SOUTH DAKOTA DEPARTMENT OF LABOR
Division of Labor and Management

RAMONA J. ALLEN, **Claimant,** **v.**	**HF 43, 2002/03**
	DECISION
JAN CHARLES GRAY, dba PRESIDENT'S RESORT and ALL AMERICAN INN, **Employer, and** **ACUITY INSURANCE, fka HERITAGE MUTUAL INSURANCE CO.,** **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. Dennis W. Finch, of Finch Bettman Maks & Hogue, P.C., represents Claimant. J.G. Shultz, of Woods, Fuller, Shultz & Smith, P.C., represents Employer/Insurer.

Issues

1. What is Allen's correct weekly benefit amount?
2. Whether Allen is entitled to additional medical care.
3. Whether Allen is currently entitled to permanent partial disability benefits, and, if so, at what rating?

Factual Background

Allen was 62 years of age at the time of the hearing. Her educational background consists of 11 grades of school, a GED, and a 6 week program of hotel/motel training school.

Jan Charles Gray owns the All American Inn in Custer, a two story motel with approximately 50 rooms.

Gray hired Allen as the manager of the All American Inn. Allen would be the only management employee on the premises. Gray's wage offer to Allen was $900.00 per month, plus residence in a house next to the motel. The house was furnished and utilities, including telephone, satellite television and a yard service, were paid by Employer. Gray told Allen he valued the house, together with the extras furnished with the house, at $1,500.00 per month.

November 25, 2000, Allen fell while in the course of her employment.

The next day, Allen went to the hospital emergency room with back and leg pain. She was eventually referred to Dr. Steven Schwartz, a neurosurgeon, who performed a laminectomy and bilateral L4-5 discectomy, in December 2000.

Allen returned to work following this initial surgery. Physically, she was limited to administrative duties, such as working at the computer and taking reservations. The hotel's business is largely seasonal. Because it was mid-winter and her duties were limited by the season, she was able to perform these administrative duties from the house.

On or about December 25, 2000, Allen fell again while working in the house. She had increased pain after this second fall.

Following this second fall, Allen made repeated visits to Dr. Schwartz, who eventually recommended a second surgery: a laminectomy/discectomy, pedicle screw fusion of the L4-5 vertebrae, and installation of carbon fiber cages.

Citing her continued pain and the upcoming surgery, Allen left her employment with Employer on or about August 15, 2001. She submitted to the surgery recommended by Dr. Schwartz on August 21, 2001.

Allen saw Dr. Schwartz following the surgery on September 19, 2001. He noted that she reported a 70% improvement in her condition following the surgery. Allen intended to move to Oklahoma to live with her mother. Dr. Schwartz recommended that she continue treatment with a neurosurgeon after her move.

Allen moved to Oklahoma in September or October 2001. Insurer made arrangements for Allen to see Dr. Stewart Smith in Oklahoma.

Dr. Smith first saw Allen on October 15, 2001. He noted Allen complained of "bilateral dysesthetic pain which radiates from the back down to the heels bilaterally." Dr. Smith attempted to treat Allen's back and leg pain medically. During this time period, Dr. Smith considered Allen temporarily totally disabled.

Dr. Smith saw Allen on December 3, 2001. She complained of pain in her hips and legs. An x-ray showed good alignment and "excellent placement of the carbon-fiber cages." Dr. Smith continued to attempt to medically manage Allen's pain. He still considered her temporarily totally disabled.

Allen returned to Dr. Smith on January 28, 2002, complaining of increasing lower back and leg pain.

Dr. Smith's February 6, 2002, note shows Allen complained her pain was worse. Dr. Smith recommended a discogram and MRI. Each study indicated a narrowing of the disc spaces at L3-4 and L5-S1, the disc spaces immediately above and below the site of Allen's earlier L4-5 fusion. Dr. Smith continued to consider Allen to be temporarily totally disabled. He told Allen that she could continue to attempt to manage her pain medically, or he could surgically remove the

carbon-fiber cage and perform a three-level fusion. Allen decided to delay any decision on the surgery in favor of further attempts to manage her pain medically.

Allen saw Dr. Smith on May 29, 2002, and again on July 10, 2002, each time complaining of significant low back pain.

In June 2002, Employer/Insurer forwarded Dr. Smith's medical records and surgical recommendation to Dr. Paul Cederberg, an orthopedic surgeon, for his review and opinions. It was Dr. Cederberg's opinion that Allen had reached MMI on February 26, 2002, and that no further surgery should be performed. Specifically, he opined that the three-level fusion was not appropriate, because the risks far outweighed any benefit, because psychological factors might be causing or contributing to Allen's lower back and leg pain, and because he felt physical therapy and anti-inflammatory medication was the most appropriate treatment.

Based on Dr. Cederberg's opinions, Employer/Insurer have denied the proposed three-level fusion.

Allen continued to see Dr. Smith. His September 11, 2002, February 12, 2003, May 14 and July 10, 2003, notes indicate that Allen continued to complain of severe back and leg pain.

To date, Allen has not undergone the three-level fusion recommended by Dr. Smith.

At the time of the hearing, Allen had lived in Blanchard, Oklahoma, for about one year, and was unemployed.

Analysis and Decision

What is Allen's correct weekly benefit amount?

The parties agree that Allen was paid $900.00 monthly in wages. The parties disagree whether Allen was provided the residence as part of her compensation, and, even if the residence was provided in lieu of wages, they disagree as to the value of the residence.

Claimant has the burden of proving all elements necessary to qualify for compensation. Day v. John Morrell & Co., 490 NW2d 720, 724 (SD 1992).

The burden is on the employee to prove his earnings. Jackson v. Lee's Travel Lodge, Inc., 1997 SD 63, ¶ 22, 563 NW2d 858; Sanborn v. Farmers Union Elevator Co., 68 SD 138, 140, 299 NW 258, 258-59 (1941).

SDCL 62-4-3 sets the compensation rate as "sixty-six and two-thirds percent of the employee's earnings[.]"

The term "earnings" as defined in SDCL 62-1-1(6), includes "allowances of any character made to an employee in lieu of wages[.]"

Employer/Insurer argue that "[t]here is no evidence Claimant's salary was affected by her use of Employer's house. In other words, had Claimant chosen not to live in the house, there is no evidence that her salary would have been adjusted upwards."

Employer/Insurer argue "there is no evidence that many of the benefits were part of the employment contract", and then recite Allen's testimony in regard to the employment contract:

> Question: And what was your agreement with Mr. Gray so far as your pay at the start there?
> Answer: He told me that the house with everything included, all the utilities and everything, was $1,500 a month, and I was getting 9 in cash.
> Question: 900 a month?
> Answer: Yes.
> Question: So did you understand the $900 a month to be your base salary?
> Answer: Plus the house, yes.

Employer/Insurer's argument is unpersuasive.

Employer's argument ignores the fact that Gray and Allen specifically agreed that the value of the house was part of Allen's compensation. This testimony was not refuted. Employer/Insurer offered no records or testimony to dispute Allen's testimony as to her understanding of the employment contract. Gray did not attend the hearing and did not testify, either in person or by deposition.

Employer/Insurer's argument also ignores the fact that the house had been modified in such a manner that it was an integral part of the hotel. It was built so as to serve as the hotel office. One room in the house had been converted to a business office for the hotel. Allen used this office for her job duties. This office had a computer that was connected to Employer's other hotels in the Custer area. A button in the hotel lobby rang an alarm in the office to notify Allen that guests were in the hotel lobby.

It is established as a fact that the residence provided Allen was part of the employment contract, and was provided in lieu of wages.

As to the value of the residence, Allen testified that she was told by Gray, at the time she was hired, that he himself valued the furnished home, together with all the furnished extras, to be in the amount of $1,500.00 per month.

Allen's testimony concerning valuation of the residence was also not refuted by Employer/Insurer.

It is established as a fact that Gray offered Allen employment at a monthly wage in the amount of $900, plus a furnished residence, with utilities and other extras paid, which he valued in the total amount of $1,500. This was the offer made by Gray and accepted by Allen.

Despite this agreement between Allen and Gray, Employer/Insurer attempt to attack the agreed value of the residence. Employer/Insurer offered the testimony of Ronald Bradeen, a real estate broker in Custer in an attempt to dispute Allen's testimony as to the rental value of the home. Bradeen valued the home at approximately $375.00 per month.

Bradeen's opinion is without sufficient foundation and will be disregarded. Bradeen admitted that he had not been in the home for 10 or 15 years, and had recently only driven by it. He did not inspect the interior, and did not even talk to Gray, the owner of the home. The home has been extensively remodeled since the last time Bradeen was in it. Bradeen's estimate was based on the home being unfurnished and not including utilities. Bradeen admitted he was not knowledgeable in the valuation of the extras included with the residence. Bradeen testified that his opinion concerning the rental value of the home was a mere "guestimate".

Allen's computation of her workers' compensation rate is accepted. Her compensation rate, based on the $1,500.00 rental value of the home, plus her $900.00 monthly wage, equals an average weekly wage in the amount of $553.85, and a workers' compensation rate of $369.42.

In addition to her wage and the residence, Allen was paid expenses, in an amount of approximately $20.00 per month, to run errands necessary for the motel. She also received a one-time Christmas bonus in 2000 in the amount of $500.00. So that my decision is clear on this point, neither amount was considered in the computation of her total wage.

Whether Allen is entitled to additional medical care.

SDCL 62-4-1 requires an employer to "provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provision of this title."

Employer/Insurer failed to prove that the treatment recommended by Dr. Smith, Allen's treating physician, is not necessary, or suitable and proper:

> 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. 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.

Hanson v. Penrod Const. Co., 425 NW2d 396, 399 (SD 1988).

The medical evidence is limited to Dr. Smith and Dr. Cederberg.

When Allen moved to Oklahoma, Insurer selected Dr. Smith to be Allen's treating physician. Dr. Smith was selected because he was a qualified neurosurgeon with a practice near where Allen would be living. Insurer acquiesced in Dr. Smith's care for several months, until he

recommended surgery. When Dr. Smith recommended surgery, Insurer then retained Dr. Cederberg, an orthopedic surgeon, to perform a records review. Dr. Cederberg found Allen at MMI, as of February 26, 2002, and opined that no further surgery should be performed. Specifically, he opined that the three-level fusion recommended by Dr. Smith was not appropriate.

When Dr. Smith reviewed Dr. Cederberg's report, he persisted in his recommendation of surgery and testified that Dr. Cederberg did not have even the basic understanding of the nature of the surgery being recommended.

Employer/Insurer argue that Dr. Smith's opinions can not be accepted because they are based on "inaccurate, incomplete, and unreliable information from the claimant." Employer/Insurer argue that Allen failed to fully disclose her daily activities to Dr. Smith, in particular her activities at Shupe's convenience store.

Employer/Insurer's argument is not convincing. Employer/Insurer overstate her activities at Shupe's.

Allen was a credible witness. Her testimony was consistent with Dr. Smith's medical records covering the same time period. Her testimony was consistent with that of lay witnesses who testified concerning her limited activities at Shupe's convenience store.

The foundation and basis for Dr. Cederberg's testimony and opinions is limited to his review of medical records. Dr. Cederberg did not personally examine Allen.

"The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 NW2d 396, 398 (SD 1988)

Dr. Smith, the doctor who was most experienced with Allen's problems, concluded that she remains temporarily totally disabled, she has not reached MMI, and she is in need of additional treatment. Allen is entitled to pick up the treatment where she left off with Dr. Smith.

The testimony and opinions of Dr. Smith, Allen's treating doctor, are accepted over Dr. Cederberg's opinions, based on the latter's records review alone.

Whether Allen is entitled to permanent partial disability benefits, and, if so, at what rating?

Dr. Cederberg found Allen at MMI and provided an impairment rating. Dr. Smith continues to be of the opinion that Allen is not at MMI, is temporarily totally disabled, and is in need of additional treatment. Dr. Smith's opinions have been accepted. Dr. Cederberg's opinions have been rejected.

Allen is not at MMI and does not yet have a rated impairment. Allen's temporary disability benefits should be reinstated at the proper rate until she reaches MMI, her treating physician releases her to work, and she has a rated impairment.

Counsel for Allen shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Employer/Insurer shall have an additional 10 days from the date of receipt of Allen'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 Allen shall submit such stipulation together with an Order consistent with this Decision.

Dated: October 21, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge