

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

CATHERINE GUADAGNINO WANG,

HF No. 107, 2003/04

Claimant,

v.

DECISION

MILEAGE PLUS, INC.,

Employer,

and

**COMMERCE AND INDUSTRY
INSURANCE COMPANY,**

Insurer.

A hearing in the above-entitled matter was on January 30, 2014, before the Honorable Catherine Duenwald, Administrative Law Judge, South Dakota Department of Labor, Division of Labor and Management. Claimant, Catherine Guadagnino Wang, was present. She is represented by the law firm, Finch Maks, Prof. LLC., attorneys Dennis W. Finch (dec.) and Mr. Jeffrey Maks. Employer, Mileage Plus, Inc., and Insurer, Commerce and Industry Insurance Company, were represented by their attorney, Kristi Geisler Holm, with the law firm Davenport Evans Hurwitz & Smith, L.L.P. The Department, having received and reviewed all evidence and argument in this case hereby makes this Decision.

The witnesses present at hearing were: Claimant, William Peniston and James Carroll.

The issues to be determined are (1) whether the incident that Claimant experienced while working for Employer is a major contributing cause of Claimant's current condition and need for treatment, and (2) whether Claimant's medical treatment with Dr. Frost was medically necessary and reasonable, and (3) whether Claimant is permanently and totally disabled due to a work-related injury or condition.

FACTS

1. At the time of hearing, Claimant was 62 years of age.
2. Claimant graduated from high school in 1969 and went to beauty school. Claimant was hairdresser for 15 years. Other occupations Claimant has worked in are bartender, florist, and customer service representative.
3. Claimant started working for Employer in November 1998. Her job ended there in June 2004.
4. Claimant's job as customer service representative is a sedentary job which involves sitting for long period of time at a desk with a computer station and phone.
5. Claimant reported to her doctors that she suffered from low back pain as early as 1994. Claimant was involved in a rear-ended motor-vehicle collision in June 1994.
6. Claimant had seen chiropractors and physicians for her back since September 7, 1988. She was involved in a rear-end collision in August 1988.
7. On March 23, 2000, Claimant was referred to The Spine Center, and Dr. Larry Teuber, for neck, shoulder, and face pain, as well as well as mid and low back pain.
8. On November 30, 2001, Claimant was seen at the Rapid City Medical Center, by her primary care physician Dr. Gordon C. Abernathie, for an 8-day history of back pain. She told the doctor that she was bending over in the closet when she felt a sudden pain in her back. Dr. Abernathie assessed Claimant as having "extreme low back pain, questionable disk, probably central protrusion." The doctor ordered an MRI.
9. Claimant returned to Dr. Teuber on December 13, 2001. Claimant was having radicular symptoms into her left leg. Dr. Teuber reviewed an updated MRI of Claimant's lumbar spine and noted a distinct disc herniation at L4-5 with compromise of the traversing L5 nerve root.
10. On December 19, 2001, Claimant underwent a left L4-5 lumbar microdiscectomy. She returned to work light duty with lifting restrictions.
11. Dr. Teuber discharged Claimant from care without restrictions on March 18, 2002.

12. Between the time of the discharge and July 2003, Claimant did not see any physicians regarding her back pain.
13. On July 24, 2003, Claimant saw Dr. Abernathie with low back pain. She was turning over in bed a couple nights prior, and felt severe pain in her back.
14. On August 1, 2003, Claimant returned to Dr. Abernathie with continued complaints of low back pain. She denied having any radicular symptoms.
15. On August 16, 2003, Claimant saw Dr. Abernathie with a complaint of left-sided chest and back pain. Claimant was remodeling a bathroom in her home, but denied any trauma.
16. On Wednesday, September 17, 2003, Claimant again saw Dr. Abernathie and reported having slipped at work and wrenched her back. The report indicates "All the tenderness was in the mid-portion of her back out in the muscles. Straight leg raising is slightly positive on the left."
17. Dr. Abernathie indicated that Claimant could go back to work next Monday, September 22, 2003.
18. The slip at work was reported to Employer and Insurer in a timely manner. Insurer issued a denial in December 2003.
19. On Monday, September 22, 2003, Claimant returned to the clinic with low back pain. She indicated to the clinic that she has a chronic history of back pain.
20. On September 26, 2003, as Claimant's back pain was not improving and she could not work, Dr. Abernathie referred her to Rehab Doctors for further evaluation and care. He also instructed that she continue with her physical therapy and return to work half-time with restrictions.
21. On October 13, 2003, Claimant returned to Dr. Abernathie as Insurer had denied her claims including a request for psychiatry. At that time, it was noted Claimant's back was non-tender and that she walked without difficulty. Dr. Abernathie noted that it was up to Psychiatry to make a causation and extent of injury determination.
22. Dr. Frost, with Black Hills Imaging Center, noted on November 6, 2003, that the most recent MRI showed "mild degenerative changes of L5-S1 unchanged from the previous exam." He compared the 2003 MRI with the November 30, 2001 MRI.

23. Claimant saw Dr. Abernathie a number of times in December 2003 for prescription refills for pain medication. The physiatrist, Dr. Simonson was also seeing Claimant at this time and had injected Claimant's back.
24. Dr. Simonson, with the Rehab Doctors, continued to see Claimant through early 2004. Claimant underwent a number of injections and rhizotomies from November 2003 to June 2004.
25. In June 2004, Claimant reported to Dr. Simonson that she felt as if something "tore" in her low back. Claimant had increased symptoms and underwent an updated MRI.
26. Dr. Teuber at the Spine Center of Rapid City saw Claimant in late June 2004. He believed Claimant's symptoms were the result of the work-related incident as the pain had not dissipated since that slip at work.
27. Dr. Marius Maxwell with the Spine Center performed a L4-5, L5-S1 PLIF (posterior lumbar interbody fusion) on Claimant in July 2004.
28. On December 9, 2004, Claimant returned to Dr. Maxwell. She reported that a couple weeks prior she injured herself in church. She reported she was doing well until that time and now has pain into her buttocks and down the right leg.
29. In May 2004, following a discogram by Dr. Simonson, a CAT scan of the lumbar spine was performed by Dr. Krafka. He noted "no significant degeneration of the L4-5 disc." Also, he noted a right disc protrusion at that level. He noted degeneration of the L5-S1 disc with a "small central disc protrusion, but no extravasation of contrast and no definite impingement on thecal sac or nerve roots."
30. In June 2004, an MRI was requested by Dr. Simonson. The radiologist, Dr. Saffell compared this MRI with the November 2003 MRI and concluded that L4-5 and L5-S1 disk herniations are present, without significant stenosis of the spinal canal. He notes that the left L4 nerve root may be in contact with the herniation, but it is not evident. There were no significant changes from the previous MRI.
31. In August 2004, Claimant started physical therapy with ProMotion Rehabilitation Center.
32. In January 2005, Dr. Maxwell reviewed the post-operative CT films of Claimant's lumbar spine and felt the PLIF was stable.

33. In March 2005, Dr. Maxwell had a “frank talk” with Claimant in regards to her pain complaints and her perceived inability to work a full day at a sedentary position. Dr. Maxwell noted that he felt Claimant was “blowing her symptoms out of proportion” and that she should return to work in the near future.
34. Dr. Abernathie continued to see Claimant for pain complaints through May 2005 when Dr. Abernathie deferred all chronic pain management to Dr. Frost and the Rehab Doctors. Claimant had just been discharged by Dr. Maxwell, a neurosurgeon, who believed she should be back at work as she was no longer disabled. She also was seeing Dr. Simonson and Dr. Lawler.
35. During this May 2005 visit, Dr. Abernathie noted that Claimant’s pain symptoms were of “questionable etiology and significance.”
36. On May 23, 2005, an IME and records review was performed by Dr. John Dowdle. He concluded to a reasonable degree of medical probability that the dehydration and degeneration of L4-5 and L5-S1 were present prior to the claimed September 15, 2003 injury. His conclusion was that the slip at work was a temporary aggravation of the underlying degenerative disc condition and not a major contributing cause of Claimant’s need for care and treatment. Dr. Dowdle likened the slip at work to Claimant’s turning in bed, which caused substantial pain just one month previous.
37. In June 2005, Dr. Wayne Anderson conducted a records review of Claimant at the request of Employer and Insurer. He concluded that Claimant’s low back pain, which first was documented in the 1980’s was chronic. He opined that Claimant was never symptom and pain free with regard to her low back. He independently determined that the slip at work was just another incident that flared or aggravated her underlying low back condition. According to Dr. Anderson, even the MRI following the slip at work did not reflect any changes in her lumbar spine from prior to the injury. It was his opinion, to a reasonable degree of medical probability that the slip at work was not a major contributing cause of Claimant’s need for treatment.
38. In June 2005, Claimant again returned to Dr. Abernathie for pain medication as she was discharged from Dr. Maxwell’s care and from the Rehab Doctors. She had yet to see Dr. Frost.
39. Claimant first saw Dr. Frost on June 13, 2005. Dr. Frost recommended a spinal cord stimulator for Claimant’s low back pain.

40. In August 2, 2005, Dr. Frost implanted a spinal cord stimulator in Claimant.
41. Dr. Frost wrote to Employer on August 31, 2005 and indicated Claimant was capable of working with restrictions. Claimant did not contact Employer to return to work with or without restrictions or accommodations.
42. In September 2005, Dr. Frost scheduled a formal functional capacities exam for Claimant. The results were that Claimant was capable of performing sedentary work for an eight hour day.
43. Ashley Olsen, a mental health nurse working with Dr. Frost and Dr. Glanzer, provided counseling services to Claimant while she had the spinal cord stimulator. "Therapy focused on relaxation therapy, stress management, and behavioral techniques to decrease pain behaviors." Ms. Olsen questioned Claimant's veracity and her willingness to return to work. Ms. Olsen noted that Claimant's pain behaviors seemed to increase through the use of therapy.
44. In late 2005, Dr. Abernathie referred Claimant for a rheumatology consultation. In December 2005, Dr. Alvillar diagnosed Claimant with fibromyalgia syndrome as well as tendonitis to the wrist.
45. At that initial appointment in December 2005, Dr. Alvillar recommended that Claimant be taken off narcotics. He wrote, "If she is not off her narcotics, none of the ministrations I can offer will be helpful."
46. Spinal Cord Stimulator was removed in March 2006 as it was not providing benefit to Claimant.
47. In September 2006, Claimant was seen by the Foothills Family Clinic, and Dr. Patricia Stephenson. Claimant was having non-work related medical issues as well as pain in her lower back. Claimant was still taking narcotic medication and reported to the clinic that she suffered permanent nerve damage to both legs. Dr. Stephenson's notes do not mention that Claimant was diagnosed with fibromyalgia.
48. In January 2007, Dr. Frost concluded that Claimant was not able to work, even at a sedentary level. This was not the result of a formal FCE but was an opinion of Dr. Frost based on clinical observations.
49. In early September 2007, Claimant was injured when she was pinned between a telephone pole and a car.

50. An MRI was conducted in late September 2007 by Gloria Walz, PA, at the Black Hills Surgery Center. This MRI was contrasted with the June 2004 MRI. Radiologist Dr. Stephen Pomeranz concluded that there was a shallow left protrusion at L5-S1 without nerve compression and at L3-4 a “very shallow posteroleft disc protrusion gently encroaches upon left ventral dural sac near to left L4 proximal nerve root.”
51. Since that date, Claimant has continued treatment with Dr. Frost consisting of regular injections in her spine and pain management including: facet rhizotomies of the median nerve branch in her cervical, and lumbar spine; pain medications; radiofrequency ablations; physical therapies; and epidural steroid injections.
52. In July 2012, Dr. Wayne Anderson conducted a physical examination of Claimant and updated his initial review of her medical records. His opinion did not change from 2005 to 2012. He explained that the fusion surgery was a natural progression following the 2001 back surgery and that the implantation of the spine stimulator was reasonable and necessary, however, neither surgery nor implantation was the result of the September 2003 incident.
53. Dr. Anderson did not give an opinion as to when Claimant reached maximum medical improvement. He is of the opinion that the incident on September 15, 2003 was a flare-up of symptoms that were chronic prior to that date.

Additional facts may be listed in the analysis below.

ANALYSIS

Claimant has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry, Inc.* 777 N.W. 2d 363, 367 (S.D. 2010). Under SDCL 62-1-1(7)(b), a work injury is compensable if it “combines with a pre-existing disease or condition to cause or prolong the disability, impairment, or need for treatment, so long as the injury is and remains a major contributing cause of the disability, impairment, or need for treatment.”

This level of proof required of Claimant “need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence.” *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. To meet his degree of proof “a possibility is insufficient and a probability is necessary.” *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

This case has been ongoing with the Department since December 18, 2003 when the Petition of Hearing was filed. This claim was never accepted as compensable by Employer and Insurer and they issued a denial to Claimant in October 2003.

To prevail on a claim for workmen's compensation, the work-related incident or accident must be a major contributing cause of Claimant's disability and her need for treatment. Claimant suffered from back pain, both cervical and lumbar/sciatic since a car accident in 1994. Dr. Anderson points out that the back pain is present in the medical records as early as the 1980's. Claimant has never been really free from back pain except for short periods of time following extensive treatments. Seven (7) weeks prior to the September 15, 2003 incident at work, Claimant turned over in bed wrong and wrenched her back so hard she went to Dr. Abernathie. Two weeks later, she returned to the doctor as she was having radicular pain down her legs. A couple weeks after that, she reported to the doctor that she was remodeling a bathroom and felt pain in her back and chest.

Prior to this incident, Claimant had back surgery on her lumbar spine in late 2001. Following release from treatment for this surgery, Claimant did not have back pain or treatment until the incident when she rolled over in her bed wrong (about 16 months). Since that time, Claimant has treated constantly. Dr. Abernathie, the initial treating physician, questioned the etiology (cause or origin) of Claimant's low back pain and eventually referred the causation question to Physiatry.

Dr. Maxwell, the surgeon who performed the PILF on Claimant's back, in 2005, also deferred the question of causation. Dr. Maxwell was not aware of the full extent of Claimant's medical history, prior to the referral from Dr. Abernathie. Dr. Maxwell had expected Claimant to return to work much sooner and released her from his care because there was nothing more he could do for her. He testified that he still felt Claimant's symptoms were not related to her pathology; there was no reason he could find for Claimant having the severe pain she was suffering. However, he did testify that he would not have recommended a spinal cord stimulator for Claimant and that she was capable of working a sedentary type job with restrictions and accommodations. Claimant's job with Employer was sedentary, however, Claimant did not return to work or request accommodations.

Claimant was referred to Dr. Frost for pain management. Dr. Wayne Anderson gave the opinion that Dr. Frost's decision to implant a spinal cord stimulator in Claimant was reasonable and medically necessary, given the amount of pain Claimant was reporting. However, Dr. Anderson also gave the opinion that this pain was not caused by any work-related injury or incident. Dr. Anderson, after reviewing all of Claimant's medical history

and comparing MRI's that were taken before and after September 15, 2003, is of the opinion that the incident at work was not a major contributing cause of Claimant's back condition and her need for treatment.

Claimant's past treating physicians, Dr. Abernathie and Dr. Maxwell, have both questioned the etiology or cause of Claimant's back pain. Both referred her on to other doctors for treatment of pain. At one point in time, after a referral from Dr. Abernathie, Claimant was diagnosed with fibromyalgia by Dr. Ricardo E. Alvillar. He did not continue to treat Claimant for that condition as Claimant was being treated narcotics and pain medication. Claimant cancelled her final appointment with Dr. Alvillar and did not return to him for the treatment of fibromyalgia. Claimant has not been treating for her fibromyalgia since that time. None of Claimant's experts have mentioned this diagnosis in their opinions on causation. Although some of Claimant's experts and the medical records do note that Claimant has a complex pain disorder.

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" as required under South Dakota's workers' compensation statute.

SDCL 62-4-1 governs an employer's obligation to pay an injured employee's medical expenses for treatment of a work-related injury. This statute provides in part:

The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title... . The employee shall have the initial selection to secure the employee's own physician, surgeon, or hospital services at the employer's expense[.]

SDCL 62-4-1. In interpreting this statute, we have stated that it is in the doctor's province to determine what is necessary or suitable and proper. And 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.

Stuckey v. Sturgis Pizza Ranch, 2011 S.D. 1, ¶23, 793 N.W.2d 378, 387-388 (internal quotes and citations omitted).

Employer and Insurer have not shown that the spinal cord stimulator was not medically necessary, but they have proven that the necessity was not caused by a work-related incident.

Claimant's lower back pain was present and actively being treated just prior to her slip at work. Claimant has not shown, by a preponderance of the evidence, that her slip was a major contributing cause of her treatment and need for surgery. This slip was rather an intervening incident. Claimant sought medical treatment for her low back for two (2) rear-end collisions, a wrenching turn in bed, and an accident that pinned her between a light pole and a truck. Claimant's initial treating physician has not testified that the "slip" was a major contributing cause of her condition and need for treatment. Claimant's subsequent physicians are unaware of Claimant's full medical history and treatments for her back. A treating physician opinion is only given greater weight if it supported by clinical and diagnostic data. *Matthews v. Bowen*, 879 F.2d 422, 424 (8th Cir. 1989). In this case, the opinion regarding causation is not supported by the data.

Dr. Wayne Anderson is the only medical expert in this case that has seen Claimant's full medical history and treatment records. He is a board certified in occupational medicine and is expert in the field of work related injuries. It is his opinion, after reviewing the full medical history, the MRI's both pre and post incident, and physically examining Claimant, that Claimant's pain is not caused by her slip at work, but by degenerative processes and prior injuries. "An expert's opinion is entitled to no more weight than the facts it stands upon." *Jewett v. Real Tuff, Inc.*, 2011 S.D. 33, ¶29, 800 N.W.2d 345, 352. Dr. Anderson's opinion is given more weight in this case as it is based upon the full information.

At hearing, vocational experts testified for both parties; William Peniston for Claimant and Jim Carroll for Employer and Insurer. Claimant, as she appeared at hearing, was in pain. The experts agree that Claimant suffers from a pain disorder for which she takes much pain medication. Claimant's inability to work is not due to a work-related injury or condition caused by work, but by degenerative condition. Claimant's inability to sit or stand for a lengthy period of time is obvious. Dr. Maxwell, early in Claimant's treatment, recommended that Claimant return to work with accommodations of sitting and standing at will. Claimant did not return to her sedentary job. Since that opinion by Dr. Maxwell, Claimant has had surgical implant and removal of the spinal cord stimulator. Claimant, at the time of hearing, is obviously unemployable as she is on narcotics and pain drugs that make it difficult for her to concentrate. During the hearing, Claimant was having difficulty sitting at the conference table. Claimant's current treating physician, Dr. Frost, is of the opinion that Claimant is not able to work. Given the opinion of her treating physician and her required accommodations, there are no jobs that are suitable for Claimant. Claimant is permanently and totally disabled, but not due to any work-related injury or condition.

Conclusion

Claimant has not proven by a preponderance of the evidence, that the work-related incident in September 2003 is a major contributing cause of her past and current condition and need for treatment. Claimant's Petition for Benefits is Dismissed. Furthermore, Employer and Insurer have not shown that the spinal cord stimulator was not medically unnecessary or unreasonable. Claimant's inability to work is not the result of a work-related injury or condition.

Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 30 days after receiving this Decision. Claimant shall have an additional 20 days from the date of receipt of Employer and Insurer's Findings of Fact and Conclusions of Law to submit Objections and/or 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, Employer and Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this 8th day of April, 2015.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Catherine Duenwald

Catherine Duenwald
Administrative Law Judge