

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

CRYSTAL G. FAWCETT,
Claimant,

HF No. 140, 2004/05

v.

DECISION

**CHILDREN'S CARE HOSPITAL &
SCHOOL,**
Employer,

and

DAKOTA TRUCK UNDERWRITERS,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor 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 on August 30, 2005, in Sioux Falls, South Dakota. Crystal G. Fawcett, n/k/a Crystal G. Reuter (Claimant), appeared personally and represented herself. Rick W. Orr represented Employer Children's Care Hospital & School and Insurer Dakota Truck Underwriters (Employer/Insurer).

Issue:

Whether certain medical treatments performed by Dr. Van Hemert are reasonable, necessary medical expenses pursuant to SDCL 62-4-1 and 62-4-43.

Facts:

On October 20, 2004, while Claimant was performing her childcare duties for Employer, a child struck Claimant's head with his head, a maneuver commonly known as a "head-butt." Claimant suffered immediate pain in her neck from the blow. Claimant sought medical care from Dr. Lyle Van Hemert, a Sioux Falls chiropractor. She was unable to get an appointment until October 25, 2004.

Dr. Van Hemert examined Claimant and noted:

[P]araspinal muscle spasms and tenderness to digital palpation in the cervical spine. Muscle guarding and active trigger points were noted in this area. Neck pain questionnaire was filled out and a rating of 20% was noted. The NRS scale was then filled out and a 40% rating was noted. Cervical range of motion was checked with dual inclinometers and the readings were: flexion 38, extension 52, left lateral flexion 36, right lateral flexion 38, left rotation 58, and right rotation 62. Dermatome testing revealed decreased sensation C6 and C7 on the right.

Cervical distraction test brought relief. Cervical compression test was positive on the right. Deep tendon reflexes were plus two bilaterally. Upper extremity muscle testing was plus five bilaterally. O Donohue's test was positive for both strain/sprain. Based upon the examination a Davis series x-rays were taken. The x-rays were negative for fracture or pathology. The lateral view reveals loss of the lordotic curve. The A/P reveals a lateral curve. The extension view reveals disruption of the posterior longitudinal line at C3/C4 and C4/C5. Based upon these findings it is my opinion that this patient is suffering soft tissue injuries to the cervical spine which is directly related to her symptoms and that the incident at work was the major contributing cause. The patient was given work restrictions. I told the patient I would work with her for two weeks and then reevaluate her. Today services include manipulation T6 and C5. This was followed by manual traction therapy techniques, interferential therapy, and hot packs. The patient tolerated the treatment well. The patient was told to return on Tuesday.

The next day, Tuesday, October 26, 2004, Dr. Van Hemert noted:

The patient enters the office making mention of neck pain and headaches. I went over the findings again with the patient and asked [if] she [had] any further questions in regards to care and she stated no as she felt everything was explained in detail to her. The patient states she feels basically the same. Examination of the patient reveals paraspinal muscle spasms and tenderness to digital palpation in the cervical spine. Muscle guarding and active trigger points more noted in this area [sic]. Visual range most revealed decreased range in the cervical spine. Today services include manipulation T6 and C5. This was followed by manual traction therapy techniques, interferential therapy, and hot packs. The patient tolerated the treatment well. The patient was told to return on Wednesday.

The next day, Wednesday, October 27, 2004, Dr. Van Hemert noted:

The patient enters the office making mention of neck pain and headaches. The patient states she feels ever so slightly better. Examination of the patient reveals paraspinal muscle spasms and tenderness to digital palpation in the cervical spine. Muscle guarding and active trigger points were noted in this area. Visual range of motion revealed decreased range in the cervical spine. Today services include manipulation T6 and C5. This was followed by manual traction therapy techniques, interferential therapy, and hot packs. The patient tolerated the treatment well. The patient was told to return on Friday.

On Friday, October 29, Monday, November 1, and again on Wednesday, November 3, 2004, Dr. Van Hemert noted essentially the same symptoms and performed the same treatment as he did on October 27.

Dr. Van Hemert performed an evaluation on November 5, 2004, noting that Claimant had demonstrated improvement. Dr. Van Hemert concluded that Claimant needed two

more weeks of the same treatments and then another evaluation. Dr. Van Hemert performed the same treatments on Claimant as he had on the previous appointments.

Claimant treated with Dr. Van Hemert on November 8, 10, 12, 15, and 18, receiving the same treatments as before with the exception of T6 manipulations on November 12, 15, and 18.

Dr. Van Hemert performed another evaluation of Claimant on November 19, 2004, finding that Claimant continued to improve but had "not reached preaccident status" or maximum medical improvement (MMI). Dr. Van Hemert recommended "cervical rehabilitation to strengthen the cervical spine which hopefully would help to compensate for the damage to the ligaments." He recommended that this rehabilitation be "one on one to make sure that she does the rehabilitation program correctly to help facilitate this neurological pathway." Claimant also received the usual treatment on November 19, 2004, which consisted of C5 manipulation, manual traction therapy techniques, interferential therapy, and hot packs.

On November 22, 2004, Dr. Van Hemert tested Claimant "for a one Max rep in cervical flexion, extension, left lateral flexion, and right lateral flexion." Based on the results of that test, Dr. Van Hemert recommended and set Claimant up for a 12-visit rehabilitation program "following the Zinovieff technique." Claimant also received a C5 manipulation and interferential therapy. Claimant received the same treatments along with the cervical rehabilitation on November 24, and 29, December 1, 3, 6, and 8. On December 10, 20, 22, 24, 27, and 29, Dr. Van Hemert also added C1 manipulations. On December 29, 2004, Dr. Van Hemert performed one more C5 and C1 manipulation and declared Claimant at MMI and told her to return as needed.

On December 3, 2004, Claimant was examined by Dr. Dean Redington, a chiropractor from Minot, North Dakota. Dr. Redington performed an independent chiropractic examination. Dr. Redington diagnosed Claimant with a "mild myofascial pain syndrome, cervical spine" with "no neurologic deficits." Based upon Dr. Redington's opinions regarding the reasonableness and necessity of Dr. Van Hemert's treatments, Employer/Insurer denied payment for approximately half of the charges Claimant incurred at Dr. Van Hemert's chiropractic clinic.

Dr. Van Hemert billed for the use of electrical pads. Dr. Redington questioned whether the electrical pads could have been reused instead of using new pads every time. As Dr. Van Hemert testified, the electrical pads he uses are one-time-use only.

After Dr. Redington opined that not all of the treatment by Dr. Van Hemert was reasonable and necessary, Employer/Insurer denied reimbursement for all but fifteen treatments. Claimant filed a Petition seeking payment for all of the treatment rendered by Dr. Van Hemert.

The Department entered a Prehearing Order on June 14, 2005, in which the following stipulations between the parties were placed in the record:

Claimant suffered an injury arising out of and in the course of her employment on or about October 20, 2004.

Employer/Insurer has accepted as compensable all but approximately \$2234.12 in medical expenses incurred by Claimant for treatment by Dr. Van Hemert.

Claimant has not missed any work because of the October 20, 2004, injury.

Dr. Van Hemert is Claimant's treating physician.

Claimant treated with no other medical provider than Dr. Van Hemert for her work-related injury of October 20, 2004.

Issue:

Whether certain medical treatments performed by Dr. Van Hemert are reasonable, necessary medical expenses pursuant to SDCL 62-4-1 and 62-4-43.

The South Dakota Workers' Compensation law provides that an employer is responsible for "necessary first aid, medical, surgical and hospital expense, or other suitable and proper care." SDCL 62-4-1. The general rule is that the claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

There is no dispute that Claimant suffered a compensable injury and that Dr. Van Hemert is her treating physician. "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, suitable or proper." Engel v. Prostrullo Motors, 2003 S.D. 2, ¶32, 656 N.W.2d 299 (citations omitted).

Dr. Van Hemert treated Claimant 26 times over 11 weeks. He argued that Claimant's injury justified all of his treatments because Claimant demonstrated bone, ligamentous, muscle, and nerve irritation. Dr. Van Hemert opined that the only thing that would make Claimant's case more serious would be disc involvement.

Dr. Redington opined that the frequency and duration of Dr. Van Hemert's treatment was excessive. Dr. Redington opined that Dr. Van Hemert should have prescribed a home-based rehabilitation program rather than a program of twelve supervised one-on-one rehabilitation sessions at his clinic. Dr. Redington also opined that Dr. Van Hemert treating Claimant three times per week beyond the first week was excessive. Dr. Redington based these opinions on his opinion that Claimant's injury did not justify twenty-six treatments. Claimant did not miss any work, did not have to undergo any sort of work hardening program, and did not have to take any pain relieving medication, over-the-counter or prescription. Most telling, Claimant's pain complaints were minimal,

a one out of ten, when Dr. Van Hemert prescribed 12 visits of supervised rehabilitation therapy. Based upon a "Neck Pain and Disability Index (Vernon-Mior)" completed on November 19, 2004, Claimant's only complaints at that time were very mild pain and slight pain in her neck when driving.

Regarding rehabilitation and the severity of Claimant's condition, Dr. Redington opined:

Yes, rehab is appropriate, even in a case like this. It can be done at home in my opinion. Exercises do not need to be high tech or even recommended - - or even prescribed by an expert in rehabilitative care for these to be effective. This has been emphasized over and over in the rehab seminars that I have taken that these can be done at home. Yes, there are cases which need institutionalized supervision, such as what Dr. Van Hemert has in his office. In my opinion this does not qualify. If this case qualifies, then absolutely every case that I see just about would need in-house rehabilitation.

He had mentioned that he felt this was at the high end of severity of case [sic]. If this is a high end, then some of the cases I see that present to my office should be in the emergency room. We see patients that present with 10/10 pain. They present with severe disk problems, with neurologic deficits. Those are severe cases.

Sir, this is not a severe case. She had an injury. She was in pain. It was 4/10. Her pain was real in my opinion. It was not a complicated case, and it did not require 27 [sic] adjustments with multiple modalities and in-house rehabilitation to take care of this simple problem.

Dr. Redington further opined that the records of Claimant's symptom and pain improvement do not justify Dr. Van Hemert's decision to continue to treat her three times a week after November 19, 2004.

Dr. Van Hemert's opinions are based on his conclusion that Claimant's case presented serious issues. Dr. Redington opined that the medical records do not support a conclusion that Claimant's injury was serious. In light of Dr. Redington's testimony, Dr. Van Hemert's opinions must be rejected because his medical records do not support his opinion. Dr. Redington's opinions do take into account the relatively minor nature of Claimant's injury. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 N.W.2d 396, 398 (S.D. 1988).
Dr. Redington's opinions are accepted.

Based upon Dr. Redington's opinions, Employer/Insurer has met its burden to demonstrate that the in-clinic rehabilitation Dr. Van Hemert gave Claimant was excessive and not medically necessary. Employer/Insurer met its burden to demonstrate that the number of weekly adjustments was excessive. Dr. Redington opined that a reasonable treatment plan for a condition such as Claimant's with her

objective and subjective findings would be “three times a week for one [week] with two times a week for two to three weeks and after [that] one time per week.” Applying that formula to the eleven weeks Claimant was treated, a reasonable treatment plan would have included sixteen treatments, allowing for three treatments the first week, three weeks of treatment two times per week and six more weeks of one treatment per week. Exhibit 7 is a table listing the charges accepted and paid by Employer/Insurer under the “Fee Guidelines” and is adopted by the Department as what treatments should be paid and in what amount with two exceptions. First, Dr. Van Hemert is entitled to reimbursement for the electrical pads. He demonstrated at hearing that he uses single use or one-time-use pads. The Department finds and concludes that it would be unreasonable to require him to reuse such electrical pads.

Second, there was also a dispute about whether Dr. Van Hemert billed his initial evaluation of Claimant using the correct code. Dr. Van Hemert used CPT Code 99204. According to Dr. Redington, for this code to be used “a presenting problem of moderate-to-high complexity with a comprehensive examination and a moderately high complexity of clinical decision-making” is required. Dr. Redington opined that Dr. Van Hemert did not make an adequate record to justify the use of this code because it is a time-based code. Dr. Van Hemert did not make a record of the time spent on this initial evaluation. His records do not support the use of this code. As opined by Dr. Redington, the initial evaluation record supports at most a 99203 billing code. Dr. Van Hemert is entitled to reimbursement for a 99203 exam.

In its post-hearing briefing, Employer/Insurer correctly asserted that Claimant is not responsible for payment of the medical expenses determined to be excessive, medically unnecessary, or in violation of the administrative regulations and therefore, not compensable. See ARSD 47:03:05:05.

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer’s proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 17th day of January, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge