SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

DIVISION OF LABOR AND MANAGEMENT

LORI A. GRENZ, **HF No. 177, 2009/10**

Claimant,

v. **DECISION**

WHITE HEALTHCARE CENTER, INC.,
d/b/a TEALWOOD CARE CENTERS

Employer,

and

TRANSPORTATION INSURANCE CO.,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Mr. Jesse J. Ronning of Fite, Pierce & Ronning Law Office, represents Claimant, Lori A. Grenz (Claimant). Mr. Rick W. Orr of Davenport, Evans, Hurwitz, & Smith, LLP, represents Employer, White Healthcare Center, Inc., dba Tealwood Care Centers (Employer), and Insurer, Transportation Insurance Company (Insurer). A hearing was held in the matter on August 14, 2012 in Brookings, South Dakota. Testifying at the hearing were Lori Grenz (Claimant), and Dr. Bruce Elkins. Deposition testimony was received from Dr.'s John Ramsay, Jerry Blow, and John Dowdle.

ISSUES

1. Whether Claimant's work-related injury of February 24, 2005 is and remains a major contributing cause of Claimant's disability, impairment, or need for treatment?

2. Whether Claimant is entitled to payment for past unpaid medical bills, permanent partial disability benefits, and future medical?

3. Whether Employer and Insurer are entitled to reimbursement of temporary disability benefits that may have been overpaid to Claimant?

FACTS

Claimant was almost 46 years of age at the time of the hearing. Claimant has a high school education from Verdi, Minnesota. She started working for Employer in late 2003 as a night cook. Claimant smokes approximately one pack of cigarettes per day, and has done so for many years. Claimant has a number of medical issues including a low thyroid and morbid obesity. She has been obese all of her adult life. At the time of her injury on February 24, 2005, Claimant weighed approximately 330 pounds.

While at work for Employer, on February 24, 2005, Claimant slipped and fell on a patch of ice. She injured her right hip and her back. This accident was witnessed by co-workers and the injury and accident was immediately reported to her supervisor. Claimant received immediate medical attention, in the form of pain relievers and ice packs, from the nursing staff. Claimant went to her regular medical doctor, Dr. David Balt, the following day. Dr. Balt took x-rays of Claimant's back and sent Claimant home to rest. Dr. Balt referred Claimant to her regular chiropractor, Dr. Chad Munsterman. Claimant initially saw Dr. Munsterman for this injury on March 1, 2005. Throughout the years prior to this injury, Claimant has been treated by both Dr. Chad Munsterman and Dr. Scott Munsterman. Claimant was prescribed and participated in physical therapy sessions with the Pipestone County Medical Center, as prescribed by Dr. Corey Welchlin. Kristin Lohnes, PT and Chuck McCullough, PT. Claimant is currently treating with pain management specialists, Dr. Fred Fisher and Dr. Thomas Ripperda.

Claimant's initial complaints of pain were in her right low back with radiating pain through her right buttock and down her right leg, as well as dull achiness or soreness through her lower neck into her upper back. Claimant was experiencing pain from her back down the right side of her neck into her upper shoulder and down her right arm. The extremity complaints were accompanied with constant headaches.

In December 2005, Claimant finished her physical therapy sessions and was given a release. The physical therapist believed Claimant had met the goals placed upon Claimant, that being a return to her pre-injury status. Claimant's pain at her last

physical therapy appointment with Susan Fangmeier, PT, on December 1, 2005 was a 1-2 on a 0-10 pain scale. Claimant was only having intermittent symptoms at that time. Claimant returned to treat with Dr. Munsterman two months later, February 2006, with symptoms of pain into her left leg and lower back. In April 2006, Dr. Scott Munsterman gave the assessment that Claimant suffered from an acute lumbar disc syndrome with sciatic neuralgia component and myospasm; that the current symptoms were a reoccurrence of the previous injury from 2005. Claimant continued to treat with Dr. Munsterman and was prescribed more physical therapy in the years to follow.

Claimant also received surgical consults regarding her injuries from Dr. Corey Welchlin, Dr. Daniel Tynan, Dr. Michael Puumala, and Dr. Kent Patrick. The surgeons do not believe Claimant is a candidate for surgery due to a variety of reasons.

Claimant received three MRI's to her lower back over the past 7 years; May 2005, August 2006, and March 2008. The MRI taken a few months after her injury in May 2005, shows a moderate L4-5 central spondylo stenosis, a central and right disc protrusion at L3-4 with mild thecal sac compression, possible irritation of the right L4 nerve root, central disc bulge at L5-S1 with mild bilateral L5-S1 degenerative facet changes. The MRI taken in August 2006 was interpreted by the radiologist, Dr. Lawrence Leon. He noted a small to moderate right parasagittal disc protrusion at L3/4, a mild broad based disc bulge at L4/5, and a facet cyst at L4/5 with the facet on the right.

In early 2008, Claimant was experiencing bladder and bowel incontinence and her doctors recommended Claimant have an MRI due to the possible neurologic causes. Claimant went to the emergency room at Avera in Sioux Falls for treatment on March 28, 2008. She received an MRI which showed "intervertebral disc space narrowing and disc dehydration with extradural defects at levels L3-4, L4-5, and L5-S1", and that "the changes are most pronounced at L4-5 with the extradural defect extending to the right of midline." Radiologist Dr. Daniel Crosby also noted that at Level 3-4, there was a "broad-based annual protrusion, effacing the ventral thecal sac, slightly greater to

the right of midline. Normal facets. Mild asymmetric central spinal stenosis with no exiting nerve root impingement." At L4-5, he notes "central to right paracentral and foraminal disc extrusion with asymmetric effacement of the thecal sac and possible encroachment upon the intraspinal right L5 nerve within the right lateral recess. Annulus protrudes into the inferior aspect of the right neural foramen but with no definitive foraminal /extraforaminal right L4 nerve root encroachment. There is a moderate asymmetric central spinal stenosis." At the lowest spine level remarked upon, Dr. Crosby notes for L5-S1, "broad-based annual protrusion predominately displaces the ventral epidural fat with no intraspinal S1 are definitive exiting L5 nerve root encroachment."

Dr. Andrew Solares, the consulting ER doctor, recommended that Claimant follow up with her gynecologist for the incontinence as it was more likely associated with mechanical issues rather than neurologic. The Avera doctors did not compare the 2008 findings with the 2006 or 2005 MRI findings.

Prior to the work incident, Claimant saw Dr. Munsterman for the same type of pain in her low back with pain radiating into her buttocks. Claimant was taken off work for a short period of time due to low back spasm and pain. Claimant had not been able to sleep in a prone position in a bed for many years, including a number of months prior to the work incident. Claimant has slept in a recliner chair since 2005. Claimant was still working and walking without the assistance of a cane prior to the injury. Claimant was able to perform the tasks of daily living without assistance prior to this incident.

Claimant's medical records note that Claimant is sedentary and deconditioning at a rapid rate, in other words losing muscle strength. At the time of hearing, she testified that she is no longer active. During the last few years of her medical treatment, she participated in her physical therapy on an irregular basis. Claimant no longer performs her home exercises. The medical records indicate that Claimant improved some with physical therapy. Claimant testified that she can no longer perform any household work without assistance. Claimant's medical records indicate that Claimant was actively

treating with doctors and therapists on a regular basis for the years following this injury.

On May 16, 2006, Claimant was referred to the Brookings Pain Management Center, Dr. F.C. Fisher. At that time, Claimant received a translaminar epidural steroid injection at lumbar spine level 4-5. Claimant continued pain treatment with the Pain Clinic until February 16, 2010.

Following an independent medical examination by Dr. Jerry Blow in January 2009, Employer and Insurer stopped paying for Claimant medical treatment for ongoing medical care associated with the work-related injury in early 2005. Employer and Insurer sent Claimant to three independent medical examiners regarding her injuries, Dr. John Dowdle, Dr. Jerry Blow, and Dr. Bruce Elkins. Claimant pursued a second opinion with Dr. John Ramsay.

Claimant's workers' compensation weekly rate is $130.64. Employer and Insurer's expert, Dr. Blow, gave Claimant a 5% permanent partial impairment rating for her body as a whole and a 5% lower extremity impairment for a total of 23.6 weeks of permanent partial impairment. Claimant filed the petition for hearing in April 2010. Employer and Insurer, in their pleadings affirmatively allege that Claimant's work-related injury is no longer a major contributing cause of disability, impairment, and/or need for treatment. Employer and Insurer counterclaimed for an overpayment of $3,440.92 for temporary total disability benefits that were paid at a rate higher than Claimant's amended workers' compensation rate.

Additional facts will be developed during the Analysis.

ANALYSIS & DECISION

ISSUE I

Whether Claimant's work-related injury of February 24, 2005 is and remains a major contributing cause of Claimant's disability, impairment, or need for treatment?

It is uncontested that Claimant suffered a work-related injury on February 24, 2005. Employer and Insurer do not contest that Claimant slipped and fell at work and injured her back and spine, to some extent. The question is whether Claimant has reached maximum medical improvement of the injury. Both Employer and Insurer and Claimant have received expert medical opinions in regards to the date at which maximum medical improvement was reached. All expert opinions listed below are given within a reasonable degree of medical certainty.

Dr. Jerry Blow, an expert hired by Employer/Insurer, made his initial report on January 26, 2009. He reported that Claimant reached MMI sometime between December 31, 2005 and January 26, 2009. Dr. Blow initially reported that is it impossible to determine when Claimant's work-related injury stopped being the reason for her medical treatment and her deconditioning and underlying issues became the cause for her treatment. Dr. Blow, during his deposition on June 27, 2012, gave the conclusion that Claimant reached MMI on December 31, 2005. He stated that the injury in February 2005 would have aggravated her preexisting condition, but by December 31, 2005, Claimant's pain symptoms had gone away and she was back to the condition she was in before the February 2005 incident. Dr. Blow reviewed the MRI and is of the opinion that most of the changes to Claimant's spine occurred prior to the February 2005 incident. He testified that the disc protrusion at L3-4 could be caused acutely as there are not a lot of degenerative changes around L3-4. Dr. Blow gave Claimant a 5% whole person impairment rating using the diagnosis related estimates model of the AMA Guides. Dr. Blow also gave Claimant a 5% lower extremity impairment due to limited hip range of motion.

Dr. John Dowdle, another witness for Employer and Insurer, was the first independent medical examiner to see Claimant. The exam occurred on March 16, 2007. At that time, Dr. Dowdle opined that Claimant had not reached MMI as of the date of

March 16, 2007. Dr. Dowdle made the treatment suggestion that Claimant pursue an active exercise program to improve her function and activities and have a selective nerve injection performed. His opinion was that if these two items were performed Claimant could improve. "If she chooses not to go ahead with this treatment option, it is my opinion she is at Maximum Medical Improvement relative to the injury that occurred 2+ years ago," he wrote. Dr. Dowdle also gave the opinion that Claimant did not have a permanent impairment relative to the work-related injury. He also testified in his deposition that Claimant's obesity was likely only part of reason why Claimant was still suffering from back pain. Dr. Dowdle said there are a multitude of reasons why Claimant had not reached MMI. Dr. Dowdle testified in his deposition, "I'm unable to tell you why she has pain because I can't find it on a physical basis, the reason for her pain."

The third and most recent IME ordered by Employer and Insurer was with Dr. Bruce Elkins. Dr. Elkins in an occupational medicine specialist; he mostly treats injured workers and performs pre-employment physicals. His clinic in Sioux Falls is the Avera Medical Group Healthworks. Dr. Elkins is also board certified by the American Board of Independent Medical Examiners. Dr. Elkins conducted a records review on Claimant's records on November 17, 2011 and the physical exam on January 4, 2012. His opinion, after looking at the records, was that Claimant's injury was resolved by March 21, 2005 and that Claimant's deconditioning likely contributes significantly to her current condition. The opinion did not change after he physically examined Claimant. Similar to Dr. Blow, Dr. Elkins also mentioned the possibility of a psychogenic reason for her pain.

Testifying at hearing, Dr. Elkins explained his opinion. He explained that Claimant's records show she experienced pain in both the left and right sides prior to the February 2005 injury. After the injury, the pain was located mostly on the right side. In records for the chiropractor and orthopedist, Claimant self-reported experiencing back pain for years prior to the injury. On March 21, 2005, Claimant was experiencing little or no pain at her chiropractic appointment. Claimant's chiropractor released her to work full time at that time. When Claimant returned to the chiropractor for treatment less than a month later, she had left sided pain. Claimant continued to work throughout the

time that Claimant originally treated until after March 2005. After March 2005, the pain complaints were again both on the left and the right side. Dr. Elkins explained that Claimant's smoking and deconditioning did not cause the degenerative disc disease or her back pain, but makes the condition worsen. Dr. Elkins specifically mentions that the most recent MRI in 2008 shows her paraspinous muscles have atrophied. In other words, Claimant has not been using her back muscles and that this makes the back pain worse. The records indicate that Claimant's range of motion in her back has decreased by at least half by the time Dr. Elkins examined Claimant.

Claimant also hired an independent medical examiner to give an opinion on Claimant's condition. Dr. John Ramsay, MD, a Board Certified Orthopedic Surgeon who is the Medical Director at the Brookings Center for Physical Therapy in Brookings, and chief of surgery at the Brookings Regional Hospital, gave Claimant an expert opinion about her condition, as well as an impairment rating. Dr. Ramsay, however, does not perform back surgeries but will refer patients onto other back surgeons. He saw Claimant on June 24, 2009 and again on December 8, 2010. Dr. Ramsay gave deposition testimony and said that Claimant has not reached MMI, as she has not returned to an asymptomatic state. Dr. Ramsay, in that statement, presumes that Claimant was asymptomatic prior to the injury. He said, "Well, return to an asymptomatic condition would be having no pain, which would be a cured status. But if she had low back pain before then and then she got over, say, a soft tissue injury or a strain that she could recover from, then she should return back to her preinjury condition." Dr. Ramsay did not fully review all of Claimant's records before forming an opinion as to her condition. It is his opinion that Claimant's symptoms are stemming from the L5-S1 disc which is not mentioned on the 2005 MRI and not the L4-5 which shows a bulging disc in 2005 and free floating disc material (that has since separated from the disc) in 2008.

Although Claimant was still having symptoms and he believed her not to be at MMI, Dr. Ramsay gave Claimant an impairment rating of 22 percent whole person impairment according to the 4th edition of the AMA Guides. Dr. Ramsay used the range-

of-motion test instead of the diagnosis-related test that Dr. Blow used to evaluate Claimant. Dr. Ramsay prefers using the range-of-motion test as the diagnosis test may not show the true extent how the injury affects the individual. Dr. Ramsay, in applying the AMA Guides, uses the test that shows the greatest amount of impairment. He admits that the range-of-motion test will be skewed if the objective portion of the test is not honest on the part of the injured person. Dr. Ramsay believed Claimant put in an honest and maximum effort while her range of motion was tested.

Dr. Ramsay gave the opinion that because Claimant's back is not stable, in that it is still changing, whether or not it was caused by the 2005 injury, that any impairment given now is not valid. He stated that with weight control and other treatments, Claimant could become stable and the impairment rating would be lower. Claimant testified at hearing that she is not currently attempting to lose weight; she cannot recall the last time she went on a reduced calorie diet. The medical records from her general physician in Pipestone, MN, indicate that her treating physician was attempting to work with her to lose weight and quit smoking in 2009 and 2010.

Dr. Ramsay could not state unequivocally, within a reasonable degree of medical certainty, that the February 2005 injury caused Claimant's back condition. It was a part of how Claimant's back condition developed. He points out that Claimant's complaints of back pain since 1992 are also part of the whole story regarding Claimant's back condition.

"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." *Johnson v. Albertson's,* 2000 SD 47, ¶25, 610 NW2d 449, 455. Dr. Ramsay did not fully review Claimant's medical records before giving his opinion in this case. Even during deposition, it seems as if he were finding out facts about Claimant for the first time. Dr. Ramsay's opinion regarding causation is found to not be reliable as the facts on which he bases the opinion are incomplete.

The causation statute applicable at the time of Claimant's injury in February 2005, SDCL §62-1-1(7), defines injury as follows:

> "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
>
> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.
>
> (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

SDCL §62-1-1(7). Claimant makes the argument, based upon *Elmstrand v. G&G Rug & Furniture Co.*, 77 S.D. 152, 155, 87 N.W.2d 606, 608 (1958), that an employer takes the employee as it finds him. The Supreme Court has recently addressed this argument in a similar case involving a claimant with a preexisting condition. They footnoted:

> *Elmstrand* was decided before the enactment of SDCL 62-1-1(7)(a) and (b). At the time of *Elmstrand,* causation issues were governed by "SDC Supp. 64.0102(4)[,] which declare[d] that injury or personal injury shall mean `only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form except as it shall result from the injury[.]'" *Elmstrand*, 77 S.D. at 154, 87 N.W.2d at 607. That causation language ("arising out of and in the course of employment") is now found in the first paragraph of SDCL 62-1-1(7) and does "not increase the causal connection a worker must show between his injury and his employment." *Grauel v. S.D. Sch. of Mines & Tech.*, 2000 S.D. 145, ¶ 9, 619 N.W.2d 260, 263. But the language of SDCL 62-1-1(7)(a) and (b) now "place[s] a new burden on the worker to show that his employment activities were a major contributing cause of his resulting condition" or disability, impairment, or need for treatment. Id. Therefore, the "take the employee as we find him" and the "event contributed" language of *Elmstrand* apply only to the causal connection that must be demonstrated between the injury and employment. That is not the issue in this case. This case involves the new burden of demonstrating that work-related activities are and remain a major contributing cause of the resulting condition, disability, impairment, or need for medical treatment.

> *Elmstrand* has been modified to this extent, and therefore, [Claimant's] reliance on *Orth* is misplaced.

Jewett v. Real Tuff Inc., 2011 SD 33, ¶23, FN 5, 800 N.W.2d 345, 350. The burden placed on the injured party in the *Jewett* case is the same burden placed upon Claimant here. She must demonstrate that "work-related activities are and remain a major contributing cause of the resulting condition…or need for medical treatment."

In proving that burden, the Supreme Court has written:

> [T]he 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.
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> *Westergren v. Baptist Hospital of Winner*, 1996 SD 69, ¶31, 549 NW2d 390, 398 (quoting *Day v. John Morrell & Co.*, 490 NW2d 720, 724 (SD 1992)). A medical expert's finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.*, 443 NW2d 5, 6 (SD 1989). *See also Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, ¶21, 653 NW2d 247, 252-53 (quoting *Day*, 490 NW2d at 724) (Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers] compensation statutes.). Instead, [c]ausation must be established to a reasonable medical probability[.] *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶19, 624 NW2d 705, 709.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶34. Furthermore, the Court has opined on the "level of proof" that must be shown by a claimant.

> "The burden of proof is on [Claimant] to show by a preponderance of the evidence that some incident or activity arising out of [his] employment caused the disability on which the worker's compensation claim is based." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. This level of proof "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." Id. To meet his degree of proof "a possibility is insufficient and a probability is necessary." *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

Claimant's expert has not testified to and the medical records do not show that Claimant's current back condition and her need for medical treatment is the direct result of her work-related injury. Claimant's expert gave deposition testimony that Claimant has yet to reach MMI, but he did not testify that her back condition and resulting pain is from her initial injury. He testified that there are a lot of factors that are the cause of Claimant's back condition, as it is now. He did not say that the 2005 injury is a major contributing cause of Claimant's back injury as it is now.

The expert testimony points to the fact that Claimant's current back condition and resulting pain was not caused by her original injury. The February 2005 is not a major contributing cause of Claimant's current back condition. The experts agree that many factors combined to cause Claimant suffer from pain and her back condition, and that the slip and fall is a not a major contributing cause.

The question remains as to when Claimant reached MMI or when did the slip and fall injury stop being the major contributing cause of the pain and back condition and when did the other factors take over. Dr. Blow's opinion seems the most reasonable and fitting with the medical records. By December 31, 2005, Claimant was no longer seeing her chiropractor on a regular weekly basis. She had stopped seeing the physical therapist because Claimant had met her goals. Claimant had returned to the same physical condition that she was in when her accident occurred. Claimant suffered from degenerative disc disease and lower back pain prior to her slip and fall. Claimant reached MMI on December 31, 2005.

There is also a question regarding permanent and total disability rating. Dr. Blow is of the opinion that Claimant suffers from a 5% whole person permanent total disability and a 5% lower extremity impairment based upon the condition of her back and hip. Dr. Dowdle gave the opinion that Claimant did not suffer any permanent impairment. More recently, Dr. Ramsay gave the opinion that Claimant suffered from a 22% whole person impairment, based upon her current condition. Dr. Ramsay's impairment rating is based

upon a range-of-motion (ROM) test instead of a diagnosis related estimates (DRE) model. Dr. Blow and Dr. Ramsay are of two different minds regarding the proper test for impairment of the whole person or the lower spine in this situation. The AMA Guides prefers the DRE model over the ROM, but the ROM is deemed to be a necessary test if the diagnosis does not fit within 8 specific categories of impairment. AMA Guides 4th Edition, pg. 94. The first four of the eight categories are: DRE Category I: This category is used for injuries that only manifest as complaints or symptoms. The level provides a 0% impairment rating. DRE Category II: Clinical signs of an injury are present without radiculopathy or loss of motion segment integrity. This level provides for a 5% impairment rating. DRC Category III: Evidence of radiculopathy is present. At this level a cervical impairment is 15%, while a lumbar or thoracic impairment is a 10%. DRE Category IV: Loss of motion segment integrity or multilevel neurologic compromise. Cervical injuries provide at 25% impairment rating and lumbar/thoracic receive a 20% impairment rating. AMA Guides 4th Edition, Table 70, pg.108. The DRE Categories V, VI, VII, and VIII involve more severe back trauma and injury than what the experts have diagnosed Claimant. Dr. Ramsay notes that Claimant presented with a right S1 radiculopathy. The radiculopathy did not appear in the medical records until after December 31, 2005, the date of MMI. The DRE Category II which Dr. Blow used would be appropriate for a claimant without a radiculopathy.

Since Claimant reached MMI on December 31, 2005, Dr. Blow's permanent partial impairment rating of 5% of the whole person and 5% of the lower extremity is accepted as correct. Had Claimant not been at MMI, the impairment rating of Dr. Ramsay would be accepted as more correct because of the symptoms presented to Dr. Ramsay by Claimant.[1]

ISSUE II

[1] Dr. Ramsay also gave a permanent partial impairment rating to Claimant but said that this impairment rating could change with diet and exercise. Under the 4th Edition Guides, an acceptable evaluation is one that is permanent and not likely to change within a year or with further medical or surgical therapy. AMA Guides 4th Edition, pg. 94.

Whether Claimant is entitled to payment for past unpaid medical bills, permanent partial disability benefits, and future medical?

Claimant is not entitled to payment for past unpaid medical bills, if the bills were generated after she reached maximum medical improvement. Claimant is not entitled to temporary disability benefits following the date she received her impairment rating from Dr. Blow on January 26, 2009.

ISSUE III

Whether Employer and Insurer are entitled to reimbursement of temporary disability benefits that may have been overpaid to Claimant?

SDCL 62-1-1(8) defines temporary disability, total or partial as: "the time beginning on the date of injury, subject to the limitations set forth in § 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first." Claimant was paid temporary disability benefits until April 5, 2009 in the amount of $20,293.48; temporary partial disability benefits from September 16, 2006 to December 15, 2006 in the amount of $627.83; and permanent partial disability benefits from April 6, 2009 to July 5, 2009 in the amount of $1,776.70.

An "ascertainable loss … becomes ascertainable when it becomes apparent that permanent disability and the extent thereof has resulted from an injury and that the injured area will get no better or no worse because of the injury[.]" SDCL 62-1-1(2). Employer and Insurer's expert, Dr. Blow, gave Claimant the initial IME that resulted in a denial of benefits for Claimant. The IME report which included the 5% whole person and 5% lower extremity impairment rating was produced and given to Employer and Insurer on January 26, 2009.

Claimant's temporary total disability rate is $130.64. Employer and Insurer paid Claimant TTD benefits of $165 per week for 100 weeks. Employer and Insurer then paid one week of TTD at $135.56. On September 22, 2008, Employer started paying Claimant the correct amount of TTD and did so for the next 28 weeks. Claimant received TTD for 10 weeks after Dr. Blow's report was sent to Employer and Insurer. Claimant received a TTD overpayment of $3,440.92.

A 5% permanent whole person impairment is equivalent to 15.6 weeks of disability benefits. SDCL 62-4-6(21). A 5% permanent lower extremity impairment is equivalent to 8 weeks of disability benefits. SDCL 62-4-6(16). Employer and Insurer

paid Claimant $1,776.70 in PPD benefits. Claimant was due $3,083.10 in PPD. A difference of $1,306.40.

The TTD overpayment minus the amount due in PPD is equal to $2,134.52. Employer and Insurer are entitled to the reimbursement of that amount.

Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Employer and Insurer may also submit proposed Findings of Fact and Conclusions of Law and an Order. The initial proposals shall be submitted to the Department within twenty (20) days from the date of receipt of this Decision. Claimant shall have twenty (20) days from the date of receipt of the initial Proposed Findings and Conclusions 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, Employer and Insurer shall submit such Stipulation along with and Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 14th day of December, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Catherine Duenwald
Administrative Law Judge