SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

BONNIE HUDSON, **HF No. 57, 1996/97**
Claimant,

v. **DECISION**

DALE ELECTRONICS, INC.,
Employer,
and

LIBERTY MUTUAL INSURANCE CO.,
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. The parties agreed to waive an evidentiary hearing and to submit this matter on the written record. Claimant, Bonnie Hudson, (hereafter Claimant), appeared personally and through her counsel, Steven K. Huff. Sandra K. Hoglund represented Employer Dale Electronics, Inc., and Insurer Liberty Mutual Insurance Company (hereafter Employer/Insurer).

Issues:

1. Are Claimant's current complaints of neck and shoulder pain causally related to her workplace injury; and
2. Are Claimant's medical treatments for this persistent neck and shoulder pain medically reasonable and necessary?

Facts:

The above-captioned matter dates back to October 2, 1991, the day Claimant reported to Employer that she had sustained injury to both her upper extremities, including bilateral carpal tunnel syndrome. Claimant later alleged injuries to her right and left shoulders. Employer/Insurer accepted these claims as compensable and paid medical expenses, as well as temporary and permanent disability benefits accordingly.

A dispute first arose in 1996, when Claimant attended an independent medical examination, which indicated she could work up to eight hours a day at her job. Claimant disagreed and filed a petition for hearing. Thereafter, another dispute arose over the proper diagnosis of Claimant's alleged physical problems and the type of treatment reasonable and necessary for them. A hearing was held and the Department determined that Claimant was entitled to an evaluation for thoracic outlet syndrome in Denver, Colorado, at Employer/Insurer's expense. The physicians in Denver determined that Claimant did not have thoracic outlet syndrome.

Employer/Insurer and Claimant continued to disagree about Claimant's ability to work. Claimant worked four hours a day for Employer until October of 2001. The parties entered into and the Department approved a Compromise Agreement and Release and Order of Approval and Judgment of Dismissal on August 26, 2002. At paragraph 10, the Agreement provided:

> This payment shall resolve and constitute a full, final and complete release of any and all claims Employee may have against Employer and Insurer for any injuries reported to have occurred in or arising out of Employee's employment with Employer, specifically including, but not limited to, bilateral carpal tunnel syndrome and injuries to her upper extremities, and any and all resulting injury(ies), condition(s), disability(ies), and benefit(s), known and unknown, including, but not limited to, those available under the Worker's Compensation laws of the State of South Dakota, specifically including, but not limited to, past and/or present medical benefits; temporary and permanent disability benefits, specifically including benefits under the Cozine and odd-lot doctrines; rehabilitation and retraining benefits; intentional tort; attorney fees; interest, costs and penalties; and any and all claims relating to the handling and processing of Employee's claim for benefits (specifically including bad faith and SDCL 58-12-3). Employee's acceptance of this payment constitutes and election of South Dakota worker's compensation benefits.

At paragraph 11, the Agreement provided:

> Employee's right to future medical benefits related to the October 2, 1991, injury shall remain open, with any future medical benefits to be paid in compliance with the statutes in effect upon the date of the initial injury. However, Employer and Insurer reserve the right to contest whether the initial injury is a contributing factor to any future medical expenses and whether those expenses are reasonable and necessary, or are otherwise compensable. The Department of Labor hereby expressly reserves jurisdiction to resolve any disputes regarding future medical expenses.

Paragraph 13 of the Agreement provided:

> Employee and Employer and Insurer continue to dispute payment of certain health care expenses as follows: (1) for trigger point injections in August, 2001, performed by Dr. Hien; and (2) for certain medications and equipment, including Employee's past and current prescriptions for: Elavil, TENS units (with batteries, electrodes and pin lead wires), Neurontin, Darvocet, Soma and Ambien. . . .

At issue in this matter is the compensability of the current medical treatment of Claimant's neck and shoulder. Dr. Doug Barnes is Claimant's current treating physician. Claimant treated with Dr. Jem Hof for nine years, from 1991 until he left private practice in 2000. As the medical records and the deposition testimony reveal

Claimant's condition is complicated, involving her wrists, shoulders, and neck. Employer/Insurer has contested the treatments recommended by Dr. Barnes, as well as those of Dr. Hof. Employer/Insurer argues that Claimant's current neck and shoulder conditions are not causally related to her employment activities.

Issue One

Are Claimant's current complaints of neck and shoulder pain causally related to her workplace injury?

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). 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). At the time of her injury, SDCL 62-1-1 governed the definition of injury. 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). At the time of Claimant's injury, SDCL 62-1-1 defined "injury" or "personal injury" as "only injury arising out of and in the course of the employment, and shall not include a disease in any form except as it shall result from the injury." Claimant must show that her employment was a contributing factor to her injury. Gilchrist v. Trail King Indus., 2000 S.D. 68, ¶ 7.

Regarding the issue of causation, the South Dakota Supreme Court has held:

> Before an employee can collect benefits under our worker's compensation statutes, he must establish, among other things, that there is a causal connection between his injury and his employment. That is, the injury must have "its origin in the hazard to which the employment exposed the employee while doing his work." This causation requirement does not mean that the employee must prove that his employment was the proximate, direct or sole cause of his injury. The employee's burden of persuasion is by a preponderance of the evidence.

Caldwell, 489 N.W.2d at 358 (citations omitted). The court also stated:

> 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. "A [worker's] compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of employment. Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under worker's compensation statutes."

Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992) (citations omitted).

In support of her burden, Claimant relies on the deposition testimony of Dr. Hof, taken on July 25, 1997, and October 18, 2001. Dr. Hof, a physician board certified in physical medicine and rehabilitation, treated Claimant's injury until 2000. Dr. Hof opined that Claimant's case is "extremely complex" given the multitude of her symptoms. Despite this complexity, which Dr. Hof witnessed and treated for nine years, he was able to opine that Claimant's work activity was a major contributing cause to her carpal tunnel syndrome, shoulder injuries, and her neck injuries, including her neck arthritis. He further opined that Claimant's symptoms will continue for the rest of her life, including her left shoulder pain, myofascial pain, and cervical pain. He causally relates her conditions to her work activities and her injury in 1991.

Employer/Insurer urges the Department to reject Dr. Hof's opinions because they were given in 1997 and 2001. Dr. Hof, in his 1997 deposition, detailed Claimant's complaints of left shoulder pain, neck pain, and myofascial problems beginning in 1993. Comparing Dr. Hof's credible testimony with the medical records and Dr. Barnes' deposition testimony, Claimant's symptoms have not changed to such a degree as to rule out Dr. Hof's analysis of the causation of those symptoms. Employer/Insurer's argument is rejected. Dr. Hof's opinions are accepted.

Claimant's current treating physician, Dr. Barnes, did not offer opinions on the causation of Claimant's current condition because he has not studied Claimant's medical history to the extent that he was comfortable with rendering such an opinion. Claimant will not be penalized for the lack of opinion from Dr. Barnes. Dr. Hof is much more familiar with Claimant's medical history from the time of her injury.

Dr. Richard Farnham conducted an independent medical examination on December 3, 2001. In his Affidavit, Dr. Farnham opined that Claimant's treatments were not related to a work injury. Dr. Farnham did not treat Claimant. He examined her one time in 2001. Compared to Claimant's extended treatment with Dr. Hof, Dr. Farnham's opinions lack the foundation and expertise of Dr. Hof's opinions. Dr. Farnham's opinions are rejected because they lack appropriate foundation and explanation for this complex case. 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). Over the course of nine years, Dr. Hof sent Claimant to numerous specialists and reviewed their reports while simultaneously treating Claimant. Dr. Hof's opinions are well reasoned and based upon his years of experience in treating Claimant and similar patients. He was deposed twice and his opinions on causation did not change. Dr. Hof's testimony and opinions are more persuasive than Dr. Farnham's inadequately explained opinions.

Claimant has met her burden to demonstrate that her current condition is compensable. Her work activities and injury are contributing factors to the shoulder and neck conditions for which she is being treated by Dr. Barnes.

Issue Two

Are Claimant's medical treatments for this persistent neck and shoulder pain medically reasonable and necessary?

Employer/Insurer has a duty to provide reasonable and necessary medical expenses related to Claimant's work injury. In Hanson, the South Dakota Supreme Court stated:

> Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. It is in the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable or proper.

425 N.W.2d at 399. Unlike Claimant's burden in demonstrating causation of her injury to a reasonable degree of medical certainty, Employer/Insurer is not required to establish to a reasonable degree of medical certainty that recommended treatment is not necessary or suitable and proper. Tischler v. United Parcel Service, 552 N.W.2d 597 (S.D. 1996).

There is no real dispute that the trigger point injections Claimant received in October of 2001 and May of 2002 were reasonable and necessary medical treatment. Dr. Barnes is a competent physician and his deposition testimony is credible. He opined that the treatment recommended for Claimant is reasonable and necessary. Dr. Hof opined in 1997 that Claimant will have pain the rest of her life and will continue to need treatment for that pain. Dr. Farnham opined that the trigger point injections were reasonable and necessary medical treatments.

Claimant's current medication prescriptions, including those for Neurontin and Amitriptyline, are disputed. Dr. Barnes opined that his treatment is reasonable and necessary, but Dr. Farnham opined, without explanation, that Dr. Barnes' prescriptions for Neurontin and Amitriptyline were not "reasonable and necessary." It is Employer/Insurer's burden to demonstrate that medical treatments offered by the treating physician are not necessary, suitable, or proper. In the face of Dr. Barnes' credible deposition testimony and without some explanation of his opinions, Dr. Farnham's opinions must be rejected.

Employer/Insurer has failed in its burden to demonstrate that the medical treatment at issue is not necessary, suitable and proper medical treatment. Claimant's medical expenses are compensable reasonable and necessary medical expenses.

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 7th day of April, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge