

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

CAROLYN GARDNER,

HF No. 81, 2008/09

Claimant,

v.

DECISION

TARGET CORPORATION,

Employer,

and

SEDWICK CMS,

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 25, 2011, in Sioux Falls, SD. Claimant, Carolyn Gardner, is represented by Renee H. Christensen. Employer, Target Corporation and Insurer, Sedgwick CMS, are represented by Mark J. Freeman.

Issues:

This case presents the following legal issues:

1. Whether Claimant's March 24, 2008, work related injury is a major contributing cause of her cervical spinal contusion and need for surgery?
2. Whether Claimant is entitled to permanent total disability benefits?
3. If Claimant's injury is compensable, whether Medicare reimbursements should be paid by Insurer to Claimant's attorney?
4. Whether Claimant's treatment on and after May 25, 2008, is not compensable because they were not authorized by Insurer?

Facts:

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

1. Carolyn Gardner (Claimant) was born in 1942 and has a high school education.
2. In September 2005, Claimant began working as a cashier at Target Corporation in Sioux Falls (Employer). Cashier is the only position that she ever held with Employer. As a cashier, Claimant's primary duty was to run the cash register to check out merchandise. She was required to bag items. She was also required to assist customers in her area. Claimant's job involved repetitive motion of her hands, arms, and back.
3. Prior to her work injury of March 24, 2008, Claimant had suffered previous injuries and disabilities. In 1982 while working in Florida she suffered a low back injury. Claimant also suffered from diabetes for which she has received treatment since the mid-1990s. She had developed diabetic neuropathy, primarily in her feet. The neuropathy in her feet caused her some instability and she was prone to falling.
4. In June of 2007, Claimant reported that she was not steady on her feet as a result of the diabetic neuropathy. She stumbles on a daily basis. She reported a history of surgery on her feet for her nerve condition. She also reported that she had been experiencing chest pain and low energy. Her diabetes was out of control and she had gained 14 pounds over the previous month.
5. In August of 2007, Dr. Richardson treated Claimant for a motor vehicle accident. Following that accident, Claimant reported pain in the left shoulder blade and extending down the left arm. At that time, Richardson also noted that there was some crepitation or cracking of the neck which he indicated was not a new symptom. There was also noted to be Para spinal pain on the left side with mild pain in the trapezius muscle. The diagnosis was upper back pain.
6. Following the motor vehicle accident the claimant continued to complain of symptoms in the left wrist and was diagnosed with a tenosynovitis in the left wrist. There were also concerns with regard to continued edema in the extremities.
7. In September of 2007, Claimant complained of worsening pain from the neuropathy in both of her hands and feet.
8. On November 14, 2007, claimant reported depression. The problem with weight gain was continuing and she reported that she was tired for unknown reasons.
9. In November of 2007, Dr. Richardson referred Claimant to an orthopedic surgeon, Dr. Timothy LeeBurton for evaluation of her left wrist. LeeBurton treated Claimant with cortisone injections. LeeBurton eventually performed a trigger release for the left wrist condition on January 22, 2008.

10. Dr. Richardson also noted that the employee had undergone an echocardiogram which had been normal.
11. The records from Dr. Richardson from the spring and summer of 2007 include complaints by Claimant of abdominal pain, chest pain, a gastrointestinal evaluation, hypertension as well as an evaluation of Claimant's advanced diabetes and renal failure. By June 26, 2007, Claimant began taking insulin to control her diabetes.
12. While at work on March 24, 2008, Claimant was assisting a customer who was in a wheelchair. As Claimant was returning to her station, she tripped on the wheelchair and fell hard on the floor. She landed on her left arm and the left side of her body. She also hit the left side of her head or face, because she was momentarily stunned.
13. On March 24, 2008, Employer was insured by Sedgwick CMS (Insurer) for purposes of workers' compensation.
14. Immediately after Claimant's fall, she was taken to the emergency room at Sanford Hospital. Claimant was treated in the ER by Dr. Scott VanKeulen. She was having serious pain in her left elbow and wrist. Claimant also experienced numbness and tingling in her left hand going up to her left shoulder and into her the left side of her neck. Dr. VanKeulen ordered x-rays, put her in a sling, and informed her that she had broken her elbow and possibly her wrist and her thumb in the fall. He directed her to follow up in a few days with Dr. Jason Hurd.
15. Dr. VanKeulen testified that he ordered a cervical x-ray of Claimant on March 24, 2008, because she complained of neck pain. Claimant's ER chart confirms that she was complaining of "mild left lateral pain."
16. On March 26, 2008, Claimant followed up with Dr. Hurd, an orthopedic specialist. She was still having numbness and tingling through her thumb, hand, wrist, elbow, upper arms, underneath her arm, her shoulder, and her neck. Dr. Hurd put Claimant's left arm in a soft cast up to her elbow.
17. On April 24, 2008, Claimant was released to work with restrictions by her treating physician, Dr. Hurd.
18. Claimant returned to work for several weeks from April 28, 2008 through May 24, 2008.
19. On May 25, 2008, after reporting to work, Claimant suddenly felt weak and could not lift her arms. She had shortness of breath and chest pain. Eventually Claimant was unable to stand. Claimant's daughter came in to Employer's store and took her to the emergency room at Avera Heart Hospital.

20. Following Claimant's ER visit on May 25, 2008, Claimant was admitted to the hospital for three days to undergo tests. Eventually the doctors ruled out any problem with Claimant's heart or lungs. Instead, they attributed her symptoms to the workplace fall in which she had fractured her arm.
21. After her discharge from the hospital, Claimant was referred to Dr. Judith Peterson, a physiatrist who is a board certified in physical medicine and rehabilitation. Dr. Peterson first saw Claimant on June 2, 2008. She reported shortness of breath and chest pains which were exacerbated by exertion. Peterson performed electrodiagnostic studies and ordered an MRI of Claimant's neck. Peterson's testing indicated nerve damage in the cervical or neck region. The MRI revealed a contusion on her spinal cord.
22. Dr. Peterson testified that Claimant "had a sensation of heaviness that was traveling into her upper extremities. And the symptoms that you would experience with a spinal cord contusion are things like tingling in an extremity, weakness in an extremity, and difficulty with use of an extremity. That kind of thing. So her symptoms were consistent." She agreed with the doctors at Avera that Claimant's ongoing pain and other symptoms resulted from her injury at work.
23. Dr. Peterson referred Claimant to Dr. Bryan Wellman for a neurological assessment. Dr. Wellman concurred with the diagnosis of a spinal cord contusion.
24. On June 1, 2009, Dr. Wellman performed a spinal fusion on Claimant of C4 through C7.
25. The surgery relieved much of the pressure and pain in Claimant's neck. However, she continued to have weakness, numbness and tingling in her left hand, elbow, arm, and up into her shoulder.
26. After the surgery, Claimant continued to treat with Dr. Hurd and Dr. Peterson. Dr. Hurd focused primary on her wrist, while Dr. Peterson treated the cervical symptoms.
27. Claimant did not return to work for Employer or anywhere else after her surgery.
28. Dr. Peterson testified that Claimant's work injury was a major contributing cause of her cervical cord contusion which ultimately required surgical intervention. Dr. Peterson testified that she was first alerted that Claimant may have a spinal cord contusion in the neck area by the physicians at the Avera Heart Hospital.
29. Dr. Peterson testified that the work injury was a major contributing cause of Claimant's continuing need for medical treatment, including ongoing pain medication, physical therapy, wrist injections, and other rehabilitative testing and

therapies. In addition, Peterson testified that Claimant's work injury was responsible for her work restrictions, including no forceful grasping or sustained gripping of the left hand, no lifting over ten pounds, using the left hand as an assist to the right, and no frequent reaching of her left hand. Dr. Peterson testified to each of these conclusions to "a reasonable degree of medical probability." Peterson testified that it was her opinion that Claimant "sustained a permanent impairment as a result of the fall...."

30. Dr. Wellman, who performed the cervical surgery, agreed with Dr. Peterson that Claimant's workplace fall was a major contributing cause of her cervical demyelination and cervical spine contusion, and need for surgery.
31. Dr. Blow was hired by Insurer to provide a medical opinion in this case. Blow conducted a review of Claimant's medical records and examined her. Dr. Blow is board certified to performing independent medical examinations.
32. Dr. Blow agrees with Drs. Peterson and Wellman that Claimant's elbow, wrist, and shoulder injuries and resulting symptoms are related to her workplace fall. However, Blow does not believe that Claimant's work fall was the cause of her cervical contusion and need for spinal fusion surgery. The basis of Blow's opinion is the belief that Claimant did not experience any neck pain immediately following the fall.
33. At the time of the hearing, Claimant could only lift her left arm up approximately perpendicular to her body. She can only lift about two pounds. She cannot grip things or pick them up with her left arm.
34. Claimant's left hand is her non-dominant hand.
35. At the time of the hearing, Claimant was suffering from end stage renal failure.
36. Additional fact 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.W.2d (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:

- (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.

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 & Permman 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.

In this case, Dr. Peterson and Dr. Wellman have opined that Claimant's fall at work was a major contributing cause of her cervical spine contusion and need for surgery. Dr. Peterson is Claimant's treating physician and Dr. Wellman was her surgeon. In contrast, Dr. Blow who performed an independent medical examination has opined that the work injury was not the cause of Claimant's neck problems.

Dr. Blow's opinion is based in part on the premise that Claimant's medical records do not indicate that she suffered any pain of the cervical area immediately following Claimant's fall. While the documentary evidence is not overwhelming, sufficient evidence exists to indicate that Claimant's had enough discomfort to warrant ex-rays. In addition, Dr. Peterson explained that the symptoms may not have been apparent immediately because it took some time for swelling to occur. It is also likely that the acute pain cause by Claimant's injured elbow and wrist may have overshadowed the less painful neck.

In light of the fact that Dr. Blow either missed or discounted the references to neck pain and related symptoms in Claimant's medical records, the Department finds that his opinion lacks the foundation necessary for an accurate medical opinion. Therefore, the department finds Dr. Peterson's and Dr. Wellman's opinions more persuasive. Claimant has met her burden of showing that her March 24, 2008, injury was a major contributing cause of her cervical spine contusion. As such, Claimant is entitled to medical expenses for the treatment of that condition including surgery.

Permanent Total Disability:

The Claimant seeks permanent total disability benefits as a result of that injury pursuant to the odd-lot doctrine.

There is no question that Claimant is totally and permanently disabled. She is diabetic and suffers from severe complications of that condition, including diabetic neuropathy in her hands and feet, and end stage renal failure which requires dialysis three days a week. However, the question here is whether her work injury is a major contributing cause of that disability. SDCL 62-7-7 (7) states in part:

- (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) (b).

When Claimant's work-related impairment is isolated from her non-work related medical conditions, it becomes apparent that the work-related impairment does not constitute a permanent total disability. The surgery relieved her pain and her work-related impairment are primarily limited to her non-dominant arm and hand. One armed people

can perform well in the employment market and Claimant has the benefit of using her left hand to assist her dominant right arm and hand.

On the other hand, Claimant's non-work related medical conditions would have rendered her permanently and totally disabled, even if she had not suffered a work injury. While Claimant has been unsuccessful at finding employment, it is not clear that her work-related impairment has added significantly to her unemployability. Claimant has not demonstrated that her work injury was a major contributing cause of her disability.

Benefits Paid to Claimant's Attorney:

Claimant asks that her benefits be paid directly to her attorney. Employer and Insurer argue that any Medicare reimbursements due for medical expenses should be made directly to Medicare.

South Dakota has discussed this issue in Lagge v. Corsica Co-op., 2004 SD 32,38, 677 N.W.2d 569, 578. In that case, the Court stated "payment through a claimant's attorney is commonly done and is contemplated by statute." Accordingly, in this case, Insurer should make the Medicare reimbursement payments to Claimant's attorney.

Unauthorized Treatment:

Employer and Insurer also argue that they are not responsible for Claimant's medical treatment on and after May 25, 2008, because that treatment was unauthorized. They contend that Claimant's treating physician following her fall was Dr. Hurd and that she did not get a referral from Dr. Hurd or permission from the Insurer for her treatment on and after the May 25, 2008 date. SDCL 62-4-43 states:

The employee may make the initial selection of the employee's medical practitioner or surgeon from among all licensed medical practitioners or surgeons in the state. The employee shall, prior to treatment, notify the employer of the choice of medical practitioner or surgeon or as soon as reasonably possible after treatment has been provided. The medical practitioner or surgeon selected may arrange for any consultation, referral, or extraordinary or other specialized medical services as the nature of the injury shall require. The employer is not responsible for medical services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section. If the employee is unable to make the selection, the selection requirements of this section do not apply as long as the inability to make a selection persists. If the injured employee unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment, the employer is not liable for an aggravation of the injury due to the refusal and neglect and the Department of Labor and Regulation may suspend, reduce, or limit the compensation otherwise payable. If the employee desires to change the employee's choice of medical practitioner or surgeon, the employee shall obtain approval in writing from the employer. An

