SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota

ANTHONY J. SHULTE, **HF No. 90, 2013/14**

Claimant,

v. **DECISION**

RURAL MANUFACTURING CO., INC.,

Employer,

and

FIRST DAKOTA INDEMNITY COMPANY,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held in this matter on January 22, 2015, at the McCook County Courthouse in Salem, South Dakota. Attorney, Michael E. Unke represents Claimant, Anthony J. Schulte (Claimant). Attorney, Michael S. McKnight represents Employer, Rural Manufacturing Co., Inc., and Insurer, First Dakota Indemnity Company (Employer and Insurer). Depositions received in this matter were from Dr. Jason L. Hurd, MD, Dr. Mark A. Werning, DC and Dr. Gary E. Wyard, MD. Post-hearing briefs were submitted by the parties and all arguments were taken into consideration.

ISSUES:

Was Claimant's work for Employer a major contributing cause of Claimant's injury or condition and need for treatment?

FACTS:

Claimant is a 59 year old gentleman who worked for Employer for over 20 years as a shop foreman doing fabrication, installation work, service work, repair work and some design work. Claimant is currently working for Employer.

On May 1, 2012 Claimant, while working for Employer, was helping fabricate a steel, scale pan for a piece of equipment they were building. The sheet metal piece used was an eighth of an inch thick, four feet wide and ten feet long. Typically, when building a pan of this size, Employer would utilize aluminum. However, the customer had requested steel, so Employer and Claimant worked with the steel. It is the first time Claimant had built a pan this large and heavy. He and another employee were lifting the metal and moving it into the metal press brake. The bends for the edges of the pan

were fairly close to the edge, so most of the piece of metal was outside of the press brake being held by Claimant and another employee. At the first bend, at the beginning of the process, Claimant testified that the piece of metal "took us by surprise a little bit and got away from us, and we were trying to catch it from falling, and I felt it, a pop or a sharp pain in my shoulder…" He testified that the pain came and went on an intermittent basis. The pain got worse over time or when he worked overhead or did any heavy lifting.

Claimant did not realize he had injured his shoulder at that time. He treated regularly with a local chiropractor, Dr. Mark Werning. He started seeing Dr. Werning in 1989 for a variety of injuries and symptoms including (but not limited to) neck pains, back pains, twisted ankles, sprained wrists, viral symptoms, sore knees, toe pains, pains "between shoulder blades", pain "under shoulder," and hips. After viewing the records, it appears that almost every musculoskeletal part of Claimant's body was treated by Dr. Werning at one time or another. According to the records, and the deposition testimony of Dr. Werning, Claimant was never treated for a rotator cuff injury or pain. Records indicate that prior to May 2012, Claimant had 24 visits or treatments that focused on his left shoulder, although Dr. Werning's testimony indicates that it was likely the scapular part of his shoulder or between the shoulder blades. Claimant testified that his left shoulder problems were usually "in the front or the back or between, but never out on the end of the shoulder where the rotator cuff is" located.

In early April, 2012, Claimant saw Dr. Werning for his cervical spine and left shoulder. The notes do not indicate it was the back or scapular region, but Dr. Werning's testimony regarding his notes would indicate that is the case. By the end of April, the pain had reduced to a 2 of 10 on a pain scale rating of 1 being least pain and 10 being the highest level of pain.

Claimant did not return to Dr. Werning until June 2, 2012. At that time he reported left shoulder pain at an 8 of 10. Dr. Werning recommended an analgesic cream (pain reliever) to rub onto his shoulder. Claimant returned on June 11, 2012 with the same complaints of his left shoulder. Dr. Werning performed some testing of the shoulder which revealed a possible rotator cuff tear. He recommended Claimant see an orthopedic surgeon in regards to his left shoulder. Dr. Werning referred Claimant to the Sanford Orthopedics & Sports Medicine Clinic. Claimant initially saw Dr. Brian C. Aamlid, an orthopedist who treated Claimant after an accident in 1997. An MRI was taken of Claimant's left shoulder on June 28, 2012 at the Sanford Medical Center. The test was to "rule out: rotator cuff tear vs. spinal notch cyst." Dr. Aamlid referred Claimant to Dr. Hurd.

Dr. Jason Hurd, an Orthopedic Surgeon with the Clinic, first saw Claimant for his shoulder on July 19, 2012. Dr. Hurd's curriculum vita reveals that Dr. Hurd is a "Shoulder and Elbow Fellow" in that he completed a medical fellowship in shoulder and elbow with NYU/Hospital for Joint Diseases in August 2007. Over the years, Dr. Hurd has authored or co-authored a number of published scholarly articles specifically on the shoulder joint and rotator cuff.

Dr. Hurd testified in his deposition that the MRI showed "AC joint arthrosis and it showed question of a possible superior labral tear as well as low grade partial thickness rotator cuff tear." Dr. Hurd explained that an MRI is not completely accurate for rotator cuff tears, and that it is hard to tell the extent of a tear from an MRI. According to Dr. Hurd, the MRI cannot show whether the tear is caused by acute trauma or whether it is a degenerative chronic change. The degree of muscular atrophy and retraction of the muscle indicated to Dr. Hurd that the rotator cuff was injured in an acute manner.

Dr. Hurd initially tried conservative treatment with Claimant, as the MRI did not show a full-thickness tear. He sent Claimant to physical therapy and gave him a cortisone shot in his shoulder. This did not alleviate the pain and the symptoms became worse.

As rotator cuff tears do not heal on their own and degenerate and become bigger over time, Dr. Hurd recommended that surgery be performed to repair the cuff. Dr. Hurd performed the surgery on Claimant on November 19, 2012. In surgery, Dr. Hurd found a full thickness tear of the rotator cuff. The cuff was not "scarred in," but was freely mobile and able to be repaired and "put back to its normal anatomic position." Dr. Hurd also recognized that the muscle had not atrophied, which is commonly found with chronic tears.

It is Dr. Hurd's opinion, by a reasonable degree of medical certainty, that Claimant's rotator cuff was torn in an acute manner, at the time the pain in his left shoulder started. Claimant has narrowed that date down to May 1, 2012, the date he felt a "pop" in his shoulder and severe pain after lifting a large steel plate.

Claimant made a First Report of Injury to Employer on July 27, 2012, regarding the injury that occurred on May 1, 2012. On July 26, 2012, Claimant and Employer started forming their second steel scale pan. At that time, Claimant realized it was when he was bending the steel for the first pan that his left shoulder rotator cuff pain started. Claimant started to help with the second pan, but the pain soon returned and he did not help with the task. Instead of two workers handling and holding the steel, Employer had three or four employees helping to hold the steel in place and Claimant ran the machine. Claimant looked back at the date they made the first steel pan and realized that it was on that date that his rotator cuff pain started. Claimant's testimony was credible and reliable.

On October 26, 2012, Employer and Insurer sent Claimant to Dr. Gary Wyard, in Worthington, Minnesota, for an Independent Medical Exam. Dr. Wyard spent about 10 to 15 minutes with a physical examination of Claimant. He also reviewed Claimant's MRI and medical records when formulating his report. Dr. Wyard is Board Certified with the American Boards of Orthopaedic Surgery and Disability Analysts. He has practiced orthopedic surgery in the Twin Cities, MN area since 1976. His surgical focus is on shoulders, knees, and hips. He has been conducting IME's since the early 1980's, with a primary focus on worker's compensation cases. He also is an expert witness for other cases such as personal injury.

After reviewing the records and examining Claimant, Dr. Wyard was of the opinion that Claimant had not suffered a rotator cuff tear. He is of the belief that a full thickness tear would show up on an MRI, if the MRI was performed correctly. He recommended Claimant restrict his lifting and overhead work. He opined that Claimant should not have surgery for his rotator cuff as he believed Claimant was magnifying his symptoms. After the surgery was performed and Dr. Wyard was given the records of Dr. Hurd, Dr. Wyard was still of the opinion that rotator cuff surgery was unnecessary. He testified that many people of a certain age have undiagnosed, asymptomatic, full thickness tears of the rotator cuff. He testified that Claimant did not suffer an acute full thickness tear of his rotator cuff on May 1, 2012, as the pain would have been too great for Claimant to continue to work after a tear occurred. He did not believe any tear was acute but degenerative in nature.

Further facts may be developed in the Analysis below.

ANALYSIS

The Supreme Court is clear on the burden of proof for causation of a workers' compensation injury. They have stated, "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." *Wise v. Brooks Const. Ser*., 2006 SD 80, ¶17, 721 NW2d 461, 466 (internal citations omitted). In a more recent case, the Court has written:

> In a workers' compensation dispute, a claimant must prove all elements necessary to qualify for compensation by a preponderance of the evidence. … A claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty. Causation must be established to a reasonable degree of medical probability, not just possibility. The evidence must not be speculative, but must be precise and well supported.
>
> The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition because the field is one in which laypersons ordinarily are unqualified to express an opinion. No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition. SDCL 62-1-1(7). Expert testimony is entitled to no more weight than the facts upon which it is predicated.

Darling v. West River Masonry, Inc., 2010 SD 4, ¶11-13, 777 NW2d 363,367 (citations and quotes omitted). Furthermore, the Court has opined on the "level of proof" that must be shown by a claimant.

> "The burden of proof is on [Claimant] to show by a preponderance of the evidence that some incident or activity arising out of [his] employment caused the disability on which the worker's compensation claim is based." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. This level of proof "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." Id. To meet his degree of proof "a possibility is insufficient and a probability is necessary." *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

Both doctors that presented testimony are highly qualified in orthopedics. Dr. Wyard, although an orthopedist, is also a specialist in performing independent medical examinations. He spent perhaps 15 minutes examining Claimant, although most of his report focuses on what is reflected in the medical records of Dr. Werning and Dr. Hurd. Dr. Hurd is also an orthopedic surgeon and specializes in shoulders and elbows. His curriculum vita details the professional study he has undertaken regarding the shoulder joint and rotator cuff. He is also the surgeon who observed the rotator cuff and fixed it. He had at the best possible view of what was going on in regards to Claimant's rotator cuff.

Dr. Hurd is of the opinion that the rotator cuff was not degenerated or slowly torn over time, but was torn quickly and more recently. He testified that he was able to repair the cuff without issue and that the muscle was not atrophied. Dr. Werning, DC, inarguably spent more time over the years with Claimant than any other physician. Dr. Werning testified that he had never treated Claimant for a rotator cuff injury or pain in the general area of the rotator cuff. He had treated Claimant for various

other injuries and pains located behind the left shoulder (scapula) and in front of the shoulder (clavicle), as well as the left forearm. However, the left bicep and the outside shoulder were not reported to Dr. Werning to be in pain under after May 1, 2012. After reading through the chiropractic records, it appears that Claimant was very thorough in his self-reporting of symptoms to Dr. Werning.

Although Dr. Wyard's reasoning regarding age and tearing of muscles appears to be "textbook," not every injury is textbook. Dr. Hurd had the opportunity to see the muscle and the tear. It is his opinion that it was acute and not degenerative. Dr. Hurd's opinion is more persuasive, given the overall circumstances of this situation, including the statements by Dr. Werning.

Claimant's work for Employer, and more specifically, the incident that occurred at work on May 1, 2012, was a major-contributing cause of Claimant's current condition and need for treatment.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Claimant may also submit Proposed Findings and Conclusions not consistent with this Decision. The initial submission shall be filed with the Department within thirty (30) days from the date of receipt of this Decision. The Employer and Insurer shall have fifteen (15) days from the date of receipt of the initial submissions to submit objections thereto or to submit their own 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 and Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 2nd day of June, 2015.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ Catherine Duenwald
Catherine Duenwald
Administrative Law Judge