SOUTH DAKOTA DEPARTMENT OF LABOR
Division of Labor and Management

GINGER VOLLMER,
Claimant,
v.

WAL-MART,
Employer, and

NATIONAL UNION FIRE INSURANCE OF PITTSBURGH, PA,
Insurer.

HF 264, 1999/00

DECISION

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Michael J. Simpson, of Julius & Simpson, L.L.P., represents Claimant. Comet H. Haraldson, of Woods, Fuller, Shultz & Smith, P.C., represents Employer/Insurer.

Issues

1. Whether Claimant's incident at work on September 1, 1999, is a major contributing cause of her condition and need for treatment.
2. If compensable, what is the nature and extent of Claimant's disability?
3. Whether certain medical expenses are compensable.
4. What, if any, benefits are due?
5. Whether SDCL 62-7-41 applies.

It is my determination that Claimant's September 1, 1999, incident is not a major contributing cause of her condition and need for treatment.

Facts

Claimant was forty-one years of age at the time of the hearing. She has worked as a pharmacy technician since approximately 1986.

Claimant began working at Wal-Mart in 1992 as a head pharmacy technician. She worked thirty-eight to forty hours weekly from 1992 to September 1, 1999, when she had a painful incident at work.

Claimant described her September 1, 1999, incident as follows: She was putting a "very small package of Insulin, it was ten vials" on a shelf in the refrigerator. "I was squatting down beside the refrigerator. It was a very short compact refrigerator. I was holding the door with my right arm, and I was reaching across my body with my left, twisting and

turning and reaching in with my arm[.]" . . . "I didn't' feel anything pop or snap or anything like that. It just - - I could not move my head. I couldn't move my left arm. I was in severe pain."

After this incident, Claimant first sought treatment for her neck and shoulder pain with a massage therapist. She had seen this massage therapist a number of times in the past to treat migraine headaches. Claimant has a long history of migraine headaches.

Claimant continued to see her massage therapist two or three times per week. She also began treating with her regular doctor, Dr. Richard Beasley, a specialist in internal medicine, on September 3, 1999.

Dr. Beasley had seen Claimant on April 27, 1999. At that time, she complained of a headache that had started a week or 10 days before. The headache was in the left occipital region, shooting over her forehead. Claimant had again seen Dr. Beasley on May 12, 1999, at which time she complained of a headache, fatigue and chest wall pain.

After the September 1, 1999, incident, Dr. Beasley treated Claimant from September 3, 1999, to September 5, 2001.

Claimant saw Dr. Beasley on September 3, 10 and 20, 1999. Dr. Beasley's objective findings were normal.

Dr. Beasley thought Claimant had a cervical strain, and initially took her off work. He prescribed pain medications. Dr. Beasley released Claimant to part-time work on September 27, 1999.

By the time Claimant saw Dr. Beasley on October 11 and October 25, she told him she was getting better. Dr. Beasley thought Claimant would be back to normal in a month. On November 22, Dr. Beasley noted that he expected full recovery soon.

Between November 22 and November 30, Claimant's condition worsened with no apparent trauma. Dr. Beasley noted that Claimant had a fair amount of discomfort down her left arm, with numbness and tingling.

Dr. Beasley then did not see Claimant until March 20, 2000. He wrote: "I do not believe thoracic outlet syndrome is the original diagnosis nor is it the active diagnosis at this time." This is still his opinion.

Claimant was still complaining of cervical symptoms on September 27, 2000.

Dr. Beasley referred Claimant to Dr. Brett Lawlor, a board certified physiatrist, in December 1999. The first time Dr. Lawlor saw Claimant was December 8, 1999. At this time Claimant was still working only part-time at Wal-Mart, due to her complaints of arm and shoulder pain.

Claimant limited herself to four or five hours per day because of pain. Claimant did not have a note from Dr. Beasley or Dr. Lawlor limiting her work.

Claimant was also seeing a chiropractor, Dr. Blickensderfer, during this time.

In November, Claimant was referred to Dr. Alexander Schabauer, whose specialty is cardiology and vascular medicine, to evaluate for any vascular etiology for the pain in her arms.

Dr. Schabauer found “no clear evidence of a vascular cause for her pain”.

Claimant was eventually terminated at Wal-Mart in March 2000 because she was not able to return to full time work and would not agree to an extended leave of absence.

On or about April 24, 2000, Claimant started at Medicap Pharmacy as a pharmacy technician, working four to five hours each day. She was still working there at the time of the hearing, and still limiting herself to part-time work. She currently works about 20 hours a week at Medicap. She started at $9 per hour, but was up to $11.18 at the time of the hearing.

Claimant testified that she has tried to work more than 4 hours, but the pain gets too intense.

In May 2001, Claimant began experiencing symptoms of Guillain-Barre Syndrome (GBS). Dr. Robert Finley, a neurologist, treated Claimant for this condition. He testified by his July 30, 2001, deposition.

Dr. Finley described GBS as a form of sub-acute neuropathy, or damage to the nerves, that comes on over a period of days or weeks, (as opposed to something like a diabetes-related neuropathy, that comes on over a period of years.) GBS is sometimes reversible. Usually the most affected nerves are those away from the center of the body, in the extremities. Dr. Finley testified that GBS is thought to be viral, although it is not known precisely what it is.

Dr. Finley first saw Claimant in June 2001. Claimant was hospitalized from June 26 to July 3, 2001.

Dr. Finley never saw Claimant for symptoms related to her September 1, 1999, incident. He did not diagnose or treat Claimant for thoracic outlet syndrome or for myofascial pain syndrome.

Dr. Finley did a neurologic evaluation of Claimant on June 19, 2001. At this time, the EMG was abnormal. The study showed that the nerve responses down Claimant’s arms were less than they should have been. This finding was consistent with Claimant’s diagnosis of GBS. Dr. Finley noted that Dr. Lawlor had done an EMG the prior year, which was normal.

Claimant eventually returned to work at Medicap in January 2002. She still has some symptoms, particularly soreness in her legs and head pain. She continues to be treated for this her GBS condition by Dr. Finley, and still has lingering symptoms of GBS.

Dr. Craig Mills, a physiatrist, has also been treating Claimant for her left shoulder and arm complaints. He first saw her in June 2001.

Among the possible causes for Claimant's condition is a September 9, 1999, car accident. Claimant's car was struck from behind by another car.

Claimant testified in her June 5, 2002, deposition concerning the lasting effects of the car accident:

> Q: You told me that it exacerbated and increased your symptomatology.
> A: Yes.
> Q: How long did you feel you had the exacerbation of symptomatology after the motor vehicle wreck? A week? A month? Six months?
> A: You're saying increased pain. Is that what you're saying?
> Q: Yes.
> A: Okay. I have the severe pains to this day, so I - - I don't know how to answer that question.
> Q: Do you feel that you ever recovered from the motor vehicle accident's effects?
> A: I suppose to a certain extent.

Dr. Michael D. Smith testified for Employer/Insurer through his January 9, 2003, deposition. He is a board certified orthopedic surgeon, with an emphasis in upper back and cervical conditions.

Dr. Smith performed an independent medical examination (IME) of Claimant in July 2002.

Although Dr. Smith admitted that he believes Claimant suffers from chronic myofascial pain, his ultimate opinion was that Claimant's September 1999 work incident was not a major contributing cause of her current neck and shoulder condition.

At the time of the IME, Claimant had complaints of diffuse pain and varying areas of numbness. Dr. Smith testified that an assessment of Claimant's condition was somewhat complicated by the fact that she described diffuse and changing complaints. He testified that Claimant's complaints did not "fit a typical anatomical pattern" and were "not consistent with a particular dermatomal irritability."

He testified:

> One of the things we look for is consistency of subjective complaint, objective findings, and the integration of diagnostic tests, medical imaging, provocative

tests, and so on. And it certainly makes the diagnostic process much more difficult when symptoms are diffuse and nonspecific as compared to focal and well defined anatomically.

Dr. Smith reviewed Claimant's EMG results. He found that the results were essentially normal, but did "reveal some peripheral neuropathic process in multiple muscles." Dr. Smith testified that the EMG results were important in indicating that the condition was more peripheral and related to muscle tissue rather than neurologic. Dr. Smith opined that a neuropathic condition in multiple muscles would be more consistent with symptoms related to Claimant's GBS. In Dr. Smith's opinion, the EMG findings did not point to a specific traumatic event to a certain particular body part, and therefore did not point to the September 1, 1999, incident as a contributing cause.

Dr. Mills's September 20, 2001, pain diagram showed entire body pain. Claimant testified in her 2002 deposition that when she tried to work an extra hour in a day, her entire body was raging in pain, from her feet to her head:

A. I don't notice it until I stop working, and once I sat down, my entire body was raging in pain.
Q. Your entire body.
A. Yes, I couldn't - -
Q. Meaning from your feet, to your ankles - -
A. To my head, to my everything. It hurt to get up and walk.
Q. Knees and hips and elbows and everything.
A. Everything. Everything.

Dr. Smith opined that Claimant's complaints of whole-body pain were not related to her September 1999 work injury.

Dr. Smith tested for thoracic outlet syndrome. His tests were negative. Dr. Smith could find no biomechanical cause related to the September 1999 incident that would result in thoracic outlet syndrome. In his opinion, it would take high speed high energy trauma, not the lifting less than a pound, to acutely narrow the thoracic outlet.

Analysis

Claimant's September 1, 1999, incident was initially accepted as compensable. Claimant received compensation benefits and her medical expenses were paid.

A dispute has since arisen concerning whether her current condition and need for treatment is causally related to the September 1, 1999, incident.

Claimant has the burden to prove by a preponderance of the evidence "all facts essential to compensation." *Westergren v. Baptist Hosp.,* 1996 SD 69, ¶10, 549 NW2d 390, 393 (citations omitted). Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment

and the injury sustained. *Brady Memorial Home v. Hantke*, 1999 SD 77, ¶11, 597 NW2d 677, 680 (citing *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73).

Claimant must establish by medical evidence that her September 1, 1999, work injury is a major contributing cause of her current disabling condition and need for treatment. SDCL 62-1-1(7).

"No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]" Id.

Claimant suffered what appeared to be a minor injury in September 1999. Her doctor at that time thought she had suffered a strain and would quickly improve. Her intervening car accident, her GBS and the mere passage of time since the 1999 incident raise doubt as to whether her present condition is causally related to her 1999 injury. "Where there is no obvious causal relationship the testimony of a medical expert may be necessary to establish the causal connection." *Kester v. Colonial Manor*, 1997 SD 127, ¶ 19, 571 N.W.2d 376.

"The burden of proof is on the claimant to show by a preponderance of the evidence that some incident or activity arising out of her employment caused the disability on which the workers' compensation claim is based." *Kester* ¶24.

"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. To meet his degree of proof a possibility is insufficient and a probability is necessary." *Schneider v. SD DOT* 2001 SD 70, ¶ 13, 628 NW2d 725. (citations omitted*).*

Many factors are involved in assessing the causation of Claimant's current condition. The medical evidence establishes no more than a mere possibility that Claimant's September 1, 1999, incident at work is a major contributing cause of her current condition.

Dr. Beasley provided no opinion on the issue of causation. His June 26, 2001, note refers to a "significant amount of complications that have occurred with a neck injury that occurred from a motor vehicle accident in the past."

Dr. Beasley's diagnosis was myofascial pain. In his opinion, this normally would have gotten better in a short period of time. Dr. Beasley gave Claimant no restrictions and provided no impairment rating.

As to the issue of causation, Dr. Schabauer could only testify: "The chronology suggests causality." This opinion is further weakened by the fact that the chronology Dr. Schabauer refers to is the history he took from Claimant. He admitted, "Clinical history does not include objective evidence." During his cross examination, Dr. Schabauer also admitted an additional potential weakness in the foundation of his opinion: "[M]y chronology was being obtained remotely from the time of injury, so I can't state that the

accuracy of the history would be the same as the history that could have been obtained in the first few weeks." Ultimately, Dr. Schabauer deferred to Dr. Lawlor on the issue of whether Claimant's work injury is a major contributing cause of her condition.

Dr. Mills testified to no more than a possibility when asked to give an opinion on causation. He testified, "I certainly feel based on the history she presented to me, and I have to take that at her word, that that's consistent with the inciting etiology for her."

Dr. Mill's admitted, "I can't tell you for sure what the pain generator is. There's some narrowing and possible nerve root impingement that may be the etiology based on the earlier MRI studies."

Finally, Dr. Mills testified: "Some patients have a distinctive etiology or cause [for myofacial pain], a specific trauma or etiology or cause. In Mrs. Vollmer's case, this appears to be the work-related incident of 9-1-99 as the onset of her pain syndrome."

Dr. Mills was not aware that Dr. Lawlor had an EMG done on Claimant before her GBS symptoms arose, and that the results of the EMG were normal. When informed of this at his deposition, he testified:

A. I was not aware of that. Prior to today I had not seen any records related to Dr. Lawlor's treatment.
Q. Okay. Assuming what I just said is true and we did depose him yesterday and talked about it, would it be fair to say that EMG findings now for Ms. Vollmer which would be abnormal would most likely be related to her Guillain-Barre experience?
A. That would seem to be acceptable.
Q. As we sit here now, you certainly wouldn't argue with that contention, would you?
A. No, I would not.

Dr. Lawlor admitted that he never documented any objective medical reason that would explain Claimant's complaints of ongoing pain in her left arm and neck.

By the time she saw Dr. Lawlor, her neck pain had improved seventy-five percent. Her shoulder and arm symptoms had stayed about the same.

An MRI showed mild degenerative changes with some stenosis at C5-6. When asked about the causation of the stenosis, Dr. Lawlor testified that he could not say with reasonable medical certainty that the September 1, 1999, incident had resulted in disc material protruding out and narrowing the foramen.

In his December 8, 1999, letter to Dr. Beasley, Dr. Lawlor stated that the MRI evidence of mild lateral stenosis at C5-6 "might be a contributing factor to her symptoms."

After his physical exam, Dr. Lawlor diagnosed cervical myofascial pain. He thought Claimant might have some thoracic outlet syndrome.

As to thoracic outlet syndrome, Dr. Lawlor testified: “there is no way to definitively establish that as a diagnosis. The only way to effectively establish that is to treat - - treat the patient presumptively and see if they improve.”

Dr. Lawlor found no evidence of nerve damage on an EMG.

Dr. Lawlor saw Claimant on September 18, 2000. His diagnosis was “neurogenic thoracic outlet syndrome and cervical, mechanical, and myofascial pain with left radicular pain.” He did not think there was any further treatment for her, and did not prescribe any further treatment.

Dr. Lawlor testified that the causes of Claimant’s complaints were “’multi-factorial”. He suggested a number of possible causes:

- mechanical or myofascial pain: “irritation of a disc or facet joint myofascial pain means muscle pain.”
- neurogenic thoracic outlet syndrome “the diagnosis is essentially irritation of the nerves in the brachial plexus from tight muscles in the front of the neck.”, or
- “I think it’s possible that the C5 - - left C5-6 ostiophyte slash disc may have irritated the nerve root, and though the MRI did not show it compressing the nerve nor did an EMG show nerve damage, that may well have irritated the nerve either chemically - - we know that there’s chemicals inside the disc that can spill out when the nerve is injured and chemically injure a nerve, cause inflammation and pain in the distribution of that nerve, and so that’s one possible explanation”
- Poor posture and biomechanics definitely are a contributing factor for the development of thoracic outlet syndrome, so I would agree with that statement.

Dr. Lawlor was asked his opinion on the issue of causation. Over objection for lack of foundation for his opinion, he testified:

> Based on the history that she provided and absent any specific medical records to the contrary, it’s my opinion that the injury that she described is the cause of her symptoms.

Dr. Lawlor is of the opinion that the single incident of reaching to place a small package in the refrigerator in September 1999 is a major contributing cause of Claimant’s complaints. He testified that is was this single incident, not her history of overhead reaching or repetitive movements at work.

However, Dr. Lawlor was not able to describe with any specificity the biomechanics of what Claimant was doing when she suffered her alleged September 1999 injury. He just points to the fact that she was “reaching” and reported pain.

> "The specific position was not discussed. Simply that that activity of reaching with her arm and the subsequent zinger that she described was the point of injury."

Dr. Lawlor was not aware at the time he testified that Claimant had since been diagnosed with GBS.

"[T]he 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, 398 571 NW2d 381 (SD 1988).

"The value of the opinion of an expert witness is no better than the facts upon which they are based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Podio v. American Colloid Co.,* 83 S.D. 528, 532, 162 N.W.2d 385, 387 (1968)).

Dr. Lawlor's opinion is rejected. It is not based on an adequate foundation.

Where Claimant's doctors had opined that the chronology was a key to establishing causation, Dr. Smith found that the chronology was more related to Claimant's September 9, 1999, motor vehicle accident than to the work incident.

In either event, Dr. Smith was of the opinion that Claimant suffered no lasting effect or impairment from either the Wal-Mart incident or the car accident. His report states:

> The exact nature of the injuries she allegedly suffered on 9-1-1999 is unclear. She did state that she did have severe onset of neck and shoulder pain. That medical record suggests that chronology was more so related to a very minor motor vehicle accident. If one were to assume that an injury did occur to her neck, she had a temporary aggravation of her underlying degenerative disc disease. There are no objective residuals as a consequence of that cervical strain.

Dr. Smith testified, the "primary rule of surgery and in medicine is if you can't name it, you can't cut it. In her case, she does not have a specific diagnosis."

The only conclusion that can be reached is that the medical evidence is not conclusive. To borrow from Dr. Smith, if you can't name it, and can't diagnose it, you can't ascribe causation.

Claimant has failed to establish by a preponderance of the medical evidence that her September 1, 1999, incident is a major contributing cause of her condition.

Claimant has also alleged an entitlement to payment of certain medical expenses. Exhibit Eight is a summary of bills totaling $22,072.23 from ProMotion, Dr. Lawlor, Dr. Ramsey, Dr. Blickensderfer, Medicap, Dr. Schabauer, Rehab Institute of Chicago, Dr. Beasley, and Dr. Mills.

Dr. Smith testified concerning the causal relationship of this medical treatment to the September 1, 1999, incident:

> The medical treatment to initially evaluate her thoracic outlet and cervical spine complaints is appropriate. Assuming her statements are correct and valid, and she had a cervical strain, the treatment within the first 6 weeks would be related to that incident. The medical records and her history clearly diverge, as to which syndrome would have resolved from either event by no later than 6 weeks after the respective events.

Dr. Smith's opinion is accepted. Claimant is not entitled to payment of these medical bills.

Because I have concluded that Claimant has failed to establish that her condition and need for treatment are causally related to her September 1, 1999, work incident, I do not reach the remaining issues.

Counsel for Employer/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/Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated: December 8, 2003.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge