

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

**ILLA LARSON,
Claimant,**

HF No. 157, 2002/03

v.

DECISION

**OTTER TAIL POWER COMPANY,
Employer/Self-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 October 13, 2004, in Watertown, South Dakota. Claimant, Illa Larson (hereafter Claimant), appeared personally and through her counsel, Robert E. Spears. Reed Rasmussen represented Employer/Self-Insurer Otter Tail Power Company (hereafter Employer).

Issues:

1. Whether Claimant suffered a work-related injury.
2. Whether Claimant provided notice pursuant to SDCL 62-7-10.
3. Whether Claimant is entitled to permanent partial disability and if so, in what amount.
4. Whether Claimant is permanently, totally disabled under the odd-lot doctrine.

Facts:

On March 31, 2004, the parties entered into the following Stipulation:

1. Claimant began working for Otter Tail Power Company at its Big Stone plant on May 28, 1996. She continued to work there until December 4, 2002, when she took a medical leave of absence.
2. From November 2000 through November 2001, Claimant worked 40 hours per week at a rate of pay of \$15.69 per hour. During this period, her compensation rate for worker's compensation benefits was \$418.61 per week.
3. From November 2001 through November 2002, Claimant worked 40 hours per week at a rate of pay of \$16.17 per hour. During this period, her compensation rate for worker's compensation benefits was \$431.42 per week.
4. A First Report of Injury form was signed by Claimant on May 14, 2002, regarding an alleged work-related injury occurring on May 13, 2002. No First Report of Injury form was completed regarding any work related injuries in October or November 2001.
5. For purposes of the hearing, neither party will object on foundation grounds to the entry into evidence of any medical records concerning Claimant.

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

Claimant suffers from cervical degenerative facet arthritis. She is restricted to medium duty work by this condition. Claimant alleges that she suffered work injuries in November of 2001 and May of 2002, which led to her current condition. The alleged incident in November happened when a barrel of soap tipped over, causing Claimant to fall onto the ground, landing on her back and head. Claimant did not receive any medical treatment at the time of that incident. She did not file a first report of injury at the time. In May of 2002, Claimant alleged that she injured her shoulder while lifting a wheelbarrow filled with heavy wet ash from the power plant. After the May of 2002 incident, Claimant sought medical treatment for pain in her shoulder and the left side of her neck.

Dr. Gregory Peterson (hereafter Chiropractor Peterson) began treating Claimant on November 16, 1988. The first time Chiropractor Peterson treated Claimant for neck pain was May 14, 2002.

Chiropractor Peterson explained how Claimant came to see him:

When she presented, it was an incident at work that she had. The day before she had injured the neck and shoulder to where the pain had become very severe, and she needed to have some treatment on it. And at that time, she had also stated that there was -- you know, it had been bothering for a while. It just finally got to the point where she needed to have something done, because she couldn't function with the pain at that level anymore.

The last treatment he gave her was on March 26, 2003. Between May 14, 2002, and March 26, 2003, Claimant received an estimated 60 to 70 chiropractic treatments for neck pain, numbness in her hand and fingers, and shoulder pain and tightness.

Dr. Rodney Peterson, an orthopedic surgeon certified by the American Board of Orthopedic surgeons, performed an independent medical evaluation (IME) of Claimant on October 24, 2002, at Employer/Self-Insurer's request.

Dr. Peterson opined that Claimant's work incidents and their combined effects were not a major contributing cause of her disability, impairment, or need for treatment. Dr. Peterson opined that Claimant suffered from a pre-existing degenerative condition that would be a major contributing cause of her disability, impairment and need for treatment. Dr. Peterson considered "major" to mean "a rather significant occurrence." Dr. Peterson opined that 75% of Claimant's condition was caused by pre-existing conditions and 25% of her condition by "aggravation" from work activities.

Dr. Walter O. Carlson, an orthopedic surgeon certified by the American Board of Orthopedic Surgeons, treated Claimant on Chiropractor Peterson's referral. On July 24, 2002, Dr. Carlson examined Claimant and found "no neurologic deficits" and

recommended an MRI of the cervical spine. On August 8, 2002, Dr. Carlson noted that Claimant's MRI showed "some cervical degenerative facet arthrosis at C4 left and C6 left." Dr. Carlson's record of that date reveals that Claimant "probably has sustained an aggravation [sic] of this [cervical degenerative facet arthrosis] to her work related injuries and job activities." Dr. Carlson prescribed Bextra and recommended home therapy, including home traction, and a physical therapy evaluation.

Claimant underwent a functional capacities evaluation showing that she can return to medium duty. Other facts will be developed as necessary.

Issue One

Whether Claimant suffered a work-related injury.

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:

"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.

Claimant's condition was diagnosed as cervical degenerative facet arthrosis. "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 Grauel v. South Dakota School of Mines, 2000 SD 145, ¶8, 16-17, 619 N.W.2d 260, 262-265).

The medical testimony establishes that Claimant's employment activities are not a major contributing cause of her degenerative condition. Dr. Peterson opined that Claimant's condition did not develop because of her work. Chiropractor Peterson could not dispute Dr. Peterson's opinion that 75% of Claimant's condition was pre-existing and 25% was related to her job.

Because Claimant's preexisting condition developed outside of the occupational setting, subsection (b) controls. Claimant must demonstrate that her alleged work injuries combined with her preexisting condition "to cause or prolong disability, impairment or need for treatment" and that her "employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment."

Dr. Peterson opined that Claimant's work incidents and their combined effects were not a major contributing cause of her disability, impairment, or need for treatment. Dr. Peterson opined that Claimant suffered from a pre-existing degenerative condition that would be a major contributing cause of her disability, impairment and need for treatment. Dr. Peterson considered "major" to mean "a rather significant occurrence." Dr. Peterson opined that Claimant's condition was caused 75% by pre-existing conditions and 25% by "aggravation" by work activities.

Chiropractor Peterson agreed that the MRI revealed degenerative changes that were not caused by the May 2002 incident. Dr. Carlson's records support a finding that Claimant suffered from a pre-existing condition. Chiropractor Peterson agreed that the type of degeneration shown on the MRI could not have occurred between the work incident and the MRI, meaning the May 2002 incident could not have caused the degenerative changes. Chiropractor Peterson could not dispute Dr. Peterson's conclusions that 75% of Claimant's current problems are due to preexisting, degenerative arthritis. Dr. Carlson's records do not support a conclusion that Claimant's work activities or work injuries are and remain a major contributing cause of her current condition.

The medical evidence fails to support a finding that Claimant's work activities and/or work injuries were and remain a major contributing cause of her current condition, disability, or need for treatment. Claimant has failed to demonstrate the compensability of her claim for workers' compensation benefits and the remaining issues will not be addressed.

Employer 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. Claimant shall have ten (10) days from the date of receipt of Employer'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, Employer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 15th day of April, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge