

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

KEITH COY,  
Claimant,

HF No. 191, 2005 / 2006

vs.

HEAVY CONSTRUCTORS, INC.,  
Employer,

**DECISION**

and

GENERAL CASUALTY,  
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. Wm. Jason Groves, of Groves Law Office, represents Claimant, Keith Coy (Claimant). Daniel E. Ashmore, of Gunderson, Palmer, Goodsell, and Nelson, represents Employer/Insurer (Employer).

**ISSUE:**

Whether prescriptions and treatment prescribed by Dr. Rand Schleusener are medically reasonable and necessary?

**FACTS:**

Claimant is a 46 year-old construction worker. On May 17, 2002, while working for Employer, Claimant fell off a scaffold that was approximately 18 feet in height. Claimant was diagnosed with small superior endplate compression fractures at L1, L2, and L3 as well as a disc herniation at L4-5. Claimant also cracked his sternum in the fall. Employer accepted the claim as compensable. On October 10, 2003, the parties entered into a compromise settlement agreement, whereby Employer agreed to pay future reasonable and necessary medical expenses directly and causally related to the back injury.

Dr. Rand Schleusener treated Claimant for the back injury following the accident. Dr. Schleusener performed a microdiscectomy on Claimant. Following the surgery, Claimant continued to have low back pain. Claimant reported to his doctor that he had numbness and tingling in his legs. Claimant reached maximum medical improvement on April 15, 2003. Dr. Schleusener did not have any surgical treatment

options for Claimant after April 15, 2003. His opinion was that Claimant would have chronic pain because of the injuries.

Claimant continued to experience chronic pain after the surgery. Dr. Schleusener referred Claimant to a pain clinic on July 25, 2003. Dr. Simonson, a pain and rehabilitation specialist, saw Claimant on July 25, 2003. Dr. Simonson performed facet joint injections on Claimant on August 5, 2003. Claimant's pain was not alleviated by the injections. Dr. Simonson prescribed different narcotic drugs to Claimant, including hydrocodone, and Darvocet, over the course of his treatment. On September 4, 2003, Dr. Simonson discharged Claimant from his care, as Claimant was non-compliant with the Darvocet.

Claimant continued to treat with Dr. Schleusener. Dr. Schleusener prescribed Vicodin to Claimant until Claimant could find a new pain specialist. Claimant requested that Dr. Schleusener take him off the Vicodin and prescribe a different pain medication. Dr. Schleusener prescribed OxyContin, a narcotic, to Claimant on September 11, 2003. Claimant's dosage of OxyContin is 20 mg every 12 hours. Dr. Schleusener or his colleague has prescribed OxyContin to Claimant each month since September 2003. Dr. Schleusener did not see Claimant from September 11, 2003 until March 9, 2006. Dr. Schleusener is of the opinion that Claimant's pain is chronic and well-established. Dr. Schleusener occasionally will prescribe narcotics on a long-term basis to patients who suffer from chronic pain.

Claimant was referred to Dr. Steven Frost with the Regional Pain Management Center in Rapid City. On September 29, 2003, Dr. Frost informed Claimant that he would not prescribe narcotics to Claimant. Claimant did not attend the initial appointment with Dr. Frost on November 4, 2003.

Dr. Wayne Anderson performed a chart review of Claimant's medical records on May 4, 2004. Dr. Anderson opined that Claimant should be seen by a physician before more narcotics are prescribed. He also recommended that Claimant attend a pain management program, the "Life Without Boundaries Program".

Dr. John Dowdle, an orthopedic surgeon who specializes in Independent Medical Exams, performed a chart review of Claimant's medical records on May 24, 2004. Claimant did not attend the appointment with Dr. Dowdle. Dr. Dowdle gave the opinion that the long-term use of narcotics was generally not usual or necessary for a patient with Claimant's injuries.

On July 1, 2004, Employer denied coverage for Claimant's prescription medication, based upon Dr. Dowdle's opinion of long-term narcotic use and Claimant's failure to attend the IME with Dr. Dowdle.

On April 5, 2007, Claimant met with Dr. Paul Cederburg, a board certified orthopedic surgeon, for an Independent Medical Examination. Dr. Cederburg conducted a

physical examination of Claimant, as well as a medical records review. Dr. Cederburg's opinion is that Claimant's pain complaints are not substantiated by objective medical findings. Claimant has no clinical findings of neuropathy and usually compression fractures heal after a few weeks. It is Dr. Cedarburg's opinion that long-term narcotic use, by any patient, is not reasonable or medically necessary. That opinion is also based upon research that shows long-term narcotic use to be a controversial treatment method for injuries such as Claimant's. However, Dr. Cederburg also believes it is reasonable for Claimant to follow the orders of his treating physician.

#### **ANALYSIS & DECISION:**

Claimant and Employer/Insurer entered into a Settlement Agreement which calls for Employer/Insurer to compensate Claimant for "future reasonable and necessary medical expenses." Employer's experts are of the opinion that the pain medication prescribed to Claimant by his treating physician is not reasonable or medically necessary.

The South Dakota Supreme Court has clarified the burden of showing reasonable and necessary medical expenses. "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.*" *Engel v. Prostrullo Motors*, 2003 SD 2, ¶ 32, 656 NW2d 299, 304 (SD 2003)(quoting *Krier v. John Morrell & Co.*, 473 NW2d 496, 498 (SD 1991).

Dr. Schleusener opined that there are "differing philosophies of treating chronic pain." He is also of the opinion that there are a number of different methods of treating pain. Claimant and Dr. Schleusener tried a number of different pain medications before settling on a dosage of 20 mg OxyContin twice a day. Claimant tried surgery and injections, neither of which alleviated his pain. Claimant was prescribed a TENS (Transcutaneous Nerve Stimulation) unit and a NMES (Neuromuscular Electrical Stimulation) machine. Claimant received some benefit from the TENS unit, but his pain continued. Claimant did not continue using the TENS unit because of pain and discomfort from his cracked sternum.

Claimant has experienced some side effects of being on the OxyContin for an extended period of time, in that he sometimes forgets things. Dr. Schleusener believes that Claimant is likely addicted to OxyContin. Dr. Schleusener admits that the long-term use of narcotics is controversial, but that for some people, it is a viable option. Dr. Schleusener has about a dozen patients that have used narcotics for an extended period of time. Based upon his examination and continuing treatment of Claimant, Dr. Schleusener believes that Claimant suffers from chronic pain due to the injury and that this treatment, with OxyContin, is the best option for Claimant.

Employer's arguments are without merit. At this point in time, the best person to judge Claimant's credibility, and decide whether Claimant actually suffers from chronic pain, is his treating physician. Although there are no objective findings that would substantiate Claimant's assertions of chronic pain, there are subjective findings by Dr. Schleusener. Employer's experts have explained different treatments that Dr. Schleusener may have prescribed, but most of those treatments have already been attempted by Claimant. Claimant's pain has been alleviated, to some extent, by following the treatment of Dr. Schleusener. The record is unclear, but it is a logical assumption that the lack of objective findings by Dr. Cederburg may be attributed to the fact that Claimant is receiving benefit from the narcotics and is improving.

Employer's physicians did not see Claimant for the IME, prior to Employer denying reimbursement for the narcotics. Dr. Dowdle based his opinion on the typical patient with compression fractures. Dr. Wayne Anderson performed a chart review and is of the opinion that Claimant should be seen by a physician before more narcotics are prescribed. Dr. Cederburg did see Claimant in 2007, but was of the opinion that it was reasonable for Claimant to follow the advice of his treating physician.

Employer has not shown that Claimant's treatment is not necessary. Furthermore, although a controversial treatment, Employer has not shown by a preponderance of the evidence, that the treatment of Dr. Schleusener is either unreasonable or unnecessary or unsuitable and improper. In this situation, Employer has the burden of proving the treating physician's treatment is unnecessary or improper. Employer has not met that burden. The treatment prescribed by Dr. Schleusener, including the OxyContin medication, constitutes reasonable and necessary medical care and treatment.

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Employer/Insurer shall have an additional 20 days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated December 14, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald  
Administrative Law Judge