

DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

CINDY WHITCOMB,
Claimant,

HF No. 37, 2016/17

v.

DECISION

THE EVANGELICAL LUTHERAN
GOOD SAMARITAN SOCIETY d/b/a
GOOD SAMARITAN SOCIETY- SIOUX FALLS
VILLAGE,
Employer,

and

SENTRY INSURANCE,
Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Joseph Thronson, Administrative Law Judge, on April 15, 2020. Claimant, Cindy Whitcomb, was represented by Laura Brahms of Kading, Kunstle, and Goodhope, LLP of Sioux Falls. Employer, the Evangelical Lutheran Good Samaritan Society, and Insurer, Sentry Insurance, were represented by T.J. Von Wald of Boyce Law Firm, LLP of Sioux Falls. The hearing was held remotely with the parties appearing through Zoom.

ISSUES PRESENTED

I. WAS CLAIMANT'S WORKPLACE INJURY A MAJOR CONTRIBUTING CAUSE OF HER DISABILITY?

II. DID CLAIMANT MEET HER BURDEN OF PROVING THAT HER CURRENT CONDITION PREVENTED HER FROM OBTAINING FULL TIME EMPLOYMENT?

III. IS CLAIMANT ENTITLED TO REIMBURSEMENT FOR MILEAGE FOR TRAVEL TO MEDICAL APPOINTMENTS RELATED TO HER WORKPLACE INJURY?

FACTS

Claimant, Cindy Whitcomb, was employed as a universal worker at the Good Samaritan Society in Sioux Falls. On May 29, Claimant was returning to the staff locker room to punch out from her shift. Another employee brought a shepherd's hook that had fallen in front of the doorway entrance to the locker room. Claimant tripped over the hook, landing on her hands and knees on a tile floor. Claimant immediately felt pain in her right shoulder, hands, thumbs, wrists, and knees.

Immediately after her accident, Claimant's husband drove her to the emergency room at Avera McKennan Hospital for treatment. Doctors at Avera x-rayed Claimant's right knee and found that it was not fractured or dislocated. Two days later, Claimant sought chiropractic treatment from Dr. Christopher Mikkelsen, D.C., for continued pain in her neck, lower back, knee, shoulder, wrist and thumb. Dr. Mikkelsen conducted a number of tests to determine Claimant's range of motion and functionality of her spine, right shoulder, and right knee. From the tests, Mikkelsen opined that Claimant suffered from a sprain/strain to the cervical and lumbar regions of the spine and mechanical joint dysfunction of the spine and shoulder. Claimant also sought treatment as a walk-in patient on June 11, 2016 at the Orthopedic Institute in Sioux Falls. Courtney Linton, a Physician's Assistant, examined Claimant and diagnosed Claimant as suffering from aggravation of left thumb CMC arthritis, a flare-up of osteoarthritis, mild lateral epicondylitis, mild ulnar neuritis of the left side, and right shoulder and right knee pain.

Claimant was fitted with thumb spica braces and given a steroid injection to her left thumb. Linton also prescribed Medrol Dosepak for inflammation.

Claimant subsequently saw a number of different doctors for pain in various parts of her body. On June 21, 2016, Claimant saw Dr. Robert Van Demark for injury to her thumbs, hands, and wrists. Dr. Van Demark diagnosed Claimant with bilateral thumb pain following her work injury. He also noted a history of right thumb CMC arthroplasty and asymptomatic left thumb arthritis. Dr. Van Demark prescribed occupation therapy and meloxicam for inflammation. Claimant then saw Dr. Michael Adler on June 23, 2016 for her knee injuries. Dr. Adler diagnosed Claimant with bilateral knee pain status post impact injury with known degenerative changes and recommended a corticosteroid injection of the right knee. Finally, Claimant saw Dr. Keith Baumgarten on June 30, 2016 for pain in her right shoulder and neck. X-Rays performed by Dr. Baumgarten showed arthrosis and spondylosis of the cervical spine. Dr. Baumgarten administered a steroid injection and suggested rotator cuff specific rehabilitation.

Claimant made several return visits to each doctor for further treatment. On July 17, 2016, Claimant returned to Dr. Van Demark with complaints of continued bilateral thumb pain. At that time, Dr. Van Demark opined that Claimant had aggravated preexisting arthritis during her workplace injury. A subsequent MRI of Claimant's right thumb revealed that Claimant suffered from synovitis, marrow edema, and arthritis. Van Demark recommended that Claimant received injections to her right and left thumbs and a follow-up appointment in 4-6 weeks. Claimant returned to Dr. Van Demark for a follow-up visit on August 25, 2016. During the examination, Claimant continued to complain about pain in her thumbs and stated the relief from the injection

only lasted about a day. Van Demark scheduled Claimant to undergo surgery on her thumbs on September 19, 2016. Until that time, Van Demark took Claimant off work.

On July 20, 2016, Claimant returned to the Orthopedic Institute for an MRI of her right knee and on August 4, 2016, for a follow-up appointment with Dr. Adler. It was Dr. Adler's opinion that Claimant's continued right knee pain was caused by degenerative arthritis which was exacerbated by her fall. It was Adler's recommendation that Claimant undergo a right knee arthroscopy on October 31, 2016.

Claimant's May 29, 2016 workplace injury was not the beginning of her ailments. In 1999, while employed at a clinic in Arizona, Claimant was electrocuted while plugging in a faulty piece of equipment. The force of the shock pushed Claimant back into a wall, resulting in injury to her shoulder and neck. However, Claimant's records also demonstrated the progression of arthritis through the years to just prior to her May 2016 accident.

Claimant sought treatment for her right shoulder beginning in January 2002 which included several shots and an eventual surgery. Though, during a July 2002 consultation, Claimant's doctor advised her there was only a 50% chance Claimant's shoulder pain would be alleviated by surgery. After a November 5, 2002 visit, Claimant physician again noted that such a surgery would have "a low likelihood of improvement and a low likelihood of long-term physical labor type work." The prognosis on Claimant's shoulder turned out to be true as Claimant continued to seek treatment for shoulder pain through 2008.

The record of Claimant's knee problems dates to 2007 when she sought treatment for a right knee after an injury. It was here that an x-ray showed degenerative changes to Claimant's right knee. On May 26, 2007, Claimant underwent a right knee arthroscopy. Claimant continued to complain of pain in her right knee until August 9, 2007, when she received an injection. Claimant also underwent an arthroscopy of her right knee in 2007.

Claimant's right knee pain returned in 2013. A November 8, 2013 MRI indicated that Claimant suffered from medial and lateral meniscus tears. Although Claimant had another arthroscopy done in January 2014, she continued to suffer pain in her right knee. A March 26, 2014 notation by her treating physician indicated Claimant "has recurrent tear of the meniscus... different from the one we removed previously." Claimant's physician recommended yet another right knee arthroscopy. During a May 12, 2014 second opinion consultation, Dr. Keith Baumgarten noted that Claimant had "quite significant progression of degenerative changes in her knee." Dr. Baumgarten also opined that further arthroscopic surgery was unlikely to offer Claimant significant relief and Claimant may require a total knee arthroplasty in the future.

Dr. Michael Adler concurred with Dr. Baumgarten's assessment of the efficacy of another knee surgery. During a May 15, 2014 follow up with Claimant, Dr. Adler opined that Claimant would likely have problems with her knee in the future. Despite this opinion, Claimant underwent a right knee diagnostic arthroscopy, partial medial meniscectomy, lateral compartment chondroplasty and patellofemoral chondroplasty on June 6, 2014.

Initially, Claimant experienced significant relief from the third knee surgery. However, during a follow up visit on June 19, 2014, Dr. Adler cautioned that Claimant would have further knee problems in the future. Specifically, Dr. Adler discussed Claimant's degenerative changes and recommended Claimant look for a new job which would be gentler on her knees. Dr. Adler's prognosis proved to be true when Claimant returned on May 7, 2015 complaining of pain in both knees. On November 17, 2015, Claimant was diagnosed with bilateral knee osteoarthritis, for which she was given to knee injections. Claimant's medical records contain no indication that she sought treatment for her knees after this point until her workplace injury.

Claimant also had a history of pain in her thumbs and hands prior to her 2016 injury. X-rays of both hands completed on August 30, 2012 demonstrated degenerative changes to Claimant's CMC joints. On February 15, 2013, Claimant underwent a CMC joint arthroplasty to alleviate pain in her right thumb due to arthritis. On March 8, 2013, Claimant returned to Sanford Orthopedic with complaints of pain in her left thumb. Claimant was diagnosed as suffering from arthritis in her left thumb and administered a shot to alleviate the pain. Claimant was provided splints for her thumb and taken off work. However, Claimant again returned to Sanford Orthopedic with complains of left thumb pain on April 11, 2013. Claimant again had x-rays taken of her thumbs on November 25, 2015. The x-ray showed that the arthritis in Claimant's left thumb had grown worse, and Claimant was suffering from metacarpal subluxation and STT joint narrowing. Claimant returned to Sanford Orthopedic in February 24, 2016 with continued complaints of pain. There was no record of whether Claimant's pain had resolved itself prior to her workplace injury on May 29, 2016.

ANALYSIS

I. WAS CLAIMANT'S WORKPLACE INJURY A MAJOR CONTRIBUTING CAUSE OF HER DISABILITY?

“If the injured claimant suffers from ‘a preexisting disease or condition’ unrelated to the injury, and the injury combines with the preexisting condition ‘to cause or prolong disability, impairment, or need for treatment,’ the injury is compensable only if the claimant can prove that his ‘employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment[.]’” *Orth v. Stoebner & Permann Const., Inc.*, 2006 S.D. 99, ¶ 33, 724 N.W.2d 586, 593 (citing SDCL 62-1-1.7). “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. The evidence necessary to support an award must not be speculative, but rather must be ‘precise and well supported.’” *Horn v. Dakota Pork*, 2006 S.D. 5, ¶ 14, 709 N.W.2d 38, 41–42 (internal citations omitted).

It is undisputed that Claimant suffered from preexisting degenerative arthritis before her workplace accident, though the parties dispute what role this played in Claimant's disability. The question remains what part, if any, Claimant's workplace injury played in her current condition. “Showing the injury occurred at work is just one piece of evidence an employee can utilize in proving his case, but he must prove more than that fact alone to show the required causal connection and that his employment

was a major contributing cause of his condition or his disability, impairment, or need for treatment.” *Grauel v. S. Dakota Sch. of Mines & Tech.*, 2000 S.D. 145, ¶ 19, 619 N.W.2d 260, 265 (emphasis original).

Our Supreme Court has considered several cases concerning claimants with preexisting conditions and whether a workplace injury was a major contributing cause of their respective disabilities. In *Brown v. Douglas Sch. Dist.*, 2002 S.D. 92, 650 N.W.2d 264, the Supreme Court upheld granting of benefits because it found that the work injury claimant suffered was greater than any previously developed fractures. The injury was therefore a major contributing cause of claimant’s condition. Claimant suffered an injury to her back while carrying a five-gallon mixer. Prior to her accident, claimant had suffered from COPD and osteoporosis. The Department ruled that these preexisting conditions were the cause of claimant’s condition and not her workplace injury. The circuit court disagreed, reversing the Department and awarding Claimant workers compensation benefits.

The School also argues that since Brown had non-work-related compression fractures both before and possibly after May 8, 1997, that this indicates Brown's work is not a major contributing cause of her condition. Dr. Anderson admitted on cross-examination, however, that any compression fractures prior to May of 1997 were completely asymptomatic and did not interfere with her ability to work. The trial court found that “[n]o medical evidence shows that any subsequent fractures sustained by Brown were any more significant in creating her inability to work than the May 8, 1997, fractures.” We agree. After reviewing the doctors' deposition testimony, the facts of this case clearly demonstrate that the *disabling* fractures occurred on May 8, 1997.

Brown, at ¶ 27.

The Court again examined whether a workplace injury was a major contributing cause in *Orth v. Stoebner & Permann Const., Inc.* The Claimant in *Orth* had spent most of his adult life doing construction and physical labor. He began working for employer in

1994 and was described as an “exceptional worker”. After several years of working without incident, Claimant suddenly began experiencing severe back pain in 2000. Despite shortened work hours and moving to light duty, Claimant’s back pain prevented him from continuing to work. Orth had not experienced any serious back problems prior to 2000 except for a fall from a room in 1993 from which he completely recovered. Neither was a single incident to blame for claimant’s condition. Rather, Claimant’s treating physician attributed his back pain to years of continued hard labor. The employer/insurer’s expert disagreed, opining that claimant’s injury was the result of degenerative disc condition and spondylolisthesis. The Department agreed with employer/insurer that Claimant’s preexisting back condition was the major contributing cause of his disability and denied claimant workers compensation benefits. The circuit court affirmed the Department. However, the Supreme Court reversed the circuit court. First, it noted “The issue in this case does not concern whether or not Dwain's injury arose out of and in the course of his employment with S & P Construction (*i.e.*, causation of the injury). Instead, the issue deals solely with the causation of Dwain's disability, and resolution of this issue turns on the medical evidence. “ *Id.*, at ¶ 36.

The Court in *Orth* then determined that the circuit court had held Claimant’s expert to too high of a standard of proof by requiring that Claimant show his injury was the major contributing cause of his condition. “[Claimant’s expert] Dr. Carlson's letter was clear and unequivocal. His opinion was stated in no uncertain terms: fifty percent of Dwain's impairment could be blamed on his preexisting degenerative condition, and fifty percent could be blamed on his work-related activities. The opinion was expressed to a satisfactory degree of medical probability.”

Id., at ¶ 44.

Finally, the Court reviewed the evidence and concluded the claimant had met his burden of proving by preponderance of the evidence that his workplace injury was a major contributing cause of his condition.

Dwain's current impairment, although it cannot be traced to a single instance of trauma, is nonetheless compensable under South Dakota law. When Dwain started working for S & P Construction, he was an "exceptional worker" who could perform any work-related task. After five years of laboring as an employee of S & P Construction, his back had become so painful that he was forced to quit working. His employment-related activities at S & P Construction clearly "aggravated, accelerated, or combined with" his preexisting condition to produce his ultimate disability.

Id., at ¶ 47.

The Court came to the opposite conclusion in *Armstrong v. Longview Farms, Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425. In *Armstrong*, the claimant suffered a workplace injury when he slipped at a hog confinement barn in which he was working. Claimant filed a petition for hearing after employer/insurer denied payment for bilateral knee surgery. Claimant had suffered two previous knee injuries and had developed severe osteoarthritis which employer/insurer's claimant was the cause of his disability. The Court upheld the denial of claimant's benefits noting:

Here, the record contains uncontroverted evidence of Armstrong's preexisting degenerative osteoarthritis as it grew worse in the years leading up to the March 31 injury. Further, there is no evidence to support the view that Armstrong's osteoarthritis was related to his employment, either at Longview Farm or any previous employer. Armstrong was a candidate for total knee replacement for 11 years prior to his injury and during that time his medical providers noted he was experiencing ongoing, worsening pain in *both knees*. The fact that the March 31 injury may have been the unfortunate tipping point of Armstrong's knee symptoms does not mean that it displaced the degenerative effects of his preexisting condition.

Armstrong, at ¶ 24.

In this case the Department determines that Claimant's injury more closely matches that in *Armstrong* than *Brown* or *Orth*. Unlike the latter cases, the evidence shows that Claimant's fall was not a tipping point injury which set off Claimant's disability. Rather, Claimant's medical history demonstrates that she suffered recurrent pain throughout her shoulder, thumbs, and knees. Claimant's condition was more like that in *Armstrong*.

Employer/Insurer's expert, Dr. Paul Cederberg opined that the progression of arthritis in Claimant's joints was the cause of her disability and not her workplace injury. The Department finds Dr. Cederberg's opinion persuasive for two reasons. First, while Claimant may have been asymptomatic just prior to her accident, she had struggled with arthritis pain for years leading up to her fall. Claimant's experts all acknowledged this fact. In a May 15, 2014 notation of Claimant's medical records, Dr. Adler explained "I had a frank discussion with Ms. Whitcomb about different treatment options... Try to make it frankly clear that in no way we can guarantee her that we are going to completely relieve her symptoms and she is likely going to have problems with her knee in the future." During at his cross-examination deposition, Dr. VanDemark also admitted that Claimant had been symptomatic prior to her workplace injury.

Q: Okay. But it's clear she was having symptoms before the fall?

A: Right.

Q: Would that change your opinion in any...

A: I think the fall aggravated her pre-existing condition and necessitated

treatment.

Regarding Claimant's shoulder, Dr. Baumgarten stated during his deposition that he based his opinion that Claimant's injury was a major contributing cause of her shoulder pain on the fact that Claimant was asymptomatic right before the accident. Dr. Baumgarten acknowledged that the records were silent about whether Claimant was suffering any pain in her shoulder at that time. He also acknowledged that x-rays of Claimant's shoulder after her accident showed signs of arthritis. Most importantly, while Dr. Baumgarten stated that he believed that Claimant's injury was the major contributing cause of her initial condition, he was unable to say that it remained a major contributing cause.

Second, the medical evidence shows that Claimant did not suffer any significant damage to her thumbs, knees, shoulder, or neck. Dr. Cederberg opined that Claimant's accident was therefore not severe enough to have caused Claimant's condition. This fact was not refuted by any of Claimant's experts.

Finally, as part of an examination for a Social Security Disability hearing, Claimant was examined by Dr. Nicholas VenOsdel. Dr. VenOsdel reviewed Claimant's medical records and examined Claimant in person. He noted Claimant's history of arthritis:

The patient has objective clinical findings today that are consistent with arthritis and suggest limitations. She has multiple medical records that were available for me to review today, as well as prior imaging, including x-rays and MRIs. These are all consistent with the patient's history that she provides an support her long history of difficulty with her hands. The reports of the images also support the conclusion that this patient has limitation secondary to the arthritis in her hands and her wrists.

Dr. VenOsdel also noted Claimant suffered from “bilateral degenerative joint disease of the knees, right greater than left.” Dr. VenOsdel’s report makes no mention of Claimant’s disability being caused by her workplace injury.

Claimant argues that because she had several different experts testify that her injury was a major contributing cause of her current condition, these opinions together are more persuasive than the one opinion of Employer/Insurer’s expert, Dr. Cederberg. The Department is not persuaded by this argument. The logical conclusion of this line of reasoning with invariably lead to which side produced the most medical experts to testify on their respective behalf without any consideration of the qualify of the opinions. Likewise, the Department finds that Claimant’s reliance on *Davidson v. Horton Industries, Inc*, 2002 S.D. 27, 641 N.W.2d 138, is misplaced.

In *Davidson*, the Court reversed the Department’s original denial of benefits because it found that the Department had ignored medical evidence presented by claimant’s experts. The Court noted, “[the Department] cannot disregard the *similar* opinions of numerous medical experts in favor of one expert hired by the insurer under these circumstances.” (emphasis added). *Davidson v. Horton Indus., Inc.*, 2002 S.D. 27, ¶ 19, 641 N.W.2d 138, 142. In this case, Claimant’s experts each gave an expert medical opinion on different parts of Claimant’s body. The only expert to give an opinion about Claimant’s entire body was Dr. VenOsdel, who attributed Claimant’s continued pain to preexisting degenerative arthritis. Further, Dr. Cederberg’s opinion is not completely at odds with that of Claimant’s experts. All agreed with Cederberg’s assessment that Claimant had preexisting arthritis at the time of her injury and all agreed that Claimant had not suffered a major contusion or break during her accident.

II. DID CLAIMANT MEET HER BURDEN OF PROVING THAT HER CURRENT CONDITION PREVENTED HER FROM OBTAINING FULL TIME EMPLOYMENT?

Claimant has argued that she is entitled to odd lot benefits owing to her workplace injury. Pursuant to SDCL 62-4-53, “[a]n employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.”

Dr. VenOsdel opined that Claimant should limit her lifting to less than ten pounds occasionally, and to stand or walk no more than two hours a day during an eight-hour shift. Though, Dr. VenOsdel also noted “patient has no limitations in her ability to speak, hear, [or] travel.” Dr. VenOsdel also noted “[Claimant] has no limitations in her ability to sit for prolonged periods of time.” Dr. VenOsdel’s report does not state that Claimant is unable to work any job given her age, and level of education.

Claimant also seeks to introduce the opinion of the administrative law judge in her Social Security Disability hearing. Claimant’s favorable determination in that hearing was based at least in part on a report from a vocational expert. The report itself was not admitted. While a decision from the Social Security Administration may be persuasive in a workers compensation case, the Department finds that in this case it is not sufficient to prove Claimant is eligible for workers compensation benefits. Social Security disability hearings are non-adversarial. Unlike in a workers compensation case, a claimant is not required to prove that a work-related injury is a major contributing cause of her disability to obtain an award of disability benefits. Therefore, a

claimant may become eligible for Social Security disability benefits while not becoming eligible for workers compensation benefits.

III. IS CLAIMANT ENTITLED TO REIMBURSEMENT FOR MILEAGE FOR TRAVEL TO MEDICAL APPOINTMENTS RELATED TO HER WORKPLACE INJURY?

Because Claimant has failed to meet her burden of proving that her work-place injury was a major contributing cause of her disability, the Department need not determine whether claimant is entitled to reimbursement for travel expenses associated with medical appointments related to her work-place injury.

CONCLUSION AND ORDER

Counsel for Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Claimant shall have an additional 20 days from the date of receipt of Claimant's 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 this 8th day of August, 2020.

Joe Thronson
Administrative Law Judge