SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota

DANA K. HEDIN, **HF No. 201, 2009/10**

Claimant,

v. **DECISION**

RCS CONSTRUCTION, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

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. A hearing was held in this matter on July 14, 2011 in Rapid City, South Dakota. Attorney, Michael M. Hickey represents Claimant, Dana K. Hedin (Claimant). Attorney, Kristi Geisler Holm represents Employer, RCS Construction Inc., and Insurer, New Hampshire Insurance Company (Employer and Insurer). Testifying at hearing were Robert M. Daly and Dana K. Hedin.

ISSUES:

The Issues before the Department are:

1. Whether Claimant's injury or condition is work-related?

2. Whether the surgery recommended by Dr. Watt is necessary, suitable, or proper?

3. Whether Employer and Insurer are responsible for the costs related to the surgery recommended by Dr. Watt or the ongoing chiropractic treatments by Dr. Lowenberg?

4. Is the August 31, 2009 injury a major contributing cause of Claimant's duodenal ulcer and resulting treatment?

5. Whether Claimant is entitled to temporary total disability benefits and the amount?

FACTS:

1. Claimant is 60 years old at time of hearing, and resides in Rapid City, South Dakota.

2. Since graduation from high school, Claimant was employed in the oil fields for 13 years and as a carpenter since 1995.

3. On April 28, 2008, Claimant began working for Employer as a carpenter.

4. Claimant did not miss any work due to medical conditions until August 31, 2009.

5. On August 31, 2009, Claimant attempted to empty a wheelbarrow of concrete. According to Claimant, the wheelbarrow twisted left and Claimant's body went right.

6. Claimant experienced instant pain in his back and down his legs. Claimant was unable to stand upright after the incident and instead had to bend at the waist.

7. Claimant finished his work on the concrete.

8. The next morning, he informed his supervisor of the incident. Claimant left work and sought treatment from his regular chiropractor, Dr. Greg Lowenberg.

9. Claimant has been consistent in the events of the incident on August 31, 2009 and has presented credible testimony.

10. Dr. Lowenberg referred Claimant to Dr. Weiland, Claimant's personal physician. Dr. Weiland diagnosed low back pain and muscle spasm and prescribed Naprosyn and Valium.

11. Dr. Weiland referred Claimant to Dr. Tim Watt for surgical evaluation. Dr. Watt had performed a back surgery on Claimant in 2006.

12. An MRI scan was taken of Claimant's back on September 22, 2009.

13. On September 29, 2009, Dr. Watt saw Claimant and recommended a repeat discectomy at the spine levels L2-3, L3-4, and L4-5.

14. Claimant had two prior back surgeries. The first in 1973, the second in 2006.

15. No records or information is available regarding the 1973 back surgery.

16. In the fall of 2006, Claimant had a lumbar discectomy at L2-3 right, L3-4 right and L5-S1 right, as well as a redo discectomy at L4-5. Claimant was discharged home on September 16, 2006.

17. Claimant was discharged from physical therapy on November 17, 2006.

18. Claimant returned to full-time heavy labor after recovering from the 2006 surgery. Claimant was off work due to the 2006 surgery for 8 weeks.

19. On February 7, 2007, Claimant aggravated his back injury after lifting a compressor at work.

20. Claimant continued to see his chiropractor for occasional spinal manipulations. Claimant saw Dr. Lowenberg 10 times in 2007, and 7 times in 2008. In 2009, prior to August 31, 2009, Claimant saw Dr. Lowenberg 12 times; the most previous was on August 21, 2009.

21. Employer and Insurer requested an independent medical examination of Claimant prior to approving surgery.

22. Dr. Grant H. Shumaker, Neurosurgeon recommended conservative treatment before surgical intervention.

23. Claimant continues to see Dr. Lowenberg for regular chiropractic treatments pending his request for surgery.

Further facts will be developed in the Analysis below.

ANALYSIS

1. Whether Claimant's injury or condition is work-related?

> The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition "because the field is one in which laypersons ordinarily are unqualified to express an opinion." Id. (quoting *Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶21, 653 N.W.2d 247, 252 (quoting *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992))). No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition. SDCL 62-1-1(7). Expert testimony is entitled to no more weight than the facts upon which it is predicated. *Schneider v. S.D. Dep't of Transp.*, 2001 S.D. 70, ¶16, 628 N.W.2d 725, 730 (citations omitted).

Darling v. West River Masonry, Inc., 2010 S.D. 4, ¶13, 777 N.W.2d 363, 367.

Dr. Greg Lowenberg, D.C., has been Claimant's chiropractor since 1998. Dr. Lowenberg saw Claimant prior to and after his surgery in 2006. Dr. Lowenberg explained during his deposition that Claimant's condition on August 31 was "dramatically different" from the condition Claimant was in just 10 days earlier. Dr. Lowenberg's objective findings were that Claimant had a very limited range of motion, decreased reflexes, positive orthopedic results, increased muscle spasm, and positive compression tests.

Dr. Lowenberg's professional opinion, to a reasonable degree of medical probability, was that Claimant's employment activities on August 31, 2009, was a major contributing cause of Claimant's medical condition and need for treatment, and was a new injury and not a recurrence of his old injury.

Dr. Kevin Weiland, M.D., is Claimant's primary care physician since 2004. Dr. Weiland referred Claimant to Dr. Watt in 2006 for back surgery. Claimant saw Dr. Weiland again in June and July 2009 for back pain. Claimant continued to work full-time and at full capacity until August 31, 2009. Because of the sudden onset of pain while at work, Dr. Weiland is of the opinion, within a reasonable degree of medical probability that Claimant's current condition and need for treatment is directly related to his work for Employer on August 31, 2009.

When Dr. Weiland saw Claimant on August 31, 2009, Dr. Weiland prescribed Naprosyn and Valium for the pain. On September 10, Dr. Weiland changed the prescription from Naprosyn to Prednisone. On September 13, Dr. Weiland gave Claimant an injection of Toradol (an intramuscular NSAID) and a prescription for Percocet. At that time, Dr. Weiland also referred Claimant to Dr. Watt for a surgical consultation. Dr. Weiland noted that Claimant may have had a pre-existing condition but that the injury definitely occurred while at work.

Dr. Timothy Watt, MD, a surgeon with Black Hills Neurosurgery and Spine, was Claimant's surgeon in 2006. Dr. Weiland referred Claimant to Dr. Watt for the spinal injury that he suffered in August 2009. Dr. Watt ordered an MRI on September 29, 2009. Dr. Watt compared Claimant's previous surgery and spine issues with the x-rays and MRI that were taken in 2009.

In Dr. Watt's opinion, within a reasonable degree of medical probability, is that there was definitely a new injury in 2009; and because there was a sudden onset of symptoms at work on August 31, 2009, that this was a major contributing cause of Claimant's condition or need for treatment. After examination and reviewing the MRI and x-rays, Dr. Watt opined that Claimant had a large recurrent disc herniation at L2-3 and L4-5 and some disc protrusion at L3-4. Dr. Watt correlated Claimant's symptoms of muscle weakness in the hip flexors to the herniation at L2-3.

The 2009 MRI showed a free form of disc material floating at L2-3. Dr. Watt had removed the herniated disc material at L2-3in 2006. Any herniation at L2-3 was new material that occurred in the years intervening. During his deposition, Dr. Watt described Claimant's disc herniation or disc rupture at L2-3 and explained why it was not a slow herniation but a

sudden onset. He said, "So it's very frequent that people may have a forewarning or an antecedent buildup that something is happening, but in the case of a rupture where you have a free fragment, this is like the kids have left the tube of toothpaste on the bathroom floor and come in and stomped on it, something's squirted out, and that typically is a discrete, focal event where that disc ruptures out. … But disc herniations are typically discrete events. He has a large fragment of disc that didn't gradually grow that shot out of the disc space."

Dr. Watt recommended surgery to remove the disc material at L2-3, L4-5, and possibly L3-4. This surgery was denied by Employer and Insurer based upon the IME of Dr. Shumaker.

Dr. Grant Shumaker, a neurosurgeon with CNOS, Centers for Neurosurgery, Orthopaedics & Spine, conducted a records review of Claimant's medical records. The record review was conducted on November 11, 2009. Dr. Shumaker also performed a physical exam of Claimant on April 21, 2011. Dr. Shumaker's opinion is that Claimant's low back condition was at most a temporary aggravation of the underlying degenerative disc disease. Based upon review of the 2006 and 2009 MRI's, Dr. Shumaker's opinion is that Claimant's back did not substantially change during the intervening years. He does note that the L2-3 disc herniation has decreased between the two MRI's. His opinion is that Claimant did not improve following the surgery in 2006, as he continued to seek out chiropractic treatments and manipulations of his spine following the surgery. Dr. Shumaker also points to Dr. Weiland's notes that indicate Claimant continued to suffer from back pain, on and off, following the 2006 surgery.

Claimant continued to see his chiropractor on a monthly basis following the surgery. Dr. Weiland and Dr. Watt were aware of his seeing Dr. Lowenberg for chiropractic care following the surgery.

In a recent South Dakota Supreme Court case, the Court set out the law regarding causation in a case with a pre-existing condition. They wrote:

> When a work injury combines with a pre-existing condition to cause or prolong the disability, impairment, or need for treatment, the claimant must prove that "the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." SDCL 62-1-1(7)(b) (emphasis added). The required proof of causation "must be established to a reasonable degree of medical probability, not just possibility." *Darling v. W. River Masonry, Inc.*, 2010 S.D. 4, ¶12, 777 N.W.2d 363, 367. "The evidence must not be speculative, but must be 'precise and well supported.'" Id. (citation omitted).

Jewett v. Real Tuff, Inc., 2011 S.D. 33, ¶23 (footnote omitted). In this case, Claimant admits he has pre-existing degenerative disc disease, as he has already had two surgeries on his back. However, Claimant returned to full-time work following each of the surgeries. After the incident in August, 2009, Claimant was instructed not to return to work. Furthermore, Claimant's pain and muscle spasms prevented him from working at that time.

Claimant has proven that his current disability and need for treatment stems directly from the August 31, 2009 incident that occurred at work while Claimant was employed with Employer. The treating chiropractor, physician, and surgeon all conclude, to a reasonable degree of medical probability that the August 31, 2009 incident was a major contributing cause of his need for treatment. Dr. Shumaker's opinion does not take into account that the herniation that appeared on the 2006 MRI was removed. Dr. Watt's opinion regarding the free-floating herniation seen on the 2009 MRI was also more persuasive than Dr. Shumaker's.

2. Whether the surgery recommended by Dr. Watt is necessary, suitable, or proper?

The South Dakota Supreme Court has ruled on the employer's burden of proof to show whether a doctor's order is "necessary, suitable, or proper"

> In interpreting this statute, we have stated that "[i]t is in the doctor's province to determine what is necessary or suitable and proper." *Streeter v. Canton Sch. Dist.*, 2004 S.D. 30, ¶25, 677 N.W.2d 221, 226 (quoting *Krier v. John Morrell & Co.*, 473 N.W.2d 496, 498 (S.D. 1991)). And "[w]hen 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." Id. (quoting *Krier*, 473 N.W.2d at 498).

Stuckey at ¶23 (citation omitted). The Employer presented the expert testimony of Dr. Shumaker in regards to the suitability of a repeat surgery.

Dr. Shumaker is of the opinion that Dr. Weiland should have referred Claimant to physiatry or physical therapy instead of a surgical opinion from Dr. Watt. Dr. Shumaker has made known that the standard of care recommends a minimum of 6-12 weeks of conservative treatment for a back injury before considering any surgical options, such as what is proposed by Dr. Watt.

Since Claimant had seen Dr. Watt just three years previous for his back, Dr. Weiland believed that Dr. Watt should be consulted in regards to Claimant's 2009 back injury. Dr. Weiland used the term "continuity" when giving the reason why Claimant was referred to Dr. Watt. By the time Claimant saw Dr. Watt, Claimant had undergone several chiropractic manipulations and other conservative treatment of his spine such as nonsteroidal and oral steroidal medications.

Dr. Watt, in his deposition, remarks that he made attempts to have Claimant treated for pain with the Rehab Doctors, since Employer and Insurer had denied authorization for surgery. Dr. Watt's opinion is that surgery is the only way to remove the new "enormous fragment of disc at 2-3 on the right." Dr. Watt also noted that the disc herniations were "frank" in that the herniations did not appear to happen slowly, but very quickly, as described in the above section. Dr. Watt said succinctly:

> "The herniations, especially the top one, were quite large. I thought the likelihood that that was going to improve with just passage of time and more chiropractic was unlikely, and, frankly, a bigger concern was the fact that he now had weakness in the leg, which he did not have before. And based on the appearance of the MRI, no response to chiropractic, and the fact that he had now developed a neurologic deficit, specifically the weakness, my recommendation was that the most prudent course was to go ahead and repeat the surgery. I felt that would get him the quickest improvement and the best chance to return to normal activity quickly."

Employer has failed to meet their burden of showing that the surgery, as recommended by Dr. Watt, is not suitable, necessary, or proper. The testimony of Employer and Insurer's expert, Dr. Shumaker, was not as persuasive as the combined opinions of Dr.'s Watt, Weiland, and Lowenberg. Most persuasive is the testimony of the surgeon Dr. Watt, as Dr. Watt has already performed surgery on the same spinal level that had suffered another herniation.

Given the passage of time since Dr. Watt's last examination of Claimant, if Dr. Watt still believes that surgery is recommended for Claimant, then it is necessary, suitable, and proper for Claimant to undergo surgery.

3. Whether Employer and Insurer are responsible for the costs related to the surgery recommended by Dr. Watt or the ongoing chiropractic treatments by Dr. Lowenberg?

SDCL §62-4-1 reads, "The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care …during the disability or treatment of an employee within the provisions of this title." SDCL §62-4-1. Employer and Insurer are responsible for the payment of the surgery recommended by Dr. Watt. The surgery is necessary, suitable, and proper in accord with the expert testimony of Dr. Watt, the surgeon whom Claimant was referred to by his then treating physician Dr. Weiland and Dr. Lowenberg.

Claimant also seeks payment of the chiropractic bills that have been accumulating since Claimant's injury. Claimant has been seeing Dr. Lowenberg on a regular basis since the August 31, 2009 injury. As Claimant's initial choice of treating physician, Dr. Lowenberg referred Claimant to Dr. Weiland for further treatment, specifically pain management. Claimant continued to treat with Dr. Lowenberg during this time, without a permanent referral to Dr. Weiland.

Dr. Lowenberg and Dr. Weiland then sent Claimant to Dr. Watt for a surgical consultation. Dr. Watt ordered the MRI and recommended surgery. Employer and Insurer denied Dr. Watt's recommendation for surgery. Employer and Insurer withdrew all forms of benefits and denied all further medical benefits on November 18, 2009. On January 5, 2010, denied Dr. Watt's referral of Claimant to the Rehab Doctors for evaluation and pain management.

Claimant, as he is no longer working at his job for Employer because of the injury and having limited financial means for seeking care, returned to see Dr. Lowenberg for chiropractic care. Dr. Lowenberg is the only doctor that will see Claimant without demanding payment. Dr. Lowenberg has been treating Claimant for the injury received in August 2009.

In the case of *Laurel Lee Cozine v. Midwest Coast Transport, Inc*, the South Dakota Supreme Court ruled that the Midwest Coast Transport Inc. had an affirmative duty to pay for necessary medical care of Ms. Cozine. *Cozine*, 454 N.W.2d 548, 555 (S.D. 1990). Midwest Coast wrote Cozine a letter denying her further worker's compensation disability benefits. Midwest Coast also denied any further medical treatment of Cozine. Cozine made other arrangements for her medical care, independent of Midwest Coast's approval. The Court quoted 2 Larson's Workmen's Compensation Law 61.12(d) at 10-817 (1989):

> It is usually held that when, the employee has furnished the employer with the facts of his injury, it is up to the employer to instruct the employee on what to do to obtain medical attention, and to inform him regarding the medical and surgical aid to be furnished.

Cozine v. Midwest Coast Transport, Inc., 454 N.W.2d 548, 555 (S.D. 1990). The Supreme Court went on to write:

> The letter [denial from Midwest] also states that it is the opinion of Midwest that there is nothing physically wrong with Cozine. Such conduct does not satisfy the employer's affirmative duty to provide medical treatment, and it was clearly erroneous for the hearing examiner to so decide. … Therefore, Cozine was within her rights to make suitable, independent arrangements at Midwest's expense. Id., 61.12(d) at 10-806.

Id.

This ruling by the South Dakota Supreme Court has been followed in subsequent workers' compensation cases such as *Scott v. Photos To Go*, 03-119, P27 (S.D. Circuit Court, Hughes Co., 2004), wherein Judge Gors found that SDCL §62-4-43 "does not fit a case where the insurer withdrew benefits." Claimant, in this case, has had no further recourse but to find a medical provider that will provide some form of pain management and treatment of the injury. Employer and Insurer denied pain management and possible physical therapy through the Rehab Doctors as well as any surgical options. They denied any form of medical care for Claimant for the injury sustained in August, 2009. Claimant and the medical providers are entitled to reimbursement of all medical treatments stemming from the August 2009 injury.

4. Is the August 31, 2009 injury a major contributing cause of Claimant's duodenal ulcer and resulting treatment?

Claimant has requested that Employer and Insurer reimburse Claimant for treatment of his duodenal ulcer. On October 11, 2009, Claimant was admitted to Rapid City Regional Hospital by the emergency room physicians. Claimant went to the emergency room because

he thought he was having a heart attack. Claimant was experiencing numbness in his left arm and pain in his chest. Claimant was in the hospital until October 14, 2009. Claimant underwent a number of tests on both his heart and his gastrointestinal tract. The hospital physician, Dr. David Blair, MD, diagnosed Claimant with a duodenal ulcer and noted that the ulcer was likely caused by NSAIDS taken for pain relief. The doctor prescribed Nexium and that Claimant stop taking NSAIDS. Claimant had been taking both prescription and non-prescription NSAIDS for his back pain.

The South Dakota Supreme Court in *Mettler v. Sibco*, determined that costs of diagnostic tests to determine whether a condition is caused by a work-related accident are compensable. The Court wrote:

> > Whenever the purpose of the diagnostic test is to determine the cause of a claimant's symptoms, which symptoms may be related to a compensable accident, the cost of the diagnostic test is compensable, even if it should later be determined that the claimant suffered from both compensable and noncompensable conditions.
>
> *Perry v. Ridgecrest Intern.*, 548 So2d 826, 827- 28 (Fla App 1989) (citations omitted). Furthermore, we have previously acknowledged that there may be instances where nonwork related diseases are nonetheless covered under workers' compensation insurance such as, "'where the treatment for nonwork related disease would be unnecessary but for the work related injury.'" *Rank v. Lindblom*, 459 NW2d 247, 250-51 (SD 1990).

Mettler v. Sibco, 2001 SD 64, ¶9, 628 NW2d 722, 724. In this case, the NSAIDS taken by Claimant were the likely cause of Claimant's duodenal ulcer.

In June and July 2009, Dr. Weiland cautioned Claimant regarding the overuse of NSAIDS for his ongoing back pain. Claimant had not been experiencing any gastrointestinal distress or signs of an ulcer, at that time. This was prior to the August 31, 2009 work-related injury. After his work-related injury, Claimant was prescribed the NSAIDs Naprosyn and Toradol (not at the same time, as these two drugs cannot be taken simultaneously) in addition to the Ibuprofen. The prescription NSAIDs are much stronger and have a different effect than straight Ibuprofen. Claimant was also given the corticosteroid Prednisone to help with the back injury. According to Dr. Weiland, ulcers are a "major, major side effect of Prednisone." Furthermore, according to Dr. Weiland, smoking, poor diet, and lack of exercise also can cause ulcers; all of which show up in Claimant's recent medical history.

Claimant's experts have presented rational and credible evidence that Claimant's duodenal ulcer was a result of the August 31, 2009 injury. In other words, the back injury and the medication prescribed to treat the back injury was a major contributing cause of Claimant's ulcer. Employer and Insurer are responsible for the resulting medical bills for the treatment.

5. Whether Claimant is entitled to temporary total disability benefits and the amount?

> "Temporary disability, total or partial," 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.

SDCL §62-1-1(8).

Claimant has been off work since August 31, 2009, pursuant to orders from his treating physician. At the time of hearing, none of his doctors had released him to work. On September 9, 2009, at the request of Employer and Insurer, Dr. Lowenberg issued an Ability to Work Report. Dr. Lowenberg indicated that Claimant could stand or sit 1 to 3 hours, could rarely squat/kneel or crawl, could rarely lift 5 to 10 pounds and could not bend or twist. This Ability to Work Report has not been modified or withdrawn by Dr. Lowenberg or any physician or surgeon which has treated Claimant.

On November 18, 2009, Employer and Insurer issued one check to Claimant for temporary total disability benefits of $414.86. Employer and Insurer have not paid any temporary total disability benefits since that date.

Pursuant to SDCL §62-1-1(8), Claimant is entitled to receive temporary total disability benefits from the date in which he was injured until such time as he is released to work by his treating physician. The current number of weeks is approximately 121 weeks. Employer and Insurer have determined that the average weekly wage is $414.86. The final calculation of the average weekly wage may or may not be correct. That issue has been bifurcated by stipulation of the parties and will be determined at a later date by the Department. The total amount due to Claimant will be determined at a later date.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within thirty (30) days from the date of receipt of this Decision. Employer and Insurer shall have twenty (20) 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.

DONE at Pierre, Hughes County, South Dakota, this __9th_ day of_January_____, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

________/s/___________________________
Catherine Duenwald
Administrative Law Judge