

November 6, 2019

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**LETTER DECISION**

Rebecca L. Mann  
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P.O. Box 8045  
Rapid City, SD 57709-8045

RE: HF No. 200, 2015/16 – Theresa Schroeder v. Bankwest and South Dakota Bancshare, Inc. and American Compensation Insurance Company

Dear Mr. Simpson and Ms. Mann:

This letter addresses the following submissions by the parties:

April 26, 2019	Employer and Insurer's Motion to Terminate Chiropractic Benefits; Affidavit of Ryan C. Sutton in Support of Employer/Insurer's Motion to Terminate Chiropractic Benefits;
August 19, 2019	Claimant's Response to Motion to Terminate Chiropractic Benefits; Affidavit of Michael J. Simpson;
September 3, 2019	Reply in Support of Motion to Terminate Chiropractic Benefits.

This matter came before the Department of Labor & Regulation (Department) in December of 2017. The Department issued its Order and Amended Decision which concluded that the injury suffered while working for Bankwest remains a major contributing cause of Theresa Schroeder's (Schroeder or Claimant) current condition, and that she is entitled to medical expenses. Bankwest and South Dakota Bancshare, Inc. and American Compensation Insurance Company (Employer/Insurer) have moved

the Department to terminate Schroeder's chiropractic benefits as they are not necessary nor reasonable to treat her condition.

## **BACKGROUND**

On April 1, 2014, Schroeder slipped and fell in the parking lot of Bankwest and suffered an injury. Schroeder filled out a First Report of Injury which describes that she slipped and fell onto her left hip and left upper arm. Employer/Insurer held the injury to be compensable, and Schroeder received treatment from chiropractor Dr. Jeffrey Burns. Burns described right/hip SI area pain as well as muscle spasms in her mid and low back. On July 31, 2014, he referred Schroeder to physical therapy. Schroeder has a history of chiropractic care dating back to 1998.

From August 5, 2014 to October 28, 2014, Schroeder was seen for physical therapy twelve times. From July 31, 2014 to November 15, 2014, Schroeder continued treatment with Dr. Burns. On December 4, 2014, Schroeder was seen by Dr. Brett Lawlor, a Rapid City rehabilitation medicine specialist. Dr. Lawlor discussed treatment options with Schroeder including diagnostic injections into the hip joint, bursal injection, SI injection, physical therapy, and further imaging. Dr. Lawlor referred Schroeder for physical therapy. Schroeder continued to see Dr. Lawlor, who eventually ordered an MRI of Schroeder's left hip, which took place in July of 2015. On August 18, 2015, Dr. Lawlor gave Schroeder a right intra-articular hip injection. In 2016, Schroeder returned to Dr. Burns for treatment, this treatment continued into 2017.

On February 27, 2017, Schroeder was seen by Dr. Wade Jensen, an orthopedic surgeon at the request of Employer/Insurer for an IME. He did not feel there was any SI joint pathology but felt Schroeder had some evidence of bilateral hip CAM lesions which were mildly symptomatic. He believed she only had a sprain strain which would have resolved itself in the first six weeks with conservative care and anti-inflammatories. On April 10, 2017, Schroeder saw Dr. Schwietert complaining of low back and right hip pain ranging from 1 to a 10. Dr. Schwietert continued to see her from April 11, 2017 to December 5, 2017, on a regular basis.

Schroeder has continued treating with Dr. Schwietert since her hearing before the Department. Dr. Schwietert's records as of November 19, 2018 indicate that Schroeder still experiences some level of pain and discomfort. Dr. Schwietert recommends Schroeder continue treatment. Schroeder was reevaluated by Dr. Jensen on February 4, 2019, for a follow up IME. Dr. Jensen noted that Schroeder is "markedly improved from her slip and fall[,]" and is "back to walking her 3 miles a day." Dr. Jensen also noted that Schroeder "has been continuing to treat with chiropractic care despite Dr. Lawlor on 4/11/2017 stating that there was no further treatment necessary." Dr. Jensen diagnosed Schroeder with great trochanteric bursitis and opines that the "best treatment for trochanteric bursitis is corticosteroid injection in the trochanteric bursa as well as physical therapy for hip abductor program, Ober stretches, core physical therapy, and a standing work station." Dr. Jensen concluded "trochanteric bursitis is

typically treated best with steroid injections and physical therapy. Therefore, [Dr. Jensen] do[es] not feel chiropractic care is needed for treatment of trochanteric bursitis.”

Additional facts may be developed in the issue analysis below.

### **ANALYSIS:**

Employer/Insurer have moved the Department to terminate Schroeder’s chiropractic benefits as they are no longer necessary nor reasonable to treat her condition. Employer/Insurer argue that while, in its Order and Amended Decision, the Department concluded that Schroeder’s work injury remains a major contributing cause of her condition and need for treatment as required by SDCL 62-4-1, it did not specifically mandate what those treatments were. SDCL 62-4-1 merely requires that the medical services be “necessary.” “ ‘It is in the doctor’s province to determine what is necessary or suitable and proper.’ ” *Engel v. Prostrollo Motors*, 2003 S.D. 2, 656 N.W.2d 299, 304 (quoting *Krier v. John Morrell & Co.*, 473 N.W.2d 496, 498 (SD 1991)). “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.” *Streeter v. Canton Sch. Dist.*, 2004 S.D. 30, ¶25, 677 N.W.2d 221, 226 (quoting *Krier*, 473 N.W.2d at 498 (emphasis removed)).

Employer/Insurer argue that Schroeder has been receiving chiropractic treatment as far back as 1998, and some of that treatment was related to SI joint pain and adjustments. They further argue that some of Schroeder’s current chiropractic care is unrelated to the work injury as it deals with treatment for her right trapezius, headaches, left trapezius, her upper back, and mid back. Dr. Lawlor noted that Schroeder “has had in my estimation appropriate medical care, appropriate physical therapy, and appropriate chiropractic treatment. At this point, I don’t see that there is any definitive treatment that is going to eliminate her symptoms.” Employer/Insurer assert that Schroeder’s current chiropractic care is like the care she has received since 1998 and relates more to her general discomfort than to the work-related injury. They argue that according to Dr. Jensen and to a certain extent Dr. Lawlor, the chiropractic care is not necessary and is not in the best course of treatment to resolve Schroeder’s condition.

In response, Schroeder has first argued that the issue raised by Employer/Insurer’s motion is res judicata. The South Dakota Supreme Court has stated, “When considering claims involving res judicata, we apply four factors to determine if the doctrine applies: (1) was the issue decided in the former adjudication identical to the present issue; (2) was there a final judgment on the merits; (3) are the parties in the two actions the same or in privity; and (4) was there a full and fair opportunity to litigate the issues in the prior adjudication?” *Herr v. Dakotah, Inc.*, 613 N.W.2d 549, 554 (SD 2000) (citing *D.G. v D.M.K.*, 557 N.W.2d 235, 240 (SD 1996)). Schroeder argues that if Employer/Insurer wish to deny future medical treatment, they must make a motion under SDCL 62-7-33 and bear the burden of proof to show a change of condition.

In order to be res judicata, the issue decided at hearing must have been the same as the current issue of the motion. While the Department concluded that Schroeder is entitled to necessary treatment, it did not decide whether chiropractic care constituted necessary treatment. Therefore, the issue at hearing and the issue to be decided in Employer/Insurer's motion are not the same. The matter is not res judicata.

In *Stuckey v Sturgis Pizza Ranch*, 793 N.W.2d 378 (SD 2011). The Court held that "An injured employee's medical expenses are to be paid as they are incurred... When Stuckey incurs medical expenses in the future, Employer may reimburse her or challenge the expenses as not necessary or suitable and proper under SDCL 62-7-33." *Id* at ¶ 27. *Stuckey* is distinguishable from the current matter because in that case, the issue of what treatment was reasonable and necessary was previously addressed at hearing. In this matter, the issue of whether chiropractic benefits are necessary and proper has not yet been decided. Further, Employer/Insurer is not seeking to terminate its obligation to provide payment for medical payments, or otherwise diminish its responsibility to provide medical payments under SDCL 62-4-1. Therefore, SDCL 62-7-33 does not yet apply. The Department retains the authority to decide if chiropractic care is necessary.

Dr. Jensen has stated that he does not feel that chiropractic care is necessary to treat Schroeder's condition which he believes to be trochanteric bursitis. Dr. Lawlor, Schroeder's treating physician, opined that Schroeder suffered from SI joint pain primarily, which caused her need for medical treatments. In its Amended Decision, the Department noted that Dr. Lawlor's opinions were consistent with Schroeder's testimony. The Department held that Dr. Lawlor's findings of hypermobility, upslip of the pelvis, and pain in the opposite SI joint and leg were consistent with Schroeder's slip and fall injury. Dr. Lawlor's stated, "[Schroeder] has had in my estimation appropriate medical care, appropriate physical therapy, and appropriate chiropractic treatment. At this point, I don't see that there is any definitive treatment that is going to eliminate her symptoms." Dr. Lawlor does not seem to indicate that chiropractic care is not necessary, but instead that the chiropractic care she has and is receiving is appropriate. In a note from a medical visit on June 17, 2019, Dr. Lawlor noted that Schroeder "is treated effectively with chiropractic mobilization and activity modification. I think this is a reasonable long term strategy for her." Dr. Lawlor believes Schroeder's symptoms are ongoing, and the chiropractic care is appropriate and necessary to treat it.

The Department agrees with Dr. Lawlor. Although, Schroeder has seen a chiropractor in the past for treatment, the Department in its Amended Decision held that Schroeder's injury remains a major contributing cause of her injury. The record, specifically the testimony of Dr. Lawlor and Schroeder, has persuaded the Department that the chiropractic treatment she is receiving is necessary for the treatment of her current condition.

**ORDER:**

In accordance with the conclusions above, Employer and Insurer's Motion to Terminate Chiropractic Benefits is Denied.

The Parties will consider this letter to be the Order of the Department.

Sincerely,

Michelle M. Faw  
Administrative Law Judge

MMF/pas