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

WORKERS' COMPENSATION

THOMAS E. ILIFF, **HF No. 24, 2009/10**

Claimant,

v. **DECISION**

ROTH TRUCKING, INC.,

Employer,

and

WESTERN NATIONAL 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. The above-entitled matter came on for hearing before Catherine Duenwald, Administrative Law Judge, Division of Labor and Management on March 31, 2010, in Rapid City, South Dakota. Attorney Jon LaFleur represented Claimant, Thomas E. Iliff (Claimant). Attorney Kristi Geisler Holm represented Employer and Insurer, Roth Trucking Inc. and Western National Insurance Company (Employer and Insurer). The witnesses presenting testimony at hearing were: Claimant, Monty Hein, and David Roth.

This case has been bifurcated. The issues presented at hearing are:

1. Whether the April 21, 2008 semi-truck collision is a major contributing cause of Claimant's current headache, vision, and neck problems? SDCL § 62-1-1(7).

2. Whether Claimant's treatment with recommended rehabilitation doctors, physical therapists, neuro-opthalmologists, and other eye care specialists is not necessary, suitable or proper? SDCL § 62-4-1.

3. Whether the nature of the injury that occurred April 21, 2008, required the treating physician to consult with or refer Claimant to a neuro-opthalmologist or other specialists? SDCL § 62-4-43.

FACTS

At the time of hearing, Claimant was 44 years of age. Claimant attended school through the eleventh grade and has worked for various companies since that time. Claimant began working for Employer in April 2008. Claimant has a Commercial Driver's License and has been working as a commercial truck driver since 2004.

On April 21, 2008, Claimant was driving a double trailer, belly dumping, semi-tractor combination. Claimant was hauling sand from a site approximately 50 miles east of Rapid City, South Dakota to the Birdsall Sand and Gravel plant in Rapid City. Claimant pulled into the Birdsall Sand and Gravel yard for his last run at approximately 5:30 pm. As he pulled into the yard, he pulled off to the side along the perimeter fence to fill in his log book while another of Employer's truck drivers, Monty Hein, dumped a load of sand. Mr. Hein was also driving a similar semi-tractor trailer combination.

Mr. Hein drove through the dump site and his second trailer or pup trailer, failed to empty. Hein signaled over the closed circuit radio that he was going to circle through again in order to drop the full trailer. In order to exit the drop site, a driveway leaves the dump site, makes a sharp left hand turn, goes up a steep incline, goes around a slight right curve, to a slight left turn and down the same degree of incline to lead to the entrance / exit of the yard. When Mr. Hein came down the hill towards the entrance of the yard, his trailer hit a patch of sand or gravel and jackknifed, sending his full pup trailer sliding into the rear end of Claimant's full pup trailer. Claimant tractor-trailer combination moved ahead a number of feet, at least 10-15 feet. The impact of the collision caused Claimant's head to jerk forward and strike on the steering wheel.

The bumper of Claimant's trailer was pushed into the rear wheels, preventing the trailer from moving. Employer called for a mechanic to come to the yard and pull the trailer body away from the tires. Claimant asked Employer whether Employer had a company doctor. Employer told Claimant to go to the emergency room if he was injured. When Claimant had emptied the load and returned the truck to Employer's lot, Claimant drove to his home, picked up his fiancée, and drove to the local hospital's emergency room.

Claimant reported to the providers at the Rapid City Regional Emergency Room that he had head, back and neck injuries with moderate to severe pain. An exam revealed muscle spasms and decreased range of motion. Claimant was placed with a cervical collar. The Emergency room doctor ordered Claimant off work until April 23, 2008, then to return to work only at light duty with no prolonged standing or walking and no lifting objects over ten pounds. Claimant was counseled on follow-up care, prescribed Ibuprofen, and Valium.

Claimant returned to the emergency room on April 25, 2008 with a persistent headache behind his eyes, left shoulder, neck and back pain. A CT Head without contrast was performed that same day. Claimant was given prescriptions for Dilaudid, Phenergan and Vicadin and was told to follow up with a family practice doctor that week. An MRI of

the brain was scheduled for April 28, 2008, due to abnormalities found on the CT Head scan.

On April 28, at the time of the MRI, symptoms included dizziness, headaches, excessive tiredness, and blurred vision. The workers' compensation caseworker requested that Claimant follow-up with the Rapid City Medical Center.

On April 29, Claimant was seen by Certified Nurse Practitioner, Debby Jensen. Claimant reported that he continued to have "headache, blurred vision, neck pain and back pain since the accident." Claimant stated that he was afraid to drive due to blurred vision and his neck and back pain. CNP Jensen placed Claimant on work restrictions that included no truck driving. Jensen advised Claimant to see a physical therapist and a neurologist for evaluation of the blurred vision.

Claimant saw physical therapist, David Barraclough on May 14, 2008 for the initial consultation. Barraclough noted that Claimant continued to have significant strain / whiplash-type symptoms, in addition to headaches and blurred vision. Claimant treated on eight (8) occasions with Barraclough.

On May 7 and 27, 2008, CNP Jensen saw Claimant for follow-up appointments. Claimant was advised to continue with physical therapy and get an appointment with a neurologist to evaluate his vision changes. Ms. Jensen suggested that Claimant undergo a cervical spine MRI. Claimant told Ms. Jensen that he would have to wait on the MRI until Insurer approved the test.

On June 17, 2008, CNP Jensen again saw Claimant for a recheck. Claimant continued to complain of headaches and blurred vision. Claimant was performing the exercises given to him by Barraclough. Ms. Jensen renewed the work restrictions previously given to Claimant. Claimant was not to drive truck due to blurred vision; limit lifting, pushing, and pulling to 10 pounds; no ladders; limit bending and twisting; and no kneeling, crawling, or squatting. Ms. Jensen continued to prescribe analgesics and medication for muscle spasms.

Claimant continued to have symptoms of headaches and blurred vision. Claimant had an MRI of the cervical spine on June 30, 2008, as scheduled by CNP Jensen. The findings concluded that Claimant appeared to have degenerative disk disease at C4-5 and C5-6. Insurer agreed to a neurologist consultation in November 2008.

Dr. Brian Tschida, a board certified neurologist with Black Hills Neurology, performed an examination of Claimant on January 5, 2009. Dr. Tschida reviewed all MRI's and scans of Claimant and took a complete history with Claimant. The physical examination revealed "significant tenderness on palpation of the cervical paraspinal muscles bilaterally" and a "very obstructed posterior pharynx." Claimant also showed a decreased range of motion of the head and neck in all directions. Claimant complained of symptoms of hazy or blurry vision, headaches that occur daily including while sleeping, and chronic neck and back pain.

Dr. Tschida is of the opinion that surgical intervention will not solve the issue of headaches, visual blurring, and neck and back pain. The MRI scans showed degenerative changes at C5-C6, but that the changes were typical of normal arthritis and would not be contributing to his current complaints. Dr. Tschida did note that since there was no record of symptoms occurring between his head injury in 2005 and the date of injury in 2008, that the incident in 2008 either exacerbated an underlying condition or precipitated (caused) the condition. Dr. Tschida recommended a sleep study (nocturnal Polysomnogram) be conducted to test for sleep apnea, as that may be a contributing factor to the complaints. He also recommended an ophthalmology review for the blurry vision.

On February 2, 2009, Claimant was seen by Dr. Gail Bernard, a board certified ophthalmologist practicing with The Eye Doctors, associated with the Rapid City Medical Center, LLP. The eye exam revealed that Claimant had an unaided visual acuity of 20/30 in each eye. Dr. Bernard saw some slight vertical cupping of his optic nerves, placing Claimant as possibly developing glaucoma. It was Dr. Bernard's opinion that Claimant's blurred vision was caused by presbyopia and that reading glasses would help with his reading vision. Dr. Bernard did not have an opinion as to why Claimant's distance vision would be blurred as well. Dr. Bernard thought Claimant saw well enough to pass a driver's test and would be safe to drive.

On June 23, 2009, Claimant was seen by Dr. Rand Schleusener with Black Hills Orthopedic and Spine Center. Dr. Schleusener noted that Claimant's current complaints were "neck pain and stiffness, midback pain and low back pain, as well as bilateral upper extremity numbness and tingling and lower extremity numbness and tingling as well as blurry vision and diminished ability to read." After reviewing all Claimant's scans and records and performing a physical exam, Dr. Schleusener was of the opinion that Claimant would not benefit from surgery but rather physical therapy, immobilization, and a referral to a physiatrist. The doctor also recommended that Claimant return to see a neurologist for his blurry vision. Dr. Schleusener also noted that Claimant's symptoms were likely related to his work injury, as described.

Dr. Monte Dirks, an ophthalmologist with the Black Hills Regional Eye Institute, reviewed Claimant's records in early 2010. Dr. Dirks is of the opinion that the optic nerve cupping seen by Dr. Gail Bernard in February 2009, could have been caused by compressive trauma to the optic nerves. In a letter to Claimant's attorney on January 13, 2010, Dr. Dirks recommended that Claimant see a neuro-ophthalmologist, specifically his colleague, Dr. Kristin Tarbet. Dr. Tarbet utilizes specialized testing in the diagnosis and management of optic nerve problems. This testing can also discriminate between optic nerve injury and occipital cortical brain injury.

Claimant has had a number of previous injuries to his head. The first such accident was in March 1999. Claimant was involved in a motor vehicle accident and sustained a blow to the head. Afterwards, Claimant complained of both neck and low back pain. Two years later, in 2001, the vehicle that Claimant was driving struck another car at 30-40

mph. Claimant's head hit the windshield in the accident and was knocked unconscious. Claimant suffered a large bruise, abrasion, and scalp laceration as well as neck pain.

In early 2005, Claimant was involved in a bar fight, where he was struck on the head and while falling, hit a glass ledge. Claimant lost consciousness and sustained a number of lacerations and contusions to his face and back of skull. Claimant lost his front left incisor and suffered a fractured jaw. A CT scan was taken of Claimant's head and cervical spine at that time. The preliminary radiology report for this incident concluded that there were no intracranial hemorrhage, midline shift or mass effect and no acute intracranial process or skull fractures noted. The radiology report also indicated that Claimant did not suffer any damage to his cervical spine. Claimant eventually underwent facial surgery to correct the cuts on his face and his fractured maxilla (upper jaw).

Between 2005 and 2008, there is no evidence that Claimant sought medical treatment for head or neck pain. Claimant presented credible testimony that he did not experience any symptoms from his previous injuries during the intervening years.

Additional facts will be developed below.

ANALYSIS

Whether the April 21, 2008 semi-truck collision is a major contributing cause of Claimant's current headache, vision, and neck problems? SDCL § 62-1-1(7).

The question of causation must be answered prior to the questions of whether specific medical treatment is necessary, suitable, or proper. The South Dakota Supreme Court has ruled:

> In a workers' compensation dispute, a claimant must prove all elements necessary to qualify for compensation by a preponderance of the evidence. … A claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty. Causation must be established to a reasonable degree of medical probability, not just possibility. The evidence must not be speculative, but must be precise and well supported.
>
> 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. 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.

Darling v. West River Masonry, Inc., 2010 SD 4, ¶¶11-13, 777 NW2d 363,367 (citations and quotes omitted).

Claimant was not suffering from blurry vision, headaches, neck or back pain prior to the accident on April 21, 2008. It is not disputed that a pup trailer, full of sand, driven by Monty Hein hit the back end of Claimant's pup trailer which was also full of sand. It is also not disputed that the force of impact was great enough to crush the pup trailer's aluminum bumper into the rear tires preventing the tires from moving, and to push the pup trailer, the first trailer, and the semi-tractor ahead a number of feet. There are no expert estimates as to how fast Hein's pup trailer was skidding when it jackknifed and careened into Claimant's pup trailer. Logically, Hein's pup trailer could have been moving at a faster speed than the semi-tractor, as the trailer jackknifed[1] or moved ahead of the hitch to the first trailer prior to the collision, to form an angle of less than 90 degrees. The estimate of how far Claimant's vehicle moved after the collision is also not precise, but it is a fact that the combination did move forward a number of feet.

The fact remains, that at the time of the accident Claimant hit his head on the steering wheel and suffered from head, neck, and back pain from that time forward. It is undisputed that Claimant was suffering from aftereffects when he had his fiancée accompany him to the emergency room only a few hours after the accident.

Employer and Insurer had Dr. Richard Farnham perform a medical records review of Claimant's file. Dr. Farnham is a forensic medical examiner. He is board certified as a medical and forensic examiner, as well as a disability analyst and medical review officer. Dr. Farnham specializes in the area of general surgery, orthopedics and occupational medicine.

The review was dated June 9, 2008. In that report, Dr. Farnham made the opinion that Claimant could not have suffered a head injury as the result of the accident based upon Employer and Insurer's reported speed of Hein's truck. Dr. Farnham is not an expert in the field of accident reconstruction, physics, mathematics or any similar field of study. Dr. Farnham based his opinion on suppositions and theories outside his area of expertise. His opinion regarding whether Claimant's truck did or did not move or whether Claimant may or may not have hit his head, due to the speed of the Hein truck, the photographs of Claimant's truck after the bumper was pulled out, and other similar factors, is not reliable. The factors surrounding the accident are not conclusive and therefore the conclusions cannot be reliable.

The South Dakota Supreme Court has often said that "medical opinions can be no better than the facts they rely on." *Tebben v. Gil Haugan Construction, Inc*., 2007 SD 18, ¶ 22, 729 NW2d 166, 172 (additional citations omitted). Furthermore, in his report, Dr. Farnham did not take into consideration the fact that Claimant did report a head

[1] Merriam-Webster Dictionary, On-line Edition (www.merriam-webster.com/dictionary/jackknife): Jackknife (intransitive verb): to turn and form an angle of 90 degrees or less with each other —used especially of a tractor-trailer combination.

injury the same day as the accident. Dr. Farnham's report is based upon a faulty presumption that Claimant did not report a head injury until eight days after the accident. Moreover, Dr. Farnham's medical opinion is that none of Claimant's symptoms reported on April 21, 2008 were caused by the accident on April 21, 2008 due to the mechanism of the accident. Dr. Farnham went outside the scope of his expertise to derive medical opinions from his own reconstruction of the accident based upon inconclusive information. Dr. Farnham's opinion regarding whether the truck accident is the cause of Claimant's neck, back, and head injury is not reliable.

The records from the Rapid City Regional Emergency Room note that Claimant did have complaints of head, neck, and back pain when he was first seen at the hospital. The injuries sustained are well documented as being from the April 2008 accident. Again on April 25, 2008, the medical records reveal that Claimant reported suffering from a "[headache] behind eyes 'like a migraine.'" And then on April 28, when filling out his forms for the MRI, Claimant reported that he has blurred vision. These symptoms have not changed.

The ophthalmologist who first saw Claimant, Dr. Gail Bernard, was of the opinion that Claimant suffered from presbyopia, a normal aging process of the eyes. Dr. Bernard suggested that Claimant try reading glasses for his blurring vision. Claimant tried a number of different powers of reading glasses, but they did not help with the blurring.

Claimant then saw Dr. Monte Dirks. Dr. Dirks is of the opinion that optic nerve cupping in Claimant could be caused by compressive trauma to the optic nerves. Dr. Dirks is of the opinion that Claimant's visual blurring could be caused by trauma to the optic nerve. Until certain tests are conducted, there is no way of telling whether the optic nerve injury was caused from trauma or natural occurrence.

The Supreme Court is clear on who has the burden of proof for causation cases. They have stated, "The claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability." *Wise v. Brooks Const. Ser*., 2006 SD 80, ¶17, 721 NW2d 461, 466 (internal citations omitted). In the above case, the claimant, Wise, provided the only medical evidence. Wise, as claimant, had the burden of proving a causal connection between his condition and work-related injury. The medical provider, in that case, did not specifically state that the injury was a major contributing cause of Wise's condition. The Department's opinion, which was upheld at both the Circuit level and at the Supreme Court, was that Claimant met his burden of proof based upon all the evidence presented. *Id.* at 469. The Wise case stands for the proposition that the magic words of "major contributing cause" are not necessary to prove causation in South Dakota. *Id.* at 469 – 470.

In the case at hand, Claimant's doctors did not use the "magic words" that the accident was a "major contributing cause" of Claimant's condition. Claimant's medical provider, CNP Debby Jensen, stated in the medical records that Claimant's headaches and neck problems were caused by the April 21, 2008 accident. CNP Jensen began to see

Claimant shortly after the accident, initially as a follow-up from the emergency room visit. Claimant continued to see CNP Jensen for treatment after the initial recheck. The medical records are clear that Claimant reported to the ER and then to CNP Jensen after being involved in the truck accident and that the symptoms are a direct result of the accident.

Dr. Brian Tschida, the neurologist, explained with a reasonable degree of medical probability, that because Claimant was symptom free between 2005 and 2008, the April 2008 injury "may have exacerbated an underlying condition or actually have even precipitated" the symptoms. Dr. Schleusener, the orthopedic surgeon, went farther to opine with a reasonable degree of medical probability that he did "think this gentleman's injury as he has described it and the facts before me are probably related to his work injury." The opinions of these doctors are well-supported by the medical records and establish a causal relationship between Claimant's April 21, 2008, work injury and his need for treatment. *Id.* Claimant supplied sufficient medical evidence that the truck accident was a major contributing cause of his headache, vision, and neck problems. *Wise* at 470. See also *Steinberg v. South Dakota Department of Military and Veterans Affairs*, 2000 SD 36, ¶ 29, 607 N.W.2d 596, 606.

The preponderance of the evidence shows that while at work for Employer on April 21, 2008, there was a motor vehicle accident in which Claimant hit his head and suffered head, neck and back injuries. These injuries and the accident directly precipitated the symptoms of headaches, blurred vision, and neck and back pain. The preponderance of the evidence shows that the April 21, 2008 semi-truck collision is a major contributing cause of Claimant's current headache, vision and neck problems.

Whether Claimant's treatment with recommended rehabilitation doctors, physical therapists, neuro-opthalmologists, and other eye care specialists is not necessary, suitable or proper?

and

Whether the nature of the injury that occurred April 21, 2008, required the treating physician to consult with or refer Claimant to a neuro-opthalmologist or other specialists?

The next two issues will be addressed together as the arguments for both are very similar. SDCL § 62-4-1 requires that employers provide all "necessary first aid medical, surgical, and hospital services or other suitable and proper care…" The law allows a claimant to make the initial selection of a medical provider and to submit the bills to Employer and Insurer for payment. SDCL §§ 62-4-1, 62-4-1.1. The law requires that Employer and Insurer pay all properly submitted bills within 30 days of receipt or give a reason or denial for the non-payment. Failure to comply with § 62-4-1.1 is punishable by an administrative fine. SDCL §62-4-1.2.

The South Dakota Supreme Court has clarified the burden of proof for this issue. "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. Prostrollo Motors*, 2003 SD 2, ¶ 32, 656 NW2d 299, 304 (SD 2003) (quoting *Krier v. John Morrell & Co.*, 473 NW2d 496, 498 (SD 1991).

Claimant's first medical provider was CNP Jensen. She saw Claimant until July 10, 2008. CNP Jensen recommended that Claimant see a physical therapist and a neurologist. Claimant participated in physical therapy until Insurer denied Claimant's claim for benefits on June 12, 2008. A neurology appointment was not scheduled until late 2008 due to issues securing a neurologist that would treat Claimant. Claimant was unable to make an appointment with a doctor until it was authorized by Employer and Insurer. The doctors would not see Claimant without his having authorization for payment by Employer and Insurer.

In November 2008, about five months after being referred by his treating physician, Insurer finally agreed to have Claimant see a neurologist, Dr. Brian Tschida. Dr. Tschida examined Claimant one time, on January 5, 2009. Dr. Tschida believed Claimant could have sleep apnea and should be tested for such. At that time, Dr. Tschida recommended Claimant consult with an ophthalmologist for the eye issues. Dr. Tschida also recommended a trial period of a dosage of painkiller for headaches with the possibility of building up to a higher dose. This drug recommendation, by its nature, would necessitate a follow-up visit to Dr. Tschida or his office. No follow-up for the prescription was ever documented. The record does not indicate that Claimant was ever tested for sleep apnea. In the weeks following the initial appointment, Claimant found that he could no longer schedule an appointment with Dr. Tschida as Employer and Insurer denied any further treatment with Dr. Tschida. This information was given to Claimant orally via Dr. Tschida's office. This testimony by Claimant was credible. Dr. Tschida did write in his report that the accident did likely exacerbate an underlying condition or precipitate Claimant's symptoms.

Employer and Insurer paid for a visit to an ophthalmologist, Dr. Bernard, who recommended reading glasses. Claimant tried reading glasses, but the glasses did not help his far-sighted blurring vision. As noted above, Dr. Bernard did not have an answer why Claimant had far-sighted blurriness, but that Claimant's general vision made Claimant okay to drive his semi.

Employer and Insurer never issued a second denial of coverage letter to Claimant. They just stopped pre-authorizing further treatment at the request of medical providers. Failing to authorize treatment is the same as denying medical treatment, although the Supreme Court has ruled Employer and Insurer do not have that power. "Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered." *Hanson v. Penrod Construction Co.,* 425 NW2d 396, 399 (S.D. 1988). Employer and

Insurer did not give any further reason for denying or failing to authorize medical treatment, but rely on their initial denial letter.

In their brief, Employer and Insurer argue that Dr. Tschida's opinion was that nothing more could be done. That argument is clearly in contradiction to Dr. Tschida's records. Dr. Tschida only remarked that surgical intervention on Claimant's cervical spine was not recommended, he did not report that Claimant was at maximum medical improvement or that no other medical treatment could assist Claimant. Claimant attempted to make a follow-up appointment but was refused by Dr. Tschida's office, as Employer and Insurer no longer agreed to pay for medical coverage.

As Employer and Insurer were no longer paying for Claimant's medical coverage, Claimant, through his attorney, set up an appointment with Dr. Rand Schleusener, an orthopedic surgeon in June 2009. At that point, Claimant had no obligation to seek approval or authorization from Employer and Insurer to obtain medical treatment. The choice by Claimant to seek medical treatment from Dr. Schleusener was not a second opinion, as argued by Employer and Insurer.

Dr. Rand Schleusener became Claimant's treating physician due to Employer and Insurer's denial of medical coverage. The Supreme Court has written that SDCL § 62-4-1 places an affirmative duty upon Employer to provide medical treatment to Claimant. *Cozine v. Midwest Coast Transport, Inc.*, 454 NW2d 548, 555 (S.D. 1990). In the above case, the claimant, Cozine, was denied treatment from Insurer and therefore, had to make private arrangements for medical care. The Court wrote, "[Employer] knew that [Claimant] needed additional treatment beyond [the date of denial], yet the company failed to properly provide that treatment. Therefore, [Claimant] was within her rights to make suitable, independent arrangements at [Employer's] expense." Citing 2 Larson's Workmen's Compensation Law § 61.12(d) at 10-806 (1989).

Similarly, Employer and Insurer knew that Claimant needed additional treatment from Dr. Tschida, but refused to authorize or pay for subsequent appointments.

The treating physician, Dr. Schleusener, referred Claimant to Dr. Monte Dirks, an ophthalmologist. Dr. Dirks recommended that Claimant see a neuro-opthalmologist for more definitive testing of the optic nerve. Dr. Schleusener has also recommended that Claimant return to physical therapy and be treated by a physiatrist. As Claimant's symptoms have continued since the time of the accident, Dr. Schleusener also recommended, at one time, that Claimant again see a neurologist. SDCL 62-4-43 allows the treating physician to make referrals to specialists, as the nature of the injury shall require.[2] Employer and Insurer are contesting that these referrals are necessary or suitable given the nature of the injury.

[2] SDCL § 62-4-43. The employee may make the initial selection of the employee's medical practitioner or surgeon from among all licensed medical practitioners or surgeons in the state. The employee shall, prior to treatment, notify the employer of the choice of medical practitioner or surgeon or as soon as reasonably possible after treatment has been provided. The medical practitioner or surgeon selected may arrange for any consultation, referral, or extraordinary or other specialized medical services as the nature

The nature of the injury results from a skidding trailer full of sand sliding into Claimant's equally full but unmoving trailer causing the total kinetic energy of Claimant's vehicle to suddenly increase. The resulting momentum causes Claimant's head to strike the steering wheel which causes Claimant to have head, neck, and back injuries which is the nature of the injury.

Some of the specialists Employer and Insurer are contesting will perform diagnostic tests. The tests may reveal that the symptoms are not caused by the April 2008 accident. 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.
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> *Perry v. Ridgecrest Intern.*, 548 So2d 826, 827- 28 (FlaApp 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, because Claimant has yet to see a neuro-opthalmologist, it is unclear whether Claimant's blurry vision and cupped optic nerves are from trauma or are naturally occurring. It is also unclear whether Claimant's headaches are caused by something other than the blow to the head when he hit the steering wheel, such as sleep apnea.

Employer has failed to show that the recommendations by Claimant's treating physician, for a neuro-opthalmologist, a neurologist, a physical therapist, and a physiatrist are not necessary, suitable, or proper.

Finally, the nature of the injury that occurred April 21, 2008, required the treating physician, an orthopedic surgeon, to consult with or refer Claimant to a neuro-

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of the injury shall require. The employer is not responsible for medical services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section. If the employee is unable to make the selection, the selection requirements of this section do not apply as long as the inability to make a selection persists. If the injured employee unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment, the employer is not liable for an aggravation of the injury due to the refusal and neglect and the Department of Labor may suspend, reduce, or limit the compensation otherwise payable. If the employee desires to change the employee's choice of medical practitioner or surgeon, the employee shall obtain approval in writing from the employer. An employee may seek a second opinion without the employer's approval at the employee's expense.

opthalmologist or other specialists, pursuant to what is allowed by SDCL 62-4-43. The evidence has shown that the nature of the injury was to Claimant's head, back, and neck. Employer has not shown that recommended treatment to be not necessary, suitable, or proper. Claimant has shown that the treating physician's medical referrals are necessary, given the nature of the injury.

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 this ___15th_____ day of __September____, 2010.

BY THE DEPARTMENT,

_____/s/ Catherine Duenwald_____
Catherine Duenwald
Administrative Law Judge