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

JOSHUA STROHM,
Claimant,

HF No. 54, 2005/06

v.

DECISION UPON REMAND

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.

The initial Decision and Final Order was appealed by Employer and Insurer to the Sixth Judicial Circuit. The Honorable Mark Barnett reversed and remanded the Decision on January 17, 2013. The Department was directed to consider the opinions of Dr. Dowdle and Dr. Segal in making a determination whether Claimant had met his burden of proving his work injury "is and remains a major contributing cause of the disability, impairment, or need for treatment." SDCL 62-1-1(7)(b). Furthermore, the Circuit Court found that the application of res judicata to the facts of the case was misapplied. This Decision follows.

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 Applebee's and 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." The Department granted Summary Judgment to the third-party respondents and issued a Final Order regarding the third-party complaints. No appeal was taken of this summary judgment order.

On February 22, 2008, Employer and Insurer amended their Answer to the original Petition for Hearing admitting that Claimant's injury was caused while at work for Employer on November 29, 2001. They also admitted that Claimant was entitled to payment and reimbursement of medical expenses and temporary total disability benefits.

Employer and Insurer paid Claimant's medical bills until September 23, 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 that was 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 is and remains a major contributing cause of his present medical conditions and complaints.

The prior decision and final order by the Department regarding Applebee's and Outback does not preclude Employer and Insurer from using the past medical records and evidence in the current argument to the Department in this case. There is no final order by the Department between Employer and Insurer and Claimant regarding whether the 2001 injury is and 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, which was denied. A Hearing took place on November 2, 2011. A Decision was issued by the Department. Employer and Insurer appealed that Decision to the Sixth Judicial Circuit.

Sixth Judicial Circuit Court Judge Mark Barnett reversed the Department's Order regarding res judicata, pursuant to Decision and Order dated January 17, 2013. Also reversed and remanded is the Decision and Order of this ALJ dated May 3, 2012. The Department was ordered to consider the opinions of Dr. Dowdle and Dr. Segal when determining whether the 2001 injury is and remains a major contributing cause of the 2011 condition.

All past medical records of Claimant were allowed, admitted, and made part of the Department's hearing record in this matter. Furthermore, all past expert medical opinions were admitted into the record during the hearing. The complete record, all pleadings, and all post-hearing briefs were reviewed and considered in this Decision. This Decision upon Remand is set out below.

ISSUES

The Issues before the Department are:

1. Whether the work-related injury from November 29, 2001 is and remains a major contributing cause of Claimant's current conditions?

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

On November 29, 2001, at the age of 20, Claimant suffered an injury to his back while at work for Employer. Claimant was injured when a door slammed shut behind him. An L-shaped bracket that was attached to and stuck out from the door hit Claimant's back. Claimant reported feeling a "pop" in his back and feeling a tingling sensation in his left foot and left leg. An MRI taken of Claimant's back on December 14, 2001 indicated that Claimant had a herniated disk at L4-5 causing a deformity on the L5 nerve root. This was determined to be compatible with the pain Claimant was suffering in his leg. On January 15, 2002, Claimant was back at work without restrictions, although the pain in his leg remained. Claimant suffered from chronic pain and was referred to Dr. Tueber.

Claimant attended physical therapy during 2001 and started doing physical therapy at home. Claimant underwent a left L4-5 epidural steroid injection. In May 2002, Dr. Mark Simonson treated Claimant with the injection in May 2002 and again in July 2002. Claimant had a return of low back symptoms in January 2003 and received another caudal epidural steroid injection from Dr. Mark Simonson.

In January 2004, Claimant visited Mitchell Chiropractic and Acupuncture Center. Claimant had recently fallen at work and had low back pain since he slipped at work. The chiropractic note in February 2004 indicates that Claimant still had occasional tingling down his left leg into his toe. His lower back was a dull ache most of the time. Dr. Quentin Thompson, DC, gave the opinion that Claimant suffered an exacerbation of his previous injury from 2001 and that Claimant's pre-existing condition was a major contributing cause of his diagnosis. Claimant was prescribed another round of physical therapy.

On August 25, 2004, Claimant underwent another Lumbar MRI. It is noted by the radiologist that the L3-4 level was normal and that the central and left paramedian disc protrusion or herniation at L4-5 appeared stable. The herniation compressed upon the anterior margin of the thecal sac. The notes indicate that this condition could likely affect the left-sided nerve roots at that level. On November 30, 2004, Dr. Mark Simonson, MD, with The Rehab Doctors, evaluated Claimant. He noted that the caudal epidural steroid injections gave Claimant relief for 1-2 months before returning to baseline. Dr. Simonson noted that repeating the injections would not be promising.

Dr. Jeff Luther examined Claimant and prepared an IME report on December 9, 2004. Dr. Luther saw Claimant upon request of Employer and Insurer. Dr. Luther, after reviewing all the records and performing an exam of Claimant, gave the opinion that the November 2001 injury was a major contributing factor to his symptoms yet in 2004. The slip and fall in January 2004 exacerbated the 2001 injury. Dr. Luther anticipated that Claimant would soon reach MMI in regards to the exacerbation.

On January 2, 2005, Claimant reported to the emergency room with increased low back pain. The complaints were written as being right low back pain across the left hip and down the left leg and tingling from the left knee to the left foot. Claimant returned to physical therapy through March 30, 2005. He was prescribed at home exercises to perform. On August 9, 2005, Claimant saw Dr. Christopher Dietrich , a Board Certified physician in Physical Medicine and Rehabilitation, who practices with the Rehab Doctors. Based upon the physical examination, Dr. Dietrich gave a diagnosis of mechanical low back pain, lumbar facet degenerative joint disease, and lumbar degenerative disc disease. Dr. Dietrich noted that Claimant's complaints were related back to the original workers' compensation injury in 2001.

In February 2006, Claimant underwent L4-5 and L5-S1 lumbar facet injections. There was short term relief by Claimant with these injections. The symptoms worsened again with Claimant's return to work. In March 2006, Claimant underwent a right-sided L4-5 and L5-S1 diagnostic medial branch block, and rhizotomies in April 2006. These were performed by Dr. Brett Lawler. Claimant pain dropped significantly from the rhizotomies and was told he was at maximum medical improvement at that time. The pain returned in May 2006, after he lifted a 20-pound box of produce at work. Claimant again returned to his baseline level by the end of July 2006.

In March 2007, Claimant underwent right L4-5 and L5-S1 lumbar facet injections. He did not receive any benefit from these injections. Claimant was instructed to return to physical therapy and look into a regular exercise regime. Although prescribed, Claimant's attendance at physical therapy sessions was poor. He was discharged from physical therapy in March 2008, but did not follow through with home exercise immediately. Claimant did not obtain an exercise therapy ball or mat until September 2008.

Claimant underwent a functional capacity exam on October 30, 2008 at the Regional Rehabilitation Institute. Claimant's attempts were valid and resulted in his being restricted to performing light-to medium duty work and lifting occasionally 25 pounds. Claimant's pain prescriptions were only to be taken on an as-needed basis. In November 2009, at a one-year follow-up with Dr. Dietrich, it was noted that Claimant still suffered from tenderness and paraspinal muscle spasm in the left lumbar facet and paraspinal region. Dr. Dietrich's plan at that time was to repeat the L4-5 and L5-S1 lumbar facet radiofrequency neural ablation. Flexeril was prescribed to Claimant to take on an as-needed basis. At that time, Claimant used heating pads and a TENS unit to alleviate his back pain.

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. In January 2010, 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. He wrote: "There have been intervening aggravating factors of Mr. Strohm's pain. I do not see, however, an indication that his pain had resolved. It appears that his 11/2001 injury remains a factor in his ongoing pain complaints."

Dr. Reichhardt was of the opinion that Claimant's treatment since January 2008, with Dr. Christopher Dietrich 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 June 18, 2010, Claimant went to the emergency room because of an increase in pain to his lower back and numbness in his left leg. He was taken off work until June 21, 2010 by the emergency room doctor. In July 2010, Claimant returned to Dr. Dietrich for a follow-up. He presented to Dr. Dietrich with leg weakness and worsening significant back and lower extremity radicular pain. Dr. Dietrich noted radicular symptoms in the left lower extremity with severe tenderness in the low back/lumbosacral region. He also had bowel and bladder urgency which was a new symptom for Claimant. Dr. Dietrich's plan was to pursue an MRI of the low back, considering potential epidural injection or lumbar facet radiofrequency neuroablation.

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. Dr. Dietrich also recommended Claimant pursue a right-sided lumbar facet treatment / radiofrequency neuroablation. The procedure 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 went back to the beginning of Claimant's treatment and performed a records review as well. 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 and Dr. Reichhardt. 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 was that the November 29, 2001 work injury was only a temporary aggravation of Claimant's underlying degenerative disc disease. He stated that the aggravation resolved within three months. It was his opinion that all subsequent treatments were also the result of the degenerative disc disease, his obesity, and deconditioning. He opined that 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 was that any additional treatment for Claimant's back would be related to his degenerative disc disease. Following this opinion by Dr. Dowdle in September 2010, Employer and Insurer denied benefits to Claimant.

Dr. Nolan M. Segal, an Orthopedic Surgeon affiliated with ExamWorks, conducted a records review of Claimant in January 2011 and issued a report on January 14, 2011. Claimant was to meet with Dr. Segal for an in- person exam, however, Claimant failed to appear due to transportation issue. 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 for other appointments, as well as the IME of Claimant.

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 noted 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. Dr. Segal, in his deposition, gave 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 after March 2, 2002 is due to the November 29, 2001 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 gave the opinion that Claimant's current condition and need for treatment is caused by the work-related injury from November 29, 2001. His opinion, noted in the record and in his deposition, was that Claimant may have suffered from specific flares or exacerbations over the years, but the root cause remains the same. 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.

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. All opinions were given by deposition or affidavit. No medical experts gave live testimony at hearing.

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 may cause pain flare-ups, 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. Claimant's daily medications are limited to over-the-counter pain relievers.

Further facts may be developed in the analysis below.

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 in their Amended Answer. Employer and Insurer are not arguing that they are 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:

> In a worker's compensation case, the "'claimant has the burden of proving all facts essential to compensation[.]'" *Phillips v. John Morrell & Co.*, 484 N.W.2d 527, 530 (S.D. 1992) (quoting *King v. Johnson Bros. Constr. Co.*, 83 S.D. 69, 73, 155 N.W.2d 183, 185 (1967)). To prevail, a claimant "must establish, among other things, that there is a causal connection between [the] injury and [the] employment. That is, the injury must have its origin in the hazard to which the employment exposed the employee while doing [the] work." *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 357-58 (S.D. 1992) (internal citations and quotations omitted); see also *Hanten v. Palace Builders, Inc.*, 1997 S.D. 3, ¶9, 558 N.W.2d 76, 78 (citations omitted). "No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]" SDCL 62-1-1(7)(a).

Tebben v. Gil Haugan Construction, Inc., 2007 S.D. 18, ¶19, 729 N.W.2d 166, 173-174. Along those lines, the Court has delineated the extent of the relationship between the injury and the current condition that must be proven by Claimant. The Court wrote in *Darling v. West River Masonry, Inc.*:

> Claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty. *Brady Mem'l Home v. Hantke*, 1999 S.D. 77, ¶16, 597 N.W.2d 677, 681 (citations omitted). Causation must be established to a reasonable degree of medical probability, not just possibility. *Truck Ins. Exch. v. CNA*, 2001 S.D. 46, ¶19, 624 N.W.2d 705, 709 (citing *Enger v. FMC*, 1997 S.D. 70, ¶18, 565 N.W.2d 79, 85). The evidence must not be

> speculative, but must be "precise and well supported." *Vollmer*, 2007 S.D. 25, ¶14, 729 N.W.2d at 382 (quoting *Horn v. Dakota Pork*, 2006 S.D. 5, ¶14, 709 N.W.2d 38, 42).

Darling v. West River Masonry, Inc., 2010 S.D. 4, ¶12, 777 N.W.2d 363, 367. Furthermore, the law requires the testimony of medical professionals in determining causation in cases such as this. The Court has written:

> 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." *Vollmer*, 2007 S.D. 25, ¶14, 729 N.W.2d at 382 (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 Claimant's case, Employer and Insurer's current medical experts are of the opinion that Claimant never suffered permanent disability from the November 2001 work-related injury. That is in distinct contrast to the Claimant's treating physician and the previous expert opinions of IME doctors that were hired by Employer and Insurer to give independent medical evaluations of Claimant in a previous hearing on the same injury.

Both Dr. Dowdle and Dr. Segal start from the standpoint that Claimant suffers from a degenerative condition and not from an injury that occurred in November 2001. Their opinion is that the work-related incident in November 2001 is not a major contributing cause of his current complaints and need for treatment. Dr. Segal and Dr. Dowdle gave the 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. Neither Dr. Dowdle, nor Dr. Segal specifically point to any intervening accident or incident that are major contributing causes of Claimant's current condition.

The medical records and the professional medical reviews of these records indicate that Claimant's lower back pain has never completely gone away following the November 2001 injury. This was affirmed by the opinions of Dr. Dietrich, Dr. Reichhardt, and Dr. Luther. All three of these doctors, at various times since 2001, have given the opinion that Claimant's injury in 2001 has continued to be a major contributing cause of Claimant's symptoms and need for treatment. Dr. Dietrich is Claimant's treating physician. "The opinion of an examining physician should be given substantial weight when compared to the opinion of a doctor who only conducts a review of medical records." *Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 S.D. 52, ¶23, 816 NW 2d 843, 850. (citing *Darling*, 2010 S.D. 4, ¶19, 777 N.W.2d 363, 369). Dr. Dietrich's opinion is given more weight than the opinions of the IME doctors who

only conducted records reviews. Dr. Reichhardt and Dr. Luther were brought in for independent medical exams by Employer and Insurer.

Claimant, although he had minor upper back issues prior to the incident, did not suffer from back pain to the extent he suffered after the incident in 2001. Claimant is not a malingerer or someone who is trying not to work. Claimant has worked most of the time since the injury with the exception of a few days off for medical treatments or following minor exacerbations of the injury. Claimant's burden of proof in this case is very clearly set out in law.

> [Claimant's] burden in this case was to prove causation by a preponderance of the evidence, not beyond a reasonable doubt or with absolute certainty. See *Rawls*, 2002 S.D. 130, ¶20, 653 N.W.2d at 252 (quoting *Caldwell*, 489 N.W.2d at 358); see also *A. Larson, Larson's on Workers' Compensation Law*, 128.02(1) (award may be made when medical evidence is "inconclusive, indecisive, fragmentary, inconsistent, or even nonexistent"). There was a dispute between the claimant's and the employer's experts. Yet, just because medical opinions differ does not mean that the claimant's medical evidence is inconclusive. It is only when a claimant's expert testimony is equivocal or based on mere possibility that we have found the evidence to be inconclusive and insufficient to satisfy the claimant's burden. See *Enger v. FMC*, 1997 S.D. 70, 565 N.W.2d 79 (the claimant's expert's testimony was equivocal); *Hanten*, 1997 S.D. 3, 558 N.W.2d 76 (claimant's expert advanced an equivocal medical opinion, thereby making the evidence inconclusive).

Tebben v. Gil Haugan Construction, Inc., 2007 S.D. 18, ¶25, 729 N.W.2d 166. Like the *Tebben* case, Claimant's experts have given conclusive and unequivocal answers to the questions. The treating physician has said that Claimant still suffers from the November 2001 injury. Dr. Luther gave the opinion that in 2004 Claimant still suffered from the November 2001 injury. In 2010, Dr. Reichhardt gave the opinion that Claimant still suffered from the November 2001 injury. Their opinions are based upon Claimant's full medical record including all MRI's taken up to the time of their opinions and are given to a reasonable degree of medical certainty.

Claimant has met his burden of proving causation by a preponderance of the evidence, as required by law. The opinions of the treating physician Dr. Christopher Dietrich are accepted as being more persuasive. The evidence is conclusive that the November 2001 injury is and remains a major contributing cause of Claimant's current condition and need for treatment.

Claimant's work-related injury of November 2001 is and remains a major contributing cause of Claimant's current condition and need for treatment. 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. See *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 upon Remand. 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 16th day of April, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

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Catherine Duenwald
Administrative Law Judge