SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

WILLIAM J. CRACKEL, **HF No. 166, 1998/99**

Claimant, **DECISION**

vs.

ROTH TRUCKING,

Employer,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,

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. A hearing was held before the Division of Labor and Management on August 2, 2002, in Rapid City, South Dakota. William J. Crackel (Claimant) appeared personally and through his attorney of record, Michael M. Hickey. Dennis W. Finch represented Employer/Insurer (Employer).

At the outset of the hearing, the parties agreed that Employer had the right to obtain an independent medical examination (IME) and take the deposition of Dr. W. Stacy Conner, Claimant's treating chiropractor, post hearing. Employer obtained an IME, but did not depose Dr. Conner. In addition during this timeframe, the parties attempted to settle this matter. However, the parties were unsuccessful in their efforts and submitted briefs addressing the sole issue of whether Claimant is entitled to payment for certain medical expenses.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence:

1. The parties stipulated that Claimant suffered an injury to his upper back and neck while working for Employer on May 29, 1990. Claimant slipped on a tailgate while untarping a load of bentonite. Claimant tried to catch himself and twisted his back and hit his head on the tailgate.
2. The injury was timely reported and Employer accepted the claim as compensable and medical benefits were paid.
3. Claimant worked for Employer until January 1991.
4. In June 1991, Claimant began working for Nation's Way Transportation, a trucking company based in Denver, Colorado. Claimant lived in the Rapid City area until he moved to Loveland, Colorado in September 1993.

5. Claimant then went to work for Wal-Mart as a truck driver. He continued to be employed in that position at the time of the hearing.
6. Following the May 1990 injury, Claimant received medical treatment from Dr. Boshoff, a chiropractor at Black Hills Chiropractic in Rapid City. Claimant continued to treat periodically with Dr. Boshoff until he moved to Colorado.
7. Dr. Boshoff recommended Claimant continue receiving chiropractic treatments and referred Claimant to Dr. Conner, a chiropractor located in Loveland.
8. Claimant began treating with Dr. Conner on October 13, 1993, for "acute neck pain into upper back - between [shoulder] blades." Dr. Conner noted that since his work-related injury in May 1990, Claimant experienced "nagging" pain that increased with activity.
9. On November 5, 1993, Claimant saw Dr. Dale Berkebile, an orthopedic surgeon. Dr. Berkebile opined Claimant was at maximum medical improvement (MMI) and that he had a five percent whole person impairment rating. Insurer paid Claimant permanent partial disability payments based upon this impairment rating.
10. Claimant continued to obtain medical treatment from Dr. Conner when the need arose. Claimant received chiropractic treatment when his pain became intolerable or affected his work.
11. The continued chiropractic treatments alleviated Claimant's pain and allowed him to continue working.
12. Claimant did not suffer any new injury to his upper back and neck after May 29, 1990.
13. Claimant experienced flare-ups of his upper back and neck pain. As Claimant stated, "just the ordinary activities of daily life" caused upper back and neck problems.
14. On October 27, 1995, Employer notified Claimant by letter that it was denying payment for any further medical expenses. Employer stated:

> I have been receiving medical bills and reports from the chiropractor you are now seeing, W.S. Connor [sic]. His office notes indicate your back has been aggravated by driving. Since you are no longer employed by our insured this aggravation would be considered a new injury and should be reported to your workers [sic] compensation carrier for your present employer. We can no longer be obligated for medical problems that are caused in you [sic] new employment. I will pay the latest medical charges through 10-9-95 but will not pay any medical charges beyond this date.

15. Even after receiving the denial letter, Claimant continued to receive periodic chiropractic treatments from Dr. Conner, usually once or twice a month. Claimant treated with Dr. Conner when the pain in his neck and the area between his shoulder blades became unbearable. The periodic treatments relieved the pain and pressure in his upper back and neck.
16. Since October 13, 1993, Dr. Conner treated Claimant approximately 143 times. Claimant incurred medical expenses in the amount of $6,696.00 for chiropractic treatments to his upper back and neck.
17. After the hearing, on September 27, 2004, Dr. Steven Nadler, an orthopedic surgeon, saw Claimant and performed an IME. In addition, Dr. Nadler requested

that Claimant undergo an MRI, which was done on March 14, 2005. Dr. Nadler diagnosed Claimant with "a cervical sprain associated with cervical degenerative joint and disk disease."

18. Dr. Nadler opined, "[a]s far as whether his work aggravated his symptoms, I would say from an orthopedic point of view that probably working as a truck driver would aggravate the symptoms in his cervical spine. Movements of the neck will most probably cause an increase of his symptoms."
19. Claimant was a credible witness. This is based on Claimant's consistent testimony and on the opportunity to observe his demeanor at the hearing.

ISSUE

WHETHER DR. CONNER'S MEDICAL EXPENSES ARE REASONABLE AND NECESSARY AND CAUSALLY RELATED TO CLAIMANT'S WORK-RELATED INJURY ON MAY 29, 1990?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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). Claimant sustained a work-related injury to his upper back and neck on May 29, 1990. "The law in effect when the injury occurred governs the rights of the parties." Westergren v. Baptist Hosp. of Winner, 549 N.W.2d 390, 395 (S.D. 1996).

Claimant "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. The causation requirement does not mean that Claimant must prove that his employment was the proximate, direct, or sole cause of his injury. Claimant must show that his employment was a contributing factor to his injury. Gilchrist v. Trail King Indus., 2000 SD 68, ¶ 7. "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." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

Dr. Conner has provided chiropractic treatment to Claimant since October 1993. Dr. Conner began treating Claimant after a referral from Dr. Boshoff, Claimant's treating chiropractor in Rapid City. Dr. Conner was fully aware of Claimant's history of a work-related injury to his upper back and neck in May 1990. In his written report, Dr. Conner opined, based on reasonable medical probability, that Claimant's "back and neck pain and disability were caused by his work related injury of May 29, 1990, and were not the result of any previous back history or subsequent new back injury."

Claimant did not suffer any new injury to his upper back and neck after May 29, 1990. Claimant credibly testified his condition has remained about the same since Dr. Berkebile opined he was at MMI, except that he needs chiropractic treatments from time to time to alleviate increased pain. Claimant experienced persistent symptoms in his upper back and neck since the time of the original work-related injury.

Employer offered the opinions expressed by Dr. Nadler in his September 2004 IME report. Dr. Nadler examined Claimant only once for an unspecified amount of time.

From information provided by Claimant, Dr. Nadler was aware that Claimant suffered a work-related injury on May 29, 1990, that he received periodic chiropractic treatments since the time of his injury and that he was employed as a truck driver. However, Dr. Nadler did not review any of Claimant's medical records, including Dr. Conner's treatment notes. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "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). Dr. Nadler's opinions are rejected because they lack foundation and are not persuasive.

There was no credible medical evidence that Claimant suffered an aggravation of his work-related condition. To the contrary, Dr. Conner credibly opined that Claimant's need for continued treatment was caused by his work-related injury in May 1990. Dr. Conner's opinions are well-founded and are persuasive. Dr. Conner demonstrated a thorough understanding of Claimant's condition based upon his twelve years as Claimant's treating chiropractor. Claimant established by a preponderance of the evidence that his work-related injury on May 29, 1990, was a contributing factor to his upper back and neck condition and need for periodic chiropractic treatment.

Pursuant to SDCL 62-4-1, Employer is responsible to pay for all necessary medical expenses or other suitable and proper care that stem from Claimant's work-related injury. In analyzing an employer's duty to provide medical services to an injured employee, the South Dakota Supreme Court stated:

> 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 Constr. Co., 425 N.W.2d 396, 399 (S.D. 1988) (emphasis added). Therefore, the burden shifts to Employer only when there is a disagreement as to the treatment recommended by the treating physician. Id.

Dr. Conner is Claimant's treating chiropractor. In his medical reports, Dr. Conner consistently opined that the treatment provided to Claimant was reasonable and necessary treatment. The chiropractic treatment alleviated Claimant's pain caused by the May 1990 work-related injury and allowed Claimant to continue working. For example, in a letter dated February 8, 1994, Dr. Conner stated:

> Mr. William Crackel presented in our office on 10-13-93 with a chief complaint of neck and upper to mid-back pain. This was a result of a work-related accident. Currently the chiropractic care Mr. Crackel is under is enabling him to continue with his daily activity and maintain productivity. It is in my professional opinion that without chiropractic care Mr. Crackel would be unable to function as he currently is.

On June 4, 1997, Dr. Conner stated, "[i]t is of my opinion that [Claimant] will need continuous chiropractic care, as it relates to [the May 1990] accident, in order to stay

productive in his current occupation." Therefore, Claimant's treating doctor has determined that continued chiropractic treatments are necessary and suitable and proper care for Claimant.

Employer must show that the chiropractic treatment was not necessary or suitable and proper. Again, Employer offered Dr. Nadler's IME report to address this issue. Dr. Nadler stated that he did "not believe that any further treatment is needed for [Claimant]." However, Dr. Nadler's opinions have been rejected as they lack foundation and are not persuasive. Therefore, Employer failed to present any medical evidence to establish that Dr. Conner's chiropractic treatments were not necessary or suitable and proper.

In summary, Claimant's work-related injury on May 29, 1990, is a contributing factor to his need for continued chiropractic treatments. Employer failed to establish by a preponderance of the evidence that Dr. Conner's chiropractic treatments are not necessary or suitable and proper care for Claimant. Claimant is entitled to payment for Dr. Conner's chiropractic treatments, plus prejudgment interest. In addition, Claimant is entitled to receive continued chiropractic treatments. Claimant's request for payment of medical benefits as set forth in his Petition for Hearing is granted.

Claimant shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Employer shall have ten days from the date of receipt of Claimant's proposed Findings and Conclusions to submit objections 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 5th day of October, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge