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

JOHN McCOY, **HF No. 120, 2010/11**

Claimant,

v. **DECISION**

PRIDE GRAIN, LLC,

Employer,

and

FARMLAND MUTUAL INSURANCE COMPANY,

Insurer,

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on December 19, 2012, in Rapid City, South Dakota. Claimant, John McCoy, was represented by Jon J. LaFleur. The Employer, Pride Grain, LLC, and Insurer, Farmland Mutual Insurance Company, were represented by Catherine M. Sabers.

Legal Issue:

The legal issues presented at hearing are stated as follows:

1. Whether John McCoy is entitled to the medical expenses of a diagnostic evaluation by Jewish National Hospital?

2. Whether John McCoy's exposure to grain and hydrated lime dust while working for Pride Grain is a major contributing cause of his current "shortness of breath" complaints?

3. Whether a diagnostic evaluation of John McCoy's "shortness of breath" by Jewish National Hospital is necessary and reasonable?

Facts:

The Department finds the following facts by a preponderance of the evidence:

1. John McCoy (Claimant) was born June 28, 1963.

2. Claimant started working for Pride Grain, LLC, (Employer) in October 2007. Farmland Mutual Insurance Company (Insurer) insured Employer for purposes of workers' compensation during all times relevant in this case.

3. Claimant's work duties included adding a binding supplement to a processing bin for making feed cake sold to the local ranchers around Martin, South Dakota during the winter months.

4. In the fall of 2008, Employer started using hydrated lime as a binding supplement in the making of the feed cake. During the process of making the feed cake the air was filled with grain and hydrated lime dust.

5. After exposure to the grain and hydrated lime dust, Claimant began experiencing eye and throat irritation. Claimant also began experiencing "shortness of breath. There would be times when Claimant would have to sit down and get his breath back.

6. Claimant eventually sought medical treatment for his shortness of breath at the Bennett County Community Health Clinic. After Claimant had been seen numerous times between November 2008 and February 2009, Insurer had Claimant see Dr. Wayne Anderson.

7. Dr. Anderson has been practicing since 1984 and is Board certified in Occupational Medicine, Preventative Medicine. However, Anderson is not Board certified in Pulmonary Medicine.

8. Dr. Anderson examined Claimant on April 15, 2009, and concluded to a reasonable degree of medical certainty that Claimant's shortness of breath was caused by Claimant's work related exposure to calcium hydroxide. Dr. Anderson saw Claimant again in May, June, and September 2009. In September 2009, because Claimant was not improving, Dr. Anderson referred Claimant to Pulmonology at the Regional Medical Clinic in Rapid City, South Dakota.

9. Dr. Anderson last examined Claimant in September, 2009.

10. Dr. Rawson initially saw Claimant on September 24, 2009. Rawson is a Board Certified Pulmonologist. Rawson's notes from that visit state, "I suggested that if he does not improve rapidly, then I would suggest he be referred to National Jewish Hospital, to their Occupational Health Clinic for their input."

11. After a visit by Claimant, on October 5, 2009, Dr. Rawson noted "If it is not clear from the CT scan why he is having so much trouble, I think I am going to suggest to his case manager that he be referred to the Occupational Health Clinic at National Jewish."

12. After a visit by Claimant on October 15, 2009, Dr. Rawson again wrote "I told him once again that as long as he is improving, we will continue on with this therapy, but if he does not continue to improve or if he worsens again with reduction in the prednisone then I think, at that point, he needs to be referred to National Jewish."

13. After Claimant's appointment on November 4, 2009, Dr. Rawson wrote "If the above studies and Cardiology cannot come up with a cause of this shortness of breath, then I really think his insurance company should send him to a place like National Jewish for their evaluation."

14. After a December 28, 2009, visit by Claimant, Dr. Rawson wrote "will have him back in next week, talk to him about the possibility of me doing a bronchoscopy verus simply referring him to National Jewish Hospital where they could do an evaluation for occupational health situation and they could also evaluate him for vocal cord dysfunction. They could probably do a better job of evaluating for that."

15. On January 4, 2010, Dr. Rawson noted "John did not show up today. His case manager came in. He has moved down to Little Rock, Arkansas. I suggested that they try to get him into the Pulmonary Division at the University of Arkansas asking for him to be evaluated by occupational health, and perhaps even checking for the possibility of vocal cord dysfunction. Certainly if he comes back here, the plan would be to get him down to National Jewish Hospital for their input. . . . If he does return here, I will try to get him into National Jewish Hospital for their input since everything I've done so far seems to be negative to explain his symptoms."

16. Claimant was again seen by Dr. Rawson on August 31, 2010, after which Rawson again recommended the evaluation at National Jewish Hospital and communicated with National Jewish Hospital sending paperwork to facilitate an evaluation of Claimant.

17. Rather than authorizing and paying for the National Jewish Hospital evaluation, Insurer arranged for Claimant to have an independent medical evaluation (IME) conducted by Dr. Farnham on October 22, 2010.

18. Dr. Farnham has 30 years of experience in occupational medicine. However, he is not Board certified in either the fields of occupational medicine or pulmonary medicine. After his examination, Farnham concluded that no further treatment or testing was medically necessary in direct relation to the work related exposure to hydrated lime. Specifically, Farnham did not recommend referral to the National Jewish Hospital in Colorado for additional testing.

19. Dr. Rawson testified in his April 17, 2012, deposition that he was unable to say whether Claimant's occupational exposure to hydrated lime was major contributing cause of his current shortness of breath. However, he testified that he had been recommending a referral to National Jewish Hospital for that purpose.

20. Dr. Anderson testified in his December 3, 2012, deposition that his opinion based upon reasonable medical probability that Claimant's symptom of shortness of breath was caused by the exposure to the calcium hydroxide had not changed. Anderson further testified that he knew of no reason from his experience and his review of Claimant's file that the recommendation for review by National Jewish Hospital should not occur. Anderson's assessment of Claimant was that he was being honest with him and that he did not detect any evidence of somatization or

malingering. Finally, Anderson testified that from a medical standpoint it was a reasonable request to have Claimant seen at the National Jewish Hospital in Denver, Colorado to see if they could determine the cause of Claimant's shortness of breath.

21. Additional facts may be discussed in the analysis below.

Motion to Strike:

On April 25, 2013, Employer and Insurer served a motion to strike statements that were allegedly made by Claimant's supervisor to a Claim's Representative of Nationwide Agribusiness. The statement was transcribed and the transcription offered during the deposition of Dr. Farnham. The Employer and Insurer object to the statements as hearsay. The Claimant argues that the statements are admissible as a business record and as a statement against interest.

While the document may be a business record, it was offered without foundation by the record custodian or the Claim's Representative. The statement is printed on plain paper which contains no letterhead or other identifying mark. In addition, the statements were offered without any other indicia of reliability. On this basis, the Department finds that the statements are not admissible as a business record or statement against interest. Employer and Insurer's Motion is granted.

Analysis:

After Claimant began experiencing shortness of breath, he initially sought treatment at Bennett County Community Health Clinic. Eventually, Insurer referred Claimant to Dr. Anderson for evaluation and treatment. Dr. Anderson, in turn, referred Claimant to Dr. Rawson. Dr. Rawson's records support his testimony that he wanted to refer Claimant to Jewish National Hospital for further evaluation to determine the cause of Claimant's shortness of breath.

As a Board Certified Pulmonologist, Dr. Rawson is more qualified to determine whether Claimant needs further evaluation by Jewish National Hospital than either Dr. Farnham or Dr. Anderson, although Anderson too, testified that an evaluation by Jewish National Hospital was appropriate. Rawson also treated Claimant more frequently and over a longer period of time than the other doctors did which puts him in the best position to determine Claimant's pulmonary condition and needs.

The South Dakota Supreme Court in Mettler v. Sibco, 2001 S.D. 64, ¶ 9, determined that costs of diagnostic tests to determine whether a condition is caused by a work related accident are compensable. The Court wrote:

> Whenever the purpose of the diagnostic test is to determine the cause of a claimant's symptoms, which symptoms may be related to a compensable accident, the cost of the diagnostic test is compensable, even if it should later be determined that the claimant suffered from both compensable and noncompensable conditions.

Id. In addition, Dr. Rawson's referral to Jewish National Medical Hospital falls within that authority granted by SDCL 62-4-43 to Dr. Rawson to refer Claimant to that institution.[1]

Conclusion and Order:

In accordance with the analysis above, a diagnostic evaluation of Claimant by Jewish National Hospital in Denver is necessary and reasonable. Claimant is also entitled to the medical expenses associated with that evaluation.

It is further ordered that the Department maintain jurisdiction of this matter and that the issue of causation shall be held in abeyance until Jewish National Hospital has completed its evaluation and the medical experts now involved in this case have had an opportunity to review the results of that evaluation and respond to them. Counsel for the Claimant shall submit an order consistent with this decision.

Dated this _31st_ day of May, 2013.

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

[1]SDC L 62-4-43 states: The employee may make the initial selection of the employee's medical practitioner or surgeon from among all licensed medical practitioners or surgeons in the state. The employee shall, prior to treatment, notify the employer of the choice of medical practitioner or surgeon or as soon as reasonably possible after treatment has been provided. The medical practitioner or surgeon selected may arrange for any consultation, referral, or extraordinary or other specialized medical services as the nature of the injury shall require. The employer is not responsible for medical services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section. If the employee is unable to make the selection, the selection requirements of this section do not apply as long as the inability to make a selection persists. If the injured employee unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment, the employer is not liable for an aggravation of the injury due to the refusal and neglect and the Department of Labor may suspend, reduce, or limit the compensation otherwise payable. If the employee desires to change the employee's choice of medical practitioner or surgeon, the employee shall obtain approval in writing from the employer. An employee may seek a second opinion without the employer's approval at the employee's expense. (Emphasis added).