SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

JOSHUA STROHM,
Claimant,

HF No. 54, 2005/06

v.

DECISION

K-RAM INDUSTRIES,
Employer,

and

ACUITY,
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. A hearing was held in this matter on November 2, 2011 in Rapid City, South Dakota. Attorney Michael Simpson represents Claimant, Joshua Strohm (Claimant). Attorney Charles Larson represents Employer, K-Ram Industries (Employer) and Insurer, Acuity (Insurer). Testifying at hearing was the Claimant, Joshua Strohm.

BACKGROUND

Claimant filed his initial Petition for Hearing against Employer and Insurer on November 1, 2005, based upon an injury that occurred on November 29, 2001. Employer and Insurer initially treated this injury as compensable and paid for medical treatment from 2001 through 2004. On April 13, 2004, Claimant was seen by Dr. Jeff Luther at the request of Insurer. On October 26, 2005, Employer and Insurer issued a denial for further workers' compensation medical benefits to Claimant based upon the IME of Dr. Luther.

Employer and Insurer's Answer to Claimant's initial Petition for Hearing alleged that Claimant had not suffered from a recurrence of his prior injury. On February 10, 2006, Employer and Insurer filed a Third-Party Complaint against Porter Apple Company and Continental Western claiming Claimant suffered from a new injury while employed there in 2005. Again in May 2006, Employer and Insurer filed a second Third-Party Complaint against Outback Steakhouse and Travelers Indemnity claiming Claimant suffered a new injury while working there in late 2005 through January 2006.

In the Letter Decision on the Motions for Summary Judgment, the Department ruled that Claimant suffered a recurrence or flare of his November 2001work-related injury, while

employed by Applebees or Outback. On December 28, 2006, the Department found as an undisputed material fact that "[o]n November 29, 2001, Claimant had suffered a compensable work-related injury to his low back while in the employ of K-Ram." Summary Judgment was granted to the third-party respondents and a Final Order regarding the third-party complaints was also issued. No appeal was taken of this summary judgment order.

On February 22, 2008, Employer amended their Answer to the original Petition for Hearing and admitted that Claimant's injury was caused while at work for Employer on November 29, 2001. Also admitted was that Claimant was entitled to payment and reimbursement of medical expenses and temporary total disability benefits up to February 22, 2008. After Employer and Insurer amended their Answer to the Petition, no further action was taken until the time in which Claimant filed the current Petition for Hearing on November 30, 2010.

Employer and Insurer paid Claimant's past and future medical treatments in 2008, 2009, and 2010. On September 23, 2010, Employer and Insurer issued a denial of Claimant's claim for benefits based upon an IME opinion of Dr. John Dowdle, Orthopedic Surgeon, issued on September 1, 2010. The Answer to the current Petition for Hearing by Employer and Insurer indicates that the question at issue is whether Claimant's 2001 injury **remains** a major contributing cause of the condition complained of in September 2010 through the present.

The prior decision and final order by the Department regarding Applebees and Outback does not preclude Employer and Insurer from using the medical records and evidence in the current argument to the Department in this case. There has never been a final order between K-Ram and Claimant regarding whether the 2001 injury remains a major contributing cause of the current medical condition and need for treatment.

Claimant made a Motion for Summary Judgment on the Issue of Causation on August 8, 2011. The resulting Order denying Summary Judgment ruled that the causation of Claimant's condition is res judicata prior to the most current denial in September 23, 2010. There was the opportunity between the parties to litigate causation, but Employer and Insurer amended their answer on February 22, 2008 admitting causation of condition and responsibility for benefits paid prior to February 22, 2008.

Both parties have submitted argument on the issue of res judicata in their post-hearing briefs. Based upon the arguments, the Department reconsiders the Order on Summary Judgment dated October 26, 2011 regarding the date when res judicata applies. Employer and Insurer's argument was convincing and therefore, Res Judicata applies to Claimant's claim up until the second Amended Answer on February 22, 2008. This amended date does not change the arguments that were presented to the Department, as all past medical records were allowed and admitted; as were all past expert medical opinions. The complete record and all pleadings were reviewed and considered in this Decision.

ISSUES

The Issues before the Department are:

1. Whether the work-related injury from November 29, 2001 remains a major contributing cause of Claimant's current conditions as of the second amended answer of February 22, 2008?

2. Whether Claimant is responsible for a cancellation fee incurred by Employer and Insurer due to Claimant's non-appearance at a scheduled Independent Medical Exam?

FACTS

In January 2010, Employer and Insurer secured another record review and opinion from Dr. Greg Reichhardt, a board certified physician in physical medicine and rehabilitation and electrodiagnosis, who practices with the Rehabilitation Associates of Colorado, P.C. Dr. Reichhardt had previously made an independent review of Claimant's condition on January 25, 2007. Dr. Reichhardt gave the opinion that Claimant's 2001 injury remained a factor in his ongoing pain complaints as Claimant's pain never completely went away. Dr. Reichhardt was of the opinion that Claimant's treatment since January 2008, with Dr. Christopher Dietrich, a Board Certified physician in Physical Medicine and Rehabilitation, who practices with the Rehab Doctors, had been reasonable and necessary, with the exception of a rhizotomy treatment. Dr. Reichhardt suggested that Claimant continue with an independent exercise program and make progress with strengthening his lower back and overall conditioning.

On July 13, 2010, Claimant returned to Dr. Dietrich with complaints of increased low back pain. Claimant had not worked since June 18, 2010. He presented with complaints of his leg giving out, significant back and lower extremity radicular pain, and difficulty with urinary and bowel urgency. Dr. Dietrich notes that Claimant was going to pursue radiofrequency ablation treatments in November 2009, but failed to do so because of illness and his new job.

Claimant underwent a left L4-5 transforaminal epidural injection on July 26, 2010. Claimant was released to sedentary only work by Dr. Dietrich on August 9, 2010. At that time, Dr. Dietrich also recommended Claimant pursue a right-sided lumbar facet treatment / radiofrequency neuroablation. Claimant made and cancelled two appointments for this procedure. It finally took place on December 6, 2010. At his surgical follow-up appointment, Dr. Dietrich noted that this treatment alleviated much of Claimant's pain.

Dr. John Dowdle, Board Certified Orthopedic Surgeon, performed an IME on September 1, 2010 at the request of Employer and Insurer. Dr. Dowdle noted that the December 1, 2001, lumbar spine MRI showed mild dehydration at the LR-5 level with a small left sided focal disc protrusion at L4-5, as well as mild desiccation at the L5-S1 disc level. He reviewed Claimant's complete medical history including the IME from Dr. Luther. The diagnoses over the years from the treating physicians were lumbar facet degenerative joint disease, lumbar degenerative disc

disease, chronic low back pain, and suspected left lower extremity radiculitis/radiculopathy. Dr. Dowdle added obesity and deconditioning to that list.

Dr. Dowdle's opinion is that the November 29, 2001 work injury was only a temporary aggravation of Claimant's underlying degenerative disc disease which resolved within three months. All subsequent treatments were also the result of the degenerative disc disease, his obesity, and deconditioning. The 5% whole person impairment rating by Dr. Luther was not the result of the work-related injury, but was due to the underlying disease. The temporary aggravation suffered in 2001 did not qualify for any permanent impairment rating in Dr. Dowdle's opinion.

Dr. Dowdle also gave the opinion that Claimant "is not a surgical candidate because of his size and, also, his degenerative disc condition is not severe enough to warrant surgical treatment." His opinion is that any additional treatment for Claimant's back would be related to his degenerative disc disease. In regards to the treatment Claimant sought in 2010, Dr. Dowdle is of the opinion that the increase in symptoms was not related to any work-related injury suffered in 2001 but that it was another exacerbation or aggravation of his underlying disc disease.

Dr. Nolan M. Segal, an Orthopedic Surgeon affiliated with ExamWorks, conducted a records review of Claimant in January 2011 and a report was issued on January 14, 2011. Claimant was to have met with Dr. Segal for an in- person review, however, Claimant failed to appear. Employer and Insurer incurred a fee of $1060.00 for the IME. The billing from ExamWorks labels a $1000.00 fee as a No Show Independent Medical Exam and $60.00 for the facility rental fee. It is unclear whether the $1060.00 includes the preparation of a records review, or if it was only that part of the total fee for an in-person IME. Dr. Segal had flown from Minneapolis, Minnesota to Rapid City to conduct the IME of Claimant, as well as to conduct other appointments.

Dr. Segal reviewed Claimant's complete medical history from October 7, 1985, including the IMEs of Dr. Dowdle and Dr. Luther. In his report, Dr. Segal notes the specific instances of musculoskeletal injury in Claimant's history. Also noted are the results of the two lumbar MRI's received after the November 29, 2001 work-related injury; the first on December 14, 2001, and the second on August 25, 2004. On July 13, 2010, a lumbar spine MRI was performed at the request of Claimant's treating physician. The results being subtle wedging of the L2 vertebral body with a hemangioma at L3. There were also Schmorl nodules and endplate changes at the L2 level. At L4-5 there was mild disc desiccation, with a shallow broad-based protrusion and annular tear that could result in mild L5 root impingement. At L5-S1 there was mild degenerative disease desiccation and endplate change with a shallow broad-based protrusion and annular tear that could abut the L5 nerve roots and left S1 nerve root, with mild facet arthritis.

Dr. Segal is of the opinion that Claimant reached Maximum Medical Improvement by March 1, 2002 and therefore any pain or symptoms Claimant experienced since then is due to Claimant's non work-related degenerative disc disease. Dr. Segal does not believe any treatments Claimant has gone through or any medication taken by Claimant since approximately March 2011 is due to a work-related injury.

Dr. Dietrich last saw Claimant on April 6, 2011. At that time, Claimant had discontinued much of his medication due to lack of ability to pay for the medicine. Claimant was only taking ibuprofen when needed. Claimant's back pain had improved significantly since the rhizotomy. Dr. Dietrich still is of the opinion that Claimant's current condition and need for treatment is caused by the work-related injury from November 29, 2001. Claimant may have suffered from specific flares or exacerbations over the years, but the root cause remains the same.

All the medical experts presented their opinions to a reasonable degree of medical certainty. All the medical experts are board certified in their field of practice.

At the time of the hearing in November 2011, Claimant had secured employment and usually worked from 4 pm to about midnight. Claimant testified that his back ached on occasion but that it was generally under control. Claimant limits what he lifts, he will not lift anything over 50 pounds. Claimant does not do anything that causes flare-ups for his back such as twisting, squatting, or bending. Claimant understands that his weight is an issue, but has been consciously trying to lose weight. Claimant is six-foot six and one-half inches tall and normally weighs around 300 pounds, although in early 2011, he weighed about 360 pounds. Claimant has reduced his cigarette smoking to about one-half pack per day.

ANALYSIS

The record reflects and the evidence shows that Claimant sustained a work-related injury in November 2001. This injury was the cause of Claimant's pain and symptoms until February 22, 2008, when Employer and Insurer admitted that to this Department in their Amended Answer. Employer and Insurer are not arguing that they are not responsible for the treatment of Claimant's condition for the time prior to February 22, 2008. They did not deny payment for Claimant's treatment until after an IME by Dr. Dowdle in September 2010.

Employer and Insurer deny that Claimant's current condition and need for treatment was caused by a work-related injury that occurred in November 2001. Claimant argues that the condition and need for treatment is on-going and all stems from the same incident.

The South Dakota Supreme Court, on the issue of causation, has stated:

> The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition "because the field is one in which laypersons ordinarily are unqualified to express an opinion." Id. (quoting *Rawls v. Coleman-Frizzell, Inc*., 2002 S.D. 130, ¶21, 653 N.W.2d 247, 252 (quoting *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992))). No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition. SDCL 62-1-1(7). Expert testimony is entitled to no more weight than the facts upon which it is predicated. *Schneider v. S.D. Dep't of Transp.*, 2001 S.D. 70, ¶16, 628 N.W.2d 725, 730 (citations omitted).

Darling v. West River Masonry, Inc., 2010 S.D. 4, ¶13, 777 N.W.2d 363, 367. In this case, Employer and Insurer's medical experts are of the opinion that Claimant has never suffered permanent disability from the November 2001 work-related injury. They both start from the standpoint that Claimant's current condition is degenerative and the November 2001work-related incident is not a major contributing cause of his current condition. Dr. Segal and Dr. Dowdle gave the general opinion that Claimant's November 2001 injury was only a temporary aggravation of his ongoing degenerative disc disease and a symptom of Claimant's obesity, smoking, and general deconditioning.

That opinion by Dr. Dowdle and agreed upon by Dr. Segal has already been rejected by this Department in a previous ruling and was not appealed by Employer and Insurer. Now, Employer and Insurer are asking the Department to accept this opinion, but agreeing to limit the time period of responsibility until after February 2008.

To accept Employer and Insurer's premise and medical experts' opinions would be to accept the already legally rejected opinion but imposing Employer and Insurer's time frames. Dr. Dowdle and Dr. Segal did not limit their opinions to after February 2008 or September 2010. Their opinions go back to the original incident of November 2001. Dr. Dowdle and Dr. Segal's medical opinions are rejected.

The opinions of the past and current treating physician Dr. Christopher Dietrich are accepted. The opinion of Dr. Greg Reichhardt is also accepted. Dr. Reichhardt's opinion is in agreement with Dr. Dietrich in that the November 2001 injury is still a contributing factor to Claimant's current condition and need for treatment. Claimant's most recent treatment, the rhizotomy, alleviated most of Claimant's need for medication and treatment. Claimant still sees Dr. Dietrich for ongoing evaluations and medication, when necessary. Dr. Dietrich's treatment of Claimant is reasonable and necessary.

Claimant's work-related injury of November 2001 remains a major contributing cause of Claimant's current condition and need for treatment, as of February 2008 or September 2010. Employer and Insurer are responsible for the reimbursement or payment of medical bills as detailed in Claimant's hearing exhibits, plus interest as applicable.

The second issue is whether Claimant is responsible for the reimbursement of $1060.00 to Employer and Insurer for a No Show IME fee. The evidence presented shows that Claimant has a bad habit of not showing up for appointments with doctors and physical therapists. This bad habit is to the point where Dr. Dietrich noted that he took Claimant to task for missing appointments and told Claimant that it would not be tolerated. Employer and Insurer have conceded that to collect this No Show fee would be almost impossible and the judgment would probably not be enforced by Employer and Insurer. There is no evidence of the cost of the records review as opposed to the in-patient IME. Dr. Segal did not fly to Rapid City with the sole purpose of seeing Claimant. Dr. Segal had a number of appointments while in Rapid City, to the point that Claimant's attempt to reschedule for a later time that same day was not possible. For those reasons, the costs are not set out with any certainty. The costs of the No Show IME fee are not assessed to Claimant. *Tischler v. UPS*, 552 N.W.3d 597, 608 (SD 1996).

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Claimant may also prepare Proposed Findings of Fact and Conclusions of Law that are not consistent with this Decision. The initial proposals shall be submitted to the Department within twenty (20) days from the date of receipt of this Decision. Employer and Insurer shall have twenty (20) days from the date of receipt of Claimant's Proposed Findings and Conclusions to submit objections thereto or to submit their own 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 and Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 3rd day of May, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/
Catherine Duenwald
Administrative Law Judge