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

SHARLEEN GRIMLIE **HF No. 75, 2012/13**

Claimant,

v. **DECISION**

LARSON MANUFACTURING COMPANY, INC.,

Employer,

and

ZURICH, NORTH AMERICA,

Insurer.

A hearing in the above-entitled matter was on October 22 and 23, 2014, before the Honorable Catherine Duenwald, Administrative Law Judge, South Dakota Department of Labor, Division of Labor and Management. Claimant, Sharleen Grimlie, was present. She is represented by the law firm, Alvine and King; attorneys Mr. David J. King and Mr. Bram Weidenaar. Employer, Larson Manufacturing Company and Insurer, Zurich, North America, were represented by their attorney, Mr. Justin G. Smith, with the law firm Woods, Fuller, Shultz & Smith. The Department, having received and reviewed all evidence and argument in this case hereby makes this Decision.

The witnesses present at hearing were: Claimant, Rick Ostrander, Joel Osbeck, Matthew Clauson, Brandi Bartels, Lora Fargen, and James Carroll.

The issues to be determined are (1) whether the incident that Claimant experienced while working for Employer is and remains a major contributing cause of Claimant's current condition and need for treatment, and (2) whether Claimant's medical treatment was medically necessary and reasonable, (3) what is the extent of Claimant's current condition, is Claimant entitled to Permanent Partial Disability Benefits, (4) whether Claimant is permanently and totally disabled due to a work-related injury or condition and falls under the Odd-Lot Doctrine, and (5) whether Employer/Insurer is required to reimburse Claimant and Claimant's medical insurer for medical bills paid, and if so, in what amount.

Post Hearing Motion to Strike

Employer and Insurer have moved the Department for an Order Striking certain allegations, regarding Employer's hiring practices from Claimant's Post-Hearing Briefs. Employer and Insurer have described the allegations as "scandalous" and "inflammatory" implications of hiring practices.

After reviewing the record and the briefs, the implications raised by Claimant's attorney in argument, are spurious and unsupported by the record. There was no reason for Claimant's attorney to include such irrelevant and vexatious allegations in a post-hearing brief. The hiring of Claimant did not fall under this "practice" and therefore is completely irrelevant. Although the Federal government sets the minimum age of 40 for filing a claim under the Age Discrimination in Employment Act, a person at the age of 45 is not "elderly." The Motion is sustained.

FACTS

1. At the time of hearing, Claimant was 60 years of age.

2. Claimant dropped out of high school in 1972 before graduating. She soon became a wife and mother so she did not pursue a GED at that time or finish high school.

3. Prior to working for Employer, Claimant was employed as a substitute aerobics instructor, a cook for Brookings Hospital, and a cook at the White Care Center for nine years. She also was employed as the assistant manager of a convenience store for 10 years.

4. Claimant started working for Employer in 1993, as a door assembler. She was employed with Employer for about 15 years.

5. On January 26, 2011, Claimant was inserting glass into doors on the assembly line. Her job consisted of turning 90 degrees to the right, bending her back slightly, and picking up a sheet of glass from a stack sitting on a cart. She would then turn back to the line and insert the glass into a door on the assembly line. She would slide the glass up and down the track to make sure it was secure and latch the glass, then slide the door down the assembly line.

6. Employer made regular and serious attempts to prevent work-related injuries to employees. They utilized ergonomic assessments and rotated tasks so employees would use different muscle groups throughout the day. The cart or "kan ban" were of different heights to accommodate different height employees, so the employee

would not have to bend to pick up the glass. On occasion, the wrong size carts were used.

7. The glass which Claimant lifted to slide into the door frame weighed about 9 pounds, with the aluminum and gasket material applied to it. Claimant, and other people at her station, stood on fatigue mats on a concrete floor. Claimant did not require, nor ask for, a raised platform in order to reach the work station.

8. On January 26, 2011, Claimant was inserting glass. She then went to a staff meeting. After the meeting when returning to her job duties, she experienced pain and stiffness that she initially attributed to overwork. She spoke with her crew leader, Matt Clausen who suggested she fill out an injury report that same day. Claimant wanted to wait until the next day to see if the pain subsided.

9. The following day, January 27, 2011, Claimant was in too much pain to work. She was encouraged by her supervisor and they filled out an injury report the day after her low back pain started.

10. Claimant saw her chiropractor, Chad Munsterman, that same day. Dr. Munsterman advised Claimant not to return to work. She continued to treat with Dr. Munsterman until being referred to someone else.

11. Although she had treated with Dr. Munsterman prior to the injury, she had not seen him for treatment of her lower back. She saw Dr. Munsterman in 2004 - 2006 for her cervical or upper spine.

12. Claimant had not treated for low back pain since 1985 when an MRI was taken of her lumbar spine. The MRI at that time was generally normal. No other records regarding Claimant's lower back were presented by the parties.

13. Dr. Munsterman referred Claimant to Dr. Mitchell Johnson, an orthopedic spine surgeon with the Orthopedic Institute on April 19, 2011.

14. Claimant's initial MRI showed that Claimant had degenerative spondylolisthesis and spinal stenosis at the L4-5 level, a bulging and protruding disc at the L3-4 level and other levels of degenerative disc change throughout her back.

15. Dr. Johnson's initial recommendation was for Claimant to wear a back brace, continue with physical therapy, and work within restrictions.

16. Claimant returned to work with restrictions for a short period of time

17. On May 27, 2011, Dr. Johnson performed a discogram to establish the source of Claimant's pain. Claimant's pain was coming from spine levels L3-4 and L4-5.

18. Employer/Insurer issued a denial of workers' compensation coverage to Claimant in June 2011. Employer is self-insured up to $150,000 of workers' compensation coverage.

19. Dr. Johnson recommended and then performed a L3-4 and L4-5 fusion surgery on August 31, 0211. Claimant returned to physical therapy until December 30, 2011 when she began a home-based program. The surgery was paid for by Employer's health insurance coverage.

20. On March 2, 2012, Dr. Johnson wrote a note for Claimant that states, "off work permanently." This was in regards to Claimant's job duties with Employer as of January 26, 2011, the date of the injury.

21. As Claimant could no longer work for Employer, Employer discharged Claimant as of March 7, 2012. Claimant's health insurance coverage through Employer was discontinued. Claimant no longer had treatment with Dr. Johnson as there was no insurance coverage.

22. Dr. Johnson, at the last appointment on March 2, 2012, indicated that Claimant may need future injections into her back. He noted that she was "walking a couple of miles a day every day and is otherwise doing well."

23. Claimant participated in Avera's charitable Physical Therapy program. This lasted from March until June 2012.

24. On June 10, 2011, Dr. Paul Cederberg performed an IME of Claimant. He is of the opinion that Claimant's employment was not a major contributing cause of Claimant's low back condition and that Claimant suffered no work related injury on January 26, 2011. It was Dr. Cederberg's opinion that Claimant suffers from chronic, long term, and degenerative preexisting conditions.

25. Dr. Cederberg performed a follow-up IME on July 17, 2014. His opinion regarding Claimant's condition and the causation thereof did not change.

26. Dr. Cederberg's opinion is based upon a surveillance video of Claimant that was taken by Employer/Insurer. Employer/Insurer did not share this surveillance video with Claimant or the Department at Hearing.

27. Claimant's low back condition has improved since the surgery. During the summer of 2012, while living in the Black Hills, Claimant was able to walk up to 5 miles per day. She can perform her own household chores without assistance. She is capable of driving and traveling long distances. She is not currently on any pain medication.

28. As Dr. Johnson has not been able to evaluate Claimant since she lost her insurance, he is unable to say whether or not she is able to return to work.

29. Claimant asked Dr. Johnson about the note that stated, "off work permanently." On June 26, 2013, Dr. Johnson wrote to Claimant, in response to a question by her attorney, "This comment was made almost 18 mos ago & was directed toward her work duties at that time. There may be other work she could perform [with] restrictions." (emphasis by Dr. Johnson)

30. Claimant has not been evaluated for a permanent partial disability. She has not undergone a functional capacities examination to determine what, if any, work for which she is capable.

31. Claimant's vocational expert, Rick Ostrander, recommended that Claimant be reevaluated by her treating physician to determine what permanent restrictions Claimant needs to follow with any future work.

32. Claimant is not obviously unemployable.

Additional facts may be listed in the analysis below.

ANALYSIS

(1) Causation of Injury

Claimant has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry, Inc.* 777 N.W. 2d 363, 367 (S.D. 2010). Under SDCL 62-1-1(7)(b), a work injury is compensable if it "combines with a pre-existing disease or condition to cause or prolong the disability, impairment, or need for treatment, so long as the injury is and remains a major contributing cause of the disability, impairment, or need for treatment."

Dr. Mitchell Johnson, after treating Claimant, gave his opinion that her work for Employer was a major contributing cause of her condition and need for treatment. During

his trial deposition, Dr. Johnson testified to a reasonable degree of medical probability that her work was a major contributing cause of her condition and need for treatment, specifically the back surgery. This exchange occurred between Dr. Johnson and Counsel for Employer/Insurer during deposition:

> Q: What I'm asking you, Doctor, is medically speaking, inside of her spine the anatomy of her lumbar spine, L3-4, L4-5, what specifically occurred on January 26, 2011, as a result of her work, in your opinion?
>
> A. Tearing of the disc. Strain to the - - to the L4-5, spondylolisthesis, that's a loose and unstable joint and likely was stretched beyond that level.
>
> Q: Please explain how we can separate or how it's your opinion that we can separate the preexisting degenerative problems and tearing before January 26 with what you say occurred on January 26, 2011?
>
> A. Typically the - - you now, new tears are painful and - - and old tears are typically not. Many tears are painless. Most of the degenerative process that we get throughout the course of our lives involve cracks and tears in our disc that we don't - - we don't feel so a new - - new onset of pain in the presence of disc tear and crack, we attribute to the injury.
>
> Q. So it sounds like, and correct if I'm - - if you disagree. It sounds like your opinion on causation, the explanation boils down to the fact that before January 26, 2011, she did not have pain, and beginning on January 26, 2011, she did have pain.
>
> A. That's a large component always of - - of determining mechanism and cause of injury, yeah.

Employer and Insurer make the argument that causation based upon "*post hoc, ergo propter hoc*" (or the temporal sequence of pain follows injury) is a logical fallacy and that "This maxim has little value in the science of fixing medical causation." *Rawls v. Coleman-Frizzell, Inc.,* 2002 S.D. 130, §20, 653 N.W.2d at 252. Well, as Dr. Johnson points out, old tears do not have pain, so he is relying upon science and the Claimant's self-report to determine when a new disc tear or back injury occurred. The logical fallacy of presumption is instead put forward by Employer and Insurer that because pain does not always follow injury, that there was no new injury in this case. It is a logical fallacy to presume that "*post hoc, ergo propter hoc*" can never be used in workers' compensation causation cases.

As Dr. Johnson explained, in the science of determining when a crack or tear occurs in the spine, doctors rely specifically upon when pain starts. This is just one general

indication of when a tear occurs. Pain is not caused by old tears, but only by new tears. The cause of tears in the back was testified to by Dr. Johnson, he said:

> Bending and twisting in combination with any degree of - - of lifting or - - or carrying or holding is - - is certainly a risk factor for additional tearing of discs. That's probably the number one way that new injuries happen to discs, with some - - some component of holding something in my hands stooped partly forward, bending or twisting to one side.

Therefore, the reasoning given by Dr. Mitchell as to the cause of Claimant's back pain is credible, logical, and persuasive. A treating physician opinion is only given greater weight if it supported by clinical and diagnostic data. *Matthews v. Bowen,* 879 F.2d 422, 424 (8th Cir. 1989). In this case the opinion is supported.

> This level of proof required of Claimant "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. 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, 62 8 N.W.2d 725, 729.

The IME of Dr. Cederberg is not as persuasive as Dr. Johnson's. Dr. Cederberg relies heavily upon a surveillance videotape that was never entered into the record. "An expert's opinion is entitled to no more weight than the facts it stands upon." *Jewett v. Real Tuff, Inc*., 2011 S.D. 33, ¶29, 800 N.W.2d 345, 352. The video was never provided to the Department by Employer and Insurer, therefore, Employer and Insurer did not want the Department to have the whole of the information. The facts that Dr. Cederberg based his opinion upon are non-existent. It was up to Employer/Insurer to produce the video to support the opinion of their expert, and no video was produced. Therefore, Dr. Cederberg's opinion is given less weight than if the video was produced. It is wholly possible that Dr. Cederberg was actually viewing a video of some unknown person and not Claimant. It is Employer and Insurer's prerogative to formulate a defense, and if there is evidence that Claimant was not injured, it is up to them to present it to the Department.

Dr. Cederberg, in his sworn deposition, gave the opinion that the only workers who suffer from work-related low back injuries, or whose work causes premature disc degeneration, are truck drivers who ride a lot in a vibrating truck, and those people who lift over 75 pounds on a regular basis. It is his opinion that degenerative disc disease in all other workers is caused from non-work related activities. It is his opinion that Claimant's

condition and need for surgery was causally related factors such as genetics and age. It is also his opinion that surgery was unnecessary. This opinion was given by Dr. Cederberg prior to Claimant's anterior posterior fusion. He gave the opinion that she only needed some physical therapy, adjustment of medication, and a psychiatrist.

Dr. Cederberg was, once again, basing his opinion of Claimant's psychological condition upon a surveillance video and comparing it to what he was observing in his exam room. He observed that Claimant while standing could only bend forward 15 degrees, however, while seated, could raise her legs 90 degrees. He associated this discrepancy with malingering or psychological overlay. However, Dr. Johnson, in his deposition noted that Claimant's spondylolisthesis[1] was obviously unstable and moving. He specifically noted this in his medical notes as a standing x-ray showed the spondylolisthesis at L4-5 and the MRI taken lying down did not. "That's a function of the effect of gravity and upright posture compared to lying down in a resting posture," Dr. Johnson testified in his deposition. Dr. Cederberg did not take the positioning of the body into consideration when determining Claimant's complaints of pain. Dr. Johnson put the spondylolisthesis at a grade 2, as compared to the grade 1 given by the radiologist.

To prevail on a claim for workmen's compensation, the work-related incident or accident must be a major contributing cause of Claimant's disability and her need for treatment. The evidence, as put forward by the Claimant, proves that her employment with Employer was a major contributing cause of her condition and need for medical treatment.

(2) Was Claimant's medical treatment medically reasonable and necessary?

The South Dakota Supreme Court has ruled on the employer's burden of proof to show whether a doctor's order is "necessary, suitable, or proper" as required under South Dakota's workers' compensation statute.

> SDCL 62-4-1 governs an employer's obligation to pay an injured employee's medical expenses for treatment of a work-related injury. This statute provides in part:
>
> > The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title… . The employee shall have the initial

[1] Spondylolisthesis [noun] spon·dy·lo·lis·the·sis \ˌspän-də-lō-lis-ˈthē-səs\: forward displacement of a lumbar vertebra on the one below it and especially of the fifth lumbar vertebra on the sacrum producing pain by compression of nerve roots. http://www.merriam-webster.com/medical/spondylolisthesis

> selection to secure the employee's own physician, surgeon, or hospital services at the employer's expense[.]
>
> SDCL 62-4-1. In interpreting this statute, we have stated that it is in the doctor's province to determine what is necessary or suitable and proper. And 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 and proper.

Stuckey v. Sturgis Pizza Ranch, 2011 S.D. 1, ¶23, 793 N.W.2d 378, 387-388 (internal quotes and citations omitted).

Employer and Insurer have not shown that the treatment by Dr. Johnson was not necessary or suitable and proper. Claimant suffered from "spondylolisthesis at L4-5 with moderate central spinal stenosis and mild to moderate neuroforaminal narrowing , and a bulging annulus with right foraminal to far lateral annular protrusion at L3-4 and multilevel degenerative [disc disease]" according to the MRI of April 11, 2011.

Dr. Johnson initially prescribed physical therapy for Claimant; however, the therapy was worsening the condition. Claimant had been treating conservatively with chiropractic care for about 3 months before being seen by Dr. Johnson, a board certified orthopedic surgeon. His initial response was to continue conservative care until Claimant's pain became much worse. The spondylolisthesis was not stable, in that lying down it was invisible and standing it became visible on an x-ray.

Dr. Johnson testified that Claimant had normal degeneration at the spine levels above and below the levels that he fused. The two levels, L3-4 and L4-5, were not normal degeneration. Conservative treatment had failed so Dr. Johnson recommended a fusion of these two spine levels. He performed a discogram to precisely pinpoint which levels were causing issue and what nerves were being affected.

Dr. Cederberg, in his initial report, was of the opinion that Claimant reached maximum medical improvement (MMI) as of April 26, 2011, or was back to her pre-injury status. He was of the opinion that the recommended discogram and surgery was not warranted based on her inconsistencies on examination. On reexamination on July 25, 2014, post-surgery, Claimant could flex forward 50 degrees, backward extend 30 degrees and side bend 25 degrees. Straight leg raising tests were 90 degrees bilaterally. Dr. Cederberg amended his opinion at that time and wrote, "In this circumstance, since Claimant had not responded to non-operative treatment, it was reasonable and proper that the surgeons performed the surgery."

Employer and Insurer have not met their burden of proof that the surgery and medical treatment by Dr. Johnson of Claimant was not reasonable and medically necessary.

(3) and (4) Extent of Claimant's condition

Claimant has not attended a Functional Capacities Examination or has been evaluated recently by a treating physician to see what her work capabilities are post-surgery and recovery.

SDCL 62-4-53 governs whether a person is totally and permanently disabled and provides in part:

> An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. **An employee has the burden of proof to make a prima facie showing of permanent total disability.** The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

As she testified to and as noted in the medical records presented at hearing, Claimant has recovered very well from her surgery. She is capable of traveling long distances in a car (sitting), she can walk up to 5 miles a day, and does all her household chores and duties independently. She has yet to see a doctor that has given permanent restrictions to her.

Claimant, in her argument, is relying upon a note written by her surgeon on March 2, 2012. It is based upon her job duties performed when she was initially injured, January 26, 2011. The surgeon who wrote the note has testified that there may be other jobs for which Claimant is capable of performing with restrictions. Those restrictions can only be ascertained through an FCE. The initial burden is not with the Employer and Insurer. The burden to determine what sort of work Claimant is capable of performing only passes to

Employer and Insurer after Claimant has proven permanent total disability, or obvious unemployability. Claimant, if she desires a permanent impairment rating, needs to find out what sort of restrictions she may have or whether she has a permanent impairment. She has not been evaluated for a permanent impairment, yet. It is not Employer and Insurer's burden to prove what sort of permanent impairment she suffers from.

Claimant's vocational expert, Rick Ostrander, wrote a letter to Claimant's attorney that said, "It would be important to get a medical opinion regarding Ms. Grimlie's current physical capacity for work. This may be achieved through a functional capacities evaluation, although Dr. Johnson or any other medical provider may feel it I necessary for Ms. Grimlie to undergo a current medical examination." In this case, Claimant should have listened to her own expert.

Dr. Cederberg was the only physician or medical expert to evaluate Claimant's capacities post-surgery. As this is the only opinion presented to the Department it is the one that will be used. Dr. Cederberg opined that Claimant reached maximum medical improvement on August 31, 2012, one year after her two-level fusion. Dr. Cederberg did not give a permanent impairment rating as to Claimant's whole person. With regard to permanent work restrictions, it is his opinion that Claimant may be able to perform sedentary work, sitting or standing as tolerated, with no lifting over 20 pounds maximum or 10 pounds maximum on a frequent basis

Claimant is not obviously unemployable. She seems to be capable of work with some sort of restrictions. She has a varied work background that would allow her to work both manual and non-manual labor. A lack of a high school education and being of a certain age are not automatic proscriptions to her finding employment. Claimant's workers' compensation benefit rate is $369.01 per week, which is equivalent to working 40 hours per week at $9.22 per hour or 30 hours per week at $12.30 per hour.

Claimant is eligible to receive temporary total indemnity benefits of $369.01 per week from the date in which she was taken off work at Larson's to the date of MMI, August 31, 2012. After that date, no argument has been put forward by Claimant for partial benefits and she has not met her burden to prove her eligibility for partial benefits.

(5) Whether Employer/Insurer is required to reimburse Claimant and Claimant's medical insurer for medical bills paid, and if so, in what amount?

Under SDCL 62-1-1.3, if after a denial of medical benefits is reversed by the Department or a Court, an Employer and Insurer is then liable for reimbursement of any

amount of medical costs paid out by a third-party. Employer is self-insured up to the $150,000 of workers' compensation benefits. After that amount is paid, Insurer is the work comp insurance carrier for Employer. Employer and Insurer, after issuing a denial of benefits to Claimant in June 2011, continued to pay medical costs for Claimant until she was discharged by Employer in March 2012.

As Claimant's medical claim is deemed to be compensable, Claimant is entitled to future medical care and treatment. She is also entitled to an assessment by her physician and given permanent restrictions for future employment, if there are any permanent restrictions.

If medical bills have been incurred by Claimant and have been paid out by any other party, then Employer and Insurer are responsible for the reimbursement to those parties for the full amount paid.

Conclusion

Claimant employment with Employer was a major contributing cause of Claimant's low back condition and need for medical treatment. She is entitled to medical benefits and temporary total benefits ($369.01 per week) until the date she reached MMI, August 11, 2012.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 30 days after receiving this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated this 28th day of May, 2015.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/Catherine Duenwald
Catherine Duenwald
Administrative Law Judge