

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

DESTINY SCHOON,

HF No. 76, 2016/17

Claimant,

v.

DECISION

NEWS AMERICA MARKETING,

Employer,

and

FARMINGTON CASUALTY COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on September 23, 2020, in Rapid City, South Dakota. Claimant, Destiny Schoon, was present and represented by Brad J. Lee of Beardsley Jensen & Lee Prof. L.L.C. The Employer, New America Marketing and Insurer, Farmington Casualty Company, were represented by J.G. Shultz and Seth Lopour of Woods, Fuller, Shultz, & Smith P.C.

Facts:

Based upon the testimony at the hearing and the record, the following facts are found by a preponderance of the evidence:

1. In November 2001, Destiny Schoon (Schoon or Claimant) was involved in a motor vehicle accident.
2. On September 9, 2002, Schoon treated with Dr. Shannon DeBoer at Complete Chiropractic. Schoon presented with upper back pain into the neck and shoulders. Dr. DeBoer's notes indicate that Schoon complained of pain in her shoulder blades and neck since childhood. Dr. DeBoer further noted that Schoon had intermittent problems with neck, upper back, and upper cervical spine since the car accident. Schoon continued to treat with Complete Chiropractic 86 times through April 2005.

3. On April 18, 2003, Schoon was treated by Dr. DeBoer who noted, Schoon presented with neck and shoulder pain. Dr. DeBoer diagnosed Schoon with aggravation of cervical complaint via motor vehicle accident.
4. In August 2003, Schoon was involved in another motor vehicle accident.
5. On February 10, 2004, Schoon treated with Break Through Health. On her patient form, Schoon indicated that she was presenting with constant neck and shoulder pain resulting from her car accident in August of 2003.
6. On August 17, 2004, Schoon suffered a slip and fall at a concert in Sioux Falls, South Dakota. In her personal injury suit against the City of Sioux Falls, Schoon alleged she suffered serious and permanent injuries.
7. On March 25, 2005, Schoon was treated at 2 Docs Chiropractic where she complained of neck pain as a result of her car accident and fall. Dr. Michael Torsney of 2 Docs Chiropractic diagnosed Schoon with acute traumatic sprain/strain of the neck with associated pain and stiffness as well as cervical, thoracic, lumbar, sacral and pelvic segmental dysfunction with associated muscle spasm, stiffness, and pain. He opined that the injuries were the combined result of the motor vehicle accident and the fall.
8. In 2007, Schoon moved to Rapid City. She continued chiropractic care, but it was only offering temporary relief. The chiropractor referred her to Black Hills Orthopedic & Spine Center (Black Hills Orthopedic). Black Hills Orthopedic conducted imaging and ordered physical therapy. Schoon took part in the physical therapy off and on for about a year. Black Hills Orthopedic then sent her for an EMG.
9. On December 8, 2008, Schoon treated with Black Hills Orthopedic for complaints of pain in her right shoulder.
10. On December 22, 2008, Dr. DeBoer offered an expert medical opinion in Schoon's lawsuit. DeBoer opined that as a result of Schoon's fall, her fibromyalgia was exacerbated which would be consistent with a force transmitted from the distal extremity through the arm and shoulder and up to the neck. Dr. DeBoer also noted that Schoon had responded well to treatment and had

progressed through the prior couple of months with the main complaint becoming less and less about her neck and upper back areas.

11. On February 5, 2009, the EMG was performed by Dr. Brett Lawlor of The Rehab Doctors. The EMG was normal. Schoon was referred to Dr. Lawlor for treatment.
12. On April 9, 2009, Schoon began her treatment with Dr. Lawlor who prescribed medication and physical therapy with a new therapist. He then performed bilateral C6-7, C7-T1 facet area injections to see if that would alleviate Schoon's symptoms. Schoon found the injections very helpful. Following the injections, School was able to work 60 hours per week and play recreational softball from 2010 through 2013 without symptoms other than the occasional flare up.
13. On and before May 7, 2015, Schoon worked for a law firm and a second job at News America Marketing which was at all times pertinent insured by Farmington Casualty Company (jointly Employer/Insurer) for workers' compensation purposes.
14. On May 7, 2015, Schoon was hanging advertising for News America Marketing when she felt severe pain in her shoulder. That night she took over the counter medication and iced the area to try to alleviate the pain. Employer/Insurer accepted the claim as compensable.
15. On May 8, 2015, Schoon went to Black Hills Health and Wellness for chiropractic adjustments to relieve her symptoms. Schoon experienced temporary relief.
16. On May 12, 2015, Schoon returned to Black Hills Wellness for another adjustment, but the relief was not long lasting. The chiropractor referred her to Black Hills Orthopedic.
17. On May 18, 2015, Schoon presented to Black Hills Orthopedic with complaints of right shoulder and neck pain. PA Candace M. Winters prescribed physical therapy.
18. On June 2, 2015, Schoon began physical therapy at Promotion with Myron Sorestad. After multiple physical therapy appointments, Black Hills Orthopedic referred Schoon to Dr. Lawlor

19. On August 20, 2015, Schoon visited Dr. Lawlor. He prescribed physical therapy with Myron at Promotion and ordered a cervical MRI. The MRI showed broad-based disc herniation at C5-6 which impinged on the right ventral hemicord.
20. On November 3, 2015, Jorna Chapple, on behalf of Employer, indicated the claim was accepted for right shoulder only and asked Dr. Lawlor to send records supporting the need for more physical therapy for the should as well as treatment for the neck.
21. On November 4, 2015, Dr. Lawlor responded to Ms. Chapple by fax. He explained that it was not uncommon for people with similar injuries to Schoon's to report shoulder pain as the predominant complaint. He opined that the findings were consistent with Schoon's stated onset of pain and consistent with her need for physical therapy to specifically address the neck as it related to her shoulder pain.
22. On December 30, 2015, following a referral from Dr. Lawlor, Schoon visited Dr. Jonathan L. Wilson at Black Hills Neurosurgery and Spine. Dr. Wilson recommended a C5-6 cervical disc arthroplasty. Employer/Insurer required an independent medical examination (IME) before the surgery would be authorized.
23. On January 21, 2016, Dr. Jeffrey Nipper performed an IME of Schoon.
24. On February 17, 2016, Dr. Nipper issued his report in which he opined that Schoon had suffered a shoulder strain and her symptoms should have gone away in six weeks. He further opined that her other symptoms were the result of pre-existing pathoanatomy. He opined she was at maximum medical improvement (MMI), entitled to no impairment, and needed no further treatment.
25. On February 24, 2016, Employer/Insurer denied the claim.
26. On May 5, 2016, Schoon underwent surgery with Dr. Wilson. After surgery she continued to have conservative treatment including physical therapy, medications, and injections. The surgery was successful in eliminating the paresthesia and numbness Schoon was having in her arms. However, she continued to have some pain.
27. On November 28, 2016, Schoon submitted this Petition for Hearing to the Department of Labor & Regulation (Department).

28. In August 2019, Schoon stopped working for Employer due to the caseload at her law firm job and the neck and shoulder pain which prevented her from working so many hours.

Additional facts may be developed in the issue analysis below.

Causation

Schoon's work injury occurred while she was hanging advertising for Employer. Her job that day involved hanging advertising and applying a clamp to a shelf. She was attempting to remove a piece of equipment with a screwdriver, but the equipment was frozen and would not move. She was trying to turn the screwdriver at roughly eye level when with the last crank, she felt severe pain in her shoulder. She also claims she felt a tightness in her shoulder and pressure in her neck. She treated that evening with over the counter medications.

The Department's first inquiry is whether Schoon's work injury on May 7, 2015, is a major contributing cause of her current condition. Schoon, as the claimant, has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry Inc.*, 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367. "The employee's burden of persuasion is by a preponderance of the evidence." *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353,358 (SD 1992).

Schoon has provided Dr. Lawlor as an expert witness. Dr. Lawlor is a medical doctor board certified in physical medicine and rehabilitation, as well as pain medicine. He was educated at the Mayo Graduate School of Medicine and practices at The Rehab Doctors in Rapid City, South Dakota. Dr. Lawlor treated Schoon in 2009, prior to the work injury. He opined that Schoon completely recovered from her complaints in 2009 and was having no difficulties prior to the work injury. Dr. Lawlor further opined that the pain Schoon was experiencing in her shoulder was consistent with the results of the MRI which showed C5-6 herniation. He further opined that physical therapy and medications were medically necessary and appropriate treatment and a necessary consequence of her work injury. Schoon has also provided the expert opinion of Dr. Wilson who is board certified in neurosurgery, was trained at Wake Forest University, and used to practice at Black Hills Neurosurgery & Spine in Rapid City, South Dakota.

Dr. Wilson examined Schoon on December 30, 2015 and reviewed her MRI. Dr. Wilson opined that the work injury was directly related to C5-6 disc herniation and ongoing neurologic symptoms.

Schoon has also provided the expert opinion of Dr. Christopher Dietrich, a medical doctor, who is board certified in physical medicine and rehabilitation, pain medicine, and sports medicine. He performed his residency at the Mayo Graduate School of Medicine and practices at The Rehab Doctors in Rapid City, South Dakota. Dr. Dietrich has treated thousands of patients with herniated or bulging discs. He estimates that 70-80% of his practice is dedicated to treating patients with neck or back pain. Dr. Dietrich reviewed Schoon's records from Dr. Lawlor, ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, the medical records summary, and also physically examined and treated Schoon over a period of several years. Dr. Dietrich opined that the work injury caused an exacerbation of Schoon's cervical disc and cervical disc herniation that led to the subsequent surgery and treatment.

Dr. Dietrich observed that between 2009 and 2015, there were no symptoms that interfered with Schoon's ability to work two jobs and there was nothing that led her to pursue additional care or treatment. Dr. Dietrich opined that the straining, twisting, torqueing, looking up, movement of the head while trying to remove the ad equipment, somehow created pressure or load that resulted in disc herniation and led to symptoms severe enough for her to seek care following the work injury. From this, he concluded that the work injury was what resulted in her need for care. Dr. Dietrich further opined that he has seen similar injuries in other patients from similar injurious events. Dr. Dietrich compared the MRIs from 2009 and 2015 and noted that there was a change specifically to the C5-6 level. He opined that the 2015 MRI is objective evidence that Schoon's condition had changed. He further testified that Schoon's treatment was reasonable and necessary, her condition was likely permanent, and she would need treatments to help with flares in pain.

Employer/Insurer has offered the expert opinion of Dr. Nipper. Dr. Nipper is a board certified orthopedic surgeon who has been practicing for over 27 years. The majority of his medical examination work is done on behalf of insurance companies, adjusters, or attorneys that represent insurance companies. He conducted an in-person

evaluation of Schoon on January 21, 2016. Then he issued his IME report on February 17, 2016. Dr. Nipper opined that Schoon sustained a right shoulder strain in the workplace on May 7, 2015, and no other injury was sustained during that event. He further opined that any ongoing symptoms referable to the neck, shoulder, or radiating symptoms into either of the upper extremities was due to pre-existing pathoanatomy. He concluded that the evolution of a C-6 disc herniation was ongoing and predated the work injury. Dr. Nipper opined that the activities Schoon was involved in during the work injury were not capable of causing a disc herniation in the cervical spine, and the other MRI findings were the product of a longstanding chronic degenerative process unrelated to the work injury. He further opined that Schoon had suffered a shoulder strain that resolved by approximately six weeks following the work injury, and over that time, there was a resolution of symptoms and a return to baseline. He concluded that the work injury is not a major contributing cause of Schoon's current diagnosis, and no additional treatment would be reasonable or necessary related to the work injury.

At the time of the IME, Dr. Nipper did not have Schoon's chiropractic records from the days following the injury. After receiving more of Schoon's records, Dr. Nipper issued an Independent Records Review on August 12, 2019. In this report, he opined that his diagnosis and impressions were unchanged from those provided in the IME report. He also noted that Schoon had a significant history of neck, spine, right shoulder, right extremity, and left extremity problems and symptoms prior to the work injury. He further opined that Schoon's current condition was the result of pathoanatomy that was present in 2004, 2005, and 2009 that had progressed. Dr. Nipper did not find it plausible that Schoon did not have symptoms between 2009 and 2015 due to the level of pathoanatomy.

Schoon argues that Dr. Nipper did not have all the records when he formed his initial opinion and that he misinterpreted the records he reviewed. He opined that, according to the records, the therapy was directed towards Schoon's right shoulder. However, medical records show that Schoon complained of neck pain as well. Dr. Nipper also testified that it would be significant if Schoon had complained about neck pain in the days following her injury, because it would tell him she had another problem. Schoon presented to Black Hills Health and Wellness with neck issues following the

injury. The chiropractor adjusted Schoon's neck and back then diagnosed her as having, among other things, a neck sprain. Four days later, Schoon returned to the chiropractor complaining of pain and stiffness in her upper back, neck, and right shoulder. Dr. Nipper testified that he could not be certain exactly where the pain was coming from, and it could be the shoulder or neck. Dr. Dietrich opined that it is not unusual for a neck injury to cause referred pain into the shoulder. Dr. Nipper also opined that he has seen and treated patients who had neck injuries that resulted in referred pain into the shoulders. Schoon argues that she reported pain in the shoulder on the date of the injury, and then shoulder and neck pain the next day. Both Dr. Dietrich and Dr. Nipper agreed that Schoon's previous injuries could make her more susceptible to injury.

Dr. Nipper also testified that Schoon's injury resolved by six weeks. However, he acknowledged that Schoon was still reporting pain more than six weeks after the injury. He further agreed that there are not any records indicating Schoon had any shoulder pain, neck pain, or radicular pain in the six years leading up to the injury, and that she did not have any pain complaints that were severe enough to require her to get medical treatment or that affected her ability to work. Employer/Insurer argue that Schoon may not have sought care due to not having health insurance.

Employer/Insurer assert that Schoon's testimony regarding her neck and shoulder pain has been inconsistent. Schoon responds that the form of the questions during the hearing and the deposition were different regarding what she felt after the injury. During her first deposition, Schoon was asked where she felt pain. She said she felt pain in her right shoulder, and she did not mention pain or pressure in her neck. At hearing, Schoon was asked where she felt pain and where the pain referred. She said she felt pain in her shoulder and pressure, not necessarily pain, in her neck. Employer/Insurer argue the change in testimony contradicts Schoon's complaint following her injury, and she did not complain of pain or pressure in her neck on May 8, 2015 when she visited Black Hills Health and Wellness Center. She also did not complain of neck pain or pressure on May 18, 2015 at her visit to Black Hills Orthopedic. Schoon argues that the records from Black Hills Health and Wellness center on May 8 and May 12, 2015 reflect that she presented with neck pain.

Employer/Insurer further assert that Schoon did not communicate any pain in her neck to Dr. Nipper during her IME. However, during his deposition testimony, Dr. Nipper acknowledged that the medical records show she was complaining of upper back and neck pain.

The Department must look to the medical expert testimony to decide if Schoon's May 7, 2015 work injury remains a major contributing cause as defined by SDCL 62-1-1(7) (b) which provides,

(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

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

"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). Additionally, "[t]here are no 'magic words' needed to express an expert's degree of medical certainty, and the test is only whether the expert's words demonstrate that he or she is expressing an expert medical opinion." *Orth v. Stoebner & Permann Const., Inc.*, 2006 SD 99, ¶ 44, 724 N.W.2d 586, 596 (Citation omitted). The Department finds that both Dr. Dietrich and Dr. Nipper's testimony rests on the necessary foundation. Dr. Dietrich's opinion is based on his review of medical records from ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, and the summary provided by Schoon's counsel. He has also treated Schoon for several years. Dr. Nipper conducted a records review and an IME of Schoon. Both doctors were aware of Schoon's previous injuries and treatment history.

In addition to Dr. Dietrich's opinion that the work injury caused an exacerbation of Schoon's cervical disc and cervical disc herniation, Dr. Wilson and Dr. Lawlor agree that the work injury was the cause of injury and need for treatment. Dr. Nipper concluded that Schoon's work injury was merely a right shoulder strain which would have resolved after six weeks, and, therefore, is not a major contributing cause of her current condition. The South Dakota Supreme Court (Court) has held that a non-treating physician's opinion can be more persuasive than the opinion of a treating physician on

causation issues. *Helms v. Lynn's Inc.*, 1996 S.D. 8, 542 N.W. 2d 764. However, in Schoon's case, the Department finds the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than that of Dr. Nipper. The records show that while Schoon does have a history of injury, degenerative disc disease, and pain in her neck and shoulder, she did not seek treatment for these issues from 2009 until the May 7, 2015 work injury. Dr. Nipper opined that it was not plausible for her to have no symptoms during that time period, and she must have merely refrained from seeking treatment. Employer/Insurer assert that Schoon did not seek treatment, because she did not have health care. However, the Department must look to the evidence before it, and there is no medical evidence or testimony that indicates that Schoon suffered symptoms between 2009 and 2015. The Department does not have evidence to support the conclusion that this was merely due to Schoon's lack of health insurance.

The Court has recently clarified the causation standard under SDCL 62-1-1(7)(b) in *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425. In *Armstrong*, Armstrong sustained multiple injuries to his left knee while working for Longview Farms. The injuries were initially found to be compensable. During the treatment for these injuries, osteoarthritis and other chronic issues were discovered. Armstrong was offered the choice of conservative treatment or a knee replacement. He opted for replacement. The insurer concluded that the work injury was not a major contributing cause of his left knee condition and it was, instead, the result of chronic, preexisting conditions. The Department held that Armstrong had not proven that his injury was the major contributing cause of his need for knee replacement surgery. On appeal, the Court stated, "[t]he fact that the March 31 injury may have been the unfortunate tipping point of Armstrong's knee symptoms does not mean that it displaced the degenerative effects of his preexisting condition." *Id.* ¶ 24, 938 N.W.2d at 431. "[W]e have previously rejected a similar argument that relegated causation standard of SDCL 62-1-1(7)(b) to an elementary cause-in-fact determination." *Id.* ¶ 26, 938 N.W.2d at 431 (citations omitted).

The Department finds Schoon's case distinguishable from that of *Armstrong*. While they both have preexisting conditions, the Court in *Armstrong* made note of the

record indicating that Armstrong's condition was worsening in the time up to the work injury.

Here, the record contains uncontroverted evidence of Armstrong's preexisting degenerative osteoarthritis as it grew worse in the years leading up to the March 31 injury. Further, there is no evidence to support the view that Armstrong's osteoarthritis was related to his employment, either at Longview Farm or any previous employer. Armstrong was a candidate for total knee replacement for 11 years prior to his injury and during that time his medical providers noted he was experiencing ongoing, worsening pain in *both knees*.

Id. ¶ 24, 938 N.W.2d at 431.

In contrast, there is no record of Schoon requiring treatment in the years leading up to her injury. The Court in *Armstrong* also did not find Armstrong's expert testimony persuasive. "The testimony from both Dr. Adler and Dr. Bissell supports the conclusion that Armstrong's work-related injury was not a major contributing cause of his need for knee replacement surgery." *Id.* ¶ 25, 938 N.W.2d at 431. Schoon's experts all agree that the injury was a contributor to her condition and need for treatment.

Therefore, the Department is persuaded that in accordance with SDCL 62-1-1(7)(b) Schoon's work injury combined with her preexisting diseases and conditions to cause or prolong her impairment and need for treatment. The Department further concludes that the work injury is and remains a major contributing cause of her impairment and need for treatment.

Employer/Insurer's Objection Regarding Dr. Dietrich's Expert Opinion:

Employer/Insurer have objected to Dr. Dietrich's opinions based on lack of foundation. Schoon has argued Employer/Insurer's objection is untimely. For the sake of expedience, the Department will address the objection that was made during deposition. Employer/Insurer argues that unlike Dr. Nipper who conducted an examination of Claimant in person and reviewed the entirety of her medical records, Dr. Dietrich did not review all of Claimant's medical records or medical history. Dr. Dietrich, instead, reviewed a summary provided by Schoon's counsel.

"Expert testimony is entitled to no more weight than the facts upon which it is predicated." *Darling*, 2010 S.D. 4, ¶ 13, 777 N.W.2d 363, 367 (citations omitted). The Court has offered guidance regarding expert testimony:

Admissibility of expert testimony is governed by SDCL 19-15-2 (Rule 702). Under this rule, before a witness can testify as an expert, that witness must be “qualified.” *Id.* Furthermore, under *Daubert*, the proponent offering expert testimony must show that the expert’s theory or method qualifies as scientific, technical, or specialized knowledge as required under rule 702. *Guthrie*, 2001 SD 61, ¶ 34, 627 N.W.2d at 415-16; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d. 469 (1993). Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415. The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. SDCL 19-9-7 (Rule 104(a)). The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence. *Daubert*, 509 U.S. at 592 n. 10, 113 S. Ct. at 2796 n. 10, 125 L.Ed.2d 469 n. 10. Relevance embraces evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415 (quoting SDCL 19-12-1).

Burley v. Kytac Innovative Sports Equip. Inc., 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402

Applying the guidance offered by the Court in *Burley*, the Department finds that Dr. Dietrich’s expert testimony is relevant, reliable, and represents scientific, technical, or specialized knowledge. Dr. Dietrich reviewed Schoon’s records from Dr. Lawlor, ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, the medical records summary, and also physically treated Schoon. The Department finds that Dr. Dietrich’s testimony is based on the appropriate foundation. Employer/Insurer’s objection is overruled.

Benefits:

For the above stated reasons, the Department has found that Schoon’s injury is a major contributing cause of her current condition and need for treatment. The Department further finds that Schoon is entitled to benefits related to her work injury. These benefits are based on the 11% whole person impairment rating assessed by Dr. Dietrich and a weekly compensation rate of \$492.84. Therefore, these benefits include permanent partial disability benefits in the amount of \$16, 914 (312 weeks x 11% x \$492.84) and medical expenses in the amount of \$59, 282.73.

Conclusion:

Schoon has proven by a preponderance of the evidence that the injury she suffered on May 7, 2015 is and remains a major contributing cause of her current condition. She is therefore entitled to benefits as reflected above.

Counsel for Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer/Insurer shall have an additional twenty (20) days from the date of receipt of Claimant's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 25 day of January, 2021.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle M. Faw
Administrative Law Judge