SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DOUGLAS S. SCHEIDT,
Claimant,

HF No. 49, 2004/05

v.

DECISION

ELDON D. WITKOP d/b/a WITKOP CONSTRUCTION,
Employer,

and

FIRST DAKOTA INDEMNITY,
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. Bram Weidenaar appeared on behalf of Claimant. Rick W. Orr represented Employer/Insurer. The parties submitted this matter via stipulations, affidavits, depositions, and other materials on file with the Department, with the parties waiving presentation of live testimony.

Issues:

1. Whether or not the alleged incident occurring on June 10, 2003, is a major contributing cause of Claimant's disability, impairment, and need for treatment.
2. Whether Claimant's medical expenses related to the alleged incident occurring on June 10, 2003, are compensable.
3. What is the appropriate application of SDCL 62-7-3 given the facts of this matter?

Facts:

The following facts are found by a preponderance of the evidence:

1. On June 10, 2003, Mr. Douglas S. Scheidt (Claimant) was employed as a job supervisor by Eldon D. Witkop d/b/a Witkop Construction (Employer).
2. Claimant worked 40 to 45 hours per week at an hourly rate of $20.00.
3. Claimant's average weekly wage was $823.98, entitling him to the maximum workers' compensation rate of $482.00 per week.
4. On June 10, 2003, Claimant was working with a crew constructing a single-family residence in Sioux Falls, South Dakota.
5. At the time of the incident, Claimant was setting 250-300 pound trusses to complete the roof structure.

6. A coworker lost his grip on the truss being moved causing the truss to fall or tip over. The truss struck Claimant on the left side of his neck and body causing him to fall to his right.
7. As he fell, Claimant's leg caught in the webbing of the truss and he was left hanging upside down by his leg until his coworkers retrieved a ladder and assisted him.
8. Following this incident, Claimant remained on the job site. He informed Eldon Witkop of the incident when Eldon arrived on the site.
9. Claimant did not seek medical care until August 13, 2003. He did not report the fall to medical providers until approximately September 23, 2003.
10. On October 16, 2003, Employer/Insurer forwarded the South Dakota Employer's First Report of Injury to its insurer and the Department of Labor.
11. On August 13, 2003, Claimant presented to the Emergency Room at Sioux Valley Hospital complaining of headaches, jaw pain and persistent leg cramping.
12. A CT scan of Claimant's head was negative for obvious problems.
13. Claimant was released and instructed by the emergency room physician to follow up with his family physician.
14. Claimant thereafter established a physician relationship with Dr. Jennifer Schriever at Sioux Valley Clinic East on August 18, 2003.
15. On September 2, 5, and 16, 2003, Dr. William Held consulted with Claimant regarding his symptoms.
16. On October 27, 2003, Dr. Held noted that Claimant had fallen and was experiencing problems with his back and his neck as well as having severe headaches and stomach symptoms. Dr. Held limited Claimant to three and one half pounds lifting, pushing, and pulling restrictions and also limited him from lifting below his knees.
17. On October 16, 2003, Clamant was referred to Dr. Viola of Neurology Associates, P.C. and evaluated for back and leg pain.
18. Dr. Viola prescribed Naproxen and Flexeril for Claimant's headaches and pain.
19. Dr. Viola recommended an MRI of the cervical and lumbar spine and also EMG studies for any nerve root impingement. The EMG revealed a mild disk herniation at the left L5-S1 level. Dr. Viola recommended physical therapy for this and neck pain. Dr. Viola prescribed Elavil and instructed Claimant to continue with Darvocet, Naproxen, and Flexeril as needed.
20. Claimant also consulted with Dr. Edward Tiezen, D.C., for low back and left leg pain. Dr. Teizen provided chiropractic treatment on September 23, 27, and 30, and again on October 6. On October 8, 2003, Dr. Tiezen recommended Claimant see a neurologist.
21. On November 5, 2003, Claimant was referred to Dakota Rehabilitation Center for physical therapy. He returned to Dakota Rehabilitation Center twelve times for treatment, with little improvement in his symptoms.
22. On December 5, 2003, Claimant was sent to Dr. Jeff Luther for an Independent Medical Evaluation.
23. As a result of Dr. Luther's report, Employer/Insurer denied any further benefits to Claimant.

24. Claimant returned to the emergency room on several occasions in December of 2003 and once in January 2004.
25. Claimant was seen by Dr. Gaspari for his radicular symptoms and an EMG was performed. Dr. Gaspari recommended a cervical epidural and a lumbar epidural. Claimant's neck and arm pain improved with this treatment.
26. On January 15, 2004, Claimant returned to Dr. Viola, who diagnosed chronic daily headaches, low back pain with L5-S1 radiculopathy and she recommended that Claimant see neurosurgeon.
27. On January 27, 2004, Claimant consulted with Dr. Daniel Tynan, a neurosurgeon who reviewed the cervical and lumbar MRI results. Dr. Tynan thought that a mild compression in the thoracic spine might be causing Claimant's problems. He recommended only conservative care.
28. On February 23, 2004, Claimant consulted with Dr. Jerry Blow, a physiatrist.
29. Dr. Blow examined Claimant and reviewed his medical records. Dr. Blow diagnosed Claimant with a post-traumatic myofascial pain of his upper back and neck, chest contusions with sternal pain and rib pain. Dr. Blow also noted Claimant had low back pain with left leg pain.
30. Dr. Blow recommended a suboccipital nerve block followed by injections into his pectoralis major, scalenes, sternocleidomastoid and subscapularis muscles. Dr. Blow also prescribed a trial dose of Depakote to help with Claimant's pain and his headaches.
31. Dr. Blow continued to see Claimant on a monthly basis. He treated Claimant with a combination of medications and injections, physical therapy and recommended that Claimant limit his physical activities.
32. On March 31, 2006, Dr. Blow assessed Claimant with a 15% impairment rating of his whole person for persistent headaches, mid back pain, chest pain, and low back pain and leg pain.
33. Dr. Blow opined that acupuncture and intermittent physical therapy would be appropriate ongoing medical care for Claimant.
34. Dr. Blow opined that Claimant should avoid sustained overhead reaching and frequent or continued bending and twisting. He indicated that Claimant could lift 25 pounds frequently, 35 pounds occasionally and 50 pounds rarely.
35. Other facts will be developed as necessary.

Issue One

Whether Claimant has a compensable injury under SDCL 62-1-1(7)(b).

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 [his] injury and [his] 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:

> [O]nly 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 an injury on June 10, 2003, when the roof truss stuck him in the neck and knocked him over. The issue is whether that injury is a major contributing cause of his current condition and need for medical treatment beginning on August 13, 2003.

Claimant has endured numerous testing and procedures to determine the cause of his many complaints, including objective medical testing in the form of MRI, EMG, and CT scans. Claimant has been examined by numerous physicians.

Dr. Jerry Blow:

Dr. Jerry Blow is a physiatrist or physical medicine and rehabilitation physician. He works with individuals who have had a variety of injuries and he attempts to diagnose their problems and provide treatment to alleviate those problems. He first saw Claimant on February 23, 2004, at Dr. Held's referral. At the time of this initial consultation, Claimant complained of "neck pain, low back pain, chest pain and leg pain." Claimant

described the pain as “deep, aching and constant.” After his physical examination of Claimant, Dr. Blow found that Claimant’s subjective complaints were consistent with the history of injury. Dr. Blow opined that Claimant presented with objective findings of injury. He testified:

> Q: What were some of the objective findings that you - -you had on that day?
> A: He had some decreased neck extension which means looking up, some decreased side bending to the left and to the right. He had decreased thoracic range of motion, especially with rotation.
> Q: That would be, what, midback, then?
> A: Yes. And then he had - - his low back, he had problems with extension or bending back, decreased rotation and diminished side bending. I did a number of maneuvers looking for vascular compromise that could cause numbness and tingling in his arm. Those were negative. I did some tests looking for a herniated disk in his low back that could be causing some of the leg pain and those didn’t look positive. Tests looking for sacroiliac joint, those were negative.
>
> Some of the positive things that make me think that - - about his diagnosis and what’s going on were he had a very tender pectoralis major. His rhomboid which is a muscle between the shoulder blades was tender. His levator scapula which is the muscle that raises the shoulder blade was very tight. The muscle underneath his skull was very tender, the suboccipital muscle. He was very tender under the subscap - - subscapularis which is the muscle underneath the shoulder blade, that was very tight. Then - - so those complaints would be consistent with his headaches. Then his - - as well as the cervical range of motion loss.
>
> Then his chest, I could palpate along his chest and that could cause some of his midback pan, and then he had a number of trigger points and tender ribs that would cause pain in his anterior chest. And then with palpating his low back, his sacroiliac joint was tender which would explain some of his -- his low back pain.
>
> So after all of that, I felt that he had multiple trauma with lots of areas of muscle tension consistent with what he described as his injury and -- but he had had - - he had seen a number of physicians before I saw him so I wanted to get all those records and carefully examine those before I recommended any treatment.

After reviewing Claimant’s medical records, Dr. Blow diagnosed Claimant with “posttraumatic myofascial pain of his upper back and neck, that he had some type of chest contusion and damage to his rib cage of some kind. He had low back pain with a herniated disk but EMG was negative for evidence of true nerve compression, radiculopathy and suboccipital tenderness.” Dr. Blow obtained an MRI of Claimant’s thoracic spine which did not reveal “frank herniation”, but did reveal disk bulges “consistent with his chest pain complaints and his midback pain.”

When asked about Claimant's failure to tell his initial medical providers about the fall on June 10, 2003, Dr. Blow opined:

> Q: You would agree with me that the lack of any documented symptoms of neck or back pain and the fact that he did not report any type of traumatic injury for some three and a half to four months after the event certainly creates reasonable doubts and suspicions regarding causation of his symptoms and the injury?
>
> A: I can understand why everybody is like, well, where is this coming from. I can understand that. But if you spend much time with Doug, I think you begin to realize that, Number 1, he's a hard-working person. He is not someone in here who makes up pain complaints. I think he really has them. I think he wants to get better. I think his employer wants him to get better. His employer wants him to get treated, and that as you sift through things, you begin to understand that Doug has inability to describe things in a very clear, chronological manner. He's all over the place.
>
> And when he comes in looking like a mountain man and his clothes are dirty, you know, I think it's easy to not take seriously some of his issues, although they certainly did when he came to the emergency room. They looked at him for his chest pain and tried to evaluate it. I think if you think that you would have a heart attack, a lot of minor things in your mind - - you know, not minor things but if you think that you're having heart attack, you're going to kind of forget about other things.

Dr. Blow also explained:

> I don't think [Claimant's history] was incorrectly taken [by earlier treating physicians], but I think you have to take the context of the patient himself, his environment, his cultural development. He lives in a sort of what someone would say a backward community. He goes to the - - the Russian community and they take care of him. They give him clothes, they give him food, they give him haircuts. They reach out to help him because he doesn't have a lot of social support. His social support is basically his workplace.
>
> And when he was there, he was having less pain complaints because he's always worked through his pain as a construction worker. Whenever he's had pain complaints, he has worked through it. And I think that after this injury, I have never talked with his employer but I suspect that if we did interview his supervisor/employer, that he's always been a hard worker, that after this accident, yes, they thought it was terrible what happened to him but, you know, he was - - he was hardworking.
>
> He goes, he has his chest pain, and he just lives through the pain which he's done for years. So when he goes to see the emergency room about his chest pain, yeah, he had these other pain complaints but he's lived with that on and off for years, and so he basically wants to get treated for his chest pain he's afraid he's going to die.

Dr. Blow opined "based upon a reasonable medical probability" that "the major contributing factor for the symptoms as described in [my] notes is [Claimant's] work related history."

Dr. Blow found that Claimant responded well to treatment, but his condition would worsen when he was not able to afford to take his medication. Dr. Blow found Claimant to be "very motivated to get better."

Dr. Jeff Luther:

Dr. Jeff Luther, Board Certified in Internal Medicine and Emergency Medicine, conducted an examination on behalf of Employer/Insurer. Dr. Luther, who is a Certified Independent Medical Examiner through the American Board of Independent Medical Examinations, found "mild degenerative findings in the cervical and lumbar spine, but certainly do not describe the constellation of symptoms that he has." Dr. Luther found no "objective findings on his examination to suspect any neurologic process, including any orthopedic or radicular problem that would explain his symptoms."

Dr. Luther concluded "with a reasonable degree of medical certainty that [Claimant's symptoms] are not related to his work environment or to his injury of 6/10/2003." Dr. Luther explained:

> Well, the complaints that the patient had offered were quite varied. There were multiple complaints that involved multiple different systems that I had eluded to before including the pulmonary, possibly cardiac, gastrointestinal. None of those lent any type of objective support, in my opinion, to relate those to that injury that he had. The results of those findings appeared to be all nonorganic in terms of anything objective. Other than during his sleep study, it was noted that his oxygen saturations dropped to 85 percent, which is abnormal, and he had findings consistent with sleep apnea based on his review of systems, and that was throughout the record listed as daytime fatigue, which certainly could be a symptom, an objective symptom, from sleep apnea, but again, not related to the accident he had reported in June of '03.

Dr. Luther testified, "Well, there's just not any supporting objective evidence that match [sic] his subjective complaints that are organic nature or physiologic in nature."

Dr. Luther opined that he would have expected a soft tissue injury, such as that described by Dr. Blow, to have manifested itself within 24 to 48 hours of the June 10, 2003, incident to such an extent that Claimant would have either sought treatment for it or recognized that he had an acute injury. Dr. Luther opined that "there is no objective medical reason for his complaints of pain." Dr. Luther opined that there might be a psychological explanation for Claimant's pain, like a somatization disorder. Dr. Luther opined that the injury of June 10, 2003, is not a major contributing factor to any psychological condition Claimant may have.

Dr. Bruce Elkins:

Dr. Bruce Elkins specializes in occupational medicine and is Board Certified in occupational medicine, preventive medicine, and independent medical evaluations. At the time of his deposition, Dr. Elkins was the medical director and the primary physician at HEALTHworks. At Employer/Insurer's request, Dr. Elkins performed a records review of Claimant's medical situation. Dr. Elkins opined that Claimant's alleged injury of June 10, 2003, is not a major contributing cause of his disability, impairment or need for treatment. He explained:

> I'll refer back to my report for the line of reasoning that I followed in coming to that conclusion. The largest single factor would be the time frame between the reported injury and any complaints stemming from that injury. That was a number of months, on the order of three months, before he referred to that as a possible cause of any of his complaints. . . . Soft tissue injury such as he's being treated for at the present time, or recently with Dr. Blow, doesn't take months to manifest itself from the time of the injury. . . . Usually there will be some pain initially. It's not uncommon to have more pain the following morning than the initial injury, but usually not beyond that time frame. The reason that I hurt worse the following morning is if you injured muscle, the muscle's response is to kind of tighten down, and that will occur most at night after the blood flow is decreased to the muscle and the muscle has a chance to become stiffer and tighter. So if he was struck about the neck and shoulder area, he may have continued to work and not noticed a lot of symptoms that day, but by the time he went to bed and woke up the following morning, that muscle would have had a chance to become tighter and stiffer, and I would have expected him to have had complaints by the following day. . . . I would have expected [him to seek medical treatment], that if his injuries were severe enough to cause the months and months of disability that they seem to be causing that he would have had cause to seek treatment earlier than he did.

Dr. Elkins also found the migratory nature of Claimant's pain complaints to be inconsistent with a "hard physical problem such as a contusion or a herniated disc." Like Dr. Luther, Dr. Elkins did not find objective medical evidence that would explain Claimant's symptoms and he suggested that a pain disorder could be Claimant's problem. Dr. Elkins testified:

> It may be possible, but it's my medical opinion that somebody who was injured severe enough, if this really was from his work injury in June of that year, I find it very unlikely that he would be injured so severe that at a later point he would require multiple visits to the emergency room, requiring narcotics, later requiring time off of work, therapy, epidural steroid injections, and still having pain complaints almost two years after the injury, I would find it very unusual that he would continue to work for several months and not complain or report that injury

> before the time that he did. So I guess to answer your question, possible, but I don't think that that's very likely.

John Meyers, Psy.D.:

Dr. Meyers, a Clinical Neuropsychologist, conducted a neuropsychological assessment of Claimant on July 18, 2005. He issued a report on July 25, 2005. Dr. Meyers interviewed Claimant, taking a history, for approximately one hour. Dr. Meyers administered several formal tests, including a social adjustment scale and the MMPI-2. Dr. Meyers deemed the results to be valid. Dr. Meyers assessed Claimant to have a full scale I.Q. of 75, which falls in the borderline range. He summarized, in part:

> Based on the profile of neuropsychological data, this patient shows a pattern of scores that does not suggest the presence of any significant cognitive injury. There is no indication of acquired brain injury. The pattern of scores is most consistent with individuals who have histories of anxiousness, worry, or stress-related reactions. There does appear to be significant psychological factors affecting this patient's perception of discomfort. The pattern of scores he presents does suggest individuals who are reporting chronic pain; however, there does appear to be significant psychological overlay. The basis of his psychological overlay appears to be in his personality characteristics. This patient does have a history of alcohol abuse in his history. There were at least four DUIs. He indicates he stopped drinking, but this also suggests the presence of addictive-type personality characteristics. His history also indicates presence of some anxiousness. There is also a family history of anxiousness. Therefore, it appears that there may be premorbid personality characteristics that make him prone to reporting an increase in sensations, which are related to stress. There does not need to be specific "stressor" but may be stressors in general.

Employer/Insurer posed the following questions to Dr. Meyers:

1. To a reasonable degree of psychological probability, is the alleged work-related injury a major contributing cause of the psychological condition to which you opine in your report?
2. To a reasonable degree of psychological probability, is the alleged work-related injury a major contributing cause to Claimant's current levels of reported pain?

Dr. Meyers responded "no" to both of those questions, giving no explanation.

Claimant

Claimant's credibility is intact. There is little evidence in the record to suggest that Claimant has manufactured his symptoms, or to suggest that he is malingering or lying about when his symptoms began. Claimant's report that he suffered pain immediately after the incident but did not report it to the medical providers because he did not

understand that his symptoms for which he sought treatment could be related to the incident is credible.

Several physicians have suggested that there is a musculoskeletal component to Claimant's pain, but the cause of a musculoskeletal component was not thoroughly explored or treated until Dr. Blow began treating Claimant. According to Dr. Blow, Claimant's pain is, in fact, musculoskeletal in nature. He diagnosed Claimant with "posttraumatic myofascial pain of his upper back and neck" with "chest contusion and damage to his rib cage." Numerous testing has ruled out other causes for his symptoms, including cardiac, gastrointestinal, infectious, and sleep apnea, to name a few. Dr. Blow found Claimant's subjective complaints to be consistent with the history of the mechanism of injury. Dr. Blow thoroughly questioned Claimant regarding his medical history and when the symptoms started. Dr. Blow realized that Claimant had extreme difficulty communicating regarding his physical symptoms. Dr. Blow thoroughly explored Claimant's medical history to verify Claimant's complaints.

No doctor has suggested that Claimant is malingering. No doctor has suggested that Claimant does not have pain. Of the deposed experts, only Dr. Blow has treated Claimant multiple times and spent time with him to sort through his complex history of medical treatment. Dr. Blow opined that the disk bulges at T5 through T9 in Claimant's spine "certainly were consistent with his chest pain complaints and his midback pain." In assessing the progression and cause of Claimant symptoms, only Dr. Blow has adequately taken into consideration Claimant's communication difficulties and how his psychological or intelligence issues could have affected his medical treatment. Dr. Meyers' report supports Dr. Blow's opinions regarding Claimant's communication difficulties.

Dr. Blow opined that Claimant's traumatic injury of June 10, 2003, is the major contributing cause for his symptoms. Dr. Blow is a certified medical review officer and independent medical examiner and has completed all educational requirements for certification by the American Board of Physical Medicine and Rehabilitation. He has a thorough knowledge of Claimant's history and has taken into consideration Claimant's communication and social difficulties, as well as any underlying psychological condition. Dr. Blow has testified in workers' compensation matters and is familiar with the causation standard. He opined that the injury of June 10, 2003, was "the" major contributing cause, not just "a" major contributing cause as required by SDCL 62-1-1(7). Based upon his deposition testimony, the totality of the medical evidence, and Claimant's testimony, Dr. Blow's opinions are entitled to more weight. He is the treating physician. He demonstrated a clear understanding of Claimant's situation. Dr. Blow also found objective evidence of a musculoskeletal injury and Claimant's symptoms.

Employer/Insurer's assertions that Dr. Blow is biased towards Claimant because of a personal relationship with Claimant are rejected. Dr. Blow is a professional physician and obviously feels passionately about Claimant's situation, but he did not demonstrate bias in his deposition testimony. He stated under oath that he does not care if he is paid for his treatment of Claimant. Dr. Blow's opinions are accepted as objective and

persuasive. Employer/Insurer argued that his opinions are "in direct conflict with the medical records generated in the three and one-half months after the injury." Dr. Blow's opinions are the only opinions that take into account Claimant's communication and social difficulties[1] regarding the beginning of his treatment. None of the medical providers could figure out what was wrong with Claimant or help him in any real way, why should Claimant have been expected to figure out what trained physicians could not? Dr. Blow treated Claimant for a musculoskeletal injury and Claimant has responded to that treatment. He has suffered relapses when his treatment is interrupted due to financial constraints.

Dr. Luther, Dr. Elkins, and Dr. Meyers disregard the fact that Claimant suffered a traumatic event. They each disregard the fact that Claimant testified that he felt pain right away after the injury and was not able to perform his regular work duties for weeks after the injury, but chose to continue to work through the pain because he thought it would improve on its own. The causation opinions of Dr. Luther and Dr. Elkins are rejected. Dr. Luther did not treat Claimant. Dr. Elkins did not exam Claimant. Dr. Meyers does not have the medical expertise to opine on a physical cause of Claimant's pain. He does not have the medical expertise to opine on whether the incident of June 10, 2007, would cause Claimant's pain. Furthermore, Dr. Meyers' opinions were offered without any explanation from him. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "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 N.W.2d 396, 398 (S.D. 1988).

Claimant testified:

> Q: Where did you feel the pain initially [after the incident]?
> A: Oh, I felt from my neck clear to my foot. I had pain there. For the first couple of days I had quite a little pain in there. I went back to work. The pain, I thought, was loosening up a little bit. About a week later I started getting cramps in my left leg, my left arm, my neck, my foot, my hand, all on my left side. I thought they were cramps, but they never went to like a full, you know, locking cramp.
> Q: Did you finish your duties that day and work until the end of the workday?
> A: Well, I worked. I didn't do much. I stood around there, you know, kind of watching the fellows.
> Q: Did you miss any work in the days immediately after this happened?
> A: No. I come to work everyday. I just pretty much sat in the pickup.

Dr. Luther, Dr. Elkins, and Dr. Meyers' opinions do not negate the fact that employers "take the claimant as they find him." Claimant's psychological profile existed before the injury and the event of June 10, 2003, caused him to need treatment related to his psychological profile. Dr. Meyers' report suggests that Claimant has the type of

[1] See Dr. Meyers' July 25, 2005, report extensively detailing problems encountered by individuals with profiles such as Claimant's.

personality which will have some difficulty adjusting to pain or drastic changes in life circumstances. Claimant was experiencing a stressful family situation in 2003, but seemed to have been coping and working without need for treatment until the work injury.

Based upon the opinions of Dr. Blow, Claimant's credible testimony, and the totality of the medical evidence, Claimant has met his burden to demonstrate that the injury of June 10, 2003, is and remains a major contributing cause of his disability, condition, and need for treatment. Dr. Blow's opinion that Claimant suffers from a 15% impairment of the whole person is accepted. Claimant is entitled to permanent partial disability benefits pursuant to SDCL 62-4-6 according to Dr. Blow's impairment rating.

Issue Two

Whether Claimant's medical expenses related to the alleged incident occurring on June 10, 2003, are compensable.

SDCL 62-4-1 states "the employer shall provide necessary first aid, medical, surgical and hospital services, or suitable and proper care, including medical and surgical supplies, apparatus . . . during the disability or treatment of an employee. " Claimant is asserting $65,735.75 in medical expenses are related to his work injury. Employer/Insurer argues that Claimant must present expert medical opinions that each of the claimed expenses is related to the treatment of his injury. This argument is rejected. Claimant has met his burden to show that he suffered a musculoskeletal injury as described by Dr. Blow when he was struck by the roof truss and suspended upside down from the rafters. Therefore, under SDCL 62-4-1, Claimant is entitled to be provided with medical care. Claimant presented the medical bills at issue, along with the corresponding treatment notes. In his deposition, Dr. Blow opined that the work-related accident that occurred on June 10, 2003, was a major contributing factor for the medical treatment he provided Claimant. All of the expenses incurred at Dr. Blow's direction are clearly compensable.

Contrary to Employer/Insurer's arguments that Claimant must prove the compensability of these expenses, it is Employer/Insurer burden to demonstrate that these expenses, ordered by Claimant's treating physicians, were not reasonable or necessary expenses. "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, suitable or proper." Engel v. Prostrollo Motors, 2003 S.D. 2, ¶32, 656 N.W.2d 299 (citations omitted).

In Mettler v. Sibco, Inc., 2001 SD 64, the South Dakota Supreme Court held that gynecological medical expenses incurred in the course of diagnosing a young woman's pain were compensable. In support of its holding, the Court cited the following authority:

> 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. Perry v. Ridgecrest Intern., 458 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).

Id. at ¶ 9. Dr. Blow testified that Claimant's reason for seeking treatment in the first place was related to his injury of June 10, 2003. Dr. Blow's opinions have been accepted. Claimant medical expenses as presented are compensable. Claimant's psychological treatments are compensable under Rank.

The record also reflects that Employer/Insurer paid some expenses up until Dr. Luther's examination and report. Any expenses paid by Employer/Insurer before the denial are compensable. The Department will assume that these were paid according to SDCL 62-4-1 and see no argument presented to find that Employer/Insurer were not responsible for all medical expenses already paid.

Issue Three

What is the appropriate application of SDCL 62-7-3 given the facts of this matter?

During briefing, Employer/Insurer added the issue of whether Claimant is entitled to recover medical expenses or indemnity benefits from and after the time that he refused to attend the scheduled examination by Dr. Elkins. Employer/Insurer asserts that benefits are precluded by SDCL 62-7-3 from and after Claimant's refusal on February 12, 2005, to attend an examination scheduled with Dr. Elkins.

SDCL 62-7-3 provides:

> If the employee refuses to submit himself to examination pursuant to 62-7-1 or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this title for such period.

SDCL 62-7-1 provides:

> An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself at the expense of the employer for examination to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury, and also one week after the first examination, and

> thereafter at intervals not oftener than once every four weeks, which examination shall be for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this title.

Claimant filed his Petition for Hearing on September 22, 2004. Employer/Insurer requested Claimant attend the examination with Dr. Elkins in February of 2005, after this litigation commenced. The remedy provided by SDCL 62-7-3 is not designed to make all litigation efforts moot two years after the refusal. Employer/Insurer should have requested the Department's intervention with a motion to compel or used the rules of discovery allowed by SDCL Chapter 1-26 if it was felt that another examination of Claimant was needed to adequately assess Claimant's entitlement to benefits. Employer/Insurer's argument is rejected.

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 21st day of August, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge