

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota**

SHIRLEY GARRETT,

HF No. 213, 2009/10

Claimant,

v.

DECISION

**CRACKER BARREL OLD COUNTRY
STORE, INC.**

Employer,

and

**GALLAGHER BASSETT SERVICES,
INC.**

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. A hearing was held in this matter on February 28, 2014, at 10 am CT, in Sioux Falls, South Dakota. Attorneys, David J. King and Bram Weidenaar represent Claimant, Shirley Garrett (Claimant). Attorney, Richard L. Travis represents Employer, Cracker Barrel Old Country Store, Inc., and Insurer, Gallagher Bassett Services (Employer and Insurer). Depositions received in this matter were from Dr. Erik Peterson (videotape), Dr. Paul Reynen, and Dr. Douglas Geise. Post-hearing briefs were submitted by the parties and argument taken under consideration. The pending issues in this matter have been bifurcated. Only one issue was heard and is being decided at this time. The Department retains all jurisdiction regarding remaining issues.

ISSUES:

Is a shoulder scope, arthrolysis and manipulation, as recommended by the treating physician and surgeon, medically necessary, suitable, or proper?

FACTS:

On August 20, 2007, Claimant slipped and fell on a wet floor, while at work for Cracker Barrel Old Country Store in Sioux Falls, South Dakota. She suffered a compensable work related injury to her back, hip, shoulder, and arm. Employer and Insurer initially accepted the injury as

work-related and paid medical and indemnity benefits to Claimant, including three arthroscopic surgeries to Claimant's left shoulder.

Claimant initially saw Dr. Douglas Geise, Claimant's treating physician, who is employed by Sanford Clinic Family Medicine. Dr. Geise referred Claimant to Dr. Paul Reynan, an orthopedic surgeon employed by Sanford Orthopedics and Sports Medicine.

The shoulder surgeries and procedures occurred on October 9, 2007, December 28, 2007, and April 17, 2008. After the initial surgery, Claimant flipped some bedding off of herself, while asleep, and reinjured her shoulder. That was a major incident that caused the second surgery to take place. The third procedure was to fix a re-tear that occurred on the rotator cuff. At the end of May 2008, while still healing from surgery, prior to starting physical therapy, Claimant had a set-back. Claimant had her left hand on a screen door when a wind gust opened the door wider and forced Claimant's shoulder in to some external rotation. Claimant continued to go to physical therapy and Dr. Reynan believed she was progressing well at that time. She continued to be in pain and the movement of her shoulder was still limited.

On October 22, 2009, Claimant's orthopedic surgeon, Dr. Paul Reynan, recommended that Claimant undergo a fourth rotator cuff repair procedure or arthrolysis. Dr. Reynan is of the belief that Claimant has adhesive capsulitis or a frozen shoulder. Employer and Insurer failed and refused to give approval or authorization for the treatment or surgery recommended by Dr. Reynan. Since the recommendation of Dr. Reynan was not authorized, Claimant has received three steroid injections into her shoulder

After numerous attempts to secure authorization for the procedure, Claimant filed a petition for hearing on June 28, 2010. After the Petition for Hearing was filed, Employer and Insurer sought out and obtained a records review from Dr. Erik Peterson. A report was issued by Dr. Peterson on April 19, 2011. Dr. Peterson is employed by CORE Orthopedics Avera Medical Group. Dr. Peterson did not recommend that Claimant undergo a fourth surgical procedure or the arthrolysis. Based upon this report, Employer and Insurer then formally denied Claimant's workers' compensation benefits.

Employer and Insurer presented the opinion of Dr. Erik Peterson as their argument that the fourth rotator cuff surgery was not necessary or suitable and proper. Dr. Peterson is a Board Certified Orthopedic Surgeon since 2010. He has completed a Fellowship in sports medicine and arthroscopic surgery. He has an active practice of surgery and does not typically perform records reviews or IME's. Prior to the review, Dr. Peterson recommended Claimant undergo an MRI arthrogram of her left shoulder to review for possible tears of the rotator cuff. This scan was performed on September 14, 2010.

The MRI arthrogram was initially read by Dr. David W. Bean, Jr., a radiologist with Sanford USD Medical Center. Dr. Bean dictated in his initial report that Claimant's left rotator cuff has an intact supraspinatus tendon; a small, focal, insertional tear in the infraspinatus tendon; and that there is a tear of the anterior labrum and a possible focal tear of the superior labrum.

Dr. Peterson also read the MRI, however he disagreed with some of the opinions of Dr. Bean. He did not believe that Claimant had a tear of the anterior labrum and a possible focal tear of the superior labrum. He noted that Claimant had an intact rotator cuff without any full-thickness or retracted cuff tears. Dr. Peterson did personally examine Claimant. Claimant's complaints were that her shoulder would not fully move (frozen) and that she was experiencing diffuse pain throughout her shoulder and down her arm.

Claimant's complaints regarding her shoulder have not changed. Claimant's physicians, Dr. Giese and Dr. Reynen, have diagnosed Claimant with a frozen shoulder. According to Dr. Giese, a frozen shoulder is basically a shoulder for which the range of motion is impaired. As of the most recent exam by Dr. Reynen on January 20, 2011, Claimant was able to rotate her left shoulder externally at only 20 to 25 degrees and internal rotation to the small of her back. Her forward flexion is at about 90 degrees. The frozen shoulder may be from swelling or adhesions or other various reasons; the movement of the tendons and the movement of the shoulder is impaired in some way. Dr. Reynen's suggestion is that the adhesions in the shoulder be lysed – or surgically released with an arthrolysis procedure and manipulation of the shoulder under anesthesia. It's a procedure in which the shoulder is manipulated and moved beyond the range of motion while the patient is under anesthesia.

Dr. Reynen is also a Board Certified Orthopedic surgeon, and is Board Certified in his subspecialty of Orthopaedic Sports Medicine. He is licensed to practice in Minnesota, South Dakota, Wisconsin, and Iowa. He completed a fellowship with the American Sports Medicine Institute. Dr. Geise is Board Certified in Family Medicine. He is Claimant's family physician and saw Claimant for a number of years prior to her shoulder injury. In Dr. Geise's opinion, the procedure that Dr. Reynen has suggested is appropriate and should alleviate some of Claimant's pain. Dr. Geise is not an expert in Orthopedics and referred Claimant to Dr. Reynen because of Claimant's musculoskeletal complaints. Dr. Geise supports Dr. Reynen's opinion in regards to whether the shoulder procedure is necessary.

Further facts may be developed in the Analysis below.

ANALYSIS

Is a shoulder surgery, as recommended by the treating physician, medically necessary, suitable, or proper?

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).

Dr. Peterson's opinion is based upon his education and experience, as well as the records of Claimant. Claimant underwent three procedures to her shoulder under anesthesia, as well as many weeks of physical therapy, and she has had three steroid injections to her shoulder. Claimant has not shown any improvement following these procedures. Claimant is currently managing pain and the shoulder is not moving more freely than when it was initially injured.

Dr. Peterson believes that because Claimant has not shown any improvement with these treatments in the past, one more treatment will not help. He does not believe that her pain is caused by her rotator cuff, but by something else. However, he does not give an opinion about what may be causing the pain. He did testify, in his deposition, that Claimant should manage the pain with a pain specialist and proceed with periodic physical therapy. In his initial report of April 19, 2011, just after examining Claimant, Dr. Peterson noted that in order to prove that Claimant does or does not have true adhesive capsulitis or frozen shoulder, that she would have to be examined while under anesthesia. Of course Dr. Peterson does not suggest or recommend that this be done, but is only explaining that examination in that manner is the only way to positively prove that Claimant does or does not have a true frozen shoulder. Dr. Peterson's opinion is that of a disagreement with the treating physician, the treating surgeon, and the radiologist.

Dr. Reynen explained that it takes about a year to completely recover from the type of decompression surgery Claimant underwent. Less than two months after the first surgery, Claimant was reinjured and underwent the second surgery. Four months after the second surgery, Claimant again had surgery on her rotator cuff. And the record indicates that she had another set-back from her shoulder being extended. This is still only 6 months post initial surgery. In the perfect world, Claimant still would not have fully recovered from the initial surgery.

Dr. Peterson is of the opinion that Claimant would have recovered or seen some improvement after the first three surgeries; however, Claimant was never given a change to fully

recover before being reinjured in some manner. Dr. Peterson does not mention the lack of recovery time in his deposition or his review. It is unclear whether Claimant would have improved following the prior procedures, had she had enough time to heal before reinjury. Claimant participated in physical therapy and did improve some. It is unclear whether or not Dr. Reynen still recommends the same procedure or surgery take place. The initial request was made in 2009, 5 years ago.

Dr. Reynen has the same education and certifications of Dr. Peterson and about 20 years more experience in treating orthopedic injuries. Dr. Reynen performed the surgeries and manipulations on Claimant's shoulder. Dr. Reynen's opinion is given more legal weight just from his position of treating surgeon. Dr. Peterson had sat for a videotaped deposition, but that only goes towards his credibility, not towards the weight of the content of his testimony. Dr. Peterson presented credible testimony, as did the Claimant.

It is Employer and Insurer's burden to prove that Claimant's requested medical treatment is not necessary, or suitable and proper. Dr. Peterson's opinion does not outweigh Dr. Reynen's opinion. Employer and Insurer have not met the required burden of showing that the left shoulder procedure as prescribed by the treating physician and surgeon is not necessary, suitable and proper. Employer and Insurer are responsible for the reimbursement of the costs of the procedure to the left shoulder, as currently recommended by Dr. Reynen.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Claimant may also submit Proposed Findings and Conclusions not consistent with this Decision. The initial submission shall be filed with the Department within thirty (30) days from the date of receipt of this Decision. The Employer and Insurer shall have fifteen (15) days from the date of receipt of the initial submissions to submit objections thereto or to submit their own proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with and Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 17th day of July, 2014.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/
Catherine Duenwald
Administrative Law Judge