SOUTH DAKOTA DEPARTMENT OF LABOR
Division of Labor and Management

DOROTHY ESTENSON, **Claimant,**	**HF 14, 1999/00**
v.	**DECISION**
JOHN MORRELL & CO., **Employer/Self-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. Patrick J. Kane represents Claimant. Scott C. Folkers represents Employer/Self-Insurer. The hearing was April 17, 2003. After the hearing, the record was held open to allow Claimant an opportunity to supplement her medical evidence.

Issues

1. Whether certain medical expenses are compensable.
2. Whether Claimant is entitled to additional wage loss benefits.

Analysis

Claimant's petition for hearing, filed July 26, 1999, alleges only one date of injury, November 24, 1993. Claimant has been represented by her current counsel since no later than December 1999. Her petition has at no time been amended to set out any injury date other than November 24, 1993. Although Claimant has suffered other incidents and episodes of pain since that time, both Claimant and her legal counsel have consistently argued that she has only the one injury date, and any later complaints of pain or need for treatment all stem from and were caused by her November 1993 injury.

Claimant has the burden of proving all facts essential to sustain an award of compensation. *King v. Johnson Bros. Constr. Co*., 83 S.D. 69, 155 N.W.2d 183, 185 (SD 1967).

"The employee's burden of persuasion is by a preponderance of the evidence." *Caldwell v. John Morrell & Co*. 489 N.W.2d 353, 358 (SD 1992).

By Claimant's admission and argument, her injury occurred November 24, 1993. The law in effect when the injury occurred governs the rights of the parties. *Helms v. Lynn's, Inc*., 1996 S.D. 8, 542 N.W.2d 764, ¶ 11, 524 N.W.2d at 766. In 1993, "injury" under our workers' compensation statutes was defined as "only injury arising out of and in the course of the employment, and shall not include a disease in any form except as it shall result from the injury[.]" SDCL 62-1.1(2).

> Before an employee can collect benefits under our [workers'] compensation statutes, [she] must establish, among other things, that there is a causal connection between [her] injury and [her] employment. That is, the injury must have its origin in the hazard to which the employment exposed the employee while doing [her] work. This causation requirement does not mean that the employee must prove that [her] employment was the proximate, direct, or sole cause of [her] injury; rather, the

> employee must show that [her] employment was "**a contributing factor"** to [her] injury.

Caldwell at 358 (internal citations and quotations omitted).

> [T]he testimony of professionals is crucial in establishing that the employment was "a contributing factor" to the injury complained of because the field is one in which [laypersons] ordinarily are unqualified to express an opinion. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. A [claimant'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 [the claimant's] employment. Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers'] compensation statutes.

Day v. John Morrell & Co., 490 N.W.2d 720, 724 (SD 1992).

The parties stipulated to the admissibility of certain medical records, including those of Dr. Robert Van Demark, Dr. Leonard Gutnik, Dr. Geise, Dr. G.S. Marckstadt, Dr. Reynen, and Dr. Chris Tountas. The records of each will be considered separately and examined for indications that Claimant's condition is work-related.

Dr. Robert Van Demark

Claimant was 24 years old when she initially treated with Dr. Van Demark. Dr. Van Demark treated Claimant for bilateral hand and arm pain from November 23, 1993, to December 27, 1993.

On November 23, 1993, Claimant complained of pain in both hands. Dr. Van Demark's November 24 note states, "She has a positive doppler for thoracic outlet. We will go ahead and plan on getting her on an exercise program. . . . If this does not help, we may have to think of changing her job . . .".

On December 27, 1993, Dr. Van Demark's note indicates: "Still having problems with her circulation. She also complains of her hands being numb." Dr. Van Demark then had Claimant submit to a cold immersion test which was positive for Raynaud's.

Dr. Van Demark's records do not establish that Claimant's conditions were causally related to her work at John Morrell. At most, his November 23 entry indicated that she may not be able to continue to do the work she was doing. He said nothing about causation.

Dr. Van Demark referred Claimant to Dr. Gutnik, a specialist in vascular and internal medicine.

Dr. Leonard Gutnik

Following the referral from Dr. Van Demark, Dr. Gutnik initially saw Claimant on January 7, 1994. Dr. Gutnik has seen Claimant on several occasions since then.

In none of his records does Dr. Gutnik indicate that Claimant's work activities at John Morrell, in particular her 1993 injury, constitute a contributing factor to her condition.

Dr. Gutnik's January 7, 1994, note indicated Claimant's problems included overuse syndrome, thoracic outlet syndrome and Raynaud's, in addition to her smoking problem. Dr.

Gutnik recommended that Claimant "clearly needs to quit smoking" and should avoid repetitive use with her arms, avoid the cold, and avoid vibrating tools. Although this note indicates these restrictions, Dr. Gutnik did not state that Claimant's job was a contributing factor to either her condition or these restrictions.

Dr. Gutnik's April 8, 1994, note indicated that Claimant was doing better on a job that allowed her to avoid repetitive work. He wrote, "She is really a success story in terms of doing great."

There is a gap in treatment to January 16, 1997, at which time Dr. Gutnik noted, "This gal has a variety of issues that were wrong in the past with her arms and circulation." At this time, Claimant was back to a job which required repetitive motion in a cold environment and was not doing as well. Dr. Gutnik prescribed avoiding repetitive work with her arms above her heart, avoiding work in the cold, and avoiding pounding or vibrating tools.

Dr. Gutnik saw Claimant on April 18, 1997, she was complaining that her arms ache, the right worse than the left. She was looking for a different job at John Morrell to allow her to stay within her restrictions.

Dr. Gutnik wrote a July 3, 1997, letter to Jim Fleming setting out the restrictions Claimant has due to her conditions: stop repetitive work, particularly with the arms above the level of the heart, avoid a cold environment, and avoid pounding or vibrating tools. Dr. Gutnik's letter refers to thoracic outlet syndrome, and the fact that "she may have an overuse syndrome as well", but at no point does he suggest a cause for either condition.

Dr. Gutnik saw Claimant again on July 16, 1997, and took her off work for a week, stating:

> Well, she has a lot of problems with the job is on [sic], and I have looked at the video and have agreed to let her strike that job and see if it works out for her. Right now though she will have to be off work for one week. It is not a fair test going into a job with the arm hurting so much from the present job she is doing.

On August 13, 1997, both of Claimant's arms were bothering her. Dr. Gutnik noted, "The job she is doing at Morrell's is bothering her." He also noted, "We will keep her same restrictions and hopefully she will mesh and find a job that she can do with a minimum of discomfort."

Dr. Gutnik saw her again on November 12, 1997. She continued to have problems with the shoulders and arms when she used them above the level of her heart. She continued to have problems with the cold, especially with the weather getting colder.

Dr. Gutnik's February 11, 1998, note included, "It has been such a mild winter even with the smoking she has gotten by."

Dr. Gutnik then did not apparently see Claimant until November 18, 1999. She was having "numbness in the arm and pain in the arm and shoulder." The right continued to be worse than the left. He noted, "thoracic outlet syndrome, I suspect, is the issue for her numbness." Dr. Gutnik again did not indicate a cause for the thoracic outlet syndrome. They discussed surgery. Claimant wanted two weeks off work to see if she would improve to a point where she could avoid surgery. Dr. Gutnik agreed and took her off work for two weeks.

Claimant's two weeks off work did not affect her condition. Dr. Gutnik's November 30, 1999, note includes, "I stopped her work for two weeks. The symptoms persist. Light duty does not affect it." Dr. Gutnik recommended a consult with Dr. Cho, a pain specialist.

Dr. Gutnik's records include a December 15, 1999, vascular testing thoracic outlet study which showed "nothing for thoracic outlet compression syndrome." This study indicates "Final Impression: Low probability of arterial compression syndrome with this study technique."

Dr. Gutnik's December 30, 1999, note indicated that Claimant had seen Dr. Cho. Dr. Gutnik's note again refers to surgery to attempt to correct the thoracic outlet syndrome: "She will know when she cannot go on anymore, and then we will arrange surgery for rib resection." There is no indication from Dr. Gutnik that either the thoracic outlet syndrome or the rib problem is work-related.

Dr. Gutnik next saw Claimant on January 24, 2002. He noted, "She tends to work with her arms down, so it is not so bad for her. When she uses them up, like to comb her hair, then she gets pain and numbness that increase significantly." Surgery was again discussed as a possibility for the future.

Dr. Geise

Dr. Geise saw Claimant on July 16, 1997, at Central Plains Clinic. Claimant's chief complaint was pain in the right elbow, wrist. Dr. Geise's note says, "She is a pretty vague historian. From what I can gather, she has had this pain for several months and just in the last 2-3 weeks she has had a worsening of it." From this somehow he concludes, "I think this is very obviously a worker's [sic] comp injury and so we did file work comp forms."

The only foundation for Dr. Geise's opinion is the following: "She work's at Morrell's and does a lot of repetitive gripping and grasping and writing with her right hand. She tells me recently she was moved to a job where she writes numbers such as weights on the carcasses as they come by and this has seemed to really exacerbate her pain over the last 2 weeks."

He did not relate Claimant's condition to her 1993 injury, and, if he was of the opinion that her condition was caused by work activities within the past weeks or months, he did not state an opinion that her work activities were a major contributing cause of her condition, the relevant standard at this later date, and had inadequate foundation to reach that conclusion in any event.

Dr. Geise put Claimant on work restrictions for a week and scheduled her to return in a week to see someone in the clinic's occupational medicine department.

Dr. G.S. Marckstadt

Claimant saw Dr. G.S. Marckstadt, a specialist in occupational medicine at Central Plains Clinic, in July and August 1997, for complaints of right hand pain.

Dr. Marckstadt first saw Claimant on July 24, 1997, for what his note indicates is a "reexacerbation [sic] of a chronic work comp injury to her right upper extremity[.] . . . The DOI of this latest exacerbation was reported 7/16/97." Other than Dr. Marckstadt's conclusory statement that Claimant suffered a workers' compensation injury, there is nothing in his note to indicate that Claimant's condition was related to any work activities. Furthermore, it must be noted that Claimant has denied that she suffered any new injury or aggravation on July 16, 1997.

Claimant returned to Dr. Marckstadt on July 31, 1997. The treatment note of that date, under the heading "Assessment", indicates: "**Etiology unclear** though the patient describes

while marking hogs, the next hanging hog would many times slap the dorsum of her hand while moving down the line." (emphasis added).

Dr. Marckstadt's last treatment note in the record is dated August 14, 1997. His assessment was right hand pain secondary to overuse syndrome, resolving, history of thoracic outlet syndrome and Raynaud's phenomena. He did not offer an opinion as to causation of any of these conditions. Claimant was formally discharged to return to full duty with restrictions similar to those prescribed by Dr. Gutnik.

Dr. Reynen

The record includes a March 25, 1999, treatment note from Dr. Reynen, of Orthopedic & Sports Medicine Clinic, P.C. Claimant complained of right shoulder pain, with some pain radiating down the lateral aspect of the right arm, to the elbow. Dr. Reynen wrote, "It has been bothering her pretty significantly over the last few months."

Claimant returned to Dr. Reynen on April 13, 1999, following a CT scan. The CT scan was "normal."

Claimant returned to Dr. Reynen on May 3, July 19, August 23, and November 15, 1999, with right shoulder and elbow pain.

Dr. Reynen's notes contain no statement as to any possible cause for Claimant's shoulder and upper right arm complaints.

Dr. Chris Tountas

Dr. Chris Tountas performed an independent medical examination (IME) of Claimant on July 14, 1997. He conducted a physical examination of Claimant, and reviewed the records from Central Plains Clinic, Dr. Robert Van Demark, McKennan Hospital and the John Morrell Occupational Health Clinic.

He noted that in November 1993, Dr. Van Demark found Claimant positive for thoracic outlet and Raynaud's.

Dr. Tountas found no evidence in his physical examination of Claimant, or in the records that Claimant was suffering from carpal tunnel syndrome or any other entrapment neuropathy of the upper extremities.

Dr. Tountas opined that "the diagnosed thoracic outlet and Raynaud's are idiopathic, preexistent, underlying, and not caused by her employment." Dr. Tountas further concluded that Claimant's thoracic outlet and Raynaud's could be aggravated by overhead use of her arms or by work in a cold environment, but that such aggravation would be "temporary aggravations of the underlying, preexistent condition."

Dr. Tountas agreed with Claimant's previous work restrictions. He also opined that if Claimant would discontinue her tobacco abuse, "this would substantially improve any of the diagnosed Raynaud's."

Although Dr. Tountas provided an impairment rating for Claimant's diagnosed conditions, he concluded that none of Claimant's impairment was work-related.

Dr. Myung Cho

The record was kept open at the close of the hearing to allow Claimant the opportunity to submit the records of Dr. Myung Cho, of Midwest Pain and Rehabilitation Clinic, Ltd.

Claimant was to submit these records by affidavit, pursuant to SDCL 16-16-8.2. Employer would then be given an opportunity to object or respond, if necessary.

Dr. Cho's records were received May 6, 2003, together with an affidavit signed by Claimant. Claimant's affidavit, of course, did not conform to the governing statute. After Claimant's attorney was informed that Claimant's affidavit was not sufficient, the affidavit of Dr. Cho was received June 9, 2003. No records were attached to the affidavit of Dr. Cho. Despite the fact that Claimant's submission of Dr. Cho's records does not conform to the requirements of SDCL 19-16-8.2, I reviewed and considered these records and found them to be devoid of any evidence relevant to the issue of causation.

Dr. Cho saw Claimant for "chronic neck and upper back problems" on December 10, 1999, February 10, 11, 16, 22, 28, March 7 and 21, and April 20, 2000.

Dr. Cho's records contain no entry relating these complaints in any way to Claimant's 1993 injury.

Conclusion

The medical evidence was all introduced by stipulated medical records. No doctors were deposed or called to testify by Claimant who carries the burden of proof on the causation issue. There is only the minimal stipulated medical records with no interpretation by any of the doctors who produced these records.

None of these records establish that Claimant's condition is related to her 1993 work injury. No doctor has expressed an opinion, to a reasonable degree of medical certainty, that Claimant's condition is work-related.

> By stating that "the testimony of professionals is crucial in establishing this causal relationship" we acknowledged the lack of medical training by lawyers, hearing examiners, and courts to interpret these records. "Expert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person to judge." Caldwell, 489 N.W.2d at 362 (citing Podio v. American Colloid Co., 83 S.D. 528, 162 N.W.2d 385 (1968)). See also In re Appeal of Schramm, 414 N.W.2d 31, 36 n.7 (SD 1987) (reviewing a record containing dental records, x-rays, and physical exhibits, this Court stated that "without expert testimony, we, like the members of the jury, are left to speculation and conjecture as to their relevance and meaning.") By not deposing these professionals or having them testify at hearing, the parties are likewise limited in the information that might otherwise be available to them.

Westergren v. Baptist Hospital, 1996 S.D. 69, ¶ 32, 549 N.W.2d 390.

Only Dr. Tountas provided an opinion on the causation issue. He opined that Claimant's condition was not work-related. Even without the opinion of Dr. Tountas, the probabilities are equal that Claimant's condition was either caused by her employment or by her preexisting conditions. Claimant has not sustained her burden of proof where the probabilities are equal.

Compensability of Certain Medical Expenses

Claimant's post hearing brief, for the first time, identified the medical expenses she is claiming. These are: Dr. Cho's billings for diagnostic charges on December 10, 1999, an office visit on February 11, trigger point injections on February 16, and 22, 2000, and office visits on February 28, March 7 and 21, 2000; Dr. Gutnik's billings for November 18 and 30,

December 10, 15, and 30, 1999; various Avera McKennan billings for physical therapy in April 1999, a chest X-ray and cervical MRI on December 1, 1999 (and associated Medical X-ray Center P.C. charges), and various charges for physical therapy in January and February 2000 (These were ordered by Dr. Cho for neck and upper back.); Orthopedic Institute charges with Dr. Reynen on July 19, August 23 and November 15, 1999; and Neurology Associates, P.C. charges for December 6, 2000; for a total in the amount of $2,349.

Because it has been determined that Claimant failed to meet her burden of proof on the issue of causation, she has also failed to meet her burden to establish that these various medical expenses are work-related.

It should also be noted that a December 16, 2002, entry in Dr. Cho's statement of account indicates that Claimant's balance with Dr. Cho was apparently written off pursuant to Claimant's bankruptcy.

Counsel for Employer/Self-Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Claimant shall have an additional 10 days from the date of receipt of the initial sets of proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer/Self-Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated: January 29, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge