SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MEGAN PETERSON,
Claimant,

HF No. 109, 2009/10

v.

DECISION

THE EVANGELICAL LUTHERAN GOOD SAMARITAN SOCIETY,
Employer,

and

SENTRY 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, in Salem, South Dakota. Claimant, Megan Peterson appeared personally and through her attorney of record, Michael E. Unke. Michael S. McKnight represented Employer, The Evangelical Lutheran Good Samaritan Society and Insurer Sentry Insurance.

Issues

1. Notice
2. Causation and Compensability

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

Megan Peterson was 21 years old at the time of the hearing and was living in Salem, South Dakota. At the time of her injury, Peterson was employed full time by The Evangelical Lutheran Good Samaritan Society (Good Samaritan or Employer), a nursing home in Canistota, South Dakota. Since 2007, Peterson worked as a certified Nurse Assistant (CNA) providing care to nursing home residents.

Peterson had a history of previous injuries. In 2003, while Peterson was still in middle school, she slipped on some wet stairs at school and injured her ankle. The ankle injury was treated with ice, compression bandages and crutches. The injury resolved, however Peterson continued to have occasional flare ups with her left ankle.

On December 9, 2007, Peterson sustained a work related injury to her back while helping a resident at Good Samaritan move into bed. Peterson treated with chiropractor, Dr. Tieszen following her injury. Dr. Tieszen treated Peterson's hips, mid and upper back and low back problems. Following treatment, Dr. Tieszen recommended Peterson continue to wear a back brace, but she returned to work with no restrictions by January 2008.

In 2009, Peterson experienced a flare up from her previous ankle injury. Peterson treated with Dr. Neilson who recommended Peterson wear a walking boot on her left ankle and attend physical therapy. Peterson was wearing the walking boot while working at Good Samaritan on July 15, 2009.

On July 15, 2009, Peterson was working at Good Samaritan, when she bent down to help a resident with her wheelchair foot pedal. When she stood up, Peterson claims she felt sharp pain going through her low back. Peterson was working alone when the incident occurred. Peterson told her supervisor, Deb Adler that she was in pain and asked for some medication. Peterson took some Tylenol and continued to work the rest of her shift. She did not fill out an incident report.

Peterson went home after she completed her shift and went to bed. When she woke up, Peterson testified that she could not move and was unable to get out of bed. Peterson's fiancé, David Kuhl, and Peterson's mother, Shannon Peterson called the ambulance and Peterson was transported to the Sanford emergency room. Peterson testified that she was not asked how the injury happened or if she had any history of back pain, however she was heavily medicated at the time she was admitted. The medical records reflect that Peterson stated she had been going to physical therapy for her left foot, and she felt low back pain getting progressively worse. The medical records from the emergency room did not mention any specific injury at work.

Peterson was treated in the emergency room with pain medication. A CT scan revealed a herniated disc in her back. Peterson was given a prescription for pain medication, put on bed rest and released from the hospital. Peterson continued to treat with Dr. Flickema, her family physician for follow up care.

The day following Peterson's release from the hospital, David Kuhl turned in paperwork to the charge nurse at Good Samaritan saying Claimant was on bed rest and unable to

work. After several days of bed rest, Peterson was able to go into Good Samaritan and fill out paperwork related to her injury and talked to the Director of Nursing.

On August 20, 2009, Dr. Jerry Blow did a records review at the request of the Employer/Insurer. Dr. Blow evaluated Peterson's medical records and issued a report. He opined that Peterson's low back problems were not work related, but rather stemmed from her ankle problems and her weight. Dr. Blow testified at his deposition as to the causation of Peterson's low back complaints, "I felt it was related to her problems she was having with her ankle, the fact that she had to wear a boot and her gait was altered, and that resulted in back pain." He went on to explain,

> Well, its all about body mechanics. If you have an injury to the ankle, then there is altered movement at the ankle, knee, and the hip on that side of the body. That means the right side has to compensate for that altered movement on the left which goes through the pelvis. And when you're having movements that are not normal for the body, that is stressful and that stress is felt not only through the pelvis, but then into the low back[.]

On August 25 and August 27, 2009, Peterson was evaluated by Dr. David Hoversten, an orthopedic surgeon at Dakota Orthopedics. Dr. Hoversten did not have the medical records from the emergency room, records from her previous injuries or Dr. Blow's report at the time of his examination. Based on Peterson's representation of her medical history, Dr. Hoversten diagnosed acute low back pain with increased sciatic radiation to the right leg without reflex changed. Dr. Hoversten also ordered an MRI which revealed a dark disk at L5-S1, and multiple Schmorl's nodes at many areas above that disk level. Dr. Hoversten recommended a back brace and prescription medications. He also gave Peterson permanent work restrictions of light duty, maximum lifting 25lbs, avoid frequent twisting and bending. Peterson was released to work 8 hours a day as tolerated under those restrictions.

Dr. Hoversten opined in a letter dated September 8, 2009, that Peterson's bending over and work activities independently caused her back discomfort and pain and the need for evaluation and treatment. He further stated that he was unaware of Peterson's ankle injury and even so, he did not know how an ankle injury would cause a problem with the L5-S1 disk and low back pain.

Dr. Hoversten testified by deposition. He testified that the Schmorl's nodes, identified on the MRI, indicated a congenitally weak back and that the flattening and the bulging of the disk at L5-S1 was the source of her pain but without compression on the nerve roots. He testified, "I feel there's some connection between the work injury of 7/15/09 and the deterioration and painful disk at L5-S1 in her back. I think there's some connection. I don't know exactly how much." He stated to a reasonable degree of

medical probability that Peterson's back problems were work related, however on cross examination, Dr. Hoversten did agree with Dr. Blow that low back problems can be related to obesity, and that an imbalanced gait can aggravate or flare up back problems and make it more painful. When asked about causation and the work restrictions placed on Peterson, Dr. Hoversten testified,

> Q: Is the claimed work incident of July 15, 2009 a major contributing cause of her need for those restrictions?
>
> A: It is a cause.
>
> Q: Are you able to say whether it is a major contributing cause?
>
> A: I think- - you know, my opinion is the major contributing cause is that she's 20, she's obese, and she has multiple Schmorl's nodes with a bad back. That's the major factor. I think the dark disk is a contributing but probably a minor factor in those restrictions.

Other facts will be developed as necessary.

Analysis

Whether Claimant provided proper notice of her work related injury?

The purpose of the 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." *Loewn v. Hyman Freightways, Inc*., 1997 SD 2 ¶ 10, 557 NW2d 762, 767 (citation omitted).

SDCL 62-7-10 provides:

> 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:

(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.

Claimant bears the burden of proof to show that her employer had notice of the work related nature of her injury. *Mudlin v. Hills Materials Company*, 2005 SD 64, 698 NW2d 67.

A first report of injury was not completed until July 21, 2009, which is past the three day reporting requirement set forth in SDCL 62-7-10. Peterson must then show that either employer had actual knowledge of the injury, or that Peterson had good cause for failing to give notice within the three day period.

Actual Knowledge

Peterson argues that she reported her injury immediately to her supervisor, Deb Adler. Adler testified at the hearing that Peterson did not tell her that she injured her back at work on July 15, 2009. Peterson told Adler that she was in pain and that she needed to take something for the pain. Adler inquired whether it was her foot that hurt, to which Peterson replied it was her back. Adler did not further inquire how Peterson had hurt her back. Adler gave Peterson Tylenol and Peterson continued her shift without ever mentioning to Adler that she had hurt her back at work. Adler was a credible witness.

> It is true that worker's compensation statutes are liberally construed in favor of injured employees. However, the minimum prerequisite is that there must be some indication that the injury is work-related. It is not enough, however, that the employer, through his representatives, be aware that claimant 'feels sick,' or has a headache, or fell down, or walks with a limp, or.... There must ... be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.

Vaughn v. John Morrell & Co., 2000 S.D. 31 ¶33, 606 N.W.2d 919 (citations omitted). Peterson continued to work with Adler for the remainder of her shift. At no time did Peterson give any indication to Adler that her back pain may possibly give rise to a compensable injury.

Peterson testified that she told another CNA working the same shift that she hurt her back at work, however a co-worker is not Peterson's supervisor and therefore, Employer was never put on notice that Peterson sustained a work injury.

Good Cause

Peterson argues that she had good cause for the delay in reporting because she was in the hospital and then on strict bed rest. She contends that as soon as possible, her fiancé David Kuhl took her paper work in and notified the charge nurse of Peterson's injuries. While Peterson's fiancé did deliver paperwork to Good Samaritan indicating Peterson was on bed rest and unable to come to work, it is unclear whether the charge nurse was informed that it was due to an injury sustained at work. Peterson herself filled out a first report of injury on July 21,2009, when she was medically able to do so.

Peterson testified that she was aware of the work related nature of her injury immediately, therefore she had ample opportunity to report her injury to her supervisor, Adler during her shift. Peterson was familiar with the Employer's policy regarding workplace injuries. In December 2007, Peterson had immediately filled out an Employee Occurrence Report when she sustained an injury at work. In this instance however, Peterson did not fill out an Employee Occurrence Report during her shift. Peterson failed to show she had good cause for waiting until July 21, 2009 to report her injury.

A first report of injury was not completed until July 21, 2009, which falls outside the three day reporting requirement set forth in SDCL 62-7-10. Employer did not have actual knowledge of the injury and

Whether Claimant sustained a compensable work related injury pursuant to SDCL 62-1-1(7), and whether that injury remains a major contributing cause of her condition or need to treatment?

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that she sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520.

SDCL 62-1-1(7) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]"

> In applying the statute, we have held a worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [her] employment. We have further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions

> are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

With respect to proving causation of a disability, the Supreme Court has stated,

> 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Orth v. Stoebner & Permann Construction, Inc., 2006 S.D. 99, ¶ 34 724 N.W.2d 586(citations omitted).

Dr. Blow in his deposition, testified that he disagreed with Dr. Hoversten's options,

> Dr. Hoversten was unaware that she had an ankle problem. He was unaware that she went for two months with significant problems. He was unaware that she put a boot on a couple days before this. And he was a unaware that she went to the emergency room and did not mention this low back injury. So when he states that these back problems are related to work based on what he knows, there was a substantial amount of information that he did not know when he made that statement on September 28, 2009

"The value of an opinion of an expert witness is dependent on and entitled to no more weight than the facts upon which it is predicated. It cannot rise above its foundation." *Podio v. American Colloid Co*., 83 S.D. 528, 162 N.W.2d 385 (1968). Dr. Hoversten's opinion is based solely on the history provided by Peterson that she injured her back at work. The testimony of Dr. Blow is more persuasive. Dr. Blow had an opportunity to review Peterson's medical records including medical records of previous injuries and the records of the emergency room.

Based upon the medical evidence presented, Peterson failed to meet her burden to demonstrate that she sustained a compensable injury and that her employment remains a major contributing cause of her condition and need for treatment. Peterson is not entitled to any benefits under South Dakota workers' compensation laws.

Conclusion

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer'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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 18th day of March, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR

/s/ *Taya M. Runyan*

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Taya M. Runyan
Administrative Law Judge