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

MICHELE G. STUCKEY,
Claimant,

HF No. 165, 2010/11

v.

DECISION

STURGIS PIZZA RANCH,
Employer,

and

NATIONWIDE MUTUAL INSURANCE CO.,
Insurer,

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Rapid City, South Dakota. Claimant, Michele G. Stuckey appeared personally and through her attorneys of record, Jason Groves and David S. Barari. Dennis W. Finch represented Employer, Sturgis Pizza Ranch and Insurer, Nationwide Mutual Insurance Co.

Issues

1. Whether Claimant has had a change in condition pursuant to SDCL 62-7-33, to the extent that the Department should end or diminish some or all of Claimant's benefits.
2. Whether Claimant is entitled to a therapeutic pool at her residence.
3. Whether a Sleep Number bed is a reasonable and necessary medical expense.

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

Michele Stuckey (Claimant or Stuckey) sustained a work related injury to her left hand, on October 8, 2003, while working at Sturgis Pizza Ranch (Employer). Following her injury, Stuckey sought treatment with Dr. Steven Frost and Dr. Troy Nesbit at the Regional Rehabilitation Institute Pain Management Center in Rapid City. Dr. Frost diagnosed Stuckey with Complex Regional Pain Syndrome, RSD. The claim was accepted and deemed

compensable. In January 2006, the Department of Labor entered an order declaring Stuckey permanently and totally disabled and entitled to benefits under SDCL 62-4-7[1].

Pursuant to a life care plan, created to organize Stuckey's various medical treatments, Stuckey moved into Sandstone Villa Town Home, an assisted living facility where she receives the recommended assisted living services. Other medical treatment recommended for Stuckey by her treating physician, Dr. Frost, included hydrotherapy at her residence. Employer/Insurer disputed the location for hydrotherapy, arguing that home based therapy was not reasonable and necessary. The Department issued a Letter Decision and Order on June 16, 2009, which ordered Employer/Insurer to provide a therapeutic pool and enclosure at Stuckey's residence. Despite this Order, the Employer/Insurer has never provided a therapeutic pool and enclosure at Stuckey's residence.

In September of 2007, Employer/Insurer hired Brian Collins, a licensed private investigator, to do surveillance regarding Claimant. Collins collected many hours of surveillance video between 2007 and 2010 depicting Claimant. Collins, along with his fellow private investigator, Robert Hansel, prepared written reports summarizing their observations.

On February 13, 2011, Dr. Suzanne Novak performed a records review at the request of Employer/Insurer and prepared a report. Dr. Novak is a board certified anesthesiologist licensed to practice in the state of Texas, and currently practices administrative medicine. She reviewed medical records from 2003 through 2010 and several hours of surveillance tapes depicting Stuckey. Dr. Novak opined that Claimant has had a material and substantial change in her physical condition from the time of her injury to the time that she conducted her records review. Dr. Novak further opined that based on her review of the records and surveillance, she did not believe that continued injections were necessary and there was no need for a hot tub or assisted living facilities and that Stuckey should be weaned from her pain medications. She also noted that there was no literature that would support the use of sleep number bed or continued massage therapy.

On March 9, 2011, Dr. Bruce Elkins, a physician board certified in occupational medicine and preventative medicine, performed an independent medical examination (IME) at the request of Employer/Insurer. As part of his evaluation he conducted a physical exam, reviewed medical records from 2003 through 2010, reviewed Dr. Novak's report and watched several hours of surveillance tapes depicting Stuckey. Dr. Elkins prepared a written report, in which he opined that CRPS was a reasonable diagnosis in the early stages, however based on his examination and documentation from the surveillance, there was no CRPS in the right upper extremity or either lower extremity at that time. He diagnosed depression, pain disorder and opioid dependence with hyperalgesia. He further concluded that Stuckey and her treating physician interpreted the

[1] On January 12, 2011, the South Dakota Supreme Court affirmed Claimant's right to benefits and to the course of treatment summarized in the life care plan. *Stuckey v. Sturgis Pizza Ranch and Nationwide Mutual Insurance Co.*, 2011 SD 1¶27, 793 NW2d 278.

hyperalgesia and possibly other medical conditions as CRPS, but he could not find any current objective evidence of CRPS, such as changes in the amount of sweating, coloration of the skin, swelling, over growth of hair in the area, in her left upper extremity. He stated that lack of objective findings, coupled with his observation of the surveillance, lead him to conclude the CRPS of the left upper extremity had resolved. Dr. Elkins recommended that Stuckey be weaned off her pain medication including her pain pump and that her massage therapy be discontinued. Dr. Elkins stated that it was reasonable to continue living at Sandstone Villa and receive in home services until her psychological and physical issues were controlled. He further opined that a hot tub was not necessary because she reported that heat exposure was painful and she couldn't put her hand in water. Dr. Elkins overall conclusion was that Stuckey had been gradually improving since 2006 such that some of the elements recommended by her life care plan were no longer reasonable or necessary or could be reduced.

On April 19, 2011, more than five years after the determination of Claimant's permanent total disability, Employer/Insurer petitioned the Department pursuant to SDCL 62-7-33, asserting that Claimant has had a change in condition such that medical payments pursuant to SDCL 62-4-1 should be reviewed and some should be ended and some should be diminished.

July 2, 2012, Dr. Novak reviewed additional surveillance and Dr. Elkins March 9, 2011 IME report. Dr. Novak did not review any additional medical records from late 2010 onward. Dr. Novak reaffirmed her original opinion that based on her review of the records and surveillance, she did not believe that continued injections were necessary, there was no need for a hot tub or assisted living facilities and that Stuckey should be weaned from her pain medications.

On July 26, 2011, Dr. Elkins reviewed additional surveillance videos and prepared an Addendum to his initial IME. Dr. Elkins did not review any new medical records from late 2010 onward. He felt that the video showed a much greater use of the left upper extremity than what she indicated at the initial IME, he also stated that he now believed she was malingering. Dr. Elkins opined that there had been a substantial change in Claimant's condition from 2006 to the present time, that her CRPS had resolved and that she should be weaned from narcotics as soon as possible.

Other facts will be determined as necessary.

Analysis

Whether Claimant has had a change in condition pursuant to SDCL 62-7-33, to the extent that the Department should end or diminish some or all of Claimant's benefits.

Employer/Insurer has petitioned the Department for a review under SDCL 62-7-33, alleging a change in Claimant's condition that would result in a modification of her workers' compensation benefits. Employer/Insurer urges the Department to find that Claimant's condition has changed to the extent that her needs for medical treatment have changed. Employer/Insurer further argue that Claimant should enter a program of rehabilitation to be weaned from the narcotic drug treatment currently being used, discontinue injections and discontinue massage therapy. Lastly,

Employer/Insurer argues that based on her condition she does not need a hot tub at her residence or sleep number bed.

SDCL 62-7-33 provides,

> Any payment, including medical payments under § 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the Department of Labor pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action. Any case in which there has been a determination of permanent total disability may be reviewed by the department not less than every five years.

The South Dakota Supreme Court has interpreted a change in condition as, "ordinarily a change, for better or worse in claimant's physical condition". *Mills v. Spink Elec. Co-Op*, 442 NW2d 243, 246 (SD 1989) (quoting 3 *Larson, The Law of Workmens Compensation*, § 81.31(a) (1988)). "Only after a party asserting a 'change in condition' has met the required burden may the Department reopen a previous award." *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶12, 575 NW2d 225, 231.

Claimant argues that there has been no change in condition that affects Stuckey's earing capacity as required by statute. Claimant argues that the South Dakota Supreme Court in *McDowell v. Citibank*, 2007 SD 52, 734NW2d 1, held that a change in physical condition is irrelevant to a SDCL 62-7-33 petition, if the moving party has not shown a change in earning capacity. Claimant further argues that Employer/Insurer failed to provide critical, contemporary medical records to their experts and therefore the opinions are incomplete, inaccurate, and insufficient. Claimant asserts that for these reasons, Employer/Insurer cannot meet its burden of proof to show a change of condition and the doctrine of res judicata applies.

SDCL 62-7-33 addresses the reopening of both medical payments and disability payments. In regards to disability payments, the party seeking to reopen must show that the earning capacity has substantially changed. This case is distinguishable from *McDowell*, in which the Claimant sought to reopen her case to receive permanent total disability benefits. SDCL 62-7-33 only allows the Department to reopen disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury. *Id*. In the case at hand, Employer/Insurer do not dispute that Claimant remains permanently and totally disabled, and does not seek to reopen or modify the disability payments. When, as in this case, a party seeks only to amend or modify medical payments under SDCL 62-4-1, a change in earning capacity need not be shown. (See *Mills*, 442 NW2d 243, 246 (SD 1989) where Claimant did not seek to reopen disability benefits, the Court did not require that a change in earning capacity be shown in order to review and ultimately increase his award of medical benefits). Employer/Insurer need not show a change in

earning capacity to request the Department review Stuckey's award of medical payments under SDCL 62-4-1.

In support of its burden to show a change in condition, Employer/Insurer relies on the testimony of Dr. Elkins and Dr. Novak. On October 7, 2011, Dr. Elkins offered his testimony by deposition. Dr. Elkins testified that at the time of his initial report "given that there is no longer any objective evidence of the CRPS—her life care plan I think took that as a lifelong condition. At this point I think there needed to be a change to allow for her current plan to reflect that she needed treatment for the complications of the CRPS, but not necessarily the CRPS any longer." After reviewing additional surveillance, Dr. Elkins testified that his opinions had changed because his observations were not consistent with what Stuckey had reported at the time of her IME. Dr. Elkins testified to a reasonable degree of medical probability that there had been a material and substantial change in Stuckey's physical condition from 2006 to the present time. Dr. Elkins testified, "I think that the additional video surveillance shows clearly that the CRPS has resolved at that point, and the additional video I think clarifies that she also is aware that her functioning is much better than what she actually described to me at the time of her IME." He further testified that his opinion was also based on the examination and lack of objective findings of CRPS at the time. Dr. Elkins went so far as to state that based on the information he had observed, he did not believe that she ever had CRPS at all and other conditions should be considered by her treating physicians.

On July 19, 2012, Dr. Novak offered her testimony by deposition. Dr. Novak testified that based on her thorough review of all the medical records and surveillance, Stuckey had a substantial change in her condition from when she had her injury to that time. She referenced Dr. Elkins examination in which he found no objective evidence of CRPS and further based her opinion on the surveillance tapes showing Stuckey driving, bending down, carrying shopping bags and using both of her hands and legs. Dr. Novak testified that in the videos "there's just no indication at all that she has anything wrong with any of her extremities."

"A change in condition refers to a condition different from that which existed when the award was made. It must be a material and substantial change." *Whitney v. AGSCO Dakota*, 453 NW2d 847 (SD 1990). Based on their reports and deposition testimony, Dr. Elkins and Dr. Novak assert that either Stuckey was misdiagnosed and never had CRPS/RSD or that the CRPS/RSD has been resolved for some time; perhaps even prior to the 2006 award for medical benefits outlined in the life care plan. Employer/Insurer asserts that based on their expert opinions regarding change in condition, Stuckey is no longer entitled to certain medical benefits. The doctrine of res judicata precludes the Department from considering a change in condition prior to 2006, when the Department awarded medical benefits. At the time of the last award of medical

benefits there was no dispute that Claimant suffered from CRPS/RSD[2]. Employer/Insurer may not use this proceeding under SDCL 62-7-33 as a means of re-litigating issues that were resolved in previous litigation. If they wished to argue that Claimant did not have CRPS/RSD or that it had resolved, they should have addressed it then.

As to the question of whether Stuckey's condition and need for treatment has changed since the award was made, the Department is not persuaded by the testimony of Dr. Elkins and Novak, and as such it is rejected. "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." *Hanson v. Penrod Constr. Co.*, 425 N.W.2d 396, 398 (S.D. 1988)). Most of Dr. Elkins testimony is based on the assertion that no objective evidence of CRPS/RSD was observed during his examination or in the records. However Stuckey's most recent medical records from late 2010 and 2011identify objective findings that are identical to the findings Dr. Elkins testified would be necessary to support her diagnosis of CRPS/RSD. Those records and findings were not made available for review by Dr. Elkins when he conducted his IME or later when he prepared his Addendum. Employer/Insurer did not provide those records even though they predate Dr. Elkins IME and even his subsequent deposition testimony. The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true. It may prove little if only partially true. *Johnson v. Albertson's*, 2000 S.D. 47, 610 N.W.2d 449 (citing *Podio v. American Colloid Co.*, 83 S.D. 528, 532, 162 N.W.2d 385, 387).

Dr. Novak's opinions are equally flawed. Dr. Novak relied on her review of Dr. Elkins IME, which the Department has rejected, and on her review of the medical records. Like Dr. Elkins, Employer/Insurer failed to provide the most recent medical records to Dr. Novak for her review. Her opinions that Claimant lacked objective findings of CRPS/RSD are not reliable without the most recent records. Furthermore, Dr. Novak was never able to physically examine Stuckey and much of her testimony was based on surveillance which did not afford her a complete picture of Stuckey's condition.

Dr. Frost, one of Stuckey's treating physicians, is a board certified in anesthesiology and pain management, and served as co-medical director of the Regional Pain Management Center. Dr.

[2] All the expert opinions relied upon in 2006 agreed that Claimant suffered from CRPS/RSD. In 2007, just weeks before Employer/Insurer hired surveillance to follow Stuckey, Employer/ Insurer stipulated that "Mrs. Stuckey is unable to care for herself, her family and her residence as a result of her work injury. She requires assistance for personal care, meal preparation and housekeeping as her hands are not useful for any meaningful purpose and any use increases her painful symptoms. Her Chronic Regional Pain Syndrome, CRPS, also affects her lower extremities and pain increases with use and exposure to weather." Additionally, in 2009 when the Department held that Claimant was entitled to hydrotherapy at her residence, Employer/Insurer did not dispute that hydrotherapy was a necessary treatment for her CRPS/RSD, or allege that her CRPS/RSD had resolved. Employer/Insurer only disputed the location of the hydrotherapy.

Frost testified live at hearing that he had reviewed all the surveillance, and he does not believe that the activity in the video contraindicated his diagnosis of RSD/CRPS. He testified that her ability to use her hand for driving, walking the dog, and holding objects is "reassuring" because it shows that she is still able to sustain some normal activities in daily living. Dr. Frost has encouraged the use of her limbs and he is pleased to see that she is doing so. Dr. Frost testified that Stuckey has not had a change in condition and the treatment she has been receiving remains reasonable and necessary for the treatment of her CRPS/RSD.

Dr. Nesbit, one of Stuckey's treating physicians, is an anesthesiologist and co-director of the Regional Pain Management Center. Dr. Nesbit testified live at hearing that he had watched the surveillance video and he was pleased to see that Stuckey was using her extremities, as use is an important part of treatment for CRPS/RSD. He also testified that while he observed use, he also observed guarding of her extremities. Dr. Nesbit testified that over the last six years he had treated Stuckey he has not observed a change in her condition. He testified,

> We've had ups and downs over the years. We've had what we call flare-ups where things have been more difficult at times than others. But as far as her diagnosis or change in condition, no, it hasn't changed. We're hopefully making progress, and her adapting to this issue in her daily life, and being able to perform daily activities on a more reasonable basis.

Dr. Nesbit disagreed with Dr. Novak and Dr. Elkins that her pain issues may be caused by her use of pain medication. He testified in those instances of drug induced hyperalgesia you find global pain that affects the patients' entire body. In Stuckey's case, she does not present with global hyperalgesia, but rather more specific pain in her extremities. Dr. Nesbit also testified about the possibility of CRPS/RSD resolving as Employer/Insurer's experts suggested. He testified that in his clinical experience, in cases where a patient presents with CRPS/RSD for longer than 6 months it would be very rare for the condition to resolve.

The Department finds the testimony of Dr. Steven Frost and Dr. Nesbit, Claimant's treating physicians, more credible and persuasive. "The opinion of an examining physician should be given substantial weight when compared to the opinion of a doctor who only conducts a review of medical records". *Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 SD 52¶23.

Employer/Insurer has failed to meet its burden to show a substantial change in condition pursuant to SDCL 62-7-33. Because Employer/Insurer fails to show a change in condition, a final compensation award is res judicata with regard to the condition of the injured employee at the time the award was entered." *Owens v. F.E.M. Electric Assn., Inc.*, 2005 SD 35, ¶18, 694 NW2d 274, 280.

Whether Claimant is entitled to a therapeutic pool at her residence.

Employer/Insurer argues that the need for a home based hot tub and enclosure is no longer reasonable or necessary. Employer/Insurer argues that even if the Department finds that there has

been no change in condition, hydrotherapy is inappropriate given her testimony that she cannot put her hand in water without pain.[3] Employer/Insurer further questions that if she is entitled to hydrotherapy, whether they are obligated to install a hot tub with enclosure at the assisted living facility being rented and not owned by Claimant.

Claimant argues that this issue was fully litigated by the parties in earlier proceedings in which the Department determined that Claimant was entitled to hydrotherapy with an enclosure at her residence, and therefore the issue is now barred by res judicata. Claimant further argues that Employer/Insurer have failed to present any evidence in support of their claim that hydrotherapy at Sandstone Villa is too difficult to accommodate or unreasonable because the property is not owned by Stuckey.

Employer/Insurer has failed to show a change in Claimant's condition to allow the Department to reopen of the award of hydrotherapy. Furthermore, the issue of location of hydrotherapy has been fully litigated by the parties. The Department has previously determined that Claimant is entitled to a therapeutic pool and enclosure at her home at Sandstone Villa. Therefore this issue is barred by res judicata.

Whether Claimant is entitled to a Sleep Number Bed.

Pursuant to SDCL 62-4-1, the employer must provide reasonable and necessary medical expenses. It is well established by the South Dakota Supreme Court that the Employer has the burden to demonstrate that the treatment rendered by the treating physician was not necessary or suitable and proper.

> 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).
Dr. Frost prescribed a Sleep Number bed for Stuckey because she can adjust it and encourage a more restful night's sleep. He testified that he has found in his practice it is helpful for many of his patients with Chronic Pain Syndrome. Employer/Insurer relies on the testimony and reports of its experts that state there is no medical data to back up this prescription.

[3] Dr. Elkins conclusion that the hydrotherapy is not warranted because it painful for Stuckey is contrary to his own deposition testimony where he stated "treatment for CRPS is to kind of desensitize, to tend to give the injections if they are helping, the ganglion blocks, and then put her through physical therapy. So even though it's painful, you have them move and use the extremity in effect to desensitize them."

While it may be true that Claimant, or any person for that matter, is better off with a sleep number bed and a more restful night's sleep, there is no medical data other than Dr. Frost's personal preference, that a sleep number bed is indicated for patients with CRPS/RSD. Employer/Insurer has met its burden to show that a Sleep Number bed is not a reasonable and necessary medical expense.

Conclusion

Claimant 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. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. 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 28th day of March, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ *Taya M. Runyan*

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Taya M. Runyan
Administrative Law Judge