

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

THERESA SCHROEDER

HF No. 200, 2015/16

Claimant,

v.

DECISION

**BANKWEST and SOUTH DAKOTA
BANCSHARE,INC. ,**

Employer,

and

AMERICAN COMPENSATION INSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on December 14, 2017, in Rapid City, South Dakota. Claimant, Theresa Schroeder, was present and represented by Michael J. Simpson of Julius & Simpson, LLP, Law Firm. The Employer, Bankwest and South Dakota Bancshare, Inc.. and Insurer, American Compensation Insurance Company, were represented by Rebecca L. Mann of Gunderson, Palmer, Nelson & Ashmore, LLP, Law Firm.

Legal Issue:

The legal issues presented at hearing are stated as follows:

- a. Causation of Schroeder's Condition;
- b. Whether Schroeder is entitled to medical expenses;
- c. Hearsay objection regarding exhibit 3

Facts:

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

1. On or about April 1, 2014, Theresa Schroeder (Schroeder or Claimant) suffered an injury while working for Bankwest which was at all times pertinent insured for

workers' compensation purposes by American Compensation Insurance Company (jointly Employer/Insurer). Schroeder filled out a First Report of Injury which describes that she slipped and fell onto her left hip and left upper arm.

2. On June 18, 2014, Schroeder was assisting her husband with some yard work involving picking up and dragging one-inch thick branches across the yard. During this activity, Schroeder described feeling an electrical current on her right hip area going into her leg. She was unable to finish the activity as she had to stop due to the discomfort. Employer/Insurer held the injury to be compensable.
3. On June 18, 2014, Schroeder visited chiropractor Dr. Jeffrey Burns. Burns saw Schroeder sixteen times from June 21, 2014, to July 31, 2014. In those visits, he described right/hip SI area pain as well as muscle spasms in her mid and low back. On July 31, 2014, he referred Schroeder to physical therapy.
4. From August 5, 2014 to October 28, 2014, Schroeder was seen for physical therapy at About You Physical Therapy. She was seen twelve times during this period.
5. From July 31, 2014 to November 15, 2014, Schroeder continued treatment with Dr. Burns.
6. On December 4, 2014, Schroeder was seen by Dr. Brett Lawlor, a Rapid City rehabilitation medicine specialist.
7. On February 4, 2015, Schroeder visited Lawlor who was estimating about a 55% improvement since her last visit.
8. On March 25, 2015, Schroeder visited Lawlor. He noted that she had been wearing an SI belt which seemed to help her and she had not been to physical therapy since the last visit even though it had offered improvement.
9. On April 13, 2015, Lawlor saw Schroeder and noted she was doing somewhat better. He noted that they had requested an MRI but the request had been denied.
10. On April 30, 2015, Lawlor dictated a note regarding a phone conversation with representative from the insurance company.
11. On July 7, 2015, Lawlor saw Schroeder who informed him that Employer/Insurer had "closed her case."
12. On July 29, 2015, Schroeder had a left hip MRI.
13. On August 18, 2015, Lawlor gave Schroeder a right intra-articular hip injection.
14. On May 29, 2015, Dr. Jeffrey Nipper performed an independent medical evaluation (IME) on Schroeder.
15. On November 18, 2015, Schroeder saw surgeon, Dr. Giuseffi.
16. On May 14, 2016, Schroeder visited Burns and noted her right hip pain was aggravated by walking but she had been able to walk two miles. He also noted that she was much improved from one year ago. He continued to note unlevel pelvic balance, SI joint in dysfunction.
17. On June 27, 2016, Burns noted that Schroeder's low back and hip ache increased after climbing on trails and that three miles was too much walking.
18. On October 11, 2016, Burns reported Schroeder's right leg pain had increased and she woke up with pain this morning.

19. From January 26, 2017 until April 26, 2017, Schroeder visited Burns four times for treatment. Burns continued to note the right hip buttock pain which was increased by activity.
20. On February 27, 2017, Schroeder was seen by Dr. Wade Jensen, an orthopedic surgeon at the request of Employer/Insurer for an IME. He did not feel there was any SI joint pathology but felt Schroeder had some evidence of bilateral hip CAM lesions which were mildly symptomatic. He believed she only had a sprain strain which would have resolved itself in the first six weeks with conservative care and anti-inflammatories.
21. On April 10, 2017, Schroeder saw Dr. Schwietert complaining of low back and right hip pain ranging from 1 to a 10. Schwietert continued to see her from April 11, 2017 to December 5, 2017, on a regular basis.

Additional facts may be developed in the issue analysis below.

Analysis:

Issue I: Causation of Schroeder's hip condition

The Department must first establish whether Schroeder's work injury on April 1, 2014, is a major contributing cause of her current condition. "A cause which cannot be exceeded is a major contributing cause." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 42. "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). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth at ¶ 34, 724 N.W. 2d 586, 593 (citation omitted). Additionally, "our law does not require objective findings in order to sustain a workers' compensation claim." Vollmer v. Wal-Mart, 729 N.W.2d 377, 385 (S.D. 2007). The proper standard is a preponderance of the evidence. Wise v. Brooks Constr. Serv., 2006 SD 80, 721 N.W.2d 461, 466.

Schroeder claims that the work injury she sustained on April 1, 2014 is the major contributing cause of her current condition. On that day, Schroeder stepped out of her car, turned to shut the door, and then slipped and fell on the ice. Schroeder documented the fall in a First Report of Injury in which she reported falling on her left side. Schroeder has testified that following the injury she felt pain in her right leg from the hip down to the knee cap. She took ibuprofen for the pain.

On June 18, 2014, Schroeder and her husband were working in the yard trimming the one-year growth from a tree. Schroeder was picking up one-inch thick branches and dragging them across the yard. When she bent over to pick up the sticks she claims she felt an electrical current on her right hip area extending into her leg. After two to three times, she was unable to continue with the yard work. Schroeder went to see Dr. Burns the next day. Burns diagnosed Schroeder with unlevel pelvic balance

caused by SI joint dysfunction/sprain/strain injury to SI joints resulting from slip and fall on ice in parking lot. Burns continued to see Schroeder sixteen times between June 21, 2014 and July 31, 2014. Burns referred Schroeder for physical therapy.

Schroeder was seen for physical therapy at About You Physical Therapy twelve times from August 4, 2014 through October 28, 2014. Physical therapist Brad Casselman reported that Schroeder's pain limited her to walking less than one mile on flat surfaces and that she could not walk on grass. He further noted that Schroeder's walking ability was beginning to come back, but she was still limited by pain in her right hip and buttock area. At her last visit, Casselman noted that she demonstrated symptoms consistent with the diagnosis of right side hip pain and SI joint dysfunction which was aided by exercise.

During the time she was receiving physical therapy, Schroeder was continuing to see Burns. On October 8, Burns noted that Schroeder was able to walk during the day but whenever she walked for more than a mile there was an increase in deep hip pain. Schroeder was seen four times by Burns from October 22, 2014, to November 15, 2014. Burns noted that Schroeder continued to complain of the same right hip/SI joint area pain.

On December 5, 2014, Schroeder was seen by Dr. Lawlor, a physical medicine and rehabilitation and pain medicine specialist. Lawlor has been practicing for 21 years and is a board-certified Mayo Clinic trained rehabilitation medicine specialist. His specialty involves the non-surgical treatment of neurological and musculoskeletal injuries and diseases. Lawlor noted that Schroeder had a mild right SI tenderness, had significant bursa tenderness, had a positive Stinchfield test on the right, a positive FABER test on the right, internal rotation of the hips positive on the right, and reverse straight leg raising was minimally positive on the right. Lawlor believed these results suggested some SI and hip joint pain. For treatment strategies, he discussed a diagnostic hip joint injection, bursal injection, SI injection, physical therapy, and further imaging. He recommended physical therapy with further imaging and/or injections if Schroeder was not showing fifty percent improvement after a month.

From December 18, 2014, through April 23, 2015, Schroeder was seen by Geoff Bonar, a physical therapist at ProMotion Physical Therapy. Bonar noted that Schroeder has pain over her right iliac crest, right lateral hip, right ischial tuberosity, coccyx, and right inguinal region "deep." He also noted that her condition was aggravated by walking, bending forward to pick things up, quick movements and sitting on a hard chair. He recorded that she was showing improvement, and would continue the exercises independently at home following the denial of further physical therapy visits by Employer/Insurer.

While Schroeder was participating in physical therapy, she again saw Lawlor on February 4, 2015. Schroeder was estimating a fifty-five percent improvement since their last visit. Lawlor noted that Schroeder was rating her pain at 2-3/10. He also noted on exam that she had tenderness over her bilateral SI joints and a positive FABER test as

well as upslip on the right. He recommended that Schroeder continue her current treatment regimen including physical therapy with a trial of an SI belt. On March 25, 2014, Schroeder again visited Lawlor. He noted that Schroeder reported that the SI belt had helped a little bit. He also noted that she had not been to physical therapy since their last visit. Lawlor records that Schroeder had tenderness in the SI joints, right greater than left, a positive FABER test, but no upslip of the pelvis. He recommended physical therapy.

Lawlor saw Schroeder on April 13, 2015. He noted she was doing somewhat better. He also noted that he had requested an MRI due to the pain down Schroeder's right leg, but the MRI had been denied. Lawlor noted that Schroeder was continuing physical therapy and chiropractic treatment. Schroeder reported that chiropractic treatments were helping with SI joint mobilization which leveled out her pelvis and resulted in significant reduction of her pain. She rated her pain at 2/10. He recommended she continue to treat with the chiropractor and physical therapists over the next month.

On May 20, 2015, Dr. Jefferey Nipper performed an IME. After reviewing Schroeder's records, Nipper concluded that the cause of injury was not the fall at work, but instead, the yard work she was performing at home. He further opined that the mechanics of the fall at work would have resulted in a left hip area contusion, and how her right leg could have been injured is unknown. Following a physical examination, he concluded that Schroeder was normal. He stated that there were no objective findings to support the presence of any diagnosable musculoskeletal condition. He further opined that none of the treatments Schroeder received would be reasonable, necessary or related to the alleged work injury.

On May 17, 2017, Lawlor's deposition was taken. He reviewed Burns' chiropractic notes going back to 1998, his own treatment notes, as well as the physical therapy notes in Schroeder's record. He stated that Schroeder had numerous tests that were positive that suggested the possibility of a hip joint problem, an SI joint problem, and perhaps some bursitis. He noted that physical therapist Bonar's findings were similar to his in that there was a leg length discrepancy with the right shorter than the left and hypermobility of the SI joint on the right. He attributed the SI hypermobility to stretching of the ligament during the fall at work. He also stated that he believed that the upslip of Schroeder's pelvis was an objective indication of some pathology. He also believes the upslip was caused by the slip and fall.

Lawlor has opined that the April 1, 2014 work related slip and fall is a major contributing cause of Schroeder's condition. He based his conclusion on the records he reviewed and the history provided by Schroeder. Prior to the slip and fall incident, Schroeder had a history of treating for right hip pain and right SI joint pain, dating back to 1998. From April 14, 1998 to August 25, 2011, Schroeder was seen for SI joint pain in both joints, assessment of pain in the SI joints and/or treatment for such pain over thirty times. Lawlor stated that while she did have treatment in the same area in the

past, she had not had treatment for three years prior to the slip and fall and had ongoing treatment following the event.

He noted that Schroeder had reported that symptoms came on after the fall, and the mechanism of injury is consistent with her physical exam findings. He stated that slip and fall injuries are how people most commonly injure their SI joint. Further, he explained that the pelvis is a ring so that when someone falls on one side the force gets transmitted all the way around and the non-impacted side can suffer the worst pain. He stated that the force that would be transmitted by a fall on the ice would be quite a bit more than the force bending over and picking up a few branches. Although he admitted it was possible, he concluded that the yard work is not likely to have caused this condition.

Dr. Wade Jensen is a board-certified, fellowship trained, orthopedic surgeon practicing at the Center of Neurosurgery, Orthopedics & Spine in Dakota Dunes, South Dakota. The majority of Jensen's practice includes seeing patients in his clinic and performing surgery. Jensen performed an IME on Schroeder on February 27, 2017. He reviewed all of Schroeder's medical records, imaging records, chiropractic records, physical therapy records, Nipper's IME, and Schroeder's deposition. He also examined and spoke with Schroeder. Jensen states that Schroeder reported that she felt discomfort following the slip and fall, and she took ibuprofen for pain over the following few weeks, and then the pain resolved itself until two and a half months later. He states that Schroeder indicated to him that she did not have a lot of symptoms until after she had performed the yard work.

Following his examination, Jensen concluded Schroeder did not sustain a significant injury as a result of her fall on April 1, 2014, because she did not have any symptoms until much later. His opinion was that if Schroeder did sustain an injury, it would have been a sprain/strain that would have resolved within five or six weeks after the injury with conservative care and anti-inflammatories. He further concluded that Schroeder has a preexisting condition her chiropractic records predating the slip and fall showed she had low back pain, SI joint pain, and even right hip pain. He opined that the slip and fall on April 1, 2014, is not a major contributing cause of Schroeder's disability, impairment, or need for treatment.

Jensen tested Schroeder for SI joint related issues but did not find any SI joint pain or symptoms. Schroeder's results showed a slightly positive Stinchfield test, but negative SI joint tests and FABER's test. He diagnosed Schroeder with trochanteric bursitis on her right side, symptomatic myofascial low back pain, and bilateral hip CAM lesions. He believes that the trochanteric bursitis on the right side was causing the bulk of her symptoms. Trochanteric bursitis is an inflammation in the hip which can be caused by doing a lot of bending and squatting. Jensen does not believe the slip and fall is the cause of the bursitis, because it would have shown up relatively quickly after the injury had it been the cause. The myofascial low back pain involves muscular issues in the paraspinal muscles which can be irritated by bending, twisting, and lifting. Although the pain is near the SI joint, it is not SI joint-related pain. A bilateral hip CAM is a hereditary

hip joint condition. Jensen explained that it is not something that is developed from a fall, but is, instead, a long-standing issue. He said the CAM lesion is apparent on the MRI. Jensen concludes that the slip and fall is not a major contributing cause of the bursitis, myofascial low back pain or CAM lesion.

Jensen has expressed doubt about whether Schroeder was largely symptom free following the slip and fall up until the yard work. He stated that he believed that is what she told him, and he based his analysis on that information. However, he agreed he may have misunderstood the information. If she did, in fact, have symptoms from the time of the slip and fall that did not resolve after a few weeks, then his opinion regarding the major contributing cause of her condition would change. Jensen further acknowledged that all of Lawlor's notes and the physical therapy notes show that Schroeder complained of pain in the same areas. This consistency in pain complaints places doubt on the assertion that she had suffered a mere five to six month sprain/strain.

Around 2008, Schroeder began having issues with her thyroid. Her thyroid was ultimately removed in 2013. During these issues with her thyroid, she was unable to walk as much as she had before. By February of 2014, Schroeder stated that she felt like her old self and was able to increase her walking again. Her husband, Gary Schroeder, also testified that she was walking regularly. She testified that before the work injury her right hip did not bother her while walking.

Schroeder worked at Pennington County Housing from 2006 to 2011. She stated that she was able to perform her job duties without problems with her right hip. Gary testified that before the April 1 incident, he and Schroeder would go for long drives of two hundred miles without needing to stop. After the incident, he said that they could drive about forty miles before Schroeder's hip pain made it necessary to stop and rest. He also spoke about the work Schroeder did in October of 2013 during the winter storm Atlas. He testified that Schroeder shoveled snow and hauled logs without complaining of hip pain.

Employer/Insurer have argued that Schroeder's testimony is inconsistent and misleading. Schroeder had stated that she had not received treatment for "this type of pain" before. Employer/Insurer have pointed out the various treatments Schroeder received to that area since 1998. However, as pain is subjective, the Department cannot conclude whether Schroeder was intentionally being misleading or she sincerely believes the pain is different. Employer/insurer also argue that Schroeder misled Burns and Lawlor by not informing him of the yard work injury. Again, the Department is not certain if this was an intentional effort to mislead or merely a reflection of Schroeder's opinion that the yard work injury was a minor incident. The opinion Lawlor has offered in this case has been based on his review of the totality of Schroeder's records which included the yard work incident. The Department is not persuaded that Schroeder has attempted to offer misleading testimony in this matter.

The Department finds Schroeder and Gary's testimony reliable. Following the April 1, 2014 slip and fall, Schroeder had ongoing symptoms. She had pain that she treated with ibuprofen, and she was unable to walk without pain which she had been able to do a month before the incident. The medical testimony is, over all, consistent with Schroeder's testimony. Lawlor opined that the mechanism of injury is consistent with her condition. He concluded that falling on the ice in the manner Schroeder described could cause hypermobility, upslip of the pelvis, and pain in the opposite SI joint and leg. He also noted that although she had received treatment in that area before, she had not done so within the three years leading up to the slip and fall. Jensen's conclusion that the slip and fall was not related was based on his understanding that Schroeder had no symptoms after a few weeks following the injury. He has stated that if she did have symptoms that did not resolve after a few weeks, then his opinion regarding whether the slip and fall was a major contributing cause would change. Nipper concluded that there was no objective evidence supporting her claim of an injury. However, Lawlor found objective findings consistent with Schroeder's description of symptoms and mechanism of injury.

SDCL § 62-1-1(7) states, in pertinent part:

"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:

(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;

The Department is persuaded by the medical evidence and Schroeder's testimony that the work-related injury of April 1, 2014 combined with her preexisting issues with her hip is a major contributing cause of her current condition as required by Orth., 2006 SD 99.

Issue II: Whether Schroeder is entitled to medical expenses

Employer/Insurer are responsible for providing medical care for Schroeder as her work-related injury of April 1, 2014, is a major contributing cause of her condition and need for treatment as required by SDCL § 62-4-1 which states in pertinent part:

The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title.

Issue III: Hearsay objection regarding exhibit 3

During the hearing in the matter, Schroeder offered a document ultimately labeled Exhibit 3. Exhibit 3 is a statement drafted by Schroeder's coworker, Patti Broer.

Broer was responsible for keeping track of the amount each employee walked during a companywide charity walking event. The numbers were provided by Schroeder but were compiled by Broer. Exhibit 3 contains both a record of Schroeder's walking from May 5, 2014 to August 4, 2014 and Broer's opinion on Schroeder's condition. The exhibit was admitted over Employer/Insurer's hearsay objection merely to refresh Schroeder's recollection of her walking at that time and not to offer Broer's opinion.

Employer/Insurer have renewed their objection regarding Exhibit 3. Upon reconsideration, the Department is persuaded that Exhibit 3 is hearsay and does not fall under an exception to the rule. The information provided by the document is not more probative than Schroeder's testimony. Exhibit 3 has not been relied on for the Department's decision in this matter. To the extent that previous rulings on the matter are inconsistent, they are superseded.

Conclusion:

Schroeder has proven by a preponderance of the evidence that the injury of April 1, 2014 remains a major contributing cause of her current condition. She is hereby entitled to medical expenses in this matter. Exhibit 3 is rejected on hearsay grounds.

Schroeder shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer/Insurer shall have an additional twenty (20) days from the date of receipt of Schroeder's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own 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, Claimant shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 30 day of July, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle M. Faw
Administrative Law Judge