SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DALE STRICKER,
Claimant,

HF No. 113, 2004/05

v.

DECISION

HENRY CARLSON CO.,
Employer,

and

OHIO CASUALTY CO.,
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. On March 12, 2007, the Department conducted a telephonic status conference to determine the issue presented by Claimant in this matter. At this time, the parties and the Department have determined that Claimant is seeking a van as a workers' compensation benefit.

Issue:

Is Claimant's request for a van in lieu of additional surgery a compensable benefit under SDCL Title 62?

Summary of the evidence:

Claimant presented a handwritten letter to the Department in support of his claim. Employer/Insurer submitted a Brief in Opposition to Claimant's Van Request, along with the following medical records of Claimant:

1. Avera McKennan Hospital – 5/9/03
2. Urology Specialists Chartered – John Robbins, MD – 3/3/94 – 2/16/05
3. Orthopedic Institute – Gail M. Benson, MD – 8/30/02 – 10/1/02, 10/1/02 MRI Lumbar spine, 12/11/02 Correspondence
4. Anesthesiology Associates – Scott A. Lockwood, MD – 10/10/02 – epidural injection L4-L5
5. Dakota Orthopedics, Ltd – David L Hoversten, MD – 2/21/03 IME
6. Arlington Medical Center – 6/3/03 – 3/21/05
7. Brookings Ambulatory Surgery Center – Pain Clinic – 7/8/06

Claimant suffered an injury on August 6, 1976, while working for Employer. Claimant was on a scaffold when it fell over. According to Claimant, he landed on his feet but

"blew a disc out into the [sciatic] nerve." Claimant underwent two surgeries as a result of this fall. Dr. Giebink performed the first surgery with a borderline to poor result. Dr. Sanchez performed a second surgery a year later on this same right-side L5-S1 level. Claimant suffered "significant damage of nerve" and was placed on full disability. Insurer has paid, and continues to pay, permanent total disability benefits to Claimant in relation to the injury suffered on August 6, 1976.

On August 30, 2002, Dr. Benson examined Claimant. Dr. Benson noted Claimant had been persistently symptomatic since 1977 with "low back [pain] radiating down the right leg to the toes." On examination, Dr. Benson found "marked rigidity of [Claimant's] lumbar spine." Dr. Benson also found "disc space narrowing at L4-5 and 5-1" as shown by X-rays of Claimant. He ordered an MRI scan with contrast. On October 1, 2002, Dr. Benson noted that the MRI scan showed "spinal stenosis at 4-5 with neural foramen narrowing at 4-5." He recommended "a decompressive laminectomy of L4, decompressing from superior or inferior due to his previous surgery, which was probably a partial laminectomy. In addition, we will do a facetectomy on the right at L4-5, Pedicle screw and fusion posterior laterally."

On October 10, 2002, Dr. Scott A. Lockwood of Anesthesiology Associates, Inc., in Sioux Falls, SD, performed an epidural injection at Claimant's L4-L5 level, with no apparent follow-up care.

On December 11, 2002, Dr. Benson, in responding to Judy Miles, Medical Case Manager for Corvel, opined that Claimant's 1976 injury is a major contributing cause of Claimant's current symptoms. Dr. Benson recommended "NSAIDS" and an epidural block if Claimant chose to pursue conservative treatments instead of surgery. Dr. Benson did not recommend or prescribe a van.

On February 21, 2003, Dr. David L. Hoversten of Dakota Orthopedics, Ltd., performed an independent medical evaluation (IME) of Claimant. Dr. Hoversten noted that Claimant "is in the process of dealing with workmen's compensation and the state in the hope of obtaining a vehicle which is more comfortable and which is more tolerable for him to drive and do his business." Dr. Hoversten's impression was:

> This gentleman's present problem is largely due to the degenerative change at L-4-5 with the facet wearing out and a grade 1 spondylolisthesis. This causes a great deal of pain with walking, sitting, moving, and standing, and is the basis for Dr. Benson's recommendation for further surgery.
>
> This is at a level completely different than the L5-S1 level which was injured in 1976 and was operated on in 1976 and 1977. As such, his present symptoms and problems are largely due to degenerative changes over the ensuing time and are completely unrelated to the injury of 1974 with the surgeries of 1976 and 1977.

> In my opinion the Dodge Caravan would be very helpful for him and would help him to get around with less pain and allow him more freedom of movement. Unfortunately, the major reasons for his increased troubles are degenerative changes at a level above and separate and different from those relating to his injury at work in 1994.

Dr. Hoversten was presented the following questions, and gave the following answers, posed to him by Judith Miles of Corvel:

1. Is the injury of 1974/1976 the major cause of Mr. Stricker's current symptoms?
   A. No.
2. Have there been interval [sic] injuries which have contributed to his current medical condition?
   A. The ensuing 20-some years have led to degenerative changes, and although there is no specific injury, that is the reason for his marked increase of trouble in the last five or six years.
3. In your opinion are surgical procedures recommended?
   A. If Mr. Stricker has enough discomfort and pain and wants surgery, what Dr. Benson has proposed would be entirely appropriate. At the present time it does not seem that Mr. Stricker wants surgery but simply wants a vehicle.
4. If he wants to avoid further surgery, what other treatments would help?
   A. Certainly the use of epidural blocks at the L4-5 area, the use of a corset to restrict movement, and the use of a vehicle such as the Dodge Caravan would help his pain. No restrictions are necessary as far as his driving or operating a vehicle.

Dr. Hoversten also noted in his February 21, 2003, IME report that Claimant had "some bladder troubles" and "takes Cardura at night." Dr. Hoversten also opined that Claimant has "significant compromise of his lungs with significant emphysema at this point."

On May 9, 2003, Claimant was evaluated by Dr. Raymond H. Allen and Dr. David W. Bean for shortness of breath. Claimant was admitted to Avera McKenna hospital in Sioux Falls and discharged on May 13, 2003, in stable condition with no suggestion of "significant emphysema".

On December 20, 2004, Hans Wagenaar, PA-C, wrote a letter on behalf of Urology Specialists in Sioux Falls, stating that Claimant "has not had any bladder problems of which we are aware."

On August 29, 2003, attorney Donald M. McCarty wrote to Dr. Benson on behalf of Claimant. Mr. McCarty wrote, in relevant part:

> I simply need answers to whether his original injury is a major contributing cause to the current symptoms and whether use of a vehicle such as a Dodge Caravan

> would be appropriate palliative treatment for his current condition as an alternative to surgery.

Dr. Benson's response was handwritten at the top of Mr. McCarty's letter and read "9/5/03 No GMB."

Claimant apparently did not receive medical treatment other than medication for his back pain until June 30, 2006. On that date, an anesthesiologist named J.E. Cook performed a "Caudal Lumbar Epidural Steroid Injection with adhesiolysis". Dr. Cook's assessment of Claimant's condition on June 30, 2006, included "lumbar radiculopathy L5-S1 secondary to adhesions, status post lumbar fusion, and chronic pain". Dr. Cook noted in his record that Claimant "has had several surgeries including two lumbar fusions." Dr. Cook recommended non-steroidal anti-inflammatory medication along with Lyrica, a medication for the neuropathic component of Claimant's pain.

Other facts will be developed as necessary.

Analysis:

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 183, 185 (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).

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 NW2d 764 (SD 1996). At the time of Claimant's injury, SDCL 62-4-1 (1978 Revision) provided in pertinent part:

> The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members and body aids during the disability or treatment of an employee within the provisions of this title.

There is no dispute that Claimant suffered a compensable work injury in 1976. There is no dispute that Dr. Benson is Claimant's treating physician for purposes of his work related injury of 1976. Claimant is requesting Employer/Insurer purchase him a van to drive. Claimant contends that a van is more comfortable for him than a regular car. Claimant contends that his current van, which is comfortable for him to drive, is old and needs to be replaced in order for him to avoid undergoing the surgery recommended by his treating physician, Dr. Benson.

"When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary, suitable or proper." Engel v. Prostrollo Motors, 2003 S.D. 2, ¶32, 656 N.W.2d 299 (citations

omitted). Dr. Benson, as Claimant's treating physician, opined on December 11, 2002, that Claimant's 1976 injury is a major contributing cause of Claimant's current symptoms. Dr. Benson recommended "NSAIDS" and an epidural block if Claimant chose to pursue conservative treatments instead of surgery. Dr. Benson's records, however, fall short of recommending the purchase of a van as a treatment for Claimant's work-related back condition. Dr. Benson's records do not show that he prescribed the purchase of a van or that a purchase of a van would be an alternative to the recommended surgery. Because the van is not a medical treatment, Employer/Insurer do not have the burden to show that a van is not necessary, suitable or proper care in the treatment of Claimant's 1976 back injury.

The Department previously stated the proper test in construing SDCL 62-4-1 is "whether the requested devices represent 'necessary or suitable and proper care' under SDCL 62-4-1." Johnson v. 3M Co., HF No. 273, 1997/98 (denying claimant's request for closed caption television devices and TDD/TTY devices). "What is required is something more than devices to merely make living more convenient, easier or more enjoyable[.]" Id. at p. 4.

The South Dakota Supreme Court addressed whether a van constituted "other suitable and proper care" in Johnson v. Skelly Oil Co., 359 N.W.2d 130, 134 (SD 1985). In that case, the employee was confined to a wheelchair and requested reimbursement after purchasing a van. Id. The Supreme Court remanded the issue to the Department on the grounds that "SDCL 1-26-25 requires Department to make a factual determination as to whether the van purchased by employee constituted 'other suitable and proper care' as stated in the language of SDCL 62-4-1." Id. at 134-35.

To satisfy the test under South Dakota law, Claimant must present medical evidence that a van is "necessary or suitable and proper care" during disability or treatment. Howie v. Pennington County, 521 NW2d 645, 646 (SD 1994). The Court concluded, "an employer is only responsible for medical necessities, not conveniences, amenities or aesthetically pleasing accoutrements." Id. at 648. Dr. Benson's records do not meet this burden. While Dr. Benson opined that Claimant's current condition is related to his 1976 injury and is a major contributing cause to his current condition, Dr. Benson did not prescribe the purchase of a van as an alternative to surgery. At best, Dr. Benson would agree that a van might make driving more comfortable for Claimant. Dr. Benson's records do not meet Claimant's burden to show that the purchase of a van is a medical necessity.

Claimant's request for the Department to order Employer/Insurer to purchase him a new van in lieu of surgery is denied. This decision should not be construed to preclude any claim, right, or remedy available to either party under the South Dakota Workers' Compensation Law.

Employer/Insurer 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. Claimant shall have ten (10) days from the date of receipt of

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

Dated this 4th day of June, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge