SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

EYERUSALEM GEDAMU,
Claimant,

HF No. 204, 2001/02

v.

DECISION

MASCO CORP./STARMARK,
Employer,

and

SPECIALTY RISK SERVICES INSURANCE,
Insurer,

and

GATEWAY,
Employer,

and

GALLAGHER BASSETT 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 February 24, 2004, in Sioux Falls, South Dakota. Claimant, Eyerusalem Gedamu (hereafter Claimant), appeared personally and through her counsel, Glenn J. Boomsma. J.G. Shultz represented Employer Masco Corp./Starmark, and Insurer Specialty Risk Services Insurance (hereafter Starmark). Michael S. McKnight represented Employer Gateway and Insurer Gallagher Bassett Services.

Issues:

1. Is Claimant's injury compensable under SDCL 62-1-1(7) and the "last injurious exposure" rule?
2. Is Claimant entitled to temporary total disability benefits?

Facts:

The only witness who testified at the hearing in this matter was Claimant.[1] Substantial records were submitted and received into the Department's record, including Claimant's deposition, a videotaped deposition of Dr. Jerry Blow, the Affidavit of Dr. Richard Farnham, and the Affidavit of Dr. Robert Suga. Based upon the record and Claimant's testimony at hearing, the following facts are found by a preponderance of the evidence:

Claimant has a condition in her right arm that leaves it weakened. This condition, which has been present since infancy, plays no role in Claimant's current condition, disability or need for treatment. The medical records simply document that Claimant has this condition.

On June 1, 1995, Claimant was working the day shift at Starmark, operating a machine that was used to place hinges on cabinet doors. While lifting a doorframe onto the machine, she "felt something" in her left shoulder. Claimant sought medical treatment from Dr. Robert Snortum at Central Plains Clinic. On July 3, 1995, Dr. Snortum noted that Claimant's shoulder had "improved very nicely" and that she should return "only if problems" with her shoulder develop. Claimant made no further visits to Dr. Snortum. Claimant did not miss any work as a result of the June 1995 incident.

On May 29, 1998, Claimant was working the night shift at Starmark and felt pain in her left shoulder while lifting a doorframe onto machinery. Shortly thereafter, she sought medical treatment from Dr. Richard Farnham. Claimant saw Dr. Farnham six times between June 5, 1998, and July 10, 1998. She went through physical therapy and ultimately went back to full duty work at Starmark. On July 9, 1998, physical therapist Bethany Martins noted that Claimant's pain increased with cutting motions at work. Despite this finding, Dr. Farnham noted at Claimant's final visit, "I don't think we need to consider [a] job change." Claimant understood Dr. Farnham to have recommended that she find different work that did not irritate her shoulder or risk permanent injury. Claimant did not miss any work as a result of the May 29 incident. Over one year later when she left Starmark in October of 1999, her shoulder was "fine."

Claimant began a warehouse job at Gateway in October of 1999. Claimant's job at Gateway involved stacking boxes weighing from five to twenty-five pounds each on shelves by lifting the boxes from a cart onto the shelves. To stack boxes on the higher shelves at the warehouse, she often had to lift the boxes overhead, or above her head. While working in the warehouse, Claimant began experiencing pain in her left shoulder. Claimant was placed on light duty. She then sought medical treatment from Dr. Robert Van Demark. Claimant did not report any new or different symptoms than when she treated after her 1998 injury. After his treatment proved unsuccessful, Dr. Van Demark referred Claimant to Dr. Blow.

[1] Claimant's native language is Amharik. She grew up in Ethiopia and came to the United States in 1992. Claimant was assisted by a volunteer interpreter at her deposition. The Department provided an interpreter at the evidentiary hearing.

Dr. Jerry Blow, a physical medicine and rehabilitation specialist, treated Claimant eight times between December 26, 2000 and April 9, 2001. Dr. Blow also performed an impairment rating on Claimant on July 14, 2003, and prepared a report.

Dr. Blow's notes reveal that Claimant sought his treatment for "left shoulder pain" and pain associated with reaching over her head with her left arm and shoulder. Specifically, she complained of "pain of her shoulder, both anterior and posterior shoulder pain, overhead reach was hurting her, combing hair was a problem, pouring milk into a glass was painful for her, cutting or chopping food was painful, no numbness and no tingling, any lifting seemed to bother her shoulder." On December 12, 2000, Dr. Blow restricted Claimant to sedentary work with no overhead lift, no overchest reach, no reaching more than 18 inches from body, and no repetitive actions with hands. On February 15, 2001, Dr. Blow again restricted Claimant to no over shoulder work, no pushing/pulling with left arm, no lifting more than 15 pounds with left arm, no reaching more than 18 inches from body and no overtime work.

Claimant relayed to Dr. Blow a history that "she initially had developed shoulder pain while working at Starmark back in '95 and that she got treatment for it and felt better and then in '98 had more pain and got treated for it and never completely recovered." Dr. Blow testified that Claimant "was emphatic that she said, 'I always had shoulder pain, it never got completely better.'" Claimant told Dr. Blow that her pain never really went away after the 1998 episode.

Dr. Blow remembered Claimant "very well" and recalled that she "was able to express things fairly well" despite not having an interpreter. Dr. Blow agreed that Claimant suffered a sprain/strain in 1995 and in 1998 that developed into tendinitis. Dr. Blow found that Claimant's shoulder pain improved after 1998, but that it never completely went away. Dr. Blow found that the pain was in the same area of her shoulder and that she reported no new symptoms. Dr. Blow found that Claimant "is a very motivated person" and "would do well" with surgery.

On April 3, 2001, Dr. Blow opined, "this all relates to her injury at StarMark and, unfortunately, patient continues to have persistent myofascial pain of the left shoulder girdle." On April 9, 2001, Dr. Blow restricted Claimant from performing repetitive work and opined that Claimant is unable to do essential job functions at Gateway. Dr. Blow opined that Claimant's pain prevented her from working at Gateway.

Dr. Blow reviewed records from the clinic in Portland, Oregon, where Claimant was treated on January 12, 2004, for "tendinitis of the left shoulder, left shoulder pain." Dr. Blow's final diagnosis is "tendinitis and impingement syndrome." He explained:

> [I]mpingement syndrome has to do with the anatomy of the shoulder. In order to move your arm in any position you have to have something take the upper arm, the bone of the arm, the humerus and move it. In order to move it, you have a rotator cuff, a muscle that attaches from the back of your spine, it goes through the bone called the clavicle underneath it and reaches to the humerus to move.

> And impingement syndrome refers to the fact that if you develop tendinitis or inflammation of the muscles that run through that boney structure, they start to swell and as they swell, you develop pain. And particularly if you go to move your arm in this position, the space gets smaller and smaller as you move the arm in this direction it becomes painful. (Witness demonstrating.) So any time you go to take off your shirt, reach up overhead, reach away from your body, you develop pain, particularly in the anterior lateral aspect of the shoulder, the outside of the shoulder, and so that's what impingement is.

Dr. Blow explained the surgical procedure called acromioplasty that has been recommended for Claimant:

> Acromium is the distal or the outer portion of the clavicle and that's the boney part that impinges or presses on the rotator cuff as you bring it up into abduction and external rotation. So if you take that bone out, you leave a lot more space for the person to move their muscle, so in effect it's taking care of what's being the impingement.

Dr. Blow restricted Claimant to an "eight-hour workday, no shoulder lifting, no pushing or pulling with her left arm, no lifting greater than 15 pounds, no reaching greater than 18 inches away from her body and no overtime work."

Dr. Blow described Claimant's complaints on July 17, 2003:

> [Claimant] is currently complaining of left anterior shoulder pain that is constant with pain into her underarm and then into her posterior shoulder. She has tingling in her posterior shoulder. She has pain in the left side of her neck that can extend into her head for which she gets headaches. All movement of her arm above her chest is painful. When she keeps her arm down, it is okay. Pain is 10 at rest. She reports that it is hard for her to fall asleep and to stay asleep. Patient has had extensive physical therapy. Modalities and manual therapy can give her some temporary reduction in pain. Exercises done can help to maintain range of motion but does not alleviate her pain. She has used ice, heat, and stretching. She has had injections and unfortunately her pain persists.

Dr. Blow found on "palpatory exam":

> Patient has muscle tenderness over her left rhomboid, left levator scapula, left supraspinatus, left subscapularis, and left scalene. She has some tenderness over her left bicipital tendon. She does have positive impingement findings; although I do have difficulty brining [sic] her up into 90° of abduction in order to get into external rotation and do a full impingement test. I can't really do a near compression test.

Dr. Robert Suga performed an independent medical examination on February 1, 2001. He found a markedly positive impingement sign and noted that MRI scan showed

"significant tendinits of the supraspinatus tendon." Dr. Suga opined that Claimant's current complaints are "not at all related" to her work at Gateway. Dr. Suga also opined that Claimant's condition is not related to acute trauma and has been an ongoing problem.

Dr. Farnham wrote on October 28, 2003, contrary to the physical therapists findings on July 9, 1998:

> This is a well-defined, well documented isolated injury occurring while employed at Starmark and for which she was appropriately treated with temporary restrictions, a nonsteroidal anti-inflammatory medication, home heat applications, physical therapy directed to the left shoulder region and x-rays of the left shoulder girdle, which were normal, and without evidence of acromioclavicular pathology. This claimant was returned to work full and without restrictions or limitations on July 10, 1998 after successfully completing a physical therapy program on a prescription medication and light duty status.

Dr. Blow restricted her work capacity to a position with a two-hour task rotation. Gateway was unable to place Claimant in such a position and her last day working was in August of 2000. After failing to find suitable work for Claimant, Gateway terminated her employment in July of 2001. Gateway and Starmark both denied responsibility for Claimant's medical expenses as of May 24, 2001. Claimant has since moved to Oregon.

Other facts will be developed as necessary.

Issue One

Is Claimant's injury compensable under SDCL 62-1-1(7) and the "last injurious exposure" rule?

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:

> [O]nly 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.

Much of the controversy in this matter stems from questions about Claimant's credibility. Claimant's deposition testimony and her hearing testimony are inconsistent in how she responded to questions about persistent symptoms in her left shoulder. Having had the opportunity to observe Claimant's demeanor and attitude at hearing and having carefully reviewed the medical records that document Claimant's complaints, the Department finds Claimant's testimony at hearing was credible. The Department also specifically finds Claimant has suffered persistent symptoms in her left shoulder since 1998. The Department also specifically finds Claimant's statements to her doctors were credible because Claimant did not demonstrate any motivation to mislead anyone, including her doctors, the attorneys involved, her other medical providers, or her employers, and there is no indication in the medical records that Claimant is not suffering the symptoms she claims. Furthermore, Claimant continued to work while in pain after her 1995 injury, her 1998 injury, and the 2000 injury. Claimant's testimony is accepted as credible.

In a worker's compensation matter, the claimant must prove by a preponderance of the evidence all the facts essential to compensation, including whether an injury is a recurrence or aggravation under the last injurious exposure rule. Titus v. Sioux Valley Hosp., 2003 SD 22, ¶ 11. Under this rule, the insurer covering the risk "at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation." Id. at ¶ 12. (citations omitted). The critical determination is "whether the successive injury is a mere recurrence or an independent aggravation of the first injury." Id. at ¶ 13. If it is a recurrence, the original insurer is liable; if it is an independent aggravation then the subsequent insurer is liable. Id.

To find a recurrence, the evidence must show:

1. There have been persistent symptoms of the injury; and
2. No specific incident that can independently explain the second onset of symptoms.

Id. at ¶ 15. To find an aggravation, the evidence must show:

1. A second injury; and
2. That this second injury contributed independently to the final disability.

Id. at ¶ 14. Of significance in this analysis is whether there is a "significant occurrence, amounting to an independent contribution to the final disability, [that] causes an onset of increased or new symptoms." Id. at ¶ 15. The question is not whether the subsequent employment contributed to a disability, but instead is whether it contributed to the causation of the disability. Id. at ¶ 16. "Evidence that an injury merely worsened is not sufficient to prove an aggravation." Truck Ins. Exchange v. CNA, 2001 SD 46, ¶ 31 (citation omitted).

While there has been persistent symptoms and no specific incident that independently explains the onset of new symptoms, the South Dakota Supreme Court has repeatedly concluded that there was a recurrence and that the first insurer is liable to pay all compensation. See Titus, 2003 SD 22, ¶ 16; CNA at ¶ 35; Enger v. FMC, 1997 SD 70, ¶ 19, 565 N.W.2d 79, 85; Tischler v. United Parcel Service, 1996 SD 98, ¶ 35, 552 N.W.2d 597, 604; Schuck v. John Morrell & Co., 529 N.W.2d 894, 900; Day v. John Morrell & Co., 490 N.W.2d 720, 725-26 (SD 1992).

The parties presented expert opinions from Dr. Blow, Dr. Suga, and Dr. Farnham, along with Claimant's medical records. Dr. Blow's deposition was presented by written transcript and videotape. Dr. Suga performed an independent medical examination and prepared a report. Dr. Farnham prepared a report based upon a records review.

Dr. Blow opined that Claimant suffers from tendinitis, impingement syndrome and chronic shoulder pain. Dr. Blow opined, "a major contributing cause for her current shoulder pain complaints would be the original 1995 injury and subsequent injury in 1998." Dr. Blow opined in his IME report that Claimant's "Starmark injuries of 06/01/95 and 05/28/98 are the major contributing cause for [Claimant]'s shoulder injuries." Dr. Blow opined, "the Gateway injury of 06/15/00 caused only a temporary exacerbation of her symptoms." Dr. Blow based his opinion on Claimant's medical records from Central Plains Clinic in 1998 and from Sioux Valley Business Health, Dr. Van Demark's notes, Dr. Suga's notes, the physical therapy notes and his own notes.

Dr. Blow refused to agree that he based his causation opinions entirely on Claimant's testimony alone. He opined that "the fact that she initially had the sprain/strain in '95, a recurrence in '98, that she certainly has an exam consistent with I think chronic tendinitis and Dr. Suga refers to as impingement and that's very correct" factored into

his opinions. He also considered her work activities at Gateway to not be of "the type of weight or repetition that she had at Starmark." Dr. Blow stated that his opinions were based heavily on what other doctors had in their records. Furthermore, Dr. Blow opined that Claimant tested positive for impingement symptoms in July of 1998. Dr. Blow also found that her injuries at Starmark were more significant than her injury at Gateway.

When confronted with the possibility that Claimant's pain may have, between her work at Starmark and her injury at Gateway, gone away completely, contrary to her reports to her physicians, Dr. Blow answered that most of his decision was based on his belief that "her work activities at Starmark far outweighed the work activities she did at Gateway and that she told me she had ongoing symptoms." Dr. Blow opined that Claimant's work activities caused a "temporary exacerbation of tendinitis." Dr. Blow opined that it was only "possible" that Claimant's work activities at Gateway could have caused tendinitis.

Dr. Blow opined that the acromioplasty recommended by Dr. Suga is "very appropriate" and will likely reduce her pain and increase her employability. Dr. Blow did not find that Claimant was "symptom-free" as of July 10, 1998, based on the physical therapy records from the time. Dr. Blow opined that Claimant's pain prevented her from working at Gateway. Dr. Blow agreed with Dr. Suga's assessment that Claimant had "Stage II impingement dating back to 1995" that was not related to her Gateway employment.

Dr. Farnham opined that Claimant's injuries at Starmark were not related to her left shoulder condition and that her work at Gateway was an aggravation and not a recurrence of the injuries at Starmark. Dr. Farnham's opinions are rejected. First, he lacks the expertise of Dr. Blow and Dr. Suga. Second, he lacked the knowledge and understanding of Claimant's work activities that Dr. Blow and Dr. Suga demonstrated. Third, Dr. Farnham performed merely a records review before giving his opinions. Fourth, Dr. Farnham had not examined Claimant in four years. His opinions lack the foundation of Dr. Blow and Dr. Suga's opinions, are not persuasive, and are rejected. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 N.W.2d 396, 398 (S.D. 1988).

Dr. Suga and Dr. Blow's opinions are accepted. Claimant suffered compensable work related injuries at Starmark on June 1, 1995 and May 29, 1998. Claimant suffered a recurrence of these injuries while working at Gateway. Claimant's injury at Starmark is a major contributing cause of her current condition, her need for treatment, and her current disability. Claimant suffered persistent symptoms of her injuries after the May 29, 1998, injury at Starmark. Claimant did not suffer a specific injury or incident at Gateway that independently explains her symptoms, condition, disability, or need for treatment. Claimant suffered a mere recurrence of her Starmark injuries in 2000 while at Gateway and; therefore, under the last injurious exposure rule, Starmark is responsible for her worker's compensation benefits.

Issue Two

Is Claimant is entitled to temporary total disability benefits?

Starmark argues that Claimant is not entitled to temporary total disability benefits because she was not incapacitated from work for seven consecutive days as is required by SDCL 62-4-2. SDCL 62-4-2 states, "[n]o temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days." Starmark argues that because Claimant did not miss any work after either her 1995 or 1998 injuries at Starmark, it does not owe her temporary total disability benefits.

Starmark's argument is without merit and contrary to the intent of the last injurious exposure rule. Starmark has been found to be responsible for Claimant's worker's compensation benefits, including temporary total disability benefits because Claimant did miss work after her injury at Gateway. Claimant's incapacity after the Gateway incident meets the requirements of SDCL 62-4-2.

Claimant and Gateway 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. Starmark 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 and Gateway shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 7th day of September, 2004

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge