SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota

SHERMA K. BITTNER-GACKE, **HF No. 127, 2014/15**

Claimant,

v. **DECISION**

TOM CRONIN TRUCKING,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor and Regulation, pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held in this matter on February 18, 2016, at 9 am CT, in Sioux Falls, South Dakota. Attorney, Jami J. Bishop represents Claimant, Sherma K. Bittner-Gacke (Bittner-Gacke). Attorney, Thomas J. Von Wald represents Employer, Tom Cronin Trucking, and Insurer, Travelers Indemnity Company (Employer and Insurer). The witnesses presenting testimony at hearing were: Bittner-Gacke and John Gacke. Stipulated Joint Medical Records Exhibit, pictures of the truck from the accident, and Curriculum Vitae for Mary E. Watson, M.D. were produced. Depositions presented by the parties in lieu of live testimony were: Thomas Ripperda, M.D. and Mary E. Watson, M.D.

ISSUES:

Whether Sherma K. Bittner-Gacke's current medical treatment of IV infusion therapy and oral pain medications are medically necessary or suitable and proper?

FACTS:

At the time of hearing, Claimant was 67 years old and living in Sioux Falls, South Dakota. On March 31, 1988, Claimant was injured when the truck she was riding in collided with another truck on the interstate. Claimant and her now husband, John Gacke, were tractor-trailer drivers for Employer and were traveling from New York City on route to Sioux Falls after dropping off a load. Claimant was given some initial

medical treatment form the local hospital and flew back to Sioux Falls shortly after the accident.

Once back in Sioux Falls, Claimant was evaluated at Central Plains Clinic. Claimant was placed in a cervical collar and informed that her muscles in her neck were so pulled apart that it was visible on a flat plate. In the days and weeks following the accident, Claimant's pain escalated in severity and Claimant had to be hospitalized because of the intensity of the pain. Claimant was referred to Dr. Joseph Cass of the Spine Institute in Sioux Falls where Claimant underwent a comprehensive rehabilitation program from June 1988 until February 1989. The program consisted of physical therapy, TENS stimulation, ice massage, deep tissue massage, strengthening programs and psychological appointments. Claimant was not able to return to work until February of 1989.

In February of 1989, Claimant was able to return to work as a truck driver and did so until 2000. Between 1989 and 2001, Claimant experienced flare ups of pain that needed medical treatment and pain medication. During this time period, Claimant also underwent a home stretching program, epidural blocks, trigger point injections, ice packs, heat treatments, and used a TENS unit, all of which were paid for by Insurer.

By 2000, Claimant's pain had increased to the point that Dr. Cass referred Claimant to Dr. Wilson Asfora a neurosurgeon from Sanford Neurology for pain in her head and down into her arms. In 2001, Dr. Asfora recommended and performed a two-level neck fusion surgery at the C5-6 and C6-7 levels. Claimant's pain in her neck, back and shoulders persisted. Claimant experienced weakness in her arms and hands and was unable to hold onto the steering wheel or shift gear in the truck. Claimant has not worked since the fusion surgery. Insurer paid and continues to pay, permanent total disability benefits pursuant to SDCL 62-4-53.

After trying conservative treatment, Claimant started treating with a family medicine doctor in 2004, Dr. Bonnie Dillon of Sanford Hospital. For pain management, Dr. Dillon prescribed Demerol shots. Claimant received these shots two to three times per week for approximately a year and three months. Claimant believes the shots provided some pain relief that allowed her to get out of the house and "do normal things." Claimant eventually had to stop the shots because she "started having red streaks" and broke "out in a rash." Dr. Dillon then prescribed Fentanyl patches, but Claimant had adverse side effects. Claimant was then prescribed Methadone. Again, Claimant had adverse side effects and it was discontinued. Dr. Dillon then prescribed Vicodin, but Claimant's stomach was not able to tolerate it.

Dr. Dillon, after consulting an anesthesiologist at Sanford, put Claimant on IV infusion therapy. The IV infusion therapy consisted of 50 milligrams of Benadryl, followed by 4 milligrams of Dilaudid, followed by 3 milligrams of Dilaudid, followed by 2 milligrams of Dilaudid with one milligram of Ativan, followed by three milligrams of Dilaudid with one milligram of Ativan. The infusion process takes about an hour and a half to finish. Claimant did not experience any adverse reactions to the IV infusion therapy. Claimant indicated that after the IV treatments she is able to sleep and relax for at least 24-36 hours. Claimant described the pain relief that she felt as "a big change", she stated she was able to go out to eat, shop, attend her grandchildren's functions, and camp.

After treating with Dr. Dillon for a couple of years, Claimant was forced to find a different doctor due to Dr. Dillon leaving the area. It took Claimant approximately six weeks to find another physician and during that time she was unable to receive IV infusion therapy. During that time Claimant suffered withdrawal symptoms and had to seek treatment at the emergency room for pain medication. Following the third emergency room visit, Claimant was instructed to immediately find a personal physician for pain management. Eventually in 2006, Claimant started treating with Dr. Mary Watson at the Center for Family Medicine. Dr. Marry Watson is a board certified family medical doctor employed by the Center for Family Medicine in Sioux Falls, South Dakota. After reviewing Claimant's medical history, Dr. Watson continued the IV infusion therapy treatments in the same dosage as Dr. Dillon. Eventually in 2008, Dr. Watson reduced the frequency of the IV infusion therapy from three times per week to two times per week. The only other pain medication Claimant is currently prescribed is Oxycodone.

In 2007, Claimant saw Dr. Tom Ripperda for an independent medical examination. Dr. Ripperda is a board certified physical medicine and rehabilitation doctor at Avera Health in Sioux Falls, South Dakota. Dr. Ripperda's practice focuses on musculosketal injuries, rehabilitation and pain management. Dr. Ripperda ultimately issued four reports regarding Claimant's medical treatment (December 10, 2007, February 9, 2009, December 6, 2011, and October 1, 2013). Dr. Ripperda opined that it was not reasonable or medically necessary to continue the IV infusion therapy. Dr. Ripperda's ultimate opinion is that he believes Claimant should attend an inpatient treatment program to wean her from opioid pain medications because he believes she is addicted and he is "concerned" about the potential side effects. After receiving Dr. Ripperda's 2011 report, Claimant complied with Insurer's request to be evaluated at the Mayo Clinic for a potential treatment program to wean her off the IV treatment and pain medication.

On August 20, 2012, Claimant was evaluated by Russell Gelfman, MD, of Mayo Clinic in Rochester, Minnesota. Dr. Gelfman stated, "[t]he main reason for this evaluation was a request from her worker's compensation insurance carrier for comment as to whether she would be a candidate for a cognitive behavioral pain management treatment program." Dr. Gelfman recognized that the IV treatment "has been relatively stable for a number of years and has been the one that has kept her out of the hospital." Dr. Gelfman stated "there has been no drug-seeking behavior, and the underlying issue is not really one of drug abuse, but of the best strategy to managing long-standing chronic pain." Dr. Gelfman warned that "simply stopping the current medications could be fatal" and noted that "[i]ndividuals with high levels of pain who have no method to control the pain can easily become suicidal." Dr. Gelfman opined that although not easy, a multidisciplinary cognitive behavioral program was worth consideration but Mayo Clinic did not have such a program. Claimant was referred to the Courage Center in Minneapolis to explore such a program.

On January 29, 2014, Claimant was evaluated by Matthew Monsein, M.D. at Phoenix Center Pain Services in Minneapolis, Minnesota. While meeting with Claimant, Dr. Monsein informed her that "there is adverse effects to [the treatment program] and there's adverse effects to trying to put you on different medications. And he said, your allergy list really causes a problem." Dr. Monsein concluded:

> [u]nfortunately, I really do not have any great recommendation to make for this individual at the present time. I did discuss with her the pain management and rehabilitation program that we have here at the Courage Center but I am pessimistic at best that a program like this particularly with the mindset that this individual has would be of any benefit. Again in stating this I do not want to imply that the patient is malingering but she has developed her own rituals with the support of her local medical community and apparently with ongoing authorization from the insurance care until recently. I do feel if the patient felt forced to come into a program such as this it would be a disaster for all concerned parties.

Dr. Monsein summarized that he did not feel Claimant would benefit from the multi-disciplinary cognitive behavioral program. He also stated that from his perspective he did not understand the rationale for Claimants ongoing use of infusion therapy to address her chronic pain and that it would be in her best interests to minimize her use of opiates.

After receiving Dr. Monsein's opinion, Insurer recommended that Claimant attend the Rosomoff Pain Clinic in Miami, Florida. The program involves psychotropic drug, exercise, physical therapy, and biofeedback, which Claimant testified "has never worked

for me." Claimant along with Dr. Watson looked into the program and had two phone conferences with representatives of Rosomoff. Claimant also contacted two former patients of the program to learn more about the program. During the first phone conversation the admissions representative was not able to answer the basic questions that Claimant and Dr. Watson were asking. Then after speaking to a physician with the program, they learned there was not a backup plan, in case the initial plan didn't work. Dr. Watson was doubtful about the program because "they didn't really give me any idea as to how they would wean her, over what time period, you know, what methods."

Claimant informed Insurer that she did not feel comfortable attending the Rosomoff Program and did not attend. Following Claimant's refusal to attend the Rosomoff Program, Claimant continued utilizing the IV infusion treatment but Insurer no longer paid for any of Claimant's treatments or future medical benefits. Claimant filed her Petition for Hearing on February 11, 2015.

Further facts may be developed in the Analysis below.

ANALYSIS

The law requires Employer/Insurer to provide necessary medical and surgical treatment. SDCL 62-4-1. SDCL 62-4-1 governs an employer's obligation to pay an injured employee's medical expenses for treatment of a work-related injury. This statute provides in 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…. The employee shall have the initial selection to secure the employee's own physician, surgeon, or hospital services at the employer's expense[.]

SDCL 62-4-1. When determining whether treatment is necessary, the South Dakota Supreme Court stated that "[o]nce notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered." *Hanson v. Penrod Const. Co.*, 425 N.W.2d 396, 399 (SD 1988). The South Dakota Supreme Court in interpreting SDCL 62-4-1 has stated that "[i]t is in the doctor's province to determine what is necessary or suitable and proper." *Stuckey v. Sturgis Pizza Ranch*, 2011 S.D. 1, ¶23, 793 N.W.2d 378, 387-388 (quoting *Streeter v. Canton Sch. Dist.,* 2004 S.D. 30, ¶ 25, 677 N.W.2d 221, 226). See *Krier v. John Morrell & Co.,* 473 N.W.2d 496, 498 (S.D.1991))). "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 or suitable and proper." *Id*.

In the matter at hand, the question is not whether Claimant's injuries are work related. Instead the question is whether the IV infusion therapy and use of oral pain medications are necessary or suitable and proper. It is undisputed that the sensation of pain Claimant feels is not a psychological reaction, but a very real physical pain, which impinges upon Claimant's life style.

Claimant has tried a plethora of medications most of which she had adverse side effects including, many months of physical therapy, TENS stimulation, ice massage, heat treatments, deep tissue massage, strengthening programs, psychological appointments, Fentanyl patches, home stretching program, epidural blocks, trigger point injections, as well as a two-level neck fusion surgery at the C5-6 and C6-7 levels, and Demerol shots. Claimant's pain in her neck, back and shoulders has not shown any significant improvement following these procedures. Claimant is currently managing her pain through IV infusion therapy treatments twice a week and a prescription pain medication of Oxycodone.

Claimant began receiving IV infusion therapy when she was treating with Dr. Dillion approximately fifteen years ago because other attempts at pain management, such as Demerol shots, Fentanyl patches, Methadone, and Vicodin caused Claimant to suffer from adverse side effects. Claimant had to seek out a new physician when Dr. Dillion abruptly left Sanford in late 2005 or early 2006. Dr. Watson started treating Claimant in early 2006. Dr. Watson continued Claimant's IV Infusion Therapy treatment for her chronic pain issues. These IV treatments are done in a controlled setting. Dr. Watson has stated that the whole purpose behind treating chronic pain is so the patient can be more functional and have some life besides being in bed. Dr. Watson and Claimant both agree this is what the IV infusion therapy has done for Claimant for more than ten years. Dr. Watson goes through what is referred to as the "Four A's" when she meets with Claimant. The "Four A's" are analgesia, activities of daily living, adverse side effects and aberrant drug-taking behavior. Using this analysis, Dr. Watson continues to prescribe the IV infusion therapy because it increases Claimant's quality of life. Dr. Watson testified that the IV infusion therapy is "not the most ideal way" for Claimant to get pain relief but she doesn't see any other option at this time and Claimant has not experienced any adverse side effects as she has with numerous other treatments.

Insurer had been paying for Claimant to receive IV infusion therapy for more than ten years and then in 2014 determined that the treatment Claimant had been receiving was no longer necessary or suitable and proper. The determination to stop paying Claimant's medical benefits was made after Claimant decided not to attend the Rosomoff program. Claimant's decision was based on the deficiencies with the program, the advice of the doctor that has evaluated and treated her for more than ten years, and the concerns about her ability to complete the program given her age, physical health and lack of support system at the program. To support Employer/Insurer's decision to stop paying benefits, Employer/Insurer submitted the reports and depositions of Dr. Ripperda. Employer/Insurer argues that Dr. Watson is a family medicine doctor with no pain management certification unlike Dr. Ripperda who has knowledge, experience and education to support his position.

In Dr. Ripperda's initial IME report of December 10, 2007, after examining Claimant, he opined that IV infusion therapy was not appropriate and that Claimant should undergo a medically supervised drug and alcohol treatment program to wean her off of the IV and Oral Medication. Dr. Ripperda believed that it was addictive behavior requiring these IV infusions on a fairly regular basis and he felt she needed evaluation and treatment for addiction. In support of his opinion, Dr. Ripperda noted that he has never seen the use of IV infusion therapy for pain control in a non-cancer patient. Dr. Ripperda went on to list several adverse effects from long-term pain medication, such as lack of hormone production, chronic fatigue, osteoporosis, increased risk of infection, addiction, and overdose that Claimant was susceptible to by continued use of the IV infusion therapy and oral pain medications. In December of 2011, Dr. Ripperda performed another IME on Claimant regarding the same pain control issues. Dr. Ripperda concluded that the 2011 IME was essentially the same as the 2007 IME and continued to opine that IV infusion therapy was not appropriate and there were serious concerns for Claimant's health and wellbeing if the IV infusion therapy did not stop. Dr. Ripperda's recommendation is that Claimant needs to improve her general activity level, get involved with a good behavioral pain program to help her cope with her current symptomatology and stop her reliance on opioid pain medications.

However, Dr. Ripperda's opinions are based upon inaccurate statements and understanding of Claimant's medical treatment. Such is the case of not knowing how long Claimant had been receiving the IV treatment or the initial protocol for the IV treatment. Dr. Ripperda believed that Claimant was still taking OxyContin and using it in an aberrant manner, when Claimant had not been prescribed OxyContin for many years. Dr. Ripperda opined that Claimant had a history of drug seeking behavior, though there is no evidence to support this opinion. Dr. Ripperda also stated that "looking through the records [prior to 2007], there is a significant trend in receiving more and more injections and aggressive therapy, particularly with IV narcotics… in my opinion, this is very concerning for addiction." This is also not the case. When Claimant began her IV treatments in the early 2000s, the protocol, drugs and dosages have not changed. Also, since 2008, Claimant has reduced the number of weekly IV treatments from three times per week down to twice per week. Claimant has also reduced her use of Oxycodone pills. Dr. Watson stated she has not seen any behavior by Claimant to indicate misuse of her Oxycodone. Dr. Watson has stated that Claimant has become very good at regulating what she takes so she does not take anymore that what has been prescribed.

Dr. Ripperda, Dr. Gelfman, and Dr. Monsein all agree that they have never seen IV infusion therapy used for chronic pain outside of Claimant. Though Dr. Gelfman had never seen an IV infusion therapy protocol like what was being used for Claimant and it did not make sense to him, he never the less warned that "simply stopping the current medications could be fatal" and noted that "[i]ndividuals with high levels of pain who have no method to control the pain can easily become suicidal." Dr. Gelfman agreed that it would be in Claimant's best interest to minimize her use of opiates from the standpoint of risk factors and a multidisciplinary cognitive behavioral program was worth considering. Dr. Monsein also did not understand the rational for the use of the IV

infusion therapy but stated he really did not have any great recommendation to make for Claimant at the present time. Dr. Monsein believed that Claimant had developed her own rituals for dealing with her pain with the support of her local medical community and apparently with ongoing authorization from Insurer until recently. Dr. Gelfman had also recognized that the IV treatment "has been relatively stable for a number of years and has been the one that has kept her out of the hospital."

At this point in time, the best person to decide Claimant's pain management treatment program for her chronic pain is her treating physician. Employer and Insurer's expert Dr. Ripperda has explained different treatments that Dr. Watson may have prescribed, but most of those treatments have already been attempted by Claimant with no success. Claimant's pain has been alleviated, to some extent, by following the IV infusion therapy treatment plan of Dr. Watson. The IV treatment is necessary or suitable and proper, as it gives Claimant the ability to have a higher quality of life.

It is Employer and Insurer's burden to prove that Claimant's continued IV infusion therapy treatments and use of Oxycodone oral pain medication is not necessary, or suitable and proper. Employer and Insurer have not met the required burden to show that Claimant's treatment is not necessary. Furthermore, although a controversial treatment, Employer has not shown by a preponderance of the evidence, that the treatment of Dr. Watson is unsuitable and improper. In this situation, Employer has the burden of proving the treating physician's treatment was not necessary or suitable and proper. Employer and Insurer have not met that burden. The treatment prescribed by Dr. Watson, including the IV infusion therapy and Oxycodone medication, constitutes reasonable and necessary medical care and treatment.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Claimant may also submit separate Proposed Findings and Conclusions not consistent with this Decision. The initial submission shall be filed with the Department within thirty (30) days from the date of receipt of this Decision. The Employer and Insurer shall have fifteen (15) days from the date of receipt of the initial submissions to submit objections thereto or to submit their own 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 and Order in accordance with this Decision.

Dated this 17th day of August, 2016.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge