0SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

BARBARA A. EKEREN, **HF No. 30, 2007/08**

Claimant,

v. **DECISION**

MERILLAT INDUSTRIES,

Employer,

and

TRAVELERS INSURANCE,

Insurer.

This is a Workers' Compensation case brought before the South Dakota Department of Labor, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The matter was heard by Donald W. Hageman, Administrative Law Judge, on June 23, 2009, at Rapid City, South Dakota. Dennis Finch appeared on behalf of Barbara A. Ekeren (Claimant) and Michael McKnight appeared on behalf of Merillat Industries and Travelers Insurance (Employer and Insurer).

ISSUES:

False representation of employee's physical condition. SDCL 62-4-46.

Causation. SDCL 62-1-1(7).

FACTS:

Based upon the hearing testimony, exhibits and medical records, the following facts are found by a preponderance of the evidence:

1. At the time of hearing, Claimant was 43 years of age.

2. Claimant graduated from the South Dakota School of Mines with a BS Degree in Chemical Engineering.

3. Before working for Employer, Claimant had suffered from some back problems. However, Claimant had never injured her back while working at any of her

previous jobs nor had she ever injured her back in a car accident or a fall prior to going to work at Employer.

4. On June 21, 2004. Claimant felt a pain in her back at home when she stood up from the table.

5. Claimant saw a chiropractor at Alternative Health in 1998 and early in 1999 a few times for some soreness and pain in her low back.

6. Claimant did not have any problems with her back between February, 1999 and June of 2004.

7. Claimant first went to Dr. Jeff Burns, a Rapid City chiropractor on June 28, 2004 because she started to experience some stiffness and pain in her lower back. The pain in Claimant's low back came on as she stood up from a table. She had not done anything physical nor had she lifted anything.

8. On June 28, 2004, Claimant completed an intake form at Dr. Burn's office. She did not check any of the boxes in the "reason for today's visit" question because she did not think they really referred to what she had going on.

9. In another question on Dr. Bur's intake form, it asked where the "injury" occurred and given the choices, Claimant checked the one that said "routine/household activity" because it was the answer which came close-set to her situation.

10. Another question of Dr. Burn's intake form asked "when did the condition/accident occur" Claimant filled in the date of June 21, 2004.

11. Claimant saw Dr. Burns a few times between June 28 and September 14 of 2004. During that time, she continued to work at her previous job without restrictions.

12. Dr. Burns testified during his deposition that Claimant suffered an "acute injury".

13. Claimant applied for work with Employer on September 29, 2005 and they called her for an interview. At the time of her job interview, Claimant filled out a job application.

14. On the 13th or 14th of October, 2005, Claimant was called in by Employer and given a tour of the facility. At that time, Employer offered the job to Claimant. Claimant started working for Employer on October 17, 2005.

15. After Claimant had been on the job for two or three days, she was asked to complete a questionnaire by Employer. Claimant was not required to take a physical before starting work.

16. Question # 15 of Employer's questionnaire states: "Have you ever suffered or do you currently suffer from a back injury". Claimant answered "no" to this question.

17. Claimant testified at the hearing that she did not believe that she ever sustained any kind of back "injury", as she understood that term, prior to going to work at Employer. Claimant's testimony was credible.

18. From September 14, 2004 until January of 2006, Claimant did not see any doctors for reasons related to her back. Claimant was not having any problems with her back at the time she applied for work with Employer.

19. Claimant returned to Dr. Burns in January of 2006 for a back treatment.

20. In March of 2006, six months after Claimant started working for Employer, she went to her regular physician, Dr. Egon F. Dzintars for a routine exam. Claimant complained to him about some pain in her back so he referred her to Dr. Brett Lawlor and she started treating with him in the spring of 2006 with facet joint injections and some physical therapy.

21. Dr. Brett Lawlor, a board certified physiatrist in Rapid City. Dr. Lawlor first saw Claimant on April 11, 2006. At that first visit, it was Dr. Lawlor's impression that Claimant had SI dysfunction as a primary source of pain and may have had some L5-S1 facet pain as well along with myofacial pain in her neck and acromioclavicular joint pain in the left shoulder. He recommended physical therapy, electric stimulator, Lidocaine and a non steroidal anti-inflammatory.

22. Dr. Lawlor saw Claimant again approximately a month after her first appointment. Claimant was approximately 25% improved after having been in physical therapy. He found that Claimant still had tenderness in the left lower lumbar region and tenderness over the left AC joint but she had not had the electrical stimulator unit that he had ordered so he reordered that and asked for some specific therapy to be done in the S1 and facet region. He also discussed with Claimant that if she was not at least 50% better on follow up that they should consider injections.

23. Dr. Lawlor's records reflect that on May 25, 2006, he gave Claimant facet joint injections.

24. Dr. Lawlor saw Claimant on June 12, 2006. At that time, Claimant reported a 100% relief of her pain for three days and then about six days later her pain became significantly worse. Dr. Lawlor then decided that since Claimant had such a profound, albeit short term relief from the injections, he repeated the injections to see if she could achieve a more long-term benefit from them.

25. Dr. Lawlor repeated the injections on June 13, 2006.

26. On June 20, 2006, while working on an edge bander with a co-worker, Claimant was involved in an accident when a number of boards fell off and landed on the inside of Claimant's right ankle pinning her foot onto the floor after which a stack of 34 boards fell against her leg in a domino effect.

27. After the boards fell against her leg, Claimant could not move either way even though the momentum of the boards was trying to push her. As a consequence, Claimant's back and knee were twisted.

28. Claimant timely notified Employer of the injury which occurred on June 20, 2006. A first report of the incident including a detailed statement by Claimant was completed.

29. Claimant continued to work after the board accident with the aid of a lot of Ibuprofen.

30. Claimant saw Dr. Lawlor on June 26, 2006 about 5 days after the board accident. Dr. Lawlor indicated that it was 13 days out from her previous injections and Claimant noted a 100% improvement but then was involved in an incident at work were a pile of wood fell on her right foot causing her to twist her knee and low back. He recommended that she continue with physical therapy and that if her knee and ankle continued to be a problem she should report to her employer and they would follow up in a month.

31. Dr. Lawlor changed his course of treatment on Claimant's back after the board accident on June 20, 2006. Prior to that accident, Claimant was receiving facet injections on one side of her back. After the incident, Dr. Lawlor began facet Injections on both sides of her back. Dr. Lawlor also administering an epidural and changed some of the physical therapy.

32. Before the board accident, Claimant's back pain was centered on where it got stiff. After the accident, the pain went all the way across the lower part of her back. After the accident, the pain became constant, waking her up at night. After the accident, the bottoms of Claimant's feet get numb when she sits which did not happen prior to the accident.

33. Claimant called Julie Smith in Human Resources for Employer and was referred to Dr. Wayne Anderson. Claimant went to Dr. Anderson on June 27, 2006 and since that time. Dr. Anderson and Dr. Lawlor have been Claimant's primary treating doctors along with Dr. Clark Duchene regarding her knee problems.

34. Dr. Anderson has been practicing as a physician since 1981 and regularly testifies in worker's compensation cases. He has also served as a medical advisor to Employer and has been in their plant. Dr. Anderson has performed a number of IMEs over the years at the request of Employer.

35. When Dr. Anderson first examined Claimant on June 27, 2006, he found that she was tender above her right ankle and there was an error of discoloration and bruising on the inside of her leg. He also found swelling in that area and pain with direct pressure over the area of apparent contact where he observed the bruising and swelling. He also examined her knee which had some swelling and some fluid within her knee joint as well some pain in the back of her knee. He felt that she had some positive signs of a meniscus tear on exam. He explained that positive signs of meniscus tear meant that is that there was some popping when he was holding her leg, twisting her foot and moving her leg up and down in various positions. Dr. Anderson's diagnosis on that first visit was that Claimant suffered a contusion to her right ankle, a strain of her right knee with possible posterior meniscus tear and left SI facet pain currently being treated by Dr. Lawlor.

36. Doug Olson, Safety Director for Employer was in the plant at the time of Claimant's accident. He also received copies of Dr. Anderson's initial visit notes in which Dr. Anderson referred to the fact that Claimant had previous back problems. Dr. Anderson's' notes also indicated Claimant had been in physical therapy since April and had seen Dr. Burns, for her back.

37. Doug Olson testified at the hearing that question # 15 of Employer's questionnaire is used for job placement. If Employer learns that an employee has a history of back problems , Employer will place them in the Finishing Department where less physical work is required

38. After Mr. Olson received the initial notes from Dr. Anderson, Employer and Insurer continued to pay benefits through February of 2007.

39. Claimant went back to work for Employer after her first visit with Dr. Anderson. However, Dr. Anderson put her on restrictions of 4 hours a shift and no more than 3 days a week with no heavy lifting and minimum bending.

40. Claimant had a follow up appointment with Dr. Lawlor on July 11, 2006. Claimant reported that her back pain had now gone from just the left side to where it was on both sides. Claimant was also reporting clicking and locking of her knee. Dr. Lawlor recommended an MRI of the knee to look for a meniscus tear and scheduled her for repeat injections on July 25, 2006.

41. Dr. Anderson saw Claimant again on July 13, 2006 primarily for her right knee. He found that Claimant had one plus effusion which is more fluid than he had found in her right knee on his prior visit. He again thought she might have a meniscal tear of her right knee and thought she needed an MRI. Dr. Anderson's notes indicated that he was sending copies of his notes to Doug Olson at Merillat.

42. Dr. Anderson saw Claimant again on July 21, 2006 and noted that her knee was bothering her significantly but that an MRI had not yet been authorized. He further found that Claimant continued to have locking, swelling and pain in her knee so he took her off work at that time until an MRI could be performed.

43. Dr. Lawlor next saw Claimant on August 2, 2006. At that time, Claimant indicated that she was continuing to have difficulty with buckling in the knee and had an episode of going down some stairs where her knee buckled causing her to fall. Dr. Lawlor stated that based upon his experience MRI's are fairly notorious for missing meniscus tears. He felt that Claimant should see Dr. Duchene, an orthopedic surgeon who specialized in knee problems.

44. Dr. Anderson again saw Claimant on August 3, 2006 and noted that she had an appointment with Dr. Duchene, an orthopedic surgeon and he agreed that she needed to see an orthopedic surgeon.

45. Dr. Lawlor's medical records indicate that Claimant came in for a follow up on August 11, 2006 and she was having increasing problems with tingling and numbness in her feet, which was not something she had previously, so he recommended an MRI of her lumbar spine.

46. On August 11, 2006, Dr. Anderson signed off on a form for Doug Olson allowing Claimant to perform a job dealing with raw materials.

47. Claimant returned to see Dr. Anderson on August 22, 2006. At that time, Claimants knee was about the same as it had been.

48. Dr. Anderson received a letter dated August 29, 2006 from Christie McCoy, Insurer's Claim Representative, indicating that she was authorizing him to become Claimant's treating physician. He also received a letter from Ms. McCoy asking whether he thought that Claimant could work in a light duty job that was available to her. Dr. Anderson said "no." He explained that her knee pain and the locking and swelling in her knee prohibited her from working

49. On August 29, 2006, Dr. Anderson indicated that Claimant was following up on her knee pain but that she would also like him to treat her back. He then began seeing her for both the problems with her knee and her back.

50. By August 29, 2006, Claimant underwent an MRI on her knee and Dr. Kadrmas told her that she did not need surgery.

51. On August 29, 2006, Dr. Anderson assessed Claimant's back condition and noted that she had left hip SI paraformus (SIC) pain prior to her accident at work and she currently had low back pain going down her left lower extremity. He noted that she got occasional tingling at the bottom of her feet, used a Tens Unit and took anti-inflamatories and that an MRI of her back was pending. After

assessing Claimant's knee, Dr. Anderson concluded that her right knee had a small effusion or swelling, she had negative straight leg raising, normal reflexes, normal strength, good range of motion but some decrease in sensation following a S1 dermatome and that extension caused her pain.

52. On August 29, 2006, Dr. Anderson indicated that he released Claimant to work at the raw materials job with Employer which he understood to be calculating the percentage of the wood and bark in quality control and she had been performing those duties since August 14, 2006.

53. An MRI was done on September 5, 2006 and the radiologist made a finding that there was an annular tear at L5-S1 with a disc protrusion.

54. Dr. Lawlor's changed his diagnosis based on the finding of the September 5, 2006 MRI. He felt at that point he was dealing with discogenic pain and potentially a chemical radiculitis as a consequence of the annual tear at L5-S1. He then talked to Claimant about doing an epidural injection to put some steroid up around the disc and around the nerves in the lower lumbar spine.

55. Dr. Lawlor explained the difference between discogenetic pain and the facet joint pain that he had been dealing with earlier by stating that the facet joints and SI joints were joints between the vertebrae and discogenic pain was pain coming from the shock absorber between the vertebrae that is not a joint but a disc and it has a ball of jelly in the center that is made up of irritating chemicals and a tear in the disc can cause those chemicals to leak out and inflame the nerves.

56. Dr. Lawlor opinioned that he was now dealing with the disc pain as the primary source of her symptoms. He also explained that the cause of the probable chemical radiculitis was a leaking of the disc material from the tear.

57. Dr. Anderson next saw Claimant on September 12, 2006 and noted that she had completed the MRI on her back and that they found an annular tear at L5-S1 with some protrusion that may have been putting some pressure on the S1 nerve root and he felt that she needed an epidural steroid injection so he sent her back to Dr. Lawlor.

58. On September 26, 2006, Dr. Anderson saw Claimant again and she was still in physical therapy for her knee. He noted that Claimant was seeing Dr. Lawlor for an epidural steroid injection and that was different than the facet injections that she had been receiving earlier. Dr. Anderson explained that the previous injections were performed in the back of her spine where the facet joints and the sacroiliac joints were located but an epidural steroid is injected in the epidural space to calm down inflammation that comes along with annular tears or disc herniations.

59. Dr. Lawlor performed an epidural injection on September 27, 2006. That was the last time he saw Claimant. After that date, Dr. Anderson coordinated all Claimant's care at her request.

60. Dr. Anderson testify at the hearing that he reviewed Dr. Lawlor's notes and noted that Dr. Lawlor did adjust his treatment moderately after the MRI finding and that the September 26 note was copied to Doug Olson at Employer's business as well as Tracy Herrigan at Insurer's business.

61. Dr. Anderson again examined Claimant's right knee on September 28, 2006 and found that she still had swelling and fluid within the joint. He then injected cortisone and referred her to Dr. Schleusener, an orthopedic surgeon because of her back complaints.

62. Anderson next saw Claimant on October 3, 2006. Claimant had just received an epidural steroid injection by Dr. Lawlor and the swelling in her knee had subsided because of cortisone shot on the 28th of September.

63. Dr. Anderson next saw Claimant on October 17, 2006. At that visit, Dr. Anderson indicated that Claimant's back was initially unchanged and her right knee was intermittently swollen but helped by physical therapy. On that day, Claimant had a one plus effusion of her right knee.

64. On October 31, 2006, Dr. Anderson saw Claimant and noted that her right knee exam revealed a one plus effusion or swelling. Dr. Anderson noted that by that time he had injected her knee twice and it helped for a short time but he thought she should go back to Dr. Duchene for reevaluation of her knee.

65. Dr. Anderson received a letter from Dr. Duchene dated December 6, 2006 indicating that Dr. Duchene thought it would be worthwhile to get another MRI of her knee and consider arthroscopy.

66. Claimant's employment ended on December 18, 2006 when she was laid off as part of a company wide layoff.

67. After her lay-off, Claimant continued to receive worker's compensation benefits until an IME was conducted by Dr. David Fey in the spring of 2007. After the IME, Claimant's her benefits were terminated

68. Claimant was told by Insurer that her benefits were being terminated in early 2007 based upon Dr. Fey's evaluation. There was no assertion by Employer and Insurer at that time that she had been untruthful when she answered questions while applying for work with Employer.

69. Dr. Anderson saw her on January 16, 2007 and stated that her right knee was currently problematic because she had pain along the level joint line and it had locked up twice causing her to fall.

70. Dr. Anderson testified that there was a definite palpable abnormality of her knee with stressing the lateral meniscus meaning that when he moved her knee as he was twisting her knee it pops and he can feel it along the level joint line. He indicated in his notes of that day that he felt she needed to undergo arthroscopy for the knee. He went on to state that he had heard from Dr. Schleusener who suggested that her back condition was not surgical and there were no good answers for the low back.

71. Dr. Anderson next saw Claimant on February 15, 2007. At that time, he stated that Claimant had a flare up and had significant right low back pain at L5-S1 and significant right knee pain. During his examination he found swelling and popping in her right knee and a decreased range of motion as well as pain in her low back. He also stated in his notes that she saw a Dr. Fey in Minneapolis and her treatment is on hold pending his IME opinion.

72. Dr. Anderson next saw Claimant on February 22, 2007 and stated that the same issues were going on as the previous visit but that there was not much to be done until they received the IME report because the insurance company has denied everything.

73. Dr. Anderson next saw Claimant on March 20, 2007. Dr. Anderson indicated that Claimant had been notified that that everything was being denied by Insurer, she was laid off from her job, and she no longer had health insurance and is not sure what to do. The pain in her low back was ongoing and her right knee continued to be a significant problem with swelling, popping and pain. On that date, Dr. Anderson's exam showed that her knee was painful swelled and he found a palpable abnormality with motion.

74. Dr. Anderson did not see Claimant between March 20, 2007 and April 15 of 2008. At that time he indicated that she was not working but was having significant low back pain and right knee pain. He indicated that she had tried returning to work four hours a day but was having a lot of pain with that. In his exam that day, Dr. Anderson found tenderness in Claimant's neck and straight leg raising was negative but he examined her knee and found mild swelling in the same area of pain as he had seen a year prior to that. Dr. Anderson testify that a meniscus or tear in the knee does not always show up on an MRI and if someone has an MRI that is normal but keeps having problems when he can feel swelling, feel a pop and there is on going pain, arthroscopy would be the best way to determine what was going on at that point.

75. Dr. Anderson saw Claimant on September 17, 2008. On that date, Dr. Anderson's notes indicate that she still had catching in her knee and had actually

fallen and hit the right side of her face in the bathtub. On examination, he found bruising on her right arm apparently from the fall. In an examination of her right knee, he found significant tenderness to palpation.

76. Claimant never had problems with her right knee before the June 20, 2006 accident. Claimant was still having problems with her right knee at the time of the hearing.

77. In the course of preparing for a deposition and for his hearing testimony, Dr. Anderson reviewed records from Dr. Brett Lawlor, Dr. Jeff Burns and Dr. David Fey. In his review of other records and from his own records he did not find any history of an injury to Claimant's low back or knee prior to the accident at Employer's facility.

78. Dr. Anderson expressed several opinions during his testimony. First, he opined that the June 20, 2006 incident at Employer's facility where boards fell on Claimant served as a major contributing cause of the torn disc seen on her MRI in September, 2006. Second, he opined that the same incident was a major contributing cause to her continued right knee problems. He further opined that the same incident was a major contributing cause for the need for her to have an arthroscopic procedure on her knee.

79. Dr. Anderson testified that he had reviewed the deposition testimony of Dr. Lawlor and he did not disagree with any of Dr. Lawlor's opinions. He explain that the annular rent or torn disc as he had described it was a different condition than the low back condition for which Claimant had been treated prior to the June 20, 2006 injury and that they are two separate and distinct conditions Finally, he testified that chemical radiculitis is ins or finding and that it is supported in the medical literature.

80. Dr. Lawlor reviewed copies of Dr. Duchene's clinical notes, copies of deposition testimony from Dr. Wayne Anderson and Dr. David Fey. Dr. Lawlor then expressed several opinions. First, he opined that the June 20, 2006 incident at Employer's facility served as a major contributing cause to aggravate the prior facet joint and SI pain for which he was treating her. His indicated that the work injury caused an aggravation of her back pain. He opined that the work injury at Employer's facility was a major contributing cause of the annular tear found on MRI in September 2006. He also opined that the June 20, 2006 work injury at Merillat was a major contributing cause of her knee problems for which he had seen and treated her. Finally, he opined that the June 20, 2006 was a major contributing cause for the ongoing pain complaints in her low back and right knee after that

81. Dr. Fey conducted an IME of Claimant on behalf of Employer and Insurer. Dr. Fey is a board certified orthopedic surgeon located in Burnsville, Minnesota. Dr. Fey treats necks, backs, arms, legs, and joints. Dr. Fey performs some IMEs,

but the bulk of his practice is treating patients at this clinic and at the VA Medical Center.

82. Dr. Fey examined Claimant on February 2, 2007, as part of his IME. Dr. Fey testified in his deposition that Claimant had a good range of motion with her low back, but Claimant had subjective complaints of tenderness and low back pain. The neurologic examinations were unremarkable which Dr. Fey interpreted to mean that there was no nerve irritation in the lumbar spine. In addition, Dr. Fey also reviewed Claimant's September 5, 2006, MRI and found Claimant had multi~level mild to moderate degenerative disc disease at L3-4, L4-5, and L5-Sl. Claimant had a disc bulge at L5-SI, which was moderate. Dr. Fey explained the literature indicated 89% of people have asymptomatic disc bulges. Dr. Fey did not find any evidence of nerve impingement. The MRI findings were consistent with Dr. Fey's physical findings. As part of his IME, Dr. Fey also reviewed the medical records of Dr. Anderson and Dr. Lawlor.

83. Based on the results of the IME, Dr. Fey expressed several opinions: First, Dr. Fey stated that there is no reasonable support that Claimant's annular tear is related to the June 20, 2005 injury. He opined that there is a lack of objective findings in the record to support any sort of significant or permanent injury. He also opined within a reasonable degree of medical probability that Claimant's current right knee condition was not related to the June 20, 2006 accident.

84. Additial facts may be stated in the analysis below,

ANALYSIS:

False Representation of Employee's medical condition.

Employer and Insurer allege that Claimant is not entitled to workers' compensation benefits because she made a false representation of the condition of her back. The South Dakota Supreme Court first acknowledged the defense of false representation in worker's compensation cases in Oesterreich v. Canton-Inwood Hospital, 511 NW 2d 824 (SD 1993). Since then, the South Dakota Legislature, in essence, codified that case when it enacted SDCL 62-4-46. That provision states the following:

> SDCL 62-4-46. A false representation as to physical condition or health made by an employee in procuring employment shall preclude the awarding of workers' compensation benefits for an otherwise compensable injury if it is shown that the employee intentionally and willfully made a false representation as to the employee's physical condition, the employer substantially and justifiably relied on the false representation in the hiring of the employee, and a causal connection existed between the false representation and the injury. The burden is on the employer to prove each of these elements.

In most instances in worker's compensation cases, the claimant has the burden of proving all essential facts necessary to show entitlement to benefits. However, SDCL 62-4-46 is the exception to that rule. Here, the statute places the burden on the Employer to prove each of the elements contained therein.

The first element of the statute is that Claimant intentionally and willfully made a false representation about her physical condition. The second element is that Employer substantially and justifiably relied on the false representation in the hiring of Claimant. The third element requires a causal connection between the false representation and the injury. Employer has failed to prove these elements.

With regards to the first element, Employer and Insurer accuse Claimant of misrepresenting her physical condition when she answered # 15 of Employer's questionnaire. That question asked: "Have you ever suffered or do you currently suffer from a back injury". Claimant answered "no" to the question. Claimant contends that she did not sustain an "injury" to her back as she understands the meaning of that word, prior to her June 20, 2005 accident.

Employer and Insurer contend that the term, "injury" as used in question # 15, is synonymous with "physical condition" and that Claimant intentionally falsified her answer. On the other hand, Claimant argues that she understood an "injury" to be related to an incident, like an accident or fall. She argues that she answered the question truthfully because she had not been involved in such an incident. She points out that Webster's New Medical Dictionary defines "injury" as "something applied in medicine to damage inflicted upon oneself or by an external agent as may be synonymous with a wound or trauma

The South Dakota Supreme Court has noted that there is a distinction between the terms "injury" and "condition" as those terms are used in workers' compensation cases. In Grauel v. South Dakota School of Mines and Technology, 2000 SD 145, ¶ 9, the Court stated that the "[i]njury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result." Id.

The facts of this case demonstrate the potential ambiguity of the word, "injury". After receiving virtually the same medical history from Claimant, Dr. Burns' notes indicate that Claimant suffered from an "acute Injury" prior to her June 20, 2005 accident. In contrast, Dr. Anderson indicted that he could not find any history of an injury to Claimant's low back or knee prior to the accident at Employer's plant. Dr. Anderson apparently understood "injury" to mean something akin to the definition provided by the Supreme Court in Grauel or Webster's New Medical Dictionary while, Dr. Burns understood "injury" to mean, "condition".

Dr. Burns' intake form reflects his understanding of the terms, "injury" and "condition". In one question, he asks, "[d]id your injury occur" with several options following. In another question, he asks, "[w]here did your injury occur? These questions assume that an injury must exist because the patient has a painful condition. The questions

make it impossible for an individual who does not believe they have suffered an injury to respond, accurately. Under such conditions a person is apt to provide the closest answer possible, though not 100% accurate, which is what Claimant did.

It should also be noted that Claimant completed Dr. Burns' intake form nearly 16 months prior to completing Employer's questionnaire. After that length of time, it is unlikely Claimant remember completing the intake form much less the questions asked and answers provided. Indeed, in that length of time, Claimant understands of the meaning of "injury" could have altered or changed completely.

Claimant credibly testified that she did not believe that she had injured her back when she answered Employer's questionnaire. While it is unlikely that she was mindful of the Grauel decision when she answered the questionnaire and may not have had "trauma" in mind, it is likely that Claimant understood an "injury" to be related to an external force or impact of some type as opposed to a disease or degenerative condition. Therefore, the Department concludes that Claimant answered question # 15 accurately.

Employer and Insurer have also failed to show that Employer substantially and justifiably relied on the false representation in the hiring of Claimant which is the second element of SDCL 62-4-46. The questionnaire was given to Claimant a day or two after she was hired. There is no evidence that Claimant's employment was dependant on her answer. Doug Olson only testified that the answer may have resulted in a change of department in which Claimant worked. Therefore, the answer may have affected her placement but did not affect her hiring.

The third element of SDCL 62-4-46 requires Employer to show a causal connection between the false representation and the injury. In this case, there is no false representation. Consequently, there can be no causal relationship between it and the injury. Employer and Insurer have failed to prove the necessary elements to sustain the defense provided by SDCL 62-4-46.

Causation

The general rule is that the claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967). "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." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

> [O]nly 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:
>
> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
>
> (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.
>
> (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.

In this case, there are conflicting medical opinions. Dr. Anderson and Dr. Lawlor opined that Claimant's June 20, 2005 accident is a major contributing cause of her annular tear, current back pain and right knee problems while Dr. Fey opines that there is insufficient support for such conclusions. Dr. Anderson and Dr. Lawlor's opinions are the most persuasive.

Dr. Anderson and Dr. Lawlor were Claimant's treating physicians. They had more opportunity to observe Claimant over the course of many office visits while Dr. Fey only examined Claimant once. In addition, Dr. Lawlor treated Claimant both before and after the June 20, 2005 accident which gives him better perspective than those physicians who only saw Claimant after her work accident.

Dr. Anderson's opinion is noteworthy because his conclusions support Claimant's position despite having a prior business relationship with Employer. Employer referred Claimant to Dr. Anderson after her accident. Dr. Anderson had served as Employer's medical advisor, had conducted IME for Employer over the years and had been in Employer's plant.

Employer and Insurer argue that Dr. Anderson and Dr. Lawlor's opinions should be discredited because their opinions changed during Claimant's treatment. In fact, it is more accurate to say that Dr. Anderson's and Dr. Lawlor's opinions "evolved" over the course of their treatment of Claimant. Their opinions evolved as they acquired more information and observed Claimant's response to treatment over an extended period of time. Opinions formed in this manner are not less valid than those formed during a one time examination of Claimant as did Dr. Fey's.

Indeed, logic dictates that opinions formed over the course of treatment preferred to those formed as Dr. Fey's were. It is akin to acquiring information by watching a movie which was shot over a period of time as opposed to looking at a still-photo which is frozen in time. The evidence in this case indicates that Claimant injured her lower back and right knee in the June 20, 2005 accident and that the medical problems that she has been treating as a result of those injuries is compensable.

CONCLUSION:

Counsel for Claimant 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 Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Proposed Findings of Fact and Conclusions of Law to submit objections or Employer and Insurer may submit 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, counsel for Claimant shall submit such stipulation together with an Order.

Dated this 12th day of February, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

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