

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

**JEFFREY I WHITESELL,**  
Claimant,

**HF No. 112, 2009/10**

v.

**DECISION**

**RAPID SOFT WATER & SPAS INC.,**  
Employer,

and

**ACUITY,**  
Insurer,

and

**ZURICH NORTH AMERICA**  
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation pursuant to SDCL §62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Rapid City, South Dakota. Claimant, Jeffrey Whitesell appeared personally and through his attorney of record, James D. Leach. William Fuller represented Employer, Rapid Soft Water & Spas Inc. and Insurer, Zurich North America. Charles A. Larson represented Employer, Rapid Soft Water & Spas Inc. and Insurer, Acuity. This matter has been bifurcated with the issues of causation and compensability of Claimants injuries as well as reasonable and necessary medical expenses heard at this trial.

**Issues**

1. Causation and compensability of Claimant's neck and low back condition
2. Reasonable and necessary medical expenses- Claimant's 2010 neck surgery

**Facts**

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

In 1999, Jeffrey Whitesell (Whitesell or Claimant) began working for Rapid Soft Water & Spas Inc. in Rapid City, SD. As a service manager, he installed, removed, repaired and sold hot tubs and water softeners. He also did inventory, warehouse and warranty work. His work duties included heavy lifting and a great deal of physical labor.

On October 28, 2002, Whitesell sustained an injury to his left shoulder and neck while moving a spa. Whitesell treated with a chiropractor at Black Hills Chiropractic and was later released to full duty. Over the next several years, Whitesell continued to treat with his chiropractor for neck and back stiffness. Whitesell testified and a review of his medical and chiropractic records supports that this treatment was not related to any specific injury, rather general aches and pains and routine chiropractic adjustments. Whitesell continued to work with no restrictions.

On June 10, 2005, Whitesell sustained an injury to his low back while setting up spas at the Rushmore Mall. He was moving a spa when he felt a pop and a sharp pain in his low back. Whitesell reported his injury to his employer. Zurich North America (Zurich), the insurance provider at that time, accepted compensability for this injury. Whitesell sought treatment with Dr. Lisa Lundstrom at Lundstrom Chiropractic. An MRI of the lumbar spine on July 13, 2005, revealed mild stenosis at L3-4 with a superimposed far lateral noncompressive disc protrusion within the far lateral respect of the L3-4 neural foramen on the right with no nerve root compression. At L4-5 there was a compressive tear within the far lateral aspect of the disc annulus on the left. On July 22, 2005, Whitesell was referred to Dr. Christopher Dietrich at The Rehab Doctors. Dr. Dietrich diagnosed lumbar strain, lumbar degenerative disc disease, and lumbar radiculitis. Dr. Dietrich recommended conservative treatment including medication, physical therapy and a TENS unit to calm down his symptoms.

On September 1, 2005, Dr. Dietrich determined that Whitesell had reached maximum medical improvement (MMI) and assigned a 0% impairment. Dr. Dietrich released him to work with no restrictions noting that "Whitesell had no limitations and no difficulties with recreational pursuits". Whitesell resumed working with no difficulties. Dr. Dietrich released him from care indicating that he was to return on an as needed basis for any flares or return of his symptoms.

On March 7, 2007, Whitesell injured his shoulder while at work. This injury was also accepted as compensable by Zurich and benefits were paid. Claimant has indicated that his neck and back were not injured as a result of this incident and the shoulder injury is not at issue in this matter.

On December 3, 2007, Whitesell was diagnosed with cellulitis in his leg, which required him to use a cane. Several days later Whitesell presented at the Rapid City Regional Hospital emergency room with left knee pain and back pain. Whitesell was later admitted to Rapid City Regional for treatment of his back pain. Following treatment, Claimant was released without restrictions. Acuity was the workers' compensation carrier for Employer in 2007 and provided benefits related to this incident, however at the time of hearing, Claimant admitted that there was not a new compensable injury in December of 2007.

On February 12, 2008, Whitesell returned to Dr. Dietrich reporting an increase or flare in his back symptoms that was identical to his previous pain and difficulties he experienced following his June 2005 injury. Dr. Dietrich diagnosed lumbar degenerative disc disease and chronic low back pain. His findings were consistent with a flare of his preexisting injury. Dr. Dietrich recommended refocusing on physical therapy and other conservative treatment. When his symptoms did not improve, Whitesell underwent epidural injections and later bilateral L4-5, L5-S1 lumbar facet medial branch blocks in October 2008, and bilateral L4-5, L5-S1 lumbar facet radiofrequency neuroablation in November 2008, which Whitesell reported improved his symptoms significantly. On June 23, 2009, Dr. Dietrich determined that Whitesell had returned to his baseline and released him from care on a regular basis. Whitesell did not seek further treatment for his back prior to October 12, 2009.

On October 12, 2009, Claimant slipped on the ice while taking the trash out at work. He continued to work the remainder of his work day, but testified that he experienced stiffness, headache and back pain the next day. Whitesell reported that he used ice and his NMES unit as well as Lidoderm patches and was able to go to work on October 13, 2009, however the next day he was in a lot more pain. Whitesell returned to Dr. Dietrich on October 26, 2009 complaining of back, neck and arm pain. Dr. Dietrich diagnosed cervicalgia, thoracic strain, and lumbar strain and recommended physical therapy. Whitesell returned for a follow up appointment on December 8, 2009. Dr. Dietrich noted lumbar degenerative disc disease, annular tears of the lumbar spine, cervicalgia, and postural deficits. He ordered an MRI and recommended continued therapy. A comparison of the MRI to previous images showed that symptoms at L4-5 and L5-S1 had worsened. Dr. Dietrich recommended an L5-S1 transforaminal epidural injection and continued physical therapy.

Dr. Dietrich noted on January 8, 2010, that Whitesell was “at MMI in regard to his lumbar spine for the recent slip and fall. He continues to have some cervicalthoracic junction pain related to this fall that has continued to be flared up. His work limitations are due to his shoulder and his preexisting back problems and not related to this most recent work injury/ slip or fall.” Whitesell continued to treat for his neck symptoms.

On April 15, 2010, Dr. Rand L. Schleusener saw Whitesell for a surgical consult, and did not recommend surgery for his neck. Dr. Stewart Rice also saw Whitesell for a surgical consultation regarding his cervical spine and spinal cord issues. Dr. Rice determined that surgery would not be beneficial; instead Dr. Rice recommended cervical injections. Whitesell obtained another opinion from Dr. Troy Gust. Dr. Gust diagnosed multilevel cervical degenerative disc disease and a disc herniation at C5-6 and C6-7 with bilateral neural foramina stenosis and spondylitic cord compression. Dr. Gust felt Whitesell was a surgical candidate and performed a cervical discectomy and fusion on November 9, 2010.

Dr. David Hoversten, an orthopedic surgeon with Dakota Orthopedics in Sioux Falls, performed a records review at the request of Zurich. Dr. Hoversten reviewed Whitesell's medical records, physical therapy records, chiropractic records and imaging studies concerning Whitesell's back condition, but did not personally examine Whitesell. Dr. Hoversten offered his testimony by deposition.

Dr. John Dowdle conducted a records review at the request of Acuity. Dr. Dowdle reviewed Whitesell's medical records, physical therapy records, chiropractic records and imaging studies concerning Whitesell's back condition, but did not personally examine Whitesell. Dr. Dowdle offered his testimony by deposition on two separate occasions.

## **Analysis**

### ***Causation and Compensability***

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted).

SDCL§62-1-1(7) provides that 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 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.

The Supreme Court has held,

In applying the statute, we have held a worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [Claimant's] employment. We have further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

*Gerlach v. State*, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

### **Low Back Condition**

Claimant has a long history of back problems and injuries. He has been diagnosed with a degenerative disorder that predates both his 2005 and 2009 injuries. The Department must determine which if any of these factors or injuries remains a major contributing cause of his condition and need for treatment.

In support of his burden, Claimant relied on the testimony of Dr. Dietrich, his treating physician beginning in 2005. Claimant argues that the treating physician is in the best position for giving opinions about the patient compared with those doctors who have never seen the patient. Dr. Dietrich testified that the low back injury of June 10, 2005, is a major contributing cause of the current condition and need for treatment. He went on to explain,

He has multi-level lumbar degenerative disk changes in his back dating back to the image of '05. I think that's the first that we knew of that. He was functioning, lifting, performing high level work duties prior to that.

Essentially since then, he has had flares or exacerbations of his low back troubles at various times but always coming back to those specific levels without anything really significantly different from a pathology standpoint; always discogenic pain that limits his lifting and his abilities.

Dr. Dietrich went on to state that the slip and fall in October of 2009 was a flare of the original injury. He testified that the pathology following the 2009 fall were consistent at the L3-4, 4-5 and 5-1 to the previously injured levels. He opined that the 2009 fall was the cause of his need for treatment after that incident, however Whitesell had returned to his baseline following the 2009 fall and treatment rendered after January 8, 2010, was again due to the 2005 injury.

Dr. Hoversten testified in his deposition that Whitesell has degenerative disc disease involving his entire spine and arthritis based on a genetic predisposition. He further explained that his condition was aggravated by his weight and will continue to get worse over time. He testified to a reasonable degree of medical certainty that none of the reported injuries constitute a major contributing cause to his low back problems today. It was Dr. Hoversten's opinion that,

He has a progressive, rather painful condition involving his entire spine, and that he's having a multitude of exacerbations which are temporary in nature. The '05 injury was a definite exacerbation of his back problem. Something happened in '07 that exacerbated it. Clearly, another injury in '09 exacerbated the problem. There will be future exacerbations of the problem. All of these are minor in the overall contribution to his trouble. The major problem is degenerative disc disease on a hereditary age-related and obesity related basis.

Dr. Dowdle testified that the October 12, 2009, injury did not contribute independently to Whitesell's disability, impairment or current need for treatment, but rather it was a temporary aggravation of his underlying degenerative disc condition and does not contribute to his ongoing problems. Dr. Dowdle disagrees with Dr. Dietrich that the June 2005 injury is a major cause. It is his opinion that Whitesell's current problems are due to his degenerative disc disease.

The South Dakota Supreme Court has adopted the last injurious exposure rule. Under the last injurious exposure rule, "[w]hen a disability develops gradually, or when it comes as a result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation." *Kassube v. Dakota Logging*, 205 SD 102, ¶43, 705 NW2d 461 (quoting *Enger v. FMC*, 1997 SD 70, ¶12, 565 NW2d 79, 83 (citations omitted)). The Legislature in 1999 codified the last injurious exposure rule at SDCL §62-1-18, which provides,

If an employee who has previously sustained an injury, or suffers from a preexisting condition, receives a subsequent compensable injury, the current employer shall pay all medical and hospital expenses and compensation provided by this title.

The South Dakota Supreme Court has interpreted the last injurious exposure rule to exclude a mere recurrence of a previous injury but to include an aggravation of a previous injury. *Id.* The original employer or insurer will be liable if the second injury is a recurrence of the first. However, if the second injury is an aggravation that independently contributes to the final disability, the subsequent insurer or employer is liable. *St. Luke's Midland Reg. Med. Ctr v. Kennedy*, 2002 SD 137, ¶20, 653 NW2d 880, 886. (citation omitted).

To find that the second injury was an aggravation of the first, the evidence must show:

1. A second injury; and
2. That this second injury contributed independently to the final disability.

*Titus v. Sioux Valley Hospital*, 2003 SD 22, ¶14, 658 NW2d 388 (quoting *Paulson v. Black Hills Packing Co.*, 1996 SD 118, ¶12, 554 NW2d 194, 196).

To find that the second injury was a recurrence of the first injury, the evidence must show:

1. There have been persistent symptoms of the injury; and
2. No specific incident that can independently explain the second onset of symptoms.

*Id.* In this case Whitesell had a preexisting condition and numerous compensable work related injuries over the years. “Insofar as a workers’ compensation claimant’s pre-existing condition is concerned, we must take the employee as we find him. If a compensable event contributed to the final disability, recovery may not be denied because of the pre-existing condition, even though such condition was the immediate cause of the disability.” *Orth v. Stoebner & Permann Construction, Inc.*, 2006 S.D. 99, ¶48, 724 N.W.2d 586. Whitesell’s degenerative spinal condition may have made him more susceptible to work-related injuries, but this does not alter the compensability of his claim.

A review of the medical records and evidence presented establishes that the October 9, 2009, slip and fall was an aggravation and not a mere recurrence of the 2005 injury. Between September 2005 and December 2007, Whitesell had no significant low back issues and did not return to Dr. Dietrich for treatment. At all times he continued to work with no restrictions and was able to complete his work duties. In late December 2007 and early 2008, Whitesell experienced pain in his low back for which he was treated and released in June 2009. Whitesell was released with no restrictions and again he was able to return to work and complete his work duties.

The medical evidence presented establishes that a specific incident occurred on October 12, 2009, that resulted in a subsequent compensable injury when Whitesell slipped and fell at work. The medical evidence also establishes that the second injury which occurred on October 12, 2009, contributed independently to the final disability. Dr. Dietrich, the treating physician testified “2009 fall was the cause of his need for treatment after that incident.” Although Dr. Dietrich used the terms flare, exacerbation and aggravation interchangeably in his testimony it is clear from the entirety of his testimony and the medical evidence that the second injury was an aggravation of the 2005 compensable injury and not a mere recurrence. Acuity, the employer on the risk at the time of the subsequent injury is responsible for the medical and expenses under SDCL§ 62-1-18.

### ***Neck Condition***

Dr. Dietrich testified that the October 12, 2009, slip and fall is a major contributing cause of the current condition of Whitesell’s neck condition and need for treatment. Dr. Dietrich explained that prior to that injury, “he was essentially functioning, doing his full work duties, recreational pursuits prior to that date of injury. He wasn’t currently in any active treatment program or pursuit of care prior to that date. He had the slip and the fall, jarred things around, and from that date moving forward, he had progressive pain, functional deficits, limitations that have since necessitated treatment.” In January of 2010, Dr. Dietrich noted that while he had reached MMI in regards to his low back, Whitesell continued to have some cervicalthoracic junction pain related to this fall that has continued to be flared up. He continued to treat Whitesell for his neck problems.

Dr. Gust, the neurosurgeon who performed neck surgery on Whitesell, testified by deposition that it was his opinion although Claimant had a history of degenerative problems with his cervical spine, the 2009 injury was a major contributing cause of his condition and need for treatment.

Employer/Insurer Acuity argues that Claimant had a history of neck problems and treated with a chiropractor for years prior to this incident and that the October 12, 2009, slip and fall injury does not remain a major contributing case of his current need for treatment.

Dr. Dowdle testified that Whitesell had reached MMI for his cervical strain on January 8, 2010 and that any remaining treatment was for his lower back. He further testified that the October 12, 2009, fall was not a major contributing cause of his need for treatment. He testified as to the basis of his opinion,

It's based on the fact that he has an underlying degenerative disc condition, and his care and treatment for his neck appears to have ceased January 8, 2010, and I put him at maximum medical improvement at that time, and his ongoing care or need for any additional care and treatment is based on his underlying condition by not related to the events of October 12, 2009.

Dr. Dowdle's testimony is rejected. His testimony is inconsistent with the medical records and the notes of his treating physical. Dr. Dietrich, the treating physician specifically stated that Whitesell reached MMI as to his low back condition in January 2010 and that he continued to need treatment for his cervical condition.

Claimant asserts that prior to October 12, 2009 Claimant had no symptoms in his neck and was able to do heavy work. "We must take the employee as we find him. If a compensable event contributed to the final disability, recovery may not be denied because of the pre-existing condition." *Id.* Although imaging studies show preexisting degenerative changes, he had no problems until October 12, 2009, when he fell on the ice at work. The opinions of Dr. Dietrich and Dr. Gust as to the causation of Whitesell's neck condition and need for treatment is more persuasive. Claimant's preexisting condition when combined with the work related injury is a major contributing cause of the impairment and need for treatment.

Based upon the medical evidence presented, Claimant has met his burden to demonstrate that he sustained a compensable injury arising out and in the course of employment on October 12, 2009, and that Claimant's injury remains major contributing cause of Claimant's disability and need for treatment.

### ***Medical Expenses***

Pursuant to SDCL §62-4-1, the employer must provide reasonable and necessary medical expenses. It is well established by the South Dakota Supreme Court that the



Employer has the burden to demonstrate that the treatment rendered by the treating physician was not necessary or suitable and proper.

Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. 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.

*Hanson v. Penrod Construction Co.*, 425 NW2d 396,399 (SD 1988).

Employer/Insurer offered the deposition testimony of Dr. Dowdle. Dr. Dowdle testified that based on his review of Whitesell's records and scans, there was no compelling reason to do surgery. Employer/Insurer further argues that compensability for surgery under SDCL §62-4-1 cannot be based on the benefit of hindsight and that whether the surgery was compensable must be determined at the time of denial.

The compensability is not based on the outcome and whether Claimant received a benefit from surgery, as was the case with Whitesell. Rather Claimant's treating physician Dr. Dietrich continued to refer Whitesell to various surgeons in an attempt to treat his cervical pain and felt that his course of treatment was reasonable. While Dr. Rice recommended alternative treatments, Dr. Dietrich still determined that another opinion from Dr. Gust was warranted. Dr. Dietrich explained in his deposition why he referred Whitesell for yet another surgical consultation for his neck,

Some of it was at his request, but he was still significantly limited in his abilities because of the neck pain and discomfort up through there. He had been through oral medications, physical therapy, cervical epidural.

When that doesn't provide the significant resolution, then typically the next step on the treatment ladder is a surgical option or consultation. And that was requested by Mr. Whitesell, and I didn't feel that was inappropriate.

Claimant also presented the testimony of Dr. Gust, the surgeon that performed Whitesell's neck surgery. Dr. Gust testified why he felt that surgery was a reasonable option,

There are many opinions that surgeons have about neck pain, arm pain, cervical degenerative disease, disc herniation, and treatment options. When I – I make my determination based not all about the MRI, only about the MRI if it correlates with the patient's physical exam.

Jeff had an examination consistent with true nerve root compression and radiculopathy, and therefore, that in conjunction with his MRI, I felt that I could give him improvement.

It is in the treating doctor's province to determine what is necessary, or suitable and proper. The testimony of Dr. Dowdle failed to demonstrate that the course of treatment recommended was improper, unnecessary or unreasonable. Employer/ Insurer Acuity have not met its burden to demonstrate that the treatment rendered by Dr. Gust was not necessary, suitable and proper.

As this matter has been bifurcated, the Department shall retain jurisdiction over any remaining issues.

### **Conclusion**

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer/Insurers shall have fifteen (15) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. 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 28<sup>th</sup> day of October, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

*/s/ Taya M. Runyan*

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Taya M. Runyan  
Administrative Law Judge