SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DORIS ROYSTON,
Claimant,

HF No. 4, 2006/07

v.

DECISION

COBORNS, INC.,
Employer,

and

SENTRY INSURANCE,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management on January 12, 2007, in Mitchell, South Dakota. Claimant, Doris Royston, appeared personally and through her counsel, James R. Davies. Michael S. McKnight represented Employer Coborns, and Insurer Sentry Insurance.

Issues[1]:

1. Whether Claimant's injury is compensable under SDCL 62-1-1(7) and if so, to what benefits is she entitled?

Facts:

Claimant was the only live witness at hearing. The deposition transcript of Dr. Lucio N. Margallo, II, M.D. was received. The following Exhibits were also received:

Exhibit 3[2] – Ambulance Record – Dr. Margallo Deposition;
Exhibit 4 – Dr. Margallo Records –Dr. Margallo Deposition;
Exhibit 5 – Delaney Clinic/Dr. Margallo bill – Dr. Margallo Deposition;
Exhibit 6 – Dr. Margallo Resume – Dr. Margallo Deposition;
Exhibit 7 – Video;
Exhibit 8 – CD of video;
Exhibit 9 – Dr. Margallo Deposition transcript;
Exhibit 10 – Medical records; and
Exhibit 11 – Medical records.

[1] The Department of Labor entered a Prehearing Order on November 21, 2006, listing this as the issue to be determined at hearing.
[2] Exhibit numbers 1 and 2 were not used for exhibits at hearing.

Employer is a grocery store located in Mitchell, South Dakota. Claimant was hired by Employer on July 23, 2003, as a part-time cashier. Claimant was subsequently promoted to customer service manager (CSM) where she was making $7.50 an hour and working forty hours per week.

On July 12, 2004, Claimant arrived at Employer's premises between 8:00 a.m. and 9:00 a.m. and began her regular shift as a CSM. At approximately 1:00 p.m., Claimant decided to take a lunch break. She went to the time clock upstairs, clocked out, came back downstairs, and picked up an item for her lunch. Shortly after paying for the item at one of the checkout counters and on her way to the break room provided by Employer, Claimant fell, face down, onto the tile floor in front of the public entry/exit doors at Employer's store.

Claimant's fall was videotaped by Employer's security/surveillance cameras. Two angles of the fall are depicted on the video. The first angle shows Claimant from behind as she is walking away from the checkout counter. As she is walking, she has her head turned back and is talking with someone at the checkout counter. The video does not take continuous footage, but appears to take snapshots. Claimant is shown to fall forward. The second angle, taken by a camera facing Claimant, shows Claimant walking toward the camera.

After the fall, several people rushed to help Claimant. Her family physician was notified and he directed that Claimant be brought to the hospital by ambulance. Thereafter, Claimant was transported to Avera Queen of Peace Hospital in Mitchell by ambulance.

During the intake process, Claimant was examined by Dr. Snortum, whose records reveal:

> A 42-year-old female patient of Lucio Margallo II, MD, was at work at [Coborns]. She just picked up a snack at the check out and was walking back down the aisle when without warning she fell forward and hit her face on the counter and th[e]n the floor. When I tried to ascertain whether or not she had loss of consciousness she was extremely vague and really just could not tell me if she thought she passed out or not. She had initially told the nurse she did not lose consciousness but then told me that she thinks she may have. The individual behind her said it looked like she stumbled and fell but that is not confirmed either. She is complaining of pain over the lips where she primarily struck her face. She has tingling to the lips, both arms, and somewhat to the left leg. She is complaining of left shoulder discomfort. She was recently in the emergency department on July 4, 2004, and seen by James Nielsen, MD with complaints of left-sided chest pain with tenderness in the chest and the left arm. She had a work up including D-Dimer, ECG, cardiac enzymes, and chest x-ray all of which were negative. She was treated symptomatically with Ibuprofen. She has had no recurrence of the chest symptoms and said that she got up this morning feeling better than she had in the last week.

Dr. Snortum's plan for Claimant's care after his initial examination included:

1. Discussed the findings with the patient and her 2 daughter[s] who are here. I also visited with Lucio Margallo II, MD. We are going to admit her and place her on telemetry to be sure she is not having any rhythm disturbances. This will give us a chance to watch her symptomatically as well with neurological checks as well as vitals.
2. Will order an EEG and an echocardiogram.
3. The stress issues may bear investigating and perhaps a consult with Dakota Counseling Institute may be appropriate depending on the negative outcome of her further labs.

Claimant was hospitalized from July 12, 2004 until July 14, 2004. Numerous medical tests were conducted to evaluate Claimant's condition. Claimant's claim for worker's compensation benefits was denied and she filed a Petition for Hearing with the Department of Labor on July 10, 2006. Other facts will be developed as necessary.

Issue

Whether Claimant's injury is compensable under SDCL 62-1-1(7) and if so, to what benefits is she entitled?

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

"One of the primary purposes of the South Dakota Worker's Compensation Act is to provide an injured employee with a remedy which is both expeditious and independent of proof of fault." Steinberg v. South Dakota Department of Military and Veterans Affairs, 2000 SD 36, ¶ 607 NW2d 596.

The South Dakota Supreme Court recently ruled:

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

> NW2d 67, 71) (quoting 2 Arthur Larson, Larson's Workers' Compensation Law, § 29, 29-1 (1999)). These factors are construed liberally so that the application of the workers' compensation statues is "not limited solely to the times when the employee is engaged in the work that he was hired to perform." Id. ¶ 8. Each of the factors is analyzed independently although "they are part of the general inquiry of whether the injury or condition complained of is connected to the employment." Id. ¶ 9.
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> "In order for the injury to 'arise out of' the employment, the employee must show that there is a 'causal connection between the injury and the employment.'" Id. ¶ 10 (quoting Mudlin, 2005 SD 64, ¶ 11, 698 NW2d at 71). Although the employment need not be the direct or proximate cause of the injury, the accident must have its "origin in the hazard to which the employment exposed the employee while doing [her] work." Id. (alteration in original). "The injury 'arose out of the' employment if: 1) the employment contributes to causing the injury' 2) the activity is one in which the employee might reasonably engage; or 3) the activity brings about the disability upon which compensation is based." Id. (quoting Mudlin, 2005 SD 64, ¶ 11, 698 NW2d at 71-72).
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> The term "in the course of employment" refers to the time, place, and circumstances of the injury. Id. ¶ 11 (quoting Bearshield v. City of Gregory, 278 NW2d 166, 168 (SD 1979)). An employee is acting "in the course of employment" when as employee is "doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment." Id. (internal quotations and citations omitted).

Fair v. Nash Finch Co., 2007 SD 16, ¶ 8 -11. Employer/Insurer has conceded that Claimant's injury occurred "in the course of employment." Therefore, the factor of "arising out of" employment must be considered. Employer/Insurer argues that Claimant's injury arose out of an "idiopathic fall" and, therefore, is not compensable because an "idiopathic fall" does not have a cause.

Contrary to the arguments of counsel, angle two of the surveillance video clearly shows Claimant stumble, reach out with her right arm to break her fall, and thereafter fall to the floor. Right before the fall, Claimant turns her head and some of her upper body to the left, apparently speaking to someone at the checkout counter behind her. As she does this, her stride is tripped up and she falls.

Claimant was not shown the video during her testimony. She did not recall whether she fell or whether she blacked out. None of the doctors or medical experts reviewed the video in making their opinions, diagnoses, and/or treatment plans. The Department carefully viewed this video multiple times. Claimant reached out with her right hand to break her fall. This action is inconsistent with a blackout or fainting spell. Claimant was not "unconscious" when she fell. She may have been stunned after the fall, but that outstretched arm is a significant indicator of consciousness as she began to fall. The

action of her feet as shown on the video demonstrates a break or disturbance in her stride. The fall was not an idiopathic fall, as argued by Employer/Insurer, but instead was a fall caused by a trip or stumble in Claimant's stride as she turned to speak to someone behind her at the checkout counter.

Dr. Margallo testified:

Q: And your diagnosis, when you discharged Doris from the hospital on July 14, was that she had suffered syncope secondary to the supraventricular tachycardia[3]?
A: During that time, yes.
Q: Is that correct?
A: That's correct.
Q: And that was the diagnosis that you had reached as of July 14, 2004, correct?
A: That's correct.
Q: Is – do you – do you have any opinion as to whether or not Miss Royston's work at [Coborns] contributed in any way to her supraventricular tachycardia?
A: I don't think so, but I would probably – it would probably be safe for me to say that her tachycardia was more due to the fall, due to the pain, due to the injury, and because she was quite anxious and scared. I think it's more to that effect.
Q: And just to make sure that I understand and that – and that this deposition reads correctly later on, it would be our opinion that Miss Royston's work at [Coborns] did not contribute in any way to her supraventricular tachycardia; is that correct?
A: The work but – to the fall, yes.
Q: Okay, so it contributed – let me start over.
Let me ask it this way: did her work at [Coborns] contribute in any way to her supraventricular tachycardia?
A: No.
Q: And that's an opinion you can state within a reasonable degree of professional certainty.
A: That's correct.
Q: Did her work at [Coborns] contribute in any way to her syncope?
A: That I cannot answer the question because I – I wasn't there. I didn't see what happened, and the historian was vague during the time of that accident.
Q: What type of information would you need in order to be able to answer that question?
A: Witnesses, people who saw what happened, if the patient is reliable enough to – to tell you what really happened from the start of the fall to, you know – to the waking up. So there – there was probably a minute, few seconds that she doesn't remember.

[3] Dr. Margallo explained "supraventricular tachycardia" as the upper portion of the heart beating faster than 60 to 100 beats per minute.

Q: What would that information tell you? I'm – maybe I asked the question in a poor way, but I'm trying to get to the bottom of whether or not you think that her work at [Coborns] contributed to her syncope, and you indicated that you don't have enough information.
A: I didn't have any information. Because you asked me earlier if she slipped or what, and I – I cannot say that, because she didn't see it and I wasn't there and I didn't see it. So if there was a span of a minute or two that she couldn't remember, you know, that's – I can't tell you.
Q: Okay. And so are you saying that if she would have slipped or tripped, then that would have contributed to the syncope?
A: If she did.
Q: Okay.
A: But nobody knows it.

Dr. Margallo opined that the cause of Claimant's fall was unknown. He did not have the benefit of the video and, therefore, his opinion is limited to supporting a finding that there was no medical reason for Claimant's fall. No witnesses to the fall were brought in to describe what they saw when Claimant fell. Only Claimant testified and she stated that she did not remember why she fell. The video is the best possible evidence regarding the incident. Based on that evidence, the Department finds that Claimant's fall was caused by a trip or a stumble; she did not pass out, faint, or black out. She tripped and fell while walking with a coworker to the break room to eat her lunch. Employer/Insurer's argument that Claimant's injuries were caused by an idiopathic fall is rejected.

Claimant trip and fall occurred on Employer's premises just after Claimant purchased a snack to eat in the employer-provided break room. In Steinberg, the South Dakota Supreme Court considered an injured employee's location important in analyzing a fall. Steinberg's injuries occurred when she fell while crossing an icy street on her lunch break. Steinberg at ¶ 13. The Steinberg court found her injuries compensable because she was "in an area where she might reasonably be and at the time when her presence there would normally be expected." Steinberg, 2000 SD 36, ¶ 22, 670 NW2d at 603 (quoting Larson's Workers' Compensation Law § 13.01[2][b], at 13-8).

Claimant was in an area where she might reasonably be expected to be, in the store buying food for her lunch, and at a time, her lunch break, when she would normally be expected to be there. Claimant was walking behind another employee at the time of her fall. Claimant's injury arose out of and in the course of her employment and is therefore compensable under SDCL 62-1-1(7). The medical expenses incurred for the treatment of her injuries are compensable.

Employer/Insurer next argues that the medical expenses incurred to determine the cause of Claimant's supraventricular tachycardia are not compensable. Claimant's doctors were concerned that Claimant's fall may have been caused by an episode of syncope or unconsciousness. Specifically, her doctors were concerned that Claimant may be having heart problems and performed many tests to determine her condition.

In Mettler v. Sibco, Inc., 2001 SD 64, the South Dakota Supreme Court held that gynecological medical expenses incurred in the course of diagnosing a young woman's pain were compensable. In support of its holding, the Court cited the following authority:

> Whenever the purpose of the diagnostic test is to determine the cause of a claimant's symptoms, which symptoms may be related to a compensable accident, the cost of the diagnostic test is compensable, even if it should later be determined that the claimant suffered from both compensable and noncompensable conditions. Perry v. Ridgecrest Intern., 458 So2d 826, 827- 28 (FlaApp 1989) (citations omitted). Furthermore, we have previously acknowledged that there may be instances where nonwork related diseases are nonetheless covered under workers' compensation insurance such as, "'where the treatment for nonwork related disease would be unnecessary but for the work related injury.'" Rank v. Lindblom, 459 NW2d 247, 250-51 (SD 1990).

Id. at ¶ 9. The medial evidence demonstrates that the tests and hospitalization of Claimant were for diagnostic purposes. Claimant had had a cardiac work-up just a week before her fall and her treating physicians were concerned that she had suffered syncope due to a heart condition. Claimant's treating physician based his treatment on an assumption that Claimant did suffer syncope, but he did not have the benefit of viewing the surveillance video.

Dr. Margallo testified that Claimant's heart was beating fast when she arrived at the emergency room. Dr. Margallo explained that a rapid heart beat "could be attributed to so many things: like you just fall down; you're in pain, you know; you're scared; you're anxious." Dr. Margallo opined that Claimant suffered syncope due to the supraventricular tachycardia, but he also could not opine as to the cause of Claimant's fall. The fall could have caused the supraventricular tachycardia, but based upon Claimant's family history of cardiac problems, the medical providers decided to test for underlying conditions that could have caused the supraventricular tachycardia and/or the fall. Dr. Margallo explained:

> Normally, when a patient presents with a history of passing out, you admit them, you examine them neurologically to be sure there are no signs of any kind of deficit like paralysis or – of course, you examine the injury and also you admit them to put them on monitor to be sure they didn't have any kind of heart attack, strokes, or any kind of heart irregularity.

These actions were reasonable given the circumstances. The diagnostic testing and hospitalization are compensable medical expenses under SDCL 62-4-1.

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

Claimant's proposed Findings of Fact and Conclusions 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 20th day of April, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge