

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

RITA PAZOUR,

HF No. 10, 2004/05

Claimant,

DECISION

vs.

ADECCO EMPLOYMENT,

Employer,

and

CONSTITUTION STATE SERVICES,

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 on March 14, 2005, in Rapid City, South Dakota. Rita Pazour (Claimant) appeared personally and through her attorney of record, Michael J. Simpson. Michael M. Hickey represented Employer/Insurer (Employer). The issues presented were whether Claimant is entitled to temporary total disability (TTD) benefits for two short periods of time and payment for Dr. Dale Anderson's bills including the charge for performing an impairment rating.

FACTS

1. At the time of the hearing, Claimant was thirty-three years old and lived in Hayward, South Dakota, a small town twenty-five miles outside of Rapid City. Claimant has lived in Hayward since October 2002.
2. Claimant started worked for Employer in March 1999. Claimant performed temporary work at various locations.
3. Claimant injured her left elbow in June 2000 while working at ProMart Flooring, one of her temporary assignments. Claimant hit her elbow on the corner of a metal desk.
4. Claimant sought medical treatment at Rapid Care and a physician diagnosed her with a "contusion of the left elbow with neuro fracture of the ulnar nerve." Claimant was provided with work restrictions including no lifting or reaching with her left arm.
5. Claimant's treatment included anti-inflammatory medications, arm sling and physical therapy.
6. Claimant continued to have persistent problems with her left arm including numbness in her left hand and pain in her left elbow.
7. On July 31, 2000, Dr. Robert Preston referred Claimant to the Rehab Doctors for an EMG to try to identify the source of her ulnar neuropathy.

8. On August 11, 2000, Dr. Preston restricted Claimant from using her left arm at all due to her persistent problems.
9. On August 14, 2000, Dr. Mark Simonson examined Claimant and noted that she had traumatic left ulnar neuritis/neuropathy.
10. The EMG study provided no evidence of ulnar nerve injury. Dr. Simonson concluded that Claimant appeared "to have a soft tissue injury at the left medial elbow, with concomitant swelling and a left ulnar neuritis."
11. Dr. Simonson recommended Celebrex, icing, stretching exercises and no left arm use at work.
12. On August 29, 2000, Dr. Simonson reexamined Claimant and noted that she was doing much better. Dr. Simonson continued with the restriction of no use of her left arm at work.
13. Claimant continued to work for Employer performing primarily light duty work. Claimant quit working for Employer in February 2001.
14. Claimant continued to experience sharp pain and numbness in her left arm, waxing and waning in severity. Claimant's symptoms increased when she used her left arm and her symptoms improved when she did not use her left arm.
15. Claimant was next employed with Kirk Funeral Home answering phones. Claimant left this employment after a short time due to difficulties with her pregnancy.
16. Claimant continued to treat with Dr. Simonson until April 27, 2001, when treatments were discontinued due to the pending birth of her child.
17. Claimant's left arm improved while she was on bed rest because she did not use her left arm very much.
18. Claimant was next employed at Manpower Employment Services beginning in July 2001.
19. Claimant returned to see Dr. Simonson on January 30, 2002, due to persistent left elbow pain and numbness and tingling in her left hand. Dr. Simonson diagnosed Claimant with recurrent left ulnar neuritis.
20. Dr. Simonson restricted Claimant from lifting with her left arm, no typing and no repetitive work.
21. In March 2002, Claimant saw Dr. Simonson with no change in her symptoms.
22. Insurer requested a second opinion and Dr. Stephen Eckrich, an orthopedic surgeon, examined Claimant on August 14, 2002. Claimant reported pain complaints of shooting pains extending into her middle, ring and little finger that increased with use.
23. Dr. Eckrich diagnosed Claimant with cubital tunnel syndrome as a direct result of the 2000 injury.
24. Dr. Eckrich opined that Claimant could continue working with no restrictions. In addition, Dr. Eckrich stated, "I think she has reached maximum medical improvement. I do feel that she has sustained an impairment as a result of this injury that could be ratable if the carrier so desired."
25. Claimant did not receive any further medical treatment for her left arm until December 10, 2003.
26. Claimant worked at Manpower until approximately February 2003. Claimant then went to work at Sjodin's Rentals until July 2003.

27. Claimant starting working at Fresh Start Convenience Store in July 2003 as a cashier performing “primarily just right handed work.”
28. Later in the fall of 2003, Claimant worked more and more in the kitchen area and then she became the primary kitchen person in the morning.
29. Claimant’s work caused her left arm problems to increase. Claimant stated that working in the kitchen “caused problems because you had to use two hands to lift trays in and out of ovens. You had to use two hands to lift 70- and 80- pound boxes of chicken. There were chickens that had to be breaded, which required two-handed work. Dishes, fryers, stocking the freezer, any of that stuff required the use of both arms”
30. On December 10, 2003, Claimant returned to see Dr. Eckrich because she was experiencing more pain in her left arm. Dr. Eckrich noted that Claimant’s symptoms “have just not gotten any better, in fact they are probably getting worse.”
31. Dr. Eckrich again diagnosed Claimant with cubital tunnel syndrome and recommended EMG/nerve conduction studies of her left arm.
32. The studies were normal and Dr. Eckrich could not explain the reason for Claimant’s discomfort so in January 2004, Dr. Eckrich referred Claimant to Dr. David Lang.
33. On February 2, 2004, Dr. Lang examined Claimant. Dr. Lang found that Claimant had “very marked tenderness about the ulnar nerve. She has a positive Tinel’s and exquisite tenderness along the course of ulnar nerve within the groove for the ulnar nerve. She also has some mild medical epicondylar symptoms.” Dr. Lang also noted that Claimant “is currently doing work at a gas station but this is involving doing a lot of repetitive flexion and extension of the wrist and elbow which she is not tolerating well.”
34. Dr. Lang diagnosed Claimant with “ulnar neuritis electrodiagnostically negative, possibly due to direct trauma to the nerve and not straightforward cubital tunnel per se.”
35. Dr. Lang recommended that Claimant try a nighttime splint, but noted that “it is rather unlikely that [Claimant’s condition] will be helped with conservative treatment as this injury is four and a half years old.”
36. Also on February 2, 2004, Dr. Lang restricted Claimant to light duty work with no repetitive left elbow flexion or extension.
37. Claimant provided this work restriction to her manager at Fresh Start, but Claimant continued to be scheduled to work in the kitchen.
38. On February 27, 2004, Claimant wrote a resignation letter to Fresh Start complaining about many examples of bad management practices. Claimant neither mentioned her left elbow nor the problems she was having in her resignation letter.
39. Claimant wrote the letter in order to resign and she hoped that someone in a higher management position would actually read the letter. Claimant did not discuss her left arm problems because her “arm had already been discussed at great length with [her manager] on several occasions. The other issues had not been.”
40. From February 27, 2004, until June 23, 2004, Claimant looked for work within Dr. Lang’s restrictions. Claimant searched for job openings in the newspaper, on the

- internet at the Career Center and listed her resume with a U.S. Government Job site. Claimant applied for some jobs, but did not receive any interviews.
41. On March 15, 2004, Claimant returned to see Dr. Lang for a follow-up visit. Dr. Lang noted that Claimant's condition was improving. Dr. Lang referred Claimant to therapy for stretching exercises and informed Claimant that he would not consider surgery as an option for her condition.
 42. Due to her financial condition, Claimant contacted a friend and was hired as a waitress at the Railhead Restaurant on June 23, 2004.
 43. The Railhead Restaurant is a "big buffet type place." Claimant was able to minimize the use of her left arm as a waitress because she did not have to carry many trays.
 44. Claimant worked at the Railhead Restaurant until approximately October 10th or 15th of 2004, when it shut down after the summer tourist season.
 45. On September 21, 2004, Claimant saw Dr. Dale Anderson, an orthopedic surgeon in Rapid City. Claimant chose to see Dr. Anderson because he was "independent of other people that I had been sent to by the insurance company."
 46. Dr. Anderson noted that Claimant was "frustrated by the chronic pain and discomfort." Claimant continued to experience ulnar neuritis with intermittent numbness and tingling and little improvement had occurred.
 47. After his examination, Dr. Anderson found that Claimant's findings suggested "an inflammation where the muscles attach to the bone." Dr. Anderson recommended that Claimant rest her left elbow and use a brace to immobilize her arm.
 48. Claimant delayed having the Bledsoe brace put on her arm until October 15, 2004, when her employment ended at the Railhead Restaurant.
 49. Claimant wore the brace all day, every day until November 30, 2004, when Dr. Anderson discontinued her use of the brace because her symptoms had not improved. Dr. Anderson recommended that Claimant use her left elbow only as tolerated.
 50. During the time Claimant wore the brace, she continued to search for employment. Claimant applied for various positions and was eventually hired by Community Alternatives of the Black Hills (CABH) on December 13, 2004.
 51. Claimant was working as an administrative assistant at CABH at the time of the hearing. Claimant performs primarily right-handed work because she continues to have problems with her left arm and she tries to avoid using it.
 52. In the spring of 2004, Insurer denied Claimant's request for additional workers' compensation benefits based upon its belief that Claimant suffered from an aggravation of her condition.
 53. Claimant filed her Petition for Hearing with the Department on July 16, 2004. Thereafter, Employer and Insurer filed its Answer and alleged that "Claimant's injuries and current disability, if any, did not arise out of her employment with this Employer."
 54. On January 7, 2005, Dr. Wayne Anderson performed an independent medical examination (IME) of Claimant's left elbow problems. Following his review of Claimant's medical records and the examination, Dr. Anderson opined that Claimant's condition was a recurrence of her June 2000 work injury.

55. At the hearing, Employer admitted that Claimant sustained a compensable injury to her left elbow.
56. Claimant was a credible witness at the hearing. This is based on her consistent testimony and on the opportunity to observe her demeanor at the hearing.
57. After the hearing, Dr. Dale Anderson performed an impairment rating on April 18, 2005. Dr. Anderson opined that Claimant had a 10% impairment rating to her left upper extremity. Insurer paid Claimant permanent partial disability (PPD) benefits based on the 10% impairment rating, but Insurer refused to pay Dr. Anderson's charges for performing the impairment evaluation.
58. Other facts will be developed as necessary.

ISSUE I

WHETHER CLAIMANT IS ENTITLED TO CERTAIN TTD BENEFITS?

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). 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). Claimant requested TTD benefits from February 27, 2004, until June 23, 2004. Claimant also requested TTD benefits from October 15, 2004, until November 30, 2004.

SDCL 62-1-1(8) defines temporary disability, total or partial, as "the time beginning on the date of injury, subject to the limitations set forth in § 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first." SDCL 62-1-1(2) states "a loss becomes ascertainable when it becomes apparent that permanent disability and the extent thereof has resulted from an injury and that the injured area will get no better or no worse because of the injury."

On August 14, 2002, Insurer requested that Dr. Eckrich perform an IME to assess Claimant's left arm problems. Dr. Eckrich diagnosed Claimant with cubital tunnel syndrome as a direct result of the 2000 injury. Dr. Eckrich also provided Claimant with several treatment options, including cortisone injections and an ulnar nerve transposition. As of that date, Claimant was not interested in pursuing any surgical intervention. In addition, Dr. Eckrich opined that Claimant could continue working with no restrictions. Dr. Eckrich stated, "I think she has reached maximum medical improvement. I do feel that she has sustained an impairment as a result of this injury that could be ratable if the carrier so desired." Employer never requested that any physician perform an impairment rating. It was not until after the hearing that Claimant received an impairment rating by Dr. Dale Anderson.

Employer argued that Claimant was never taken off of work by any of her treating physicians. In addition, Employer argued that Claimant reached MMI as of August 14, 2002. Despite Dr. Eckrich's opinion that Claimant had reached MMI, Claimant neither had attained a complete recovery nor had her loss become ascertainable. Claimant continued to experience persistent problems with her left arm. In December 2003, Claimant returned to see Dr. Eckrich with worsening symptoms. Claimant had reached "the point where she is seriously considering surgical intervention." Because of this, Dr. Eckrich referred Claimant to see Dr. Lang to discuss treatment options.

Dr. Lang recommended that Claimant try a nighttime resting extension splint for her elbow. Dr. Lang also discussed performing an injection or possible surgery. On February 2, 2004, Dr. Lang restricted Claimant to light duty work with no repetitive left elbow flexion and extension. Claimant was unable to work within these restrictions and she quit her job at Fresh Start Convenience.

Claimant's condition worsened, thereby necessitating additional treatment and time off work. Thus, Claimant's loss did not become ascertainable during 2004. Because Claimant had not attained a complete recovery and her loss was not ascertainable, she is entitled to TTD benefits for seventeen weeks, meaning the time from February 27, 2004, until June 23, 2003.

For the same reasons, Claimant is also entitled to TTD benefits for the six weeks, from October 15, 2004, until November 30, 2004. During this time period, Claimant wore a brace and her arm was completely immobilized due to her work-related injury. Dr. Anderson discontinued use of the brace because her symptoms did not improve. Because Claimant was off work due to the additional medical treatment, she is entitled to TTD benefits.

ISSUE II

WHETHER CLAIMANT IS ENTITLED TO PAYMENT FOR CERTAIN MEDICAL EXPENSES?

Employer argued that it has paid all of the medical expenses that it believes are legally related to this claim. Claimant argued that Employer is responsible for payment of Dr. Dale Anderson's bills, including the charge for performing an impairment rating pursuant to SDCL 62-4-6 and 62-1-1.2. SDCL 62-4-1 provides that an 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."

Claimant sought treatment with Dr. Anderson after Insurer denied compensability of her injury and disability. Her first visit with Dr. Anderson was on Sept 21, 2004, several months after Insurer denied her claim. Employer argued it is not responsible for Dr. Anderson's medical expenses because SDCL 62-4-43 governs this issue. This statute states, in part, "[a]n employee may seek a second opinion without the employer's approval at the employee's expense." However, this language pertains only with a compensable claim. That is not the case here.

ARSD 47:03:04:05 provides, in part:

A medical provider who is not a participating provider in the case management plan may provide medical services to an employee in any of the following circumstances:

....

(4) When compensability for an injury or disability is denied by the insurer. The employer is liable for reasonable and necessary medical services if the injury or disability is later determined compensable. At the point that the injury or

disability is accepted as compensable by the insurer or is determined to be compensable, the medical provider must comply with the requirements of § 47:03:04:06. (emphasis added).

Because Insurer had denied compensability of her claim, Claimant was entitled to seek medical treatment with a non-participating provider. Insurer has now admitted compensability of Claimant's claim. Therefore, Insurer is responsible for any and all reasonable and necessary medical expenses. This includes payment for treatment provided by Dr. Anderson, including the expense of performing the impairment rating. The evaluation was a necessary and reasonable medical expense pursuant to SDCL 62-4-1, 62-4-6 and 62-1-1.2.

Claimant shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Employer shall have ten days from the date of receipt of Claimant's proposed Findings and Conclusions to submit objections 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 15th day of September, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge