

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

**LANA FURMAN,
Claimant,**

HF No. 46, 2007/08

v.

DECISION

**BLACK HILLS SURGERY CENTER,
Employer,**

and

**FINCOR SOLUTIONS,
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 July 1, 2008, in Rapid City, South Dakota. Michael J. Simpson represented Claimant. Comet Haraldson represented Employer/Insurer. By Prehearing Order entered by the Department on May 12, 2008, and the agreement of the parties the issues to be decided are whether Claimant is entitled to permanent partial impairment benefits pursuant to SDCL 62-4-6 and whether medical expenses incurred after Claimant reached maximum medical improvement are compensable.

Facts:

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

Claimant was injured while working as a certified nursing assistant at Black Hills Surgery Center (Employer) on August 23, 2006. As she was assisting with a physical transfer of a patient, Claimant felt pain between her shoulder blades and up into her lower neck. Claimant sought medical treatment from chiropractor Dr. David McDonald. Dr. McDonald returned Claimant to work on or about August 30, 2006, with no restrictions and no limitations to her regular job duties. Dr. McDonald eventually referred Claimant to Dr. Christopher Dietrich, a specialist in physical and rehabilitation medicine. Dr. Dietrich first saw Claimant on November 29, 2006. Claimant complained of pain between a three and a six on a scale of one to ten, ten being the worst pain. Dr. Dietrich diagnosed thoracic rib facet dysfunction and thoracic strain and recommended physical therapy, a Lidoderm patch, and a TENS unit.

Dr. Dietrich saw Claimant again on January 27, 2007, March 1, 2007, and April 17, 2007. On April 17, 2007, Dr. Dietrich noted that the physical therapy had not provided any significant or long lasting benefit. Dr. Dietrich also noted that Claimant had continuing thoracic region pain and pinching with a variety of activities. Dr. Dietrich

changed her medication to Celebrex and recommended obtaining an MRI of the thoracic spine.

On May 1, 2007, Dr. Dietrich saw Claimant again and reviewed the MRI of her thoracic spine. He noted that the MRI showed a small right paracentral T8-9 disk herniation and some mild chronic superior end plate compression fractures at T12 and L1.

Dr. Dietrich saw Claimant again on May 29, 2007, July 2, 2007, and August 28, 2007. During these visits, Dr. Dietrich described her progress in physical therapy and her symptoms, which continued to wax and wane and increased with activity.

On August 28, 2007, Dr. Dietrich assigned a 5% impairment rating under the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Ed., Table 74 for DRE of thoracolumbar spine category II impairment for Claimant's thoracic disk herniation at T8-9. In support of his opinion Dr. Dietrich wrote:

Ms. Furman does have signs of thoracolumbar injury present, without radiculopathy or loss of motion segment integrity. She had MRI evidence from 4/19/07 of a right paracentral T9 disk herniation as well as superior end plate compression fractures of T12 and L2, with no acute fracture or dislocation identified. I believe the disk herniation certainly qualifies as thoracic injury and is related to her work related date of injury.

On May 15, 2008, Claimant's attorney wrote to Dr. Dietrich and asked whether her work injury was a major contributing cause of her condition, including her 5% impairment rating and whether Ms. Furman would need further medical treatment.

On May 21, 2008, Dr. Dietrich responded that he believed Claimant's work injury was a major contributing cause of her condition, including her 5% impairment rating. Dr. Dietrich reasoned that because Claimant had a "clear lifting injury" and "had not had any symptoms in this region before" he believed her work injury was a major contributing cause of her condition. Regarding the impairment rating, Dr. Dietrich again noted that the 5% was for a mid-thoracic disk herniation at T8-9 which is documented clearly on the April 19, 2007, MRI of the thoracic spine and "fits with the area, region, and type of symptoms that she sustained with her initial work injury." With regard to medical treatment, Dr. Dietrich wrote, "I would recommend long term continued use of Tramadol and Celebrex to manage her symptoms." Employer/Insurer paid for Claimant's chiropractic treatment and her treatment with Dr. Dietrich.

On June 23, 2007, Employer/Insurer had Dr. Richard Farnham perform an "independent medical examination." Dr. Farnham performed a medical records review, examined Claimant, and issued a report opining:

It is my professional medical opinion and best judgment that this abnormal radiological finding is not the result of the mechanism of injury as described by the Claimant as having occurred on August 23, 2006. There are other factors in

her medical history which are more likely to have caused this abnormal radiological finding.

Dr. Farnham explained, "The preponderance of the medical documentation presented to this examiner is not supportive of a causal relationship between Claimant's current symptomatology with respect to headache and mid and upper back pain and discomfort to the incident of August 23, 2006." Dr. Farnham gave Claimant a 0% impairment rating and did not recommend any additional ongoing treatment and recommended that physical therapy be discontinued.

Claimant's job description required her to lift 60 pounds and exert at least 40 pounds of force to assist with patient transfers. After her injury, Claimant never asked Employer for any accommodations or restrictions as a result of her injury. Claimant continued to work for Employer through February 12, 2007, when she resigned because she wanted to go to work for the police department. Claimant had an exit interview with Employer and never mentioned back pain or an inability to perform her job duties as reason for leaving.

After resigning from her job with Employer, Claimant took a job with Harley Davidson that also required her to perform lifting and overhead activities. Claimant admitted that the lifting that she was required to do at Harley Davidson caused back pain. At the time of hearing, Claimant was employed at Interim Home Health and her duties require lifting, causing flares in her back pain.

Other facts will be developed as necessary.

Analysis:

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). Under South Dakota law, Claimant must prove her employment was "a major contributing cause" of her injury. SDCL 62-1-1(7).

Claimant's treating physician expressed his opinion that Claimant's work injury of twisting and lifting a patient and suffering immediate onset of mid back pain which did not resolve is a major contributing cause of Claimant's herniated disk at T8-9 and need for continued medical treatment, including medications. Employer/Insurer refute these opinions with the opinions of Dr. Farnham, who opined that Claimant has no impairment and has no need for medical treatment related to the August 23, 2006, injury.

Dr. Dietrich is Claimant's treating physician. Employer/Insurer accepted his medical treatments as compensable until it received the report of Dr. Farnham. Dr. Dietrich is a board certified physical and rehabilitation medicine specialist who saw Claimant on

many occasions for medical treatment. Dr. Dietrich is in the best position to assess Claimant's condition and the effectiveness of treatment. Dr. Farnham saw Claimant one time. Dr. Farnham does "independent medical examinations" and does not treat any patients. Ninety percent of Dr. Farnham's examinations are done at the request of defendants. Dr. Dietrich has more expertise and specializes in the treatment of conditions like Claimant's and his opinion is entitled to greater weight than that of Dr. Farnham. Dr. Dietrich has an active practice treating injured people. It is axiomatic that when a medical expert has more expertise or actually specializes in the treatment of a particular condition, that medical expert's opinion is entitled to greater weight than a medical expert with less expertise or experience in treating that condition. Haynes v. Ford, 686 NW2d 657, 662-664 (SD 2004)(accepting the opinion of Dr. Lawlor over that of a chiropractor and a physician's assistant in part due to his specialized training in physical medicine and rehabilitation and her greater experience in treating the claimant's problems.); 7 Arthur Larson, Larson's Workers' Compensation Law, §128.06(8), 128-21 (necessity for expertise in medical witness corresponding to complexity of medical problem); Myhre v. North Dakota Workers' Compensation Bureau, 653 NW2d 705, 712 (ND 2003)("a long term physician – patient relationship may afford a treating doctor a more comprehensive view of the claimant's medical history and condition"). Dr. Dietrich's opinions are accepted as more persuasive than those of Dr. Farnham.

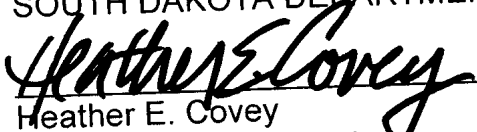
Conclusions:

Claimant is entitled to a 5% impairment rating for purposes of a permanent partial disability benefits pursuant to SDCL 62-4-6. Claimant is also, by virtue of the acceptance of Dr. Dietrich's opinions, entitled to future medical treatment, to include the recommended medications, for her thoracic disk herniation at T8-9.

Claimant 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. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 23rd day of October, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR


Heather E. Covey
Administrative Law Judge