

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
WORKER'S COMPENSATION

SUZANNE OELKERS,
Claimant,

HF No. 115, 2005/06

vs.

NATURAL ABUNDANCE FOOD
COOPERATIVE,
Employer,

DECISION

and

ZURICH INSURANCE COMPANY,
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. Michael D. Bornitz, of Cutler & Donahoe, LLP, represents Claimant, Suzanne Oelkers (Claimant). J. G. Shultz & Sara Greff Dannen of Woods, Fuller, Shultz, & Smith P.C., represents Employer/Insurer (Employer). This case was submitted to the Department of Labor on a stipulated record: depositions of Claimant, Dr. Donald J. Frisco, MD, and Dr. Michael R. Puumala, and Claimant's medical records.

ISSUE:

Whether a surgical procedure for Claimant is a medically necessary procedure pursuant to SDCL 62-4-1?

FACTS:

1. Claimant is a 35 year old woman who worked for the Natural Abundance Food Store in Aberdeen, SD.
2. Claimant started working for Employer in 2002. She was subsequently named store manager.
3. Claimant lives in Britton, SD and drives 55 - 60 miles to work in Aberdeen.
4. Employer is a cooperative grocery store that sells organic produce.

5. On October 14, 2004, Claimant and a volunteer board member were visiting other cooperatives. The board member was driving her personal vehicle.
6. The van, in which Claimant was riding, was broadsided by a semi-truck on the passenger side. The van went off the road and collided with a utility pole.
7. Claimant sustained multiple injuries in the accident. She injured her right leg, had cuts on her forearms, her left shoulder and arm were bruised, and she experienced pain in her right hand and fingers.
8. Claimant was initially treated at a local hospital and released.
9. Claimant had continued pain between her shoulder blades, along the back of her head, and pain and tingling down both arms.
10. Five days after the accident, Claimant began physical therapy at the local hospital in Marshall County. Claimant started to treat with her family doctor, Dr. Small. Dr. Small ordered an MRI of Claimant's cervical spine and did not note any continuing injury from the accident.
11. Dr. Small referred Claimant to neurosurgeon, Dr. Charles Miller. Dr. Miller, via his physician's assistant, did not see anything on Claimant's flexion and extension films that would require surgery.
12. Dr. Miller referred Claimant to physiatrist, Dr. Heloise Westbrook, for trigger point injections. Claimant was helped some by the trigger point injections.
13. Dr. Miller ordered an MRI of the cervical spine to rule out any herniation in the neck. This order for the MRI was not approved by Employer and not carried out.
14. The nurse case manager, in response to Claimant having more numbness and tingling in her hands, referred Claimant to Dr. Donald Frisco, a physiatrist.
15. Claimant saw Dr. Frisco on April 25, 2005 for an independent medical exam.
16. Dr. Frisco examined Claimant and had Claimant participate in an EMG Study. Dr. Frisco also reviewed Claimant's medical records.
17. Dr. Frisco diagnosed Claimant with cervical and thoracic musculoligamentous injury, periscapular myofascial pain, cervicogenic headaches and left cubital tunnel syndrome. Dr. Frisco recommended continued physical therapy.
18. Dr. Miller released Claimant from his care because Employer referred Claimant to another doctor. Claimant returned to Dr. Small, her primary care provider, for continued treatment.

19. Dr. Small ordered a thoracic MRI and referred Claimant to neurosurgeon Michael Puumala, M.D., P.C.
20. Claimant was examined by Dr. Puumala on May 13, 2005. Dr. Puumala reviewed Claimant's full medical history including all MRIs and x-rays.
21. Dr. Puumala diagnosed ligamentous laxity at C4-C5 and that this condition contributed to her continued pain. Dr. Puumala recommended an anterior cervical fusion at C4-C5 with allograft and anterior plating.
22. Dr. Frisco responded to Employer's inquiries regarding the surgery recommendation. He wrote, "It is hard to tell when [Claimant] will reach maximum medical improvement as the result of the motor vehicle accident, especially since if there is cervical instability she may require surgery and I would defer to the surgeon for the decision to move forward with that type of intervention."
23. Dr. Frisco and Dr. Puumala are both of the opinion that Claimant's injury was caused by the motor vehicle accident.

ANALYSIS & DECISION:

The law requires Employer/Insurer to provide necessary medical and surgical treatment. SDCL 62-4-1. The South Dakota Supreme Court has clarified the burden of showing reasonable and necessary medical expenses. "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. Prostrullo Motors*, 2003 SD 2, ¶ 32, 656 NW2d 299, 304 (SD 2003)(quoting *Krier v. John Morrell & Co.*, 473 NW2d 496, 498 (SD 1991) (emphasis in original).

Claimant's physician, Dr. Pummala has recommended Claimant undergo a cervical fusion surgery based upon objective and subjective findings. Dr. Puumala found that Claimant has cervical instability at the C4-C5 level of her spine which is the cause of her pain. He stated that Claimant's injury will not heal itself and he recommends surgery to stabilize the area. This instability was caused by the work-related motor vehicle accident in which Claimant was injured. Dr. Puumala's opinion is that the surgery would stabilize the neck and alleviate some of the pain that Claimant is experiencing.

Employer's expert, Dr. Frisco, is not a surgeon. Dr. Frisco specifically said that he would defer to the surgeon to make the decision on whether surgery is necessary in this case. Dr. Frisco does mention that there are risks associated with surgeries of this type and that Claimant's pain may not go away as expected. Dr. Puumala is also aware of these risks and is of the opinion that Claimant will benefit from the surgery.

In this case, Employer has not shown, through the evidence presented, that surgery recommended by Claimant's physician is not necessary or suitable and proper. If it is still Dr. Puumala's recommendation that Claimant have the cervical fusion, the surgery is a medically necessary procedure covered under SDCL 62-4-1.

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. Employer/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. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated March 12, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald
Administrative Law Judge