SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CHRIS BETTS, **HF No. 128, 2005/06**
Claimant,

v. **DECISION**

JOHN MORRELL & COMPANY,
Employer/Self 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. A hearing was held before the Division of Labor and Management in Sioux Falls, South Dakota. Claimant, Chris Betts, appeared personally and through his attorney of record, Stephanie R. Amiotte. Scott Folkers represented Employer/Self Insurer, John Morrell & Company.

Issues

1. Causation of Claimant's neck and back injury
2. Nature and extent of disability (permanent partial disability)
3. Reasonable and necessary medical expenses

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

On August 22, 2005, Chris Betts (Claimant) sustained an injury while working at John Morrell & Company (Employer). It was the first day Claimant was working in an area known as "smoke alley" where he would push a stainless steel tree loaded with meat on an overhead rail into another area to be smoked. Mike Lambertz, the supervisor at John Morrell & Company, estimated that an empty steel tree weighs between 390-470 pounds and the product weighs between 1100-1700 pounds.

On August 22, 2005, a large tree full of meat fell on Claimant striking him on the top front of his head and again on his face near his lip. Claimant testified that he was stunned by the blow and knocked backwards onto the concrete floor. Claimant was wearing a hard hat at the time of the incident which was damaged by the metal tree. Claimant testified that there was an indentation in the top of the hard hat and the plastic straps were broken.

Immediately after the incident, Claimant went to the foreman's office to get help. The foreman gave him paper towels to wipe the blood off his head and face. Claimant then went to the first aid station at John Morrell to see the nurse. The nurse noted that Claimant had a two inch laceration on his frontal lobe and a deviated nose with blood. Claimant was asked to sign a doctor's choice form and Claimant was sent to Avera Healthworks by taxi.

Claimant saw Dr. Bruce Elkins at Avera Healthworks. Dr. Elkins noted that Claimant sustained a cut inside the upper lip, but no apparent dental injuries, and a 1.5cm scalp laceration[1]. The scalp wound was closed with four skin staples. Dr. Elkins records make no reference to any pain being reported by Claimant's to his neck or back. Dr. Elkins directed Claimant to take Tylenol for pain and use ice on his face and nose. Dr. Elkins recommended Claimant follow up in one week for staple removal and released Claimant back to work with no restrictions.

Claimant was not provided with any discharge instructions from Healthworks. Claimant was driven back to John Morrell first aid by taxi. Claimant turned in the forms from Healthworks, did a drug urinalysis test and took an eye exam. Claimant remained in pain and was unable to complete his shift. Claimant went home and went to bed. The next day, Claimant returned to work and was able to work nine hours out of his ten hour shift. Claimant left early due to pain.

After leaving work early on August 23, 2005, Claimant went home and went to bed. Claimant awoke several hours later, feeling light-headed, nauseous, and clammy as if something was wrong. Claimant went to Avera McKennan emergency room. The medical records reflect that Claimant complained of headache, head pain, dizziness, nausea, and pain and swelling above the lip. Claimant was seen by Dr. John W. Belk. A CT scan of Claimants head and facial bones were normal. Dr. Belk diagnosed an acute closed head injury and acute facial injury status post work related trauma. Claimant was given a tetanus shot and directed to take Tylenol as needed for pain. Claimant was also given discharge instructions for head injury and facial contusion.

Claimant saw Dr. Elkins for a follow-up evaluation on August 29, 2005, to have his staples removed. Dr. Elkins' notes indicate that Claimant reported his face and scalp was doing much better. Claimant explained the increased swelling and symptoms that lead to the emergency room visit on August 23, 2005, and that he continued to use Tylenol. Claimant reported that he was working his regular duties without difficulties at that time. Dr. Elkins' examination noted no signs of infection and no significant swelling

[1] Claimant disagreed with Dr. Elkins description of the wound. Claimant testified that the laceration was approximately two inches long. This is consistent with the testimony of Diana Falk, a family friend who observed Claimant's wound, the Avera McKennan Emergency Room that treated Claimant the day after the injury, and the nurse's notes at first aid. Dr. Elkins in his deposition admitted that the records do not reflect length and width of the laceration and that such information would have been helpful.

on Claimant's face. Claimant was released by Dr. Elkins at maximum medical improvement (MMI) with no anticipated residual impairment.

On September 21, 2005, Claimant presented at Avera McKennan emergency room with chest pains. Claimant was diagnosed with chronic fatigue and atypical chest pain. Claimant was sent home and instructed to follow up with his regular doctor. Claimant's family physician, Dr. Leonard Gutnik referred Claimant to Dr. Richard S. Rigmaiden. On September 23, 2005, Claimant saw Dr. Rigmaiden to follow up after his emergency room visit. The medical records reflect Claimant reported to Dr. Rigmaiden that he was experiencing some back pain secondary to heavy lifting on the job. Claimant was released to fully duty on September 28, 2005.

On November 1, 2005, Claimant went to the first aid station at John Morrell to get approval for a doctor's visit. The nurse's notes indicate that Claimant continued to have headaches. The nurse's notes also indicate that Claimant had neck and back discomfort and soreness in his jaw. Claimant was given a workability form and sent to Dr. Elkins.

Claimant saw Dr. Elkins on November 1, 2005, for a follow-up evaluation. The medical records reflect that Claimant reported continued headaches since his August 2005, work injury. Claimant also reported that over the last three days he noticed neck and low back discomfort. Dr. Elkins reviewed the emergency room CT results. Dr. Elkins diagnosed headache, status post closed head trauma. Dr. Elkins prescribed amitriptyline for the headaches and advised that given the number of months that had elapsed since the work injury, he would not relate Claimant's neck and back pain over the last three days to the work injury of August 2005. Dr. Elkins advised Claimant to follow up with his family physician for his back and neck complaints. Claimant was released to full duty with no restrictions.

Claimant began treating with Dr. Bruce Jon Hagen at Back Specialists of the Midwest, on January 31, 2006, for headaches, soreness and stiff ness in his neck and low back. Dr. Hagen diagnosed Claimant with acute moderate cervical sprain, acute moderate lumbosacral sprain, facet syndrome, ligament instability, and myalgia. Dr. Hagen's initial treatment plan was 10-12 office visits with conservative chiropractic spinal correction and physical therapy to return Claimant to pre-injury status baring any further exacerbation/aggravations. Claimant continued to treat with Dr. Hagen 2-3 times per week; the medical records reflect that Claimant showed improvement with treatment. Dr. Hagen reevaluated Claimant on May 2, 2006, and determined that Claimant's prognosis was guarded due to unresolved positive orthopedic tests following the treatment regime and recommended 6-8 more office visits and another re-evaluation.

On February 22, 2006, Claimant saw Dr. Allen D. Bliss, his dentist for popping in his jaw which Claimant felt may be related to his August 2005, work injury. Dr. Bliss wanted Claimant to get a study and treatment done out of town, which Claimant did not do since he could not afford it at the time.

On June 21, 2006, Claimant was involved in a motor vehicle accident where his vehicle was rear ended by another vehicle. Claimant sustained injuries to his low back, neck, right arm and right leg. Claimant sought treatment for those injuries from Dr. Hagen beginning on Jun 22, 2006. Claimant continued to treat with Dr. Hagen at the time of the hearing.

Dr. Hagen assigned an impairment rating of 8% under the AMA Guides to Permanent Impairment, 5th Edition, which Dr. Hagen apportioned equally between the workplace injury of August 25, 2005 and the subsequent motor vehicle accident on June 21, 2006. The AMA Guides to Permanent Impairment, 5th Edition is not recognized by the Department of Labor, therefore Dr. Hagen completed a subsequent impairment assessment utilizing the AMA Guides to Permanent Impairment, 4th Edition, which resulted in a 5% permanent impairment to the whole body, apportioned equally between the workplace injury of August 25, 2005 and the subsequent motor vehicle accident on June 21, 2006.

Claimant saw Dr. Jeff Luther on November 25, 2008, for an independent medical evaluation at the request of Employer/Self-Insurer. Following a review of Claimant's medical records and a physical examination, Dr. Luther concluded that "Mr. Betts does not qualify for impairment under the criteria set forth in the AMA guides. He has documented soft tissue pain and mild limitations in range of motion, but in my opinion there are minimal objective findings to support a ratable impairment."

Other facts will be developed as necessary

Analysis
Causation of Claimant's back and neck injury

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. The claimant must prove that "the employment or employment-related activities are a major contributing cause of the condition complained of." SDCL 62-1-1(7)(a). We construe the phrase "arising out of and in the course of employment" liberally. *Id.* at, ¶10, 674 NW2d at 521.

Employer/Self- Insurer does not dispute that Claimant suffered a laceration on his scalp line and a contusion to his face when the metal tree with meat struck him. However, Employer/Self-Insurer argue that Claimant did not sustain an injury to his neck or low back as a result of the work related incident on August 22, 2005.

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[.]"

> In applying the statute, we have held 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. We have further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

Because an injury is a subjective condition, an expert opinion is required to establish a causal connection between the incident or injury and disability. *Truck Ins. Exchange*, 2001 SD 46, ¶20, 624 NW2d 705, 709; *Day v. John Morrell & Co*., 490 NW2d 720, 724 (SD 1992). The South Dakota Supreme Court has stated,

> 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, 724 NW2d 586 (citations omitted).

In support of his burden, Claimant relied on the testimony of Dr. Hagen. Dr. Hagen testified live at hearing as to the causation of Claimant's back and neck injuries. Dr. Hagen opined that based upon reasonable chiropractic probability, the major contributing cause of Claimant's current medical condition was the trauma to Claimant's spine from his August 2005, accident at Morrell's. This opinion was based on the patient's history and Dr. Hagen's examination, diagnosis and treatment of Claimant over several months.

Dr. Hagen took a patient history when he began treating Claimant in January 2006. Claimant related to Dr. Hagen that he was injured on the job, and that he had been experiencing headaches, and neck and lower back pain since the August 2005, injury. Claimant told Dr. Hagen that his headaches, and neck, back and face started to hurt about a week after the injury.

The value of an opinion of an expert witness is dependent on and entitled to no more weight than the facts upon which it is predicated. It cannot rise above its foundation.

Podio v. American Colloid Co., 83 SD 528, 162 NW2d 385 (1968) (citing *Oviatt v. Oviatt Dairy, Inc.*, (citations omitted). The primary fact on which Dr. Hagen's opinion is based is that Claimant had been experiencing neck and back pain from the time of the accident. This is without support in the record. Claimant was seen by Dr. Elkins on August 29, 2005, one week after the injury, to have the staples removed, and made no mention of neck or back pain. While Claimant complained of headaches prior to beginning treatment with Dr. Hagen on January 2006, the medical records indicate that there was no complaint of any neck or back pain until the September 23, 2005, appointment where Dr. Rigmaiden noted neck and back pain due to heavy lifting at work. Dr. Hagen's opinions as to causation are rejected. "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." *Hanson v. Penrod Constr. Co*., 425 N.W.2d 396, 398 (S.D. 1988).

Dr. Elkins testified by deposition on July 11, 2008. As to the causation of Claimant's neck and back pain, Dr. Elkins opined that Claimant's back and neck pain appeared to begin some time after the work injury and were not caused by the August 22, 2005, work incident. Dr. Elkins testified, "[Claimant] had no complaints for a number of months…I would have expected there to be some notable discomfort long before he actually developed it." Dr. Elkins testified to a reasonable degree of medical certainty, the August 2005, work injury was not a major contributing cause to Claimant's later complaints of neck and low back pain.

On cross examination, Dr. Elkins was asked about the possibility of the August 2005, injury causing back and neck injuries,

Q: Would you agree that a head trauma that causes somebody to fall onto a hard concrete floor and causes a laceration to their head and scalp could cause a neck injury?
A: It's possible.
Q: Would you agree that that sort of trauma could also cause a muscular skeletal injury?
A: Yes.
Q: You were talking about I think some delayed symptoms earlier, and I think your testimony was along the lines that if somebody were to have injured their neck and back, like Chris on the date of the work accident, that you would have thought he would have complained immediately or within days after the accident, right?
A: Correct.
Q: Now would you agree that everybody has different pain tolerances from individual to individual?
A: Yes
Q: So something that might no be as painful to Chris might be extremely painful to another individual, correct?
A: That is possible.

Q: And differing pain tolerances could certainly explain as to why somebody would not complain immediately about a neck or back injury as opposed to somebody who has a very low pain tolerance, who would perhaps immediately complain about it?
A: Correct

Dr. Jeff Luther performed an independent medical evaluation on November 25, 2008, at the request of Employer/Self-Insurer. Dr. Luther reviewed Claimant's medical records performed and a physical examination, Dr. Luther did not express an opinion as to the causation of Claimant's current back and neck condition.

Based upon the live testimony at hearing, the medical evidence, and expert medical testimony presented, Claimant has failed to meet his burden to demonstrate by a preponderance of the evidence that he sustained a compensable injury to his neck and back arising out and in the course of his employment and that Claimant's employment was a major contributing cause of Claimant's injury.

Nature & Extent of Disability (PPD)

Dr. Hagen completed an evaluation and determined, using the AMA Guides to Permanent Impairment, 5th Edition, that Claimant has an 8% whole person impairment rating. Dr. Hagen stated that half was attributable to the workplace injury and half was attributable to the car accident in 2006.

The 5th edition of the AMA Guides is not accepted under South Dakota's workers' compensation laws. Following the hearing, Dr. Hagen completed an evaluation under the 4th edition of the AMA Guides and determined that Claimant had a 5% whole person impairment rating, again apportioning it half to the workplace injury and half to the car accident in 2006. Both impairment ratings were based on continued pain in the cervical area of the spine, non-uniform loss of range of motion and non-verifiable radicular complaints affecting his right upper extremity. Dr. Hagen's impairment rating were based on Claimant's back and neck pain that the Department has determined were not related to the work related injury of Aug 22, 2005. Dr. Hagen made no determination of a permanent impairment due to the compensable injuries Claimant sustained on August 22, 2005.

Dr. Luther performed and independent medical exam at the request of employer. He reviewed claimant's medical records and conducted a physical examination. Dr. Luther found no basis for assigning permanent impairment.

Causation is a threshold issue that must be met before benefits are awarded. Claimant failed to meet his burden of proof that his neck and low back issues arose out the work related injury on August 22, 2005. Claimant has no permanent impairment associated

with the injuries he sustained on August 22, 2005 and is not entitled to permanent partial disability benefits.

Reasonable & Necessary Medical Expenses
The last question addressed by the parties is whether Claimant is entitled to reasonable and necessary medical expenses pursuant to SDCL 62-4-1.

Pursuant to SDCL 62-4-1, the employer must provide reasonable and necessary medical expenses. It is well established by the South Dakota Supreme Court that the Employer has the burden to demonstrate that the treatment rendered by the treating physician was not necessary or suitable and proper.

> Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. It is in the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.

Hanson v. Penrod Construction Co., 425 NW2d 396,399 (SD 1988). Claimant argues that he is entitled to unpaid medical expenses in the amount of $10,567.08. The medical expenses are itemized as follows:

Back Specialists of the Midwest	$6,867.94
Avera McKennan Hospital	$3,080.39
Medical X-ray Center, PC	$513.75
Dr. Allen Bliss	$105.00

Back Specialists of the Midwest
The treatment Claimant received from Dr. Hagen at Back Specialists of the Midwest is for Claimant's continued low back and neck pain. The Department has determined that Claimant failed to meet his burden to demonstrate by a preponderance of the evidence that he sustained a compensable injury to his neck and back arising out and in the course of his employment and that Claimant's employment was a major contributing cause of Claimant's injury. Therefore Employer/Self-Insurer is not liable for the medical treatment provided by Dr. Hagen for Claimant's back and neck injuries.

Avera McKennan Hospital & Medical X-Ray
The Avera McKennan Hospital bill stems from the emergency room visit on August 23, 2005. The night after Claimant's August 22, 2005 work injury, Claimant awoke, feeling light-headed, nauseous, and clammy as if something was wrong. Claimant went to Avera McKennan emergency room. The medical records reflect that Claimant complained of headache, head pain, dizziness, nausea, and pain and swelling above the lip. Claimant was seen by Dr. John W. Belk. A CT of Claimants head and facial

bones were normal. Dr. Belk diagnosed an acute closed head injury and acute facial injury status post work related trauma. Claimant was given a tetanus shot and directed to take Tylenol as needed for pain. Claimant was also given discharge instructions for head injury and facial contusion.

On September 23, 2005, Employer/Insurer denied payment of the emergency room bill, indicating that Claimant had failed to receive preauthorization for the referral as required by statute. SDCL 62-4-43 provides in part,

> The employee may make the initial selection of the employee's medical practitioner or surgeon from among all licensed medical practitioners or surgeons in the state. The employee shall, prior to treatment, notify the employer of the choice of medical practitioner or surgeon or as soon as reasonably possible after treatment has been provided. The medical practitioner or surgeon selected may arrange for any consultation, referral, or extraordinary or other specialized medical services as the nature of the injury shall require. The employer is not responsible for medical services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section. … If the employee desires to change the employee's choice of medical practitioner or surgeon, the employee shall obtain approval in writing from the employer. An employee may seek a second opinion without the employer's approval at the employee's expense.

Immediately following Claimant's injury, he was asked to sign a doctor choice form indicating that Claimant had chosen Healthworks to be his treating physician. On December 22, 2005, Employer/Insurer sent a letter to Claimant indicating that the denial on the basis of no referral was incorrect, but maintained the denial because the treatment was not reasonable and necessary pursuant to SDCL 62-4-1. Employer/Insurer argued that because there was no new diagnosis or treatment, the emergency room visit was unnecessary.

Jim Fleming, the representative for Employer admitted at hearing that the diagnosis of closed head injury was different that the diagnosis of scalp laceration rendered early at Healthworks. Given the nature of Claimant's injury, Claimant's treatment at the Avera McKennan emergency room was reasonable and necessary. Employer/Self-Insurer is liable for the costs associated with that treatment and diagnostic tests performed at the emergency room.

Dr. Allen Bliss

Claimant sought treatment with Dr. Bliss on one occasion for jaw popping after his work injury. Claimant believed that the popping was related to the work related accident when he was hit in the head and mouth. Claimant was never referred to Dr. Bliss by his treating physician or another doctor. Claimant never received prior authorization from Employer/Self-Insurer prior to seeking treatment from Dr. Bliss. Pursuant to SDCL 62-4-43, the employer is not responsible for medical services furnished or ordered by any

medical practitioner or surgeon or other person selected by the employee without prior approval. Employer/Self-Insurer is not liable for the treatment provided by Dr. Bliss.

Employer/Self-Insurer 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. Claimant shall have ten (10) days from the date of receipt of Employer/ Self-Insurer'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, Employer/Self-Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 31st day of July, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M. Dockter
Administrative Law Judge