SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
WORKERS' COMPENSATION

KARIE CALLAWAY,
Claimant,

vs.

BESHARA ENTERPRISES, INC,
d/b/a PIRATES TABLE,
Employer,

and

MIDWEST FAMILY MUTUAL INSURANCE,
Insurer.

HF NO. 174, 2005/2006

DECISION

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 8, 2008. Attorney Jason Groves of Groves Law Office, represents Claimant, Karie Callaway (Claimant). Attorney Daniel E. Ashmore of Gunderson, Palmer, Nelson and Ashmore, LLP, represents Employer, Beshara Enterprises, Inc. and Insurer, Midwest Family Mutual Insurance (Employer/Insurer).

ISSUES:

(1) Whether Claimant suffered a work-related injury?

(2) Whether Employer received timely notice of an injury?

(3) Whether Claimant's work-related injury is compensable?

(4) Whether Insurer has shown the recommended surgery is not reasonable and necessary?

This case requires Claimant to prove that she sustained a work-related injury, that she informed Employer in a timely manner, and that this injury is compensable. Whereas, Employer/Insurer has the burden of proving that the recommended surgery is not reasonable or compensable.

ISSUE ONE: Whether Claimant suffered a work-related injury?

The first issue is whether Claimant suffered a work-related injury. The SD Supreme Court, in the recent case of *Gerlach v. State*, 2008 SD 25, has summarized the requirements under the law necessary for a Claimant to sustain a claim for workers' compensation benefits:

> When applying for workers compensation benefits [Claimant] bears the burden of proving a causal connection between his condition and his work-related injury. *Wise v. Brooks Constr. Serv.,* 2006 SD 80, 21, 721 NW2d 461, 468. SDCL 62-1-1(7) provides that a compensable injury must be established by medical evidence, and that [n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of. Whether [Claimant's] employment was a major contributing cause of his condition is necessarily a question of fact.
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> > In applying the statute, we have held a workers 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 his 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.
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> *Wise*, 2006 SD 80, 21, 721 NW2d at 468 (internal citations omitted).

Gerlach, 2008 SD 28, ¶7.

Claimant must prove the essential facts by a preponderance of the evidence. *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 358 (S.D. 1992). 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. The South Dakota Supreme Court has long held, that to prove causation:

> [T]he 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 Const., Inc., 724 NW2d 586, 593 (S.D. 2006) (citations omitted).

Claimant is a 45 year-old female who was employed for Employer as a waitress for approximately four years until July 11, 2005. Claimant's work for Employer required her to lift and carry heavy trays of food. Claimant worked from 4:15 to 9:30 or 10 pm on July 6,

2005. Claimant was next scheduled to work on July 9, 2005. Claimant worked her full shift on July 9. On July 11, 2005, Claimant told her manager, Teresa Grant, that she was in pain. Claimant completed her shift on July 11.

Claimant alleges that on July 6, 2005, at approximately 7:30 pm, she set a tray, loaded with plates of food, onto a tray jack when she felt a “pop” or a “pull” in her neck down into her shoulder. During a sworn deposition on September 5, 2006, Claimant testified that a few minutes later, she sat down at the waitress station. She further testified that on July 6, she told Ms. Grant that she had pulled something in her neck.

On August 8, 2005, about one month after the alleged incident, when being questioned by an insurance investigator, Claimant said that she told Ms. Grant on Saturday, July 9, that her neck and back hurt. During this interview Claimant did not tell the insurance investigator that she had sat down after the incident or had informed any other co-workers.

Ms. Grant testified at the hearing that on July 6, Claimant could not have sat down in her waitress station, as there is no place to sit. Ms. Grant also testified that Claimant did not tell Ms. Grant on July 6, that she had injured herself. The testimony indicates that for Claimant to have sat down at a waitress station, she would have had to sit at a station other than her assigned station. It would have been very noticeable and uncommon for Claimant to sit down while at work at another station. Ms. Grant, who gave credible testimony, did not recall that on July 6 Claimant had either sat down while at work or had indicated to Ms. Grant that she was injured or hurting. The other waitress working on July 6 was not listed by Claimant as a witness to the injury.

Claimant saw chiropractor Dr. Gregory Scherr, on July 13, 2005. Claimant complained of pain in the muscles of the posterior neck and upper back. Claimant did not relate to Dr. Scherr that she received a specific injury at work. She informed Dr. Scherr that her job involved lifting and carrying heavy trays. Claimant demonstrated to Dr. Scherr how she carried trays at work. Claimant told Dr. Scherr that her pain started the previous Friday (July 8) and worsened until Claimant saw Dr. Scherr. Claimant did not work at Employer’s restaurant on Friday, July 8.

Dr. Scherr and Claimant listed employment as the cause of her pain, as Claimant had no other specific injury or explanation for the pain. Claimant saw Dr. Scherr on a regular basis until July 26, 2005. On July 20, Dr. Scherr instructed Claimant to fill out a first report of injury form for Employer. Claimant spoke with Employer about filling out a first report of injury form. Employer told Claimant that she could fill out a form, but that the insurance company might not accept the claim as compensable, as it was beyond the three day time limit.

Claimant filled out a first report of injury form on July 24. The report was given to Employer on July 26. She reported that she informed Employer about the injury on Saturday, July 9 and Monday, July 11. She reported that the witnesses to the incident were Carmen, Jill and Steven. Claimant testified that these three witnesses were present at the restaurant on July 6 and knew about her injury. Ms. Grant testified and presented evidence that supported the fact that on July 6, the staff at work were Claimant, JJ, Carmen, Sarah, and

Travis. Steven and Jill were not working on July 6 and could not have witnessed the incident that Claimant described.

Dr. Scherr ordered an MRI of Claimant's cervical spine, which was performed on July 26, 2005. The MRI showed a C4-5 mild anterior disc protrusion and a C6-7 posterior disc protrusion of approximately 2 millimeters with signs of anterior endplate spondylosis. Dr. Scherr referred Claimant to a surgeon, Dr. Tim Watt, for further diagnosis and treatment.

Dr. Scherr is of the opinion that Claimant received a permanent partial impairment from an acute injury. Dr. Scherr speculated to the manner in which Claimant set a tray down while at work, based upon his experience watching and treating wait staff. It is his speculation that Claimant set down a heavy tray in an improper manner and ruptured her disc at C6-7. This opinion on causation is based upon Claimant's report to him. Claimant did not report to Dr. Scherr that she set down a tray wrong and felt a "pop" in her back or a muscle "pull" between her shoulders. Claimant reported to Dr. Scherr that she worked as a waitress and regularly lifted and carried heavy trays.

On August 22, 2005, Claimant wrote to the surgeon Dr. Watt inquiring about the causation of her herniation. Dr. Watt wrote to Claimant on August 25 and explained, "[m]ost people who have a herniated disc do not have any specific problem that caused it, it simply occurs. That of course does not mean that your work injury did not have a causal relationship. However, it is not necessary to have an obvious injury in order for a disc to herniate."

An orthopedic surgeon, Dr. Michael D. Smith, was secured by Employer/Insurer in January 2007, to perform an independent medical exam on Claimant. Dr. Smith concluded that Claimant suffered from 1) mild age-related cervical degenerative disc disease and 2) diffuse arthralgias of uncertain etiology. Dr. Smith further opined that Claimant did not suffer an objective injury on July 6, 2005 and that there are no underlying radiological or consistent clinical findings that support an anatomical diagnosis. Dr. Smith's opinion contradicts the findings of Dr. Watt in that Claimant's back pain (arthralgia) is caused by specific radiological findings.

Dr. David Symonds, a neuroradiologist, performed a review of the MRI films taken on July 26, 2005 and March 22, 2007. Dr. Symonds found a minimal disc bulge at C4-5 and a mild disc bulge at C6-7 with small anterior and posterior osteophytes. He further found that the osteophytes had increased slightly from 2005 to 2007 and the intervertebral foramina had narrowed at C6-7 bilaterally. Dr. Symonds is of the opinion that the presence of osteophytes at C6-7 indicates the disc bulge was preexisting rather than occurring from an acute injury.

Dr. Watt's opinion on causation was that the herniation could have happened at work or at home and could have been caused by an acute injury, but that sometimes there is no cause for a herniation. Dr. Smith does not believe the herniation was caused by an acute injury. Dr. Scherr's opinion on causation is based upon the statements made by Claimant and by speculating as to the methodology of Claimant's lifting and setting down trays. Dr. Symonds clearly states that the osteophytes are an indicator of a pre-existing condition.

Claimant told Dr. Scherr that her pain started on Friday, July 8, not Wednesday, July 6. Claimant did not report a specific injury or incident to Dr. Scherr, only that she performs heavy lifting and carrying at work. Dr. Scherr speculated as to how Claimant set her tray down on a tray jack and that her continued heavy lifting caused the herniation.

Claimant's narrative of the incident changed from August 8, 2005 to the time of her deposition on September 5, 2006, and both narratives are different from what was initially told to the treating physician. The evidence presented by Claimant fails to meet the criteria of *Horn v. Dakota Pork*, 2006 SD 5, 14, 709 NW2d 38, 42. The evidence presented by Claimant has not been supported and is not precise and is speculative on the part of Dr. Scherr. Claimant's injury is not a work-related injury under SDCL § 62-1-1(7).

Causation must be proven by Claimant before benefits are awarded. However, the Department gives the analysis and ruling on the remaining issues brought forward in this case.

ISSUE TWO: Whether Employer received timely notice of an injury?

The second issue that Claimant must prove is that she notified her employer of her injuries in a timely manner. 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:
> (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.

SDCL § 62-7-10.

The South Dakota Supreme Court has clarified this law and the test created within the law. In *Orth v. Stoebner & Permann Construction, Inc*., supra, the South Dakota Supreme Court overruled the Circuit Court that decided the employer had not received actual notice of the injury from the claimant. *Orth* at ¶ 63. The question of notice is the threshold question in a workers' compensation case. *Orth* at ¶55. To this end, the Court wrote:

> 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 at ¶ 52-53.

On July 11, Claimant told Employer that her back and neck hurt and that she did not know the cause. Claimant did not tell Employer that she suffered an injury at work or that the pain started while at work. Claimant expected the pain to be alleviated after a chiropractic treatment. Claimant went to the chiropractor, Dr. Scherr, on July 13. On July 13, Dr. Scherr gave Claimant a medical release to be off work through July 15. Claimant returned to the chiropractor's office the next few days, July 14, 15, 16, and 18. On July 15, Dr. Scherr gave Claimant another medical release to be off work until July 18. On July 18, Dr. Scherr issued a medical release for Claimant to be off work until further notice. Claimant did not return to work for Employer.

When Employer found out about Claimant's pain on July 11, Employer did not question the source of Claimant's pain. In past years, Claimant had made other complaints of pain to Employer. In July 2002, Claimant's doctor diagnosed Claimant with fibromyalgia. At that time, Claimant had various complaints of pain throughout her body, including her shoulders, her upper and lower back. Employer knew about Claimant's fibromyalgia diagnosis.

Claimant continued to see Dr. Scherr on a regular basis until July 26. At that time, Dr. Scherr referred Claimant to a surgeon, Dr. Watt. Dr. Scherr suggested to Claimant that she make a first report of injury to Employer. Claimant did not tell Employer that she received an injury at work, prior to being referred to a surgeon. Claimant filled out a first report of injury form after being instructed to by Dr. Scherr. Claimant submitted the first report of injury to Employer on July 26.

In July 2005, Employer did not have policy regarding injuries at work. Employer did not instruct their employees to inform Employer immediately if they are injured at work. The first report of injury forms were kept by the owner, Jim Beshara, in his office. No one else had access to these forms. During the last week of July, Claimant spoke with Jim Beshara about filling out a first report of injury form. Mr. Beshara, in his deposition testimony, said that he told Claimant to fill out a form, but that since it was after three days, the insurance company may not respond favorably. At that time, Mr. Beshara had not yet been informed or had actual knowledge that Claimant was injured at work.

In *Kuhle v. Lecy Chiropractic*, 2006 SD 16, 711 NW2d 244, the South Dakota Supreme Court upheld a decision denying workers compensation benefits to a chiropractic assistant who should have known the seriousness of her injury, based upon her education and experience.

> Claimant carries the burden of proving that he or she provided timely notice to the employer, or that either (1) the employer had actual notice, or (2) that good cause exists 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; *Clausen*, 2003 SD 63, ¶8, 663 NW2d at 687 (citing *Miller v. Lake Area Hospital*, 1996 SD 89, ¶11, 551 NW2d 817, 819). However, it is well settled that "the time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of [the] injury or disease." *Clausen*, 2003 SD 63, ¶13, 663 NW2d at 689 (quoting 2B Arthur Larson, Larson's Workmen's Compensation Law, § 78.41(a) at 15-185-6 (1995)). Whether the conduct in question was reasonable is based on the claimant's education and intelligence, not on the hypothetical reasonable person familiar to tort law. *Shykes*, 2000 SD 123, ¶42, 616 NW2d 493, 502. However, the standard creates an objective, not subjective test. Id. ¶43 ("The standard is based on an objective reasonable person with the same education and intelligence as the claimant's.")

Kuhle v. Lecy Chiropractic, 2006 SD 16 ¶18, 711 NW2d 244, 247-248 (2006).

Kuhle followed the reasoning issued earlier in *Bearshield v. City of Gregory*, 278 N.W.2d 164 (SD 1979). In that leading case, the South Dakota Supreme Court reasoned:

> [T]he fact that [employee] suffered from pain and other symptoms is not the determinative factor and will not support a determination that [employee] had knowledge of the existence or extent of his injury. A claimant cannot be expected to be a diagnostician and, while he or she may be aware of a problem, until he or she is aware that the problem is a compensable injury, the statute of limitations does not begin to run.

Id. at 166.

At the time that Claimant informed Employer of her injury, Claimant had just become aware of the extent of the injury, and that she needed an MRI and possibly surgery. Claimant is not a diagnostician, nor is she expected to be one. The Supreme Court is clear in their rulings regarding the three-day notice to employers. SDCL § 62-7-10 requires the liberal construction of the determination of good cause. Such construction results in the conclusion that Claimant had good cause for not reporting her injury to Employer three-days after the purported injury of July 6, 2005, as required by statute. Claimant has met her burden of proof under SDCL § 62-7-10.

ISSUE THREE: Whether Claimant's work-related injury is compensable?

The third issue requires Claimant to show that her injury is compensable under SDCL § 62-1-1(7). The evidence presented by Claimant fails to show the disc herniation is causally related to her work with Employer. Claimant's employment or employment related activities have not been shown to be a major contributing cause of Claimant's back injury and therefore her injury is not compensable.

ISSUE FOUR: Whether Insurer has shown the recommended surgery is not reasonable and necessary?

The law requires Employer/Insurer to provide necessary medical and surgical treatment. SDCL 62-4-1. The South Dakota Supreme Court has clarified the burden of showing reasonable and necessary medical expenses. "It is in the doctor's province to determine what is necessary or suitable and proper. *When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.*" *Engel v. Prostrollo Motors*, 2003 SD 2, ¶ 32, 656 NW2d 299, 304 (SD 2003) (quoting *Krier v. John Morrell & Co.*, 473 NW2d 496, 498 (SD 1991) (emphasis in original).

Dr. Scherr, the chiropractor, referred Claimant to Dr. Watt, the orthopedic surgeon. Dr. Watt examined Claimant on August 1, 2005. He reviewed the file from Dr. Scherr including the MRI. Dr. Watt found that there are minimal degenerative changes throughout. He also found a "broad based protrusion at C6-7 and denting into the thecal sac without frank cord compression." He found that this protrusion explains some biforaminal narrowing. He also found no acute bony abnormalities.

During the physical exam, Dr. Watt noted that Claimant had a positive Tinel's sign on her left wrist and that she had a "mild but definite weakness of tricep strength on the left." Dr. Watt's diagnosis was that Claimant has a herniated disc at C6-7 with foraminal involvement and possible carpal tunnel syndrome. Dr. Watt recommended an anterior cervical discectomy and fusion of the C6-7.

On March 22, 2007, an updated MRI of the cervical spine was ordered by Dr. Watt. On March 26, 2007, Dr. Watt saw Claimant again to see if her condition had changed. Claimant had not had the surgery recommended by Dr. Watt. The repeated MRI confirmed

the herniated disc at C6-7 with no obvious improvement in Claimant's condition. Dr. Watt still recommends a discectomy and fusion at C6-7.

Employer/Insurer secured Dr. Michael Smith to perform an independent medical exam of Claimant. Dr. Smith's orthopedic surgery practice concentrates on the cervical spine. Since 1999, Dr. Smith has performed approximately 2,000 cervical spine surgeries. Only 2% of Dr. Smith's practice is performing independent medical exams. Dr. Smith reviewed Claimant's records, including her psychiatric records, MRI scans, EMG, and written reports from her other doctors. Dr. Smith made a report on January 23, 2007 and updated the report on May 17, 2007. Dr. Smith concluded that Claimant has degenerative disc disease. "She has documented changes and she had clinical complaints at least five years predating the alleged work injury in question…. She has demonstrated progressive degenerative changes based on longitudinal review of the two MRI scans."

On January 18, 2007, Dr. Michael Smith performed an independent medical exam of Claimant. He concluded that the incident of July 6, 2005, reported by Claimant, did not cause an acute injury. In January 2007, Claimant reported dull suboccipital neck pain and occasional radiating shoulder pain. The pain in Claimant's shoulders migrated from the right side to the left side. Dr. Smith wrote, in his exam notes, that "the disc was basically normal at C6-7. There were degenerative changes with a minimal disc protrusion without spinal cord or nerve root compression." Dr. Smith did not find any muscular atrophy of Claimant's upper extremity or fasciculations. Furthermore, Dr. Smith found the EMG (electromyograph) was not positive for radiculopathy, as one would expect in a case of a disc herniation. Dr. Smith did not see or quantify the tricep weakness found by Dr. Watt on prior occasions. Dr. Smith's impression was that Claimant suffers from "mild age-related cervical degenerative disc disease" and a "diffuse arthralgia of uncertain etiology." Dr. Smith noted Claimant had minor degenerative bone spurs projecting into the spinal canal. He explained that these bone spurs take up some of the room in the spinal canal causing the disc to slightly bulge out of the canal. Dr. Smith found no evidence of spinal cord or nerve root compression that would cause pain.

The indications of herniation that require surgical intervention, according to Dr. Smith, are pain, numbness, tingling and weakness, usually due to compression of the spinal cord or nerve root from disc material. The herniation suffered by Claimant does not show an impingement of the spinal cord or nerve root. Dr. Smith would not recommend surgery or cervical fusion to Claimant to alleviate her pain.

Dr. Smith attributes Claimant's pain to something other than the disc herniation. Claimant reported neck and shoulder pain in 2002, about the same time as her diagnosis of depression and fibromyalgia. Dr. Smith is of the belief that Claimant's fibromyalgia may be the source of Claimant's pain and not the back injury. Claimant's migratory pain symptoms, swelling of her hands, the pulling sensation in both arms behind the elbow along with headaches are consistent with a diagnosis of fibromyalgia.

Dr. Smith's opinion is adopted as more persuasive than Dr. Watt's. Employer/Insurer has demonstrated that Dr. Smith is an expert in the field of cervical surgery. Dr. Watt is a qualified neurosurgeon and has a different opinion than Dr. Smith. However, Dr. Smith's

specialty is the cervical spine. Dr. Smith thoroughly examined Claimant and read the scans and tests necessary to make a learned opinion. Dr. Smith explained the symptoms and signs of why someone would benefit from a fusion surgery. Dr. Smith also contrasted that with Claimant's physiological symptoms and explained why she is not a candidate for cervical fusion. Employer/Insurer has proven by a preponderance of the evidence that the anterior cervical discectomy and fusion surgery, recommended by Dr. Watt, is not reasonable or necessary.

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. Counsel for Claimant shall have an additional 20 days from the date of receipt of Employer/Insurer's 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 8th day of August, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Catherine Duenwald
Administrative Law Judge