SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT
WORKER'S COMPENSATION

SHANNON M. COLLINS, **HF NO. 152, 2011/12**

Claimant,

DECISION

v.

AVERA McKENNAN HOSPITAL and AVERA WORKERS' COMPENSATION TRUST,

Employer and 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. Claimant, Shannon M. Collins (Claimant), represented herself pro se. Michael S. McKnight, of Boyce, Greenfield, Pashby & Welk, L.L.P., represents the Employer and Self-Insurer, Avera McKennan Hospital and Avera Workers' Compensation Trust (Employer/Insurer). A Hearing in the above matter was held on July 1, 2014 in Sioux Falls, South Dakota. The parties gave oral argument following submission of evidence. They chose not to submit post-hearing briefs to the Department. All pleadings, affidavits, evidence, and arguments were taken into consideration by the Department.

ISSUES:

Was Claimant's work for Employer a major contributing cause of her current condition and need for treatment?
What is the nature and extent of Claimant's disability?
Is Claimant permanently and totally disabled?

FACTS:

1. At the time of hearing, Claimant is a 58 year old female.

2. Employer hired Claimant as a nursing assistant on March 26, 2008.

3. On September 17, 2008, after an incident at work, Claimant made a workers' compensation claim for injuries involving her cervical and lumbar spine and her right hip.

4. On June 5, 2009, Claimant made another workers' compensation claim involving her cervical and lumbar spine as well as her left arm. This is the injury that is pled as a work-related injury on Claimant's Petition for Hearing.

5. On July 24, 2009, while at physical therapy for a previous injury, Claimant was placed into a traction machine. Claimant alleges that the therapist was not familiar with how the machine worked and alleges she suffered a new injury or reinjury of Claimant's neck and spine.

6. Claimant had a number of injuries to her neck and spine prior to becoming employed with Employer.

7. Claimant did not report these injuries to all of her treating physicians after the alleged work-related accidents.

8. According to her medical records, Claimant was involved in a motor vehicle accident in 1997, while she was living in Texas.

9. On January 16, 2001, Claimant was in another motor vehicle accident. Claimant was rear-ended and suffered injury to her neck, head area, and back. She also chipped a tooth.

10. In 2001, she reported to her medical provider, Dr. Stephen Foley that symptoms from the 1997 MVA had healed fine. The notes indicate, "She hasn't had any neck pains or headache problems, shoulder aches, or any backaches really the last couple of years."

11. Claimant attended physical therapy for about 6 weeks after her 2001 injury before starting chiropractic care. She also received injections in her upper back or cervical and thoracic spine.

12. Claimant was unable to work for almost a year after the MVA in 2001. She did not believe she could lift anything without reinjuring herself.

13. Two years after the 2001 accident, Claimant was still experiencing pain from the MVA and seeking prescription medication.

14. In October 2003, Claimant reported to her doctor that lifting patients at her work bothered her sometimes. In November 2004, Claimant reported to Dr. Foley that she still will get some discomfort from her whiplash injury suffered in 2001.

15. In June 2005, Claimant reported to Dr. Foley that her low back pain has been better since she no longer lifts patients at the nursing home where she is employed.

16. On October 9, 2006, Claimant had another motor vehicle accident (MVA) and sought treatment with Dr. Bruce Jon Hagen, DC. The records indicate that the MVA caused strain and limited range of motion to Claimant's cervical, thoracic, and lumbar spine levels. She reported pain in her back, neck, and left shoulder as well as radiating pain down her arm.

17. Claimant returned to work in January 2007, although she continued to treat for symptoms from the 2006 MVA.

18. In March 2007, Claimant sought treatment from Dr. Judith Peterson in addition to her chiropractor. Claimant continued to treat with Chiropractor, Dr. Hagen through the end of April 2007.

19. On March 13, 2007, Sioux Falls Open MRI took an MRI scan of Claimant as follow-up to the 2006 MVA. Dr. Judith Peterson was the referring physician.

20. On May 29, 2007, Dr. Bruce Jon Hagen gave Claimant an 8% whole person disability rating, based upon the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment.

21. There is no indication that an impairment rating was issued after the 2001 MVA.

22. On May 23, 2007, Claimant was seen by a medical provider at the Parker Chiropractic Clinic, near her residence in Ohio. Claimant moved to Ohio for a brief time. She reported to the Parker clinic that this was a follow-up visit following a car accident in October 2006.

23. After returning to SD in July 2007, Claimant continued to see Dr. Hagen for regular chiropractic treatments.

24. On September 17, 2008, Claimant reported a work injury while employed with Avera Prince of Peace. She reported twisting her back wrong while trying to maneuver to reach an oxygen cord.

25. Claimant chose to see Dr. Bruce Jon Hagen, DC for this injury after receiving some muscle relaxants from a medical professional at Healthworks, the healthcare provider for Avera employees.

26. Claimant returned to work on October 1, 2008, with lifting and movement restrictions. The restrictions were in place until October 15, 2008.

27. Claimant saw Dr. Hagen about once per week through the end of December 2008. At the end of December 2008, Claimant believed she was in pre-injury status. Dr. Hagen gave her a 0% impairment rating for this injury.

28. On June 5, 2009, Claimant reported another work-related injury due to lifting, while employed with Avera Prince of Peace.

29. Claimant saw Dr. Hagen on June 6, 2009 for treatment. Dr. Hagen dictated that the complaints were due to the injury at work and there were no contributing factors due to pre-existing conditions.

30. After seeing Dr. Hagen, Claimant went over to Sanford Clinic and saw Patricia Bultsma, CNP, for a second opinion. Claimant provided a history that this is a new problem that started the day prior. **Claimant also told CNP Bultsma that this problem occurs constantly and has been gradually worsening.**

31. On July 25, 2009, Claimant was instructed by Employer/Insurer to see Dr. Elkins of Healthworks regarding her workers' compensation claim.

32. Dr. Elkins referred Claimant to Avera Physical Therapy. During the first visit to Avera Physical Therapy, Claimant allegedly suffered an injury to her cervical spine, allegedly due to operator error on a traction machine.

33. Chiropractic care was denied by Employer/Insurer. Claimant continued to treat with chiropractic care and pay for it out-of-pocket.

34. On July 12, 2010, Claimant saw Dr. Hagen for initial treatment for a new injury sustained on July 11, 2010 while at work. Claimant was lifting a 400 pound plus patient with a Hoyer lift and she reinjured her neck, mid-back, and low back/right hip. Dr. Hagen recommended that Claimant not work for a few days.

35. Claimant returned to light duty work on July 21, 2010.

36. Claimant had her right hip replaced in the fall of 2011. Claimant does not make the claim that her need for hip surgery is work-related.

37. In April 2012, Claimant was still undergoing physical therapy that was being covered by workers' compensation.

38. Claimant saw Dr. Bruce Jon Hagen for chiropractic treatments on an almost monthly basis since her MVA in October 2006. After each "new" injury, Claimant would receive chiropractic manipulations and treatments daily for short period of time. These visits were gradually reduced to weekly visits. There were a few short periods of time (2 to 3 months) where Claimant did not see Dr. Hagen.

39. June 3, 2013 was the most recent visit to Dr. Hagen that was submitted as evidence in this case.

40. Claimant did not present testimony from any of her physicians or medical providers for her injuries or condition.

41. Employer's expert, Dr. Elkins, in his report to Employer/Insurer indicated that because Claimant indicated that she was symptom free prior to the work-related injuries, that his initial assessment that her injury in June 2009 was work-related is likely not correct. Claimant did not inform Dr. Elkins that she had been in a number of MVA's prior to the work-related incidents.

ANALYSIS

The causation statute, SDCL §62-1-1(7), defines injury as follows:

> Injury" or "personal injury," 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.
>
> The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought;

SDCL §62-1-1(7). The Claimant has the burden of proving an injury under the above statute. The South Dakota Supreme Court has interpreted this statute on numerous occasions. Recently, the Supreme Court wrote:

> In a workers' compensation dispute, a claimant must prove the causation elements of SDCL 62-1-1(7) by a preponderance of the evidence. *Grauel v. S.D. Sch. of Mines & Tech.*, 2000 S.D. 145, ¶11, 619 N.W.2d 260, 263. The first element requires proof that the employee sustained an "injury" arising out of and in the course of the employment. SDCL 62-1-1(7); Bender v. Dakota Resorts Mgmt. Group, Inc., 2005 S.D. 81, ¶7, 700

> N.W.2d 739, 742. The proof necessary for the second element ("condition") is dependent on whether the worker also suffered from a preexisting condition or a prior, compensable work-related injury. See SDCL 62-1-1(7). If the worker suffered from neither of these, the claimant must prove that the employment or employment related activities were a "major contributing cause" of the "condition" of which the employee complains. SDCL 62-1-1(7)(a). In cases involving a preexisting disease or condition, the claimant must prove that the employment or employment related injury is and remains a "major contributing cause of the disability, impairment, or need for treatment." SDCL 62-1-1(7)(b); see also *Grauel*, 2000 S.D. 145, ¶9, 619 N.W.2d at 263 (citing SDCL 62-1-1(7)(a)-(b)). Finally, if "the injury combines with a preexisting work related compensable injury, disability, or impairment," the claimant must prove that "the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment." SDCL 62-1-1(7)(c) .

Peterson v. Evangelical Lutheran Good Samaritan Society, 2012 S.D. 52, ¶20, 816 N.W.2d 843, 849-850.

The Supreme Court has further stated that "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). They have 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) (emphasis added). 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.

The medical records indicate that Claimant has been suffering with the same complaints of left shoulder, neck, upper back pain since that initial reported motor vehicle accident in 2001 or even 1997. However, since that time, Claimant has had a number of other incidents that caused similar symptoms to the same body parts. Claimant has provided no testimony from any medical providers to support her claims that these symptoms are caused by work-related incidents. There are medical records and forms the doctors filled out for the federal government, but there are no affidavits, depositions, or likewise that could possibly be considered testimony.

What the Department is faced with, is over a decade of medical records in which some of the doctor's opinions are based upon inaccurate and incomplete information. Claimant was treating for her work-related injuries with doctors at Avera while just months previous, she was treating for her MVA's with doctors at Sanford and her Chiropractor. Some of the physicians knew about the other physicians, but not all the physicians had the whole history of Claimant's injuries.

It is unclear whether Claimant's medical providers were taking into account her MVA's from 1997, 2001, and 2006 when making their opinions regarding her lifting injuries that occurred at work in September 2008, June 2009, and July 2010. The notes also show that Claimant suffered pain from lifting patients while in recovery for the first two MVA's; however, it was not reported as a workers' compensation injury. The physicians' opinions, some of which are contained within the medical records, are only as good as the information that is given to them by Claimant. Because it is unclear which facts were given to the doctors and upon what they based their opinions, the opinions are not persuasive and are given little or no weight.

Causation of Claimant's condition and need for treatment has not been proven by Claimant. Therefore, the extent of Claimant's disability based upon a work-related injury cannot be established or ruled upon by the Department. Claimant's chiropractor had given her an impairment rating on at least two occasions for the motor-vehicle accidents. The impairment ratings for her alleged work-related injuries are not presented through testimony of a physician.

For those reasons, I am denying Claimant's claim for benefits. Claimant has not proven causation which is necessary before the extent of disability can be established.

Dated this _____day of _____, 2014.

SOUTH DAKOTA DEPARTMENT OF
LABOR AND REGULATION

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Catherine Duenwald
Administrative Law Judge