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

TAMMY LAGLER, **HF No. 31, 2008/09**

Claimant,

v. **DECISION**

MENARDS, INC.,

Employer,

and

ZURICH AMERICAN INSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This matter was heard by Donald W. Hageman, Administrative Law Judge on May 10, 2011, in Sioux Falls, SD. Claimant, Tammy Lagler, is represented by Scott N. Heidepriem. Employer, Menards, Inc., and Insurer, Zurich American Insurance Company, are represented by J.G. Shultz.

Objection and Motion to Strike:

During the hearing, Employer and Insurer objected to the admission of Exhibit 2 and 2A which had been offered by the Claimant. Exhibit 2 and 2A are records of payments made by Insurer for Claimant's disability and medical expenses. Employer and Insurer contended that the exhibits should be excluded because they were offered as evidence of admission of liability. The Department admitted the exhibits into evidence over Employer and Insurer's objection.

After the hearing, Employer and Insurer renewed their objection to Exhibits 2 and 2A and moved to strike them from the record. Employer and Insurer base their objection on SDCL 19-12-11 (Rule 409). That provision states:

> Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

SDCL 19-12-11 (Rule 409). Claimant argues that the exhibits are relevant and admissible for purposes of impeaching the credibility of Dr. Farnham's testimony.

Claimant contends that the evidence shows that Insurer stopped paying for Claimant's medical treatment and subsequently hired Dr. Farnham to justify its actions.

One of the issues in this case deals with the compensability of Claimant's injury. Consequently, the sums spent for the treatment of that injury is relevant at some level, although the amount of money owed is not in dispute here. The evidence also reflects on the credibility of Dr. Farnham's testimony. However, absent evidence that Farnham was aware of the fact that Insurer had stopped paying for medical treatment; the evidence has little or no weight. Dr. Farnham's testimony is damaged more by the fact that he has failed to pass his board certification test for occupational medicine on three occasions and remains uncertified in the field in which he holds himself out to the public and claims 30 years' experience.

Nevertheless, Employer and Insurer's objection is to be sustained in part. Exhibit 2 and 2A will not be admitted to show liability, but will be admitted for purposes of impeachment only.

Issues:

This case presents the following legal issues:

1. Whether Claimant's April 21, 2007 injury was a major contributing cause of her need for two surgeries on her right root?

2. Whether the two surgeries performed on Claimant's right foot are compensable?

Facts:

The following facts are found by a preponderance of the evidence:

1. Claimant began working at Menards, Inc. (Menards) in 1990. Claimant started as a cashier. Eventually, Claimant began working in sales and hardware where she also helped in the garden center.

2. In 1994, Claimant left Menards and went to work at ESI. She was at ESI for about six months and then was laid off. Claimant then worked at the Sioux Falls Regional Airport until 1998.

3. In 1998, Claimant returned to Menards where she again worked in hardware. Claimant became an assistant manager for a short time in 2001.

4. On April 21, 2007, while working for Menards, Claimant stepped back off a planter and landed on a piece of wood. Claimant lost her footing and landed hard on her right foot. Claimant then heard a pop and felt a sharp pain on the inside of her right heel area that ran from her toe up the back of her leg to the inside of her knee. Claimant fell on the ground landing hard, knee first and

ripping a one-inch patch of skin off her knee. This fall also caused her to suffer a bruise under her right elbow.

5. At the time of Claimant's accident, Menards was insured by Zurich American Insurance Company (Insurer) for purposes of workers' compensation.

6. In 1987, Tammy Lagler (Claimant) sprained her right ankle which caused her pain for seven to ten days. Claimant had no problems with her right ankle for the 20 year period between her 1987 and 2007 injuries.

7. Immediately after her fall on April 21, 2007, Claimant's right ankle became swollen and painful. She could barely walk on her injured leg.

8. Within a few hours of her fall, Claimant went to Sanford Clinic for treatment and saw Rodney Ridenour, PA, who ordered x-rays of Claimant's right foot and ankle. Ridenour's initial assessment was that Claimant did not have any fractures or joint space abnormalities and diagnosed her with an ankle sprain. Ridenour authorized her to return to work with restrictions.

9. On April 22, 2007, Claimant returned to work. She limped while performing her work duties.

10. On May 2, 2007, Claimant went to Sanford Occupational Medicine where she saw Dr. William Rossing. Rossing evaluated Claimant. Claimant reported pain in her "right proximal and mid-foot region." Rossing diagnosed Claimant with right foot pain, probable sprain/strain and recommended contrast baths and physical therapy. Rossing also fitted her with a cast shoe and allowed Claimant to return to work with no lifting or carrying over 25 pounds, alternate sitting and standing, and no walking over 45 minutes at a time, as well as limited stair climbing.

11. New x-rays of Claimant's right foot were taken on May 4, 2007; again there was no evidence of acute fracture, dislocation, or problems with the soft tissue.

12. Claimant returned to see Dr. Rossing on May 11, 2007, after attending three physical therapy sessions. During this visit, she reported pain in her "right dorsum going across the tarsal metatarsal region…wrap[ping] into the medial arch and up the heel." She rated her pain at a 2-5 out of 10 but was worse with activity. She also reported that she tended to be sorer at the end of the day.

13. Following Claimant's May 11, 2007 appointment, Claimant attended more physical therapy sessions. She went back to see Dr. Rossing in early June, 2007.

14. During the months of April, May and June, Claimant continued to experience pain in her right foot.

15. On June 6, 2007, Claimant went to see Dr. William F. Bell, a Board certified orthopedic surgeon, who fitted Claimant with a CAM walker boot.

16. On July 2, 2007, Claimant underwent a bone scan. Dr. Bell diagnosed probable stress reactions in the area of the cuboid bone and navicular bone of the right foot. On July 9, 2007, Dr. Bell diagnosed Claimant with compression fractures of the cuboid and naviculum and told Claimant to wear the CAM boot for an additional four weeks.

17. Claimant returned to see Dr. Bell on August 1, 2007, and was still having significant pain in her right foot. She also reported some paresthesias in the front part of her ankle. Bell thought that this might be due to the straps on the boot putting pressure on the anterior portion of her distal tibia.

18. Claimant returned to see Dr. Bell on September 5, 2007, and reported no improvement. Bell was not sure what was causing Claimant's pain and ordered an MRI of her right foot and ankle.

19. On September 24, 2007, Claimant had an MRI done of her right ankle and foot. Dr. Bell found no abnormalities. The MRI demonstrated that Claimant's ligaments and tendons in her hindfoot region were "intact without significant degenerative change." Bell was at a loss to explain why Claimant was still having pain. Bell referred Claimant to Dr. David Watts.

20. During the time that Dr. Bell treated Claimant, his records only indicated pain on the outside of Claimant's right foot.

21. Claimant saw Dr. Watts on October 7, 2007. Dr. Watts is a board certified orthopedic surgeon, who has practiced in Sioux Falls since 2005. Watts also has specialty training in foot and ankle surgery. Watts diagnosed Claimant with posterior tibial tendonitis. Watts diagnosed this condition in two different ways. First, Watts gave Claimant an injection in her posterior tibial tendon which gave her almost 100% relief. Second, Watts had Claimant attempt a single heel raise, which Claimant was unable to perform.

22. Dr. Watts initially prescribed orthotic inserts in Claimant's shoes, which she wore for three months. These orthotic inserts did not help her condition. Conservative treatment did not resolve Claimant's symptoms.

23. In February 2008, Dr. Watts performed FDL transfer surgery, also referred to as "flat foot reconstruction", on Claimant's right foot to correct the posterior tibial tendon problem. Watts found fraying of Claimant's posterior tibial tendon.

24. Dr. Watts testified that the fraying of the tendon was caused by an external load on the outside of the foot causing it to twist outward. He concluded that

Claimant's posterior tibial tendonitis was a result of her work related injury because she had experienced continuous pain in that area since her accident.

25. On March 19, 2008, Claimant saw Dr. Watts and began progressive weight bearing in a CAM boot.

26. Claimant continued with physical therapy after her surgery in February of 2008.

27. Claimant reported on June 2, 2008, that she was no longer experiencing pain in the posterior tibial tendon. However, she did have pain along her Achilles tendon. Dr. Watts diagnosed Claimant with Achilles tendonitis and released Claimant to return to with limitations.

28. Claimant went back to Menards and informed them twice through Randy Gilbert that she could return to work in a sedentary only position. Claimant also went to Menards a third time in October 2008 and informed them that she could return to work in a sedentary position.

29. Claimant continued to attend physical therapy in July 2008, three times per week.

30. On July 30, 2008, Dr. Watts evaluated Claimant and diagnosed her with Haglund's deformity and retrocalcaneus bursitis, a condition where part of the heel is poking into the cushion between her heel and Achilles tendon and causing pain and discomfort.

31. On August 4, 2008, Dr. Watts reviewed an MRI of the retrocalcaneal area. He found that Claimant had fluid at the retrocalcaneal bursa. Dr. Watts continued Claimant's work restrictions.

32. Dr. Watts testified that Haglund's deformity may become symptomatic due to a change in gait, congenital problems, or a degenerative tear of the tendon.

33. Dr. Watts concluded that a change in gait, due to wearing the CAM boot, was the cause of Claimant's Haglund's deformity to become symptomatic resulting in a diagnosis of retrocalcaneus bursitis. He concluded that the symptoms were not due to congenital problems, antibiotics, or a degenerative tear.

34. Dr. Watts opined that this condition was caused by Claimant's work accident.

35. In August 2008, Dr. Watts stated that it would be appropriate for Claimant to obtain another medical opinion.

36. On October 27, 2008, Dr. Watson confirmed the diagnosis of Haglund's deformity and retrocalcaneal bursitis. Dr. Watson opined that Claimant would likely benefit from surgery to alleviate her condition. Both Dr. Watson and Dr. Watts opined that Claimant had run out of non-surgical options.

37. On February 19, 2009, Dr. Watson performed surgery which excised the Haglund's deformity and retrocalcaneal bursectomy of the right foot.

38. On March 6, 2009, Claimant followed up with Dr. Watson and reported much less pain than she had before the surgery. She was told by Dr. Watson to temporarily wear in a boot and underwent physical therapy. Watson released her to return to sedentary work.

39. On April 6, 2009, Claimant was again seen by Dr. Watson who noted some hypersensitivity along the incision site but that the pre-operative pain was going away. Dr. Watson said she could return to work, with frequent sitting, starting a four-hour day and she was to add two hours per week.

40. On April 28, 2009, Claimant called Dr. Watson's office and noted that she had swelling in her foot especially on longer days. She also noted that she was having a hard time weaning out of the boot because her foot swelled so much she was having a hard time getting it into a shoe.

41. On May 18, 2009, Dr. Watson noted that Claimant was much better than she was pre-surgery, although she still reported swelling and difficulty being on her feet for long periods of time. She stated she worked 30-35 hours per week as cashier primarily sitting down. Watson said that Claimant could progress back to regular duties as she tolerated but he did not see her being able to be on her feet 40 hours per week comfortably. Watson decreased Claimant's hours to thirty hours per week on May 25, 2009.

42. Dr. Jerry Blow evaluated Claimant on August 19, 2010, and reviewed Claimant's medical records, as well as Dr. Watts' deposition in this case. Dr. Blow agreed with Dr. Watts that Claimant's posterior tibial tendonitis was caused by the injury she suffered while working at Menards.

43. Dr. Blow agreed with Dr. Watts' conclusions that Claimant's Haglund's deformity and retrocalcaneus bursitis became symptomatic because of the fall at Menards while Claimant was working.

44. Currently, Claimant continues to take pain medication to alleviate her pain due to the Haglund's deformity and retrocalcaneus bursitis.

45. Dr. Bell testified that he concluded that Claimant did not have any injury to her right foot and that from his perspective, the flat foot reconstruction surgery done by Dr. Watts was not necessary.

46. Dr. Bell testified to a reasonable degree of medical certainty that Claimant did not require treatment of Haglund's deformity as a result of the April 2007 injury.

47. Employer and Insurer retained Dr. Richard Farnham to conduct a records review and provide medical opinions in this case. Farnham agreed with Dr. Bell that the flat foot reconstruction surgery was not related to the April 21, 2007, incident at work. Farnham also agreed with Dr. Bell that the work incident was not a major contributing cause of the need for the second surgery to correct the Haglund's deformity.

48. Prior to her accident, Claimant's right foot contained an accessory navicular, and the Haglund's deformity. There is also a possibility that it was flat footed. The accessory navicular was not a factor in Claimant's post-injury condition. There is no evidence that the Haglund's deformity or flat footedness' would have become symptomatic or problematic absent the work injury.

49. Additional facts may be discussed in the analysis below.

Analysis:

Causation:

Claimant has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 777 N.W.2d 363, 367 (SO 2010); Day v. John Morrell & Co., 490 N.W2d (SD 1967). 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:
>
> (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.

SDCL.62-1-1 (7).

The South Dakota Supreme Court has noted that there is a distinction between the use of the term "injury" and the term "condition" in this statute. See *Grauel v. South Dakota Sch. of Mines and Technology*, 2000 SD 145, ¶ 9. "Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result." Id. Therefore, "in order to prevail, an employee seeking benefits under our workers' compensation law must show both: (1) that the injury arose out of and in the course of

employment and (2) that the employment or employment related activities were a major contributing cause of the condition of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." Id. (citations omitted).

"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). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 NW2d 586, 593 (citation omitted).

"The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and prove nothing if its factual basis is not true." Johnson v. Albertsons, 2000 SD 47, ¶ 25, 610 NW2d 449, 455.

It must first be noted that Claimant's right foot was afflicted with several congenital conditions prior to her work injury on April 21, 2007. Her foot had an accessory navicular, the Haglund's deformity and it was possibly flat footed. It must also be noted that those conditions caused no symptoms or problems prior to that injury. Indeed, Claimant had no problems with her right foot for any reason for a period of 20 years prior this injury. It is also noteworthy that Claimant suffered continuous pain in that foot from the time of her injury until the causes of her pain were surgically addressed.

Next, the Department must consider the need for the first surgery in February of 2008. Dr. Watts and Dr. Blow have opined that Claimant's work injury was a major contributing cause of Claimant's posterior tibial tendonitis which ultimately necessitated the first surgery. Dr. Bell and Dr. Farnham disagree with those opinions. Dr. Watts' and Dr. Blow's opinions are the more persuasive.

Dr. Watts diagnosed posterior tibial tendonitis by conducting two diagnostic tests. He first administered an injection into the posterior tibial tendon which resulted in nearly 100% relief from the pain. Second, he had the Claimant attempt a single heel lift which she could not perform. Dr. Watts ultimately performed surgery on the tendon which alleviated the pain. Dr. Watts reached this conclusion based on the fact that Claimant reported suffered continuous pain in the area of the tendon since her injury. The area of the tendon is on the inside of the foot. He also noted during surgery that the tendon was frayed which was caused by an external load on the foot that twisted the foot outward.

Employer and Insurer attempt to discredit Dr. Watts' opinion based on the fact that he did not see Claimant until six months after the injury and he did not review Claimant's medical records between the time of the injury and his treatment. They contend that

Claimant did not suffer pain on the inside of her foot because Dr. Bell's records only indicated pain on the outside of the foot.

Despite the fact that Dr. Watts did not review all of Claimant's prior medical records, the records of Dr. Rossing in May of 2008 supports Claimant's version of her history. Those records note pain in Claimant's "right dorsum going across the tarsal metatarsal region…wrap[ping] into the medial arch and up the heel."

It is unlikely that the pain in the medial arch of Claimant's right foot resolved during Dr. Bell's treatment to suddenly reappear during Dr. Watts's examination only days after Claimant's last office visit with Dr. Bell. In light of the fact that Dr. Bell failed to diagnose the posterior tibial tendonitis, it is likely that Claimant either failed to specify the location of her pain during her visits with Dr. Bell or that he failed to accurately note the location. In either event, the Department concludes that Claimant's work injury of April 21, 2007 was a major contributing cause of her posterior tibial tendonitis.

Finally the Department must consider Claimant's second surgery in February of 2009. Dr. Watts and Dr. Blow have opined that Claimant's work injury was the primary cause of Claimant's need for surgery to excise the Haglund's deformity of her right foot. Dr. Watts opined that the Haglund's deformity became symptomatic from the change in gait caused by wearing the CAM boot. He reached this conclusion by eliminating the other possible cause of the symptoms, such as antibiotics, a congenital tear or other congenital problems. Dr. Watts' analysis is persuasive.

The CAM boot was worn to treat Claimant's ankle injury and posterior tibial tendonitis which were caused by the work injury. Consequently, the work injury was the primary cause of the need for the second surgery.

Dr. Bell does not believe that the pain from the Haglund's deformity was caused by Claimant's work injury. However, Bell's opinion is based on the conclusion that Claimant's posterior tibial tendonitis was not caused by the work injury. This premise is incorrect. Therefore, it follows that Dr. Bell's opinion concerning the Haglund's deformity is likewise incorrect. In addition, Dr. Bell's opinion is plagued by the fact that he neither treated nor examined Claimant after her Haglund's deformity became symptomatic. Claimant has demonstrated by a preponderance of the evidence that her work injury was a major contributing cause of her need for the second surgery

Compensability:

The Department must also address the parties' second legal issue: whether Claimant's surgeries are compensable. "It is in the doctor's province to determine what is necessary or suitable and proper. And when a disagreement arises as to the treatment rendered or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper." Stacey v. Sturgis Pizza Ranch, 2011 SD 1 ¶ 23, 793 N.W.2d 378, 387-88 (internal quotations and citations omitted).

In this matter, Dr. Watts treated Claimant's posterior tibial tendonitis and Haglund's deformity conservatively for several months before recommending surgery. Dr. Blow agreed with Dr. Watts' recommendations. Dr. Watson also agreed that surgery for the Haglund's deformity was appropriate. Accordingly, both surgeries on Claimant's right foot were reasonable, necessary and compensable.

Conclusion

Claimant's April 21, 2007, injury was a major contributing cause of her need for two surgeries on her right root and those surgeries are compensable. Counsel for Claimant shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Employer and Insurer shall have an additional 20 days from the receipt of Claimant's Findings of Fact and Conclusions of Law to submit objections/Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Claimant shall submit such stipulation together with an Order.

Dated this 9th day of September, 2011.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge