SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

SHARLYNDA BURLEY **HF No. 6, 2007/08**

Claimant,

v. **ARBITRATION DECISION**

COMMON CENTS, LEAD,

Employer,

and

GENERAL CASUALTY COMPANY,

Insurer.

This matter involves a Workers' Compensation claim brought before the South Dakota Department of Labor, Division of Labor and Management. The parties have agreed to submit the issues discussed here to the Department relying on the Claimant's medical records for the factual basis of the case without hearing.

Issues:

Whether Claimant is barred from receiving Workers' Compensation benefits in the future by SDCL 62-7-35 for the right knee injury Claimant suffered October 5, 2005?

Whether the medical treatment sought by Claimant for her December 17, 2005, back injury is reasonable and necessary?

Facts:

Based upon the record, the following facts are found by a preponderance of the evidence:

1. Sharlynda Burley (Claimant) was born on April 8, 1961.

2. Common Cents, Lead (Employer) hired Claimant on or about August 5, 2005, as a cashier.

3. On October, 5, 2005, Claimant suffered a work-related injury to her right knee while working for Employer. Claimant sought medical treatment for the knee on the day of her injury.

4. On December 17, 2005, Claimant suffered a work-related injury to her lower back while working for Employer. Claimant sought medical treatment for her back on the day of her injury.

5. On October 5 and December 17, 2005, Employer was insured by General Casualty (Insurer) for Workers' Compensation purposes.

6. Employer and Insurer initially accepted responsibility for Claimant's October 5 and December 17, 2005, injuries.

7. On February 17, 2006, Claimant's right knee was at Maximum Medical Improvement (MMI) with no impairment.

8. On March 1, 2006, Employer and Insurer sent a letter to Claimant indicating that they did not intend to pay any additional benefits for Claimant's right knee injury.

9. Claimant initially filed a Petition for Hearing in June 2007. Claimant then moved for a voluntary dismissal of the case without prejudice. The Department granted Claimant's motion on January 28, 2008. To date, Claimant has not re-filed a Petition for Hearing.

10. Claimant was first treated for her back injury on December 17, 2005, at the Lead-Deadwood Regional Hospital. She received follow-up care at the Queen City Medical Center with Dr. Knudson.

11. Claimant was placed on Vicodin, a strong pain medication within days of her lower back injury. As Claimant's treatment continued, her dosage and dependence on narcotic pain medications increased over time.

12. An MRI taken on December 30, 2005, indicated:

    a. Desiccation of the lumbar disc from L3 through S1.
    b. Mildly bulging disc at 2-3-4 and S1, however, significant encroachment on the sac on the intervertebral foramina is not seen.
    c. At L4-5, there is a right sided disc herniation. This right sided herniation extends caudally over the vertebral body of L5 and may be impinging on the traversing on the right-sided L5 nerve root.
    d. The changes at the L4-5 are the presumed source of the patient's symptomatology.

13. Claimant was referred to Dr. Maxwell at the Neurosurgery a Spinal Center. Claimant underwent a bilateral L4-5 Microdiskectomy on April 19, 2006. Claimant received follow-up treatment by Dr. Maxwell and Black Hills Physical Therapy.

14. A post-surgical MRI was performed of June 8, 2006.

15. Claimant relocated to Des Moines, Iowa in July 2006. After her move to Des Moines, Claimant initially received follow-up care for her back from Dr. Prevo, then Dr. Nelson.

16. On October 12, 2006, Claimant began seeing Dr. Bahls for treatment of her lower back injury. Dr. Bahls saw Claimant several times from November 2006 through February 2007. During these visits, Dr. Bahls removed Claimant from work and altered Claimant's pain regime in an attempt to relieve some of her pain.

17. On January 26, 2007, a MRI was again performed. The MRI was read as follows:

    a. Interval evolution of operative changes at L4-5 as discussed above with enhancing scar seen within the operative bed. No rim enhancing fluid collection is seen.
    b. Multi-level degenerative disc change, greatest at L4-5, multilevel disc bulging is seen with annular tearing as discussed above. No focal disc degeneration is seen.

18. An independent medical examination (IME) was performed by Dr. Troll on April 11, 2007. Dr. Troll assigned a 10% impairment rating to Claimant. Dr. Troll opined that Claimant should wean off the narcotic pain medications.

19. On August 22, 2007, Dr. Bahls noted that Claimant was not following her pain medication protocol. Dr. Bahls advised Claimant to see a psychologist for pain management.

20. In a letter dated March 12, 2008, Employer and Insurer offered to pay for a pain management program in Minneapolis at the Courage Center.

21. On May 6, 2008, Claimant told Dr. Bahls about the Courage Center. Dr. Bahls recommended the Minneapolis program. Claimant considered the program at the Courage Center, but ultimately declined to attend.

22. In June of 2008, Claimant relocated to Arizona.

23. Dr. Ripperda conducted a records examination of Claimant on July 2, 2008. Dr. Ripperda advised that Claimant wean off the narcotic pain medications.

24. After Claimant moved to Arizona, she saw Dr. Dodd regarding her lower back condition. Dr. Dodd referred Claimant to Dr. Powar. Dr. Powar first saw Claimant on September 15, 2008.

25. On December 1, 2008, after reviewing supplemental records, Dr. Ripperda noted that Claimant had been unsuccessful at weaning off the narcotic drugs and should seek inpatient treatment.

26. In a letter dated January 19, 2009, Employer and Insurer advised Claimant that she needed to enroll in an inpatient pain program by February 13, 2009, or they would terminate her benefits. Claimant requested and received an extension of time in which to pick a pain program

27. Dr. Powar ordered a MRI on February 26, 2009. Dr. Powar's not of April 1, 2009, states:

> Her MRI that was done showed her to have degenerative disk disease. At L5-S1, she has facet arthropathy with neural foriminal stenosis. A mild bulge at L4-L5, there is left protrusion with left stenosis, significant facet arthropathy. At L3-L4 moderate facet arthropathy was noted . . . She continues with the 75mcg fentanyl patch . . . Impression: Failed back, chronic pain, depression.

28 On April 1, 2009, a random drug test was given to Claimant by Dr. Powar. The test indicated positive for marijuana use.

29 Dr. Powar agreed with Dr. Ripperda's recommendation that Claimant seek an inpatient rehabilitation program. Claimant was not receptivity this recommendation.

30 .On June 29, 2009, Claimant began seeing Dr. Venger regarding her lower back condition after severing her doctor-patient relationship with Dr. Powar. Dr. Venger's notes indicated that Claimant was going through "obvious withdrawal" after four days without narcotics.

31 On June 30, 2009, Employer and Insurer denied future treatment for her lower back injury because of her continued use of narcotic pain medications.

32 Dr. Ripperda's and Dr. Venger's notes indicate that Claimant has Peripheral Neuropathy. Their notes do not indicate that this condition is work-related.

33 Claimant's treating physicians in Arizona have recommended injections, a spinal cord stimulator, a surgical consult, continued narcotic use and neuropathy testing for Claimant's back condition. Dr. Ripperda has opined that these treatments are not necessary.

34 Additional facts may be discussed in the analysis below.

Analysis:

Right Knee Injury

Employer and Insurer argued that any future benefits for Claimant's knee injury are barred by the statute of limitations imposed by SDCL 62-7-35. Despite the fact that Claimant did not address this issue in its brief, it will be discussed here. SDCL 62-7-35 states:

> SDCL 62-7-35. The right to compensation under this title shall be forever barred unless a written petition for hearing pursuant to § 62-7-12 is filed by the claimant with the department within two years after the self-insurer or insurer notifies the claimant and the department, in writing, that it intends to deny coverage in whole or in part under this title. If the denial is in part, the bar shall only apply to such part.

Claimant's right knee was at MMI with no impairment on February 17, 2006. On March 1, 2006, Employer and Insurer sent a letter to the Claimant indicating that they did not intend to pay any additional benefits for Claimant's right knee injury. Claimant initially filed a Petition for Hearing in June 2007. Claimant subsequently moved for a voluntary dismissal of the case without prejudice. The Department granted Claimant's motion on January 28, 2008. To date, Claimant has not re-filed a Petition for Hearing.

More than two years have lapsed since Employer's and Insurer's March 1, 2006, denial letter and no Petition for Hearing "is filed" with the Department. Consequently, future benefits for Claimant right knee injury are barred.

The South Dakota Supreme Court discussed the purposes for statutes of limitation. In a recent case when it stated:

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 US 342, 348-349, 64 SCt. 582, 586, 88 LEd 788.* Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

<u>Dakota Truck Underwriters v. SD Subsequent Injury Fund</u>, 2004 SD 120, ¶ 30, 689 NW2d 196, (quoting, <u>Burnett v. New York Central Railroad Co.</u>, 380 US 424, 428, 85 SCt 1050, 13 LEd2d 941 (1965)):

These purposes would not be served by allowing Claimant to avoid the statue of limitation by allowing her to re-file a Petition for Hearing at some indefinite time in the

future. The petition that Claimant originally filed was, in affect, withdrawn and no petition is currently filed.

Lower Back Injury

Employer and Insurer challenge the reasonableness and necessity of several medical treatments recommended for Claimant's back injury. Employer and Insurer correctly state that Claimant has the initial burden to show that her December 17, 2005, accident is a major contributing cause of her current back condition. Johnson v. Albertson's, 2000 SD 47, ¶ 22 states that claimant "must establish a causal connection between her injury and her employment." Consequently, that issue will be dealt with first.

In this case, Claimant injured her lower back in a work-related accident on December 17, 2005. Claimant sought medical treatment for her back on the day of her injury. An MRI taken on December 30, 2005, indicated damage to her lower spine. Claimant suffered pain from the injury and was treated soon after the injury with pain medication. Claimant underwent surgery on her back on April 19, 2006. Employer and Insurer accepted responsibility for Claimant's injury.

Claimant has received medical care for her back injury on continuous basis since her accident. She has experienced pain throughout this treatment. A number of MRIs taken of Claimant lower back throughout her treatment all reveal damage to Claimant's spine consistent with her December 2005 accident. There has been no evidence presented that Claimant's back problems are the result of any other incident. Employer and Insurer stated their primary reason for denying future benefits was due too Claimant's ongoing narcotics usage, not due to concerns about causation.

The absence of medical opinions regarding causation in this case is attributable to the fact that Employer and Insurer immediately accepted responsibility for Claimant's injury. There was simply no need for the physicians opine about causation. Under these circumstances, Claimant has met her burden to show that the December 2005 injury was a major contributing cause of her current lower back condition.

One caveat must be noted. Dr. Ripperda's and Dr. Venger's medical notes refer to Claimant's Peripheral Neuropathy. It is unclear from these records whether this condition was caused by Claimant's injuries or her tobacco use. Therefore, Claimant has not met her burden with regards to this condition.

Causation being established for Claimant lower back pain, Employer and Insurer are required to provide Claimant with all necessary, suitable and proper medical care related to her back injury in the future. SDCL 62-4-1. "It is in the doctor's province to determine what is necessary or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper." Engel v. Prostrollo Motors, 2003 SD 2, ¶ 32, 656 NW2d 299, 304 (SD 2003) (quoting Krier v. John Morrell & Co., 473 NW2d 496, 498 (SD 1991).

Claimant's Arizona doctors have recommended a number of treatment options. Whether those treatments are reasonable and necessary will be discussed here in turn. This decision will deal with Claimant's use of narcotic pain medications first. Claimant's attorney stated in Claimant's brief that she has weaned off the narcotic pain medications and that, consequently, the issue is moot. Everyone prays that Claimant's narcotic use is in the past. However, the nature of narcotic use to resurface in the future makes it appropriate to deal with issue here.

Claimant clearly has a narcotics dependency problem. At least four doctors have advised her to wean off the drugs or seek treatment at a pain management or rehabilitation center. Therefore, narcotic pain medications are not a suitable, reasonable or necessary treatment option for Claimant in the future. Employer and Insurer are not responsible for providing those medications in the future.

Next, Dr. Venger has recommended neuropathy testing. As discussed above, Claimant has failed to meet her burden of causation with regard to this treatment. Therefore, Employer and Insurer are not responsible for providing those tests.

Injections, a spinal cord stimulator and a surgical consult have also been recommended by Claimant's treating physicians. While Dr. Ripperda opined that these procedures are not necessary after conducting a records review, his recommendations do not outweigh the recommendations of her treating physician. These treatments are related to Claimant's pain which may become more important in the absence of narcotics. Therefore, these treatment options are reasonable and necessary.

Conclusion:

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Proposed Findings of Fact and Conclusions of Law to submit objections or Employer and Insurer may submit Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer and Insurer shall submit such stipulation together with an Order.

Dated this_16th___day of November, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

__/s/ Donald W. Hageman_______________________
Donald W. Hageman
Administrative Law Judge