

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

Anita K. Kray,
Claimant,

HF No. 216, 2004/05

v.

DECISION

Fiat Corporation,
Employer,

and

Great West Casualty Company,
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, Anita K. Kray appeared personally and through her attorney of record, Bram Weidenaar. Richard L. Travis represented Employer, Fiat Corporation and Insurer Great West Casualty Company.

Issues

1. Causation and Compensability
2. Nature and Extent of Claimant's Disability

Facts

At the time of the hearing, Claimant, Anita K. Kray (Claimant) was 60 years old. She is married and resides in Boyden, Iowa. Claimant has been driving truck with her husband since 1974. Claimant and her husband have worked for several trucking companies and at times Claimant worked in the office of the various companies. While working for Fiat Corporation, the couple drove in tandem, meaning that one would drive while the other rested and visa versa.

On December 14, 2002, while unloading flowers, Claimant suffered an injury. Claimant was unloading a pallet of flowers consisting approximately 30 boxes of flowers using a pallet jack. While descending a concrete ramp, Claimant lost control of the pallet jack and she was knocked down, her left leg was run over and then she was knocked against a wall hitting her head and shoulder.

Following the incident, Claimant's husband, James Kray, helped Claimant back to the truck to rest while he continued to unload the truck. Claimant testified that following the incident, she was able to get up and walk, but she had pain in her knee and right shoulder, a bruised leg, and a headache. After a while, Claimant was able to return to work and help unload the remaining flowers. The couple continued on their scheduled route to New Ulm, MN to pick up a load of cheese destined for Miami, FL. Claimant and her husband drove to Miami, unloaded the cheese and picked up another load of flowers. The couple then returned to Nebraska and then Iowa to deliver the flowers.

After returning to Iowa, the couple took time off during the Christmas holiday to spend time with family. On December 25, 2002, Claimant had trouble getting up from a sofa. Claimant experienced dizziness and fell back onto the sofa and was unable to get up without help. As a result of this incident of dizziness, Claimant sought medical attention at the Orange City Health System Clinic.

Claimant saw Dr. John C. Weber on December 27, 2002. Dr. Weber diagnosed a closed head injury with headache and dizziness, and a left calf contusion and a right shoulder strain. Dr. Weber ordered a CT scan, and took Claimant off work for one week and instructed Claimant to return in a few weeks. Claimant returned to Dr. Weber on January 3, 2003 for a follow up. Claimant's shoulder and calf pain had improved, however she was still experiencing headaches and dizziness. Dr. Weber kept Claimant off work for another week and prescribed prescription medication and physical therapy. On January 10, 2003, Claimant returned for follow up and reported that her vertigo had not improved. Dr. Weber ordered a CT scan, which was negative, and referred Claimant to an ENT physician.

Between January 6, 2003 and July 15, 2003, Claimant attended 42 therapy sessions. On July 15, 2003, the physical therapist noted that Claimant continued to report dizziness and vertigo, but was managing very well. The physical therapist also noted that Claimant was able to return to her functional activities and Claimant was discharged from physical therapy.

Dr. Weber referred Claimant to Dr. Daniel Jorgensen, a hearing specialist at Northwest Iowa Ear Nose & Throat, in Spencer Iowa. Dr. Jorgenson tested Claimant for conditions related to the sensation of vertigo and dizziness. Dr. Jorgenson referred Claimant to Dr. Rick Nissen at the Ear Specialty Center in Minneapolis, MN. Dr. Nissen noted that Claimant experienced dizziness, with onset shortly after head trauma. He also noted that the cause of Claimant's dizziness was uncertain. Dr. Nissen recommended an ENG and MRI. Claimant later requested a referral to Mayo Clinic for treatment.

Dr. Weber eventually referred Claimant to Dr. Jimmy Fulgham at the Mayo Clinic. On February 26, 2003, Claimant presented to Dr. Fulgham complaining of dizziness and headaches. Dr. Fulgham diagnosed a closed head injury, vertiginous symptoms, and

post-concussive headache. Dr. Fulgham ordered an MRI. The MRI results failed to address any abnormalities that would explain Claimant's symptoms. The MRI did show scattered changes that would be consistent with her hypertension. On June 9, 2003, Claimant saw Dr. Fulgham for a follow up. Claimant told Dr. Fulgham that she felt increasingly better, but was still occasionally getting vertiginous symptoms. Dr. Fulgham released Claimant to return to work as a truck driver effective June 16, 2003.

On May 16, 2005, Claimant underwent a physical examination as required by the Department of Transportation (DOT). Claimant reported during this physical that she did not suffer from fainting or dizziness. A Physical Examination Report for Commercial Drivers Fitness Determination was prepared indicating that Claimant was fit to retain her commercial driver's license. Another DOT physical was performed on April 30, 2007, and similar to the first examination, Claimant reported that she did not suffer from fainting or dizziness, however Claimant did report a history of "head/brain injuries, disorders or illness."

Claimant continued to treat with Dr. Fulgham intermittently from May 10, 2004 until September 17, 2007, complaining of persistent headaches. On September 18, 2007, Dr. Fulgham determined that Claimant was unable to drive truck or any other vehicle due to her headaches and sense of imbalance and took her off work.

On May 13, 2003, Dr. Jerry Blow performed an independent medical exam (IME) at the request of Employer/Insurer. Dr. Blow reviewed Claimant's medical records, took a medical history and conducted a physical examination. Dr. Blow opined that Claimant had benign positional vertigo which was "most likely not secondary to her work injury". Dr. Blow stated in his report that had Claimant's condition been related, "her dizziness should have occurred that evening or the following day rather than 11 days later." Dr. Blow also opined that Claimant's headaches "appear to be myofascial in nature and do not appear to be secondary to post-concussive syndrome." Dr. Blow was deposed on August 14, 2009, and testified that his opinions, given to a reasonable degree of medical probability, had not changed.

On November 8, 2008, Dr. Khalafalla Bushara, a board certified neurologist at the Minneapolis VA Medical Center and the University of Minnesota, performed an IME at the request of the Employer/Insurer. Dr. Bushara reviewed Claimant's medical records, took a medical history and performed a physical examination. Dr. Bushara noted that Claimant's medical history was significant for hypertension since a young age, a past head injury, and previous symptoms of positional vertigo in 1997. Dr. Bushara opined that Claimant's imbalance and headache complaints are related to subjective symptoms of white matter changes and long-standing hypertension and antihypertensive treatment. Dr. Bushara stated that in his opinion, the injury of December 14, 2002, resulted in no significant head injury, concussion, or sequelae.

Tom Audet, a vocational rehabilitation counselor with over twenty years of experience, met with Claimant and provided a vocational evaluation. Mr. Audet also provided live testimony at hearing. Mr. Audet opined that Claimant is unemployable and unable to participate in any kind of rehabilitation program that would restore her to occupational functioning. Other facts will be determined as necessary.

Analysis

Causation and Compensability

The first question addressed by the parties is whether the work related injury sustained on December 14, 2002, remains a major contributing cause of Claimant's continued dizziness and headaches.

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 also prove that "the employment or employment-related activities are a major contributing cause of the condition complained of." SDCL §62-1-1(7)(a). The parties have stipulated that Claimant sustained an injury arising out of and in the course of her employment on December 14, 2002.

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 [her] employment. We have further said South Dakota law requires [her] 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).

"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, 724 (SD 1992). In support of her burden, Claimant relies on the opinion of Dr. Fulgham and medical records of Dr. Weber, her treating physicians. Dr. Weber's medical records reflect that Claimant's dizziness and headaches are associated with her work related injury on December 14,

2002. Dr. Weber's records further reflect a lack of significant treatment for Claimant's dizziness and headaches prior to her work related injury. Dr. Weber did not offer any opinion testimony at hearing or in the form of affidavit or deposition as to whether the work related incident of December 14, 2002, was a major contributing cause of Claimant's current symptoms.

In his deposition, Dr. Fulgham testified to a reasonable degree of medical certainty that the work related injury on December 14, 2003, was the major contributing factor for claimant's headaches and dizziness. Dr. Fulgham testified that he believed Claimant's headaches and imbalance were secondary to her closed head injury. Dr. Fulgham, when questioned about the causation of Claimant's vertigo, admitted that vertigo is a common symptom and there could be other causes for it, and in fact it may be unrelated to the December 14, 2002, work related incident.

Dr. Fulgham admitted at his deposition that Claimant had related her history of the work related incident on December 14, 2002, however she had not informed him of any previous instances of dizziness or head traumas. Dr. Fulgham never reviewed any of Claimant's previous medical records. Dr. Fulgham was not aware that in 1996, Claimant had fallen off of a tractor and reported hitting her head, and experienced symptoms of vertigo after that incident. Claimant had also not reported to Dr. Fulgham that in March 2006, Claimant had fallen on the ice and hit her head. When asked if that information would have an impact on his opinions, Dr. Fulgham answered, "certainly for the imbalance problem, yes."

Employer/Insurer argue that the opinions rendered by Dr. Bushara and Dr. Blow as to causation are more reliable because they are based upon a physical examination of the Claimant as well as a complete review of Claimant's medical records dating back some twenty years.

Dr. Blow conducted a physical examination, took a medical history from Claimant, and reviewed her previous medical records and DOT physical records. Dr. Blow agreed with Dr. Fulgham's diagnosis of benign positional vertigo, however based upon a reasonable degree of medical certainty, he opined that the work related accident of December 14, 2002, was not the major contributing cause of the benign positional vertigo. Dr. Blow explained that it was significant that Claimant did not experience symptoms until 11 days after the work related accident. Dr. Blow also opined that Claimant's headaches appeared to be myofascial in nature and did not appear to be secondary to post-concussive syndrome. Dr. Blow explained that Claimant did not have any other post-concussive symptoms such as sleep disturbance, mood disturbance, or any cognitive impairment. Dr. Blow testified at his deposition that he believed Claimant had a head injury; however he did not believe she had post-concussive syndrome. Dr. Blow suggested that Claimant's longstanding history of hypertension and treatment could be causing her headaches.

Dr. Bushara, in his deposition testified that the fact there was a lapse of 11 days between the work related incident and the onset of vertigo symptoms made it unlikely that the vertigo was related to the incident. It was Dr. Bushara's opinion that the work-related incident was not a major contributing cause of the vertigo symptoms. When asked about Claimant's persistent headaches, Dr. Bushara testified that Claimant's twenty year history of hypertension was significant because "hypertension is a very common cause of chronic headaches and can also lead to balance problems through causing brain lesions, white matter lesions." Dr. Bushara opined, to a reasonable degree of medical probability,

My opinion is that she did have a closed-head injury, without concussion and without any sequelae from that head injury. And I believe that the persistent headaches, especially the current complaints of headaches, are related to hypertension and were preexistent to the incident.

And I also believe that the balance problems and these complaints of dizziness are related to the diagnosis of benign positional vertigo, which is – which can be long standing and typically reoccur. It comes and goes over the years. And also the balance may be contributed to by the white matter ischemic disease. Again related to long-standing hypertension.

The Department finds the opinions of Dr. Bushara and Dr. Blow more persuasive. "The value of an opinion of an expert is dependent on and entitled to no more weight than the facts upon which it is predicated. It can not rise above its foundation." *Podio v. American Colloid Co.* 162 NW2d 385, 387 (SD 1968). The opinions of Dr. Bushara and Dr. Blow are based on a comprehensive review of Claimant's entire medical history as well as a physical examination. The opinions of Dr. Weber and Dr. Fulgham do not consider that the Claimant had a long standing history of hypertension and benign positional vertigo. Dr. Fulgham also was unaware of several other head injuries sustained by Claimant, therefore his opinions are rejected.

Based upon the medical evidence presented, Claimant failed to meet her burden to demonstrate that Claimant's employment remains a major contributing cause of her current condition. Causation and Compensability is a threshold issue and must be met before benefits are awarded. Therefore it is not necessary to address the nature and extent of Claimant's disability. Claimant's request for relief is hereby denied.

Conclusion

Employer/Insurer shall submit proposed 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. 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 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/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 28th day of January, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

Taya M. Dockter
Administrative Law Judge