SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JUNE SMITH WERNSMANN,

Claimant, **HF No. 163, 2000/01**

vs. **DECISION**

MIDAMERICAN ENERGY,

Employer/Self-Insurer.

This matter comes before the Department on a petition for workers' compensation benefits pursuant to SDCL §62-7-12. A hearing was held on November 7, 2007; Claimant, June Smith-Wernsmann, was represented by Rollyn H. Samp, Samp Law Offices, Sioux Falls; Employer/Self-Insurer, MidAmerican Energy (MAE), was represented by Kristi G. Holm, Davenport, Evans, Hurwitz & Smith, Sioux Falls.

On June 2, 1998, while performing her duties for MAE as a service technician, Claimant stepped into a hole at a customer's residence. Her leg went about mid-calf into the hole, but she did not fall to the ground. Afterwards, she continued to work the rest of the day and returned to work the following day, though she had pain in her left foot, knee and back.

On June 12, 1998, Claimant saw Dr. White, a podiatrist, who had performed two surgeries on her feet previously. He concluded she had sprained her foot, but recommended she have an orthopedic evaluation because she complained of back pain.

Dr. Suga, an orthopedic surgeon, saw Claimant on June 30, 1998. He diagnosed her with lumbar degenerative disc disease, lumbar strain, and left knee osteoarthritis, and released her to work light duty. In his view, neither the lumbar nor knee problems stemmed from Claimant's work incident, as they would have developed over a long period. He felt that the work incident might have temporarily exacerbated

her back and knee discomfort, but had no long-term implications, and that surgical intervention was not warranted.

Claimant returned to Dr. Suga on July 16, 1998. She reported having gradually increasing back pain over the last four or five years, and now having pain radiating into both legs. He had an MRI done which showed mild L5-S1 degeneration but no disc herniation. On July 21, 1998, Dr. Suga met with Claimant to explain these results, and Claimant became "very insistent that something has to be done today." He described her as "extremely impatient" and "totally unreasonable." He suspected psychological issues such as secondary gain. He ordered conservative treatment over the next month.

At her August 18, 1998 appointment with Dr. Suga, Claimant insisted on both back and knee surgery that week. Dr. Suga told her she was not a surgical candidate, and he had the opinion that she was at pre-injury status. Claimant had a final appointment with Dr. Suga on September 10, 1998, in which she once again was "adamant" about having surgery, but Dr. Suga refused, telling her surgery might not help at all, or even make her worse, and he returned her to her usual work duties.

Claimant went back to her original work duties until November 23, 1998, when she saw Dr. Alvine, another orthopedic surgeon. As she had with Dr. Suga, she told Dr. Alvine that she wanted surgery. He diagnosed her with chronic low back pain with acute exacerbation, degenerative disc disease and degenerative joint disease in her knee. Dr. Alvine referred her to Dr. Cho, a physiatrist, rather than performing surgery.

Dr. Cho evaluated Claimant on December 18, 1998, and prescribed conservative care for her back and knee that lasted until March, 1999. Claimant's subjective complaints did not change, so Dr. Cho referred her back to Dr. Alvine. On March 23, 1999, Dr. Alvine proceeded with arthroscopy on Claimant's left knee. MAE had been

informed of the upcoming surgery, but did not authorize it, relying on Dr. Suga's opinion that surgery was not appropriate, and refusing to authorize the change in treating physician from Dr. Suga to Dr. Alvine.

The surgery did not improve Claimant's knee condition, and her back deteriorated. She insisted that Dr. Alvine do back surgery. He referred her to Dr. Wood in Minneapolis for another opinion; as of July 2, 1999, Dr. Alvine was not convinced that such surgery would help. Dr. Wood was not optimistic, either, but he proceeded with an anterior/posterior fusion on September 7, 1999. His diagnosis was "degenerative disc disease at L5-S1."

Shortly following surgery, Claimant developed significant pain and numbness in her legs. She met with Dr. Plaga in December, 1999 for her knee pain, who tried an injection which did not help. He did not recommend any further treatment for the knee.

In July, 2000, Dr. Cho rated Claimant's impairment as 20% of the left lower extremity for the arthritis, pain and loss of cartilage in the knee. She also rated Claimant's low back with a 10% impairment from the fusion surgery.

Claimant had two Functional Capacities Assessments, in June, 2001 and June, 2003. The first was declared invalid based on Claimant's failure to provide maximum effort during the evaluation, but the second was considered valid, and reported that Claimant could perform sedentary work. Dr. Cho provided pain management treatment after that.

In February, 2005, Claimant's family physician referred her to Dr. Hansen for pain management. He required her to undergo drug testing which revealed methamphetamine and marijuana, for which he referred her for a chemical dependency evaluation. This evaluation revealed that she and her husband had used marijuana for a couple of months.

Dr. Hansen required regular drug testing as part of his treatment, which led Claimant to return to Dr. Cho for pain management.

Claimant currently suffers from charley horses down the length of her legs and in her back, so bad that she can sometimes barely breathe. She uses a wheelchair if going more than a few feet. She hurts constantly, and must have her feet up when she sits. She can sit at a computer for about an hour, and drive for roughly an hour and fifteen minutes. She sleeps an hour and a half at a time, but has difficulty staying awake because of her medications. She has a number of personal health conditions, unrelated to her work injury, for which she receives treatment, including a circulatory condition and carpal tunnel. She is on Social Security Disability from the combination of her various health conditions.

The claimant has the burden of proving both that she suffered an injury arising out of and in the course of her employment, and the employment was a major contributing cause of the condition of which the employee complains. Grauel v. South Dakota School of Mines, 2000 SD 145, ¶9, 619 N.W.2d 260. 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. Orth v. Stoebner & Permann Construction, Inc. , 2006 SD 99, ¶34, 724 NW2d 586.

Here, MAE has not disputed that a work-related injury occurred on June 2, 1998. Dr. Suga concluded that Claimant had no more than a temporary aggravation of pre-existing conditions in her left knee and back. He opined that her various surgeries after June 2, 1998 were unnecessary, and did not result from her work injury. Dr. Farnham, who conducted an independent medical examination, confirmed that Claimant strained

her back and knee in her work injury, but her ongoing conditions related to degenerative conditions that were not work-connected.

Dr. Cho, however, has connected Claimant's work injury to the conditions she now suffers. She concedes that the injury did not cause the degeneration in Claimant's knee or spine, but opines that the injury triggered the symptoms prompting the treatment that followed. While she did not see Claimant for about six months following her injury, she has treated Claimant off and on for the almost ten years since, and has both expertise and experience in conditions of this type.

MAE points out that Dr. Cho was not aware the Claimant had conservatively treated both her back and knee before her work injury. Dr. Cho was aware, however, that Claimant had degenerative conditions in her knee and back. A claimant does not need to prove that the work injury was the major contributing cause, only that it was a major contributing cause, pursuant to SDCL 62-1-1(7). A cause which cannot be exceeded is a major contributing cause. Orth, 2006 SD 99, ¶42, 742 NW2d at 594. It is concluded that the conditions for which Claimant has made claims since 1998 are a product of her work injury, and are compensable.

The legal standards for a permanent total disability claim are well-established:

> The claimant has two avenues to make the required prima facie showing for inclusion in the odd-lot category. First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment is actually available in claimant's community for persons with claimant's limitations. Obvious unemployability may be shown by: (1) showing that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category, or (2) persuading the trier of fact that he is in fact in the kind of continuous, severe and debilitating pain which he claims. Second, if the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated to the odd-lot category then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work. Under this test, if the claimant is obviously unemployable, he will not bear the burden of proving that he made reasonable efforts to find employment in the

> competitive market. Likewise, it is only when the claimant produces substantial evidence that he is not employable in the competitive market that the burden shifts to the employer.
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> Fair v. Nash Finch Co., 2007 SD 16, ¶19, 728 NW2d 623 (additional citations omitted.)

Here, Claimant is 50, has an eighth-grade education, and her work history has been almost entirely customer service jobs with MAE. Her 2003 FCE, accepted by Dr. Cho, released her to sedentary employment. She has not performed a job search, so she must demonstrate that she is "obviously unemployable." Rick Ostrander testified on the Claimant's behalf as a vocational expert. He opined that the Claimant was obviously unemployable within her community. Commuting to the larger labor market in Rapid City would be out of the question given her arm problems. Given her physical restrictions, Ostrander also concluded that retraining would be futile. She credibly, and without contradiction, testified that her pain was severe, constant, and significantly limiting, so much so that a job search would serve no meaningful purpose. It is concluded that the Claimant has met her prima facie burden of establishing her permanent and total disability.

The burden then shifts to MAE to establish that some form of suitable employment is regularly and continuously available within her community. Fair, 2007 SD 16, ¶23, 728 NW2d 623 (citation omitted). It offered the testimony of Jim Carroll, which Claimant moved to strike on the grounds of insufficient foundation. That motion is hereby overruled, nonetheless MAE has not met its burden through his testimony. Mr. Carroll utilized the sedentary restrictions established in the FCE in approaching potential employers, and presented her as someone who could work full-time, but this is not consistent with Claimant's true circumstances. She has difficulty staying awake because of her medications (and takes Provigil to stay awake.) Dr. Cho has prescribed

a scooter and van for her to improve her mobility, and she uses a wheelchair. Her pain is constant and significant, so much so that she even resorted to illegal drug use for relief. Her household activities are passive, mostly watching TV and hunting and pecking on a computer for an hour or so. She receives social security disability benefits as a result of the effects of her multiple knee and back surgeries, in combination with the various medical conditions unrelated to her injury. The Claimant has established by a preponderance of the evidence that she is entitled to permanent total disability benefits.

Claimant has asserted that MAE is responsible for the medical expenses associated with Claimant's treatment with Dr. Alvine and providers to whom Dr. Alvine referred her. SDCL 62-4-43 provides, in pertinent part, that:

> The employee may make the initial selection of the employee's medical practitioner or surgeon from among all licensed medical practitioners or surgeons in the state ...The employer is not responsible for medical services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section ... If the employee desires to change the employee's choice of medical practitioner or surgeon, the employee shall obtain approval in writing from the employer. An employee may seek a second opinion without the employer's approval at the employee's expense.

Claimant initially selected Dr. White, a podiatrist, who referred her to Dr. Suga. After Dr. Suga refused to perform surgery for her, she turned to Dr. Alvine, without getting written approval from MAE. Dr. Alvine referred her to Dr. Cho for pain management services, and Claimant did not get written authorization for that referral. He referred her to Dr. Wood for a second opinion, and she did not obtain authorization for that referral, either. MAE informed her that Dr. Alvine's treatment was not authorized in December, 1998. Claimant is not entitled to reimbursement for Dr. Alvine's, Dr. Wood's, or Dr. Cho's treatment. Similarly, Dr. Dickinson treated by way of referral from Dr. Cho, his treatment was never authorized, and cannot be reimbursed.

In February, 2005, Claimant was treating with Dr. Cho, but sought treatment with Dr. Boyens, her family physician. Dr. Boyens referred her to Dr. Hansen for pain management. Dr. Cho was already providing pain management treatment to the Claimant. Claimant did not obtain written authorization for either Dr. Boyens or Dr. Hansen to treat her, and is not entitled to reimbursement for their services.

MAE has also raised the issue that Claimant's knee and back surgeries were unnecessary, and are therefore not MAE's responsibility. SDCL 62-4-1 provides that the employer shall provide necessary medical care. "Once 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. It is in the doctor's province to determine what is necessary, or suitable and proper. 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." Hanson v. Penrod Construction Co., 425 NW2d 396, 399 (SD 1988). The claimant does not get the benefit of this presumption of appropriateness, however, where treatment is being provided by an unauthorized, inappropriately selected physician. Rather, as Dr. Suga was the last authorized provider in this case, his opinion that surgery was inappropriate should be given presumptive weight.

Even without the benefit of a presumption, the record confirms that Claimant's various surgeries were unnecessary, and by hindsight arguably made her worse. All of Claimant's doctors, even the surgeons, were reluctant, and most were opposed, to performing surgery on her back and knee. Her knee and back had arthritic degeneration which her doctors conceded could not be treated surgically. Nonetheless, at her aggressive insistence, these surgeries were performed, finally leaving her in such

pain that she was effectively confined to a wheelchair. MAE is not responsible for these medical expenses.

Claimant has asserted claims for reimbursement of the cost of a cane, house cleaning, lawn care, and motel and meal expenses, totaling $1,181.60. She has not demonstrated the necessity of these expenses, and they are therefore not compensable.

Claimant has also claimed reimbursement for an electronic scooter and a wheelchair-accessible van. Dr. Suga opined that they were unnecessary. Dr. Cho concedes she prescribed them for Claimant's convenience, which would be insufficient to make MAE liable for them. "An employer is only responsible for medical necessities, not conveniences." Howie v. Pennington County, 521 NW2d 645, 648 (SD 1994). The requested scooter and van are not compensable.

Claimant has made a mileage claim for $3,078.82. It is unclear from the documentation in the record where this travel occurred. Any treatment Claimant obtained after Dr. Suga's was unauthorized, so any mileage connected with that treatment would not be compensable. Up to that point, Claimant was not physically restricted in her ability to travel within Sioux Falls; she is still able to drive for at least an hour and a half, so it has not been demonstrated that her travel for treatment was made necessary by her injury. Her mileage claim is not compensable.

MAE asserts a statutory lien against proceeds Claimant collected from a third-party lawsuit and private health insurance. MAE may well have the right to offset Claimant's recovery based on such a lien. In Truck Insurance Exchange v. Kubal, 1997 SD 37, ¶12, 561 NW2d 674, 675, however, it was reiterated that:

> The general rule appears to be that, when it is ancillary to the determination of the employee's right, the compensation commission has authority to pass upon a question relating to the insurance policy. This is, of course, in harmony with the conception of compensation insurance as

> being something more than an independent contractual matter between insurer and insured.
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> On the other hand, when the rights of the employee in a pending claim are not at stake, many commissions disavow jurisdiction and send the parties to the courts for relief. This may occur when the question is purely one between two insurers, one of whom alleges that he has been made to pay an undue share of an award to a claimant, the award itself not being under attack.

The Department concludes it lacks the jurisdiction to rule on the issue, as MAE does not dispute its liability as to Dr. Suga's bills which are the basis for the offset claim.

The parties 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. The parties shall have ten (10) days from the date of receipt of opposing party's proposed Findings of Fact and Conclusions to submit objections to them and/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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 26th day of September, 2008.

James E. Marsh
Director