SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

**TINA MARAGE,** **HF No. 11, 2008/09**
**Claimant,**

v. **DECISION**

**HOT STUFF FOODS,**
**Employer,**

**and**

**GALLAGHER BASSETT SERVICES,**
**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, on March 5, 2009, in Sioux Falls, South Dakota. Claimant, Tina Marage appeared personally. Justin G. Smith represented Employer, Hot Stuff Foods and Insurer Gallagher Basset Services.

**Issues**
The Department issued a prehearing order on February 12, 2009, which identified the following issues to be heard at hearing:

1. Causation and Compensability of Claimant's injury.
2. Whether Claimant is entitled to medical expenses.

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

In 2007, Tina Marage (Claimant) worked for Hot Stuff Foods (Employer) in Sioux Falls, South Dakota. Claimant worked in the food preparation area. On or about January 10, 2007, a pan used in food preparation fell and struck Claimant on her low back. Claimant notified Employer of her injury and sought medical treatment.

Claimant sought treatment at Sioux Valley Acute Care on January 13, 2007. Four X-ray views were performed which indicated no lumbar compression fractures, no spondylosis or spondylolisthesis, and that the intervertebral disk spaces were maintained and unremarkable.

Claimant then saw Dr. Larry Vanderwoude at Sioux Valley Clinic. Dr. Vanderwoude diagnosed a contusion of the lower back. He recommended no lifting, pushing or pulling over 15 pounds and prescribed pain medication, muscle relaxants, and physical therapy. Claimant also used a TENS unit. Claimant treated with Dr. Vanderwoude until June, 2007.

On August 22, 2007, Claimant saw Dr. Bruce Elkins for an independent medical evaluation. Dr. Elkins diagnosed a lumbar contusion with left radicular complaints. When asked to address causation, Dr. Elkins stated, "Ms. Marage sustained a lumbar contusion on January 10, 2007. Her symptoms have remained consistent over time and *may* be due entirely to the contusion. Dr. Elkins recommended that Claimant have an MRI. The MRI indicated left lumbar contusion with radiculopathy, curvature of the upper lumbar spine, minimal disc desiccation and disc bulge at L5- S1, and minimal disc desiccation and disc bulge at L4-L5 and mild disk bulging at L3-L4. Dr. Elkins stated that Claimant had not yet reached maximum medical improvement (MMI).

On October 1, 2007, Claimant saw Dr. Thomas Ripperda at Avera Rehabilitation Associates. Dr. Ripperda prescribed several medications including Lyrica and Lidoderm patches. Claimant returned for a follow up appointment on January 8, 2008. Dr. Ripperda noted that Claimant was essentially unchanged since she was last seen in October and that her pain was 2 out of 10. Dr. Ripperda's notes indicate that Claimant reported the Lyrica seemed to help a little and the patches here mildly helpful. Dr. Ripperda opined that Claimant's symptoms were "consistent with a cluneal nerve irritation given the location of the pain, quality, location, distribution and the mechanism of injury." He stated that Claimant may have some residual symptoms in this location that may not be able to be 100 percent controlled. Dr. Ripperda also opined that the left lateral herniation at L4-L5 would not be causing these current or ongoing symptoms. Dr. Ripperda recommended an increased dose of Lyrica, and continued use of TENS unit and Lidoderm patches.

On March 11, 2008, Dr. Ripperda released Claimant to work full time with no restrictions. On April 8, 2008, Claimant saw Dr. Ripperda for a follow up appointment. He noted that the Lidoderm patches, TENS unit and Biofreeze all seemed to be helpful. He also noted that standing and lifting irritated her symptoms, but was working full time at Hy-Vee with no restrictions and tolerating that well. Dr. Ripperda indicated that Claimant had reached MMI. Dr. Ripperda recommended that she continue with TENS unit and Lidoderm patches, potentially lifelong for control of these symptoms. He also stated,

> We follow up with the patient just on an as needed basis. Hopefully she will be able to get the Lidoderm patches from her primary care physician as I would have no ongoing reason to follow up with Ms. Marage except for yearly visits for prescription of the Lidoderm patches. If this could be done with her primary care physician, there would be no need to follow up with me.

Dr. Ripperda did not write any prescriptions at that appointment. Claimant did not seek treatment with her primary physician, nor did she follow up with Dr. Ripperda for prescriptions.

On May 30, 2008, Claimant saw Dr. Richard Farnham for an independent medical evaluation. Dr. Farnham reviewed Claimant's medical records, took a complete patient history, performed a physical examination and prepared a report. Claimant was observed to move about freely and without complaint of pain. Claimant was able to perform all physical task and displayed full range of motion. Dr. Farnham agreed with Dr. Ripperda that Claimant is at MMI and there was no impairment rating.

Dr. Farnham noted that Claimant had not received medical care since her last appointment with Dr. Ripperda on April 8, 2008 and despite her lack of ongoing treatment, Claimant was able to perform the nice activities of daily living and she was working without medical restrictions. Dr. Farnham opined that no additional modality is medically likely to improve her state of health and her ability to continue functioning in a normal manner.

Other facts will be developed as necessary.

**Analysis**
**Issue 1 Causation and Compensability of Claimant's Injury**

The first issue is whether Claimant sustained a compensable injury arising out and in the course of her employment pursuant to 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. *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 she 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).

> 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 [her] 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).

Claimant's initial treating physician, Dr. Vanderwoude did not express an opinion to a reasonable degree of medical probability that the work related injury on January 10, 2007 was a major contributing cause of her condition or need for treatment. While Dr. Vanderwoude's notes reference a work related injury, he makes no opinion whether the injury was and remains a major contributing cause of her condition. In his notes, Dr. Vanderwoude merely states,

> Workers compensation patient being seen and treated with me and in physical therapy. Her progress is somewhat slow as she had a pan hit her in the left iliac crest and as a result had fallen. She is working approximately 20 hrs per week and has work restrictions, but not sure how compliant with the restrictions is able to be. She has new symptoms of left arm and UT pain that she reports always being there however since her back is feeling somewhat better, this has gotten a little worse. Work seems to increase her pain and feels better on her days off. She is using TENS unit at home and work and reports that this is helping to control her symptoms. Continue with Physical therapy on her days off.

Dr. Elkins, who performed an independent medical exam at the request of the Employer/Insurer, opined that Claimant's condition *may* be due to injury. His report states, "Ms. Marage sustained a lumbar contusion on January 10, 2007. Her symptoms have remained consistent over time and may be due entirely to the contusion."

Dr. Ripperda, another of Claimant's treating physicians, did not address the issue of causation or give an opinion to a reasonable degree of medical probability whether the January 10, 2007 work related injury was a major contributing cause of Claimant's condition or need for treatment. In fact, a review of Dr. Ripperda's medical records show no mention of the work related injury on January 10, 2007 or any work related injury.

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. J. Morrell & Co*., 490 NW2d 720 (SD 1992). The South Dakota Supreme Court has held,

> We have consistently required expert medical testimony in establishing causation for workers' compensation purposes, and we have held that when the medical evidence is not conclusive, the claimant has not met the burden of showing causation by a preponderance of the evidence. Causation must be established to a reasonable medical probability, not just a possibility.

*Enger v. FMC*, 1997 SD 70, ¶18, 565 NW2d 79 (citations omitted).

In the case at hand, the Claimant did not provided sufficient medical evidence to establish by a preponderance of the evidence that the work related injury on January 10, 2007, is and remains the major contributing cause for her current need for

treatment. Claimant has failed to meet her burden of showing causation by a preponderance of the evidence. Causation is a threshold issue and must be met before benefits are awarded. Therefore, Claimant's request for benefits is denied and her Petition for Hearing must be dismissed, with prejudice.

Employer/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/Insurer's proposed Findings of Fact and Conclusions of Law to submit bjections 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/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 29th day of April, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M. Dockter
Administrative Law Judge