

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

ELIZABETH COUNTRYMAN

HF No. 38, 2016/17

Claimant,

v.

DECISION

SPEE-DEE DELIVERY SERVICE, INC. ,

Employer,

and

AMERICAN CASUALTY CO. OF READING,

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 November 15, 2017, in Rapid City, South Dakota. Claimant, Elizabeth Countryman, was present and represented by Michael J. Simpson of Julius & Simpson, LLP, Law Firm. The Employer, Spee-Dee Delivery Service, Inc. and Insurer, American Casualty Co. of Reading, were represented by Rick W. Orr of Davenport, Evans, Hurtz & Smith, LLP, Law Firm.

Legal Issue:

The legal issues presented at hearing are stated as follows:

- a. Causation of Countryman's low back condition;
- b. Whether Countryman is entitled to medical treatment and expenses; and
- c. Whether Countryman is entitled to permanent total disability benefits.

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 November 26, 1986, Elizabeth Countryman (Countryman or Claimant) worked for Black Hills Tent and Awning. Countryman hurt her right knee and had surgeries in February of 1988 and November of 1990 as a result. Following the filing of a workers' compensation claim for permanent and total

disability benefits, the matter was settled between the parties with Countryman getting an annuity payment of \$326 a month for her lifetime.

2. In the early 1990s, Countryman applied for Social Security disability due to her migraine headaches and right leg pain.
3. From the 1990s to 2005, Countryman was not employed. She received the Social Security disability benefits and the annuity at that time.
4. In 2005, Countryman began working at Spee-Dee Delivery Service which was at all times pertinent insured by American Casualty Company of Reading (jointly Employer/Insurer). At Spee-Dee, Countryman helped her husband, Ron, unload a semi-truck with one or two trailers filled with packages. Countryman also cleaned the office and bathrooms.
5. At Spee-Dee, Countryman usually worked between 16 and 24 hours per week. Social Security permitted Countryman to work part time without losing benefits.
6. On January 16, 2015, a box being unloaded by another worker came off the truck and struck Countryman in the shoulder causing her to fall down.
7. On January 16, 2015, Countryman was seen by Andrea Hansen, a PA at Urgent Care. Hansen noted that Countryman had been struck by a fifty-five pound box, and she was having significant pain in the right lower back that radiates down her right leg.
8. On January 19, 2015, Countryman was seen by Dr. Wayne Anderson at Urgent Care. Anderson noted that her pain severity was moderate, which was unchanged since her last visit. Anderson ordered x-rays of her ribs and released her to work with no bending, no prolonged twisting, no lifting over her shoulder greater than five pounds, no lifting from waist to shoulder greater than ten pounds, and no lifting below waist greater than ten pounds.
9. On January 23, 2015, Countryman was seen by Danielle Shaffer, a PA at Urgent Care. Shaffer noted that Countryman was describing pain of 6/10, and that she had come to Urgent Care because she felt her right hip popping in and out of place. Shaffer prescribed the muscle relaxer Robaxin, rest, light stretching, and ice two to three times a day.
10. On January 26, 2015, Countryman was seen by Anderson, who noted she was still having severe pain in her right hip area, and had noticed a clicking in her right hip. Anderson recommended an MRI of the lumbar spine and right hip and released her to work with the continued work restrictions.
11. On February 5, 2015, Countryman was seen by Dr. Harlow at Urgent Care. Harlow noted Countryman continued to have pain and stiffness involving her lower back and right posterior ribs. He noted Countryman was stating her pain was a 5/10 and her symptoms were intermittent, located over her right hip, and she had a feeling of popping. Harlow recommended physical therapy at PT-OT Professionals. He continued the work restrictions given by Anderson.
12. On February 13, 2015, Countryman was seen for physical therapy at PT-OT Professionals by therapist Kelly Cholousek. Cholousek noted that Countryman had pain mostly in her right side, some burning sensation, and she sleeps on her left side. She noted Countryman was using Ibuprofen, ice, and heat for pain, and she was unable to put weight on her right lower extremity. Cholousek recommended physical therapy two to three times a week for four weeks.

13. On February 24, 2015, Countryman described that she was having clicking in her right hip. The physical therapist noted that Countryman had not met any of her goals and that no improvement had been seen after five treatment sessions. She recommended further assessment from a physician and noted that Countryman had severe pain, and was unable to progress to any exercise program.
14. On April 28, 2015, Countryman was complaining of clicking when she tried to do stretches.
15. On May 12, 2015, Countryman stated to the therapist that her pain was the same and that she could not sit straight or walk well.
16. On May 14, 2015, Countryman told the therapist she was still in a lot of pain and the popping had increased. The therapist noted that Countryman seemed to be looking forward to trying a TENs unit at home.
17. On May 29, 2015, the therapist noted that the TENs unit was helping Countryman at rest but walking was still bad.
18. On June 9, 2015, Countryman complained to the therapist that she still felt the clicking pain and over all discomfort.
19. On June 17, 2015, at physical therapy, Countryman continued to complain of pain and was only able to put 25% of her weight on her right side when sitting and was unable to put full weight on her right lower extremity.
20. On March 5, 2015, Countryman was seen by Harlow, who noted that she continued to have daily discomfort in her right gluteal area as well as the right anterior thigh. He noted she had pain over her right hip which was aggravated when walking when it would rise up to a 9/10. He continued previous work restrictions.
21. On April 2, 2015, Harlow noted that Countryman continued to have lumbar pain and clicking with bending. He also noted Countryman was doing well and making progress in physical therapy.
22. On May 7, 2015, Harlow noted that Countryman reported that she was considerably worse than the previous visit. He noted that she still complained of clicking with every step. Harlow noted that Countryman did not want any steroid injections and she had a bad reaction to a knee injection in the past. Harlow noted Countryman's pain was 7/10 in the low back, posterior aspect of the right hip, and lateral aspect of the right hip, and a feeling of popping, and that the pain was aggravated by walking. Harlow continued physical therapy and continued work restrictions.
23. On June 16, 2015, Countryman was seen by Dr. Dietrich, a Rapid City physical medicine/pain medicine specialist who conducted an Independent Medical Examination (IME).
24. On July 10, 2015, Countryman saw Harlow who noted that she was continuing to do physical therapy and to have pain and clicking in her right hip. He also noted that her left knee was starting to hurt since she had been favoring the left side when she walks. He recommended physical therapy and that she be fitted with a sacroiliac belt.
25. On September 16, 2015, Countryman was seen by Dr. Schleusener, an orthopedic surgeon. Schleusener noted that Countryman has been referred by

- the insurance company. He noted that the cause of her pain remained elusive. He referred her back to Dietrich to evaluate and treat for right SI joint pain.
26. On October 8, 2015, Countryman visited Harlow. He noted that Countryman's pain remained in the area of the right iliac crest and into the lateral aspect of the right hip, and she was having a new pain that goes over toward the base of her lumbar spine.
 27. On October 29, 2015, Countryman was seen by Certified Nurse Practitioner (CNP) Michelle Delzer at the Regional Rehabilitation Institute. Delzer noted that Countryman was not able to sit or walk without any pain. She recommended sacroiliac injections. Delzer also recommended continuing heat, ice as well as Voltaren gel and a Lidocain patch and Baclofen.
 28. On November 23, 2015, Dr. Huot at Regional Rehabilitation Institute performed a right sacroiliac joint injection. Huot noted Countryman had pain over her right sacroiliac hip, and all the way down her leg on both the front and posterior aspect to her foot. He noted that Countryman mentioned hearing her hip click when she walked.
 29. On January 20, 2016, Huot performed a right L3, L4, L5, and S1 medial branch nerve diagnostic injection. Huot noted that the injection did not relieve her pain and that at that point her pain was not due to facet arthropathy. He wrote that it was highly likely that the predominant component of her pain was myofascial in nature.
 30. On February 4, 2016, Countryman was seen at Regional Rehabilitation Institute-Pain Management complaining of chronic right low back pain, buttock pain and right leg pain. She was prescribed Lyrica or Gabapentin, a muscle relaxer, and Cymbalta. Employer/Insurer did not approve these medications.
 31. On March 3, 2016, Employer/Insurer referred Countryman for a functional capacities evaluation (FCE) at PT-OT Professionals. The evaluation was performed by occupational therapist, Kathleen Boyle.
 32. On March 11, 2016, Huot responded to a letter from Calley Crowley, the rehab nurse hired by Employer/Insurer. Huot was asked what his diagnoses was, and he stated Countryman's back pain was multifactorial in nature, including a component of myofascial pain, facet arthrosis and sacroiliac joint dysfunction. Huot opined that he felt that Countryman had reached maximum medical improvement (MMI). He recommended continued pain management. Huot was asked to review the FCE and then was asked when he anticipated Countryman will be able to return to light or full duty. Huot responded that from the perspective of the FCE, Countryman is very debilitated in her function, particularly in terms of pain. He opined that since pain is subjective, the question will need to be posed to Countryman herself. He concluded that based on the FCE, Countryman would not be able to return to full duty.
 33. On June 3, 2016, at the request of Employer/Insurer, Dr. Paul Cederberg performed a record's review of all of Countryman's medical records up to that point. Cederberg opined that Countryman had reached MMI on May 7, 2015 when she completed physical therapy. He was asked to provide an impairment rating, and he opined that based on the lack of objective findings documented in the medical records that he could relate to the January 16, 2015, incident, he

could find no evidence of any permanent partial disability as a result of claimed workers' compensation injury on January 16, 2015. As a result of Dr. Cederberg's report, the workers' compensation insurance company denied any further workers' compensation benefits.

34. On June 8, 2016, Employer/Insurer denied Countryman's worker's compensation claim based on the records review conducted by Cederberg.
35. On September 12, 2017, Countryman was seen by Dr. Blower. Blower prescribed Cyclobenzaprine.
36. On April 3, 2017, Countryman was seen by Cederberg for an IME. Cederberg took a history from Countryman and reviewed medical records provided by Employer/Insurer.

Additional facts may be developed in the issue analysis below.

Analysis:

Issue I: Causation of Countryman's low back condition

The Department's first inquiry is whether Claimant's work injury on January 16, 2015, is a major contributing cause of her current condition. Countryman, as the claimant, has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry Inc., 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353,358 (S.D. 1992).

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;

SDCL §62-1-1 (7).

"A cause which cannot be exceeded is a major contributing cause." Orth v. Stoebner & Permman 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.

Countryman visited multiple medical professionals during the course of her treatments. Dr. Christopher Dietrich examined Countryman in June of 2015. Dietrich is a board certified physical medicine and rehabilitation specialist. He received his training at the Mayo Clinic. He is certified in physical medicine and rehabilitation, pain medicine, and sports medicine. Dietrich reviewed Countryman's medical records from both before and after her work injury as well as information concerning her Social Security claim and her prior workers' compensation claim.

Dietrich testified that after his IME of Countryman, he diagnosed her with SI joint or sacroiliac joint instability as well as an exacerbation of some pre-existing lumbar facet degeneration and some lumbar spondylolisthesis pain and right hip impingement pain. He recommended physical therapy. During the examination, Dietrich heard an audible click in Countryman's pelvic area. He opined that an audible click "signifies movement and instability. That would not be a normal finding in an individual." Dietrich performed a Faber test which indicated that Countryman had significant pain through her buttock and SI joint. He explained that the audible click plus the Faber maneuvers are objective tests for the pelvis and SI joint which can be used to diagnose SI joint pathology and pain.

Dietrich noted that Countryman had significant pain and he found her to be in distress and uncomfortable during the exam and that she had difficulty while moving around the exam room. He opined that Countryman was suffering from constant, severe, and debilitating pain at the time of his evaluation. He further opined that her pain complaints were consistent with his findings. Dietrich stated that he believed the mechanism of injury was the twist and fall to the ground which could have caused the SI joint injury. He further concluded that as there was no evidence or documentation of previous SI joint pathology or problems prior to the date of injury that her condition was related to the work injury from that date. Dietrich concluded that Countryman had objective findings and objective pathology at the time of the exam. Dietrich has not examined Countryman since that time and, therefore, is unable to provide an opinion on her current condition. However, he has opined that the work injury Countryman suffered on January 16, 2015 was a major contributing cause of her medical condition at that time.

Countryman was examined by occupational therapist, Kathleen Boyle. Boyle was hired by Employer/Insurer to perform a Functional Capacities Evaluation (FCE) of Countryman. An FCE is intended to evaluate upper and lower body function. Boyle has been doing these evaluations for almost sixteen years and performs approximately one per week. She has performed over eight hundred assessments in her career. The FCE takes four hours to complete. During the FCE, Boyle noted that Countryman had very high pain levels which progressed to a rating of 7/10. Boyle opined that Countryman is very restricted in her functional level related to pain. Boyle gave restrictions on lifting, sitting, standing, walking, and other work activities. In addition to performing the FCE, Boyle also reviewed Countryman's deposition and medical records. Boyle opined that the results of the FCE were consistent with Countryman's complaints such as her claim that she needs to lie down for pain relief. Boyle concluded that Countryman suffered from constant, severe, and debilitating pain. Boyle opined that Countryman's pain level affected her ability to stand as well as her level of concentration.

Boyle was asked directly whether she felt Countryman would be capable of working in a sedentary position three to four hours a day. In her report following the FCE, Boyle reported that Countryman could sit for three to four hours. However, Boyle clarified in her testimony that while Countryman could physically sit for sixty to seventy minutes at a time, her pain level would affect her concentration and ability to perform tasks. The pain would also be likely to cause her to miss work frequently. Boyle concluded that Countryman could not consistently work a four hour day.

Countryman was also examined by Dr. Paul Cederberg in March of 2017. Cederberg is a board certified orthopedic surgeon with thirty-five years of experience who is licensed to practice in Minnesota and South Dakota. Cederberg reviewed all of Countryman's medical records and performed an IME at the request of Employer/Insurer. After examining Countryman's various scans, Cederberg found them to be unremarkable for her age and gender. During his examination of Countryman, she tended to give way, and he noted her results were often inconsistent during testing and her muscles showed no signs of atrophy. He ended the IME early because Countryman's guarding behavior would not allow him to complete all the testing.

Cederberg has opined that Countryman's January 16, 2015 injury is not a major contributing cause of her current condition based on the lack of objective findings, inconsistencies in his examination, and unexplained pain in her right lower extremity. He asserts that the injury in January of 2015 caused a temporary contusion of Claimant's upper back, shoulder, and lower back. He further concluded that Countryman did not require any restrictions at work since he was unable to find anything objective to support her symptoms. Cederberg believes that Countryman is malingering her symptoms. He testified that he believed she was malingering before he examined her based on her medical records, and while he was open to changing his opinion due to the results of the IME, his opinion did not change. Cederberg did not read Dietrich's deposition concerning whether Countryman was malingering her symptoms. Cederberg was asked whether the Dietrich's opinions would be important in determining whether malingering was occurring. Cederberg testified that he had not reviewed other opinions on whether Countryman was malingering, but the other opinions would not have changed his opinion. He did agree that when doctors feel or hear a clicking in the hip area, it is considered an objective finding. He opined that the clicking in her hip did not explain her symptoms.

Dietrich was asked if he believed that Countryman was malingering. He concluded that he did not see that and would not make that statement. Upon reviewing Cederberg's assessment, he stated that the only objectively documented inconsistency he could see was Cederberg's conclusion that during the IME Countryman had an unusual gait but was observed walking with normal posture after the exam. Dietrich stated that Cederberg's assessment that there was no objective pathology was not the case. Various other doctors Countryman had seen consistently documented SI joint pathology, difficulty sitting, and pain.

Boyle was also asked about the issue of malingering. Boyle testified that during the four-hour FCE, Countryman was tested and retested. All the test results were consistent. Boyle stated that in her opinion Countryman tried hard during the examination and made an effort to complete tasks. She also agreed that the results were consistent with both Countryman's complaints and previous medical assessment.

Dr. Michael Huot of Regional Rehabilitation Institute examined Countryman, and noted that she had pain over her right SI joint, right hip, and all the way down her leg. Huot performed a right L3, L4, L5, and S1 medial branch nerve diagnostic injection. He noted that Countryman had pain to palpation in the right side of her low back and limited range of motion. Huot recommended a diagnostic injection which did not relieve Countryman's pain. In a letter response to the rehab nurse hired by Employer/Insurer on March 11, 2016, Huot opined that Countryman's back pain was multifactorial in nature, including a component of myofascial pain, facet arthrosis, and sacroiliac joint dysfunction. He further stated that Countryman had reached Maximum Medical Improvement (MMI) because the various therapies Countryman had undergone were not alleviating her pain. Upon review of the FCE, Huot was asked when he anticipated Countryman would be able to return to light duty or full duty. He responded that the FCE results indicate that Countryman is very debilitated in her function, particularly in terms of pain. Returning to work would depend on Countryman's pain tolerance, and, at this point, based on the FCE, she would not be able to return to full duty.

On July 27, 2017, Huot responded to a letter from Claimant. This letter included a list of questions to which Huot was to indicate yes or no in response. Through this letter, Huot indicated that he believed that the injury on January 16, 2015 was a major contributing cause of the low back pain he treated, and that her need to lie down is consistent with her objective findings and medical condition. He also indicated that he believed Countryman was experiencing constant, severe, and debilitating pain and would need pain management treatment in the future. He did not believe that Countryman was malingering. Employer/Insurer have argued that Huot's opinion in this matter has been expressed primarily through this letter check list, and has not been subject to cross-examination.

In order for Countryman to prevail in this matter, she must prove by a preponderance of the evidence that the injury which occurred on January 16, 2015 remains a major contributing cause of her current condition. Dr. Dietrich has limited his medical opinion to merely stating that the injury was a major contributing cause of her condition at the time he examined her. However, he would not opine that the injury remains a major contributing cause of her current condition. Dr. Huot's opinion that the injury remains a major contributing cause of Countryman's current condition is presented through the medium of a checklist supplied by her attorney. As such, his opinion offers little probative value as he has not offered any rationale for his conclusions. Boyle's FCE results are very persuasive regarding Countryman's current condition, but they offer no information on causation. Considering a preponderance of the evidence and the necessity for medical testimony to prove causation, the record fails to prove that the injury which occurred on January 16, 2015 remains a major contributing cause of Countryman's current condition.

Conclusion:

Countryman has failed to prove that the injury of January 16, 2015 remains a major contributing cause of her current condition.

Counsel for Employer/Insurer 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. Claimant shall have an additional twenty (20) days from the date of receipt of Employer/Insurer'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 11 day of June, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle Faw

Michelle M. Faw

Administrative Law Judge