

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

MARY VU,
Claimant,

HF No. 45, 1993/94

v.

DECISION

JOHN MORRELL & CO.,
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. Mike Abourezk, represented Claimant Mary Vu. Scott C. Folkers represented Employer/Self-Insurer John Morrell & Co.

This matter was originally heard by the Department on the sole issue of notice. The Supreme Court reversed the decision of the Department and remanded the matter to the Department. The issue is whether Claimant's injury at Employer is and remains a contributing factor to her current condition.

The parties stipulated to the record. A "Stipulation of the parties Re: Submission of the Issues and the Record" was submitted on May 22, 2003, and provides in relevant part:

1. The hearing previously scheduled for May 15, 2003, is hereby cancelled and the parties will submit the issues to the Department of Labor based upon the record, as agreed in the following paragraphs.
2. The parties agree that all treatment records of the Claimant, whether or not they arose out of the injury at issue in this matter, may be offered and admitted as exhibits. The claimant will compile a compendium of those exhibits and submit them to the Department along with claimant's opening brief. If the employer discovers any treatment records that were not included, and which the employer wishes to include, the employer may then supplement the record accordingly along with the employer's brief.
3. All exhibits or matters included in the record during the previous hearing in this matter, pertaining to notice, shall also be incorporated into the present records so that the Department and/or reviewing courts will have all of these materials available.
4. The report of Dr. John Dowdle, M.D., dated October 28, 2002, and the clarification of that report, dated January 31, 2003, along with Dr. Dowdle's C.V., shall be submitted as part of the record. Claimant maintains the right to assert substantive objections to certain parts of Dr. Dowdle's opinions but objections to authenticity are waived.
5. The parties stipulate and agree that Dr. Dowdle did not examine the claimant, and the following facts are true:

- a. Employer asked for the opportunity for a medical examination of the claimant by Dr. Wayne Anderson, which was to take place in Rapid City, South Dakota;
 - b. Claimant agreed but asked through her attorney that any verbal conversations between herself and the doctor be audio taped;
 - c. Written notice was given to Dr. Anderson of this request, and Dr. Anderson's office responded in writing, agreeing that the examination could be audio taped;
 - d. On the date of the scheduled examination, claimant appeared as scheduled, but Dr. Anderson then refused to conduct the examination if it was going to be audio taped;
 - e. Thereafter, employer made arrangements with Dr. John Dowdle to conduct the examination, and scheduled that examination to take place in Rapid City;
 - f. Claimant, through her attorney, objected to making herself available a second time for a medical examination, but agreed to do so if it would be audio taped;
 - g. Claimant appeared at the examination as scheduled, and Dr. Dowdle refused to conduct it unless claimant dropped her request to have it audio taped;
 - h. Thereafter, counsel for claimant and counsel for the employer agreed that the examination would be rescheduled with Dr. Dowdle, and that this time, in lieu of an audio tape, claimant would be entitled to have a nurse accompany the claimant in order to witness any verbal conversations and to witness the examination;
 - i. Employer did schedule the examination with Dr. Dowdle, but then elected not to proceed with the examination;
 - j. Ultimately, employer determined to withdraw its request for a medical examination of the claimant and simply submit the written report of Dr. Dowdle based upon his review of records. The letter of October 28, 2002, and the letter of January 31, 2003, from Dr. Dowdle to Mr. Jim Fleming at John Morrell & Company, constitute Dr. Dowdle's report.
6. The parties stipulate to admission of claimant's personnel records at John Morrell, and her medical records at John Morrell.
 7. The parties stipulate to foundation with respect to the criminal Information and Conviction Records of Ronald E. Greenwood and Barry W. Milbauer, copies of which have been exchanged between the parties. The employer reserves the right to object to relevancy, or to make other substantive objections, but the parties do stipulate to authenticity.
 8. The parties stipulate to foundation of four (4) pages of police reports, attached hereto, which are as follows:
 - a. Page 1 of 1, Arrest Report and Custody Authorization, 8/24/97, Mary Jane Vu.
 - b. Page 1 of 5, Case Report, 8/24/97.

- c. Page 2 of 5, Case Report, (Data Collection), 8/24/97.
 - d. Page 3 of 3, Case Report Addendum, 8/10/99.
9. The parties stipulate that the following depositions are and shall be included in the hearing record, along with attached deposition exhibits:
- a. Mary Vu, 6/23/97;
 - b. Mary Vu, 4/17/02;
 - c. Dr. Renka, 4/17/02;
 - d. Dr. David Sabow, 4/17/02;
 - e. Dr. Brett Lawlor, 11/4/02;
 - f. John Kolbach, 4/22/03;
 - g. Ruth Parker, 5/12/03;
 - h. Geraldine Jackson, 5/14/03; and
 - i. Jim Jackson, 5/14/03.
 - j. All depositions taken prior to the hearing on notice in this matter that are not already part of the record.
10. The parties stipulate to foundation of the 42nd Report by the Committee on Government Operations, 100th Congress, 2nd Session, House Report 100-542, dated March 30, 1988. Employer reserves the right to object to relevancy, but foundation is admitted.
11. The parties stipulate to foundation on all bills for medical or psychological treatment of Mary Vu.
12. The parties stipulate that any Interrogatory answers or responses to Requests for Admission may be admitted, subject to the objections stated within the responses.
13. The parties stipulate that the nurse's first aid file on Mary Vu, which should be part of the employer's medical records, is admitted.
14. The parties stipulate that the transcript of hearing held on May 12, 1998, shall be part of this record, along with all exhibits admitted therein.
15. The parties stipulate that the videotaped surveillance conducted by John Kolbach of Mary Vu, may be admitted.
16. The parties stipulate that any Social Security Disability records of Mary Vu may be admitted in this record.

Facts:

In Mary Vu v. John Morrell & Co., 2000 S.D. 105, 615 N.W.2d 171, the Supreme Court found the following:

Mary Vu is thirty-four-years-old. She started work at Morrell on May 5, 1987 as a janitor. She developed problems with her wrist and was moved to a position in pork cut. After two to three weeks, she became a ham saw operator, where she remained for one and one-half years.

As a ham saw operator, Mary was responsible for positioning large pork cuts, mostly hind quarters, on an assembly line. She would align the legs so the saw cuts would be accurate. The tail would commonly get stuck in the rollers and Mary, a 5'5" woman weighing 130 pounds, would have to reach over the conveyor and pull or jerk the cut back on the table. If a pork cut fell, she would carry it to the wash sink or to the side of the table. After washing the pork cut, she would return it to the table. The average weight of the cut was thirty to thirty-two pounds, but some were forty pounds. Mary's work day ranged between eight to ten hours.

On Friday, January 6, 1989, Mary was working the line when one of the larger cuts got stuck in the corner of her table. She reached over and felt a "terrible pain" in her back; it was pain she had never experienced before. She shut off her line, but restarted it because her co-worker operating the line behind her did not see her shut down. Two supervisors and a foreman arrived and excused her from the line so she could see the nurse.

At the nurse's station, Mary saw "an older nurse," Ila Henderson. Mary testified that she told Nurse Henderson that she was experiencing a bad back pain and Nurse Henderson asked her if she wanted to lie down. Mary laid down for approximately forty-five minutes. Mary also testified that Nurse Henderson told her to make an appointment with "the John Morrell doctor," Dr. Gail Benson, an orthopedic surgeon with Midwest Orthopedics and associated with Central Plains Clinic. Despite Mary's reluctance, Nurse Henderson successfully encouraged her to finish the day on the line.

This visit to the nurse's station was not documented; however, Nurse Sharon Schumacher testified that the nurses did not "always" record an employee's visit if they only needed to lie down, wanted an aspirin or a Band-Aid. Nurse Connie Wheeler also testified to this effect--that they would not document an employee coming down to the nurse's station to lie down unless the employee went home.

Mary called Dr. Benson's office from home and the earliest available appointment was Tuesday, January 10. Before work, on Monday, January 9, Mary called the nurse's station and spoke with Nurse Schumacher. Mary testified that she told the nurse that she bent over at home and was unable to straighten up due to the injury she sustained at work. The first aid card reflects that Mary "states [she] has appointment [with] Dr. Benson tom[orrow] as yest[erday] [at] home [she] bent over [and] couldn't straighten up." This entry consists of one and one-half lines and is immediately followed by one and one-half lines of partially erased words. Nurse Schumacher testified that this entry was in her handwriting but she could not recall whether Mary told her that her injury was work-related.

Exhibit 3 is the original first aid card, which was maintained by Morrell employees until offered and received in this case. It is clear that there are one and one-half partially erased lines immediately following the above statement. No entry has been made and no writing appears over the one and one-half partially erased lines. The erasures were not complete and words may still be discerned.

Curiously, there are fourteen entries on Mary's first aid card and these three lines constitute the only entry written in pencil.

There is no testimony by Nurse Schumacher or anyone else about the partial erasure, the reason therefore, or the words remaining after the partial erasure. In their appellate briefs, both parties commented on the erasure, but neither party commented on the partially erased words. If these partially erased words were being relied upon, we would need to remand to the DOL to determine their effect, if any. However, because we are determining the issue of whether timely notice was provided, we review the remaining record de novo.

On January 10, Mary saw Dr. Benson for the first time. Dr. Benson diagnosed Mary with "degenerative disk symptomatology." His notes indicate:

23 year old female who has been having low back pain with pain radiating into the buttocks and down into the legs, primarily left leg over the past 2 months. She works at Morrell's and pushes and pulls hogs. She denies a history of injury. She does smoke. No family history of back problems and she does not do a great amount of driving. Her orthopedic exam today shows she has some loss of lumbar lordosis and mild loss of lumbar range of motion. Negative straight leg raising test. No neurologic deficits. X-rays of her lumbar spine are normal. It is my impression she is beginning to have some degenerative disk symptomatology.

(footnote omitted). Dr. Benson advised Mary to stop smoking and to implement a home exercise program and a home traction program. He also advised that she attend a program at McKennan Hospital to learn the proper techniques for home exercises. He prescribed some "mild analgesics" and stated that she could return to work. The accompanying radiology report indicates that Mary's spine alignment "is good" with "no fracture, destructive lesion or other abnormality." Mary's visit to Dr. Benson was paid for by Mary's insurance company.

Mary testified that she did not understand the diagnosis of degenerative disk disease; specifically, she did not understand the source of the pain or how to alleviate it. In accordance with Dr. Benson's advice, she thought that moving around would help to "work out" the pain and she resumed working even though she was experiencing chronic, "excruciating" pain. Mary quit her job at Morrell in April of 1989 because of her pain and the harassment she received from supervisors when she claimed she was in too much pain to work. Despite the "constant" pain, she continued to try to work at different jobs until the end of 1992.

Between April of 1989 and October 1991, Mary relied on Dr. Benson's diagnosis and attempted to maintain a home exercise program; however, she testified that the exercises seemed to cause her more pain. After her visit with Dr. Benson, she did not see any physicians during 1989 because she did not know she had a permanent injury and thought that the pain would improve with exercise. Later, she moved to Rapid City to live with her parents to receive help caring for her

four children and herself. She saw physicians at Indian Health Services and went to Sioux San Hospital approximately six times complaining of back pain. Each time, she was given a variety of medications and sent home.

On October 2, 1991, Mary was referred to Dr. Sabow, an orthopedic neurologist, who informed her of the permanent nature of her injury. Dr. Sabow noted in his report that Mary injured her back while working on the line at Morrell in 1989. Dr. Sabow concluded:

The patient obviously has a chronic low back syndrome and exertion simply aggravates the situation. Because of her age and the fact that she literally is having her life change because of it, a CT scan should be obtained--not because I would recommend a laminectomy but because, if she has a large bulging fragment, nonherniated, she may be a candidate for percutaneous nucliectomy.

The CT scan, conducted on November 6, 1991, revealed that Mary suffered from two bulging disks and did not have degenerative disk disease.

After careful consideration of the voluminous record in this matter, the following facts are found by a preponderance of the evidence:

After Claimant quit Employer and moved back to Rapid City, she worked at Northgate Bingo. Her father helped her successfully "bid" the janitorial services. Claimant could not perform the necessary duties herself. She eventually lost the bid. Claimant also attempted employment at Burger King for approximately three weeks, but could not physically handle the job. Claimant has had no other employment since leaving Employer.

Claimant has a long and complex medical history. She has been diagnosed with degenerative disk disease, scoliosis, carpal tunnel syndrome, spondylosis, fibromyalgia, discogenic pain syndrome, chronic pain syndrome, symptom exaggeration, myalgia, somatic disorder, and mechanical back pain due to poor posture, among other conditions. Claimant has also been diagnosed with schizoaffective disorder, a panic disorder, depression, an anxiety disorder, and schizophrenia. Her struggles with alcohol and substance abuse are well documented by the voluminous medical records.

The depositions of three medical experts have been received, Dr. Renka, Dr. Sabow, and Dr. Lawlor. These physicians reviewed Claimant's voluminous medical records and treated Claimant. Each opined on the causation question. The two reports of Dr. John Dowdle, in which he offers opinions on Claimant's conditions, were received by stipulation.

Dr. Sabow:

Claimant continued to treat with Dr. Sabow, who is now a retired neurologist with over thirty years of experience. At the time of his deposition, Dr. Sabow was self-employed as a case evaluator for insurance companies, industry, legal profession, and as a

forensic evaluator. His business is called Medical Jurisprudence. Dr. Sabow is board certified in neurology. He also has a background in internal medicine. Dr. Sabow emphasized that when he was trained as a neurologist, psychiatry was an integral part of that training.

Dr. Sabow first examined Claimant on October 2, 1991, on a referral from her physician. At the time, Dr. Sabow was the contract neurologist for the Public Health Service in Rapid City and, consequently, had all of Claimant's records from Sioux San hospital for reference. Dr. Sabow ordered a CT scan, which was performed on October 15, 1991. The scan showed a "moderate central bulging of the disc at the L5-S1 level" and "a more mild bulge" at the L4-L5 level.

Dr. Sabow opined that disc bulging is an unusual condition in a twenty-six year-old woman. He also opined that this "was a wear and tear on a very young person's back." Dr. Sabow found Claimant's complaints of bilateral pain in her hips, thighs, and heels to be consistent with the CT finding of central disc bulges. He explained that Claimant's central disc bulges "indicate[] ligamentous laxity." Dr. Sabow opined that this condition is very unusual in a young woman and is a sign of "some type of chronic abuse."

Dr. Sabow read Claimant's medical records predating her employment with Employer and found no evidence of significant back problems. Dr. Sabow found no evidence to support a conclusion that Claimant had an employment-related disability that preexisted her employment with Employer. He did find that Claimant demonstrated a possible tendency toward low back strain. He explained:

The fact that she had complained in 1986, a year and a half before, approximately, before employment doesn't in any way diminish the extent, the impact, the contribution of her work at moving the carcasses because she might have had an episode a year before she was employed there. It only showed the potential susceptibility to the development of an incapacitating back problem in the future.

The incident in 1986 was cured by Motrin, Robaxin, and Tylenol and Dr. Sabow explained that those medications "simply do not cure a chronic low back problem." Dr. Sabow opined:

[I]f she had insults to the back that began in May a year before she was employed, or prior to that, she – and that was the – the beginning of the – the problems that eventually were proved on CT and MRI, then she wouldn't have been symptom-free or at least have excellent results with those three generally minor medications and be able to become employed and be able to do the cleanup at Employer.

Dr. Sabow opined that Claimant's employment at Northgate Bingo demonstrates that she was trying to work despite her pain, coping with the pain to the extent that she was sneaking other people in to do the work for her. Regarding Claimant's complaints of

back pain while working for Northgate, Dr. Sabow opined that “if she didn’t have a severe chronic back problem at a relatively young age, lifting a bucket of water wouldn’t have caused her to require or request medical treatment the following day.” Dr. Sabow opined that these incidents at Northgate “emphasizes the damage that she has sustained somewhere at some time to her back prior to her picking up a bucket.” He stated that “we don’t see [two bulging discs] in a twenty-six-year-old that’s making change in a lottery machine and sweeping and occasionally picking up a bucket. There has to have been some greater repetitive insult.”

Dr. Sabow also found it significant that Claimant performed duties for Employer that were vigorous enough to cause carpal tunnel syndrome symptoms, yet Claimant did not complain of back problems until she began working with the carcasses. Dr. Sabow elaborated on this significance by stating:

[T]he average janitorial job doesn’t get carpal tunnel. We’re talking about a repetitive use injury and she developed that during the cleanup, so then, again, one, as a neurologist, then, assumes that it was of a type that required fairly vigorous use of her upper extremities, so my – I don’t speculate entirely, but I do use little elbow room in the imagining of what she was doing.

Dr. Sabow described the nature of Claimant’s injury at Employer as “the totality of the insults that occurred on a day-to-day, minute-to-minute, hour-to-hour basis. It wasn’t that one insult. It was that – it was that type of job that a man should be doing with upper body strength, not a woman with not the – the muscular strength to do those things.”

Dr. Sabow found evidence of a physical assault suffered by Claimant in 1985 during an altercation. Dr. Sabow discounted the assault of 1985 as a cause (to the exclusion of her work at Employer’s) of Claimant’s back problems. He stated that if Claimant had suffered an injury to her back at that time, she “would have been back and back to physicians at that time because of the low back problem.” She would have suffered “severe pain at least of a subacute nature.” Subacute nature meaning “several weeks she would have been under treatment for severe low back pain.” Dr. Sabow opined “then you could say it would have subsided and she could have had a damaged posterior longitudinal ligament at that time. So it’s a good question, but apparently there was no history, then of this ongoing subacute problem for which she would have had to have medical treatment.”

Throughout much of Claimant’s adult life, she has struggled with psychological issues. She has been diagnosed with several different personality disorders and other psychological conditions. Regarding these psychological conditions, Dr. Sabow opined that Claimant’s chronic pain associated with her back condition “combined with [her depressive symptoms] and it added to them.” Dr. Sabow further concluded that Claimant “wouldn’t have been as debilitated if she didn’t have the schizoaffective disorder, but it definitely added to it, to the depressive – the depressive portion of the schizoaffective disorder.” Dr. Sabow opined that Claimant’s “chronic pain syndrome

was the major cause of her depression or a significant contributing factor to her depression.”

Dr. Richard Renka:

Dr. Richard Renka, a psychiatrist, began treating Claimant in March of 1994, when she sought “help for depression and a panic disorder” at Black Hills Psychiatry Associates. Dr. Renka diagnosed “major depression, a panic disorder, a history of alcohol abuse, and I thought that she might have a borderline personality disorder.” Dr. Renka added the diagnosis of “schizoaffective disorder, depressed type,” which he defined:

Schizoaffective disorder is probably a disorder of neurotransmitters in the brain which tends to migrate around a bit and will present as a schizophrenic picture at some times and a manic or depressive picture at others. I have seen classical cases in which individuals came into the hospital presenting one way one time and different way the next time; but clearly both aspects of the diagnosis were present and we would consider that a classical schizoaffective disorder, but a schizophrenic individual can become depressed, and they do, and so it's kind of like a different route to the same kind of thing, although the underlying genetics are probably different.

In preparation for his deposition, Dr. Renka reviewed Claimant's medical records from the year 1975 to the year 2000. When asked specifically about Claimant's hospitalization in 1988 for mental health problems, Dr. Renka testified:

- Q: Have you come to any conclusions as to, given the fact that she had already been diagnosed with a schizoaffective disorder in 1988, have you come to any conclusions as to whether her subsequent -- or whether her back condition and her chronic pain syndrome has subsequently contributed to that disorder or aggravated it?
- A: Well, a back condition would not cause a schizoaffective disorder nor would it cause schizophrenia. It could cause depression and it could worsen depression and it could probably worsen any of the schizophrenias.
- Q: All right. Have you come to any conclusions, after having looked at all these records that I've presented you with and based on your own analysis and treatment and evaluation of Mary, as to whether her back problem has aggravated her depression?
- A: I believe her - - the pain resulting from her back and her inability to function and to carry out ordinary work routines has contributed to depression.
- Q: Now, in contributing to her depression, has it also contributed to her overall level of - - of functional capabilities?
- A: Impairment, yes.
- Q: Can you give us any further clarification of how it would interfere with her - - or enhance her impairment, I should say?

A: Well, she's attempted work a couple of times and has simply been unable to do it. Her father ran a bingo parlor. He employed her. She was living at home at the time. She had to subcontract it out because she could not sit for long enough to do it.

Dr. Renka concurred with Dr. Sabow's diagnosis of chronic pain syndrome. Dr. Renka explained the effects of chronic pain on the psyche:

And pain, of course, is a demoralizing condition and it has made her extremely irritable and wary and angry and she's had a very difficult time getting along with other people. She has been at times combative and has been a victim of physical abuse, starting with her marriage to a Vietnamese national and then going through boyfriends and sometimes even people she meets on the street. She was once in this office saying that she would like to go at her doctors so that they would understand, you know, because they hadn't helped her.

Dr. Renka opined that Claimant is not capable of operating in the work force because she is not even capable of being a patient. He explained: "She doesn't do what I tell her to do. She's too disorganized. She misses appointments. She comes in when she has needs. She didn't take the medicine right. She gets confused about it. She's difficult." Dr. Renka further explained: "She has a thought disorder which confuses her. She is subject to paranoid ideation and unrealistic ways of thinking and her drive and motivation are very much affected by the depressive aspect of her illness. I guess perhaps worse [sic] of all, she doesn't think that it's going to do any good."

Dr. Renka explained the complex nature of Claimant's condition and the relationships between her psychological condition and her physical condition:

Q: Now, if we removed all of the physical components or causations or the physical link in this chain of events of her chronic pain, do you have an opinion or can you state an opinion to a reasonable degree of probability that she would be disabled anyway?

MR. FOLKERS: Objection. Calls for speculation.

Q: My question is simply: Could you even formulate an opinion as to whether she would be disabled anyway?

A: Well, a schizoaffective disorder can be disabling. There are a lot of patients on disability for just that reason alone; however, I suspect that she would be more functional, at least at times. You know, most of my schizophrenic patients can function in some capacity and they're a little easier to get along with and so on because they have been treated. This lady has so many different problems that I don't believe anyone has been able to successfully treat her and I don't think that's due to the schizoaffective disorder alone.

Q: Okay. Now, I've got to be very particular about the words and make sure that I understand completely. When you say you suspect - - let me phrase it more specifically. Can you say to a degree of probability, in other words,

is it more likely than not that without any of her physical components or chronic pain, that she would be more functional?

A: That she'd be more functional? Yes, I'm quite certain of that.

Q: Can you say that she would be functional enough to find some sort of employment?

A: Well, again, I'll refer to the bingo parlor experience. She was able to subcontract that to other people and I believe get the job done but she couldn't do it herself. Now, as time has progressed, I don't think she'd even be able to do that. She has gotten worse with time.

Q: Maybe I need to reverse the focus of my question. If we take away all of the physical components of her disability, take away all the physical components of her impairment, and take away any influences that the chronic pain may have had on her emotional states, can - - do you know whether or not, just based on her psychiatric condition as it would be without any of these chronic pain influences or the depression, whether she would still be unable to be employed?

A: I can't say.

Q: So in other words, if we subtracted all that physical part from the picture, there's no way of knowing or no way for you to predict whether or not she'd be employable or not[sic]?

A: No, I really can't say.

Q: Would it considerably improve her position and chances of getting employment if we were able to subtract out all of the physical components and the chronic pain?

A: Yes.

Dr. Renka agreed that Claimant's major depression is "a component of her disability, a significant part of her day-to-day limitations, of her day-to-day functional problems."

Q: In this particular case, do you have any opinions as to whether her medical difficulties leading up to your seeing the patient had any kind of an impact or were a contributing factor in any way to her psychiatric difficulties?

A: I didn't make that -- I didn't come to that conclusion in 1994, but as time progressed it became apparent that she did have a variety of symptoms resulting from back pain and what appeared to be difficulty finding some common ground with the medical community on treating that. She became very frustrated. Her depression seemed to worsen with time. She had, I believe, panic attacks because of the uncertainties in her life based on her inability to function. And part of that was physical, so she seemed to worsen as time went on.

Q: And you're saying worsen with respect to her psychiatric problem?

A: Yes; and her functional level deteriorated.

Q: I'm going to kind of go to the end of the discussion first and work our way back. Do you feel that her chronic pain symptoms have aggravated or accelerated her psychiatric problems?

A: It certainly contributed to her depression. Pain is a demoralizing influence. On a number of occasions in seeing her she presented very discouraged, very angry, and I think in some ways somewhat oppositional to care because of the perceived failures of it and also paranoia. She -- she wasn't paranoid in the sense of believing that she was going to be harmed by physicians, but she didn't think anybody would help her and she talked about ghosts and her thinking was kind of strange and at that point I became more aware of the fact that she was harboring a psychotic degree of illness.

Dr. Renka opined that Claimant's depression was not treatable because of her "chronic poor compliance with medication." He attributed Claimant's poor compliance to "her paranoia and her irritability, her distrust and her demoralization." He also opined that Claimant's depression, probably the pain, her psychosis and distrust and demoralization, her personality factors, and maybe her alcoholism, all combine to make her difficult to treat. Dr. Renka also testified:

Q: Now, I just want to clear up a few things. Just referring to her overall level of impairment, including chronic pain and the depression and psychiatric difficulties, tell me how, if any, ways that the chronic pain, chronic back pain has aggravated that level of impairment.

A: Again, I'll refer to the demoralizing effect of chronic pain. It is one of the most demoralizing things in existence and certainly is a major contributor to depression. It has also, I believe, interfered with her compliance, you know, she doesn't get to appointments, and so she's been untreated, you know, nobody's been able to treat her, either here or at Sioux San, and, you know, the pain is a contributor to that.

Q: When you talk about her poor compliance, is that part of her disease?

A: It's fairly typical of severe psychiatric illness, especially the psychoses, but by the same token I have schizophrenics who come very regularly.

Regarding her panic attacks:

Q: Now, you also talked about how she's had panic attacks and fears that she's going to die in her sleep. How do those symptoms interplay here with the chronic pain? Is there any -- is there any relationship, causative effect between any of those different problems?

A: Panic disorder represents an overly sensitive set point on an alarm system in the brain stem and it can occur, that is, the set point can become too sensitive on the basis of trauma, but also depression and specific fears. So there's a lot of possible reasons why she developed a panic disorder. It is often co-morbid with depression but sometimes it -- it is the first psychiatric symptom and then depression may follow.

Q: In Mary's case, do you have an opinion as to whether the panic attacks and that conditions have been influenced by her chronic pain?

A: Well, you know, the panic attacks and the depression both seem to start around 1992 or at least at that point somebody noticed them and the depression itself is likely related to her losses, her limitations of function and the pain, so there is a - - a connection, although I can't tell you specifically what the connection is. Let's just call it influence.

Dr. Renka opined that Claimant is not manipulative but that "her presentation was quite genuine." He also opined that Claimant has "a hard time distinguishing between reality and her own delusions and a difficult time understanding her role in interactions."

In rendering his opinions, Dr. Renka considered psychological tests administered by Dr. Scott Cherry, a licensed psychologist. Claimant had been referred for testing by her treating physicians. Dr. Cherry's records indicate that Claimant may have exaggerated her problems when answering questions on the MMPI-2 that he administered. Dr. Renka opined that the MMPI-2 is "a very bad tool" when used alone, especially in an untreated, chronic pain situation.

Dr. Renka opined that Claimant's history of physical altercations with other people is a good indicator that she lacks the ability to get along with other people well enough to stay employed.

Dr. Brett Lawlor specializes in "physical medicine and rehab and pain medicine." "Physical medicine and rehab and pain medicine" are both specialties that emphasize the nonsurgical treatment of neurological and musculoskeletal injuries and diseases. Dr. Lawlor first saw Claimant on November 20, 2000, for back and leg pain. In addition to taking a history from Claimant, reviewing her diagnostic studies and conducting a physical exam, Dr. Lawlor performed an evaluation that allowed him to determine whether significant psychological factors were contributing to Claimant's pain. Claimant's neurological exam was normal, with normal curvature of her spine and normal range of motion in her joints. Dr. Lawlor diagnosed "probable discogenic low back pain, [] cervical and thoracic mechanical myofascial pain, and chronic pain syndrome." He defined chronic pain syndrome as "pain for more than six months and that pain is negatively impacting their life." Claimant's treatment with Dr. Lawlor was interrupted by a pregnancy. She did not follow through with physical therapy or with a functional capacities evaluation because of her pregnancy. Dr. Lawlor last evaluated Claimant on September 18, 2001.

Dr. Lawlor opined to a reasonable degree of medical probability that Claimant's work activity at Employer's in 1988 and 1989 was a contributing factor to the discogenic condition he diagnosed. Dr. Lawlor opined that Claimant's bout of low back pain in 1986 was caused by endometriosis and not a back strain. He also opined that Claimant would not have been able to work as long as she did for Employer if she had back problems before she began working for Employer. Dr. Lawlor also opined that Claimant's physical altercations after her injury at Employer's does not "eliminate the fact that the work activities at John Morrell were also a contributing factor to her condition." Dr. Lawlor stated:

My presumption is that she injured her disc at John Morrell and in all likelihood suffered an internal disc disruption or tear in the disc resulting in disc protrusion and that each one of these episodes may have been, making the assumption that you described, aggravations or exacerbations, but that the original injury occurred from the bending forward activity at John Morrell.

Dr. Lawlor did not find “that [Claimant] complained of significant back pain” after the subsequent incidents of physical altercations. He explained:

Well, if their back pain is already at a very high level, then they’re not likely to notice much change in it. People that have chronic back pain typically develop some accommodation to that problem. It just becomes a part of their life. For an example, a lot of patients that come in with neck pain and headaches and they’ll also write in that they hurt in their low back. I ask if they’re here for their neck pain and headaches. I ask them about their low back. They say, “I’ve had it for a long time. It hasn’t changed. I just want to talk about my neck pain and headaches.” That doesn’t mean it’s not hurting. It’s just not at a level that they feel they have to have it evaluated or they’re satisfied with the explanation that was given for their problem and are just putting up with it.

He further explained his opinion:

Based on her - - the history that she provided to me and review of the medical records which indicate that in - - at Morrell’s, she was doing an activity that is consistent with an activity that would injure a disc, that she had back pain then and has essentially had back pain ever since, and prior to that, in my opinion, there was not a similar type of back pain problem.

Beyond stating that his clinical experience leads him to believe that there is a relation between chronic pain and depression, Dr. Lawlor offered no opinion on how Claimant’s physical condition combined with her psychological problems to affect her capacity to work. Dr. Lawlor was not comfortable putting limitations on Claimant without a functional capacity test.

Dr. Dowdle, whose records were received through the parties’ stipulation set forth above, conducted a records review in October of 2002 and opined that Claimant’s “complaints regarding her back are related to her preexisting degenerative condition noted on her scans.” Dr. Dowdle opined that Claimant’s work activities at Employer between 1987 and 1989 “are not a substantial contributing cause to any of [Claimant]’s current conditions, including any disability, impairment, or need for care and treatment.” Dr. Dowdle found that Claimant was “fully functional” after her employment with Employer.

The surveillance footage of Claimant presented by Employer/Self-Insurer was not viewed by the medical experts. The Department viewed the surveillance footage and

found that none of it was significant in relation to the issue of causation as presented by the parties.

Other facts will be developed as necessary.

Whether Claimant's injury at Employer is and remains a contributing factor to her current condition.

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 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 193, 195 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

Claimant "must establish a causal connection between her injury and her employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. The statutes in effect at the date of injury apply to the rights of all parties in any claim for workers' compensation benefits. Helms v. Lynn's Inc., 542 N.W.2d 764 (S.D. 1996). Claimant was injured in January of 1989. "The causation requirement requires [Claimant] to show [her] employment was 'contributing factor' to [her current condition.]" Gilchrist v. Trail King Indus., 2000 SD 68, ¶ 18.

"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). 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 N.W.2d 79, 85 (S.D. 1997).

In Westergren v. Baptist Hospital of Winner, the Supreme Court explained the role of the medical expert in workers' compensation proceedings:

Here, the majority of evidence regarding Claimant's injuries was introduced by voluminous stipulated medical records without benefit of interpretation by the doctors who produced these records. By stating, "the testimony of professional is crucial in establishing this causal relationship" we acknowledged the lack of medical training by lawyers, hearing examiners, and courts to interpret these records. "Expert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person to judge."

549 N.W.2d 390, 398, 1996 S.D. 69, ¶ 31 (citations omitted).

Dr. Sabow opined that "without question" Claimant was hurt while performing duties for Employer. He further opined that the work that Claimant performed at Employer "had to have been, it had to have been the cause of the deterioration of the low back at 4-5 and L5-S1." Dr. Sabow explained that his opinions are "with absolute certainty based on my

thirty years of practice and fourteen years of training.” He opined, “[w]hat I can say without question is she became symptomatic after she became employed, she became chronically symptomatic after she was employed on the line.” Dr. Sabow agreed that Claimant’s job at Employer was a contributing factor in her development of bulging discs and chronic pain syndrome that he later diagnosed in 1991. He described Claimant as a “textbook authentic case” of a chronic pain sufferer caused by her back pain. Dr. Sabow opined that Claimant’s “chronic pain syndrome was the major cause of her depression or a significant contributing factor to her depression.”

Dr. Renka opined that Claimant’s pain resulting from her back and her inability to function and to carry out ordinary work routines has contributed to her depression. He acknowledged that Claimant “did have a variety of symptoms resulting from back pain and what appeared to be difficulty finding some common ground with the medical community on treating that. She became very frustrated. Her depression seemed to worsen with time. She had, I believe, panic attacks because of the uncertainties in her life based on her inability to function. And part of that was physical, so she seemed to worsen as time went on.”

Dr. Lawlor also opined that Claimant’s physical altercations after her injury at Employer’s does not “eliminate the fact that the work activities at John Morrell were also a contributing factor to her condition.”

Dr. Sabow and Dr. Renka have treated Claimant many times and over the course of many years. They are familiar with Claimant’s day-to-day struggles with her back pain and her psychological issues. Their opinions are persuasive. Dr. Lawlor also treated Claimant. Dr. Sabow, Dr. Renka, and Dr. Lawlor are all experts in their fields. They each explained their opinions based on their experience and training. Their opinions are accepted as favorable to Claimant. Their opinions are further supported by the U.S. Labor Department publications submitted by Claimant.

Dr. Dowdle’s opinions are based solely on a records review. He has never met Claimant and has never treated her. Dr. Dowdle’s report does not explain why the reasoned opinions of Claimant’s treating physicians should not be accepted. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). “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. Lawlor’s opinions, Dr. Renka’s opinions, and Dr. Sabow’s opinions are accepted. Dr. Dowdle’s opinions are rejected as they lack the persuasiveness and factual explanations of the opinions given by Dr. Lawlor, Dr. Sabow, and Dr. Renka.

Claimant has demonstrated by a preponderance of the evidence that her injury at Employer is and remains a contributing factor to her current condition.

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/Self-Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. 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 3rd day of February, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge