SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

GREG STURTZ,
Claimant,

HF No. 277, 2000/01

v.

DECISION

YOUNKERS, INC.,
Employer,
and

LIBERTY MUTUAL INSURANCE CO.,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. The parties agreed to submit this matter on a stipulated record. Rollyn H. Samp represents Claimant, Greg Sturtz, (hereafter Claimant). Steven Siegel represents Employer Younkers, and Insurer Liberty Mutual Insurance Company (hereafter Employer/Insurer).

Issues:

1. Whether Claimant suffered a compensable injury to his C5-6 level either on October 20, 1999, or as a result of subsequent surgeries.
2. Whether Claimant is entitled to temporary total and/or temporary partial disability benefits while recovering from his third cervical fusion surgery on January 18, 2002.
3. What is the amount of permanent partial disability from the October 20, 1999, incident?
4. Whether Claimant is entitled to reimbursement for certain out-of-pocket medical expenses.

Facts:

Based upon the record, the following facts are found by a preponderance of the evidence:

On October 20, 1999, Claimant suffered an injury to his neck while lifting and stacking suitcases in Employer's store room. It is undisputed that Claimant reported the injury within the statutory time and that Employer/Insurer received proper notice as required by SDCL 62-7-10.

After the injury, Claimant went to see his family doctor, Dr. Michael Olson. Claimant first saw Dr. Olson on November 1, 1999. An MRI performed on November 3, 1999, showed a disc herniation at the C6-7 level of Claimant's cervical spine.

Claimant was referred to Dr. Mark Fox, who saw him on November 8, 1999. Dr. Fox recommended a cervical fusion surgery to repair the C6-7 level. Dr. Fox performed surgery at the C6-7 level on November 19, 1999. The surgery alleviated some of Claimants symptoms, but not all of them.

On February 24, 2000, Dr. Fox noted "progressive spondylosis at C5-6" and continued

> complaints of right neck and right arm discomfort with some numbness and tingling of his right forearm and second finger. He also has had some pain in his left neck, left shoulder and proximal arm without significant symptoms in his forearm. He had had some occasional tingling of his left hand. . . . [w]hen he is lying down, he does have some increase in symptoms and has had some problems with headaches here recently as well.

Dr. Fox recommended a "right anterior cervical diskectomy and fusion C5-C6 with allograft and plating."

On April 5, 2000, Dr. Fox performed fusion surgery on the C5-6 level. Dr. Fox's discharge summary of April 7, 2000, noted the following:

> [Claimant] is a young man who underwent anterior cervical diskectomy and fusion approximately 4 months ago. The patient did fairly well and did have improvement of his neck and arm pain but not completely. The patient was managed conservatively. Repeat MRI imaging demonstrated persistent cervical spondylosis at C5 to C6. The patient did have a disk herniation at C6 to C7, and I felt that this was the most likely etiology of his symptoms. Therefore, the initial surgery did not address pathology at the C5 to C6 space. It was discussed with the patient that due to his failure to improve, that repeat surgery at the C5 to C6 level could be performed.

Claimant recovered from the second surgery, but still had continuing symptoms that were treated with various modalities, including physical therapy and medication. On November 28, 2000, Dr. Fox noted that an MRI revealed "mild spurs at C6-C7" and Dr. Fox offered "a 60-70% chance of improvement with surgery." On December 7, 2000, Dr. Fox noted "post-surgical changes at C5-6 and C6-7." Dr. Fox did not perform the third surgery. Instead, Claimant went to Dr. Michael Puumala at Dr. Fox's referral. Dr. Puumala recommended a third surgery. After weighing the risks, Claimant decided to go forward with a third cervical surgery.

Employer/Insurer paid for the second surgery performed by Dr. Fox on April 5, 2000. Before agreeing to pay for the third surgery recommended by Dr. Puumala, Employer/Insurer sent Claimant to Dr. David Hoversten for an Independent Medical Examination (IME). Dr. Hoversten examined Claimant, his medical records, and MRIs on January 11, 2002, at his office in Sioux Falls. In his written report, he opined that Claimant suffered an injury to C6-7 on October 20, 1999, but that the injury to the C5-6

level was unrelated to the work place injury. Employer/Insurer immediately notified Claimant that they would not pay for the third surgery proposed by Dr. Puumala and Dr. Fox. Because his pain and other symptoms were interfering with his ability to work, Claimant went ahead with the surgery, and on January 18, 2002, Dr. Puumala performed a third surgery on Claimant. The third surgery improved Claimant's condition, but left him with some residual symptoms. Claimant was off work for six weeks recovering after the third surgery. Because of a reduction in his work hours at Employer's, Claimant quit his job at Employer's in March of 2002. He is now employed in Fosston, Minnesota.

Claimant was involved in a high-impact, rear-end motor vehicle collision on August 29, 1992, in Fargo, North Dakota. Claimant sustained injuries to his neck that caused neck pain and numbness and pain in both hands that resolved after six months. Claimant did not seek medical care for any symptoms related to this accident between 1993 and 1999. Dr. Fox opined that Claimant's medical records contain "no notes to substantiate" an argument that Claimant suffered "a significant injury in 1992 from his car accident."

Employer/Insurer is not seeking reimbursement from Claimant for the costs of the second cervical fusion surgery at the C5-6 level. Employer/Insurer has paid for the second surgery. The costs of the third surgery, performed by Dr. Puumala, are in dispute.

Other facts will be developed as necessary.

Issue One

Whether Claimant suffered a compensable injury to his C5-6 level either on October 20, 1999, or as a result of subsequent surgeries.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

Claimant "must establish a causal connection between her injury and her employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "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). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

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

> "Injury" or "personal injury," only 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.

There is no dispute that Claimant suffered a disc herniation at C6-7 as a result of his work activities on October 20, 1999. Dr. Fox and Dr. Hoversten both opined that Claimant suffered a work-related injury. The disc herniation required Claimant to undergo a fusion surgery on the C6-7 level of his spine. There is no dispute that the first surgery was compensable.

In support of his burden, Claimant offered the opinions of Dr. Fox, who performed the first and second surgeries. The Department accepts the opinions of Dr. Fox. Dr. Fox opined in a letter dated March 1, 2002:

> I agree with Dr. Hoversten that he had a work-related injury in 1999, which gave rise to the disc herniation at C6 which subsequently led to his first surgery. I believe that the patient did have improvement from that surgery but never got completely better. I had concerns that there were some progressive problems at the fifth area above the level of my first fusion. He subsequently went on to have surgery at that area, which did not result in significant improvement overall. We attempted to put him through chronic pain management, and ultimately he had non-union at C5-C6 with fractured screws. He had surgery recently by Dr. Mike Puumala for re-do surgery at C5-C6 anteriorly, as well as a posterior spinal fusion. It is my belief that the work-related injury in 1999 gave rise to the disc herniation with subsequent requirement for surgery. **I believe that a fusion at C6 puts increased stress on the level above at C5-C6, which was not clearly symptomatic prior to surgery. As a result of this, this led to some progressive symptomatic problems at C5-C6, with the need for a second surgery.**

(emphasis added). Dr. Fox's opinion here is unequivocal: the fusion at C6-C7 "led to some progressive symptomatic problems at C5-C6, with the need for a second surgery." This opinion meets Claimant's burden to demonstrate compensability of the third surgery.

Dr. Hoversten agreed that a fusion at C6 can cause problems at the level above or below the fusion. He testified, "You have got to realize . . . if you stiffen the 6-7 with the fusion, you then put extra stress on the 5-6 and as it has extra stress, it may become symptomatic from the fusion, the one below." Dr. Hoversten opined that the work-related injury at C6-7 did not cause the problem at C5-6. His opinion, however, does not contradict Dr. Fox's opinion. Dr. Fox further explained:

> I believe that surgery at C6 put additional stresses on the level above, which subsequently made that level symptomatic. Therefore, it is my belief that **if the patient had not had the first operation at C6, then he might not have required surgery at the second level.** I generally discuss with patients that there is 3-5% chance that they may require surgery at the level above or below an anterior fusion due to additional stresses placed at those levels.
>
> Unfortunately the surgery was unsuccessful, and the patient continued with ongoing problems. I am hopeful that this recent surgery with Dr. Puumala will lead to a more satisfactory outcome.
>
> I do not believe that [Claimant] had a significant injury in 1992 from his car accident. There are no notes to substantiate that. He had no significant ongoing symptoms between 1992 and 1999. He may indeed have had osteophytic spurs at C5-C6 prior to his 1999 work-related injury, but I do not think that they were symptomatic at the time.

As stated by Dr. Fox in his discharge summary of April 7, 2000, Claimant's need for the second surgery was caused by his work-related injury in that the first surgery failed to alleviate his symptoms caused by the injury. Dr. Fox, the treating physician at the time, recommended the second surgery and it was treated as compensable. There is no dispute that the second surgery was necessary and suitable and proper medical treatment for Claimant's condition.

There is no dispute that the second surgery resulted in a failed fusion. Dr. Fox referred Claimant to Dr. Puumala. Dr. Puumala noted that Claimant continued to suffer symptoms, that the hardware used in the fusion had broken, that the bone graft had not healed as it should have and that the fusion was not solid. There is no dispute that the third surgery performed by Dr. Puumala was anything but necessary and suitable and proper given Claimant's continued symptoms and the failure of the second fusion.

Employer/Insurer argues that Claimant has not met his burden because he did not present expert medical testimony regarding causation. Medical causation of Claimant's C6-7 injury and the compensability of the first fusion have been agreed to by

Employer/Insurer. The burden to demonstrate the compensability of the resulting surgeries is on Employer/Insurer. SDCL 62-4-1 places an affirmative duty on the Employer to provide necessary medical care to an injured employee. Cozine v. Midwest Coast Transport., Inc., 454 N.W.2d 548, 555 (SD 1990). Once the employee has provided notice (admitted by Employer here), and has selected his physician, ". . . the employer has no authority to approve or disapprove the treatment rendered. It is in the doctor's province to determine what is necessary, 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." Hanson v. Penrod Construction Company, 425 N.W.2d 396, 399 (S.D. 1988). Dr. Fox, Claimant's treating physician, did not dispute the necessity or the suitability and properness of the surgeries. Employer/Insurer relies upon Dr. Hoversten to meet their burden.

Dr. Hoversten's testimony is insufficient to show that the third surgery was unnecessary or not suitable and proper for treatment of Claimant's work-related injury. He agreed that the first surgery was caused by the work injury. He agreed that the fusion surgery at C6-7 was necessary. He also opined that Dr. Fox could have done a fusion at C5-6 at the time of the first surgery, but it was a difficult medical decision. Dr. Hoversten did not refute Dr. Fox's opinion that any pre-existing condition suffered by Claimant before the injury was not symptomatic before the injury.

Dr. Hoversten could not attribute any deterioration in Claimant's neck to the 1992 automobile accident. In fact, Dr. Hoversten agreed that a fusion at one level creates additional stress at the levels above and below the fusion. Dr. Hoversten's opinions do not show that the second and third surgeries were not necessary, suitable, and proper treatment for Claimant's C6-7 herniation and subsequent fusion surgeries.

Claimant suffered an injury arising out of and in course of his employment. The injury, a herniation at C6-7, was a major contributing cause of his need for fusion surgery. The first fusion surgery was necessary, suitable and proper. The second fusion surgery was necessary, suitable, and proper because Dr. Fox, who found that the symptoms caused by the injury were not relieved by the first surgery, recommended the surgery. The third fusion surgery resulted because the second surgery failed. As Dr. Fox opined, Claimant probably would not have needed a fusion at C5-6 if he had not had a fusion at C6-7. Claimant's surgeries are all compensable.

Issue Two

Whether Claimant is entitled to temporary total and/or temporary partial disability benefits while recovering from his third cervical fusion surgery on January 18, 2002.

Claimant's third cervical fusion surgery has been found compensable. He is entitled to temporary total disability benefits for the six weeks Dr. Puumala took him off work.

Claimant is also entitled to temporary partial disability benefits pursuant to SDCL 62-4-5, if applicable.

Issue Three

What is the amount of permanent partial disability from the October 20, 1999, incident?

Dr. Walter O. Carlson conducted an IME on January 29, 2003, finding that Claimant had a 25% whole person impairment due to his work-related injury and three cervical fusion surgeries. Dr. Hoversten agreed with that amount if both levels of fusion were considered in the calculation. All fusion surgeries have been found compensable; therefore, Claimant is entitled to a 25% whole person impairment.

Issue Four

Whether Claimant is entitled to reimbursement for certain out-of-pocket medical expenses.

SDCL 62-4-1 requires employers and insurers to provide "reasonable and necessary medical expense." The third surgery was a reasonable and necessary medical expense and is the responsibility of Employer/Insurer. See SDCL 62-1-1.3.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. 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.

Dated this 23rd day of August, 2003

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge