SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JAMES BOWEN, **HF No. 140, 2003/04**

Claimant, **DECISION**

vs.

DIMOCK DAIRY,

Employer,

and

CONTINENTAL WESTERN GROUP,

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 January 19, 2005, in Dimock, South Dakota. James Bowen appeared pro se. Comet Haraldson represented Employer/Insurer (Employer).

The Prehearing Order, entered on December 15, 2004, identified notice and causation as the issues to be presented at hearing. After the hearing, Employer withdrew its affirmative defense of notice. Therefore, causation is the sole issue addressed in this Decision.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence.

At the time of the hearing, Claimant was forty-six years old and lived in Mitchell. Claimant dropped out of school after 8th grade. Claimant obtained a GED and received vocational training as a welder. Claimant is currently self-employed as an auto mechanic. Claimant has operated his business for five to ten years, but he has been doing mechanic work on cars for over thirty years. In his business, Claimant services cars, rebuilds engines, performs transmission work, and changes and repairs tires. Claimant's work involves a great deal of physical labor and repetitive motion with his hands.

Employer makes cheese at its plant in Dimock. Mike Royston, Employer's manager, oversees the entire operation. Denise Royston, Mike's wife, is the office manager. Five or six employees work during a shift to make cheese. Each employee's duties are widely varied and ever-changing throughout the work day. An employee performs a task for a few minutes and then moves to a different station. No single employee performs repetitive type activities or duties during a work shift.

Claimant worked for Employer for one day on November 3, 2003. Claimant was hired as a production worker. Claimant's shift started at 4 a.m. and his first day of employment was considered an orientation day. Several employees, including Mike,

showed Claimant various duties that needed to be performed during the cheese-making process. For example, Claimant lifted cheese, packed cheese, stirred cheese in large vats, folded boxes and put cheese on racks and in the cooler. Claimant performed a variety of duties throughout the work day. Mike specifically recalled that Claimant, after being shown a new work activity, would do one or two repetitions and then stop and watch the work being done. Mike did not say much about this because it was Claimant's first day and he was learning the various job duties.

Claimant testified he had to lift bricks of cheese weighing fifty or seventy-five pounds for at least a couple hours. Claimant also stated that he had to spend time a lot of time in the "cold" freezer loading carts for ten to fifteen minutes at a time. Claimant stated, "I never did it before and it was a hard, you know, exerting myself to push the cart because there was a lot of cheese on it." Claimant estimated that during his work shift, the plant produced 75,000 pounds of cheese.

Contrary to Claimant's testimony, Mike credibly explained each block of cheese weighed, at most, forty to forty-two pounds. In addition, on November 3rd, the workers produced only 5,567 pounds of cheese. According to Mike, one vat produced thirty-two blocks and the last vat of the day produced thirty-five blocks, which was a big yield. Mike also stated the cooler temperature is kept at forty-eight to fifty degrees and that the work in the cooler usually is done by two workers and takes a very short period of time. Mike confirmed that Claimant did not perform any type of repetitive activities.

In the early afternoon on his first and only day of employment, Claimant noticed that his right hand started hurting. Claimant described his pain as a tingling feeling that moved from finger to finger and ultimately he experienced pain in the fleshy part of his hand between his first finger and thumb. Claimant could not identify a specific accident or incident that happened on November 3rd that caused his right hand to hurt. Claimant attributed the pain in his hand to lifting cheese.

Claimant completed his work shift and punched out at 3:42 p.m. At the end of the shift, Mike asked Claimant how the day went for him. Claimant stated that he was fine and he would return to work the next day. Claimant did not mention anything to Mike about experiencing pain in his right hand during the shift.

After Claimant left work, he received a service call to tow a car. While Claimant was making the service call, he noticed that his hand was swollen and extremely cold. Claimant towed the car and then went home. Claimant's pain continued and during the night, Claimant noticed his right hand was numb.

On November 4, 2003, Claimant was supposed to report to work at 4 a.m., but he still had pain in his right hand. Claimant had problems with his cell phone and finally contacted Denise about 9:30 a.m. Claimant told Denise that his hand hurt and that "[i]t's like it's frozen or something." Denise stated, "he said that he didn't come to work because he felt like his hand was numb or he didn't know if it was frost bite or what it could be." Claimant asked Denise if he could start his shift at noon.

Denise checked with Mike to verify if Claimant should come into work because most of the hard work was completed by noon. Denise informed Claimant not to come in to work because they hired someone else to do the job. Claimant did not return to work for Employer.

Claimant stopped by the plant sometime in the afternoon of November 4th and asked Denise whether Employer carried workers' compensation insurance. Claimant told Denise he wanted to make a workers' compensation claim because he hurt his right

hand on November 3rd. Denise gave Claimant a First Report of Injury and he completed the form. Denise properly filed the First Report of Injury with Insurer.

Claimant sought medical treatment for his hand condition. Claimant eventually saw Dr. Derek Ferrie and was diagnosed with right carpal tunnel syndrome. Claimant received some physical therapy and his right hand is better now.

ISSUE

WHETHER CLAIMANT'S ALLEGED NOVEMBER 3, 2003, INJURY IS A MAJOR CONTRIBUTING CAUSE OF HIS RIGHT CARPAL TUNNEL SYNDROME?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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 [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "The medical evidence must indicate more than a possibility that the incident caused the disability." Maroney v. Aman, 565 N.W.2d 70, 74 (S.D. 1997). Claimant's burden is not met when the probabilities are equal. Hanten v. Palace Builders, Inc., 558 N.W.2d 76 (S.D. 1997). SDCL 62-1-1 states, in part:

> (7) "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 [.]

(emphasis added). "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).

Dr. Ferrie's opinions were provided through his deposition testimony. Claimant initially saw Dr. Ferrie's colleague, Dr. Amir Cheema, on November 4, 2003, for right hand pain. Dr. Ferrie then treated Claimant beginning in mid-December 2003. Dr. Ferrie referred Claimant to Dr. Judith Peterson for EMG studies. Based on these studies, Dr. Peterson concluded Claimant had right carpal tunnel syndrome. Dr. Ferrie confirmed that Claimant's symptoms were consistent with carpal tunnel syndrome and that he was "comfortable with the diagnosis of carpal tunnel."

Dr. Ferrie agreed that carpal tunnel syndrome typically results from repetitive type activities or injuries. Dr. Ferrie testified as to his understanding of Claimant's duties during his only day of employment:

> What was reported to me is that he was lifting a number of heavy, round cheese, I don't know what they are, if they're tubs or pallets or plates or whatever, and was carrying those, and those would have pushed up against the median compartment and caused some bruising. What you said initially is correct in that most commonly carpal tunnel is caused from repetitive use of the hands, which causes some swelling. The medial compartment is a very small area where a nerve passes through there. A direct blow or repetitive heavy things hitting on that area could also cause swelling in that area and cause sensory problems. The nerve can get pinched, if you will, from carrying heavy boxes kind of pushing, you know, on this soft tissue.

Dr. Ferrie also stated that "if somebody's lifting lots of really heavy things repeatedly every hour, it would be possible to damage that carpal tunnel and end up with carpal tunnel syndrome."

Claimant told Dr. Ferrie that his work duties involved lifting heavy blocks of cheese for eight hours and that the blocks weighed fifty or seventy-five pounds. Dr. Ferrie stated:

> He was asked to carry large blocks of cheese for an extended period of time, which made his hands very sore, and after a time we were left with soreness predominantly in the right hand versus the left hand, and the sensory component of the EMG nerve conduction studies showed some latency in the median nerve compartment, which would be consistent with carpal tunnel.

Dr. Ferrie agreed there is no way to be sure if the latency preceded the November 3rd incident. Dr. Ferrie based all of his opinions on information provided by Claimant about the job site and the duties he performed. Dr. Ferrie agreed that if Claimant's information was wrong, his opinion on causation would also be incorrect.

Dr. Ferrie's opinions lack foundation and must be rejected. 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). Dr. Ferrie's opinions are solely based on Claimant's incorrect and misleading information that he lifted blocks of cheese that weighed fifty or seventy-five pounds throughout his work shift. The credible testimony from Mike Royston established that the cheese blocks weighed no more than forty-two pounds. More importantly, Claimant did not perform any type of repetitive activity on his one and only day of employment. Claimant's statements about his work duties were inconsistent with Mike's credible testimony and description of Claimant's work activities and information about the production plant. Dr. Ferrie based his opinions on incorrect facts; thus, his opinions are flawed. In addition, Dr. Ferrie did not opine that Claimant's work activities were a major contributing cause of his right carpal tunnel syndrome.

Employer relied upon the opinions expressed by Dr. Richard Farnham, an occupational medicine physician, in his Affidavit. Dr. Farnham performed a medical records review of Claimant's records on June 17, 2004. Dr. Farnham reviewed Claimant's medical records, Claimant's deposition and statements from Mike and Denise Royston. Dr. Farnham opined Claimant "did not sustain a well-defined work-

related injury on his first and only date of employment at the Dimock Dairy." Dr. Farnham concluded the documentation did not support a "cause → effect relationship between [Claimant's] statement of injury as contained within the medical records and the medical diagnosis of right hand and wrist carpal tunnel median nerve compression syndrome." Dr. Farnham opined that Claimant's one day of work was not a major contributing cause of his need for medical treatment. Finally, Dr. Farnham opined that Claimant's employment as an auto mechanic "points in the direction of non-work-related medical condition causing this claimant's subjective symptomatology." Dr. Farnham's opinions have the appropriate foundation and are accepted.

Claimant may have experienced pain in his right hand after his one day of employment. However, there is no medical evidence to support Claimant's burden. Claimant failed to establish by a preponderance of the evidence that his alleged work injury or work activities on November 3rd were a major contributing cause of his right carpal tunnel syndrome. Claimant's Petition for Hearing must be dismissed with prejudice.

Employer shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Claimant shall have ten days from the date of receipt of Employer's proposed Findings and Conclusions to submit objections 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 22nd day of February, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

_____

Elizabeth J. Fullenkamp
Administrative Law Judge