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

CATHERINE TOBIN, **HF No. 13, 2014/15**

Claimant,

v. **DECISION**

CARE CONCEPTS, LLC,

Employer,

and

FIRST DAKOTA INDEMNITY COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on November 12, 2014, in Belle Fourche, South Dakota. Claimant, Catherine Tobin was represented by Margo Tschetter Julius. The Employer, Care Concepts, LLC and Insurer, First Dakota Indemnity Company were represented by Charles A. Larson.

Legal Issues:

The legal issue presented at hearing is stated as follows:

> Whether Catherine Tobin's injury on May 30, 2014, arose out of her employment with Care Concepts, LLC?

Facts:

The Department finds the following facts by a preponderance of the evidence:

1. Catherine Tobin (Tobin) was a 68 year old woman at the time of the hearing. She started working for Care Concepts, LLC (Employer) in January of 2013.

2. Employer operates an assisted living facility, d/b/a Country Place Senior Living (Country Place) in Belle Fourche, SD. The facility has 18 suites, and residents can set up their suites however they want. The residents have as much independence as they want/can handle. Some residents drive, some do not need much assistance, while others need help with everyday tasks.

3. Tobin worked approximately 32 to 34 hours at Country Place as a certified medication aide. Tobin worked the morning shift from 6:00 a.m. to 2:00 p.m.

4. Tobin was given an employment screening by Ann Mollman, Employer's nurse, at the time she was hired by Employer. Tobin had no physical difficulties doing her job as a certified medication aide prior to May 30, 2014. Ann Mollman testified that she never observed Tobin having any physical difficulties doing the physical aspects of the work.

5. Lindsay Schloredt, Director of Country Place, described Tobin as a "wonderful worker."

6. On her first performance review done on May 20, 2013, the only below average reviews were in the areas of thoroughness and time management. The comments made were "She has had a few med errors this year…. Some morning task not complete." Her supervisor commented that, "[d]oes well as a med aide. Sometimes doesn't get much else done."

7. Tobin's next performance review was on February 21, 2014. She received outstanding or above average ratings in nearly every aspect of her performance. Her supervisor stated: "Your attention to detail is outstanding, and appreciated by the families of the residents. You take the time to do the little things which sets you apart from other employees." However, Tobin's lowest review was still in time management. While she had improved from the previous review, this was still her lowest category on her performance review.

8. The 6:00 a.m. to 2:00 p.m. shift is a very busy shift. Tobin's job duties included passing medications to 17 different residents as well as provide resident care and assistance to residents in daily living, activities, and meal service.

9. Ann Mollman described her observations of Tobin working as a bit "rushed". Other co-workers described Tobin's work habits as "fast paced" or "hustling."

10. On Friday, May 30, 2014, Tobin was scheduled to work at 6:00 a.m. to 2:00 p.m. She was very prompt. When she got there, she and the medication aide coming off from the night shift started by counting the narcotic medications to make sure that the count was correct and there were none missing. That morning, the person who was scheduled to work on the floor as a residential aide with Tobin did not show up for work. Tobin was concerned when the residential aide did not show up that morning because there would only be one person on the floor responsible for everything. Lindsey Schloredt called the facility to ask whether the residential aide scheduled to work that shift had showed up. Tobin informed her that she had not. Schloredt told Tobin that she would be right in. Tobin did not know what time Schloredt arrived at the facility.

11. At approximately 11:00 a.m. on May 30, 2014, Tobin was passing her last morning dose of medication to a resident in Room 3 named Martha. This was later than it usually took her to pass out medications. Generally, Tobin would have completed passing the morning medications around 10:00 a.m. She was very concerned Martha was not yet

dressed. Lunch was at 11:45 a.m. Martha also has a bedside commode and a cat litter box to clean.

12. Lilly O'Dell, a residential aide, who often worked the morning shift, testified that Martha was typically dressed by around 10 a.m., sometimes later but before 11 a.m.

13. Tobin handed Martha her medication, and picked up her breakfast tray. Tobin took the breakfast items back over to a little kitchenette in Martha's room. After setting the breakfast items beside the sink, Tobin turned to go into Martha's bathroom to clean the cat litter box and empty the commode. On the way to the bathroom, she fell. Tobin testified that she had no idea how she fell. Tobin also testified that she was hurrying. Tobin's testimony was credible.

14. Tobin fell to the ground, landed on her left hip. She was bruised from her left wrist to her elbow. Tobin also broke some vertebrae. Tobin's pain was severe but she tried to get up.

15. Tobin testified that there was nothing on the floor that caused her to fall. She did not trip over anything. There was no fraying in the carpet, there were no rugs, she did not trip over the resident's cat, it was not slippery, she did not trip over the walker, and she did not have anything in her hands at the time she fell.

16. The first person to enter the room after Tobin had fallen was Dena Frazey, a co-worker. Dena had been called in when the residential aide had not shown up for work. After finding Tobin in Martha's room, Dena went and got Ann Mollman and Lindsey Schloredt. After the nurse came in and took her vital signs, Tobin, Ann Mollman and Lindsey Schloredt went back out by the nurses' station. Ann told Tobin to call her husband or she was going to call an ambulance.

17. While waiting for her husband to pick her up and take her to the hospital, Tobin told Lindsey Schloredt that "I fell over my own two feet."

18. Tobin's husband took her to the emergency room in Spearfish, South Dakota. The medical report for May 30, 2014 indicates that Tobin "tripped at work". On June 30, 2014, Tobin told her doctor that she was in a patient's room when she "tripped and fell to the ground and felt a pop in her mid-back on Friday." The record stated in another section that Tobin "tripped and fell, and landed on her left hip and left arm." On July 18, 2014, Tobin told her medical doctor that she tripped, lost her balance and fell.

19. On June 4, 2014, Tobin spoke to Insurer's investigator on a recorded interview. During that interview, when asked what caused the fall, she answered, "I simply fell down. I was hurrying…." Tobin also stated "evidently I lost my balance because I wound up on the floor."

20. Additional fact may be discussed in the analysis below.

Analysis:

The South Dakota Supreme Court recently dealt with the "arising out the employment" issue in Voeller v. Hsbc Card Servs., 2013 S.D. 50, 834 N.W.2d 839. In that case the Court stated:

> To recover worker's compensation benefits, the employee has the burden of proving that he or she sustained an injury "arising out of" and "in the course of" employment. SDCL 62-1-1(7). We construe these requirements liberally so benefits are "not limited solely to the times when the employee is engaged in the work that he [or she] was hired to perform." Fair v. Nash Finch Co., 2007 S.D. 16, ¶ 9, 728 N.W.2d 623, 628-29. Even though we analyze each requirement independently, "they are part of the general inquiry of whether the injury or condition complained of is connected to the employment." Id. ¶ 9, 728 N.W.2d at 629.

Id. at ¶ 7.

The Voeller court then set forth the different categories of risk in determining whether the requisite causal connection exists:

> There are three categories of risk which an employee may be exposed. 1) Risks distinctly associated with employment; 2) Risks personal to the employee; and 3) Neutral risks. Id. at 843 citing Bentt v. D.C. Dep't of Emp't Servs., 979 A.2d 1226, 1232 (D.C. 2009) (internal quotation marks omitted). Also citing, Logsdon v. ISCO Co., 260 Neb. 624, 618 N.W.2d 667,672 (2000);·Fetzer v. N.D. Workforce Safety & Ins., 815 N.W.2d 539, 546 (N.D. 2012) (Maring, J., dissenting); 1 Arthur Larson & Lex K. Larson, Larson's Worker's Compensation Laws§§ 4.01 - 4.03 (2012). Injuries arising from risks distinctly associated with employment are universally compensable, while injuries from personal risks are generally noncompensable. Bentt, 979 A.2d at 1232; Logsdon, 618 N.W.2d at 672; Fetzer, 815 N.W.2d at 546; see also Larson, supra, § 7.02[4]. Risks personal to the employee are those risks "so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment." Larson, supra, § 4.02.
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> Injuries occurring as a result of neutral risks may be compensable under the positional risk doctrine. See, e.g., Milledge v. Oaks, 784 N.E.2d 926, 931-34 (Ind. 2003); Logsdon, 618 N.W.2d at 672-74; Larson, supra ¶ 9, § 3.05. The positional risk doctrine involves:
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> > situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by "neutral" neither personal to the claimant nor distinctly associated with the employment. Larson, supra ¶ 9, § 3.05. The positional risk doctrine utilizes the "but for" test:{fn1} "An injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he or she was injured." Id. is compensable under the "but for" test.

Id. at ¶¶ 9-10. In this case, both parties agree that Tobin's fall was a neutral risk.

The Positional Risk Doctrine was adopted by our Supreme Court in Steinberg v. South Dakota Department of Military & Veterans Affairs, 2000 S.D. 36, 607 N.W.2d 596. In Steinberg, an employee slipped and fell on ice in the Employer's parking lot during her lunch break. The Employer denied the claim arguing that the work activities were not a major contributing cause to Claimant's injury, arguing that her employment related activities were not a major cause of her fall. The Supreme Court disagreed.

In Steinberg the Court Stated:

> DMVA's argument with regard to this issue rests upon the premise that the source of Steinberg's injury (slipping on ice) was a natural phenomenon and a risk common to all in the Rapid City area. In Nippert v. Shinn Farm Canst. Co., 223 Neb. 236, 388 N.W.2d 820 (1986), the court rejected the increased risk rule now advocated by DMVA. The court concluded the better rule is that "an employee's injuries are compensable as long as his employment duties put him in a position that he might not otherwise be in which exposes him to a risk even though the risk is not greater than that of the general public." Id at 822. In I Larson's Workers' Compensation Law § 8.12 at 3-23 (1985), this rule is specifically explained as follows:
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> > [W]hen one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his employment, that accident is one 'arising out of' the employment of the person so injured.

Steinberg, 2000 S.D. 36 at ¶ 25.

In this case, it is clear that Tobin's employment placed her in Martha's room where she met with an accident. While the risk of falling is very small, it is a risk that any member of the public would have met with.

In Voeller, the Court favorably and repeatedly cited Logsdon v. ISCO Co., 260 Neb. 624, 618 N.W.2d 667 (2000). In Logsdon, the claimant was injured when he suffered an unexplained fall on the pavement while walking around during his morning break.
The Nebraska Supreme Court found his injury compensable when applying the Positional Risk Doctrine. The Logsdon court stated:

> The commonest example of [a neutral risk where the nature of the cause of harm is unknown] is the unexplained fall in the course of employment. If an employee falls while walking down the sidewalk or across a level factory floor for no discoverable reason, the injury resembles that from ... positional risks in this respect:
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> > The particular injury would not have happened if the employee had not been engaged upon an employment errand at the time. In a pure unexplained-fall case, there is no way in which an award can be justified as a matter of causation theory

> except by a recognition that this but-for reasoning satisfies the "arising" requirement. In appraising the extent to which courts are willing to accept this general but-for theory, then, it is significant to note that most courts confronted with the unexplained-fall problem have seen fit to award compensation. Id., citing 1 Larson & Larson, supra, § 7.04[1] [a] at 7-15. See, e.g., Circle K Store No. 1131 v. Indus. Com'n, 165 Ariz. 91, 796 P.2d 893 (1990); Waller v. Mayfield, 37 Ohio St.3d 118, 524 N.E.2d 458 (1988); Moore v. Darling Store Fixtures, 22 Ark.App. 21, 732 S.W.2d 496 (1987); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Logsdon 618 N.W.2d at 674. (emphasis added)

> Similarly, Professor Larson maintains "the only rule that is consistent with the positional-risk doctrine" is the rule that an unexplained fall, being attributable neither to the employment nor to the claimant personally, is a neutral risk. It is no answer to this to say that the burden is on the claimant to prove his [or her] case. He [or she] has proved his [or her] case when he [or she] proves an injury by accident in the course of employment from a neutral risk-as much so when the neutral risk is an unexplained event as when it is an arrow out of nowhere.

Logsdon at 674.

The Employer and Insurer argue that the Unexplained Fall Doctrine is not applicable here. The Department disagrees. It seems clear that Tobin is unaware of what caused the accident. Tobin testified that she had no idea how she fell. She told Insurer's investigator that, "I simply fell down. The fact that she sometimes told people that she tripped and at other times told people that she lost her balance suggest that she really does not know the precise cause of her fall. Finally, Tobin told a co-worker while waiting for her husband to pick her up and take her to the hospital that "I fell over my own two feet". This is a phrase that is frequently used to explain an otherwise unexplained fall.[1]

Employer and Insurer conceded that the risk here was neutral. Therefore, even if the Department were to find that in her rush to clean the commode and litter box, Tobin failed to set her foot properly and lost her balance (and there are facts to support this finding), the outcome of this case would be the same under the Positional Risk Doctrine. The obligations of Tobin's employment placed her in the particular place at the particular time when she was injured by some neutral force. Voeller at ¶ 10. The injuries Tobin suffered from the fall are compensable.

Employer and Insurer argue that some hazard must exist before an injury is compensable. The Department disagrees. While a hazard may be a factor under the Increased Risk Doctrine it is not under the Positional Risk Doctrine. There was no apparent hazard in the unexplained fall in Logsdon and none is needed here.

The South Dakota Supreme Court justified its rejection of the Increased Risk Doctrine in Steinberg when it stated:

[1] Unless a person is equipped with a third foot, it is literally impossible to trip over one's own "two feet".

> This argument creates a danger of imposing a requirement of fault-finding on the part of an employer. One of the primary purposes of "the South Dakota Worker's Compensation Act is to provide an injured employee with a remedy which is both expeditious and independent of proof of fault." Sowards v. Hills Materials Co., 521 N.W.2d 649, 652 (S.D. 1994) (citing Scissons v. City of Rapid City, 251 N.W.2d 681, 686 (S.D. 1977)) (emphasis added). See also Iddings v. Mee-Lee, 919 P.2d 263, 270 (Haw 1996) (quoting 2 Larson's Workers' Compensation Law § 72.22, at 14-152) (explaining the purpose of employer's immunity from common law actions under workers' compensation scheme is quid pro quo by which the employer gives up normal defenses and assumes automatic liability while the employee gives up the right to common law verdicts). Under the workers' compensation acts, the theory of negligence as the basis of liability is discarded. Keil, 355 N.W.2d at 530. Under the Workmen's Compensation Act, the employee may recover for all injuries arising out of and in the course of employment, regardless of any actionable fault upon the part of the employer.
> Stevenson v. Douros, 58 S.D. 268, 235 N.W. 707, 708 (1931).

Steinberg at ¶ 27.

Conclusion:

Tobin shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Tobin's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Tobin shall submit such stipulation together with an Order consistent with this Decision.

Dated this _10th_ day of April, 2015.

_/s/ Donald W. Hageman___
Donald W. Hageman
Administrative Law Judge