

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

SARAH SORENSON,

HF No. 71, 2010/11

Claimant,

v.

DECISION

HARBOR BAR, LLC,

Employer,

and

**MIDWEST FAMILY MUTUAL
INSURANCE COMPANY,**

Insurer,

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on November 8 and 9, 2012, in Watertown, South Dakota. Claimant, Sarah Sorenson, was represented by Lee C. (Kit) McCahren. The Employer, Harbor Bar, LLC, and Insurer, Midwest Family Mutual Insurance Company were represented by Steven J. Morgans and Jennifer L. Ferris.

Legal Issues:

The legal issues presented at hearing are stated as follows:

1. Whether Sorenson's work-related injury was a major contributing cause of her intracranial hemorrhage?
2. Whether past and future medical expenses associated with Sorenson's intracranial hemorrhage are compensable?
3. Whether Sorenson is permanently and totally disabled (PTD) as a result of her work-related injury?

Facts:

The Department finds the following facts:

1. Dan McKee (McKee) and his wife began taking foster children into their home while living in Minnesota. Sarah Sorenson (Sorenson or Claimant) and her brother Robbie

came to the McKee's as foster children when Sorenson was 15 years old. After moving to Watertown, South Dakota, the McKees gave up taking foster children and adopted Sorenson and Robbie. Sorenson was 17 when the McKees adopted her.

2. Initially, Sorenson had some difficulties common with foster children. She was treated for cutting herself and drug addiction. However, eventually Sorenson became a relatively stable and intelligent young woman, who was described as having a "bubbly" personality. McKee stated that Sorenson ended up being one of his "success stories".
3. Sorenson graduated from Watertown High School. She was good student, although McKee testified that she would have done better if she had studied.
4. After graduating from high school, Sorenson began living on her own and looked after her own finances. She was also capable of working a full-time job and held several waitressing positions.
5. Sorenson began working as a waitress or bar maid at the Harbor Bar (Harbor Bar or Employer) in Watertown. The Harbor Bar was insured by Midwest Family Mutual Insurance Company (Midwest Family or Insurer) during all times relevant in this case.
6. While Sorenson was working at the Harbor Bar on New Year's Eve, December 31, 2009, a fight broke out among the patrons shortly before midnight. Sorenson went to break up the fight, at which time she became involved in the fight.
7. It took Paul Kranz, a Harbor Bar bartender, longer to get to the fight than it had Sorenson. By the time he got to the scene, a number of people had gathered around the fight and he had to push his way through the crowd. When he reached the fight, he saw a patron, later identified as Tim Schussler, on top of someone who was lying on the concrete floor and Schussler was hitting that person from very close proximity so that at first, he could not see who the person was. Kranz saw Schussler hitting the person with closed fists in the vicinity of the face. He stated that Schussler was just "swinging away".
8. Kranz pulled Schussler off the person with a choke hold and then saw that the person on the floor was Sorenson. Kranz escorted Schussler out of the bar. Sorenson got up and ran crying into the bathroom.
9. After the fight, Sorenson continued to work until the end of her shift during which at least two witnesses observed that she was getting black eyes and that she complained of a bad headache. Sorenson was also described after the fight, as having the appearance of a broken nose.
10. In the days following the New Year's Eve fight, Sorenson reported to McKee that she was suffering headaches.
11. The New Year's Eve fight was reported to the police on January 3, 2010. The report was taken by Officer Hegg of the Watertown Police Department. At that time, Hegg

took pictures of Sorenson's face. Those police photos clearly show Sorenson's swollen face with two black eyes.¹

12. Sorenson returned to the Harbor Bar on January 4, 2010, to pick up her check. At that time, witnesses again observed her with two black eyes.
13. On January 7, 2009, Sorenson sought medical treatment at the Prairie Lakes Hospital in Watertown after experiencing a severe headache and nausea. An MRI of Sorenson's head revealed an intraventricular hemorrhage in Sorenson's brain.²
14. Sorenson was transported to Sanford Hospital in Sioux Falls, South Dakota, where she underwent brain surgery on January 8, 2010.
15. On January 8, 2010, Dr. Wilson Asfora, a Neurosurgeon, inserted a temporary drainage tube into the ventricle of Sorenson's brain to drain excess blood and fluid. Ultimately, Sorenson underwent three brain surgeries. The second to insert a permanent drain and the third to help restore circulation to the brain.
16. During Sorensen's hospitalization, she was diagnosed with moyamoya disease, which is a vascular disease of the brain. Dr. Asfora testified that the condition was either congenital or Sorenson developed it in early childhood. Moyamoya results in occlusion of some of the major vessels of the brain which results in revascularization. During revascularization, a network of new, small and less stable vessel grow in an attempt to supply the brain with needed nutrients. These small abnormal blood vessels are prone to bleeding and Asfora stated that a person with this condition is at risk for a major vascular event.
17. Sargent Detective Timothy Toomey (Toomey) became involved in the investigation of the New Year's Eve bar fight. He interviewed Sorenson and numerous witnesses of the incident. He reviewed video tapes of the fight which had been taken by the Harbor Bar's surveillance camera, two or three times. During the investigation, Toomey discovered that the identity the perpetrator in the fight was Schussler and eventually charged him for aggravated assault. In December of 2010, Schussler was convicted of simple assault for his participation in the New Year's Eve fight.
18. On January 27, 2010, Toomey was contacted by Todd Syhre about another incident that had taken place in the Harbor Bar. Syhre said that Harbor Bar owner, Timothy Engels, had prompted him to contact Toomey about the incident. Syhre told Toomey that Dave McGuire and he were playing pool in the Harbor Bar one evening while Sorenson and her boyfriend, Levi Stanton, were roughhousing. He stated that his back was turned to the couple when Stanton apparently picked Sorenson up and dropped her on the floor. When Syhre turned, he saw Sorenson on her back with her feet sticking up on the air. Syhre told Toomey that he and McGuire did not like the way Stanton was treating Sorenson but that Sorenson came up to them and said that she was fine. At the time Syhre told Toomey about this incident, he could not

¹ Exhibits 11, 12, 20 and 21.

² The ventricle is a cavity deep within the brain into which Sorenson's hemorrhage was draining.

remember the date of the incident. So he called McGuire who also was unsure of the date. Together they finally concluded that the incident took place on January 4, 2010.

19. Amanda Greeley, a co-worker of Sorenson at the Harbor Bar, also told Toomey of another incident when she had rented a room at the Dakota Sioux Casino after work. She stated that Sorenson and her boyfriend were wrestling on the bed. Greeley told Toomey that this event took place on December 19, 2010. At the hearing, Greeley testified that the incident took place after work on New Year's Eve, after the fight.
20. Toomey doubted the validity both of the accounts that Syhre and Greeley had described. He felt that Engels had encouraged them to talk to him in an attempt to keep the Harbor Bar out of trouble. He also concluded that those incidents were unrelated to the investigation of the bar fight on New Year's Eve.
21. Sorenson was evaluated by Dr. Robert Packard for purposes of SoCal Security Disability in June of 2010. Packard is a Ph.D. licensed Psychologist, who has practiced in Watertown for more than 20 years.
22. Packard testified at hearing that Sorenson has suffered clear mental deficits, particularly in the area of memory, particularly in the area of details like dates or what came first. He stated that she is experiencing a sense of loss over her loss of memory and functionality and that she was depressed. Packard stated that Sorenson had suffered from a loss of concentration and follow-through. He testified that she could not remember what she last ate or when, and that she has lost the natural signals that tell us when we are hungry or full. He stated that Sorenson had a history of mood swings and a lack of impulse-control which have become much worse. Packard testified that Sorenson's overall IQ rating was in the lower half of average, at 96, but in the area of memory, her rating fell into the mild retardation range. Packard stated that the memory rating and the overall IQ are usually fairly close together, but that the large difference in ratings that Sorenson has is often seen in brain injury cases.
23. Dr. Packard concluded that Sorenson was totally disabled and that she was not capable of managing her own affairs.
24. Dr. Asfora testified by deposition that Sorenson's work-related injury was a major contributing cause of her brain hemorrhage and need for medical treatment. He stated that Sorenson was asymptomatic before the events of New Year's Eve, 2009. He also testified that the punches sustained by Sorenson on the night were as likely to cause the hemorrhage as striking her head on the floor. He stated the striking one's head on the floor is likely to cause a brain contusion but is less likely to cause a hemorrhage, while the rotary motion of being punched which forces the head to turn from side to side is more likely to cause a hemorrhage.
25. Dr. Donald Starzinski, a Neurologist, testified on behalf of the Harbor Bar and Midwest Family by deposition. Starzinski opined that the New Year's Eve fight was not a major contributing cause of Sorenson's brain hemorrhage. Starzinski opined that the moyamoya was the primary cause of her hemorrhage. He also stated that

his opinion was based on the fact that she could continue her normal activities for a number of days following the fight. Despite the fact that she had a headache following the fight, he said that a headache one would get from an intracranial hemorrhage would be a “show stopper”.

26. Dr. John David Sabow, a Neurologist from Rapid City, testified at the hearing. During his testimony, Sabow was shown two photos of Sorenson which had been taken by Officer Hegg on January 3, 2010.³ The photos show Sorenson with a swollen face and two black eyes. Sabow stated that Sorenson had “raccoon eyes” in the photos. He testified that “raccoon eyes” were a classic sign of a traumatic intracranial hemorrhage. He went on to state “This lady had intracranial hemorrhage present when this was taken.”
27. The Harbor Bar and Midwest Family sought a response to Dr. Sabow’s testimony from Dr. Mathew Howard, a Neurosurgeon from the University of Iowa. Howard testified in his deposition that a Neurosurgeon could not diagnose an intracranial hemorrhages based solely on “raccoon eyes” in a photo.
28. The Department found McKee, Toomey and Kranz’s testimony the most credible of those witnesses who were not a physician or psychologist.
29. Additional facts will be discussed in analysis below.

Preliminary Matters:

Rebuttal Testimony:

At the hearing, Sorenson presented Dr. Sabow as a rebuttal witness. The Harbor Bar and Midwest Family objected at the time and since, arguing that Dr. Sabow was not a rebuttal witness and should have been presented in Sorenson’s case in chief. The Department initially declined to allow Sabow’s testimony primarily because the witness had not been identified in the Prehearing Order in accordance with Lagge v. Corsica Co-op, 2004 S.D. 32, ¶ 25, 677 N.W.2d 569. Consequently, Sorenson asked that the testimony be made as an offer of proof, which the Department allowed.

After hearing the testimony, the Department recognized the information provided was significant enough to justify admission to the record. Therefore, the Department reversed its original ruling and allowed the testimony to stand.

Frankly, the Department did not seriously consider the rebuttal witness question during the proceedings because workers’ compensation cases are not governed by the rules of civil procedure and it is generally recognized that administrative hearings are less formal than criminal trials or civil trials in circuit court. See SDCL 15-6-1; Sowards v. Hills Materials Co., 521 N.W.2d 649, (SD 1994) and Kauth v. Bartlett, 2008 S.D. 20, ¶ 22, 746 N.W.2d 747; State v. Milk, 519 N.W.2d 313 (SD 1994); respectively. Consequently, it believed that it had the flexibility to deal with the evidence.

³ Exhibits 20 and 21.

The Department was more concerned with the fact the Harbor Bar and Midwest Family did not have notice of Sabow's appearance and an opportunity to meet that evidence. As such, the Department took steps to insure the defendant's basic due process rights by holding the record open and allowing the defendants submit any additional evidence and testimony they deemed necessary.

Engels Criminal Conviction:

During the hearing, the Harbor Bar and Midwest Family objected to the admission of a judgment of the criminal conviction of Timothy Engels, the owner of the Harbor Bar, for tax evasion. The Department asked the parties to address the admissibility of the evidence in their post-hearing briefs.

Prior to the hearing, Sorenson asked that the Department take notice of the criminal convictions of Timothy Schussler and Timothy Engel. At the time, the Department agreed to do so. However, the Department only considered the matter for purposes of foundation, not having enough knowledge of the case at that time to make a ruling on relevance. The Department now turns to the relevance of Engels conviction.

The Department finds that any impeachment of Engels character is too entenuated from the issues in this case to be of value and any value it may have is outweighed by the prejudice it may have. This is particularly true in light of the fact that Engel did not testify and his credibility is not in question here. Further, prior bad acts and character evidence are generally not admissible. Therefore, the evidence is excluded from evidence in this case.

Daubert Motion:

Prior to the hearing, Sorenson filed a Daubert Motion to preclude Dr. Starzinski's testimony.⁴ The Department denied her motion at that time.

In Sorenson's post-hearing brief, she renewed that motion and asked the Department to disregard Dr. Starzinski's testimony. The Department again declines to do so. Dr. Starzinski is eminently qualified to testify and offer an opinion in this case. Any facts that he may choose to consider or consider while forming his opinion can be weighed by the Department in this decision.

Analysis:

Causation:

The Department must first determine whether there is a causal relationship between Sorenson's New Year's Eve bar fight work-injury and her resulting brain hemorrhage and resulting impairment. Sorenson, as the claimant in a workers' compensation case, has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353,358 (SD 1992).

⁴ See State v. Kvasnicka, 2013 S.D. 25, ¶ 27.

SDCL 62-1-1(7) defines “injury” or “personal injury” as:

[O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

(b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment;

The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought;

SDCL 62-1-1 (7) (emphasis added). This provision dictates that Sorenson prove that her condition is a major contributing cause to her mental injury by clear and convincing evidence.

The South Dakota Supreme Court has noted that there is a distinction between the use of the term “injury” and the term “condition” in this statute. See Grael v. South Dakota Sch. of Mines and Technology, 2000 SD 145, and ¶ 9. “Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result.” *Id.* Therefore, “in order to prevail, an employee seeking benefits under our workers’ compensation law must show both: (1) that the injury arose out of and in the course of employment and (2) that the employment or employment related activities were a major contributing cause of the condition of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.” *Id.* (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. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). “A medical expert’s finding of causation cannot be based upon mere possibility or speculation. Instead, “[c]ausation must be established to a reasonable medical probability.” Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted).

There is no question that Sorenson was engaged in an altercation on the evening of December 31, 2009. It is also clear that, at the very least, that she was knocked or put down to the floor on her back very violently and while on her back was punched several times with closed fists. There is also not a dispute that she suffered work-related injuries as a result of that altercation, which is evidenced by the swollen face and black eyes that are reflected in the photos taken by Officer Hegg.

When considering whether that incident was a major contributing cause of Sorenson's brain hemorrhage and resulting disabilities, the Department must consider what impact, if any, the other incidence referenced in the facts of this decision had upon Sorenson. The first incident involved Sorenson and her boyfriend wrestling on the bed at the Dakota Sioux Casino. The second involves the alleged incident at the Harbor Bar where Sorenson's boyfriend reputedly dropped Sorenson on her back on January 4, 2010.

The Department concludes that the first incident did not play a role in Sorenson's brain hemorrhage. Despite the fact that Amanda Greely testified at hearing that the incident took place after work on New Year's Eve following the fight, she initially told Toomey that it took place on December 19, 2009. In addition, Greeley qualifies her answers during her testimony by stating repeatedly that her memory was not good. It is also seems unlikely that Sorenson was involved in a wrestling match after receiving a beating which blackened her eyes and appeared to break her nose. In addition, Kranz testified that Sorenson jerked away from him when he tried to touch her face following the fight. Finally, the wrestling reportedly took place on a bed and there was no suggestion that Sorenson struck her head or sustained any type of injury.

Like Sargent Detective Toomey, the Department also discounts the second incident as described by Syhre.⁵ Here too, the witnesses were uncertain of the date. While talking to Toomey, Syhre had to call McGuire to ask about the date, McGuire was also uncertain of the date. At first there was confusion whether the incident took place the week before New Year's Eve or the week following. There was also confusion over whether it took place on a poker night or a pool night and it is unclear how they finally settled on January 4th as the date.

It is also noteworthy that neither Syhre nor McGuire actually saw Sorenson hit the floor and neither saw whether she struck her head. All indications are that she immediately jumped up with no apparent ill effects. If Sorenson had struck her head on the floor, it seems likely that she would have had at least a momentary interruption in her activities.

Toomey reviewed the Harbor Bar's surveillance tapes of January 4, 2010, and several other days following the New Year's Eve fight in an attempt to document Syhre's account. He failed to find the incident on the tapes or any evidence that Sorenson was even in the bar in the evenings following the New Year's Eve fight. While it is possible that the incident took place outside the camera's view, it is not likely that the surveillance tapes would not have shown Sorenson and her boyfriend in some context because they were reportedly drinking and running all over the place.

Perhaps the most compelling evidence that this incident did not take place on January 4, 2010, is the fact that neither Syhre nor McGuire noticed that Sorenson had black eyes or any other signs she had been in a fight three days earlier. It is inconceivable that both witnesses would have missed, on January 4th, the swollen face and black eyes evidenced by the police photos taken on January 3rd. Consequently, the Department is convinced that

⁵ Unlike Toomey, the Department will not speculate about the motives behind bringing these incidents to his attention a week after the New Year's Eve fight when neither incident had anything to do with the investigation of a possible crime committed on New Year's Eve.

this incident took place before December 31, 2009, if it took place at all, and had nothing to do with Sorenson's brain hemorrhage.

The Department next turns to the medical opinions offered in this case. Dr. Asfora was the neurosurgeon who operated on Sorenson. He opined that Sorenson's work-related fight caused Sorenson's hemorrhage. In support of his opinion, he said that Sorenson had a brain contusion which indicated that she had suffered a trauma. He stated that Sorenson was asymptomatic before the bar fight but experienced headaches and nausea following it, which increased in intensity. He stated that striking her head on the floor could have caused the injury but that a bleed is more likely from punches which suddenly rotate the head to the side.

Dr. Sabow's testimony supports that of Asfora. He stated that the "raccoon eyes" that Sorenson had in the January 3, 2010, police photos were classic symptoms of an intracranial hemorrhage.

Dr. Starzinski, on the other hand, opined that the New Year's fight was not a major contributing cause of Sorenson's hemorrhage. He attributes the bleed to Sorenson's moyamoya disease.

The Department finds Dr. Asfora's opinion in conjunction with Dr. Sabow's testimony the most persuasive. Asfora's opinion is well supported by the record.

Dr. Starzinski states that the moyamoya disease is the primary cause of the hemorrhage; however, South Dakota case law provides that the claimant must only show that the work-related injury is a major contributing cause of the condition, not the major contributing cause. Peterson v. Evangelical Lutheran Good Samaritan Society, 2012 S.D. 52, ¶ 21, 816 N.W.2d 843. While the moyamoya was a major factor, the brain contusion and the "raccoon eyes" indicate that a traumatic event occurred to trigger the event. Finally, it is more than a coincidence that surgery was required less than a week following the fight and that headaches and nausea were present in between those events.

The Harbor Bar and Midwest Family criticize Asfora's opinion because he was unaware of the alternative events discussed above. This argument is now moot in light of the Department's determination that those events did not occur after the New Year's Eve fight and Sorenson had no symptoms before the fight.

They also criticize Dr. Sabow's testimony by arguing that a diagnosis of an intracranial hemorrhage cannot be based solely on "raccoon eyes". This is undoubtedly true. However, the fact that "raccoon eyes" are a classic sign of an intracranial hemorrhage is evidence the hemorrhage was present on January 3rd when we know from other sources that a brain hemorrhage did occur. While Sabow's testimony may not stand on its own, it is not taken here in isolation. We know that a hemorrhage occurred and that it was traumatic enough to cause brain contusions. Consequently, the Department finds by clear and convincing evidence that Sorenson's work-related bar fight on New Year's Eve 2009 was a major contributing cause of her brain hemorrhage and resulting disabilities.

Past and Future Medical Expenses:

When considering the compensability of Sorenson's medical expenses, a distinction must be made between those expenses associated with the fight and those solely attributed to the moyamoya disease. In Sorenson's third surgery, Dr. Asfora connected blood vessels in the scalp to vessels in the inner brain. He also applied muscle along with dura mater over the brain. These procedures were done because of the moyamoya.

Dr. Asfora stated that the moyamoya disease was asymptomatic until the bar fight. However, he could not say whether the procedures would have been necessary had the fight not occurred. In light of his uncertainty, the Department can only conclude that these procedures were not due to the bar fight but due to the moyamoya and as such, are not compensable.

The other expense in question here is any future follow-up treatment of a very small aneurysm. The aneurysm was caused by the moyamoya, but Dr. Asfora's initial concern with it was that it could have been the source of the hemorrhage. However, this concern cannot justify compensation into the indefinite future. Therefore, the Department finds that future follow-up and treatment of this aneurysm and any others that may be found in the future are not compensable.

Other than those expenses identified above the Department finds that all past and future medical expenses associated with Sorenson's intracranial hemorrhage are compensable.

Permanent Total Disability:

Dr. Packard's conclusion that Sorenson is permanently and totally disabled is well grounded by his testimony. Sorenson has gone from an intelligent, self-supporting 21 year old girl with a "bubbly" personality, to an individual who cannot remember at 2:30 p.m. whether she ate lunch and has no sensation of being full or hungry. She has suffered a loss of concentration and impulse control. She is depressed by her loss of memory and functionality and is unable to take care of her own finances. Sorenson has met her burden of showing that she is obviously disabled as provided in SDCL 62-4-53 as a result of her work-related bar fight.⁶

⁶ SDCL 62-4-53 states in part: An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

Conclusion and Order:

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Claimant shall submit such stipulation together with an Order consistent with this Decision

Dated this 25 day of June, 2013.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge