

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

**MARK DENNIS MCQUAY,**  
**Claimant,**

**HF 137, 2004/05**

**v.**

**DECISION**

**FISCHER FURNITURE,**  
**Employer, and**

**ACUITY,**  
**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. Dennis W. Finch, of Finch Bettmann Maks & Hogue, P.C. represents Claimant, Mark Dennis McQuay (McQuay). Charles A. Larson, of Boyce, Greenfield, Pashby & Welk, L.L.P., represents Employer/Insurer.

**Issue**

The sole issue presented for decision is whether the fusion surgery recommended by Dr. Watt is reasonable and necessary treatment of McQuay's October 22, 2002, injury.

The parties agreed to submit this matter to the Department on a stipulation of medical records, and the deposition testimony of McQuay, Dr. Tim Watt, and Dr. Margaret Wallenfriedman.

**Facts**

On or about October 2, 2002, McQuay, while working for Employer, was struck on the top and back of his head by a falling 12' by 25' roll of vinyl remnant, weighing approximately 150 to 175 pounds. Immediately after this incident, McQuay felt dizzy, stiff and sore and had a throbbing pain in his neck. McQuay was able to finish his shift that day, but he was worse by the next morning.

McQuay saw Dr. Wayne Anderson the day after the incident, at the direction of Employer. McQuay had never treated for or been diagnosed with any kind of neck problems prior to this incident.

Dr. Anderson diagnosed McQuay's condition as a "[h]ead contusion with neck strain." He placed McQuay on work restrictions, including a 20 pound lift restriction "with only occasional neck movement." McQuay was directed to return in one week.

McQuay attempted to work, but after experiencing ongoing neck pain, popping in his neck, and low back pain, he returned to Dr. Anderson on October 30, 2002. Dr. Anderson noted McQuay was "having significant problems with his neck." Dr. Anderson took McQuay off work and referred him for physical therapy. Again McQuay was directed to return in one week.

McQuay continued to treat with Dr. Anderson. Dr. Anderson's November 18, 2002, treatment note described "some tingling sensation in the fingertips of his left hand." Dr. Anderson diagnosed "Neck pain with possible left upper extremity radiculopathy."

A November 25, 2002, MRI ordered by Dr. Anderson showed bulging disks and foraminal narrowing at C5-6 and C6-7. After a December 2, 2002, visit, Dr. Anderson referred McQuay to Dr. Lawlor or Dr. Simonson for McQuay's neck and low back pain.

On December 5, 2002, Dr. Anderson wrote to Sylvia Sebestia, a claims representative for Insurer, indicating that McQuay's October 22, 2002, injury was a major contributing cause of his continuing neck problems and low back pain. Dr. Anderson's letter concluded: "We are trying to treat him conservatively without him ending up with a cervical fusion, although this certainly remains a possibility."

Dr. Simonson first saw McQuay on December 11, 2002. On January 24, 2003, after several visits and notations of continuing neck and left upper extremity symptoms, Dr. Simonson referred McQuay to Dr. Larry Teuber, a neurosurgeon, for neurosurgical assessment.

Dr. Teuber first saw McQuay on February 13, 2003, for "[n]eck pain and headaches." On February 23, 2003, Dr. Teuber noted "occasional sensory abnormality" in McQuay's fingers. Dr. Teuber recommended conservative management and told McQuay there was "no surgical option available." Dr. Teuber did, however, refer McQuay to Dr. Tim Watt, a neurosurgeon and one of Dr. Teuber's partners, for a second opinion.

Dr. Watt first saw McQuay on February 24, 2003, and noted neck pain, as well as "radiation into his shoulders", "continued numbness in the fingers of his left hand", and "occasional tingling and numbness down his arm". Dr. Watt scheduled a discography in order to "better delineate a treatable pain generator." Dr. Watt kept McQuay off work pending the results of the discography. Dr. Watt later noted "intermittent right arm pain that shoots down the back of his arm about his elbow".

Following the discography, and after again visiting with McQuay on March 12, 2003, Dr. Watt recommended fusion surgery: "anterior cervical discectomy 5-6, 6-7 with Trinica plating." On that same day, Dr. Watt set out his surgical recommendation and reasoning in his letter to Dr. Craig Hansen, McQuay's primary treating physician:

I saw your patient Mark McQuay in the spine clinic on the 12<sup>th</sup>. His discography performed by Dr. Nesbitt was positive at both C5-6 and C6-7. He has failed all conservative treatment options and continues to be debilitated by his neck pain.

At this point I think his only real option is to proceed with a two level cervical decompression and fusion. We will get that on the schedule at Mr. Mcquay's [sic] convenience.

McQuay was uncertain about the surgery and requested the opportunity to return to Dr. Teuber to see if Dr. Teuber's opinion had changed based on Dr. Watt's more recent tests. Although Dr. Teuber again did not personally recommend surgery, he deferred to Dr. Watt, and noted on April 1, 2003:

Considering his clinical presentation, the multiple levels involved on discography as being abnormal, and his apprehension of surgery, I would personally not recommend surgical treatment. I would defer to Dr. Watt and Mark to make this [decision] though in that every practitioner has a different opinion concerning the effectiveness of discography in identifying pathological disc segments.

On April 30, 2003, Dr. Watt's treatment plan was interrupted when McQuay was found to have developed an infection at C6-7 caused by the earlier discogram. McQuay submitted to urgent surgery to remove the infected disc and surrounding tissues. Dr. Watt did not consider fusion at this time because of the complications presented by McQuay's infection.

Dr. Watt started McQuay on physical therapy on June 16, 2003. Dr. Watt expected McQuay to be able to return to light duty work in a couple weeks, gradually increasing his activity. McQuay was to return to Dr. Watt in approximately two months for "declaration of MMI."

However, McQuay returned to Dr. Watt on August 4, 2003, "complaining of significant posterior neck pain." Dr. Watt ordered a repeat MRI and told McQuay he may need to consider repeat surgery to do a definitive anterior fusion. Because McQuay was still unsure of surgery at that time, Dr. Watt referred him to Dr. Simonson for continued conservative care. McQuay then treated with Dr. Simonson through late 2003 and into 2004. Dr. Simonson noted "tingling in his left hand" in January 2003.

On September 1, 2004, following months of conservative care, Dr. Watt again recommended fusion surgery. He noted that he had previously recommended the two level fusion and wrote: "I think at this point we need to go back and re-address the original problem." Dr. Watt recommended that McQuay not return to work pending fusion surgery.

Insurer refused authorization for the surgery based on Dr. Margaret Wallenfriedman's November 2004 records review and opinion. Dr. Wallenfriedman, based on her conclusion that McQuay did not have "arm pain, motor weakness, sensory deficit, or spinal cord compression", and suffered "strictly neck pain"; opined that Dr. Watt's proposed fusion surgery is not necessary treatment.

### **Authority**

SDCL 62-4-1 provides that "the employer shall provide necessary . . . medical . . . care."

Given Dr. Watt's recommendation of fusion surgery, Employer/Insurer have the burden to prove that the recommended treatment was not "necessary, suitable or proper." Hanson v. Penrod Construction Co., 425 NW2d 396, 399 (SD 1988).

“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.” Krier v. John Morrell & Co., 473 NW2d 496, 498 (SD 1991).

Dr. Watt is recommending fusion surgery because, as he testified, “I strongly believed that the surgery would help Mr. McQuay, that it would relieve his pain and let him return back to normal function.”

Dr. Watt opines that McQuay’s current condition is a progression of the problem he originally had at C5-6 and C6-7. Dr. Watt is now recommending a three-level fusion. McQuay is now experiencing problems at C4-5, which had appeared normal after the original injury. There has been “more wear and tear, plus the stress of the change in alignment caused by the settling of the adjacent disks.”

Although Dr. Watt does not have a medical opinion concerning why the C4-5 level is now a problem, he is clear that this level should not be left out of any fusion surgery:

C4-5 has deteriorated subsequently and looks clearly more pathologic than it did when all of this started a year ago, to do the other two and leave the other one alone, you’re probably going to end up coming back and operating on him a second time.

Dr. Watt’s opinions, as McQuay’s treating physician, are hereby accepted.

Dr. Wallenfriedman, also a neurosurgeon, performed a records review and testified by deposition for Employer/Insurer. She testified:

My opinion would be that a surgical intervention such as a fusion is justifiable for neurological compromise such as arm pain, motor weakness, sensory deficit, or spinal cord compression, none of which he has. Most neurosurgeons will not intervene surgically for strictly neck pain.

Dr. Wallenfriedman testified that in her review of the record she did not see any evidence of arm pain, motor weakness, sensory deficit or spinal cord compression.

Contrary to the opinion of Dr. Wallenfriedman, McQuay’s condition has not been limited to neck pain. When McQuay was deposed on May 4, 2005, he described his condition and problems as follows:

I do have a tingling feeling in all my fingers on my left-hand side. I get pain down through my left shoulder blade. I get like a tearing, burning sensation sometimes shooting down through my arm, my left arm to my fingertips. Sometimes when I wake up my left arm is completely numb.

Dr. Wallenfriedman did not personally interview or examine McQuay.

McQuay's complaints of arm pain and numbness are supported by entries in the medical records of Dr. Anderson, Dr. Simonson, Dr. Teuber and Dr. Watt.

"The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Johnson v. Albertsons, 2000 SD 47, ¶26, 610 NW2d 449, 455 (citations omitted).

Dr. Wallenfriedman's opinions lack adequate foundation and are rejected.

"The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true. It may prove little if only partially true." Id. (citing Podio v. American Colloid Co., 83 SD 528, 532, 162 NW2d 385, 387 (1968)).

McQuay's treating doctor has recommended three-level cervical fusion surgery. Employer/Insurer failed to prove that the recommended treatment is not necessary, suitable or proper.

Counsel for McQuay shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Employer/Insurer shall have an additional 10 days from the date of receipt of McQuay'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 McQuay shall submit such stipulation together with an Order consistent with this Decision.

Dated: July 19, 2006.

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Randy S. Bingner  
Administrative Law Judge