SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MARY GROUT,
Claimant,

HF No. 78, 2005/06

v.

DECISION

POWERS OIL COMPANY,
Employer,

and

FEDERATED MUTUAL INSURANCE,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. Claimant appeared personally and through her counsel, Michael E. McCann. Timothy A. Clausen represented Employer/Insurer.

Issue:

Whether Claimant suffered a compensable injury as defined by SDCL 62-1-1(7).[1]

Facts:

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

1. Claimant worked as a cook for Employer at its convenience store in Flandreau, South Dakota.
2. At the time of her injury, Claimant was 67 years old.
3. Employer was insured by Federated Mutual Insurance at all times in question.
4. Claimant began her employment with Employer in September of 2000.
5. On November 2, 2004, Claimant began her shift at around 3:30 p.m.
6. At approximately 7:30 p.m., Claimant was walking from the kitchen to the office area of the store when she suddenly fell to the tile floor onto her right side.
7. Claimant's fall was "hard and fast" and she had no opportunity to break her fall with her arms.
8. Claimant felt no pain until she hit the floor.
9. Claimant was unable to get to her feet because of excruciating pain.
10. Betty Von Eye, a coworker, attempted to help Claimant get up and tried to sit her in a chair. Claimant could not sit in the chair due to excruciating pain.

[1] The Department of Labor's July 9, 2007, Prehearing Order reserved all other issues.

11. Von Eye called the store's manager, Sandy Ekern, and left Claimant, leaning against a threshold of a doorway, to attend to customers.
12. Ekern arrived at the store after approximately seven to eight minutes after she was called. Ekern moved Claimant into an office chair, but Claimant was unable to sit down due to the pain in her low back, right hip, and right leg. Claimant fell off the chair onto the floor.
13. The evidence was insufficient to establish that there was any substance on the floor where Claimant fell that might have contributed to her fall.
14. Claimant was transported by ambulance to the Flandreau Hospital, where Dr. Tad Jacobs diagnosed a subcapsular fracture of the right hip.
15. Claimant was transferred to Avera McKennan Hospital in Sioux Falls under the care of Dr. Blake Curd with the Orthopedic Institute.
16. Claimant underwent open reduction and internal fixation of her right hip.
17. A DEXA bone scan revealed that Claimant suffered from osteopenia, placing her at increased risk of fracture from low bone mineral density.
18. At Employer/Insurer's request, Dr. Mark Harlow performed a review of Claimant's medical records.
19. Employer/Insurer received notice pursuant to SDCL 62-7-10.
20. Claimant continued to suffer chronic pain in her right hip and low back. Claimant's testimony was credible.
21. Employer/Insurer denied the compensability of Claimant's hip fracture.
22. Claimant filed a timely Petition for Hearing with the Department of Labor.
23. Other facts will be developed as necessary.

Issue

Whether Claimant suffered a compensable injury as defined by SDCL 62-1-1(7).

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 NW2d 720 (SD 1992); Phillips v. John Morrell & Co., 484 NW2d 527, 530 (SD 1992); King v. Johnson Bros. Constr. Co., 155 NW2d 183, 185 (SD 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353, 358 (SD 1992).

Claimant "must establish a causal connection between her injury and her employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "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 NW2d 720, 724 (SD 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 NW2d 79, 85 (SD 1997).

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

> only 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.

There is no dispute that Claimant suffers from a preexisting condition, diagnosed as osteopenia. "While both subsection (b) and subsection (c) deal with preexisting injuries, the distinction turns on what factors set the preexisting injury into motion; if a preexisting condition is the result of an occupational injury then subsection (c) controls, if the preexisting condition developed outside of the occupational setting then subsection (b) controls." Byrum v. Dakota Wellness Foundation, 2002 SD 141, ¶15 (citing Grauel v. South Dakota School of Mines, 2000 SD 145, ¶ 8, 16-17, 619 NW2d 260, 262-265.) The parties do not dispute that Claimant's osteopenia is a preexisting condition that did not develop within the occupational setting. Therefore, subsection (b) of SDCL 62-1-1(7) controls. Claimant must demonstrate that she suffered an injury arising out of and in the course of employment and she must demonstrate the factors of SDCL 62-1-1(7)(b).

The South Dakota Supreme Court recently ruled:

> A claimant who wishes to recover under South Dakota's Workers' Compensation Laws "must prove by a preponderance of the evidence that [s]he sustained an injury 'arising out of and in the course of employment.'" Bender v. Dakota Resorts Management Group, Inc., 2005 SD 81, ¶ 7, 700 NW2d 739, 742 (quoting SDCL 62-1-1(7)) (additional citations omitted). "Both factors of the analysis, 'arising out of employment' and 'in the course of employment,' must be present in all claims for workers' compensation." Id. ¶ 9. The interplay of these factors may allow the strength of one factor to make up for the deficiencies in the strength of the other. Id. (quoting Mudlin v. Hill [sic] Materials Co., 2005 SD 64, ¶ 9, 698 NW2d 67, 71) (quoting 2 Arthur Larson, Larson's Workers' Compensation Law, § 29, 29-1 (1999)). These factors are construed liberally so that the application

> of the workers' compensation statues is "not limited solely to the times when the employee is engaged in the work that he was hired to perform." Id. ¶ 8. Each of the factors is analyzed independently although "they are part of the general inquiry of whether the injury or condition complained of is connected to the employment." Id. ¶ 9.
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> "In order for the injury to 'arise out of' the employment, the employee must show that there is a 'causal connection between the injury and the employment.'" Id. ¶ 10 (quoting Mudlin, 2005 SD 64, ¶ 11, 698 NW2d at 71). Although the employment need not be the direct or proximate cause of the injury, the accident must have its "origin in the hazard to which the employment exposed the employee while doing [her] work." Id. "The injury 'arose out of the' employment if: 1) the employment contributes to causing the injury' 2) the activity is one in which the employee might reasonably engage; or 3) the activity brings about the disability upon which compensation is based." Id. (quoting Mudlin, 2005 SD 64, ¶ 11, 698 NW2d at 71-72).
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> The term "in the course of employment" refers to the time, place, and circumstances of the injury. Id. ¶ 11 (quoting Bearshield v. City of Gregory, 278 NW2d 166, 168 (SD 1979)). An employee is acting "in the course of employment" when as employee is "doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment." Id. (internal quotations and citations omitted).

Fair v. Nash Finch Co., 2007 SD 16, ¶ 8 -11. In post hearing briefing, Employer conceded that Claimant suffered an injury "in the course of" her employment. Employer contests that Claimant can show that she suffered an injury "arising out of" her employment. Dr. Jacobs, a general practice physician, found that it would be "unusual" for a person "with a standard deviation of minus 1.5 would have a spontaneous fracture of the hip."

Claimant does not know precisely why she fell. Claimant does not recall if she slipped, or if she tripped, or if she stumbled, or if she merely lost her balance. Claimant argues that the totality of the circumstances requires a finding that her hip fracture was "arising out of and in the course of employment." Considering the factors set forth in Fair, Claimant's employment contributed to her injury in that she was walking in furtherance of her duties as a cook for Employer. Claimant's act of walking is an activity in which Claimant might reasonably engage. Furthermore, based upon the medical testimony of Employer's expert, the walking contributed to the fracture, whether caused by osteopenia or not. Dr. Harlow testified that Claimant's hip fracture occurred before the fall, explaining:

> Well, most of these femoral neck fractures occur either by a twisting or turning motion in bone that's somewhat weakened by, you know, aging which a lot of people refer to as osteoporosis which is fairly prominent in women over the age

of fifty. That just based on the fact of the type of fracture was through the neck of the femur just below the head and it wasn't displaced.

Dr. Harlow further testified:

Q: And the fact that [the fracture] wasn't displaced, what does that tell you?
A: Well, that means just basically she turned or whatever. It probably cracked through and then she had pain and fell to the floor.
Q: And if it was a fracture that occurred from the impact say with the floor, would you expect a nondisplaced fracture?
A: Well, that of course is certainly possible, but it's probably unlikely. If they fall from a standing height to the floor on a hard surface, usually there's not that type of fracture in the first place. It's more of a different type of fracture. It's lower down in the region below the neck. It's a lot more pieces, a lot more deformity. It would be unusual to sustain that type of a fracture from a fall directly on it. It could happen, but most of the time it's caused before they - - or develops before they hit the floor.
Q: And so by nondisplaced, what do you mean?
A: I mean basically the two bone - - the bony alignment between the upper and lower segment of the fracture hasn't moved. It's just a crack through the bone.
Q: And the location of the fracture at the neck of the femur, what does that tell you?
A: Well, that's more than likely the area that most of these fractures that occur with a twisting or turning motion occur.

Dr. Harlow further explained:

Q: In other words, if she had a displaced fracture, for example, that would be an indication that it might have happened when she hit the floor?
A: Well, no, that's not exactly true either. That femoral neck fracture comes in several different types and it depends on what happens when they hit the floor. The fracture itself probably occurs before they fall, but then when they fall, if they twist or turn, they separate the fragments and the ball rolls off and that's a, you know, more significant injury. That has to have a - - have a new hip joint put in instead of pins.
Q: Okay.
A: But those are all - - the fracture itself develops, you know, most of the time when they're twisting and turning and still walking and then when they go down, depending on how they land, they may, you know, displace the fragments and in her case, it wasn't. It didn't break - - it didn't move.
Q: Okay.
A: It just cracked through.
Q: And in terms of the twisting and turning you're talking about, you're talking about the twisting and turning that we normally do in our everyday lives?

A: Well, yeah, you'll be walking along and turn to look at somebody and you know, turn back or something could be enough in some people.

Based upon this testimony, Claimant's act of walking in performance of her duties contributed to the fracture. Claimant has met all of the factors outlined in Fair. Based upon the totality of the evidence, Claimant has met her burden to demonstrate that she suffered an injury "arising out of and in the course of employment." Claimant's fracture "arose out of and in the course of her employment."

The next analysis must be SDCL 62-1-1(7)(b), which states:

> 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.

Claimant had been at work for hours and this "twisting and turning" happened in the course of her duties. Employer/Insurer's argument that if Claimant's hip broke before the fall "as a result of an idiopathic condition," Claimant cannot meet her burden, is rejected. So is Employer/Insurer's position that Claimant's fall was "idiopathic" or "unexplained." Dr. Harlow's testimony establishes that Claimant's osteopenia preexisted the fracture and that Claimant's fracture was caused by the combination of osteopenia and "a twisting or turning motion." Dr. Curd, an orthopedic surgeon, opined, based upon his experience, that "it's more likely than not that [Claimant's hip fracture] occurred either during the process of the fall or with impact." Dr. Curd opined that Claimant's DEXA scan did not show evidence of "osteoporosis." Dr. Curd did not clarify the difference, if any, between "osteoporosis and osteopenia." Dr. Curd's opinion regarding Claimant's preexisting condition is rejected as less persuasive than Dr. Harlow's. Dr. Jacob's opinions regarding the hip fracture are not as persuasive as Dr. Harlow's, given Dr. Harlow's experience and expertise, and are rejected. Based upon Dr. Harlow's testimony, which is accepted, and the medical evidence in this matter, Claimant's fall was not "idiopathic" or "unexplained." Dr. Harlow's opinions show that this "twisting and turning" happened at work, caused the break, and then the fall.

The South Dakota Supreme Court has stated:

> Under South Dakota law, insofar as a workers' compensation claimant's "pre-existing condition is concerned[,] we must take the employee as we find him." Kennedy, 2002 SD 137, ¶13, 653 NW2d at 884. "If a compensable event contributed to the final disability, recovery may not be denied because of the pre-existing condition, even though such condition was the immediate cause of the disability." Id. (quoting Elmstrand v. G & G Rug & Furniture Company, 77 SD 152, 155, 87 NW2d 606, 608 (1958)). Dwain's age and degenerative spinal condition may have made him more susceptible to a work-related injury while working for S & P Construction, but this does not alter the compensability of his claim.

Orth v. Stoebner and Permann Constr., 2006 SD 99, ¶ 49. Claimant established by a preponderance of the evidence that her employment related injury is and remains a major contributing cause of her need for treatment. Claimant's injury is compensable.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit 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 in accordance with this Decision.

Dated this 9th day of May, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge