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

**MELESECH AYELE,** **HF No. 55, 2007/08**

**Claimant,**

**v.** **DECISION**

**JOHN MORRELL & COMPANY,**

**Employer/Self-Insurer.**

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 February 22, 2012 at 9:30 am in Sioux Falls, South Dakota. Attorney, Brad Bonynge represents Claimant, Melesech Ayele (Claimant). Attorney, Michael McKnight represents Employer/Self-Insurer, John Morrell and Company (Employer/Insurer). Claimant was assisted at hearing with a department-appointed interpreter.

## ISSUES:

The issues before the Department in this matter are whether a work-related injury reported by Claimant on November 20, 2004, December 23, 2005, or March 22, 2006 was a major contributing cause of Claimant's low back condition and need for surgery? And whether Claimant is permanently and totally disabled as defined in SDCL §62-4-53 and related statutes, and eligible for benefits?

## FACTS:

1. At the time of hearing, Claimant was 50 years old. Her date of birth is January 1, 1962.
2. Claimant is from Ethiopia. She came to the United States in December 1991.
3. Claimant moved to Sioux Falls, South Dakota, in August of 1992 and began work for Employer/Self Insurer.
4. Claimant has worked in at least two job positions with Employer/Insurer. The first was on the eighth floor, working with the wizard knife, which she held for about nine months. The most recent job was that of night clean-up.

5. Claimant's Petition for Hearing alleges three injury dates.

    a. November 20, 2004, Claimant contends she sustained a lower back injury in a fall. The notes from Employer/Insurer note that Claimant slipped on water on floor and fell hitting her right hip area. The notes indicate that Claimant continued to work without medical restrictions although she suffered back pain.

    b. December 23, 2005, Claimant alleges she fell down two steps injuring her lower back and left knee. The investigation form from Employer/Insurer indicates that Claimant suffered from left knee pain from a fall on December 23, 2005. It also indicates that Claimant complained of back pain from a fall at work on August 22, 2005.

    c. March 22, 2006, Claimant alleges she reinjured her back due to repetitive bending. Claimant did not make a first report of injury on that date. Claimant saw P.A. Bruce Wesner of HealthWorks the day prior. Wesner noted that Claimant was suffering from right-sided back pain and left anterior knee pain. Claimant reported that the back pain was from a fall in August 2005 and the left knee pain was from December 2005. On March 22, 2006, Claimant saw PT Nancy Rausch for physical therapy on her low back and knee.

6. Claimant did not report an injury to Employer/Insurer in August 2005. In August 2005, Claimant reported to Employer/Insurer that her back hurt due to the fall in November 2004. Claimant also reported repetitive stress to her back in August 2005.

7. Claimant also contends that she is permanently and totally disabled under the Odd-lot Doctrine.

8. Claimant did not seek treatment from a medical doctor for either the November 20, 2004 or December 23, 2005, claimed incidents until March 2006.

9. Claimant saw Dr. Peter Looby for treatment of her left knee injury. Claimant underwent a left knee arthroscopy on May 11, 2005, to repair a torn medial meniscus.

10. Employer/Insurer accepted compensability for Claimant's left knee injury suffered on December 23, 2005, and paid benefits to Claimant or on her behalf for that injury.

11. Dr. Looby released Claimant to return to work with no restrictions on her left knee on August 7, 2006.

12. Claimant was referred to Dr. Jerry Blow by Dr. Looby for treatment of her back and left knee.

13. Dr. Blow assigned a 2% impairment to the lower extremity on January 11, 2007, for which Employer/Insurer paid benefits. Dr. Blow released Claimant to return to work without restrictions.

14. Claimant continued to have low back pain, despite physical therapy.

15. Dr. Walter Carlson, orthopedic surgeon, became Claimant's treating physician for her low back pain. On August 1, 2006, he ordered an MRI of Claimant's lumbar spine. The MRI findings are that Claimant has defects at the spinal levels L3-4 and L5-S1. The final diagnosis is degenerative disc disease with grade 1 spondylolisthesis, L5-S1.

16. Dr. Carlson performed low back fusion surgery on Claimant on February 22, 2007. Claimant participated in physical therapy after surgery.

17. Dr. Carlson did not give an opinion as to whether Claimant's low back condition was caused by her employment with Employer/Insurer.

18. Dr. Carlson noted in a medical record that Claimant's back condition was not work-related and that he called "medical resources" to assist in the payment for the surgery.

19. Claimant left her job in October 2007.

20. Joan Hanson of Physical Therapy Solutions performed a KEY functional capacity examination of Claimant on July 8, 2008. The FCE indicated that claimant can lift 21.4 pounds above head and shoulder level with both arms, 14.8 pounds desk to chair level with both arms, and 17 pounds from chair to floor level with both arms. She can push/pull 35.3 pounds. She is able to carry only 17 pounds. Claimant is capable of performing sedentary to light duty work.

21. The KEY assessment by Ms. Hanson was not ordered by a physician, nor were the results interpreted by a physician or medical provider.

22. Employer/Insurer asked Dr. Blow to perform an SDCL § 62-7-1 exam on Claimant and give an impairment rating. This exam was scheduled for July 10, 2008 at 8:30 am.

23. Dr. Blow gave Claimant a 20% whole person disability, based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

24. Dr. Blow's opinion is that the spondylolisthesis was not caused by her employment with Employer but was a genetic condition that she was most likely born with. Dr. Blow opined that Claimant's low back condition was not the result of her injuries suffered at Employer/Insurer.

25. Dr. Blow, in his sworn deposition, testified that Claimant was not being truthful in regards to her pain complaints. Dr. Blow observed an odd gait pattern in Claimant's walking when she was at his office. The gait pattern did not match the

injury or pain complaints that Claimant had presented. There was no biomechanical reason for Claimant's gait pattern.

26. Employer/Insurer's videographer was waiting in the parking lot of Dr. Blow's office while Claimant was with Dr. Blow in a medical exam. The video reflects that Claimant exited the Dakota Rehabilitation Building at 10:15 am.

27. Dr. Blow viewed the surveillance video of Claimant taken on June 26-27, 2006, July 5-6, 2006, February 27, 2008, March 12, 2008. He opined the activities and walking pattern in the video did not coincide with Claimant's complaints and gait pattern shown in his office.

28. Dr. Blow's deposition and exam notes indicate that Claimant "demonstrated significant pain behavior and very limited movement" in Dr. Blow's presence. "She essentially hobbled into the office," Dr. Blow noted.

29. It is unclear whether he also viewed the video that was taken just after he had examined Claimant on July 10, 2008. In that video, Claimant is seen walking to her car. It appears that Claimant has a very slight limp. Claimant is not hobbling or walking stiffly. There is no outward appearance or indication on the video that Claimant is in significant pain.

30. The video of June 27, 2006 shows Claimant getting in and out of a four-door sedan in front of a number of stores. At these stores, Claimant is carrying a seemingly light-weight bag of merchandise from the store which she lifts into the passenger side of the car while easily entering the driver side door. Claimant has a noticeable limp or a stilted gait pattern.

31. The video of February 27, 2008 (post-surgery) shows Claimant quickly walking from a store to a vehicle pushing a shopping cart without limping or walking with a stilted gait. The video then shows her opening the back of an SUV and reaching above her head to reattach some interior paneling on the rear door that had come loose, and unload the shopping cart into the rear compartment.

32. On March 12, 2008, Claimant is videotaped at a gas station pumping gas into a vehicle. Claimant did not appear to have an obvious limp or antalgic gait.

33. Dr. Blow is of the opinion that Claimant's normal gait pattern and actions getting in and out of cars and standing for a significant time, as viewed in the surveillance videos, is proof that Claimant can work with no work restrictions.

34. Claimant then saw Dr. Richard Farnham, a board certified disability analyst and medical examiner on May 17, 2010. Dr. Farnham specializes in forensic analysis of medical conditions, and performs evaluations such as independent medical exams, record reviews, second opinions, fitness for duty evaluations, and other exams such as these.

35. Dr. Farnham is not a board certified in the fields of orthopedics or occupational medicine. Dr. Farnham's practice is limited to, but is not exclusive to forming opinions of how a person was injured, whether he or she is still injured, and whether or not the treating physician is correct in the ongoing treatment of the patient.

36. Dr. Farnham performed an independent medical evaluation on Claimant on May 17, 2010. He is of the opinion that Claimant's claimed injuries caused her pre-existing spondylolisthesis to become symptomatic; or that there was a permanent aggravation of a pre-existing condition.

37. Dr. Farnham is of the opinion that Claimant's condition began in 1994 when she experienced a different work-related incident that is not at issue during this hearing. Claimant had been injured when a forklift truck or mule struck Claimant while at work for Employer/Insurer.

38. Claimant's accident on March 4, 1994, did not result in hospitalization. Claimant was on medical leave from this injury until March 14 when she returned to work with restrictions. Claimant returned to full duty work on March 21, 1994.

39. Employer/Insurer hired Dr. Richard Strand to perform a records review of Claimant's records. Dr. Strand is an orthopedic surgeon who has operated on patients with spondylolisthesis. At the time of his deposition, Dr. Strand was waiting to hear from the South Dakota Medical Board on his license to practice in South Dakota. Dr. Strand is licensed in Minnesota and became Board Certified in Orthopedic Surgery in 1975.

40. On November 30, 2010, Dr. Strand issued the opinion that Claimant's back condition was not the result of injuries suffered at Employer/Insurer. He is of the opinion that Claimant's work injuries were not a major contributing cause of Claimant's spondylolisthesis or the aggravation thereof.

41. Dr. Strand disagreed with Dr. Farnham's explanation of spondylolisthesis. Dr. Strand explained that the surgery on Claimant was not due to a temporary aggravation of the condition, but the condition itself. Dr. Strand also did not believe that Dr. Farnham was qualified to render an opinion on causation as he is not a board certified orthopedic surgeon.

42. On February 6, 2009, Mr. Richard Ostrander made a vocational evaluation of Claimant's abilities to return to work. Mr. Ostrander also testified to his findings during the hearing. It is his belief that Claimant's functional limitations prevent her from returning to her previous employment; that she is permanently and totally disabled; and that there is no formal vocational rehabilitation that could be expected to restore her to gainful employment.

43. Mr. Ostrander testified that Claimant is functionally illiterate in any language, as she cannot read or write.

Further facts are included in the analysis below.

**ANALYSIS:**

**Whether Claimant's work-related injury is a major contributing cause of Claimant's back condition and subsequent need for surgery?**

The Supreme Court is clear on who has the burden of proof for causation cases. They have stated, "The claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability." *Wise v. Brooks Const. Ser*., 2006 SD 80, ¶17, 721 NW2d 461, 466 (internal citations omitted). They have also written:

> In a workers' compensation dispute, a claimant must prove all elements necessary to qualify for compensation by a preponderance of the evidence. … A claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty. Causation must be established to a reasonable degree of medical probability, not just possibility. The evidence must not be speculative, but must be precise and well supported.
>
> The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition because the field is one in which laypersons ordinarily are unqualified to express an opinion. No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition. SDCL 62-1-1(7). Expert testimony is entitled to no more weight than the facts upon which it is predicated.

*Darling v. West River Masonry, Inc.,* 2010 SD 4, ¶11-13, 777 NW2d 363,367 (citations and quotes omitted).

Claimant's expert witness, Dr. Richard Farnham, is a board certified disability analyst and medical examiner. Dr. Farnham specializes in forensic analysis of medical conditions, and performs evaluations such as independent medical exams, record reviews, second opinions, fitness for duty evaluations, and other exams such as these. Claimant was examined by Dr. Farnham on May 17, 2010. It was Dr. Farnham's conclusion, with a reasonable degree of medical certainty, that Claimant's back condition was caused by an initial trauma that occurred at work for Employer/Insurer in March 1994 and that subsequent work-related trauma created a permanent aggravation of that condition, which necessitated the surgery.

Employer/Insurer's expert, Dr. Richard Strand, disagreed with Dr. Farnham's conclusions and opinions regarding the condition of spondylolisthesis, as well as his

conclusions regarding Claimant's condition. Dr. Richard Strand is a board certified orthopedic surgeon who has treated and performed surgery on patients with this condition. Dr. Strand did not physically examine Claimant but performed a records review. It is Dr. Strand's opinion that Claimant's ultimate surgery was due to the nature of the condition, not the temporary aggravation of the condition. The aggravation may have been caused by her work or an incident at work, but the underlying condition and ultimate surgery was not caused by any work-related injury. The aggravation would have gone away without surgery, as it was not permanent but only temporary.

Claimant's initial treating physician and Employer/Insurer's expert witness, Dr. Jerry Blow, is of the opinion that Claimant's back condition was not the result of a work-related injury, but was likely a condition she has had her whole life. The treatment of the knee injury did not cause the back condition to become symptomatic, according to Dr. Blow. Claimant's work-related incidents were not the cause of Claimant's back symptoms and the ultimate requirement of surgery.

Dr. Blow is also of the opinion that Claimant is exaggerating her back symptoms and is not being completely honest in regards to the current condition of her back. Dr. Blow came to that conclusion after viewing Claimant walking into his office and then viewing her on a surveillance tape performing everyday tasks. Video was taken both prior to Claimant's back surgery and post-surgery and recovery.

After reviewing the surveillance video, I agree with Dr. Blow that Claimant appears to not be as disabled as what she portrayed during hearing. On the video, Claimant was seen easily maneuvering a shopping cart through a parking lot and unloading groceries. Claimant entered the drivers' side door with bags of groceries and did not appear to be in any distress. Claimant stood for a lengthy period of time in her grocery store speaking with customers or friends. During hearing, Claimant's facial expressions of pain and discomfort may or may not have been real, but they did not coincide with the ease of movement that was visible in the video.

Another expert of Employer/Insurer is Dr. Jeff Luther. He reviewed Claimant's medical records starting in March 2006, as well as the nurse's station reports from Employer. Dr. Luther was unable to state with any degree of medical certainty which fall, if any, caused an aggravation of Claimant's low back condition. He noted that the injury and ultimate findings are not the result of any one fall. Dr. Luther noted that Employer had recorded Claimant's falls from September 20, 1999; December 17, 2002; June 11, 2003; and November 20, 2004.

The injury from March 4, 1994, (the incident with the forklift) was not included in the information given to Dr. Luther. The 1994 incident is also the injury that Dr. Farnham believed had caused the condition in the first place. Claimant's other work-related back injuries that occurred while Claimant was employed for Employer/Insurer occurred on August 23, 1995 (a ham hit Claimant on the lumbar spine); May 15, 1997 (slip and fall in bacon room); and January 22, 1998 (slip and fall in restroom).

The only injuries included in Claimant's Petition for Hearing were reported on November 20, 2004; December 23, 2005; and March 22, 2006.

The fifth medical expert involved in this case was not a witness for either side. Dr. Walter Carlson performed the surgery on Claimant's back. Dr. Carlson noted that this condition and need for surgery was not related to Claimant's work and not covered under workers' compensation. These statements by Dr. Carlson were found in his medical notes for Claimant's treatment. The statements were not sworn statements and were not made with any "degree of medical certainty."

The evidence and records reflect that Claimant reported ten (10) different injuries or incidents of slipping and falling or injuring her back, while she was employed with Employer/Insurer. However, the experts tend to agree that spondylolisthesis is a condition that people are born with or that is genetic. It is a condition that may result from trauma, but a traumatic cause is very unlikely. Claimant's expert, retained after the back surgery, testified that to a reasonable degree of medical certainty, Claimant's condition was caused by trauma. However, the evidence shows that the absence of low back pain prior to a traumatic episode or aggravation does not necessarily mean that the underlying condition is not present. The evidence does not show that Claimant's surgery resulted from a condition caused by a work-related injury.

The evidence presented by Claimant, in support of her claim, is not precise and it is not well-supported. Claimant's work-related injuries that occurred on November 20, 2004, December 23, 2005 or March 22, 2006 are not a major contributing cause of Claimant's back condition and subsequent need for surgery.

**Whether Claimant qualifies for a finding of permanent total disability status?**

Claimant makes the argument that she is permanently and totally disabled and is eligible to receive benefits. The criterion for finding a status of permanent total disability is described in SDCL §62-4-53:

> An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. …

SDCL §62-4-53. The facts of each case determine whether there is sufficient evidence to support the Department's findings that the claimant was permanently and totally disabled under the odd-lot doctrine. *Kassube v. Dakota Logging*, 2005 S.D. 102, ¶35, 705 N.W.2d 461, 468.

While employed with Employer/Insurer, Claimant was a co-owner of a grocery store for a number of years. This store was in business prior to her injury and following her injury. The videotape surveillance shows Claimant entering the business and standing and speaking with a customer for a lengthy period of time. The testimony at hearing indicates that Claimant was able to sit in the grocery store and wait on customers and run part of the business. Ultimately, Claimant did not make any money from the store and "gave up" the business. Claimant has not worked since leaving her employment with Employer/Insurer. There is no evidence that Claimant's work injuries or back condition caused her or her business partner to close the store.

Claimant's current daily activities include walking or driving to her friends' homes, staying home and watching her grandchildren, or just lying in bed watching television. Claimant also testified that she walks around inside her home.

The KEY Assessment that Claimant participated in in July 2008 indicates that Claimant is capable of sedentary or light duty work of some sort. However, the Assessment results have not been interpreted by Claimant or approved by her treating physician. It is unclear what the results of the Assessment mean in terms of how much work Claimant can safely perform.

The work-related injury sustained by Claimant, her knee injury and the temporary aggravation of her back condition, did not cause Claimant to be permanently and totally disabled. Claimant has not sustained her burden of proof with a prima facie showing that she is permanently and totally disabled.

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'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 26th day of July, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR

_____

Catherine Duenwald
Administrative Law Judge