

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION  
DIVISION OF LABOR AND MANAGEMENT  
Pierre, South Dakota**

**ELLA BURMEISTER,**

**HF No. 70, 2013/14**

**Claimant,**

**v.**

**DECISION**

**BLACK HILLS WORKS, INC.,**

**Employer,**

**and**

**DAKOTA TRUCK UNDERWRITERS,**

**Insurer.**

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held in this matter on July 15, 2014, in Rapid City, South Dakota. Attorney, Michael J. Simpson represents Claimant, Ella Burmeister (Claimant). Attorney, Michael S. McKnight represents Employer, Black Hills Works, Inc., and Insurer, Dakota Truck Underwriters (Employer and Insurer). Depositions received in this matter were from Dr. Stephen Kazi, and Dr. Stuart E. Fromm. Post-hearing briefs were submitted by the parties and all arguments were taken into consideration.

**ISSUES:**

**Was Claimant's work for Employer a major contributing cause of Claimant's injury or condition and need for treatment?**

The parties have agreed that if Claimant prevails on the above issue of causation, she is entitled to temporary total disability benefits for when she was off work following surgery, medical expenses, and future workers' compensation benefits.

**FACTS:**

Claimant is a 66 year-old woman who has worked for Employer as an associate instructor since 2000. Her job is to help developmentally disabled residents with physical care, bathing, feeding, preparing meals, dressing, undressing, and shopping. Prior to this job, Claimant worked for about 25 years as a nursing home social worker and activity director.

On September 22, 2012, Claimant was assisting a resident from his bed into a wheelchair. In order to dress the resident, he had to be lifted up so his underwear and pants could be put on. This type of lift is an everyday occurrence and Claimant had been trained to perform this two-person lift. Two

workers stand on either side of the resident and lift under the arm and shoulder of the resident. On this occasion, Claimant was to hold the resident with her right shoulder and the co-worker was to use her left shoulder. For some reason, the co-worker was not shouldering her half of the resident's weight when the standing resident buckled his knees and fell. The whole of the resident's weight came onto Claimant's right shoulder.

Claimant immediately felt pain on the outside portion of her shoulder. She testified that she took some aspirin as she believed it was just a muscle pain. This incident was immediately reported to her supervisor. After work, at home, Claimant treated with ice and heat and ibuprofen. The next morning, Claimant noticed a bruise in her shoulder area. She could not use her arm or shoulder for the next few days and switched to using mostly her left side. The pain did not go away over the next few weeks.

On November 16, 2012, Claimant went to a doctor regarding her shoulder. PA Ferrell recommended physical therapy, MRI, and a likely referral. The notes indicate that PA Ferrell believed Claimant had rotator cuff/subacromial bursitis. On January 21, 2013, Claimant went to Black Hills Orthopedic & Spine Center and was seen by PA Matthew Henry. He reviewed the x-rays taken in September 2012. The x-rays did not show any fracture or glenohumeral arthritis. It did reveal some mild AC joint osteoarthritis. PA Henry recommended an MRI to evaluate her for rotator cuff pathology. This MRI showed a large rotator cuff tear. PA Henry recommended a surgical repair of the right shoulder rotator cuff, a subacromial decompression, and Mumford.

On March 30, 2013, Claimant was sent to Dr. Stephan Kazi, MD, by Employer and Insurer for an independent medical examination. After Claimant clarified with Dr. Kazi that he could only ask her questions regarding her shoulder, Dr. Kazi examined her shoulder. Dr. Kazi's notes are in slight contradiction to what Claimant testified as occurring during this examination. However, Dr. Kazi did testify in his deposition, that he reviewed all Claimant's medical records and MRI's in developing his opinion. It was his opinion that the rotator cuff tear was associated with the impingement and acromioclavicular arthritis and that the work incident represented a temporary flare-up of the underlying arthritis and impingement. His initial report was sent to Employer and Insurer on April 1, 2013. Dr. Kazi issued a follow-up report on August 14, 2013 confirming the previous findings and opinions.

On May 20, 2013, Dr. Stuart Fromm performed surgery on Claimant. The arthroscopic surgery on Claimant's right shoulder is recorded as being a subacromial decompression of the right shoulder; a Mumford resection of the distal clavicle spurs; and a rotator cuff repair. The surgical notes indicate that degenerative changes were present on the acromioclavicular joint which necessitated a Mumford be carried out on the distal clavicle; the bone spurs on the distal clavicle were resected (or surgically removed). The rotator cuff was secured to the bone in the usual manner. "A complete and stable repair was felt to be obtained."

On June 13, 2013, PA Matt Henry wrote a letter to Claimant's workcomp nurse explaining that the findings during the surgery were consistent with the manner of work-place injury described by the Claimant. Claimant underwent post-surgical physical therapy two times per week for fourteen (14) weeks.

On October 2, 2013, Dr. Fromm, Claimant's surgeon, reviewed Dr. Kazi's opinion and wrote in Claimant's medical records:

Of note, she said that her case was denied by workmans' compensation, and she was told because she had a spur that caused the rotator cuff tear. I disagree completely with this assessment. Her case should be straightforward. She was doing fine and not having any symptoms until work injury. In other words, she was lifting a client and then had pain afterwards. This is not consistent with an "attrition" type of tear that may be caused by a chronic subacromial spur. Rather, she had an acute tear, which is not caused by a spur, but rather is very consistent with her work injury.

The surgical notes confirm Dr. Fromm's report that the resected spur was not subacromial, but was present on acromioclavicular joint. Dr. Fromm went on to explain his position during his trial deposition. He stated:

You can tear a rotator cuff a lot of different ways. You can have a traumatic injury and tear a rotator cuff. You can tear it by attrition, which means you have a spur that bites down into that cuff and gradually wears a hole in it and you can tear it by degenerative changes, i.e. getting older. Unfortunately that particular area where these rotator cuffs tear, the blood supply becomes more poor over time. So you can tear it. You can have degenerative tears. But her history, her exam, all of her - mainly her history doesn't fit with that. Her history fits with a traumatic injury i.e. a traumatic tear.

Dr. Fromm explained that rotator cuff tears can and do occur in the manner that Dr. Kazi suggests occurred to Claimant. Claimant did have some arthritis in her AC joint and the surgical record reports that a spur was removed. Dr. Fromm explained further during his deposition:

Q: And so when the judge reads this, the question is going to be, how does a shoulder look when you've got an attrition tear as opposed to how Ella Burmeister's shoulder looked?

A: I don't know if you can dial it down that specific. ... It would be easier to distinguish a tear by a mechanism of injury versus a degenerative tear, which usually means it's been around for a while. It does mean it's been around for a while. So to give you a better answer than that, rotator cuff tears, they don't heal on their own. They don't. They just get bigger and bigger and bigger in time. So as these tears get bigger and bigger, they get more degenerative, more degenerative, and then you start seeing changes on the humeral head where the rotator cuff attaches. If they get big enough, you see changes on the undersurface of the acromion. She didn't have any of that.

Q. But if I hear you correctly, there are certain findings that were not present that are present with attrition tears?

A. Yeah. And the main one would be if somebody came in, you see this from time to time, you have a type III acromion, which means a big spur, and you can see this big spur biting down into this rotator cuff. So you can physically see the spur eroding a hole into the cuff and she did not have that.

Further facts may be developed in the Analysis below.

## ANALYSIS

The Supreme Court is clear on the burden of proof for causation of a workers' compensation injury. They have stated, "the claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability." *Wise v. Brooks Const. Ser.*, 2006 SD 80, ¶17, 721 NW2d 461, 466 (internal citations omitted). In a more recent case, the Court has written:

In a workers' compensation dispute, a claimant must prove all elements necessary to qualify for compensation by a preponderance of the evidence. ... A claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty. Causation must be established to a reasonable degree of medical probability, not just possibility. The evidence must not be speculative, but must be precise and well supported.

The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition because the field is one in which laypersons ordinarily are unqualified to express an opinion. No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition. SDCL 62-1-1(7). Expert testimony is entitled to no more weight than the facts upon which it is predicated.

*Darling v. West River Masonry, Inc.*, 2010 SD 4, ¶11-13, 777 NW2d 363,367 (citations and quotes omitted). Furthermore, the Court has opined on the "level of proof" that must be shown by a claimant.

"The burden of proof is on [Claimant] to show by a preponderance of the evidence that some incident or activity arising out of [his] employment caused the disability on which the worker's compensation claim is based." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. This level of proof "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." *Id.* To meet his degree of proof "a possibility is insufficient and a probability is necessary." *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

*Schneider v. SD Dept. of Transportation*, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

Both doctors that presented testimony are qualified and capable. Dr. Stuart Fromm is licensed to practice in South Dakota and Wyoming. He is Board Certified in Orthopedic Surgery and is a member of a number of professional associations. Dr. K. Stephen Kazi is also Board Certified in Orthopedic Surgery, as well as Neurosurgery. At the time of the IME, he was licensed to practice in Minnesota, Florida, and South Dakota. When Dr. Kazi performed the IME, he was licensed within South Dakota. However, when he finished writing his opinion and gave his deposition testimony, he had let his South Dakota license lapse, as he was getting ready to retire. Because the IME was conducted while Dr. Kazi was a SD licensed physician, I am allowing his opinion to be considered.

Dr. Fromm's explanation of the etiology of Claimant's injury is more persuasive than the explanation from Dr. Kazi. The explanation by Dr. Kazi regarding Claimant's injury was very thorough, but it seems to be more of an objective explanation of how this injury usually happens in the general population of Claimant's age and work history. Claimant's case was not typical. This is

evidenced by the testimony of Dr. Fromm. Dr. Fromm specifically addressed the typical tear, as explained by Dr. Kazi, versus the tear of Claimant's rotator cuff. Dr. Fromm did not see the changes to the bone that normally occur in a typical tear caused by a bone spur. Both doctors are qualified orthopedists and have given their opinions by a reasonable degree of medical certainty. The opinions are credible. However, one opinion is more specific than the other, and that opinion is accepted as being more persuasive.

Claimant's work for Employer, and more specifically, the incident that occurred at work on September 22, 2012, was a major-contributing cause of Claimant's current condition and need for treatment.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Claimant may also submit Proposed Findings and Conclusions not consistent with this Decision. The initial submission shall be filed with the Department within thirty (30) days from the date of receipt of this Decision. The Employer and Insurer shall have fifteen (15) days from the date of receipt of the initial submissions to submit objections thereto or to submit their own 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.

DONE at Pierre, Hughes County, South Dakota, this 17<sup>th</sup> day of February, 2015.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

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/s/  
Catherine Duenwald  
Administrative Law Judge