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

CHRISTINA BLANCHARD, **HF No. 81, 2011/12**

Claimant,

v. **DECISION**

MILLSTONE II,

Employer,

And

FARMERS INSURANCE,

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 March 21, 2014, in Rapid City, South Dakota. Claimant, Christina Blanchard, is represented by Heather Lammers Bogard. The Employer, Millstone II and Insurer, Farmers Insurance are represented by Eric Blomfelt.

Legal Issue:

The legal issue presented at hearing is stated as follows:

> Whether Christina Blanchard's work activities are a major contributing cause of her current lower back pain?

Facts:

The Department finds the following facts by a preponderance of the evidence:

1. Christina Blanchard (Blanchard) was employed by the Millstone II restaurant (Millstone) in Rapid City, South Dakota from March of 2008 to January of 2011. She was originally hired as a line and prep cook. Later, she was promoted to a managerial position.

2. Blanchard is a 35-year old woman who resides in Rapid City, South Dakota.

3. The Department found Blanchard's testimony to be soft-spoken and credible.

4. As the morning manager at Millstone, Blanchard's job duties included moving supplies that were delivered, from where the truck driver unloaded them, to the storage shelves. This activity required repetitive lifting of boxes and bags weighing up to 50 pounds. Blanchard was required to reach over her head to put many of these items away. Blanchard performed this duty 2 to 4 times per week, sometimes alone and sometimes with help. These items took ½ to ¾ of an hour to store after each delivery.

5. In August of 2010, Blanchard began suffering from lower back pain. At the time, the restaurant was very busy due to the Sturgis motorcycle rally.

6. Blanchard had no history of back pain prior to August of 2010.

7. In August 2010, Blanchard's average weekly wage was $541.24 and her compensation rate was $360.83.

8. Everyone at work knew her back was hurting. However, her supervisor would not complete a First Report of Injury, because there was no specific date of injury. Eventually, Claimant was forced to complete the Report herself.

9. Millstone was insured by Farmers Insurance (Insurer) for workers' compensation purposes during all time relevant in this case.

10. Blanchard first sought medical treatment on September 23, 2010, at Community Health because she could not stand the pain any longer. It was noted in her records that her back pain was so significant she was unable to work for several days. Initially, the medical provider mistakenly believed Claimant had a bladder infection and suggested treatment for that condition. This resulted in Blanchard's back pain continuing.

11. Blanchard then returned to Community Health on October 5, 2010. It was noted that she was no longer throwing up from the pain, but that the pain continued. She was prescribed Tramadol. Again, the treatment Claimant received failed to improve her condition. In fact, her back pain was worsening.

12. On October 31, 2010, Halloween night, Blanchard began suffering significant back pain. She had to "pull over" because she was unable to continue driving. She required assistance from her brother to get home. She then collapsed in her apartment and slept on the floor of her apartment because she was unable to get to her bed due to the pain.

13. The next morning, November 1, 2010, Blanchard went to the emergency room (ER) at Rapid City Regional Hospital for treatment. She reported to the

medical team that she had daily pain, that it was constant, and that it had been ongoing for about a month.

14. During this early November 2010 time frame, Claimant was able to attend work only for a total of 41 hours due to her debilitating back pain.

15. Blanchard's employment records show that she worked less in August, September and October of 2010 than she had in other years.

16. On November 8, 2010, Blanchard's supervisor suggested that she see chiropractor for her pain. He then made an appointment for her with Dr. Steve Gullikson. On November 9, 2010, Blanchard had her first appointment with Dr. Gullikson. She continued to see him regularly through September of 2011. Blanchard stopped seeing Dr. Gullikson when the Insurer instructed her to see Dr. Wayne Anderson.

17. By December 2010, Claimant was unable to work at all and in January 2011, she was terminated from her position with Millstone.

18. Blanchard visited Dr. Anderson on January 11, 2011. He noted that she "began having low, left-sided back pain while working at the Millstone restaurant" in August of 2010." Dr. Anderson's diagnosis was left lumbar and low thoracic myofascial pain.

19. Per Dr. Anderson's instructions, Blanchard underwent physical therapy at the Physical Therapy Center in January of 2011. She attended about 7 sessions. This therapy did not provide Blanchard with any relief from her pain. Notes referenced that Blanchard "was crying because it hurt so bad yesterday."

20. Dr. Anderson then referred Blanchard to Dr. Vonderau at Rehab Doctors. Blanchard first saw Dr. Vonderau on February 10, 2011. Dr. Vonderau has been Board Certified in Physical Medicine and rehabilitation since 2007 and Board Certified in the subspecialty of Sports Medicine since 2011. He has been an M.D. since 2002 and active in the field of Physical medicine since 2003.

21. Blanchard saw Dr. Vonderau a total of 6 times from February 11, 2011 until August 25, 2011.

22. Blanchard described her back pain to Dr. Vonderau as a "fairly constant sharp or burning sensation[.]" and advised him that, while working at Millstone, that she was lifting supplies of up to 50 lbs. in weight. Dr. Vonderau testified that the MRI of Blanchard's back showed a disc protrusion at T7- 8 and mild degenerative changes at L4-5. He suspected a "myofascial-type irritation".

23. Dr. Vonderau testified that his physical examination of Blanchard supported her subjective complaints of pain. Based on his examination and the testing conducted, Dr. Vonderau determined that Blanchard should maintain the 20 lbs. work restriction provided by Dr. Anderson. He also recommended an epidural steroid injection and advised that she continue taking Flexeril, Percocet, Lidoderm patches, and Meloxicam.

24. During Blanchard's follow up visit on March 8, 2011, she stated that the injection did not provide significant relief. Dr. Vonderau started her on Lyrica and again referred her to physical therapy.

25. Visits to Dr. Vonderau in April, May and June showed little improvement for Blanchard's pain, although the TENS unit was providing benefit.

26. During Blanchard's July 2011 visit, Dr. Vonderau placed her at maximum medical improvement (MMI) with a 5% whole person impairment. He indicated that her 20 lbs. weight restriction would be permanent. He further indicated that future indefinite treatment should include Lyrica, Lidoderm patches, Robaxin, the TENS unit and, for periodic exacerbations, physical therapy.

27. Blanchard's second round of therapy started at the end of March 2011 and ended at the end of June 2011. During her last visit, however, she was still reporting being unable to get out of bed due to pain in her neck and thoracic spine. Her therapist believed that she plateaued.

28. Dr. Vonderau testified, to a reasonable degree of medical certainty, that the work injury described by Blanchard was a major contributing cause of her low back and thoracic pain; that the work injury was a major contributing cause of her need for treatment and care; and that the work injury was a major contributing cause of her need for continuing treatment. He stated that the type of injury from which Blanchard suffered would be reasonable or expected from someone repetitively lifting 50 lbs. He also testified that he never had any concerns regarding Blanchard's veracity during his treatment of her, or detected any malingering.

29. On July 22, 2011, Dr. Vonderau recommended that Blanchard continue with medication and the TENS unit.

30. On August 25, 2011, further benefits for Blanchard were denied by the Insurer. As a result, Blanchard was unable to continue treatment with Dr. Vonderau or anyone else because she could not afford it.

31. To date, Blanchard continues to suffer from lower back pain.

32. Blanchard was unable to find employment after being terminated by Millstone until she was finally hired, in August of 2012 by Murphy's as a line and prep cook. Murphy's accommodates Blanchard's work restrictions.

33. Dr. Jerry Blow conducted and independent medical examination (IME) of Blanchard in March of 2013. Dr. Blow conducted both a records review and a physical examination.

34. Dr. Blow is a physical medicine and rehabilitation specialist who has practiced for 20 years. Dr. Blow is not board certified. He has failed to pass the certification exam on three occasions.

35. Dr. Blow testified within a reasonable degree of medical certainty that Blanchard's work activities were not a major contributing cause of her current condition. He did not believe that a myofacial strain would not present as dramatically as it did on October 31, 2010. He also stated that myofascial pain should have resolved with physical therapy. He did not believe that the amount of lifting Blanchard did at work was sufficient to cause her symptoms.

36. Additional facts will be discussed in the analysis below.

Analysis:

Blanchard, 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).
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:
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> > (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
> >
> > (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;

> (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to 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).

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 Grauel 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).

In this case, Dr. Vonderau has testified that Blanchard's work actives were a major contributing cause of her current back pain and Dr. Blow has testified that they were not. The Department finds the opinion of Dr. Vonderau to be the more persuasive.

Millstone and Insurer argue that Dr. Vonderau was unable to make an informed opinion because he was not aware of many important facts in this case. Dr. Vonderau was unaware of how often Blanchard was required to store supplies at work during the week, how long it took her to store the items after each delivery or Blanchard's mechanism of lifting. Dr. Vonderau was also unaware that Blanchard had collapsed from pain on Halloween 2010 and had gone to the ER the next day.

However, Dr. Blow was also unaware of some critical facts when he offered his opinion. It is clear that Dr. Blow believed that Blanchard had not sought treatment between August 2010, when she first complained of back pain, and Halloween 2010 and as such had not experienced any pain during that time period.[1] The reality is that Blanchard sought treatment from Community Health and had been in continuous pain during that period.

Even after being told of Blanchard's treatment at Community Health and being confronted by evidence of her pain in her medical records, Dr. Blow was reluctant to acknowledge that she suffered from back pain during that period.[2] This exchange during Dr. Blow's testimony hardly makes him appear as an impartial evaluator.

It is also clear, that Dr. Blow believed that Blanchard's painful episode on Halloween 2010 had taken place several months after she had been terminated from her job.[3] The fact is that she was still working in October 2010 and was not terminated until January 2011. This makes it both possible and likely that her pain on Halloween had been exacerbated by her work activities.

These factual errors on the part of Dr. Blow impact the validity of his opinion more than the factual omissions contained in Dr. Vonderau's opinion. Dr. Vonderau's opinion was based on Blanchard's description of repetitive lifting of up to 50 lbs. This is an accurate description of Blanchard's activities. It is unlikely that knowing the number of boxes she lifted each week would have been of great assistance in light of the fact that each patient's body would respond to that lifting differently.

Dr. Vonderau, as a treating physician, also had more opportunity to observe and evaluate both Blanchard and her condition. In addition, the Department finds that Dr. Vonderau is the more qualified of the two physicians to offer an opinion in this case. Dr. Vonderau has been certified in physical medicine and rehabilitation since 2007. Dr. Blow is not board certified and has failed the certification exam in physical medicine on 3 separate occasions. While it is true that 20 years of practice has probably made him a better physician. The board certification process reflects directly upon the quality of care his patient's received over the course of that time.

Conclusion:

In conclusion, the Department finds that Blanchard met her burden of showing that her work activities are a major contributing cause of her current lower back pain. Blanchard 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

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[1] Dr. Blow's Deposition, Exhibit 15, page 30.

[2] Dr. Blow's Deposition, Exhibit 15, pages 31-32.

[3] Dr. Blow's Deposition, Exhibit 15, page 10.

days after receiving this Decision. Millstone II and the Farmers Insurance shall have an additional 20 days from the date of receipt of Blanchard'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, Blanchard shall submit such stipulation together with an Order consistent with this Decision.

Dated this _8th__ day of July, 2014.

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