

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota**

FERN Y. STANTON JOHNSON,

HF No. 62, 2010/11

Claimant,

v.

DECISION ON REMAND

UNITED PARCEL SERVICE,

Employer,

and

**LIBERTY MUTUAL INSURANCE
GROUP,**

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 June 7, 2011 at 9:00 am MT in Rapid City, South Dakota. Attorneys, Jason Groves and David S. Barari represent Claimant, Fern Y. Stanton Johnson (Claimant). Attorneys, Eric C. Shulte and Justin T. Clarke represent Employer, United Postal Service, and Insurer, Liberty Mutual (Employer and Insurer). Testifying at hearing were Steven G. Frost, MD; Scott Sogge; Fern Stanton Johnson; Bruce Norback, MD; and Ross Johnson.

The Department issued a Decision in the above matter on December 1, 2011. Cross-motions for Appeal followed the Decision, to the Seventh Judicial Circuit. The Honorable Mary P. Thorstenson issued a Decision on January 7, 2013, affirming in part, reversing in part, and remanding two issues back to the Department. Supplemental briefs were prepared by the parties and submitted to the Department. This Decision addresses those two issues remanded to the Department by Judge Thorstenson.

ISSUES:

1. Whether continued radiofrequency ablation treatments are medically necessary, suitable, or proper?

Judge Thorstenson reversed the previous ruling. Judge Thorstenson remanded this issue for a determination of whether radiofrequency ablation is medically necessary or suitable and proper, taking into consideration the opinions of Dr. Bruce Norback.

2. Whether the pool and enclosure at Claimant's home is medically necessary, suitable, or proper?

In the previous Decision by the Department, it was found that "home-based hydrotherapy is not specifically recommended by the treating physician." Judge Thorstenson ruled that finding clearly erroneous and requires a balancing of the credibility of the testimony of Dr. Norback and Dr. Frost. Judge Thorstenson wrote, "Stanton is only entitled to compensation for the pool if it is determined medically necessary or suitable and proper. She is only entitled to be compensated for the amount expended to make the pool serve her medical condition. She will not be reimbursed for anything determined to be a convenience, amenity, or aesthetically pleasing accoutrement."

FACTS:

Claimant suffers from chronic groin pain. The record indicates that Claimant started suffering from this particular pain in 1995. While at work, Claimant suffered a sharp pain in her groin in January 1996. Claimant's doctor, in January 1996, found endometriosis implants on both pelvic side walls, as well as a 2.5 centimeter inguinal hernia, which was operated on at that time. Claimant was off work for periods of time throughout 1996 and 1997. Claimant left her job with Employer in December 1997, after a separate and unrelated injury. Claimant returned to work for one month since that time.

The causation of Claimant's pain was litigated extensively from 1997 through February 2006. The final legal proceedings included a remand to the Department by the Seventh Judicial Circuit and the issuance of Findings and Conclusions that were ordered by the Circuit Court. The Department also adopted the Findings and Conclusions made by the Circuit Court. These final Findings of Fact and Conclusions of Law entered by the Department on February 27, 2006 were not appealed by Employer/ Insurer. The Findings and Conclusions found that Claimant's groin pain was caused by a work-related injury. The exact name of the condition or the injury was not a finding, but it was found that doctors' had diagnosed it as a neuroma (impingement of nerve scar tissue) or a "causalgia" or "neuralgia" (nerve-related pain).

An IME was performed on Claimant at the request of Employer/Insurer on June 10, 2010. Dr. Bruce Norback, the IME physician and board certified neurologist, produced a written report. In that report, Dr. Norback reviews Claimant's full medical history and the results of a physical exam of Claimant. Dr. Norback's opinions were by a reasonable degree of medical certainty. He found that there was still no definitive diagnosis for Claimant's groin pain. He is of the opinion that Claimant's radiofrequency ablation treatments do not seem to be helping and are not a cure for Claimant's condition. Furthermore, he opined that Claimant has no need for an in-home pool for hydrotherapy.

On August 9, 2010, Employer/Insurer sent a letter of denial to Claimant. This denial was for any additional benefits including payment of present and ongoing medical expenses for the January 1996 neuroma/groin injury. Employer/Insurer also denied Claimant's request for

reimbursement of the installation of a heated pool at her home and in-town mileage expenses. Claimant's claim for payment for present and ongoing medical expenses was granted by the Department in the December 2011 decision, and affirmed by the Seventh Judicial Circuit.¹

Claimant's treating physician, Dr. Steven Frost continues to be Claimant's primary medical provider for her groin pain. Dr. Frost has been treating Claimant's chronic pain for many years. Dr. Frost is of the opinion that Claimant's treatment by radiofrequency ablation is a reasonable and necessary and suitable treatment for chronic pain. The other possible treatments that could be prescribed for Claimant are an implanted spinal cord stimulator or regular use of narcotic painkillers. Dr. Frost also recommends hydrotherapy over "dry-land" physical therapy and recommends that the pool be warm and located indoors, as the therapy results are more positive. The home pool is a convenience according to Dr. Frost, and is not a medical necessity.

Dr. Frost recommended hydrotherapy or pool therapy for Claimant on an "as needed" basis. Dr. Frost did not order that Claimant install a pool at her home, but did recommend that she try to find a location with an indoor, heated pool. Claimant has found hydrotherapy to be successful in pain control when the water is warm and the treatment is used on a regular basis. Claimant uses her pool two to three times per day. The hydrotherapy in combination with the TENS unit and other therapies, including meditation and regular radiofrequency ablation treatments, has reduced her use of narcotics and her chronic pain. Claimant installed a pool in her home for her hydrotherapy before Dr. Frost recommended she use hydrotherapy. To install the pool, she and her husband remodeled their attached garage/shop. The complete cost of remodeling and installation, without accumulated interest, was \$20,570.97.

Employer/Insurer argues that the hydrotherapy can be accomplished at public facilities within Rapid City. According to the Nurse Case Manager assigned to Claimant's case, there are four public facilities in Rapid City available: High Plains Physical Therapy can be booked three times per week at a rate of \$36 per month; Rapid City Regional Hospital Rehab can be attend 2 times per week at a cost of \$35 per month; Roosevelt Swim Center is available Monday through Sunday at a cost of \$78 per month; YMCA is available Monday through Sunday at a rate of \$46 per month. The Roosevelt Swim Center and the YMCA pools are slightly cooler than what Claimant prefers, 85 and 89 degrees respectively, however there are hot tubs available for use at both of these facilities. Claimant prefers to have her pool at 97 to 98 degrees.

Further facts may be developed in the Analysis below.

¹ The Honorable Judge Mary Thorstenson affirmed the Department opinion that the etiology of Claimant's condition is res judicata absent a showing by Employer/Insurer of change in Claimant's medical condition, required by SDCL 62-7-33.

ANALYSIS

Are continued radiofrequency neuroablation treatments medically necessary, suitable, or proper?

Employer and Insurer ordered an IME of Claimant, conducted by Dr. Bruce Norback. Dr. Norback testified at the hearing. Dr. Norback is board certified in neurology and clinical neurophysiology and practices at the Minneapolis Clinic of Neurology. He is a Clinical Professor of Neurology at the University of Minnesota Medical School. Dr. Norback's clinical research from 2001 through 2004, as noted upon his curriculum vitae, concentrated upon epilepsy and seizure disorders. He is also the Medical Director of the EEG laboratory at the North Memorial Medical Center in Minneapolis, MN.

Dr. Norback performed a physical examination of Claimant as well as a records review. Dr. Norback reviewed Claimant's medical file and history including the depositions of the doctors deposed in the previous hearing before the Department. Dr. Norback testified at hearing about the treatment that Claimant has been prescribed, the hydrotherapy and the radiofrequency neuroablation treatments. According to his live testimony, these treatments are not a cure for the pain and only provide temporary relief of Claimant's symptoms. Dr. Norback testified that the long-term use of temporary treatments for an unknown nerve condition is not medically appropriate. Dr. Norback's opinion is based upon the fact that no doctor has definitively diagnosed the cause of Claimant's nerve pain, despite the legal ruling that her nerve pain is caused from a work-related injury.

Dr. Norback is not an expert in radiofrequency neuroablation treatments. During his testimony regarding these treatments, Dr. Norback explained what he knows to be the science behind the treatments; that the injured nerve is given a small shock or burn to alleviate the pain. He explained that the treatment can scar or damage the nerve over time and possibly do more damage to the nerve. Dr. Norback's opinion is that long-term use of radiofrequency neuroablation treatments are not necessarily helpful and could be damaging in the long-term. In the short-term the neuroablation treatments may alleviate pain for a few months. Dr. Norback recommends that her treating physician obtain an updated MRI and possibly perform exploratory surgery in the area of the pain to find a more definitive cause of the pain in order to properly treat Claimant. He is of the opinion that radiofrequency neuroablation is not a cure, but only a method to alleviate pain in the short-term. Dr. Norback presented credible testimony and was a credible witness. He fully admits that he is not an expert on certain types of pain treatment including radiofrequency ablation.

Claimant's treating physician, Dr. Steven Frost, also presented credible testimony at the hearing. He is board certified in anesthesiology and board eligible in pain management. He is the medical director of Pain Management Services and the Staff Anesthesiologist at Rapid City Regional Hospital. Dr. Frost has treated Claimant for approximately 14 years for her chronic groin pain. According to Dr. Frost's tests, Claimant's pain involves the ilioinguinal nerve and the genitofemoral nerve. Over the years, and in the course of his treatment, he has pinpointed the specific nerves that are causing the pain for Claimant. In 2000, Dr. Frost gave the medical

opinion, one which he still holds, that Claimant's groin pain is chronic and caused by a work injury. That is a legal fact regarding the etiology of Claimant's pain and is res judicata at this point. Dr. Frost's treatment by radiofrequency ablation is acknowledged to only temporarily dull or reduce the chronic pain. The longest that this type of treatment will last is 18 months. Typically, the pain is dulled for a period of three to six months.

Dr. Frost is of the opinion that Claimant's chronic groin pain will continue indefinitely. In his opinion, the radiofrequency ablation treatments are the best possible treatment, with the least amount of side effects, for Claimant. He is of this belief because Claimant's pain is significantly reduced with these treatments, in combination with the other therapies prescribed.

The South Dakota Supreme Court has ruled on the employer's burden of proof to show whether a doctor's order is "necessary, suitable, or proper"

In interpreting this statute, we have stated that "[i]t is in the doctor's province to determine what is necessary or suitable and proper." *Streeter v. Canton Sch. Dist.*, 2004 S.D. 30, ¶25, 677 N.W.2d 221, 226 (quoting *Krier v. John Morrell & Co.*, 473 N.W.2d 496, 498 (S.D. 1991)). And "[w]hen 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." *Id.* (quoting *Krier*, 473 N.W.2d at 498).

Stuckey v. Sturgis Pizza Ranch, 2011 S.D. 1, ¶23, 793 N.W.2d 378, 387-388. In this case, the treating physician, who is an expert in pain management, has prescribed the use of radiofrequency ablation treatments for Claimant's pain. Dr. Frost has pinpointed the nerves which are the source of the pain and these nerves are treated three or four times per year with radiofrequency. Claimant's pain is chronic. It will likely never be cured, according to Dr. Frost. These treatments are not invasive and give the least amount of side effects to Claimant.

Dr. Norback is not an expert in radiofrequency ablation and therefore his testimony regarding these treatments is weighted less than Dr. Frost's, who is an expert. He is also not an expert in pain management. Dr. Norback wants to continue to explore for a cause of Claimant's pain and treat the underlying cause, if there is one. Although he gives some reasons why radiofrequency ablation on a continuing basis may not be a wise treatment, he tempered that opinion with the fact that those side effects are only possible. One possible side effect is that the nerves could be burned and not shocked and that the nerves would be subjected to more damage. He notes that ablation of the nerves is not a cure.

The medical expert for Employer/Insurer has not given an opinion that shows the radiofrequency ablation treatment is not necessary or suitable and proper. In the treating physician's opinion, radiofrequency of Claimant's nerves is necessary, suitable and proper. Dr. Frost is an expert in pain management and radiofrequency; Dr. Norback is not. The witnesses' testimony is weighted according to their expertise in this matter. Claimant has shown the radiofrequency ablation treatments to be medically necessary, suitable and proper.

2. Whether the pool and enclosure at Claimant's home is necessary, suitable, or proper and whether Claimant should be reimbursed for the cost of the pool and enclosure?

Following the ruling by the South Dakota Supreme Court in a similar case, Judge Thorstenson remanded this issue to the Department to make a ruling whether the swimming pool installed in Claimant's home is a medical necessity.

We reiterate that an employer is only responsible for medical necessities, not conveniences, amenities or aesthetically pleasing accoutrements. We agree with the Maryland Supreme Court which stated:

We remain mindful that the act is to receive a liberal construction.

Nevertheless, in the area of modifications to a residence, the concept of medical treatment under § 37(a) must be limited to access for necessities.

Here the purpose of the possible improvements goes beyond the necessities already being provided, and seeks to give [Claimant] a sense of increased independence and self-worth. Under the circumstances here that goal is beyond the process of construction of § 37(a). Were we to depart from the standard of access to medical treatment, there would be no statutory standard to guide the Commission in determining the extent of an insurer's obligation to make alterations to a claimant's residence.

Howie v. Pennington County, 521 N.W.2d 645, 648 (S.D. 1994) (quoting *R & T Const. Co. v. Judge*, 594 A.2d 99, 107, 108 (MD. 1991)) (emphasis added).

Both expert physicians are of the opinion that hydrotherapy, as a prescribed treatment or therapy for pain, can be medically necessary and is suitable and proper care. Employer/Insurer are responsible for the payment of "necessary ... and suitable and proper care". SDCL § 62-4-1. However, neither physician has said that home-based hydrotherapy is required or medically necessary. Dr. Frost has recommended that Claimant utilize a warm indoor pool for exercises as frequently as she wants, although it is not a medical necessity. Dr. Frost did not instruct nor prescribe Claimant to install a swimming pool at her home. In November 2009, he suggested Claimant try hydrotherapy. In December 2009, Claimant had a pool installed in her home. In February 2010, Claimant asked Dr. Frost to specifically prescribe home-based hydrotherapy.

Dr. Frost does prefer that the pool be closer to Claimant's residence in order to maximize the benefits from the hydrotherapy, especially during the cold winter months. He gave the opinion that the "pool therapy be in an enclosed, temperature regulated space." Dr. Frost's preferences were only given to Claimant after she had installed the pool in her home and after Employer/Insurer denied the payment of the cost of the pool and home remodel. Claimant purchased and had the pool installed in her home, two months before she asked Dr. Frost about prescribing home-based hydrotherapy.

The Nurse Case Manager with Alaris, Julie Bradford, presented evidence that shows that there are two therapy pools in Rapid City. The High Plains Physical Therapy pool is available for Claimant three times per week. The Rapid City Regional Hospital Rehab pool is available two

times per week. Neither location can accommodate Claimant's pool therapy of three times per day, 7 days per week.

Ms. Bradford's report also showed two public indoor swimming pools available for Claimant's use, with a paid membership. The Roosevelt Swim Center has a leisure pool with a temperature of approximately 85 degrees and a hot tub. The YMCA has a leisure pool heated to 89 degrees and has a steam room and hot tub available. These facilities are open 7 days per week. Currently, Claimant performs therapy exercises in her warm therapy pool at home. The pool is approximately 7 feet wide by 14 feet long by 4 ½ feet deep. The pool is large enough and deep enough for Claimant to perform her exercises.

There is not a therapy pool in Rapid City, heated to the temperature preferred by Claimant, which Claimant can schedule two to three times per day. Therefore, Claimant took it upon herself to install a pool in her home. Claimant's husband performed the remodeling of the home and installation of the swimming pool at a cost of \$20,570.97. Claimant received an estimate from a local contractor for cost of the work performed. The estimate from the contractor for materials and labor was \$17,596 (not including overhead and profit). To hire the contractor to perform the work would have cost about \$21,620. There is no indication which costs are necessary for the installation and which costs make the pool room more aesthetically pleasing.

Dr. Frost did not prescribe Claimant to install a home therapy pool. Dr. Norback testified that he has never, in his 30 years of practice, prescribed a therapy pool to be installed in a patient's home. To have a patient install a therapy pool for hydrotherapy is not normal. Dr. Frost, likewise, testified that he does not usually prescribe a therapy pool to be installed in a patient's home. Dr. Frost testified, "And so if funding's there and approved, I am all for a patient to be able to have access to their therapy at home." This is not a prescription for a pool by Dr. Frost; it is a recommendation that if insurance can pay for a pool, it would be a benefit. That is not a statement of medical necessity. Dr. Frost approves of Claimant using hydrotherapy as it does not cause more injury and relieves her pain; he approves of any therapy that keeps Claimant moving and active. Dr. Frost's opinion is that a pool at home will increase Claimant's use of the hydrotherapy as it is more convenient for Claimant. Dr. Frost did not note his preference for a home therapy pool until after Claimant had purchased and installed one in her residence.

This fact pattern is very similar to the case of *Lindsey v. Reeves*, No. W2010-01736-WC-R3-WC, Tenn. Supreme Court 2011. In this Tennessee Workers' Compensation Appeals case, the employee installed a therapy tub without a prescription from his treating physician. The treating physician, after the fact, said that claimant "would benefit" from the installation of the therapy tub in his home. The Tennessee Supreme Court concluded that this opinion from the Employee's doctor is "insufficient evidence to find that the hydrotherapy tub was medically reasonable and necessary for the treatment of Employee's work injury." *Id.* The court wrote, "The fact that he *would benefit* from such treatment falls short of the requirement that Employee show the *necessity and reasonableness* of such treatment." *Id.* (emphasis added).

Similarly, Dr. Frost is of the opinion that a home-based hydrotherapy pool is preferred, but that is not the same as saying that a pool in the home is medically necessary. The pool at home may be more convenient, and may help Claimant use the pool more, but it is not medically necessary. As noted before, hydrotherapy in general is suitable and proper for the relief of Claimant's pain and continued treatment for the injury. Employer/Insurer would have been required to pay for Claimant to utilize therapy pool or exercise pool in any of the locations indicated by Employer/Insurer as being available.

Claimant's petition for repayment of her home remodeling and cost of pool installation is denied. Home-based hydrotherapy is not specifically prescribed by the treating physician, and Employer/Insurer has shown that a pool in the Claimant's home is not a necessity but a convenience.

Employer/Insurer has not met the required burden of showing that the radiofrequency ablation treatments, as prescribed by the treating physician, are not reasonable, suitable and proper. Employer/Insurer is responsible for the payment of Claimant's radiofrequency ablation treatments.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision on the Issue of Radiofrequency Ablation. Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision on the Issue of Reimbursement of the Home-Based Therapy Pool. Both parties may also submit Proposed Findings and Conclusions not consistent with this Decision. The initial submissions shall be filed with the Department within thirty (30) days from the date of receipt of this Decision. The opposing parties shall have fifteen (15) days from the date of receipt of the initial submissions 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 24th day of May, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

Catherine Duenwald
Administrative Law Judge