SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DAVID THYEN **HF No. 55, 2008/09**

Claimant,

v. **DECISION**

HUBBARD FEEDS, INC.,

Employer,

and

SENTRY 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. This case was heard by Donald W. Hageman, Administrative Law Judge on December 15, 2009, in Watertown, South Dakota. David Thyen (Claimant) was represented by Ronald L. Schulz. Michael S. McKnight represented Hubbard Feeds, Inc. (Employer) and Sentry Insurance (Insurer).

Issue:

The Prehearing Order states the following legal issue:

Causation

Facts:

1. Claimant was born on August 23, 1962.

2. Claimant is a high school graduate.

3. Claimant is married and lives on a small dairy farm north and east of Watertown, South Dakota. Claimant helps his wife on the dairy farm in the morning by mixing the feed for the cows and then, using a skid steer loader, drives the feed to the feed bunks. After feeding the cows, Claimant goes to his job with Employer.

4. Claimant started working for Employer on January 30, 2003. Claimant has been a mixer operator during the entire duration of his employment. Claimant typically works 40 hours per week for Employer.

5. On the morning of July 2, 2008, Claimant helped his wife with feeding the dairy cows and then drove to work at Employer's place of business as usual. He arrived at Employer's place of business at approximately 9:00 a.m.

6. After arriving at Employer's business on July 2, 2008, Claimant began working outside where he monitored the flow of wheat midds being removed from a tank which had accidentally been contaminated with a load of limestone the previous day. While performing this task, he also cleaned-up in an area near the meat and bone tank where old feed had been spilt which had become moldy and "raunchy smelling".

7. While performing those duties described in 6 above, Claimant's face began to turn red and "burn red hot". Claimant immediately went inside the plant and tried to run cold water on his face. The cold water did not help. Within a matter of minutes, his abdomen, arms, hands, legs and neck were hot and tingling. Claimant described the feeling as a pins and needle burning sensation.

8. During the episode described in 7 above, Claimant did not have any problems breathing and was not wheezing or coughing.

9. Employer's Plant Manager, Drew Worlie took Claimant in Employer's vehicle from Employer's place of business to the Brown Clinic in Watertown. Upon arriving at the Brown Clinic, Claimant also began to shake uncontrollably.

10. At the Brown Clinic, Claimant was seen by Dr. Allison Geier who diagnosed Claimant with an allergic reaction. Claimant was treated with an epinephrine injection. Benadryl and solumedrol were also administered by IV. After treatment, Claimant's skin color slowly improved but the shaking continued.

11. Claimant was transferred to Prairie Lakes Hospital where he was admitted on July 2, 2008 for observation. Claimant was released from the hospital on July 3, 2008.

12. On July 10, 2008, Claimant had allergy testing done by Dr. Rogotzke at Sanford Lake Area Ear, Nose, Throat. The results of those tests were negative.

13. At the request of his doctor, Claimant went back to Employer's place of business on July 16, 2008, to pick up Material Safety Data Sheets (MSDS) which contained a list of ingredients stored or used at the business.

14. Claimant entered Employer's office to pick up the MSDS sheets and was there for approximately 15 minutes when he began to notice symptoms seemingly identical to those on July 2.

15. Employer's office is quite some distance from the outdoor location where he developed symptoms on July 2, 2008

16. After developing symptoms on July 16, 2008, Claimant's daughter drove him to the office of Dr. Kenneth Rogotzke. Rogotzke was not in on July 16 but his office was able to reach him on the phone. Claimant injected himself with an epinephrine pen.

17. Claimant saw Dr. Rogotzke on July 17, 2008, and on that date, Dr. Rogotzke referred him to an allergist in Sioux Falls, Dr. Brennan.

18. Claimant saw Dr. Brian Brennan on July 22, 2008. Brennan examined Claimant and made the following remarks in the medical records:

> "Episodes of flushing and uncontrollable jitteriness – doubt allergic reaction or anaphylaxis. At this time I am at a loss for determining a cause of this from his history. Perhaps a pesticide exposure could cause symptoms such as this, but also symptoms of pesticide exposure are lacking and there is no history of pesticide exposure. This could represent a flushing syndrome, but again, many of the symptoms are lacking. Certainly some of this flushing could be related to his Niacin therapy but at this time it is unclear whether he was taking Niacin on the dates of these reactions."

19. Dr. Brennan reviewed the MSDS sheets and ". . . did not see anything in there that may have been an obvious cause for the type of symptomatology he experienced." Brennan believed a consultation with the Mayo Clinic was in order.

20. Claimant was seen at the Mayo Clinic on July 28, 2008. He was seen by Dr. Butterfield, an allergist. Dr. Butterfield's diagnosis was flushing episode and hypertension. Claimant's blood studies were normal and his allergy testing was negative. The Mayo Clinic had some concern that Claimant had underlying mast cell activation or mastocytosis but that was also determined to be negative.

21. Claimant was seen by Dr. Douglas Pay with Avera Dermatology on August 25, 2008. Pay's diagnosis was occupational dermatitis secondary to work related exposure, exact etiology undetermined at this time. Pay recommended that Claimant see an occupational medicine doctor.

22. Claimant saw Dr. Bruce Elkins on August 25, 2008. Elkins believed that the most likely explanation for Claimant's symptoms was an unrecognized work place exposure.

23. Claimant was seen by Dr. Mark Bubak an allergist with Dakota Allergy & Asthma on September 10, 2008. Bubak records indicate the following:

> "Flushing episode twice in about two week period in July. I am unable to give an allergic reason for this and unfortunately I do not know enough about toxic mold exposures to say that is what happened to him either. It is unusual that just going to the office would have a similar flushing episode."

24. Claimant requested samples of the spilt moldy feed at Employer's business for testing. Claimant provided Employer with a sampling kit. Employer informed Claimant that his request was denied because no protocols were in place for the sampling procedures.

25. Claimant provided Employer with a second testing kit which contained instructions. Employer also did not collect sample with this sampling kit. Employer subsequently cleaned up the spilt moldy feed.

26. Claimant returned to work with Employer on November 5, 2008. Upon his return, Employer required Claimant to sign an agreement that no samples would be removed from the premises.

27. Claimant has continued to work for Employer ever since November 5, 2008 without a reoccurrence of the symptoms he suffered on July 2 and 16, 2008.

28. During deposition testimony, Dr. Rogotzke was of the opinion that Thyen's work place episodes on July 2 and July 16, 2008 were work-related. On cross examination Dr. Rogotzke was asked if he was able to say with reasonable medical certainty that this was something that he reacted to at work and his answer was "I don't have any other reason but not to think that it was something at work, because it happened on two occasions and both when he was at work. And they were in close proximately to themselves."

29. Dr. Beth Baker was employed by Hubbard to do a medical record review. Baker is board certified in internal medicine, occupational medicine and medical toxicology. During deposition testimony, Baker stated that she could not say with a reasonable degree of medical certainty what caused the reaction on July 2, whether it was work related or not.

30. Additional facts may be discussed in the analysis portion of this decision.

Analysis:

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Horn v. Dakota Pork, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that he sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7); Norton v. Deuel School District #19-4, 2004 SD 6, ¶7, 674 NW2d 518, 520. SDCL 62-1-1(7) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]"

The testimony of medical professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion. Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶34, 724 NW2d 586.

Moreover, a medical expert's finding of causation cannot be based upon mere possibility or speculation. Deuschle v. Bak Const. Co., 443 NW2d 5, 6 (SD 1989); see also Gerlach v. State, 2008 SD 25, ¶ 7, 747 NW2d 662, 664 ("[A] worker's 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."). Instead, "[c]ausation must be established to a reasonable medical probability[.]" Truck Ins. Exchange v. CNA, 2001 SD 46, ¶ 19, 624 NW2d 705, 709 (citing Enger v. FMC, 1997 SD 70, ¶ 18, 565 NW2d 79, 85).

"The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and prove nothing if its factual basis is not true." Johnson v. Albertsons, 2000 SD 47, ¶ 25, 610 NW2d 449, 455 (citing Podio v. American Colloid Co., 162 NW2d 385, 387 (SD 1968)).

Claimant saw several physicians after the "flushing" episodes on July 2 and 16, 2008. The only theme common in all their medical observations and opinions is that none know with any certainty, what caused the episodes. Dr. Geier and Dr. Rogotzke initially believed that the episodes were some type of allergic reaction. However, at least two allergists to whom Claimant was referred voiced

skepticism that the episodes were allergy related. Likewise, none of the doctors state with any probability that the episodes were caused by a toxin.

Several physicians indicated in their medical notes that the episodes were likely work-related. Dr. Rogotzke testified as much in his deposition. However, the sole basis for their conclusion is the fact that the episodes occurred twice" while Claimant was at Employer's business location, in other words a "temporal sequence".

The South Dakota Supreme Court stated in Rawls v. Coleman-Frizzell, Inc., 2002 SD 130, ¶ 20, 653 NW2d 247:

> The axiom "*post hoc, ergo propter hoc*," refers to "the fallacy of ... confusing sequence with consequence," and presupposes a false connection between causation and temporal sequence. (citations omitted).

Id. The Court also stated in Darling v. West River Masonry, Inc., 2010 SD 4, ¶ 18, 777 NW2d 363, that, "[a]rguements relying solely on temporal sequence have little value in the science of fixing medical causation," (citation omitted) (quotation omitted). Concluding that the work-place was the source of Claimant's episodes solely on the basis of Claimant's location at the time is the easiest way to assign blame, but the accuracy of such opinions is largely a matter of chance.

In addition, assigning blame for the episodes in this fashion ignores the following facts: The episodes occurred in separate environments. The first occurred outside near the feed tanks. The second occurred inside the office, quite some distance from the first location. Exposure to toxins or allergens was as likely at Claimant's dairy operation as it was at Employer's business. Employer worked for Employer for seven years, working hundreds of days at Employer's business location without experiencing similar symptoms. Claimant's symptoms could have been caused by something he ate or drank on those days. They could have been caused by the clothes that he wore. They could have been caused by the deodorant or soap he used. They could have been caused by exposure to insecticides or chemicals sprayed anywhere between Claimant's home and Employer's business. The list of possibilities is nearly endless.

On the other hand, it is troubling that Employer did not make a greater effort to collect samples to test for toxins. Its action showed a total disregard for Claimant's health, the health of its other employees and its customers. If a harmful toxin had been present, it would have been in every ones best interest for Employer to be proactive in finding it.

Nevertheless, Employer action in this regard does not alter or shift Claimant's burden of proof in this case. Claimant has failed to demonstrate that he sustained a compensable injury arising out of and in the course of his employment.

Conclusion:

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

Dated this _4 th_ day of August, 2010.

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