

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

SUZANNE OELKERS,

HF No. 115, 2005/06

Claimant,

v.

DECISION

**NATURAL ABUNDANCE FOOD
COOPERATIVE,**

Employer,

and

ZURICH INSURANCE COMPANY,

Insurer.

This is a Workers' Compensation case brought before the South Dakota Department of Labor, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The Department conducted a hearing on May 10, 2007, and rendered a Decision on three legal issues on January 20, 2010 in Aberdeen, South Dakota. Claimant, Suzanne Oelkers was represented by Michael Bornitz. The Claimant and Insurer, Natural Abundance Food Cooperative and Zurich insurance company, were represented by J.G. Shultz.

Issue:

This case presents the following legal issue:

Whether Claimant is entitled to temporary total disability benefits from May 5, 2005 to May 18, 2007?

Facts:

Based upon the hearing testimony, exhibits and record, the following facts are found by a preponderance of the evidence:

1. Suzanne Oelkers (Claimant) began working for the Natural Abundance Food Cooperative (Employer) in the fall of 2002 as a part-time bookkeeper. In 2003, Claimant was promoted to the manager position. As the manager, Claimant was responsible for the everyday operations of the business including filing taxes and paying bills.

2. Claimant lives in Britton, South Dakota, and drove approximately 55-60 miles to Work in Aberdeen, South Dakota where Employer is located.
3. The IRS sent Employer two notices of a federal tax lien, one on June 30, 2004 and one on September, 30, 2004 while Claimant was manager.
4. On October 14, 2004, Claimant was involved in a work-related motor vehicle accident. Claimant was riding with Natural Abundance board member Arlene Cleberg visiting other cooperatives. Cleberg pulled out from a stop sign and was struck broadside by a semi-truck on the passenger side of her van. Claimant was riding on the passenger side of the van.
5. Insurer provided workers' compensation coverage for Employer at the time of the accident.
6. The parties stipulated for purposes of the hearing that Claimant's compensation rate is \$257 a week.
7. Claimant sustained multiple injuries in the October 14, 2004 accident. These included injuries to her neck, right leg and hand, cuts on both forearms from glass, left shoulder and arm pain and bruising, and right hand and finger pain.
8. After the accident, Claimant was transported to a local hospital by ambulance where she was treated for her injuries and released.
9. Claimant returned to Britton and was treated at the Marshall County Hospital the day after the accident. At that time, Claimant suffered significant neck pain and was unable to get out of bed without help. Her neck pain ran from between her shoulder blades to the back of her head.
10. Claimant began a course of physical therapy in Britton five days after the accident. The physical therapist documented "bruising allover" and "bruising throughout" and noted that Claimant was experiencing numbness and tingling that radiated into both hands. She also complained of headaches and reported the need to sleep in a recliner.
11. Claimant sought additional treatment with her family physician, Dr. Small with the Marshall County Medical Center in Britton. Claimant had a long-standing relationship with Small dating back to when Claimant moved to the Britton area in 1994 or 1995.
12. Before the accident, Claimant was falling behind with her work for Employer.
13. After the accident, Claimant returned to work with the Employer. Claimant was faced with an additional IRS claim and many overdue bills.

14. On numerous occasions in early November of 2004, Claimant reported neck pain while driving to work in Aberdeen to her physical therapist. She also complained of arm pain and radiating numbness and tingling.
15. Because of continuing problems with neck pain, Claimant was referred to an Aberdeen neurosurgeon, Dr. Charles Miller on November 18, 2004. Miller ordered flexion and extension films to determine whether Claimant had cervical instability. The physician's assistant reviewed the films and noted there was nothing that would require surgical intervention at that time.
16. After Dr. Miller's exam, Claimant continued using non-narcotic medication and began using an RS stimulator. Claimant was subsequently referred to Dr. Heloise Westbrook, an Aberdeen physiatrist at the Avera St. Luke's Pain Management Center, for further conservative care on January 6, 2005.
17. Dr. Westbrook treated Claimant in March and April of 2005 for pain management. At that time, Claimant was taking four non-narcotic medications and was experiencing pain. Westbrook authorized Claimant to return to work with restrictions on March 31, 2005.
18. On April 25, 2005, Dr. Miller concluded that an MRI should be done to investigate the cause of Claimant's continuing pain. However, Claimant's workers' compensation case manager did not authorize the MRI. Instead, the case manager referred Claimant to a different physiatrist, Dr. Donald Frisco, for an independent medical examination on that same day.
19. Dr. Frisco examined claimant on April 25, 2005. Based on a single visit, Frisco opined that "I can state with a reasonable degree of medical probability that Suzanne Oelkers is capable of returning to work full time. I would give her a 25lb. lifting limit, also frequent position changes."
20. With regard to Claimant's pain, Dr. Frisco thought she should simply live with it. Frisco testified during his deposition that he did not take patients off-work for pain because it was hard to get them back to work. He also testified that he did not take them off-work because of pain medications.
21. Claimant's pain continued to get worse after she saw Dr. Frisco.
22. Dr. Westbrook received a call from Claimant on May 3, 2005. Claimant complained of the onset of additional pain after physical therapy. Claimant also requested additional medication. Westbrook prescribed Vicodin and Neurontin for Claimant, but did not recommend that Claimant refrain from driving or working. This was the first time since the accident that Claimant was prescribed narcotic medications.

23. Claimant went in to see Dr. Small on May 5, 2005. Small's records indicate that Claimant was "in an incredible amount of pain" that day. Claimant presented Small with "complaints of severe neck and upper back, shoulder blade pain." The pain was "incapacitating" and was "so severe it keeps her awake at night." Small described Claimant's condition as follows:

She is literally crying at times. This is a woman that I just have not seen much ill in her life or even complaining of any pain or chronic pain. Really tends to hold at her neck and moves her upper back area even throughout the exam just to try and get comfortable.

On May 5, 2004, Dr. Small prescribed narcotic pain medication and a muscle relaxer for Claimant.

24. Dr. Small testified during her deposition:

[S]he was having a significant amount of pain and discomfort. I got to know Suzie fairly well through all of this and, I mean, I don't know if you want me to go on and elaborate more for later, but her pain syndrome got so bad that she couldn't sit for any length of time, she couldn't stand, she couldn't lay, she could hardly do her activities of daily living such as showering, bathing. Even trying to cook supper was almost impossibility for her as things progressed.

25. Dr. Small's records do not indicate that she removed Claimant from work on May 5, 2005. However, Small states in a letter dated May 16, 2007:

I did recommend patient not work from that day [May 5, 2005] until the present. She is in a lot of pain which can be very variable and very incapacitating to her but not only is it the pain and discomfort that is an issue or problem but it is also the pain medication she has to take to even try to be somewhat comfortable and function just to do her activities of daily living - narcotics. It is not recommended that one operate any machinery or even drive while taking this medication considering its side effects, especially sedation. I continue to recommend this work cessation yet at this time.

26. Dr. Small reaffirmed the statements that she made in her May 16, 2007 letter during her deposition testimony.

27. During deposition testimony, Dr. Westbrook was asked about Dr. Small's recommendation to remove Claimant from work on May 5, 2005. Westbrook agreed with Small's decision and stated that "it was not safe for her to work at this time."

28. Claimant discontinued working for employer after May 5, 2005. She testified at the hearing that she informed employees Lisa Dyce and Melody Raastad and board member Noel Belcher that she was unable to work because of the pain and the medication she was taking.
29. After Claimant discontinued working, employees began calling Claimant at home and leaving messages. Several employees called with problems in the Coop and seeking guidance on situations that needed her attention as manager.
30. Claimant was referred to Sioux Falls neurosurgeon Dr. Michael Puumala in May 2005. Puumala's records indicate that Claimant was having difficulties with neck, shoulder and arm pain, which related to the October 2004 motor vehicle accident. In that visit, Claimant described her neck pain as radiating down into her hands. Puumala noted that this neck pain was intermittent in nature but was much worse with activities despite the use of narcotic pain medication.
31. Dr. Puumala took a history and performed a neurological examination, the findings of which were normal, with the exception of decreased cervical range of motion. He also reviewed Claimant's MRI and cervical spine x-rays, including the flexion/extension x-rays. Puumala was concerned about the "increased motion between the fourth cervical and the fifth cervical vertebra when she moved her head back and forth; that is, in flexion and extension." Puumala believed this ligamentous laxity at C4-5 could be the cause of Claimant's discomfort.
32. In an effort to confirm his diagnosis, Dr. Puumala recommended that Claimant undergo a set of facet injections. He described the purpose of the injections during his testimony: " the neuroradiologist inject[s] the joints - between C4 and C5 which would numb up these joints and would allow you to say that some of the pain was - or a lot of the pain was coming from that area or not. ... If this helps quite a bit for the patient, one could consider an anterior cervical fusion. If the patient does not get good relief, continuation with conservative measures would be indicated."
33. Dr. Puumala's records indicate that Claimant had the injections, and they helped the pain "significantly."
34. Dr. Puumala advised Claimant that surgery was the best option he could recommend to relieve Claimant's symptoms. He predicted that Claimant "would have a significantly reduced amount of pain."
35. Dr. Westbrook and Dr. Small agreed with Dr. Puumala's conclusion that surgery would resolve claimant's neck pain.
36. Employer hired an attorney to assist it in contacting Claimant. On July 28, 2005, Randall Turner sent a letter on behalf of Employer to Claimant asking for business records and inquiring about her work status.

37. On September 6, 2005, Mr. Turner sent Claimant another letter. Turner stated that Employer would assume that she had voluntarily terminated her employment if she did not respond to the letter.
38. Claimant did not respond to any of Mr. Turner's phone calls or letters.
39. Employer was very close to going out of business as a result of Claimant's failure to pay taxes and otherwise manage the financial aspects of the business. After Employer hired a new manager, it was discovered that many bills were overdue.
40. Dr. Small treated Claimant in September of 2006, after Claimant stopped working. At that time, Small's notes did not include any work restrictions.
41. Dr. Small treated Claimant on December 18, 2006, and again her notes and dictation do not contain any reference to her recommendation that Claimant be off work at this time.
42. Claimant had the fusion surgery recommended by Dr. Puumala on May 14, 2008. Claimant's surgery went well. After the surgery, Claimant regained her range of motion and Dr. Small began taking her off the pain medications.
43. Employer and Insurer began paying temporary total disability (TTD) benefits on May 18, 2008.
44. Claimant has reached maximum medical improvement since the surgery.
45. Since the surgery, Claimant has returned to work for a different employer.
46. Additional facts may be discussed in the Analysis of this Decision.

Analysis

In this case Claimant seeks temporary total disability benefits. 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 Brothers Construction Co.*, 155 N.W.2d 193, 195 (S.D. 1967).

Claimant argues that she was unable to work from May 5, 2005 to May 18, 2007 due to the extreme pain she was suffering and her use of narcotic pain medications during that time. Employer and Insurer argue that Claimant voluntarily quit working because of her poor job performance and that she was physically capable of working. The fact is that elements of both of these explanations may have prompted Claimant to quit. Our task here is to determine whether the medical reasons when viewed alone was sufficient to prevent Claimant from working during the time in question.

In worker' compensation cases, the Department looks to medical experts to evaluate medical evidence. See, *Orth v. Stoebner & Permann Construction, Inc.*, 2006 SD 99, ¶134, 724 NW2d 586. In this case, there are differing medical opinions. On one hand, Dr. Frisco states that Claimant was capable of working on April 25, 2005. On the other hand, Dr. Small states that she took Claimant off-work on May 5, 2005.

Employer and Insurer point out that Dr. Small did not document that she removed Claimant from work on May 5, 2005, or at any other time, in her office records. They note that Small's statement that she removed Claimant from work on that date was not forthcoming for more than two years, when Small wrote the May 16, 2007 letter. Employer and Insurer contend that Small did not remember the precise appointment at which she removed Claimant from work during her deposition. Therefore, Dr. Small's May 16, 2007 declaration was speculative. They also argue that Dr. Frisco's opinion is superior to Dr. Small's because it was more contemporaneous. The Department disagrees.

First, Dr. Small's statement declaration in her May 16, 2007 letter was not speculative. Despite the fact that Dr. Small did not document Claimant's work status in her office records, those records contained all the criteria necessary to evaluate Claimant work status. The records document the pain Claimant suffered and the amount of medication Claimant was taking at that time. Consequently, those records contained sufficient information for Dr. Small to determine that Claimant was unable to work.

Contrarily, Dr. Frisco saw Claimant on April 25, 2005, ten days prior to Dr. Small's May 5, 2005 examination. There is evidence that Claimant's condition deteriorated during that time. Claimant was prescribed narcotic pain medications for the first time on May 3, 2005. On May 5, 2005, Claimant was still in pain and Dr. Small prescribed additional narcotics. When asked about it later, Dr. Westbrook agreed with Dr. Small's conclusion that it would not have been safe for Claimant to work under those conditions.

In addition, Dr. Frisco only saw Claimant once. Dr. Small had treated Claimant for many years. Dr. Small knew Claimant's pain threshold and complaint history. She was in a better position than Dr. Frisco to evaluate Claimant's pain and physical condition.

It is also noteworthy that Dr. Frisco's philosophy on employee's removal from work can be fairly described as "harsh". His practice of not removing patients from work because it is hard to get them to return and his instructions not to take pain medication until evening does not seem conducive to either work productivity or medical recovery. In this case, surgery ultimately proved to be the most expeditious way to restore both.

Conclusion

Claimant has demonstrated by a preponderance of the evidence that she was temporarily and totally incapable of working due to her work-related accident from May 8, 2005 to May 18, 2007. Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of

the receipt of this Decision. Counsel for Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Proposed Findings of Fact and Conclusions of Law to submit objections or Employer and Insurer may submit 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, counsel for Employer and Insurer shall submit such stipulation together with an Order.

Dated this 18th day of October, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

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