

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

REBECCA S. CANTWELL,
Claimant,

HF No. 243, 2004/05

v.

DECISION

CLEAR CHANNEL RADIO,
Employer,

and

**GALLAGHER BASSETT SERVICES,
INC.,**
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 May 9, 2007, in Aberdeen, South Dakota. Drew C. Johnson represented Claimant. Comet H. Haraldson represented Clear Channel Radio and Gallagher Bassett Services, Inc. (Employer/Insurer).

Issues:

- 1. Whether Claimant has a compensable injury under SDCL 62-1-1(7).**
- 2. Is Claimant entitled to benefits pursuant to SDCL 62-4-6 for the cystocele/rectocele/vaginal prolapse and the loss of her uterus and cervix?**
- 3. Is Claimant entitled to temporary total disability benefits and if so, in what amount?**

Facts:

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

Claimant worked for Employer as an Account Executive, principally working in the sales department. She was paid on a commission basis. On May 8, 2003, her wage rate was \$1,020.59 per week.

On May 8, 2003, Cantwell was working in the evening serving one of her advertising accounts. Claimant suffered pain when she, along with her boyfriend Mark Heintzman, lifted an empty pool onto a flatbed trailer as part of her work duties. The pool measured approximately 4 feet wide and 9 feet long and 4 feet deep. The pool weighed around 100 pounds.

The next morning, May 9, 2003, Claimant sought medical treatment from Dr. Jundt. Dr. Jundt diagnosed Claimant with cystocele/rectocele. Dr. Scott H. Berry is a board-certified OB/GYN who has been practicing in Aberdeen, South Dakota for the last twenty-two years. Dr. Berry treated Claimant throughout her pregnancies in 1990 and in 1992. Dr. Berry saw Claimant on June 2, 2003, on a referral from Dr. Kim Jundt, M.D., a family practitioner in Aberdeen, regarding a symptomatic rectocele. Dr. Berry performed a vaginal hysterectomy and repair of Claimant's cystocele/rectocele/vaginal prolapse. Claimant made a full recovery after the surgery and has no work restrictions or work limitations due to the surgery.

Dr. Philip Marcus performed an evaluation of Claimant pursuant to SDCL 62-7-1 and on behalf of Employer/Insurer. Dr. Marcus is board certified in and specializes in obstetrics and gynecology, with a subspecialty in infertility and vaginal surgery. He also teaches at the University of Minnesota medical school as an associate professor in obstetrics and gynecology. He is a vaginal plastic surgery expert. He opined that Claimant's injury and/or condition is not compensable and that she has no impairment stemming from the injury or treatment.

Dr. Jeff Luther, a certified independent medical examiner, performed an impairment rating regarding Claimant's gynecological problems. Dr. Luther is board certified in internal medicine and emergency medicine. Dr. Luther has certification in Evaluation of Disability and Impairment Ratings (CEDIR) through the American Academy of Disability Evaluating Physicians. Dr. Luther conducted an examination and took a medical history of Claimant on August 21, 2006. Dr. Luther concluded that Claimant has a 15 percent whole person impairment based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Other facts will be developed as necessary.

Issue One

Whether Claimant has a compensable injury under SDCL 62-1-1(7).

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).

Cystocele/Rectocele/Vaginal Prolapse

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:

[O]nly 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 at the time of the lifting incident Claimant suffered from preexisting conditions sometimes associated with cystocele/rectocele/vaginal prolapse, namely multiple vaginal childbirths and obesity. “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 conditions did not develop within the occupational setting. Subsection (b) applies.

Due to the nature of Claimant’s injury and condition, the Department will focus on the gynecological experts and their opinions. Dr. Luther’s opinions on causation of Claimant gynecological problems are rejected because he is not a gynecologist and he does not treat patients for gynecological problems.

In support of her burden, Claimant offered the testimony of Dr. Berry, Claimant’s treating physician. Dr. Berry opined that the lifting incident “played a major role” in

conjunction with other contributing factors in causing Claimant's hernia. "[The lifting event] caused this problem to become symptomatic, it then led her to have surgery." Dr. Berry further explained:

I would say that in general, rectoceles or cystoceles are a condition that, that because of a, that are a weakness in tissues that partly from, from a person, a person' own, just as hernias are, as a weakness in that tissue. They are - - often, there is a precipitating event that causes that hernia to occur, or that cystocele or rectocele to occur. . . and this precipitating event seems to be the heavy lifting of this hot tub.

Employer/Insurer offered the testimony of Dr. Marcus in support of its argument that Claimant's cystocele/rectocele/vaginal prolapse is not compensable. Dr. Marcus opined that the lifting incident "was a probable incident that contributed to" her cystocele/rectocele/vaginal prolapse, but he did not "feel [the lifting incident is] a major contribution." Dr. Marcus explained that everything that "has happened to her contributed to the fact that she had prolapse." He went on to state further that "[w]hether the lifting of the pool was the major contributing factor, you can only say if you knew what her exam was right prior to that, but as far as her history she has many contributing factors."

Both doctors are highly qualified to offer causation opinions in this matter. Both have outstanding credentials in their field and are competent to render opinions. Both doctors performed thorough evaluations of Claimant and her medical history, using objective and professionally sound procedures. Both doctors had the opportunity to explain their opinions fully. Neither doctor's opinions are equivocal. Neither doctor is biased. The opinions are clearly stated. Both used the proper test of "a major contributing cause" as set forth in statute. Dr. Berry said "a major contributing cause"; Dr. Marcus said "not a major contributing cause."

Dr. Berry performed Claimant's initial examination on June 2, 2003. Dr. Marcus examined Claimant on July 10, 2006, some three years after the incident took place and after her corrective surgery. Dr. Berry performed the corrective surgery. Although Dr. Berry treated Claimant throughout her pregnancies in 1990 and in 1992, he had not seen Claimant for nine years before the incident. In fact, Claimant testified that she had not seen any OB/GYN during the nine years before her May 2003 incident. Neither doctor is in a better position than the other to assess the condition of Claimant's pelvic organs in the years before the lifting incident. Claimant's testimony was credible.

Dr. Marcus based his opinion on causation on his opinion and belief that Claimant's preexisting condition of obesity is more of a cause than the actual incident. He disagreed "totally" with Dr. Berry, stating that "obesity contributes to organ prolapse." His reasoning is somewhat explained by this explanation in his testimony:

I can't say that she didn't have these problems previously. He states that she didn't complain about those problems previously. So if there's a cause and

effect, I can't really say that there is a major cause and effect. I can say that this was a probable incident that contributed to it, but I don't feel that it's a major contribution.

The South Dakota Supreme Court recently opined:

Under South Dakota law, insofar as a workers' compensation claimant's pre-existing condition is concerned[,] we must take the employee as we find him. If a compensable event contributed to the final disability, recovery may not be denied because of the pre-existing condition, even though such condition was the immediate cause of the disability.

Orth v. Stoebner and Permann, 2006 SD 99, ¶ 48 (internal citations omitted). The lifting incident was a compensable event that contributed to, if not caused, her organ prolapse. Dr. Berry's opinions are accepted over Dr. Marcus because Dr. Marcus based his causation opinion on the assumption that a preexisting condition precludes an incident being a major contributing cause. Claimant has met her burden to demonstrate the compensability of the lifting incident and the cystocele/rectocele/vaginal prolapse under SDCL 62-1-1(7)(b). The treatment for the cystocele/rectocele/vaginal prolapse was reasonable and necessary as contemplated by SDCL 62-4-1.

Low back condition

Next, Claimant argues that she suffered a compensable back injury when she lifted the pool. It is undisputed that Claimant had preexisting lumbar degenerative disc disease for years before the lifting incident. Claimant had continuously sought treatment from her chiropractor, Dr. Skjefte, for low back pain that was often quite serious. Claimant commonly complained of pain in the five or six range on a scale of one to ten, ten being the worst pain. On at least two occasions during her treatment prior to the incident, Claimant's low back pain was eight or nine in severity. In December before the lifting incident, Claimant had decreased lumbar range of motion. The pain in Claimant's lower back regularly radiated down into her left and right legs, which often became numb. All of the symptoms pre-date the May 8, 2003, incident.

In support of her argument that she suffered a compensable back injury on May 8, 2003, Claimant offered the opinions of Dr. Skjefte and Dr. Ivey. These opinions do not meet Claimant's burden to demonstrate causation to a reasonable degree of medical probability. Orth, 2006 SD 99, ¶ 34. Claimant's subjective complaints of pain which Dr. Skjefte admitted were "similar" to what she had before the incident are not sufficient to meet her burden to establish causation to a reasonable degree of medical probability as required by Orth.

After the incident of May 8, 2003, Claimant's complaints continued as before but she did not have any further invasive procedures. Claimant presented no objective findings demonstrating how the lifting incident caused any discernable injury to her back. She

has failed to meet her burden of proof on the issue of causation of her back pain and medical treatment.

Issue Two

Is Claimant entitled to benefits pursuant to SDCL 62-4-6 for her cystocele/rectocele/vaginal prolapse and the loss of her uterus and cervix?

SDCL 62-4-6 governs permanent partial impairment and provides in relevant part:

For injuries in the following schedule, an employee shall receive in addition to compensation provided by §§ 62-4-1, 62-4-3, and 62-4-5.1, compensation for the following further periods, subject to the limitations as to rate and amounts fixed in § 62-4-3, for the specific medical impairment herein mentioned, but may not receive any compensation under any other provisions of this title:

- (24) For permanent disfigurement, or permanent disability resulting from injury to any part of the body not hereinbefore listed, compensation for that portion of three hundred twelve weeks which is represented by the percentage that such permanent partial disability or permanent disfigurement bears to the body as a whole.

In support of her claim to permanent partial disability benefits, Claimant offered the opinions of Dr. Luther. Dr. Luther has certification in Evaluation of Disability and Impairment Ratings (CEDIR) through the American Academy of Disability Evaluating Physicians. He opined that Claimant qualifies for a 15% permanent impairment under a “blend” of classes one and two under Chapter 11.6a of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Employer/Insurer relied upon the opinion of Dr. Marcus that Claimant has no permanent impairment.

The AMA Guides provides the following:

A patient belongs in class 1 when (1) symptoms and signs of disease or deformity of the vulva or vagina are present that do not require continuous treatment; and (2) sexual intercourse is possible; and (3) the vagina is adequate for childbirth if the patient is premenopausal.

A patient belongs in class 2 when (1) symptoms and signs of disease or deformity of the vulva or vagina are present that require continuous treatment; and (2) sexual intercourse is possible only with some degree of difficulty; and (3) the premenopausal patient has limited potential for vaginal delivery.

In providing his physical examination, Dr. Luther did not find any “disease or deformity of [Claimant’s] vulva or vagina.” During his deposition testimony, Dr. Luther conceded repeatedly that there is no disease or deformity in Claimant’s vulva or vagina. Dr.

Luther opined that sexual intercourse is possible for Claimant. Claimant does not require continuous treatment for symptoms and signs of disease or deformity of her vulva or vaginal. Dr. Luther conceded that Claimant's vagina would be adequate for childbirth if she still had the ability to have children. However, Dr. Luther explained that he used a "clinical judgment" based upon his expertise as an impairment expert, explaining that "surgery to treat an impairment doesn't modify the original impairment estimate irrespective of the outcome of surgery, good or bad." He further explained:

I truly believe that she, to be fair and objective to this lady, that this is the Guides and even though there is criteria set in there, I don't believe they are all-inclusive, and if so, then the impairment ratings that I have done probably are inaccurate and as a matter of fact, 89 percent or 90 percent of impairment ratings done in the United States have been reported to be erroneous. I think part of that is the subjectivity of the clinical assessment that's rendered in trying to offer a fair and objective impairment of a person's residual. If we only render the impairment after the surgical procedure has been done, then we may not ever have any resultant impairment.

The plain language of SDCL 62-4-6 allows permanent partial benefits for "disfigurement". SDCL 62-4-6 (24) "provides compensation 'for permanent disfigurement, or permanent disability resulting from injury to any part of the body not hereinbefore listed.' Disfigurement and disability are listed in the disjunctive. Recovery for the disfigurement does not depend on whether it creates a disability." Lewis v. S.D. Dept. of Transp., 2003 SD 82, ¶ 34. Dr. Luther is certified in the evaluation of disability and impairment ratings. Dr. Luther's opinion is accepted as persuasive.¹ Claimant has met her burden to show a permanent impairment of 15% of the whole person.

Issue Three

Is Claimant entitled to temporary total disability benefits and if so, in what amount?

Claimant, having met her burden to show compensability of her cystocele/rectocele/vaginal prolapse, is entitled to compensation for lost work time pursuant to SDCL Title 62. The evidence presented demonstrates that she missed fifteen days of work because of the cystocele/rectocele/vaginal prolapse and subsequent treatment. She is entitled to compensation for only those fifteen days that she actually missed, not the six weeks she claims it should have taken her to recover.

The calculation of temporary total disability benefits is set by statute. The statutes in effect at the date of injury apply to the rights of all parties in any claim for workers' compensation benefits. Helms v. Lynn's Inc., 542 N.W.2d 764 (S.D. 1996). In May of 2003, the maximum allowable amount per week was \$482.00 and fifty percent of that,

¹ Claimant's argument that Dr. Marcus changed his opinion during his testimony and opined that Claimant qualified for a 30% impairment is rejected. Dr. Marcus clearly intended to opine that Claimant is entitled to absolutely no recovery under SDCL 62-4-6 for her injury and subsequent loss of her uterus and cervix.

the minimum, was \$241.00. Claimant's wages were \$1,020.59 per week. She is entitled to the maximum amount for the fifteen days she missed work, \$1,446.00. Although Claimant alleges that she should receive compensation for days of work missed for doctor appointments, she failed to present adequate evidence, available to her, of time missed from work other than fifteen days. An award cannot be based upon speculation.

Conclusion

Claimant has demonstrated that the work incident of May 2003 is a major contributing cause to her cystocele/rectocele/vaginal prolapse. Her medical expenses for the treatment of that condition are compensable. Claimant failed to demonstrate that the work incident of May 2003 is a major contributing cause to her low back complaints and disability. Claimant met her burden to demonstrate that she is entitled to fifteen days of temporary total disability benefits. Claimant has also met her burden to demonstrate that she is entitled to a fifteen percent permanent impairment rating. Claimant is entitled to \$1,446.00 in 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/Insurer 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 17th day of April, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge