SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

LINDA CAMPBELL,

Claimant, **HF No. 255, 2007/08**

vs. **DECISION**

TOWER TRANSPORT, INC.,

Employer,

and

BERKLEY RISK ADMINISTRATORS COMPANY, LLC,

Insurer.

This matter comes before the Department by way of a Small Claims Petition for Workers' Compensation Benefits pursuant to SDCL §62-2-12 e.s. The parties have submitted the matter by stipulated record and briefs. Claimant, Linda Campbell, was represented by Michael F. Marlow and Lindsay J. Hovden, Yankton; Employer, Tower Transport, Inc., and Insurer, Berkley Risk Administrators Company, LLC, were represented by Robert B. Anderson, Pierre.

On September 18, 2004, Claimant fell from a trailer, and approximately 350 pounds of flowers fell on her. Employer/Insurer acknowledges liability for this injury, including reasonable and necessary medical costs, but disputes the claims involved here as unrelated, unnecessary, and/or unauthorized under law.

Dr. James Morland, an Idaho physiatrist, first saw the Claimant in November, 2004. In a March, 2006 letter, he noted that she had a work-related L5-S1 disk herniation, pre-existing degenerative disk disease with spondylolisthesis, a pre-existing cervical fusion at C6-7, cervical strain, and resolved left rotator cuff strain. He opined

that her future medical needs would be over-the-counter anti-inflammatories and analgesics such as Advil and acetaminophen.

Dr. Morland referred Claimant to Dr. Edwin Clark, an Idaho orthopedist, in November, 2006, for treatment of a frozen left shoulder. Dr. Clark restored her shoulder motion with conservative therapy and released her on January 30, 2007. His report on that date gave the opinion that her left shoulder pain was "directly related to the work related injury of September 18, 2004."

Dr. Morland reevaluated Claimant on November 6, 2007. He was asked about causation of Claimant's shoulder problems, and said "there is essentially a weak association between her symptomatology and her injury." On November 20, 2007, Claimant's attorney sent Dr. Morland a letter asking him to address causation as to her shoulder condition, and he concluded that "In my professional medical opinion, Linda Campbell's workplace injury sustained on September 18, 2004, is not a major contributing factor to her current need for treatment regarding her left shoulder."

Dr. Penny Beach, an Idaho family practice physician, began treating Claimant for shoulder pain sometime around May 26, 2006, when she asked Employer/Insurer to cover her treatment. She suspected Claimant had a left rotator cuff tear at that time. Dr. Beach commented in a June 25, 2007 note that "Linda has chronic shoulder pain which began after an industrial accident she suffered 9/18/04. Patient has arthritis in both the cervical spine and left AC joint of the shoulder; the pain from this arthritis has worsened considerably since the accident."

Dr. Beach ordered repeat MRIs for Claimant's cervical and lumbar spine, which were negative for a rotator cuff tear, but showed degenerative changes in the AC joint. Dr. Clark saw those films, and concluded on October 16, 2007 that they showed "no

significant increase in deterioration of the prior cervical fusion or the lumbar fusion or the adjacent intervertebral discs."

Claimant has claimed $290 for treatment provided by Dr. Beach between June 11, 2007 and September 17, 2007. Evaluation and management were billed for June 11, 2007, August 23, 2007, and September 17, 2007. Blood and urine testing were billed on August 28, 2007. The diagnoses connected with these billings were hypothyroidism, degeneration of the cervical intervertebral disc, headache, unspecified allergy, and contact dermatitis/eczema; however, in a July 13, 2007 chart document, Dr. Beach lists Claimant's "chief complaint" as "workmans comp shoulder."

Clamant's attorney sent a series of letters to Employer/Insurer's attorney on July 11, 2007, August 7, 2007 and August 23, 2007 which acknowledged that Employer/Insurer had denied coverage for Claimant's shoulder, and requesting authorization for her shoulder treatment. Employer/Insurer responded by letter dated September 17, 2007, denying that request.

Claimant also claims $648 billed by Napa Radiology and $3,023 by MRI Mobile for cervical and lumbar MRIs. These were repeat tests from those done by Drs. Morland and Clark, ordered by Dr. Beach and performed on September 4, 2007. Dr. Clark's October 16, 2007 report says "It is my opinion that the patient would best be served by a repeat consultation with Dr. Morland and/or referral to pain management … It is fortuitous that Dr. Beach performed the MRIs as this is extremely useful in guiding further care, knowing that there is no significant deterioration going on at this time."

The parties dispute Dr. Clark's $186 billing for an office visit on October 16, 2007, and Dr. Morland's $51.31 billing for an office visit on November 6, 2007. Dr. Clark saw her for an orthopedic reevaluation of her back and shoulder, recommending a follow-up with Dr. Morland and additional physical therapy for her back and shoulder. Dr. Morland

agreed with the therapy recommendation, and addressed the causation issue as to Claimant's shoulder problems. The therapy recommended by Drs. Clark and Morland was performed at Rehab Authority – Kuna from November 8, 2007 to December 5, 2007, at a cost of $1,935. The parties dispute the compensability of these charges.

A claimant must establish by a preponderance of the evidence that the injury arose out of the course of her employment and that her employment was a major contributing cause of her condition or her disability, impairment or need for treatment. Even if there is no dispute that a claimant suffered an initial work-related injury, that injury does not automatically establish entitlement to benefits for her current claimed condition. Rather, a claimant must establish that such injury became a major contributing cause of her current claimed condition. The testimony of medical professionals is crucial in establishing that a claimant's injury is causally related to the injury complained of because the field is one in which laypersons ordinarily are unqualified to express an opinion. Vollmer v. Wal-Mart Store, Inc., 2007 SD 25, ¶14, 729 NW2d 377.

SDCL 62-4-1 provides that the employer shall provide necessary medical care. 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. 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. Streeter v. Canton School District, 2004 SD 30, ¶¶ 25-26, 677 NW2d 221. Also, whenever the purpose of a 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. Mettler v. Sibco, Inc., 2001 SD 64, ¶9, 628 NW2d 722.

SDCL 62-4-43 provides, in pertinent part:

> 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 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 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.

Implicit in SDCL 62-4-43 is the premise that the employer made medical or surgical treatment available. Gilchrist v. Trail King Industries, Inc., 2000 SD 68, ¶33, 612 NW2d 10. Where an employer knows that an employee needs additional medical treatment, yet fails to properly provide it, the employee is within her rights to make suitable, independent arrangements at the employer's expense. Cozine v. Midwest Coast Transport, Inc., 454 NW2d 548 (SD 1990).

While the evidence is clearly conflicting on the point, Claimant has established by a preponderance that her work injury is a major contributing cause for the treatments she received. Dr. Clark and Dr. Beach both had that opinion. Dr. Morland did not think the shoulder condition for which Claimant treated in 2007 was work-related, though he conceded it was possible. Claimant has complained of shoulder pain since shortly after her work injury, has received treatment for it, and did not have it before her injury. No doctor has said that Claimant's neck and back problems are not work-related, and the treatments and tests provided here were for each of these areas to some degree.

There is no viable dispute that the claimed treatments and tests were medically necessary. All the doctors in the record have recommended what was done, and no physician has said it was unreasonable, excessive, or unrelated to the conditions treated.

Claimant did not get written authorization from Employer/Insurer to switch providers to Dr. Beach. Early on into that treatment, however, Employer/Insurer made it clear that it would not pay for any treatment to the shoulder under any circumstances. The last word from Drs. Clark and Morland at the time was that they had released her from care. Dr. Beach sent a letter early on in her treatment requesting Employer/Insurer to authorize treatment, and was refused. SDCL 62-4-43's apparent object is to prevent "doctor-shopping," but this does not appear to have occurred here. It is concluded and shall be ordered that Claimant is entitled to the benefits she requested in her petition. Costs of the petition shall be borne by the parties.

The Department's Findings of Fact, Conclusions of Law, and an Order shall accompany this Decision.

Dated this 7th day of November, 2008.

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James E. Marsh
Director