SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
WORKER'S COMPENSATION

KELLY E. MCCABE,
Claimant,

vs.

CITY OF RAPID CITY,
Employer,

and

BERKLEY RISK ADMINISTRATORS,
Insurer.

HF No. 42, 2006/07

DECISION

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Dennis W. Finch of Finch Bettman Maks & Hogue, P.C., represents Claimant, Kelly E. McCabe (Claimant). Scott Sumner of Banks, Johnson, Colbath, Sumner & Kappelman, represents Employer and Insurer (Employer). A hearing was held in the matter on December 18, 2007 via Dakota Digital Network with sites in Pierre and Rapid City. Claimant and her husband, Dale McCabe, testified at the hearing. Claimant's medical records were admitted by Affidavit from the various doctors and therapists.

ISSUE:

Whether the surgery performed on Claimant in March 2005 was related to and necessitated by a compensable injury that occurred on February 3, 2003?

FACTS:

The parties have stipulated to the following facts: 1) that Claimant sustained a work-related injury on or about February 3, 2003; 2) the injury was accepted as a compensable event by Employer; and 3) the surgery that followed the injury was covered by Employer.

Based upon the record and the live testimony at the hearing, the following facts are found by a preponderance of the evidence.

The back injury occurred when Claimant slipped on a patch of ice, while working as a parking enforcement officer for the Rapid City Police Department. Claimant immediately began to suffer from symptoms that she had not had previous to this injury. An MRI was

taken of Claimant's spine on March 7, 2003 which showed a right-sided disc herniation at C6-7 as well as a chronic disc protrusion and osteophyte at C5-6. The osteophyte at C5-6 was more right sided than left, but the radiologist noted there was no impingement on the right C6 nerve root. Other than those findings, the MRI was normal.

Claimant's surgeon, Dr. Edward Seljeskog performed an anterior cervical diskectomy with arthrodesis and plating at C6-7. This surgery was not remarkable, in that the surgery went as expected and Claimant healed properly. Dr. Seljeskog did not perform surgery on C5-6 as there was no nerve impingement caused by the herniation. On November 18, 2003, Dr. Seljeskog ordered post-operative films of Claimant's cervical spine. The surgeon noted that there was a slight degeneration of C5-6 at that time. On December 9, 2003, Claimant was released from Dr. Seljeskog's care and was given an 8% whole person permanent impairment rating. Employer paid benefits to Claimant based upon this impairment. Claimant was allowed to return to light duty work.

Claimant continued to see her primary care physician, Dr. Gordon Abernathie, D.O. Dr. Abernathie referred Claimant to a rehabilitation specialist, Dr. Mark Simonson. Claimant started to treat with Dr. Simonson in January 2004, for neck, upper back, right arm and shoulder pain. Concurrent with this, Claimant participated in physical therapy with at least two different physical therapists. In April 2004, Dr. Simonson released Claimant from his care as she had reached maximum medical improvement (MMI). Dr. Simonson also noted that he suspected Claimant's right C6 nerve root was being mildly irritated. Around that time, Claimant was also discharged from physical therapy.

On June 27, 2004, Claimant returned to Dr. Abernathie as she had continued pain in the right side of her neck. Dr. Abernathie ordered an MRI of Claimant's cervical spine. After Dr. Abernathie received the results of the MRI results he referred Claimant to Dr. Craig Mills for injections for pain. Claimant continued to take medication for pain.

Claimant returned to Dr. Seljeskog on December 7, 2004 with complaints of worsening neck pain that radiated into her upper extremities. Dr. Seljeskog found that Claimant's pain was likely caused by her degenerating disk at C5-6. The C5-6 disk was slightly bulging with some early lateral spur formation. At that time, Dr. Seljeskog recommended further surgery consisting of a diskectomy and fusion at C5-6 and removal of the fusion plate at C6-7, as the C6-7 fusion was stable. The decompression and diskectomy at C5-6 with fusion and anterior plating reinforcements was performed on March 3, 2005. The surgeon found that C5-6 was bulging and degenerating. He also confirmed that the same early spur formation along the lateral and anterior aspect of the spine present on the 2003 MRI was still present. Dr. Seljeskog removed the anterior, lateral spur formation on C5-6. He then performed the diskectomy and decompression of C5-6.

On December 29, 2005, Dr. Seljeskog was of the opinion that Claimant had again reached MMI. Claimant continued to work light duty until June 15, 2005. Dr. Seljeskog noted in his records of May 17, 2005 that Claimant's initial MRI showed a bulging disc at C5-6, but chose not to operate on that disc because of the more obvious problems with C6-7. Dr. Seljeskog's notes go on to explain that fusion at one level of the cervical

spine can create instability in the adjacent levels. He stated "fusion of the C6-7 level predisposed the patient to progressive problems at C5-6. In addition and more than likely this disc was likely disrupted back at the time of the original 2003 problem. At the time, that is 2003, this did not appear to be significant enough to consider intervention, but in view of the lingering symptoms and more recent progression, we felt it justifiable in 2005."

Dr. Wayne Anderson, a board certified specialist in occupational medicine, performed an independent medical exam (IME) upon Claimant and performed a records review, at the request of Employer. The IME was performed on March 28, 2006. Dr. Anderson gave opinions on May 3, 2005 and June 9, 2005 based upon his examination and records review.

Dr. Anderson's opinion was that Claimant experienced a progression of her preexisting degenerative disk disease that was identified at the time of her March 2003 MRI. He wrote, "…there was already a spur and chronic disk complex that was causing some stenosis at the time. That complex has now progressed to the point of causing compression on the right C6 nerve root and therefore her symptoms and need for surgery." Subsequently, in June 2005, Dr. Anderson followed up and explained further after reading Dr. Seljeskog's operative report from March 2005. "Therefore, what Dr. Seljeskog removed on March 3, 2005 to relieve [Claimant's] symptoms was the chronic disk protrusion and osteophyte, which was present on MRI on March 7, 2003 and which already appeared chronic."

Additional facts will be developed as necessary.

ANALYSIS & DECISION:

Claimant has the burden of proving all facts essential to sustain an award of compensation. *King v. Johnson Bros. Constr. Co.*, 155 N.W.2d 182, 185 (S.D. 1967). 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). In order to meet this burden of proof, it is necessary that Claimant provide medical evidence. *Enger v. FMC*, 1997 SD 70, ¶ 18. The Supreme Court has long held, that to prove causation:

> [T]he 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Orth v. Stoebner & Permann Const., Inc., 724 NW2d 586, 593 (S.D. 2006) (citations omitted). "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 [.]'" *Id.* (citations omitted).

In this case the doctors that treated Claimant submitted affidavits, along with their medical records, that say they would testify to the contents and opinions contained within their notes and records with a reasonable degree of medical certainty or probability. 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 Constuction Co., 425 NW2d 396, 399 (SD 1988).

The 2003 MRI shows that Claimant had early signs of degenerative disc disease as well as a chronic disc protrusion at C5-6. At that time there did not seem to be any impingement on the C6 nerve root. Agreeing with these findings, the surgeon operated on C6-7 and performed a diskectomy and fusion at C6-7. At that time, C5-6 was not operated upon.

> Under South Dakota law, insofar as a workers compensation claimants pre-existing condition is concerned[,] we must take the employee as we find him. *St. Luke's Midland Regional v. Kennedy*, 653 NW2d 880, 884 (S.D. 2002). If a compensable event contributed to the final disability, recovery may not be denied because of the pre-existing condition, even though such condition was the immediate cause of the disability. *Id.* (quoting *Elmstrand v. G & G Rug & Furniture Company*, 77 SD 152, 155, 87 NW2d 606, 608 (1958)). [Claimant's] age and degenerative spinal condition may have made him more susceptible to a work-related injury while working for [Employer], but this does not alter the compensability of his claim.

Orth v. Stoebner & Permann Const., Inc., 724 N.W.2d 586, 597 (S.D. 2006).

After the surgery was performed on C6-7, the surgeon was of the opinion that C5-6 was compromised by the fusion at the adjacent level. This fusion at C6-7 caused instability at C5-6 and was the cause of the C6 nerve root being irritated by the already partially degenerated disc and the right anterior, lateral bone spur (osteophyte).

This progressing degenerative of the cervical spine may be caused by natural processes. However, Dr. Seljeskog, the surgeon who operated upon and had a chance to look at Claimant's spine, is of the opinion that the fusion at C6-7 was the cause of the instability at C5-6, despite the chronic bulge and spur formation. The C6 nerve root was not irritated by C5-6 until after the fusion of C6-7.

Claimant was more susceptible to further disc problems because of the degeneration, but it does not change the fact that Claimant's work-related injury in 2003 was a major contributing cause of her initial herniated disk. Claimant has proven that the injury of February 2003 was a major contributing cause of the need for the second surgery at C5-6 for which she received treatment.

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 30 days of the receipt of this Decision. Employer/Insurer shall have an additional 30 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 the _27th___ day of October, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald

Catherine Duenwald
Administrative Law Judge