

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

SHARON A. DANIELSON,
Claimant,

HF No. 140, 2006/07

v.

DECISION

**STURGIS CYCLE, INC./BLACK HILLS
HARLEY DAVIDSON,**
Employer,

and

FEDERATED INSURANCE,
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 July 7, 2008, in Rapid City, South Dakota. Claimant appeared personally and through her counsel, Dennis W. Finch. Timothy Clausen represented Employer/Insurer.

Pursuant to a Prehearing Order entered by the Department on May 12, 2008, the following issues were presented for hearing

1. Causation (SDCL 62-1-1(7)).
2. Extent and degree of disability, if any, arising out of the November 1, 2005, incident.
3. Medical expenses (SDCL 62-4-1).
4. Retraining.

Facts:

The following facts are found by a preponderance of the evidence:

1. At the time of hearing, Claimant was 45 years of age.
2. Claimant graduated from high school, has a one-year certificate as a massage therapist, and one year toward an associate's degree as a field-engineering technician.
3. Claimant's work history consists of work as an electronics assembler, a warehouse assistant, a traffic controller, sign artist assistant, stagehand, owning/managing a operating a gun repair shop, a bar and grill, and a massage clinic.

4. Claimant has an extensive pre-existing medical history associated with multiple accidents. In 1997, she was diagnosed with "chronic full-blown pain syndrome with chronic whiplash."
5. From August 2004 through December 23, 2004, Claimant worked for Employer in traffic control and in its warehouse. Claimant assisted in directing the heavy flow of traffic into the parking lot during the Sturgis Motorcycle Rally. Claimant also worked in the warehouse processing merchandise for sale and shipment. At the end of 2004, business slowed down and Employer released Claimant from work.
6. Claimant returned to work for Employer in the summer of 2005 and during the interim between 2004 and the summer of 2005, she performed some massages and picked up odd jobs including event staff and stagehand work.
7. On or about August 23, 2005, Claimant sustained a knee injury while working for Employer. Up to the time of her knee injury, Claimant had no difficulties physically carrying out her duties for Employer. Claimant received medical treatment for her knee symptoms, but continued to work.
8. On November 1, 2005, Claimant was hanging product after the rally to help get everything stocked back into the warehouse for the end of the year inventory. She reached to grab a hold of some clothing to slide it over so she could add more clothing to the display rack and as she slid the clothing over, the bar slid and disconnected from the above hanger and fell. Claimant saw that the bar was falling toward her so she put her hands out to keep it from hitting her in the head and jerked herself back.
9. At the time of the incident, Claimant was earning \$9.65 per hour.
10. Claimant sought medical treatment for neck pain after the November 1, 2005, incident and never returned to work for Employer.
11. Claimant suffers from cervicalgia (whiplash) and cervical facet degenerative joint disease.
12. Claimant's medical expenses were paid by Insurer up until an "independent medical examination" was performed by Dr. John Dowdle. After Dr. Dowdle made his report, Insurer denied Claimant further workers' compensation benefits.
13. Claimant sought assistance from the South Dakota Department of Labor local office (Career Center) in Rapid City and the Department of Human Services, Division of Vocational Rehabilitation Services (DVRS).
14. Claimant conducted a reasonable and good faith job search, but was unsuccessful in finding employment within the restrictions provided by Dr. Dietrich.
15. DVRS approved Claimant for assistance and is currently financing a retraining program at Western Dakota Tech in field engineering technician studies.
16. Claimant failed to tell her treating physician, Dr. Dietrich, of her medical history.
17. Claimant failed to inform her vocational expert, William Peniston, of her medical history.
18. Claimant suffered injuries in a motor vehicle accident on April 5, 2007, that caused her neck symptoms to flare up.
19. Claimant's permanent restrictions are related to her pre-existing condition and the motor vehicle accident of April 5, 2007.

20. The incident of November 1, 2005, caused a temporary exacerbation of her underlying condition.
21. Other facts will be developed as necessary.

Analysis:

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); 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).

Claimant "must establish a causal connection between her injury and her employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "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." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

- (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
- (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment.
- (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

There is no dispute that Claimant suffers from a preexisting condition, diagnosed as "chronic full-blown pain syndrome with chronic whiplash." "While both subsection (b) and subsection (c) deal with preexisting injuries, the distinction turns on what factors set

the preexisting injury into motion; if a preexisting condition is the result of an occupational injury then subsection (c) controls, if the preexisting condition developed outside of the occupational setting then subsection (b) controls.” Byrum v. Dakota Wellness Foundation, 2002 SD 141, ¶15. (citing Grael v. South Dakota School of Mines, 2000 SD 145, P8, 16-17, 619 N.W.2d 260, 262-265.) The parties do not dispute that Claimant’s preexisting condition did not develop within the occupational setting. Therefore, part (b) applies.

Claimant offered the opinions of Dr. Dietrich in support of her claim. Employer/Insurer offered the opinions of Dr. Dowdle in support of its argument that Claimant’s permanent neck condition and resulting physical restrictions are not compensable. Dr. Dietrich was deposed twice. During the first deposition, Dr. Dietrich admitted that he had not been made aware of Claimant’s medical history and prior diagnosis of “chronic full-blown pain syndrome with chronic whiplash.” Before his second deposition, Dr. Dietrich reviewed Claimant’s prior medical records. Dr. Dietrich conceded that the incident of November 1, 2005, caused a temporary exacerbation of her prior condition. Dr. Dietrich opined that Claimant’s treatment up through March of 2007 was related to the November 1, 2005, incident. Dr. Dietrich also conceded that Claimant’s medical treatment after March of 2007 and her current limitations and restrictions are related to her previous condition and/or the motor vehicle accident on April 5, 2007.

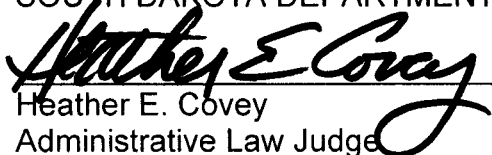
Given the medical opinions offered in this case, Claimant has failed to establish a causal connection between her current condition and the November 1, 2005, incident. Therefore, Claimant’s request for benefits pursuant to SDCL 62-4-5.1 must be denied. However, Claimant has demonstrated, through Dr. Dietrich’s opinions, that her medical treatments through March of 2007 are compensable. Dr. Dietrich, as the treating physician, is in the best position to opine on when Claimant reached maximum medical improvement after the November 1, 2005, incident. Dr. Dowdle, while certainly a qualified and competent orthopedic surgeon, did not treat Claimant. Dr. Dietrich is a Board certified physical and rehabilitation medicine specialist who routinely treats conditions like Claimant’s. It is axiomatic that when a medical expert has more expertise or actually specializes in the treatment of a particular condition, that medical expert’s opinion is entitled to greater weight than a medical expert with less expertise or experience in treating that condition. Haynes v. Ford, 686 NW2d 657, 662-664 (SD 2004)(accepting the opinion of Dr. Lawlor over that of a chiropractor and a physician’s assistant in part due to his specialized training in physical medicine and rehabilitation and her greater experience in treating the claimant’s problems.); 7 Arthur Larson, Larson’s Workers’ Compensation Law, §128.06(8), 128-21 (necessity for expertise in medical witness corresponding to complexity of medical problem); Myhre v. North Dakota Workers’ Compensation Bureau, 653 NW2d 705, 712 (ND 2003)(“a long term physician – patient relationship may afford a treating doctor a more comprehensive view of the claimant’s medical history and condition”). Dr. Dietrich’s opinions are accepted as more persuasive than those of Dr. Dowdle.

Based upon Dr. Dietrich's opinions, Claimant is entitled to temporary total disability benefits from the date of denial in late 2006, through March of 2007, as well as medical expenses incurred during that time.

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 23rd day of October, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR


Heather E. Covey
Administrative Law Judge