SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

LUCINDA BOBELDYKE,
Claimant,

HF No. 60, 2005/06

v.

DECISION

LINK SNACK FOODS/ LSI,
Employer,

and

ZURICH 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. A hearing was held before the Division of Labor and Management, in Huron, South Dakota. Claimant, Lucinda Bobeldyke appeared personally and through her attorney of record, Gary D. Blue. Jennifer L. Wollman represented Employer, Link Snack Foods/LSI and Insurer Zurich Insurance Co.

Issues
Whether Claimant's work related injury on January 24, 2005, at LSI is a major contributing cause of her current left shoulder condition, impairment and need for treatment.

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

Claimant, Lucinda Bobeldyke began working at LSI in May of 2004, as a floater or rotator. Her usual shift was 6:00 a.m. to 4:30 p.m. Claimant would typically work on the Klockner or a nugget shaker machine and then fill in when needed at other stations.

On January 24, 2005, Claimant began her shift at the nugget shaker station. Around 10:00 a.m. Claimant moved into the boxing room. Claimant worked in the boxing room bulking bags of beef jerky as they came off the line. Claimant's job was to take a handful of bags off the conveyor belt and put them into a box about the size of an apple box up to a count of 50 bags and then putting them into a larger box on a pallet which stood44 inches high.

While working in the boxing room, Claimant noticed pain in her left shoulder. She notified her supervisor, Delwyn Oschner. Claimant then finished the remainder of her shift. The next day, Claimant's shoulder was swollen and sore. Claimant went to LSI and filled out an incident report before going to see the doctor.

Claimant saw PA-C Jackie Siver at Tschetter & Holm Clinic on January 25, 2005. X-rays taken of Claimant's left shoulder showed no obvious bony or soft tissue deformities. Claimant was given a restriction of no left shoulder lifting. Claimant followed up with Siver on February 1, 2005. Claimant reported that she continued to have pain, but it was not as bad.

Claimant saw Dr. James Cole, at Great Plains Orthopaedics on February 9, 2005. Concerning the cause of Claimant's injury, Dr. Cole noted, "[o]n 1/25/05 she developed left shoulder pain without any specific injury, but states she was lifting bags off the line at shoulder height. However according to Carl from LSI, the activity that she was doing at the time of shoulder complaint was not at shoulder level but she was picking bags weighing some 50 ounces off a conveyor basically at waist height." Dr Cole diagnosed probable rotator cuff tendonitis and muscle strain left shoulder. Dr. Cole also noted, "it is difficult to know exactly how this left shoulder pain developed. It appears that it more likely developed from an activity other than her work at LSI, possibly her weekend job as a stocker which requires quiet heavy lifting and probably reaching upwards." Dr. Cole recommended physical therapy and restricted Claimant's use of her left arm to below shoulder level.

Claimant returned to Dr. Cole on March 7, 2005. Claimant reported that she continued to have pain in her left shoulder. Dr. Cole gave Claimant an injection in her left shoulder and recommended continued physical therapy. Dr. Cole restricted Claimant's duties to no boxing.

Claimant returned to Dr. Cole on March 25, 2005. Dr. Cole noted that she had finished her physical therapy and had regained full range of motion in the left shoulder. Claimant reported continued anterior shoulder pain, but no pain in the left arm or the left posterior shoulder. Dr. Cole recommended that she stay off boxing duties on a permanent basis as it aggravated her shoulder.

Claimant continued to treat with Dr. Cole for her left shoulder pain. After another round of injections, Dr. Cole recommended an MRI which revealed rotator cuff tendonitis with impingement. Dr. Cole also noted there was a bone spur from the AC joint. At this point, Dr. Cole recommended surgery if there was no improvement in a few weeks. Dr. Cole told Claimant to continue working her usual job at LSI.

On June 13, 2005, Claimant saw Jackie Siver PA-C complaining of left shoulder pain. Claimant reported that she had been doing exercises and was getting along pretty well until recently. Claimant denied any recent injury other than her usual work activities.

Claimant was taken off work until she was able to see Dr. Cole. On June 15, 005, Claimant was able to see Dr. Cole. Claimant related to Dr. Cole,

> About 2 weeks ago at work she was throwing bags and she usually does this with her right arm but she threw a bag with her left arm across her chest and that flared up her shoulder with increased pain. That Saturday, June 11, she clapped her hands together while playing with the cat at home and this further increased the pain in her left shoulder.

Dr. Cole diagnosed aggravation of rotator cuff tendonitis left shoulder, and prescribed pain medications. Claimant was also given another injection and taken off work for the remainder of the week. At a follow up appointment on June 24, 2005, Claimant indicated to Dr. Cole that she wanted to have the shoulder surgery.

On February 6, 2006, Claimant saw Dr. Paul Rynen at Sanford Clinic Orthopedics & Sports Medicine for a second opinion. Dr. Rynen noted that Claimant needed to be restricted at work so she is not doing repetitive activity and not reaching or lifting. On September 18, 2007, Dr Rynen assigned an 11% upper extremity impairment to the left arm which is a 7% whole person impairment based upon the AMA Guidebook, 4th Edition.

On December 3, 2008, Claimant saw Dr. Jerry J. Blow for an independent medical evaluation at the request of Employer/Insurer. Dr. Blow opined, that since Claimant's "work in packaging was done at waist level, I cannot see that would be the major contributing case for her current left shoulder condition and any disability, impairment, or need for treatment." Dr. Blow went on to state, "I believe her current symptoms are related to her underlying condition and not her work activities at LSI, specifically given the fact that the work in packaging is at waist level and not at shoulder level. In addition to this, she has not done this work activity for a considerable length of time and thus the tendonitis itself would be not related to the work activities at LSI." Dr. Blow agreed with Dr. Rynen, that an 11% impairment is an accurate assessment of Claimant's impairment, and agreed that surgery would be medically appropriate, however he believed "that the need for surgery is based on her preexisting bone spur and tendonitis and not her work related condition."

Claimant's employment with LSI ended in February of 2006. At the time of hearing, Claimant worked at Wal-Mart in Huron as a full-time cashier.

Other facts will be developed as necessary.

Analysis
Issue 1 Causation and Compensability
The general rule is that a claimant has the burden of proving all facts essential to

sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that she sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520. The claimant must prove that "the employment or employment-related activities are a major contributing cause of the condition complained of." SDCL 62-1-1(7)(a).

Is Claimant's work related injury on January 24, 2005 at LSI a major contributing case of her current left shoulder condition, impairment and need for treatment?

Initial compensability of the left shoulder injury has never been disputed by Employer/Insurer. Employer/Insurer dispute Claimant's entitlement to additional benefits, including surgery for her left shoulder condition. Employer/Insurer contends that Claimant's current need for treatment is not related to her work related injury. SDCL 62-1-1(7) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]"

> In applying the statute, we have held 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 [her] employment. We have further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

The medical opinions of both Dr. Blow and Dr. Cole are dependant on their understanding of Claimant's job duties and whether her job at LSI was waist level work or shoulder level work. Claimant credibly testified at hearing that her job boxing/bulking required her to do shoulder level work. This is supported by her initial account of the incident when she presented to Dr. Siver and Dr. Cole.

Jeremie LeGrand, the production foreman testified on behalf of the Employer/Insurer. LeGrand testified that he had worked for LSI since 1999, and had been production foreman since 2005. He testified that he was familiar with the various job stations and various job duties at the plant. He further testified that none of the job stations have changed in anyway since the time Claimant worked at LSI. When questioned about the conveyor belt involved in the job duty Claimant was assigned at the time of her injury, LeGrand testified,

Q: And, can you just describe a little more in detail the conveyor belt that would have been involved in this job duty?
A: Yes. The conveyor belt is 48 inches high.
Q: Okay. Would that be 38 inches high?
A: No. Actually the top belt is 48 inches high.
Q: Okay. But tell us- can you tell us where the bag comes out? What is the height of the end of the line?
A: The end of the line where she would have been grabbing the bags?
Q: Yes.
A: Is 48 inches.

Dr. Blow testified at hearing that he personally observed the worksite and measured the conveyor belt at 38 inches in height from the floor to the belt. He estimated that based on the Claimant's height of 5 feet 2 inches, that Claimant was doing waist to chest level work.

The Department "is free to choose between conflicting testimony." *Wise v. Brooks Const. Ser*., 2006 SD 80, ¶33, 721 NW2d 46. Based on his experience and familiarity with the equipment used at LSI, the Department finds the testimony of Jeremie LeGrand more credible. The Department finds that the conveyor belt was 48 inches which would result in shoulder level work.

In support of her burden Claimant relies on the opinion of Dr. Cole on July 7, 2005 when he stated that Claimant's job was a major contributing cause of her problem and that the bone spur was not the cause. Dr. Cole's testimony was provided in the form of an affidavit pursuant to SDCL 19-16-8.2 and medical records only. Dr. Cole did not testify live, his deposition was not taken.

On July 7, 2005, a representative from Zurich North American asked Dr. Cole, "I would appreciate your medical opinion regarding the recommended surgery and relationship to the work environment? Do you consider her job with Link Snacks a major contributing cause to the condition?" Dr. Cole responded, "Yes, the bone spur is not the cause of the problem."

On August 10, 2005, Dr. Cole was again contacted by a representative from Zurich North America regarding Claimant's need for surgery. Dr. Cole was asked the following questions:

Q: Initially you were not sure what the cause was for her left shoulder pain, possibly related to her job at K-Mart. Are you now saying that her symptoms and recommended surgery are related to her job activities at Link Snacks?
A: No

> Q: She claimed two intervening activities causing an increase in her symptoms and one of the activities aggravated her condition enough to take her off of work for a week that was found to be unrelated to the work injury but personal. Did the personal aggravation having a significant impact on the necessity for the recommended surgery?
> A: Some impact, not the main reason for the surgery.
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> Q: The MRI results showed mostly a bone spur. It is my understanding that you advised the employer that the bone spur was not related to the work activities at LSI. The employer advised me that you stated that the bone spur was the cause for the left shoulder symptoms. If this is correct why would the surgery be covered under workers' compensation?
> A: The problem is tendon inflammation and bone spur- as stated previously I cannot be sure this is work related.
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> Q: If in fact her job did not involve reaching above waist level at LSI and she continued working at LSI after filing the workers' compensation claim in the lightest capacity, what would the cause for her left shoulder symptoms be?
> A: Symptoms can be caused by normal use of shoulder- does not have to be a specific injury.

Dr. Cole's opinion must be rejected. At best Dr. Cole's medical opinions are inconclusive as to whether claimants need for surgery is work related. When an expert's testimony is equivocal or based on mere possibility, the Supreme Court has found the evidence to be inconclusive and insufficient to satisfy the claimant's burden. *Tebben v. Gil Haugan Construction, Inc*., 2007 SD 18, ¶25, 729 NW2d 166; *See Enger v. FMC*, 1997 SD 70, 565 NW2d 70; *Hanten v. Palace Builders, Inc.*, 1997 SD3, 558 NW2d 76. Dr. Cole was unable to state to a medical degree of probability that Claimant's employment was the cause of Claimant's condition. Dr. Cole was uncertain as to the causation of Claimant's injuries based on inaccurate information from the Employer/Insurer that Claimant's job did not involve reaching above the waist. "Expert testimony is entitled to no more weight than the facts upon which it is predicated." *Hanten v. Palace Builders, Inc*., 1997 SD 3 ¶10, 558 NW2d 76, (citing *Westergren v. Baptist Hospital of Winner*, 1996, SD 69 ¶25, 549 NW2d 390, 397(citations omitted)).The Supreme Court has long held that "while the worker's compensation act is to be liberally construed in favor of the claimant, this rule applies to the law and not to the evidence offered to support the claim. *Id*.

Dr. Blow testified at the hearing that even if Claimant had been working at shoulder height on January 24, 2005, it would still not be a major contributing cause of her current condition and need for surgery. He testified,

> Well as we've been talking here today and thinking, and as I listened to the testimony today, I am acutely aware of the fact that Ms. Bobeldyke only did this

> job one time, on the 24th of January. And so, when I – when I initially saw Licinda, I had the impression that she had done it a lot more than that. Then when I went out to the job today and saw what it would involve, you know, even if it were at chest height or shoulder height, I think at 4 to 6 hours of that job, and then the appropriate treatment that she had, and then the fact that she hasn't done that job ever again, makes that less significant.

Based upon the evidence presented, Claimant has failed to meet her burden that her employment at LSI is and remains a major contributing cause for her current condition and need for treatment.

Conclusion

Employer/Insurer shall submit proposed 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 ten (10) days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit 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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 24th day of August, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M. Dockter
Administrative Law Judge