SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

KAREN A. JOHNSON-MCGREGOR A/K/A KAREN A. JOHNSON,

HF No. 154, 2006/07

Claimant,

v.

DECISION

K-MART HOLDING CORPORATION,

Employer,

and

K-MART CORPORATION,

Insurer.

A workers' compensation proceeding was brought in the above-entitled matter, pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held on November 21, 2008 in Sioux Falls, South Dakota, before Catherine Duenwald, Administrative Law Judge for the South Dakota Department of Labor, Division of Labor and Management. Karen A. Johnson-McGregor (Claimant) is the Claimant in this matter. K-Mart Holding Corporation and K-Mart Corporation (Employer/Insurer) are the Employer/Insurer. Appearing as counsel for Claimant was Bram Weidenaar of Hoy Trial Lawyers, LLC. Appearing as counsel for Employer/Insurer was Sandra Hoglund Hanson of Davenport, Evans, Hurwitz & Smith, LLP. Fact witnesses called at hearing were Claimant and Craig Davis.

At issue are: 1) whether Claimant's employment with Employer was and remains a major contributing cause of Claimant's medical condition for which she required treatment and surgery? And 2) whether Claimant gave timely notice to Employer of her injuries?

FACTS

At the time of hearing, Claimant was 46-years old and residing in Valley Springs, South Dakota, a small town outside of Sioux Falls, SD. Claimant has lived in the Sioux Falls area for 15 years. Claimant was first hired by Employer in Sioux Falls in 1994. She started her employment as a cashier. Claimant moved from that position to a day-freight position and then to overnight freight. These job changes were made at her request because of more convenient hours and pay increases. After she worked with overnight freight for seven months, Claimant applied for and was given a job as a department

manager. Employer first assigned Claimant as manager for consumables and then as manager for the receiving department. Claimant was the receiving manager for about four (4) years. Claimant supervised up to 20 people.

Employer has a policy whereby employees injured on the job must report the injury to their supervisor or the personnel office within 24 hours of the occurrence. Claimant was given training on this policy. Claimant had several on-the-job injuries during her tenure with Employer that she reported and for which she received treatment. She sustained work-related injuries to her mid-thoracic back on February 25, 1999 and September 21, 1999. These previous injuries were accepted as compensable by Employer/Insurer. Claimant received chiropractic treatments for these injuries with no permanent disability. Claimant continued to see a chiropractor on an annual basis.

On Friday, January 14, 2005, prior to going to work, Claimant went to her chiropractor, Dr. R.G. Knuth. Claimant reported to Dr. Knuth that she had general complaints of pain in her neck, between the shoulders, and in her low back. Dr. Knuth noted that Claimant's "job may be contributing." Dr. Knuth's notes specify that Claimant's pain was in the "cervical/upper thoracic area of most pain on palpation." Dr. Knuth's opinion was that Claimant suffered a "moderate cervical-thoracic-lumbar strain." Claimant testified that later in the day, on January 14, Claimant injured her neck and spine while unloading a merchandise truck. Claimant testified that she finished her shift and did not work during the weekend.

Claimant spoke with her supervisor on Monday morning, January 17, 2005. She informed him that she "had done something to her neck on Friday" and that she would need a few more chiropractic treatments. Claimant did not tell Employer that she was injured at work or that her pain started at work. A First Report of Injury form was not completed by Employer at that time or requested by Claimant. Employer did not make further inquires about Claimant's medical condition.

Claimant returned to Dr. Knuth one week after the date of the first reported injury. Claimant treated with Dr. Knuth on January 21, 25, February 1 and 18, 2005. Claimant continued to have pain in her neck and upper back. Claimant went to her family practice physician, Dr. Douglas DeHaan on February 9, 2005, for a general physical. Dr. DeHaan recommended physical therapy for Claimant's upper back pain and restricted Claimant's work to half shifts with a lifting restriction of 15 pounds and no lifting above the waist for two weeks. Claimant made a general request to Employer to work half days. Claimant did not explain why she wanted to work half days. Dr. DeHaan also ordered an MRI of Claimant's spine. The MRI, taken March 2, 2005, revealed a disk herniation at spine level C5-6 with no other spinal abnormalities.

On or about February 13 or 14, 2005, Claimant reported to Employer that she had an on-the-job injury on January 14. This was immediately reported to Insurer by Employer. Claimant's supervisor does not recall being informed of the injury prior to February 13 or 14. Employer completed the First Report of Injury form on February 14, 2005.

Dr. DeHaan referred Claimant to Dr. Bryan Wellman, a neurosurgeon, as well as the Sanford Pain Clinic. Dr. DeHaan remarks in his referral letter to Dr. Wellman, dated March 8, 2005, that Claimant "was blaming [her upper shoulder, neck, and back discomfort] on her work activity at K-Mart where she was doing a lot of lifting." He also wrote that Claimant "was denying any numbness or tingling" and that there was "no specific incident of injury." Dr. DeHaan described Claimant as having "some cervical disc disease." Claimant did not see Dr. Wellman until November 21, 2005.

On March 9, 2005, Claimant went to the Sanford Pain Clinic and was seen by Dr. Scott Atchison. Claimant informed Dr. Atchison that while unloading trucks with product weighing 20-30 pounds, she noticed neck pain. Dr. Atchison read the MRI and the records from Dr. DeHaan and diagnosed that Claimant likely was suffering from cervical strain or chronic tension myalgias; that her pain was not caused by any cord compression. Dr. Atchison did note that Claimant had a bulging disc at C5-6, but that it was unlikely that this disc bulge was causing any pain. Dr. Atchison performed the epidural steroid injection on Claimant but warned Claimant that it may not help her symptoms as her symptoms did not correlate with the MRI. Claimant returned to Dr. Atchison on March 23, 2005. Claimant did not receive any benefit from the injection. Dr. Atchison released Claimant to physical therapy for her neck.

Claimant attended six (6) physical therapy sessions between the dates of March 25 and April 14, 2005. Claimant reported to the physical therapist that she had no pain in her neck and shoulders for a majority of the time. Mr. Brian Kittelson, MPT noted in the release report, "[s]he reports occasional catching in the neck with cervical motion, however the symptoms are minimal and brief…. Objectively, she demonstrates full range of motion in the cervical spine in all directions without any pain." Claimant was released from physical therapy on April 14, 2005. After participating in physical therapy, Claimant returned to work on a part-time basis. Eventually, Claimant returned to work full-time without restrictions. Claimant had some residual pain, but was able to control the pain with relaxation techniques. Claimant did not see Dr. Wellman after being referred to him by Dr. DeHaan.

Claimant did not have medical attention again until September 7, 2005 when she saw Beth Amdahl, a physicians' assistant of Dr. Susan Anderson. Claimant was experiencing intermittent symptoms in her back, neck, and shoulders. Dr. Anderson ordered a follow-up MRI which was performed on September 15, 2005. Dr. Thomas Free, DO, the doctor who read the MRI, compared the 2nd MRI with the 1st MRI taken on March 2, 2005. According to Dr. Free, the MRI showed the disk protrusions at C3-4, C4-5, and C5-6 had increased in size due to disk disease and degeneration.

On September 21, 2005, while unloading a truck at work, Claimant was struck on the back of the neck with a 5 pound box of shampoo bottles causing a momentary loss of consciousness. Claimant informed Employer of the injury. Employer filed a First Report of Injury with Insurer on or about the date of the injury. Claimant did not complete the day's work. Claimant returned to Dr. Susan Anderson's physician's

assistant, Beth Amdahl. Claimant was experiencing neck pain and bilateral "tingling" in her fingers. Ms. Amdahl took Claimant off work. A third MRI was taken on October 28, 2005 and compared with the MRI taken in September. Dr. Daniel Crosby, who read the third MRI, wrote in his findings that degenerative changes were seen at C3-4, C4-5, and C5-6 as well as C7-T1, but that there are no significant changes from the previous MRI.

Dr. Anderson's office referred Claimant to Dr. Myung Cho on November 3, 2005. Dr. Myung Cho is certified with the American Board of Physical Medicine and Rehabilitation and the American Board of Medical Acupuncture. She is currently the Medical Director for the Avera McKennan Outpatient Rehabilitation Center and Lymphedema Clinic. Dr. Cho's initial diagnosis was that of chronic myofascial, cervical, and upper back pain with cervical disk disease. Dr. Cho treated Claimant conservatively with physical therapy and Ultram (a pain reliever). Dr. Cho took Claimant off work on November 3, 2005. Dr. Cho referred Claimant to Dr. Wellman, the same neurosurgeon Claimant had been referred to by Dr. DeHaan.

Claimant saw Dr. Wellman on November 21, 2005. Dr. Wellman diagnosed Claimant as having a herniated disk at spine level C5-6, and a small disc bulge at C3-4. Dr. Wellman gave Claimant a 50 percent chance of improvement with surgery due to the mechanism of her injury. After treating conservatively for a couple of months, Claimant decided to have the surgery. Dr. Wellman and Dr. Cho advised Employer/ Insurer that Claimant was going to undergo surgery.

Employer/Insurer scheduled Claimant to see Dr. Stephen Kazi for an independent medical examination (IME). Based upon Dr. Kazi's opinion, Employer/ Insurer did not authorize Dr. Wellman to perform the surgery, in that Employer/Insurer would not pay for the surgery. Dr. Cho continued to treat Claimant and recommend surgery. Dr. Cho advised Claimant to remain off work until after surgery was performed. Dr. Cho provided work restrictions for Claimant in that she could not work above shoulder level, or lift more than 25 pounds and no repetitive pushing or pulling. On July 9, 2007, Dr. Cho gave Claimant an impairment rating of 6% whole person based upon the AMA – Guides to the Evaluation of Permanent Impairment, the 4th Edition. Dr. Cho has not seen Claimant since July 2007.

On November 28, 2007, Dr. Wellman performed a decompression and fusion of spinal level C5-6. This surgery was paid for by Medicaid. Dr. Wellman kept Claimant off work for 6 weeks following the surgery. Claimant did not improve with the surgery. Dr. Wellman released Claimant to work although he recommends that Claimant undergo a C6-7 anterior cervical diskectomy and fusion. Claimant continues to suffer from upper back and neck pain, as well as intermittent headaches and occasional pain from her shoulder down to her fingers.

Claimant eventually took a job with Y's Buys in Sioux Falls. She is currently the store manager and can work within her medical restrictions. Claimant continues to treat her neck pain with pain medication as prescribed by Dr. Susan Anderson.

Further facts will be developed as necessary.

ANALYSIS & DECISION

Whether Claimant's employment with Employer was and remains a major contributing cause of Claimant's medical condition for which she required treatment and surgery?

SDCL §61-1-1(7) requires that an injury be established by medical evidence. The statute reads:

> "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:
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> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
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> (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.
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> (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 established precedent on what must be proven by a claimant to establish a work-related injury.

> To prevail on a workers compensation claim, a claimant must establish a causal connection between [her] injury and [her] employment. That is, the injury must have its origin in the hazard to which the employment exposed the employee while doing [her] work. *Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, 20, 653 NW2d 247, 252 (citation omitted) (alteration in Rawls). Employees need not prove that their employment activity was the proximate, direct, or sole cause of their injury, only that the injury arose out of and in the course of employment. SDCL 62-1-1(7). And, an injury is not compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.] SDCL 62-1-1(7)(a); *Caldwell v. John Morrell & Co.*, 489 NW2d 353, 358 (SD 1992) (citations omitted).

Vollmer v. Wal-Mart Store, Inc., 2007 SD 25, ¶13, 729 NW 2d 377, 382 (footnote omitted).

"The claimant must prove the essential facts by a preponderance of the evidence." *Caldwell v. John Morrell & Co*., 489 NW2d 353, 358 (SD 1992). Claimant must prove that her work-related injuries are a major contributing cause of her medical treatment or current medical condition. Claimant must show by a preponderance of the evidence that her current condition arose out of and in the course of her employment with Employer.

The parties' case must be fully supported by the medical evidence and testimony. "The evidence necessary to support an award must not be speculative, but rather must 'be precise and well supported.'" *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42. "[T]he testimony of medical professionals is crucial in establishing that a claimant's injury is causally related "to the injury complained of 'because the field is one is which [laypersons] ordinarily are unqualified to express an opinion.' Indeed, SDCL 62-1-1(7) requires 'medical evidence.'" *Vollmer* at 382 (internal citations omitted).

Claimant initially treated with Dr. Knuth after the injury in January 2005. The day of that first injury, prior to going to work, Claimant's back and neck were hurting, so she went to the chiropractor. Dr. Knuth, prior to the purported injury, wrote in his notes that Claimant's job may be contributing to her back pain. According to Claimant's testimony, she waited a week before going back to see Dr. Knuth. The notes taken by Dr. Knuth on January 21, 2005 indicate that Claimant reported to him that she improved after the treatment on January 14, 2005.

It is unclear from the evidence and testimony whether Claimant improved after January 14, 2005 or suffered more after being "injured". The testimony seems to be in direct contradiction to the medical records. Claimant testified she was injured on January 14, 2005 but on January 21, 2005 she reported to Dr. Knuth that she felt better after her treatment on January 14, 2005. Claimant did not report any new symptoms or injuries to Dr. Knuth.

After receiving limited value from the chiropractic treatments, Claimant saw her family practitioner, Dr. DeHaan. Similarly, Claimant did not report any specific incident of injury to Dr. DeHaan. Dr. DeHaan reported this to Dr. Wellman in a referral that was written about one month after the First Report of Injury Form was filed by Employer.

Claimant treated at the Sanford Pain Clinic until April 14, 2005. Claimant informed Dr. Atchison that she noticed her neck pain while unloading a truck. Dr. Atchison is the first doctor to note that Claimant specified a work-related incident that caused the pain. Claimant returned to work without restrictions in April 2005. On September 15, 2005, Claimant underwent a second MRI as ordered by Dr. Anderson. The second MRI report indicated that the disc herniation in Claimant's cervical spine had increased in size and that Claimant suffered from degenerative disc disease.

One week after the second MRI was taken, Claimant suffered the second injury.

On September 21, 2005, Claimant was struck on the back of her head and neck with a box of product. Claimant's neck and upper back pain returned. Claimant could not control the pain with previously prescribed treatments. Dr. Anderson referred Claimant to Dr. Myung Cho with the Midwest Pain Rehabilitation Clinic.

Dr. Cho initially saw Claimant on November 3, 2005. Dr. Cho treated Claimant conservatively and then referred Claimant to Dr. Wellman for a neurosurgical evaluation. Claimant first saw neurosurgeon Dr. Bryan Wellman on November 21, 2005. Claimant eventually had the surgery but did not improve.

On February 24, 2006, Claimant was seen by Dr. Stephen Kazi at the request of Employer/Insurer for an IME. Dr. Kazi is board certified in orthopedic surgery and neurologic surgery of the spine. Dr. Kazi examined Claimant and performed a records review of Claimant's medical records. Dr. Kazi's preliminary report was completed on February 24, 2006, and an addendum was completed on April 11, 2007. Dr. Kazi stated with a reasonable degree of medical certainty that Claimant was not injured on either January 14 or September 21, 2005; that Claimant's symptoms from chronic cervical spondylosis and associated degenerative disc disease predated either incident; and that trauma did not contribute to any progression of Claimant's medical condition. The medical records indicated that Claimant had experienced upper back and neck pain intermittently since October 1997, with no record of trauma. Dr. Kazi noted that any pain suffered by intermittent exacerbations and remissions are common in cervical spondylosis. Dr. Kazi also noted that it was his belief that Claimant's symptoms were exaggerated due to the inconsistency of the symptoms with the MRI.

Dr. Kazi's opinion regarding the inconsistency of Claimant's symptoms with the MRI was the same as Dr. Atchison's opinion. Dr. Atchison was reluctant to perform the epidural injection for the same reason.

Dr. Cho, in her deposition of September 18, 2008, gave the opinion, stated with a reasonable degree of medical certainty, that Claimant's herniated disc was not caused by her degenerative disc disease but by the incident at work in January 2005. However, Dr. Cho was also of the belief that Claimant was asymptomatic prior to the incident in January 2005. The chiropractic records clearly show otherwise. Claimant experienced the same type of pain only <u>hours prior</u> to the incident on January 14, 2005.

The Supreme Court wrote, "[t]he value of the opinion of an expert witness is no better than the facts upon which they are based. It cannot rise above its foundation and proves nothing if its factual basis is not true. In other words, medical testimony is only as credible as its foundation." *Byrum v. Dakota Wellness Foundation*, 2002 SD 141, ¶17, 654 NW2d 215, 219 (internal citations omitted). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." *Johnson v. Albertson's*, 2000 SD 47, ¶26, 610 NW2d 449 (internal citations omitted).

Dr. Cho's opinion is only as good as the facts that are given to her. Dr. Cho testified at her deposition that she was unaware that Claimant experienced any neck

and upper back pain prior to the January 14, 2005 incident. The information provided to Dr. Cho was either incorrect or incomplete. The evidence clearly shows Claimant suffered from the same neck and upper back pain prior to January 14, 2005. Dr. Cho's opinion regarding the causation of Claimant's disc herniation can not be considered.

It is Claimant's contention that lifting a box out of a truck on January 14, 2005 caused her disc herniation. Claimant has failed to show, by a preponderance of the evidence that an incident on January 14, 2005 was a major contributing cause of Claimant's back condition and pain symptoms. Claimant has not met her burden of proof that the incident on January 14 was a major contributing cause of her medical condition and cannot recover benefits based upon that injury.

The question then becomes whether the injury on September 21, 2005, contributed independently to Claimant's medical condition. Claimant's pre-existing condition of a herniated disc likely was aggravated when the box fell on the back of her neck. Dr. Cho presented credible testimony to this effect. Dr. Cho testified that Claimant does have degenerative disc disease and a herniated disc, but those conditions, in and of themselves do not cause pain. Dr. Cho opined that Claimant's pain was caused by tightened muscles and that these tightened muscles were caused by acute injury.

Under SDCL 61-1-1(7)(b), "if an injury combines with a non-work-related 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." The pre-existing condition is Claimant's degenerative disc disease. Both experts agree that Claimant likely suffered from degenerative disc disease prior to the injury in January 2005. The evidence fails to show that the disc herniation was caused by employment related activities. The incident in September caused an increase in pain, but the evidence is insufficient to show that the incident in September was a major contributing cause of Claimant's need for treatment and surgery. Claimant had already been treating extensively for this medical condition prior to September. The third MRI taken in October 2005 did not differ greatly from the MRI taken just one month prior. The second injury was not a major contributing cause of Claimant's condition, disability, impairment, or need for treatment.

Claimant has not met her burden of proving that Claimant's employment was a major contributing cause of Claimant's medical condition, disability, impairment, or need for treatment.

Whether Claimant gave timely notice to Employer of her injuries?

SDCL § 62-7-10 regulates the time deadlines for employees to report work-related injuries to employers. The statute is as follows:

> 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
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> (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.

SDCL § 62-7-10. Claimant told her supervisor on Monday, January 17, 2005, that she had gone to the chiropractor and that she needed to see the chiropractor for a few more treatments for her neck. However, Claimant saw the chiropractor before work on Friday, January 14, 2005 and her injury supposedly took place later at work that same day. The next time Claimant went to the chiropractor was the following Friday, January 21, 2005.

Claimant did not testify that she told her supervisor she was injured at work. Claimant testified that she told her supervisor that she had done something to her neck and was going to have to attend more chiropractic treatments. Claimant had a history of chiropractic treatments and work-related injuries. If the injury had occurred at work, Claimant knew she had to report it to Employer. Claimant was a manager and knew the process for reporting a work-related injury. Employer was not put on notice that Claimant may be suffering from a work-related injury.

The South Dakota Supreme Court has provided guidance on the interpretation of SDCL §62-7-10 and how an Employer obtains notification of an injury:

> Notification of an injury, either written or by way of actual knowledge, is a condition precedent to compensation. *Westergren*, 1996 SD 69, ¶17, 549 NW2d at 395. The purpose of the written notice requirement is to give the employer the opportunity to investigate the injury while the facts are accessible. *Id.* at ¶18. 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. *Id.*
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> In determining actual knowledge, the employee must prove that the employer had sufficient knowledge to indicate the possibility of a compensable injury. *Shykes v. Rapid City Hilton Inn,* 2000 SD 123, 36, 616 NW2d 493, 501 (quoting *Streyle v. Steiner Corp.*, 345 NW2d 865, 866

> (SD 1984)). The employee must also prove that the employer had sufficient knowledge that the injury was sustained *as a result of [his] employment* versus a pre-existing injury from a prior employment. *Id.* (emphasis original). In other words, to satisfy the actual knowledge notice requirement, the employer: 1) must have sufficient knowledge of the possibility of a compensable injury, and 2) must have sufficient knowledge that the possible injury was related to employment with the employer.

Orth v. Stoebner & Permann Construction, Inc, 724 NW2d 586, 597-598 (S.D. 2006).

There is no indication that Employer had sufficient knowledge that Claimant was suffering from a work-related injury. Claimant's observation that Claimant had "done something to her neck" is not sufficient to put Employer on notice that Claimant's "something" had happened at work or was work-related. Claimant has not met her burden of showing that Employer had actual knowledge of the injury or has met the *Orth* test of sufficiency.

SDCL 61-7-10(2) also allows a claimant to fail to give actual notice within three days if the claimant has "good cause" for failing to give notice. Claimant has not argued that "good cause" exists for her not to give notice. Claimant argues that she was injured when she picked up a box and immediately felt pain in her back and neck. Claimant has not made any argument that she had good cause for not reporting her injury.

Claimant failed to give timely notice to Employer, pursuant to SDCL §62-7-10, regarding her injury of January 14, 2005. Claimant gave Employer timely notice of her injury of September 21, 2005.

Counsel for Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Claimant shall have an additional 20 days from the date of receipt of Employer/Insurer proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this 26th day of March, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Catherine Duenwald
Administrative Law Judge