SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CYNTHIA PFITZER, **HF No. 73, 2000/01**
Claimant,

v. **DECISION**

L.G. EVERIST,
Employer,
and

WAUSAU INSURANCE COMPANIES,
Insurer,

and

RAPID PACKAGING COMPANY, INC.,
Employer,
and

CNA COMMERCIAL INSURANCE,
Insurer,

and

QUALITY TOOL, INC.,
Employer,
and

FEDERATED INSURANCE,
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 11, 2003, in Brookings, South Dakota. Claimant, Cynthia Pfitzer (hereafter Claimant), appeared personally and through her counsel, Ellie M VandenBerg. R. Alan Peterson represented Employer L. G. Everist and Insurer Wausau Insurance Companies (hereafter Everist). Rick W. Orr represented Employer Rapid Packaging Company, Inc. and Insurer CNA Commercial Insurance (hereafter Rapid). Timothy M. Clausen represented Employer Quality Tool, Inc. and Insurer Federated Insurance (hereafter Quality).

Issues:

1. **Whether Claimant's myofacial syndrome is a compensable condition under SDCL 62-1-1(7)(b).**
2. **Whether Claimant is permanently and totally disabled.**

Facts:

1. Claimant was born on May 3, 1961, and is now 42.
2. She has a GED degree and is currently attending a technical program for electronics engineering.
3. Claimant alleges that she suffers a myofascial syndrome that is debilitating and is caused by her work at Rapid.
4. Claimant's previous employment, from the time she left high school, were as a food wiatress, cocktail waitress, bartender, secretary/receptionist, hopital aide, mold machine operator, house cleaner, apartment manager/cleaner, cashier/bookkeeper, day care provider, child photographer, grain elevator operator, assemploy line parts packager, assembley linedoors and windows assembler, and factory worker. Since 1994, she has only worked as either a grain elevator laborer or a factory worker.
5. Claimant's most recent employment which she claims led to her condition was at Rapid for approximately one month, from April 17, 2000, through May 16, 2000.
6. Claimant worked with a glue gun, constructing boxes, for eight hour shifts.
7. Claimant alleges that she woke up on the morning of May 17, 2000, and was unable to grasp objects with her hands.
8. Claimant was employed with Quality for 51 days, from January 31, 2000, to April 5, 2000.
9. During her employment with Quality, Claimant sought no medical treatment and was taking no medications.
10. Claimant's only problem at Quality was stiffness and muscle tightening.
11. Claimant did not miss a single day of employment at Quality as a result of any work-related condition.
12. Claimant did not experience any numbness while employed at Quality.
13. Claimant was always able to perform her job duties at Quality.
14. Claimant never complained to any supervisor at Quality during her employjment about any physical symptoms.
15. Prior to June 1 of 2000, no one at Quality had any reason to suspect that Claimant was claiming she was injured at Quaility because she never complained to anyone and never told them about her alleged symptoms.
16. On June 1, 2000, Claimant sent notice of injury to Quality.
17. Claimant did not offer a single piece of medical or expert testimony or evidence that her employment a Quality was a contributing cause to any condition complaine dof or for which she seeks beneftis.
18. Claimant's treating physician, Dr. Ramsay, did not even know that Claimant had worked at Quality until receiving Dr. Farnham's report in Spetember of 2002.

19. Dr. Ramsay conceded there was no information in any of the medical records that Claimant had any problems related to her employment at Quality since he "never saw her."
20. Dr. Farnham has opined that Claimant's employment at Quality did not cause, contribute to, temporarily exacerbate or permenently aggravate her non-work related condition.

Issue One

Whether Claimant's myofacial syndrome is a compensable condition under SDCL 62-1-1(7)(b).

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 193, 195 (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).

South Dakota law requires Claimant establish by medical evidence that the "employment or employment conditions are a major contributing cause of the condition complained of." SDCL 62-1-1(7).

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).

In Westergren v. Baptist Hosptial of Winner, the Supreme Court explained the role of the medical expert in workers' compensation proceedings:

> Here, the majority of evidence regarding Claimant's injuries was introduced by voluminous stipulated medical records without benefit of interpretation by the doctors who produced these records. By stating tha t"the testimony of professional is crucial in establishing this causal relationship" we acknowledged the lack of medical training by lawyers, hearing examiners, and courts to interpret these records. "Expert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person to judge."

549 N.W.2d 390, 398, 1996 S.D. 69, ¶ 31 (quoting Caldwell v. John Morrell & Co., 489 N.W.2d 353, 362 (S.D. 1992)(citing Podio v. American Colloid Co., 162 N.W.2d 385 (S.D. 1968))) (citing In re Appeal of Schramm, 414 N.W.2d 31, 36 n.7 (S.D. 1987)) (emphasis added).

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). "'[A] possibility is insuffiencent and a probability is necessary.'" Maroney v. Aman, 1007 SD 73, ¶ 9, 565 N.W.2d at 73 (quoting Caldwell, 489 N.W.2d at 358 (citiation omitted)).

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

> "Injury" or "personal injury," only 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.

"While both subsection (b) and subsection (c) deal with preexisting injuries, the distinction turns on what factors set the preexisting injury into motion; if a preexisting condition is the result of an occupational injury then subsection (c) controls, if the preexisting condition developed outside of the occupational setting then subsection (b) controls." Byrum v. Dakota Wellness Foundation, 2002 SD 141, ¶15. (citing Grauel v. South Dakota School of Mines, 2000 SD 145, P8, 16-17, 619 N.W.2d 260, 262-265.)

Claimant's connective tissue disorder is a preexisiting condition.

The medical experts disagree about the proper diagnosis for Claimant's condition. Claimant has been diagnosed with a mixed connective tissue disorder (CTD). Dr. Farnharn explained this diagnosis in his deposition testimony and his report. He summed it up by stating that Claimant suffers from "an Anti-Nuclear Antibody Rheumatic type disease" that is not work-related. Dr. Farnham examined Claimant and reported that she had a normal physical examination, with no evidence of carpal tunnel syndrome at that time. Dr. Farnham found no impairment. Dr. Farnham opined that Claimant's condition was not related to any of the work activities she performed at Everist, Rapid, or Quality.

EMG/NCS studies conducted on April 5, 2002, at the request of Dr. John A. Mallek of the Department of Rheumatology of the Sioux Valley Clinic, revealed “no evidence of median or ulanar entrapment, brachial plexopahty, or rediculopayth (paraspinal muscle testing was limited.) A bone scan performed on April 5, 2002, at the request of Dr. Mallek revealed “no definite diagnositc abnormalities”. More and more tests reviewed by Dr. Farnham.
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Dr. Farnham recommended work restrictions “designed to be protective in natrue and proactive in nature and to prevent future injury to the claimant based upon her non-work-related medical contion of mixed connective tissue disorder.”

Claimant’s preexisting condition is not work-related, therefore SDCL 62-1-1(7)(b) applies and Claimant must show that her condition of mixed connective tissue disorder combined with a work-related acitivity that continues to be the major contributing cause of the disability, impairment, or need for treatment. Claimant has failed to present expert testimony that supports such a conclusion. Her petition for hearing is dismissed. The record does not contain sufficient evidence to support a finding that Claimant’s work at Everist, Rapid, or Quality, was or remains a major contributing cause of her alleged disability, impairment, or need for treatment.

Furthermore, Claimant presented no medical evidence of a permanent or temporary impairment relating to any of her work activities at Everist, Rapid, or Quality.

Issue

Whether Claimant is permanently and totally disabled.

The issue of whether Claimant is permanently and totally disabled will be addressed in spite of the finding and conclusion that she has failed in her burden of establishing medical causation.

Claimant asserts that she is entitled to permanent total disability benefits. At the time of Claimant’s injury, SDCL 62-4-53 (1994) defined permanent total disability:

> An 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. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant in the community. An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the

> employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

A recent Supreme Court opinion further defined the burdens of proof:

> To qualify for odd-lot worker's compensation benefits, a claimant must show that he or she suffers a temporary or permanent "total disability." Our definition of "total disability" has been stated thusly:
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> > A person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in insubstantial income.
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> Under the odd-lot doctrine, the ultimate burden of persuasion remains with the claimant to make a prima facie showing that his physical impairment, mental capacity, education, training and age place him in the odd-lot category. If the claimant can make this showing, the burden shifts to the employer to show that some suitable work is regularly and continuously available to the claimant.
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> We have recognized two avenues in which a claimant may pursue in making out the prima facie showing necessary to fall under the odd-lot category. First, if the claimant is "obviously unemployable," then the burden of production shifts to the employer to show that some suitable employment within claimant's limitations is actually available in the community. A claimant may show "obvious unemployability" by: 1) showing that his "physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category," or 2) "persuading the trier of fact that he is in the kind of continuous, severe and debilitating pain which he claims."
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> Second, if "'the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or regulated to the odd-lot category,' then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has made [] 'reasonable efforts' to find work" and was unsuccessful. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that "some form of suitable work is regularly and continuously available to the claimant." Even though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

McClaflin v. John Morrell & Co., 2001 SD 86, ¶ 7 (citations omitted).

> A recognized test of a prima facie case is this: "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" 9 Wigmore, Evidence, (3rd

> {*506} Ed.) § 2494; see Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585, 72 A.L.R. 7.

Northwest Realty Co. v. Perez, 81 S.D. 500, 505, 137 N.W.2d 345, 348 (S.D. 1965)

Claimant is not "obviously unemployable." She testified that she did well working as an apartment manager until asked to perform strenuous physical labor, laying carpet. Laying carpet is obviously not within the physical restrictions given by Dr. Farnham. Claimant was able to perform the non-physical aspects of the apartment manager job. She is currently employable. Claimant is also pursuing higher education in the area of electronics engineering, and will be even more employable in the near future. Claimant has not demonstrated that she is in such severe, continuous and dibilitating pain that she cannot work. Dr. Farnham found that she could work with restrictions. Dr. Ramsay testified that

"Notice to the employer of an injury is a condition precedent to compensation." Westergren v. Baptist Hosp. of Winner, 1996 SD 69, ¶ 17, 549 N.W.2d 390, 395 (*citing* Schuck v. John Morrell & Co., 529 N.W.2d 894, 897-98 (S.D. 1995)). SDCL 62-7-10 sets the rules for providing notice:

> An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three **business** days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:
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> (1) The employer or the employer's representative had actual knowledge of the injury; or
> (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three business-day period, which determination shall be liberally construed in favor of the employee.

(Emphasis added). The proper test for determining when the notice period should begin has been explained: "The time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of [the] injury or disease." Miller v. Lake Area Hospital, 1996 SD 89, ¶ 14. "Whether the claimant's conduct is reasonable is determined 'in the light of [his] own education and intelligence, not in the light of the standard of some hypothetical reasonable person of the kind familiar to tort law.'" Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ 29 (citing Loewen v. Hyman

Freightways, Inc., 1997 SD 2, ¶ 15). "The standard is based on an objective reasonable person with the same education and intelligence as the claimant's." Id. at ¶ 43.

The South Dakota Supreme Court summarized:

> The Workers' Compensation Act was enacted by the South Dakota Legislature in 1917. The purpose is to provide employees, who are injured within the scope of their employment, with reimbursement for medical care and wage benefits without having to prove the employer was at fault or negligent. Schipke v. Grad, 1997 SD 38, ¶ 11, 562 N.W.2d 109, 112. In turn, employers are "granted total immunity from suit for its own negligence in exchange for payment of workers' compensation insurance." Id. (citations omitted). However, an injured employee must also comply with the statutory notice requirements in order to recover.
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> "The purpose of the written notice requirement is to give the employer the opportunity to investigate the injury while the facts are accessible. The notice requirement protects the employer by assuring he is alerted to the possibility of a claim so that a prompt investigation can be performed." Westergren v. Baptist Hospital of Winner, 1996 SD 69, ¶ 18, 549 N.W.2d 390, 395. Therefore, "notice to the employer of an injury is a condition precedent to compensation." Westergren, 1996 SD 69, ¶ 17.

Shykes at ¶¶ 23-24.

The parties dispute whether the injury Claimant suffered on April 10, 2002, should be classified as a recurrence or aggravation under the last injurious exposure rule. See SDCL 62-1-1(7)(c). In Arends v. Dakotah Cement, 2002 SD 57, the Supreme Court explained the application of SDCL 62-1-1(7)(c):

> "Workers' compensation statutes should be applied without defeating the purpose of the overall statutory scheme." Grauel, 2000 SD 145 at ¶ 14, 619 N.W.2d at 264 (citation omitted). The Legislature intended this section of the statute to settle disputes between two or more employers or insurers. Application of the doctrine to the facts of this case would not advance this purpose. Here, we have a dispute between the employer and employee to determine whether the employer-caused injuries or the employee-caused injury is responsible for the condition. But such disputes are already settled under the causation portion of the analysis. Therefore, there is no need to reach the last injurious exposure rule.

Claimant did not have subsequent employment. This is a dispute between Employer and Claimant to determine whether the employer-caused injuries (the two scrapes to

the left ankle) and Claimant's pre-existing condition is responsible for the need for medical treatment. The last injurious exposure rule does not apply in this matter. 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).

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 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 shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this _____ day of September, 2003

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge