SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

RANDALL MACK, **HF No. 207, 2013/14**

Claimant,

v. **DECISION**

RAPID CITY SCHOOL DISTRICT,

Employer,

and

DAKOTA TRUCK UNDERWRITERS,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on September 24, 2015, in Rapid City, South Dakota. Claimant, Randall Mack was represented by Michael J. Simpson. The Employer, Rapid City School District and Insurer, Dakota Truck Underwriters were represented by Daniel E. Ashmore.

Legal Issues:

The legal issue presented at hearing is stated as follows:

Whether Mack's July 28, 2010, work injury is a major contributing cause of his current neck and radicular left upper extremity pain?

Facts:

The Department finds the following facts by a preponderance of the evidence:

1. Randall Mack (Mack) is a 59 year old man who grew up in Watertown, South Dakota. He got an associate's degree in electronics from the vo-tech in Watertown in 1976 and then went to work for Magnetic Peripherals (later SCI) in 1976.

2. Mack worked at SCI for 34 years or until 2008 when he was laid off as part of SCI shutting down.

3. In December of 2008, Mack started working for the Rapid City School District (Employer) as a janitor/custodian. He stared out as a "floater" and ended up as a full time custodian at North Middle School.

4. In 1999, Mack hurt his neck while working at SCI moving boxes on May 27, 1999.

5. On July 6, 1999, Mack saw Dr. Teuber. Teuber noted that Mack had discomfort in his neck, left shoulder, and arm, with sensory complaint in his first, second, and third digits. Teuber recommended four weeks of physical therapy. Teuber did not personally look at Mack's cervical MRI as it was unavailable, but reported that radiologist Dr. Frost had read it as "normal".

6. On July 13, 1999, Mack was seen at ProMotion Physical Therapy by Geoff Bonar. Bonar noted that Mack was complaining of left posterolateral neck pain with left upper extremity symptoms into the posterior aspect of the arm to the medial side of the elbow and paresthesias into the lateral three fingers of the hand. Bonar noted that Mack's pain ranges between 3 and 8/10 and he also complained of headaches. Bonar noted that periodically with side bending his head to the left, Mack would have a sharp pain into the medial aspect of the left arm. Bonar noted some neurological weakness in the triceps and that deep tendon reflexes were also diminished in the triceps.

7. On July 27, 1999, Teuber noted that Mack's symptoms had progressed, with him now demonstrating "a C7 nerve root irritation as manifested by weakness of the triceps, absent reflex, and sensory abnormality." Teuber personally reviewed the MRI and believed it showed a disk herniation in the foramina C6-7. Teuber diagnosed a C7 radiculopathy secondary to disk herniation at left C6-7 and recommended a decompression and fusion surgery at C6-7.

8. On September 20, 1999, Dr. Teuber performed a decompression and fusion surgery at Mack's C6-7 level.

9. After the surgery, Mack received physical therapy at ProMotion Physical Therapy by therapist Geoff Bonar.

10. On October 18, 1999, Bonar noted that since Mack's surgery "he no longer has the upper extremities symptom; however he continues to have headaches particularly when forward bending." He noted that Mack's pain was described as 4/10 and he was taking Tylenol p.r.n.

11. On November 10, 1999, Bonar noted that Mack's headache frequency had diminished but remains secondary to forward bending and overall he had an increase in his mobility and an increase in his exercise resistance.

12. On November 15, 1999, Bonar reported on Mack's progress in physical therapy that Mack's strength in his shoulder and neck was improving, his headache frequency was less, and Mack was "very motivated to continue exercises."

13. On November 22, 1999, Bonar discharged Mack from physical therapy and noted that “the patient has noted a significant reduction in his headache frequency, improvement in his mobility and strength of the regions involved. Bonar noted that Mack’s compliance was excellent and that the goals in physical therapy have essentially been met.

14. On January 3, 2000, Dr. Brett Lawlor, a rehabilitation physician, saw Mack for an impairment rating at the request of Dr. Teuber. Lawlor noted that after the surgery, Mack’s arm pain and numbness is completely resolved and “he is left with some mild persistent neck pain that he considers to be a minor annoyance.” Mack was rating his pain as 2/10. Lawlor noted that Mack had had a return of his headache after a long road trip and sleeping in a motel. Lawlor gave Mack five percent whole person impairment and diagnosed him “status post C6-7 diskectomy and fusion with good surgical outcome.” He recommended that he continue with his exercise program under the direction of Geoff Bonar.

15. On January 5, 2000, Bonar saw Mack noting that he had had a recurrence of cervical spine pain and headaches since he spent a week in Sioux Falls while attending a relative who was in the hospital. Bonar found minimal limitation in range of motion to the cervical spine with some restriction of rotation right at the C1-2 level with some local tenderness on the suboccipital region. Bonar recommended some soft tissue mobilization, massage, and mobilization to the upper cervical spine for two weeks.

16. On January 12, 2000, Bonar discharged Mack from physical therapy, noting that “as a result of improvement in his status over the past two weeks, I feel we have exhausted therapeutic interventions to resolve his headaches.”

17. On January 20, 2000, Mack was seen again by Dr. Lawlor because he was having continued neck pain and headaches. Lawlor diagnosed cervicogenic headache with occipital nerve irritation. Lawlor recommended a trial of Amitriptyline.

18. On March 6, 2000, Lawlor saw Mack who was “making gradual improvement”. Lawlor noted Mack’s headaches were under better control through use of ibuprofen. Lawlor noted that Mack was not having any radicular symptoms but that Mack wanted to see “more rapid improvement” although he could “put up with things the way they are.”

19. On May 1, 2000, Lawlor saw Mack who was complaining of continued neck pain and headaches. Mack was concerned that something might be being missed and wanted to know if he had a recurrent disk herniation. Lawlor agreed to repeat the MRI and make arrangements for him to see Dr. Teuber to make sure there were no recurrent disk abnormalities.

20. On May 31, 2000, Lawlor saw Mack noting that Dr. Teuber had evaluated him with a bone scan and further imaging studies and felt there were no surgical

options for him at this point. Lawlor recommended Celebrex and if that was not helpful, Vioxx.

21. From May 31, 2000, until Mack's work injury in 2010, he did not receive any medical treatment with Dr. Lawlor, with the exception of a liver panel that was done on November 14, 2003, because of "long term Celebrex used." In addition, Mack treated with his family practice doctor, Dr. Craig Hansen during these years.

22. Dr. Hansen's notes from 2003 and 2004 do not make any mention of neck pain or left upper extremity pain. These notes are concerned with routine medical matters such as cold symptoms, cough, fatigue, hypertension and urinary dysfunction.

23. In Dr. Hansen's September 27, 2004, annual physical, he noted that Mack "occasionally takes Celebrex p.r.n. for joint pain which is not frequent."

24. Mack testified at hearing that after 2002 or 2003, "it seemed to heal up pretty fair. I mean, you know, I would still have some discomfort and slight headaches, nothing out of the ordinary too much, up until 2010. I guess."

25. Mack testified that during 2004 through 2010, before he injured his neck again, he occasionally took some Celebrex if his symptoms would flare up, but for the most part he just took non-prescription medications occasionally.

26. On July 28, 2010, while working for Employer, Mack slipped and fell on a floor that had floor stripper applied to it. He filed an accident report which described him falling and hitting his right hip and shoulder.

27. After the fall, Mack described a sore neck in the injury reports done shortly after the fall.

28. Co-worker Jane Cecil testified at hearing that she talked to Mack on the day he fell or the day after and he told her that he fell and his neck hurt.

29. Mack was achy following his fall. Within a week or two of the fall he began complaining that his left elbow and arm hurt. As time went on, his arm and elbow began to hurt worse.

30. Mack began to worry that had another herniated disk because "it felt the same as when he'd hurt his neck before."

31. Mack initially tried to cope with the pain. He tried to "tough it out."

32. Mack did not go to a doctor for 12 weeks after the injury but eventually came to the conclusion that the pain was not going to get any better.

33. He saw Dr. Wayne Anderson on October 19, 2010. Anderson's note indicates that Mack slipped and fell on July 28, 2010, and "he developed neck and arm pain thereafter." Anderson wrote "He is concerned about this, as the pain is very similar to what he'd had prior to undergoing a cervical fusion at C6-7 performed by Dr. Teuber in 1999." Anderson also noted "he also had left arm pain in the forearm at that time that was similar to where his pain is now." Anderson's exam revealed significant tenderness to palpation over the lateral epicondyle (elbow), pain with gripping as well as pain with full extension of his elbow. Anderson noted that he discussed getting x-rays to confirm the stability of the previous neck fusion as well as treatment for potential epicondylitis. Anderson noted that Mack "occasionally takes Celebrex, but states that he doesn't like to take any medications including the Celebrex." Anderson stated he would make a decision regarding his neck following the x-ray.

34. On November 2, 2010, Dr. Anderson saw Mack again and noted that "his neck continues to bother him significantly. He has pain radiating down to his elbow." Anderson noted "this seemed to me to be epicondylitis, but he says this is exactly what he'd felt previously when he needed neck surgery. . .." Anderson ordered an MRI of the neck.

35. On November 9, 2010, Dr. Anderson saw Mack and noted that "he indeed has a disk herniation one level above his previous fusion. Anderson stated "the last time this happened to him he tried extensive conservative care and failed all of it. He ended up undergoing fusion surgery performed by Dr. Teuber. His current situation is very similar to what had occurred in the past." Anderson referred Mack to Dr. Vonderau for conservative treatment and also to see Dr. Schleusener, a surgeon. Anderson noted that Mack was still performing his work as a custodian at the schools and would continue.

36. On December 3, 2010, Mack saw Dr. Peter Vonderau, a Rapid City physiatrist. Mack described neck pain of 3/10 to 8/10 as well as pain radiating diffusely along the left upper extremity to the hand. Vonderau noted that Mack endorsed significant focal pain along the lateral aspect of the left elbow and had occasional numbness and tingling throughout the tips of all digits of the left hand as well as vague left upper extremity weakness. Vonderau performed a physical exam which showed decreased range of motion of the cervical spine. Vonderau reviewed the MRI and noted that Mack had neck pain localized to the left cervical paraspinal region, intermittent pain radiation diffusely along the left upper extremity to the hand; mild weakness of the left C6-7 innervated muscles, tenderness over the left lateral epicondyle; cervical MRI evidence of a left sided disk herniation at C5-6 abutting the left C6 nerve root; and a history of the C6-7 fusion in 1999 and the work related injury on July 28, 2010.

37. Vonderau noted "Mr. Mack's neck and left upper extremities symptoms are most consistent with a left C6 radiculopathy, although there is also evidence of left lateral epicondylitis." Vonderau recommended physical therapy and gave him samples of Celebrex. He noted that Mack was working full duty, self-restricting as needed.

38. Mack attended two physical therapy visits which did not change his segmental mobility and he did not make any progress toward his physical therapy goals. He was discharged by Bonar on January 19, 2011.

39. On January 4, 2011, Mack was seen by Dr. Rand Schleusener, a Rapid City orthopedic surgeon. Schleusener noted that Mack continues to work "but he said it is a struggle." Schleusener noted that Mack said "the biggest problem he has is neck pain, but the left arm pain is quite problematic as well." Schleusener reviewed the MRI and noted "he has a large annular tear at 5-6 with a left sided disk bulge." Schleusener believed that Mack's pain "is most certainly coming from the C5-6 cervical disk injury." Schleusener offered him a C5-6 diskectomy and inner body fusion. Schleusener noted that Mack was "a little leery to proceed with extending his fusion up." Schleusener encouraged him to try to maximize his conservative care but stated "I do think he is a candidate for a surgical procedure, if he chooses." Schleusener concluded "I advised him to live with it as long as possible and, if his pain is too problematic, to consider extending his fusion."

40. On January 6, 2011, Dr. Vonderau saw Mack who was complaining of pain in his left lower cervical paraspinal region with radiation along the lateral aspect of the left upper extremity to the hand. Vonderau noted that Mack had neck pain localized to the left lower cervical paraspinal region, intermittent pain radiation along the lateral aspect of the left upper extremity to the hand, and mild weakness of the left C6-7 innervated muscles. Vonderau noted that Mack's left neck and left upper extremities symptoms persist and that therapy had not been particularly helpful. He offered Mack a C7-T1 interlinear epidural steroid injection and refilled his prescription of Celebrex.

41. On January 20, 2011, Vonderau performed the epidural steroid injection for the "left C6 radiculopathy".

42. On February 3, 2011, Vonderau noted that Mack was reporting relief of his radicular pains, particularly his pain in the left elbow region, with the epidural steroid injection. He was continuing to have some left sided neck pain, but it had been tolerable. Vonderau recommended 30 pound lifting restrictions with no vacuuming or mopping more than two hours a day and stated "hopefully, the restrictions will be enough to let the axial pain resolve."

43. On March 4, 2011, Dr. Vonderau saw Mack again, who was still endorsing no left upper extremity radicular symptoms, but was having some pain localized to the lower cervical paraspinal regions as well as the upper trapezii muscles. Overall, Mack was still "very pleased" with his progress. He was taking Celebrex occasionally for pain control and tolerating his 30 pound restrictions. He felt he could mop or vacuum up to four hours per day. Vonderau increased his restrictions to 40 pounds lifting, pushing, or pulling, and mopping or vacuuming up to four hours per day.

44. On April 1, 2011, Vonderau saw Mack who noted that over the past several weeks his pain had been worsening, although it was not at the level it was prior to the injection. Vonderau noted that Mack's pain will radiate from the C7 region along the left upper trapezius muscle to the shoulder. Mack was taking Celebrex occasionally for pain control and was working with the 40 pound restrictions, which he felt was tolerable. Vonderau noted tenderness over the left C7 paraspinal region and along the left upper trapezius muscle and believed that "Mr. Mack is experiencing an exacerbation of this left C6 radicular symptoms." Vonderau recommended repeating the cervical epidural steroid injection.

45. On April 7, 2011, Vonderau performed another epidural steroid injection for the left C6 radiculopathy.

46. On April 29, 2011, Vonderau saw Mack, who was reporting that he had benefit with the second injection, although he still had some discomfort localized to the left cervicothoracic junction area but it has been tolerable. Vonderau noted that Mack will occasionally have an aching sensation along the lateral aspect of the left elbow but denied any upper extremity numbness, tingling, or weakness. Mack had not been taking any Celebrex recently and had been working with 40 pound restrictions. Mack felt it would be reasonable to try full duty work, self-restricting as needed. Vonderau placed Mack at maximum medical improvement and gave him a five percent impairment rating and released him to a trial of full duty work, self-restricting as needed. Vonderau noted that "Mr. Mack understands that he could develop an exacerbation in the future necessitating additional physical therapy, medications, epidural steroid injections, or even surgery. I anticipate that he is going to do quite well, however."

47. On July 14, 2011, Vonderau saw Mack who was noticing increased pain localized to the left lower cervical paraspinal region as well as pain along the lateral aspect of the left shoulder and elbow. Mack believed he sustained injuries to his left shoulder and elbow over the last day or so while lifting. Vonderau noted that a Hawkins shoulder test was positive and he had a positive painful arc. Vonderau believed that Mack was experiencing an exacerbation of his neck and left upper extremity, radicular symptoms and also appears to have evidence of left subacromial bursitis and possibly left lateral epicondylitis. Vonderau recommended another epidural steroid injection. He noted that if he did not have significant benefit of his upper extremity symptoms with the injection, further evaluation of the shoulder and elbow may be needed. Vonderau did restrict Mack to 35 pounds lifting.

48. On July 19, 2011, Vonderau performed another epidural steroid injection for left lower cervical radiculitis.

49. On August 4, 2011, Vonderau saw Mack who reported "that the repeat injection has given him significant benefit." Mack did report that his neck was sore because of buffing floors recently and he still had some discomfort along the lateral aspect of the left elbow that his worse with lifting. Vonderau noted improvement with respect to the left upper extremity, radicular symptoms and

believed much of his left elbow pain appeared to be related to lateral epicondylitis. Vonderau prescribed Lidoderm patches for his neck pain and continued the 35 pound lift restrictions and encouraged Mack to ice the affected area and take Celebrex consistently.

50. On January 4, 2012, Vonderau noted that Mack was tolerating full duty work, although he still had some discomfort and was taking Celebrex once daily. Vonderau noted that Mack's left elbow was doing quite well and that Mack "has some left sided neck discomfort but it has been tolerable." Vonderau recommended home exercises for the next four to six weeks.

51. On February 17, 2012, Vonderau saw Mack who was complaining of some left sided neck pain but it has been tolerable and he was only having minimal discomfort in the left elbow. Vonderau continued him working full duty and recommended he continue taking Celebrex.

52. On April 25, 2012, Vonderau saw Mack for an exacerbation of his neck pain. Vonderau reported that after Mack's last injection on July 19, 2011, he had no significant discomfort until January of 2012. Vonderau noted in March or April Mack took a long drive and his symptoms worsened. Mack was complaining of pain in the left lower cervical paraspinal region with radiation along the medial border of the left scapula and occasionally along the left upper trapezius muscle. Mack was describing the pain as a dull aching sensation rated from 5/10 to 9/10 in severity. Vonderau noted that he had neck pain localized to the left lower cervical paraspinal region, pain radiation into the left parascapular region and prior cervical MRI evidence of a left sided disk herniation at C5-6. Vonderau noted that Mack was "experiencing an exacerbation of his left C6 radicular symptoms." Because he had "done very well with epidural steroid injections in the past" Vonderau offered a repeat injection.

53. On May 3, 2012, Vonderau performed another epidural steroid injection for the left C6 radiculitis.

54. On May 18, 2012, Vonderau saw Mack who reported he had had "excellent relief" with the epidural steroid injection. Mack still had some mild discomfort localized to the left lower cervical paraspinal region, but denied any radiation of the pain. Mack had been able to work full duty without much problem and was still taking Celebrex daily.

55. On October 5, 2012, Vonderau saw Mack who reported that over the last two to three weeks he had had increased pain localized to the bilateral cervicothoracic junction areas, left greater than right. Vonderau noted Mack's pain will radiate into the left parascapular region, but not distal to the shoulder. Mack was taking Celebrex and was no longer working for the Rapid City School District, and had been working at a new job since August 1st. Vonderau recommended another epidural steroid injection for the exacerbation of the left sided neck pain.

56. On October 12, 2012, Vonderau performed another epidural steroid injection for "left lower cervical radiculitis."

57. On October 26, 2012, Vonderau saw Mack who reported he had 75 percent to 80 percent relief with the repeat cervical epidural steroid injection. Vonderau noted Mack did not have any radiation of the pain today, had been taking Celebrex and was working full duty.

58. On May 7, 2013, Mack was seen by Dr. Vonderau who performed another epidural steroid injection for left lower cervical radiculitis.

59. On May 31, 2013, Vonderau saw Mack who was reporting he had had "almost complete relief with the repeat epidural steroid injection." Vonderau noted Mack still takes Celebrex daily and tries to avoid heavy lifting at work to reduce the chance his symptoms will flare up. Id.

60. On March 5, 2014, Mack was seen by Dr. Nolan Segal for an "independent medical evaluation" at the request of Penny Call, an adjuster for Risk Administration Services (Insurer). Segal noted that Mack had aching in his neck but that his left arm was fine now but that he had had a flare up in his symptoms about two weeks ago. Segal noted Mack was "thinking about getting another injection last week; however, symptoms are getting less now, but slowly."

61. Segal expressed an opinion that Mack's current complaints are the result of a "chronic degenerative process" and "would not be considered a result of an acute injury." Segal opined that the July 28, 2010 injury just caused a temporary aggravation of any underlying degenerative condition to his cervical spine." Segal opined that the July 28, 2010 injury is no longer a major contributing cause to his disability, impairment, or need for treatment and that his employment related activities did not contribute independently to his current disability, impairment, or need for treatment. Segal opined that "he would have required treatment through April 29, 2011, when it was stated he was at maximum medical improvement and was to return to full duty work." Segal did not find any evidence of symptom magnification, malingering, secondary gain, or functional overlay. He believed Mack's subjective complaints were consistent with his radiologic studies and objective findings."

62. On July 18, 2014, Claimant's counsel wrote to Dr. Vonderau and asked for his opinion as to whether Mack's work injury of July 28, 2010, is and remains a major contributing cause of his current need for medical treatment and current condition. Dr. Vonderau responded and stated "Yes, the work injury of 7/28/10 remains a major contributing cause of his current symptoms and need for treatment." Vonderau explained "The disk herniation at C5-6 was a new finding when compared to his prior study on 5/4/2000. Mr. Mack was not experiencing any significant left upper extremity symptoms just prior to his work injury on July 28, 2010."

63. On February 16, 2015, Dr. Vonderau saw Mack who was complaining of an exacerbation of his neck pain. Vonderau noted that Mack's last injection was performed on May 7, 2013, and gave him relief for approximately six to eight months. Vonderau noted that since that time, his pain has been gradually worsening but Insurer denied his claim. Vonderau noted that Mack had been taking Celebrex in the past but Dr. Schaubauer recommended he take Aleve in lieu of Celebrex. Vonderau noted Mack had pain in his bilateral mid/lower cervical paraspinal regions with radiation into the left parascapular region and to the left shoulder. Vonderau noted that Mack was now working at the base on flight simulators and the job was much less strenuous than his prior jobs. Vonderau noted that Mack was experiencing an exacerbation of his left C6 radicular symptoms and recommended another epidural steroid injection.

64. On March 6, 2015, Dr. Wade Jensen opined by letter after performing a medical record review. Jensen opined that Mack's work injury did not contribute independently to his current condition and that "I believe that this would have occurred regardless of incident based on his adjacent level degeneration and history of previous fusion at the C6-7 level."

65. On March 10, 2015, Vonderau performed an epidural steroid injection for left C6 radiculitis.

66. On April 20, 2015, Vonderau saw Mack who reported that the repeat injection gave him more than 50 percent relief. Vonderau noted he had occasional discomfort along the left upper trapezius region but denies distal radiation. Vonderau noted that Mack occasionally takes Aleve and that his lateral bending was limited to 50 percent on each side. Vonderau recommended that Mack condition with his home exercise program and stated "in general, he seems to get three to four months of relief with these injections."

67. On June 9, 2015, Dr. Vonderau testified by deposition. Vonderau noted that Mack's response to the steroid injections was good and the fact that he's getting relief from the injections which are directed at the nerve root is diagnostic. Vonderau explained "If the pain wasn't coming from the nerve roots in the lower part of the neck I wouldn't expect any significant relief." Vonderau opined that it would be reasonable to do as many as two or three injections per year, depending upon the severity of his symptoms.

68. Vonderau expressed an opinion to within a reasonable degree of medical certainty that the injury at work on July 28th was a major contributing cause to his neck and left upper extremity symptoms and the need for his treatments. Vonderau explained "the disk herniation was a new finding, and that wasn't present on his prior studies. He had this trauma and subsequently was found to have the disk herniation at the C5-6 level, which corresponded perfectly to the symptoms he was describing. So it was really a very logical presentation."

69. Vonderau testified that Mack had degenerative changes at several levels, but the primary finding was this disk herniation at the C5-6 level on the left." Vonderau

did not believe that Mack was having any symptoms as a result of his degenerative changes but that the problems with his current problems were attributed to the disk herniation at the C5-6 level.

70. Vonderau disagreed with Dr. Jensen's opinion that the work injury was not a major contributing cause to his disk herniation at C5-6. Vonderau explained "these disk herniations can occur with trauma, and Mr. Mack sustained trauma, was found to have a disk herniation, had new symptoms immediately after the fall at work, and the symptoms matched well with the disk at the C5-6 level so I would agree that he did have degenerative changes in his neck and those can contribute to a disk herniation. It would certainly make him more prone to having a disk herniation, but I feel the herniation itself is a direct result of the trauma related to the fall."

71. Vonderau testified how Mack's fall on his right side and his right hip and shoulder could cause the herniation at the C5-6 level. Vonderau stated that such a fall "would put more pressure on the right side of the disk and would off load the left side of the disk, so that could cause the disk herniation to the contralateral or the left side." Segal explained that it was relevant that Mr. Mack didn't seek any kind of medical attention between July and October of 2010. He testified "Well, if someone sustains a significant injury and has significant symptoms relative to that injury, I would expect that they would seek medical attention sooner than almost three months following the incident."

72. Segal admitted on cross examination that in the five years prior to the July 28, 2010 fall, Mr. Mack did not receive any medical treatment at all for neck or left arm complaints.

73. After Dr. Segal's evaluation, Insurer denied any more workers' compensation benefits. Mack or his health insurance has paid $2,399.42, including interest for the treatment of his neck and left arm pain since the denial.

74. Addition facts may be discussed in the analysis below.

Analysis:

Mack, as the claimant, has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry Inc., 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353,358 (SD 1992).

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

> [O]nly 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).

"The 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." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted).

Mack had a work-related injury in 1999 that resulted in neck and radicular pain in his left arm. He underwent diskectomy and fusion of his cervical spine at the C6-7 level. After the surgery, his radicular pain resolved and he only suffered minor neck pain which he treated occasionally with Celebrex. From May of 2000 until October of 2010, Mack received no medical treatment for his neck and arm pain.

On July 28, 2010, Mack suffered a traumatic slip and fall. The evidence suggests that his neck was immediately sore and hurt.

The Employer and Insurer question Mack and his wife's testimony at hearing that he began suffering a re-occurrence of the radicular pain in his left arm within a week or two of the fall, because Mack did not seek medical treatment until three months after the fall.

The Department believes Mack and his wife's testimony. Their testimony was credible. They could not pin-point a specific date when the symptoms became worse. Had they lied, it would have been easy enough for them to fabricate a date. In addition, Mack gave the appearance of an individual who would try to "tough out" the pain, hoping that it would resolve on its own. He had learned over the years to live with a certain amount of pain and had missed little or no work during that time.

After he finally sought treatment, it was discovered that he had a herniation at the C5-6 level of his spine, which had not existed in previous MRIs and that the experts of all the parties agreed was the cause of his pain.

Dr. Vonderau opined that Mack's fall was a major contributing cause of the herniation and current need for treatment. Dr. Segal opined that Mack suffered an aggravation of the degenerative process which was occurring at several levels of Mack's spine but that it had resolved as of April 29, 2011, when Dr. Vonderau found Mack to be at maximum medical improvement. The Department finds Dr. Vonderau's opinion to be the more persuasive.

The degenerative changes in Mack's spine were asymptomatic prior to his fall. He had gone from 2000 until October of 2010 without any treatment of his neck or arm pain prior to his fall. He began suffering severe neck and arm pain shortly after the fall which has continued until this time. MRIs showed no herniation at C5-6 prior to the fall but did after. Under these circumstances it more likely than not that the trauma of the fall caused the herniation at the C5-6 level.

In addition, there is no evidence to support Dr. Segal's opinion that an aggravation was resolved as of April 29, 2011. There has been no objective or subjective changes in Mack's condition since the fall. Mack's symptoms and treatment remained the same both before and after that date. He suffers periodic exacerbations of his condition which are treatment with steroid injections. The injections give Mack some relief of his symptoms for three to four months when cycle begins again.

There is also some controversy whether Mack struck his head on the floor during his fall. The Department is of the opinion that the herniation would have occurred in any event. Dr. Vonderau explained how the fall on his right side, hip and shoulder would put more pressure on the right side of the disk and would off load the left side of the disk. These forces would be the same whether he struck his head or not. In fact, physics suggests that the stress on the neck could be greater if the head did not strike the floor because the head striking thee floor may absorb some of the energy placed on the neck, though this conclusion is admittedly speculative.

Finally, there was some discussion in the parties briefs whether the standard to be used in this case arises from SDCL 62-1-1(7)(a) or SDCL 62-1-1(7)(c). Frankly, an argument could also be made that the appropriate standard arises from SDCL 62-1-1(7)(b). If Mack's July 28, 2010, fall combined with his preexisting degenerative disease to cause his current condition, his fall is compensable if the fall was and remains a major contributing cause of his need for continued treatment under SDCL 62-1-1(7))b). If Mack's July 28, 2010, fall combined with his 1999 work-related injury to cause his current condition, the fall is compensable if the fall contributed independently to the his need for treatment under SDCL 62-1-1(7)(c). If neither of these standard are applicable then the appropriate standard is set forth in SDCL 62-1-1(7)(a), whether Mack's fall on July 28, 2010, is a major contributing cause of his current condition and need for treatment.

The Department is of the opinion that SDCL 1-1(7)(a) is the correct standard. While it is possible that the preexisting degenerative disease and the prior 1999 injury may have contributed to his condition, it remains no more than a possibility. The evidence simply does not rise to the level of probability. On the other hand, the 1999 and 2010 injuries

caused separate and distinct conditions. The 1999 injury caused the herniation at C6-7 and the 2010 fall was the major contributing cause of the C5-6 level herniation.

Mack has met his burden of showing that his July 28, 2010, work injury is a major contributing cause of his current neck and radicular left upper extremity pain. Therefore, he is entitled to past and future benefits for the treatment of his neck and radicular pain.

Conclusion:

Mack shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Mack's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Mack shall submit such stipulation together with an Order consistent with this Decision.

Dated this 9th day of February, 2016.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge