

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

IRENE E. HOMAN,
Claimant,

HF No. 177, 2005/06

v.

DECISION

WAL-MART,
Employer,

and

AMERICAN HOME ASSURANCE CO.,
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. Michael J. Simpson represented Claimant. Comet H. Haraldson represented Employer/Insurer.

The Department of Labor entered a Prehearing Order on July 30, 2007, setting forth issues for hearing and the parties thereafter agreed at the hearing that the issues to be decided are:

1. Whether a spinal cord stimulator is compensable, reasonable, and necessary medical treatment.
2. What are Claimant's appropriate work restrictions?
3. Should Employer/Insurer be ordered to pay the cost of an impairment rating performed by Claimant's treating physician(s)?

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The 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).

FACTS:

Claimant began working for Employer in 1999. Claimant injured her left ankle on June 27, 2004. While pulling a rolling rack, she bumped the outside of her ankle on the bumper pad that surrounds the outside of the wheel on the rolling rack. Claimant sought medical attention for pain in her left foot.

Claimant's medical treatment for left lower extremity pain has been extensive. She has been treated with numerous medications, physical therapy, injections, and a TENS Unit. She has undergone multiple tests. Dr. Steven Frost, a pain management specialist, is her current treating physician. Dr. Frost currently recommends Claimant undergo a trial of a spinal cord stimulator.

Claimant was taken off work for a period of two weeks, but she was ultimately able to return to work, as long as she could keep her left leg elevated. Claimant was prescribed a wheelchair with an adjustable footrest so that she could keep her left leg elevated. Employer accommodated Claimant's prescription for a wheelchair by switching her to a different job. Claimant's new duties require her to sit at a table and either take Employer credit card applications or encourage people to give to various charitable organizations. Claimant is able to perform her current duties.

Other facts will be developed as necessary.

Issue One

Whether a spinal cord stimulator is compensable, reasonable, and necessary medical treatment.

The South Dakota Workers' Compensation law provides that an employer is responsible for "necessary first aid, medical, surgical and hospital expense, or other suitable and proper care." SDCL 62-4-1. The general rule is that the claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967). The 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).

There is no dispute that Claimant suffered a compensable injury and that Dr. Steven Frost is one of her treating physicians. "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, suitable or proper." Engel v. Prostrullo Motors, 2003 S.D. 2, ¶32, 656 N.W.2d 299 (citations omitted). The causation of Claimant's condition and need for treatment is not at issue. Employer/Insurer dispute that the spinal cord stimulator surgery recommended by Dr. Frost, one of Claimant's treating physicians, is a reasonable and necessary expense.

Hanson v. Penrod Construction Co., 425 NW2d 396, 399 (SD 1988) provides that with regard to medical treatment "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." In support of its burden,

Employer/Insurer offered the medical opinions of Dr. Paul Cederberg, a Board certified orthopedic surgeon who performed a medical examination of Claimant. Dr. Cederberg opined that Claimant's pain is being adequately controlled with pain medication, she has use of her left lower extremity, and she should continue with her conservative treatment. Dr. Cederberg opined that a spinal cord stimulator would likely not benefit Claimant.

In response to Employer/Insurer's arguments, Claimant offered her own testimony regarding her pain. Claimant currently suffers from pain every day, takes multiple pain medications that are causing undesirable side effects, and must elevate her leg as much as possible. Claimant also offered the testimony of Dr. Frost. Dr. Frost is a specialist in chronic pain management. He is a Board certified anesthesiologist and a Board eligible pain management specialist. He has practiced for 11 years in the specialty of pain management. Ninety percent of his practice is pain management. Dr. Frost regularly performs spinal cord stimulator surgery. Dr. Frost treated Claimant from August of 2005 to October of 2007. Dr. Frost is very well informed regarding Claimant's condition.

In contrast, Dr. Cederberg examined Claimant one time and reviewed her medical records. Dr. Cederberg has never performed a spinal cord stimulator surgery. Despite his opinions that "most spinal cord stimulators become infected, do not work, and have to be removed," Dr. Cederberg still refers patients to pain specialist doctors.

It is axiomatic that when a medical expert has more expertise or actually specializes in the treatment of a particular condition, that medical expert's opinion is entitled to greater weight than a medical expert with less expertise or experience in treating that condition. Haynes v. Ford, 2004 SD 99, ¶¶ 14-32, 686 NW2d 657, 662-665 (accepting the opinion of a physiatrist over that of a chiropractor and a physician's assistant in part due to his specialized training in physical medicine and rehabilitation and his greater experience in treating the claimant's problems.); 7 Arthur Larson, Larson's Workers' Compensation Law, §128.05(8) (necessity for expertise in medical witness corresponding to complexity of medical problem).

Dr. Frost's opinions are accepted as more persuasive than Dr. Cederberg's opinions. Dr. Frost's opinions are given more weight based upon his expertise in the field of pain management and his thorough understanding of and his experience in treating Claimant's condition. Employer/Insurer has not met the burden to prove that the proposed medical treatment of a spinal cord stimulator is not reasonable, necessary and suitable medical treatment. Employer/Insurer is responsible for such medical treatment.

Issue Two

What are Claimant's appropriate work restrictions?

Claimant currently works thirty hours a week for Employer. Employer/Insurer assert, relying on Dr. Cederberg's opinions, that Claimant is ultimately capable of working a full eight-hours a day. Dr. Cederberg also opined that Claimant's complaints of pain should not be believed.

Claimant underwent a functional capacities examination on October 12, 2005. The results of this FCE showed that she is capable of sedentary work for eight-hours a day. Dr. Frost agreed that if Claimant is able to elevate her leg at a sedentary job, she should be able to work an eight-hour day. Dr. Frost also opined that an eight-hour workday without the use of wheelchair would be the ultimate goal of the spinal cord stimulator. Dr. Frost also opined that Claimant is not malingering or overstating her pain complaints. Dr. Frost based this opinion in part of his review of a report by Dr. Cherry, a neuropsychologist who performed an evaluation of Claimant to determine the feasibility of a spinal cord stimulator. Dr. Cederberg did not review Dr. Cherry's report.

Dr. Cederberg's opinions that Claimant's complaints should not be believed are rejected. Claimant's condition is well documented by Dr. Frost. Dr. Frost is in the better position to evaluate Claimant's pain complaints and her work restrictions. Dr. Frost's opinions on Claimant's appropriate work restrictions are accepted. Claimant can continue working at her current position, sedentary work for six hours a day.

Issue Three

Should Employer/Insurer be ordered to pay the cost of an impairment rating performed by Claimant's treating physician(s)?

Employer/Insurer's obligation to Claimant for medical treatment and expenses is to provide Claimant with reasonable and necessary medical treatment and care. SDCL 62-4-1. Employer/Insurer asked Dr. Cederberg to provide an independent and objective forensic medical examination of Claimant, along with a permanent partial impairment rating for Claimant's condition. Dr. Cederberg gave Claimant a thirteen percent whole person permanent partial impairment rating, only half of which equates to a 6.5% lower extremity impairment.

Claimant requests that the Department order Employer/Insurer pay for the costs of an impairment rating evaluation (\$368.00) performed by one of her treating physicians, Dr. Christopher Dietrich, at her request and after Dr. Cederberg had provided his impairment rating. Claimant's request is denied. Dr. Cederberg's examination is within the parameters of SDCL 62-7-1 and there is no obligation for Employer/Insurer to pay for an additional evaluation.

Counsel for 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. Counsel for 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 11th day of August, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge