her shoulder. After stopping work for a period of time, that condition resolved. Claimant worked for a short period for Muller Industry in Yankton, putting bolts into windmill blades to put them into bars for windmills. Claimant adequately performed that job and did not sustain any injuries while working there.

Claimant went to work for Employer in 2000. Prior to beginning her work with Employer, she was required to take a pre-employment physical and no physical problems were indicated. Employer was in the business of building substrates for computers and phones. When Claimant first started her job she worked as a spring mount employee, meaning that she placed little springs into the substrates with cement and baked them. She then became an inspector which involved sitting at a table using a microscope to look through trays of parts and make sure there were no springs missing or springs that were on crooked or any broken wires. Up until January 24, 2001, Claimant had no difficulty doing this job. Her duties consisted of sitting at a table with a microscope in one position, looking down into a microscope for 12-hour days. Other than one break in the morning and a 20-minute lunch and two short breaks in the afternoon, Claimant inspecting parts with the microscope continuously during her shift.

On January 24, 2001, after constant looking down at the microscope at her workstation, Claimant sustained neck problems. Claimant described the situation as starting out like a dull ache and then turning into a sharp burning sensation. By the end of the day, the pain was very sharp and going up into the back of her head. She reported the problem to her group leader, Bonnie Erickson, at the end of the shift that day.

Claimant then had 7 days off and felt that if she just went home and relaxed, the pain would go away. The pain did not go away. On the first day she was scheduled to return to work, her husband was taking her to work because the roads were bad and she told him they needed to go home because the pain was just unbearable. She then went to see Dr. Mark, her family physician, that same day. Dr. Mark opined that Claimant suffered from "spondylosis" at "C3-4, C4-5, and C5-C6" that could put a "little" pressure on her spinal cord. Dr. Mark also opined that Claimant had "mild disk bulge at C3-4 and C4-5 and C5-6" that could also put a little pressure on her spinal cord.

Employer then requested that Claimant see Dr. James Kerr in Yankton for a second opinion. Dr. Kerr began treating Claimant on February 14, 2001. Dr. Kerr gave her some pain medication and put her into physical therapy. Dr. Kerr's record of February 14, 2001, reveals the following:

Dr. Mark thought the neck problems were work related due to body position and I agree that is very likely what is going on. She basically has overuse injury with neck pain and spasm. Now she is in a cycle that can't be broken until she has physical therapy and knowledge about how she can do exercises to benefit her. She may even need injections to improve that. I referred her to physical therapy to evaluate and treat.

On March 30, 2001, Dr. Kerr released Claimant to return to work, advised her try to return to work, and see how it worked with her neck to see if the pain persisted or got worse. In a letter dated April 4, 2001, Dr. Kerr stated:

I saw Cindy Kennedy today and she reports that she has recurrence of the posterior neck pain that she had when she presented to me initially. She's gone through five sessions of physical therapy with emphasis on manual therapy, ultrasound stimulation, stretching and posture education. Mr. O'Brien in physical therapy has been working with her. I think at this point that she's going to need to find other employment because she is not able to successfully complete her duties due to the pain she's experiencing. Her sensation is intact, although she has tingling at times in her upper extremities.

On or about April 5, 2001, Dr. Kerr further opined that Claimant's restrictions were temporary.

Claimant went back to work and although she was supposed work 12 hours, she only made it to four o'clock and could not finish her shift. Insurer then requested that she see Dr. Blow in Sioux Falls for another opinion and she saw him about 8 times from mid April through mid July of 2001.

Dr. Blow diagnosed Claimant with degenerative disc disease with mild spondylosis and "some spondylitic C5-6 cervical cord compression eccentric to the right with mild spondylitic C5-6 neural foraminal narrowing." Dr. Blow opined that simply bending her neck would not cause those types of changes on Claimant's cervical spine. Dr. Blow noted, "they would be more age-related than simply from prolonged cervical flexion, certainly not from working for less than one year and seven months."

Claimant failed to attend several physical therapy sessions and was dropped from the program by the physical therapist. Dr. Blow convinced the physical therapist to work with Claimant again. Claimant failed to attend two more physical therapy appointments and failed to attend an appointment with Dr. Blow. He released her on July 10, 2001, noting that Claimant had been "noncompliant with her physical therapy," and gave her a 5% permanent partial impairment. Dr. Blow opined that Claimant's "work-related difficulties are primarily muscular in origin and certainly have improved." Claimant was paid permanent partial disability benefits in accordance with her impairment rating. Dr. Blow also gave Claimant a permanent work restriction of "avoid neck flexion (sustained)".

Claimant did not return to work for Employer. After her worker's compensation benefits ended, she looked for work at a motel but they would not hire her because of the limitations. She has not attempted any other work or looked for any other work. On May 1, 2003, Claimant filed her Petition for Hearing.

Dr. Jeff Luther, a certified independent medical evaluator and a board certified physician of internal medicine and emergency medicine, performed an independent medical examination of Claimant on March 16, 2004. He testified that on physical exam he found no objective signs of clinical significance. He found subjective muscle tenderness and some guarding, but overall a normal neurologic examination. He explained:

She had normal range of motion with the exception of some mild limitations of left and right rotation of the cervical spine and also tilt, lateral tilt of the spine. But, again, in my opinion that was a subjective finding. And that she also had some tenderness in the - - the paravertebral - - the neck muscles that also extended down in to the upper shoulder area that in my opinion and experience was out of proportion to what one would typically find. It's frequently referred to as touch-me-not tenderness. And that is with just light palpation or touching, the patient will wince significantly. And it's a finding that appeared to be more subjective than it is objective.

Dr. Luther opined that Claimant's work activities are not a major contributing cause of her disability. He explained:

In review of the chart, there was very similar findings of complaints and physical examination that were very similar to what she had predating the reported injury. Also the degenerative changes in her spine, it was my opinion that those would not be a major contributing factor, at least her job would not be a major contributing factor, given the static flexion that she had to maintain and given the length of employment that she had. Those in my opinion were more of an age-related process.

Dr. Luther opined that Claimant's condition should not limit her activities of daily living or her ability to be employed. Dr. Luther opined that Claimant's "mechanism of injury which was reported as static posture of the neck, usually would only result in some type of myofascial or muscle stiffness or deconditioned process." He opined that Claimant's disability is "related to her depression and not due to her physical condition or reported injury."

Dr. Luther also opined that injuries such as Claimant's benefit from correction of the posture and physical therapy. In his written report, he explained the reasons physical therapy could have helped Claimant if she had completed it:

It has been well-demonstrated in the literature that physical therapy is a type of treatment strategy that emphasizes modalities to treat the acute pain which is

based on range of motion exercises with modalities which requires strict compliance, in order to be successful. If compliance is not maintained, the benefits of the physical therapy fall off after a short period of time. Therefore, it cannot be stressed enough that a physical therapy program as outline by her treating physician needs to be completed as closely as possible.

Dr. Luther opined that Claimant bears partial responsibility for her condition in that “her decision not to participate [in physical therapy] would have delayed and/or perpetuated her symptoms.” Dr. Luther opined that Claimant’s injury was “a temporary exacerbation of [her] preexisting condition” and agreed with Dr. Blow in his opinion that her work activities did not cause her to develop degenerative disc disease.

Claimant also suffers from psychological problems. She has been awarded Social Security Disability Benefits by Disability Determination Services. In 1995, a psychological evaluation found her to be suffering from “Dysthemic Disorder and Dependent Personality Disorder.” In 2002, a second psychological evaluation done by a Dr. Van Kley found her to be suffering from Post Traumatic Stress Disorder, chronic, and Dysthemic Disorder in addition to Dependent Personality Features. Dr. Van Kley opined that Claimant’s current condition is relatively unchanged with comparing to her functioning to what she presented during her evaluation in 1995.

Claimant described her current condition and disability as pain in her neck 90% of the time, with the pain being a “9 out of 10”, with no good days, which interrupts her sleep, causes her to have to lie down more than once a day to seek relief. Claimant testified that because of her pain she cannot sit comfortably for more than about 5 minutes in a standard chair and cannot stand very long. She testified she does very little walking and cannot take her dogs for walks. She testified that she has lost sensation in her middle finger of her right hand.

Other facts will be developed as necessary.

Issue One

Does Claimant’s work-related injury remain a major contributing cause of her current disability?

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 two preexisting conditions, a psychological one and a physical one. Her psychological condition has been diagnosed as Dysthemic Disorder and Dependent Personality Disorder. Her physical condition has been diagnosed as degenerative disc disease with mild spondylosis and “some spondylitic C5-6 cervical cord compression eccentric to the right with mild spondylitic C5-6 neural foraminal narrowing.”

“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 Grael v. South Dakota School of Mines, 2000 SD 145, ¶8, 16-17, 619 N.W.2d 260, 262-265).

The parties do not dispute that Claimant’s psychological conditions are preexisting conditions that did not develop within the occupational setting. The medical evidence also demonstrates that Claimant’s degenerative disc disease with mild spondylosis and “some spondylitic C5-6 cervical cord compression eccentric to the right with mild spondylitic C5-6 neural foraminal narrowing” did not develop from the one year and

seven months she spent working for Employer. Therefore, subpart (b) is the appropriate test to determine if Claimant's disability is compensable.

Claimant must demonstrate through medical evidence that her work injury is and remains a major contributing cause of her disability. To prove this causal link, Claimant relied on the testimony of Dr. Mark. Dr. Mark opined that Claimant was unable to work because of the pain from her physical conditions. Dr. Mark opined that Claimant's work at Employer serves as a major contributing cause to her diagnosis of cord compression and neuroforaminal narrowing because of the combination of the flexion of her neck at work and the preexisting narrowing on the spinal cord. Dr. Mark described it as a "combination for chronic pain."

Dr. Kerr opined that Claimant suffered an injury arising out of her employment, but assigned no permanent restrictions when he released her to return to work. Dr. Blow opined that Claimant's condition was more age-related than work-related. Dr. Kerr and Dr. Blow treated Claimant and both concluded that her condition was improved enough to return to work. Finally, Dr. Luther opined that Claimant suffered a "temporary exacerbation of her preexisting condition" and was treated appropriately. Dr. Luther also opined that he saw no objective evidence of ongoing injury, that her symptoms are out of proportion to what is usually found with Claimant's condition and that any disability would be related to Claimant's depression and not due to the injury suffered at Employer.

When the medical evidence supplied by Dr. Luther, Dr. Blow, Dr. Kerr and the psychological evaluations are weighed against the testimony of Dr. Mark, Dr. Mark's opinions are not persuasive. 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. Luther opined that Claimant suffered a temporary exacerbation of her preexisting condition and her continued symptoms are not supported by objective evidence. The medical evidence also shows that Claimant's non-compliance with her physical therapy affected her recovery. Claimant failed to demonstrate that her work injury is and remains a major contributing cause of her claimed disability.

Issue Two

Is Claimant entitled to permanent total disability benefits under the "odd-lot" doctrine?

In light of the finding that Claimant's current condition is not compensable, she is not entitled to any additional workers' compensation benefits. Claimant's request for permanent total disability benefits is denied and her Petition for Hearing must be dismissed with prejudice.

Employer 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'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 shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 18th day of May, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge