SOUTH DAKOTA DEPARTMENT OF LABOR

DIVISION OF LABOR AND MANAGEMENT

ROBERT JORENSEN,
Claimant,

v.

HIGH PLAINS GENETIC RESEARCH,
Employer, and

WAUSAU INSURANCE COMPANY,
Insurer.

HF 52, 2003/04

DECISION

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Jon J. LaFleur represents Claimant, Robert Jorensen [Jorensen]. Catherine M. Sabers, of Lynn, Jackson, Shultz & Lebrun, P.C., represents Employer/Insurer.

Issue

Whether Employer/Insurer are legally responsible to pay for the surgery recommended by Dr. Stuart Rice, Jorensen's treating physician.

Conclusion

Based on the evidence submitted at the hearing, Jorensen did not suffer a new injury or aggravation after May 9, 1994, which would act to relieve Employer/Insurer of the responsibility for medical treatment causally related to Jorensen's May 9, 1994, work injury; and the surgery currently recommended by Dr. Rice represents necessary, suitable and proper medical care.

Analysis and Decision

Jorensen's May 9, 1994, work related injury is a contributing factor to his current need for treatment.

The parties agree that Jorensen suffered work related injuries on May 9, 1994, when a bull knocked him down and stepped on his back.

The parties' October 4, 1996, Agreement as to Compensation and Stipulated Award, which was approved by the Department on October 9, 1996, accepted compensability, and stated, in relevant part:

5. The Insurer agrees that claims for future medical expenses related to Claimant's alleged back injury shall be left open, and may be made or pursued by the Claimant. Insurer reserves the right to contest whether such expenses arise out of or are causally

> related to the alleged work-related injury to the back and also reserves the right to contest whether such expenses are medically necessary.

The South Dakota Supreme Court has consistently ruled in workers' compensation cases that "the law in effect when the injury occurred governs the rights of the parties." Faircloth v. Raven Indus., Inc., 2000 SD 158, ¶5, 620 NW2d 198, 200.

Prior to its amendment in 1995, SDCL 62-1-1(7) defined "injury" or "personal injury" as "only injury arising out of and in the course of the employment, and shall not include a disease in any form except as it shall result from the injury." Brady Memorial Home v. Hantke, 1999 SD 77, ¶11, 597 NW2d 677, 680. In 1995, the legislature amended the workers' compensation law to add the language "major contributing cause." Steinberg v. State Dept. of Military Affairs, 2000 SD 36, ¶9, 607 NW2d 596.

Jorensen's entitlement to benefits must be considered under the law as it existed at the time of his initial injury, before the 1995 amendment to SDCL 62-1-1(7):

> Before an employee can collect benefits under our worker's compensation statutes, he must establish, among other things, that there is a causal connection between his injury and his employment. Sudrla v. Commercial Asphalt and Materials, 465 NW2d 620 (SD 1991)); Roberts v. Stell, 367 NW2d 198 (SD 1985); Kirnan v. Dakota Midland Hosp., 331 NW2d 72 (SD 1983). That is, the injury must have "its origin in the hazard to which the employment exposed the employee while doing his work." Sudrla, supra at 621 quoting Deuschle v. Bak Const. Co., 443 NW2d 5 (SD 1989)). This causation requirement does not mean that the employee must prove that his employment was the proximate, direct, or sole cause of his injury; rather, **the employee must show that his employment was "a contributing factor" to his injury.** Sudrla, supra at 621; King v. Johnson Bros. Construction Company et al., 83 SD 69, 155 NW2d 183 (1967). (emphasis added).
>
> The employee's burden of persuasion is by a preponderance of the evidence. In Mehlum v. Nunda Cooperative Ass'n., 74 SD 545, 546, 56 NW2d 282 (1953), we clearly stated that "(t)he burden of proof rested upon claimant to prove by a preponderance of the evidence the facts necessary to establish a right to compensation." Later, in King, supra, 83 SD at 74, 155 NW2d at 186, we said that the employee's burden "is not sustained when the probabilities are equal." Finally, in Wold v. Meilman Food Indus., Inc., 269 NW2d 112, 116 (SD 1978), we cited Holmes v. Bruce Motor Freight, Inc., 215 NW2d 296 (Ia. 1974) for the proposition that "the claimant has the burden of proving by a preponderance of evidence that some employment incident or activity brought about the disability on which the worker's compensation claim is based; a possibility is insufficient and a probability is necessary." See also, Deuschle v. Bak, supra.

Caldwell v. John Morrell & Co., 489 NW2d 353 (SD 1992).

Jorensen met his burden to prove by a preponderance of the medical evidence that his May 9, 1994, injury is a contributing factor to his current condition and need for medical treatment.

Jorensen did not suffer a new injury or aggravation after May 9, 1994.

Employer/Insurer argue that Jorensen, by the cumulative effect of continuing to work on his own ranch after his injury, suffered an aggravation or new injury, which would act to relieve them of continued responsibility for his workers' compensation benefits.

On the date of Jorensen's May 9, 1994, injury, the last injurious exposure rule was found only in case law:

> South Dakota has adopted the "last injurious exposure rule" when considering successive injuries. Under that rule,
>
> > When a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation.
>
> Schuck v. John Morrell & Co., 529 NW2d 894, 900 (SD 1995) (citing Novak v. C.J. Grossenburg & Son, 89 SD 308, 311, 232 NW2d 463, 464-65 (1975)).
>
> The determination of how the last injurious exposure rule applies to a particular claim is based on a factual determination: whether the successive injury is a mere recurrence or an independent aggravation of the first injury.
>
> > In successive injury cases, the original employer/insurer remains liable if the second injury is a mere recurrence of the first. If the second injury is an aggravation that contributes independently to the final disability then the subsequent employer/insurer is liable. Schuck, 529 NW2d at 900.

Enger v. FMC, 1997 SD 70, ¶ 12, 565 NW2d 79.

Pursuant to the above, Employer/Insurer will remain responsible for Jorensen's medical treatment if his current condition is a mere recurrence of his May 9, 1994, injury. However, if Jorensen has suffered a second injury or an aggravation that independently contributed to his current condition and need for treatment, Employer/Insurer are no longer responsible.

> To find that the second injury was an aggravation of the first, the evidence must show:
> 1. A second injury; and
> 2. That this second injury contributed independently to the final disability.
>
> To find that the second injury was a recurrence of the first injury, the evidence must show:
> 1. There have been persistent symptoms of the injury; and
> 2. No specific incident that can independently explain the second onset of symptoms.

Paulson v. Black Hills Packing Co., 1996 SD 118, ¶12, 554 NW2d 194, 196.

"We look to whether a significant occurrence, amounting to an independent contribution to the final disability, causes an onset of increased or new symptoms." Titus v. Sioux Valley Hospital, 2003 SD 22, ¶ 11, 658 NW2d 388 (citing Enger, 1997 SD 70 at ¶17, 565 NW2d at 84).

"The question is not whether later employment contributed to [Jorensen's] disability, but **whether it contributed to the causation of [his] disability."** Titus ¶16, (citing Enger, 1997 SD 70 at ¶17, 565 NW2d at 84). (emphasis added).

The burden remains with Jorensen to prove all facts essential to compensation by a preponderance of the evidence. The burden does not shift to Employer/Insurer to prove the existence of an injury or aggravation relieving them of responsibility. Titus ¶15.

The medical records show Jorensen has suffered from persistent low back and lower extremity symptoms from and after his May 9, 1994, injury; and that his doctors, from early on, did not expect him to improve.

On May 10, 1994, the day after Jorensen was stepped on by the bull, Dr. Thomas P. Delaney saw Jorensen at the Sturgis Medical Center. Jorensen had pain and stiffness in the small of his back and had trouble moving. Dr. Delaney prescribed rest and told Jorensen to return for an MRI in two days if he was not better. Jorensen was worse when he returned to Dr. Delaney two days later on May 12.

A May 20, 1994, MRI showed a herniated disk. On May 24, Dr. Delaney referred Jorensen to Dr. Larry L. Teuber. On June 2, 1994, Dr. Delaney took Jorensen off work until further notice.

Dr. Teuber saw Jorensen on June 16, 1994, pursuant to the referral from Dr. Delaney. Dr. Teuber recommended conservative care, and referred Jorensen to Dr. Dwight K. Caughfield. Dr. Caughfield saw Jorensen on June 23, 1994. He noted:

> The weight of the bull itself was 2,300 pounds and a substantial amount of pressure was placed on Mr. Jorensen's back to the point that he did have a footprint left on his back. He had immediate onset of low back pain prompting a visit to his local physician in Sturgis the following day.

Jorensen continued to suffer low back pain, and continued to see Dr. Caughfield over the next several months.

On September 6, 1994, Dr. Caughfield noted that Jorensen had bought a new tractor with improved seating, but was able to sit only about 2 hours before needing to quit due to pain.

Dr. Caughfield's October 4, 1994, note is one of many that support Jorensen's testimony that he has been unable to do the heavier manual labor around his own ranch since his May 1994 injury. This note included the following: "He is only able to ride on his tractor around two hours a day, has been unable to do the work around his ranch that needs to be done." and "Mr. Jorensen is essentially experiencing some localized back pain, which is quite understandable after he was

stepped on by a bull. I am sure there is some neuropathic component of this as well from the crush injury[.]"

Dr. Teuber's early treatment plan was continued conservative care. He noted on October 25, 1994: "Unfortunately, I don't have a surgical option to offer Mr. Jorensen. A majority of his problem appears to be blunt trauma. I would recommend that he continue with Dr. Caughfield as previously being done."

On October 28, 1994, Dr. Caughfield kept Jorensen off work "except for possibly part time sedentary activities." Dr. Caughfield noted, "A compression-type fracture of the lumbar spine can take quite a while to heal and could theoretically improve over the next year to year and a half, but will need observation."

Jorensen did not improve over the next year to year and a half. According to Dr. Caughfield's December 9, 1994, note, "Mr. Jorensen appears to have hit a plateau and I believe he has reached MMI and is left with a chronic pain syndrome. I will see him back in three months, primarily just to monitor, but I do not anticipate any significant changes."

Dr. Caughfield released Jorensen to return to work on March 14, 1995, with restrictions, including a limitation to four to six hour days, no handling of livestock, no lifting over 20 pounds, no walking more than 100 yards, rest periods every 45 minutes and no repetitive bending.

Jorensen was unable to work even within these restrictions. He returned to Dr. Caughfield on April 3, 1995, complaining of a escalation of back pain over the past week.

According to Dr. Caughfield's May 8, 1995, note, Jorensen was working about twice a week for a few hours each time, he was working within his restrictions, and he had experienced an increase in low back pain.

Jorensen's back condition continued to worsen. In May 1995, he was complaining of a change in his back pain after merely sitting in his tractor for 4 hours spreading grass seed. He was worse, and was experiencing more weakness. A May 25 MRI showed "persistent herniated disc with impingement on the left L5 nerve root."

Jorensen continued to experience increasing leg symptoms through the summer and fall of 1995. On November 20, 1995, he was complaining of increased low back pain. According to Dr. Caughfield's note, Jorensen could not identify any specific trauma which may have caused this flare. Jorensen was having more radiating pain with greater intensity.

Jorensen saw Dr. Teuber on December 8, 1995, who noted: "The patient's history goes back to an injury from a bull stepping on his lower back at High Plains Clinic." and "He describes the pain as being in one area about the size of his fist, in the above noted area of injury." Under the heading "Impression" Dr. Teuber wrote: "Patient has chronic low back pain and there is not much we can offer him at this time."

When Jorensen did not improve after months of conservative care, Dr. Teuber performed a "decompressive lumbar laminectomy, left by way of foraminotomy" on February 14, 1996. As a result of the surgery, Jorensen experienced marked improvement of his leg pain, but his back pain was not significantly improved. This had been expected. Dr. Teuber noted in March: "Concerning his back pain, however, he still has a tightness across his back and we noted previously that problem was associated with a bull stepping on his back and a blunt injury to his lumbar spine. For this we did not direct our surgical treatment."

Dr. Teuber wrote to Dr. Caughfield on April 22, 1996, recommending continuing therapy: "We will be clinically following him. I am not overly optimistic that his back pain will ever be cured and I suspect that he will eventually require total disability, but we will continue to hope for the best."

Dr. Teuber again wrote to Dr. Caughfield on June 20, 1996: "In my opinion his low back condition is likely a chronic condition and will not be improved with surgical therapy. . . . He still [can do] some light things around the farm, custom work, and his own need for putting up hay and the like. He may continue to do this as he wishes, but over the long haul I do not believe that heavy manual labor will be in his best interest."

Dr. Teuber opined in an August 5, 1996, letter addressed "to whom it may concern": "Mr. Jorensen is not able to carry out his regular duties that involve heavy manual labor."

Jorensen returned to Dr. Delaney on August 23, 1996, for post-surgical follow-up. Dr. Delaney noted that Jorensen's prognosis was poor and that his condition could be expected to continue to deteriorate: "He's in today for [follow-up] for his evaluation by Dr. Teuber and Dr. Caughfield for his back. They are of the mind that he is disabled completely and see no anticipation that he will improve. They anticipate that he will have progressive disability. They do not feel that he can operate his ranch any more. In spite of his determination he is totally disabled. We'll see him back in about 2 months."

In his August 23, 1996, letter addressed to "to whom it may concern", Dr. Delaney expressed his opinions relating Jorensen's continuing back problems to his May 1994 injury, his inability to work his own ranch, and the likelihood that his condition would never improve:

> Mr. Jorensen has been a patient of mine for a couple years. He has had an injury to his back. He was stepped on by a bull at his work and received a back injury from that in 1994. Since then he's had severe debilitating back problems. He has had multiple attempts at therapy. As recently as February he had a back surgery. However, there was little to be done because of the destruction to his back from the injury from the bull. All they could do is a little decompression of some nerve, but stabilization of the back was not possible because of loss of muscle tissue. Mr. Jorensen is completely incapacitated from his injury. He is unable to perform his usual duties on his ranch. He cannot sit in his machinery and operate them for any significant amount of time without severe pain and disability. He's unable to work. He's been seen by Dr. Caughfield and Dr. Teuber, physiatrist and neurosurgeon respectively; and they are both of the mind that he is totally incapacitated. It is my medical opinion Mr. Jorensen is totally disabled from his injury

> and I see no anticipation in the future that he will recover; most likely a progression of his dysfunction. And he will probably end up being wheelchair bound before too long.

Dr. Delaney saw Jorensen on February 18, 1997, at which time he noted: "Much parethesias, pain in his back, occasionally at the point where he has to crawl to move. . . . [Dr. Teuber and other orthopedic and neurosurgeons] feel that he is completely disabled and I would have to concur."

Dr. Delaney noted on March 18, 1997: "Has a lot of back trouble which is according to Dr. Teuber, really not redeemable. So we'll just continue to observe. He really doesn't want anything else done at that time. Have him back as he needs it[.]"

Dr. Delaney noted on September 22, 1997, that Jorensen was continuing his downward path: "He's in with his back pain again. He is progressively more disabled from this. It amazes me that he is able to do any kind of work at all, but he's fairly incapacitated." and "I've encouraged him to apply for disability. It is my opinion he is disabled and he's just [a] very stubborn rancher type and refused to quit, but that will come."

Jorensen returned again to Dr. Delaney on October 6, 1997, for an attempt to treat his back pain. There was little benefit. Dr. Delaney noted: "He's very incapacitated at this time. He's unable to walk hardly at all without a cane. He's certainly unable to do any ranch work at all. He's progressively disabled. I anticipate this will never improve. My opinion is he is totally disabled at this time and I do not anticipate an improvement. He's seen the neurologists and neurosurgeons. They really offer him no benefit at this time. The only thing we can offer him is pain medication. We'll attempt to do same."

Dr. Teuber requested a consultation with Dr. Mark J. Simonson. Dr. Simonson wrote a report in November 1, 2002, in which he stated, "He is a self-employed rancher. He states he is currently working limited light duties which began in May of 1994." and "He tells me he can hardly even work on the ranch."

Dr. Rice, on a referral from Dr. Teuber, opined on causation in his May 12, 2003, to William Traeger at Wausau Insurance, writing: "As you have detailed in your note, the patient has an extensive history of low back difficulties, but essentially relate back to his original injury." and "[I]t is very difficult to differentiate between chronic repetitive motion and trauma associated with activity such as farming as well as the old work injury. I would be inclined to [apportion] each as 50% responsible.

In his March 4, 2004, letter to counsel for Jorensen, Dr. Rice clarified his opinion, minimizing the effect of Jorensen's ranching operation since May 1994:

> Although I indicate in my May 12, 2003, letter to Mr. Traeger that it is difficult to differentiate between chronic repetitive motion and trauma associated with activities such as farming and as well as the old work injury[, a]fter visiting with Mr. Jorensen on February 23, 2004, I understand that his ranching activity has been limited since May 9, 1994, the date of the original work injury. I do not believe that Mr. Jorensen would be in

> need of the surgery I recommended in my April 28, 2003[,] office note had it not been for the May 9, 1994, incident in which a bull stepped on his back. This is in my view regardless of the extent of Mr. Jorensen's ranching activities that he has performed since May 9, 1994.

Dr. Rice also wrote on March 4, 2004:

> After reviewing Mr. Jorensen's medical history in my medical chart, and after visiting with him about his medical history, I believe that Mr. Jorensen has suffered persistent symptoms from the original work injury dated May 9, 1994. Furthermore, there has been no specific subsequent incident that can independently explain Mr. Jorensen's continuing and current symptoms.

Dr. Stephen Eckrich performed an independent medical examination [IME] for Employer/Insurer on April 14, 2004.

In his history, Dr. Eckrich notes that Jorensen was never able to return to work for Employer after his May 1994 injury, and that his work at the ranch was generally supervisory, rather than heavy physical work: "[Jorensen] never did return to work with the same company because of the limitations which had been given to him. He continued to work managing his own ranch, which he says is more supervisory type work, and he generally was not able to perform the heavy physical work associated with running a ranch."

Dr. Eckrich also noted that from and after his original injury, Jorensen had complaints of a constant pain which was worse with virtually all activities. Dr. Eckrich also wrote: "He says that prior to this incident he had never had any significant problems related to his back despite working around cattle and being knocked down on a rather routine basis."

Dr. Eckrich relied, in significant part, on Dr. Teuber's 1995 note that Jorensen suffered from chronic back pain: "Dr. Teuber's note in 1995 made note of the fact that he had back pain for years prior to the time of the original incident. The patient had stated to me that he had never had problems with his back prior to this incident." It is apparent that Dr. Eckrich chose to believe Dr. Teuber's 1995 note.

Dr. Eckrich opined that "[Jorensen's] back pain is due mainly to degenerative age-related changes" and that his need for any surgery at the present time "is unrelated to his original injury which was essentially a disk herniation with pre-existing underlying degenerative changes."

Dr. Eckrich was under the mistaken impression that Jorensen had experienced a period of time after his May 1994 injury when he was relatively symptom free: "The time lapse between the original injury and the present time is such that, combined with the patient's pre-existing degenerative changes in his back, all point to his current back pain as most probably due to underlying and pre-existing degenerative changes in his back."

Employer/Insurer's argument, and Dr. Eckrich's opinions, rely on Dr. Teuber's initial history note stating Jorensen suffered from "chronic low back and neck pain, 1985 and 1992." At the

hearing, however, Jorensen testified that his 1985 injury involved only temporary muscle soreness from which he quickly and completely recovered, and that his 1992 injury did not involve his low back. Jorensen insisted at the hearing that Dr. Teuber's note, insofar as it referred to chronic low back pain, 1985 and 1992, was incorrect. Dr. George Jenter's February 20, 1992, treatment note supports Jorensen's testimony concerning his 1992 injury:

> Bob comes in today. He's been mauled by a bull down at work – High Plains Genetics. . . . The bull turned and pinned him between the bull and the fence and just kept pounding at his left upper chest, bumping him against the fence until he could crawl up over the fence.

Dr. Jenter noted only neck pain and left arm and shoulder pain: "Most of his pain though I think is in his upper posterior thoracic area. He has no abdominal symptoms, no pelvis symptoms, no lower extremity symptoms."

Jorensen's follow-up visits with Dr. Jenter over the next four months were due to his continued neck and upper thoracic symptoms. The treatment notes during this time show absolutely no low back or lower extremity symptoms or treatment.

Therefore, Dr. Teuber's understanding that Jorensen suffered prior chronic low back pain, as well as Dr. Eckrich's and Employer/Insurer's reliance on this note, is simply incorrect and unjustified. The first medical note in the record of significant low back pain is Dr. Jenter's May 10, 1994, note the day after Jorensen was knocked down and stepped on by the bull.

Out of all the medical notes, Employer/Insurer attempt to use a single sentence in Dr. Teuber's November 30, 1999, letter to Dr. Jenter to argue that Jorensen's ranching operating required him to engage in heavy manual labor. Dr. Teuber's letter stated, in part, "Robert has had progressive aching of the legs and low back discomfort over the last year or two. He is very actively employed on a farm/ranch operation performing all the duties to include: caring for livestock, and handling of feed."

Concerning his ranching duties, Jorensen testified at the hearing, credibly, that he acted as manager of his ranch, making any required decisions. He further testified that heavy manual labor was not required. He was able to feed his cattle with a tractor and loader, or with an automated system. He depended on others to assist him when he needed help. Jorensen's testimony in this regard is consistent with Dr. Teuber's note that Jorensen was "actively involved" in his ranching operation. However, Jorensen's testimony that his active involvement in the ranch did not require heavy manual labor is accepted. Jorensen's testimony that he has been unable to engage in heavy manual labor is consistent with and corroborated by the bulk of the medical record.

"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).

"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).

The opinions stated by Dr. Eckrich are based on inadequate foundation and are rejected.

Jorensen did not have significant or chronic low back pain prior to his May 1994 injury, and has suffered from persistent symptoms from and after the time of that injury. There is no specific incident that can independently explain any change or increase in his symptoms. The medical evidence proves Jorensen's symptoms and pain complaints were consistent and that his symptoms changed or increased only as his injury naturally progressed.

Therefore, Jorensen has sustained his burden of proof that he experienced a continuation, a worsening, a recurrence, and not an independent aggravation relieving Employer/Insurer of responsibility for his continuing medical care.

The fusion surgery currently recommended by Dr. Rice represents necessary, suitable and proper medical care related to Jorensen's work injury.

Having established that Jorensen's current need for treatment is causally related to his May 1994 work injury, and having established that he has not suffered an intervening, superseding injury or aggravation, it remains an issue whether the surgery recommended by Dr. Rice is necessary or suitable, and proper medical care.

SDCL 62-4-1, in effect on Jorensen's date of injury, requires Employer/Insurer to "provide necessary . . . suitable and proper care[.]"

"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) (emphasis original).

The medical record shows that the decision to recommend surgery has not come without first exhausting all other reasonable alternatives.

As of February 8, 2000, Dr. Teuber was not recommending surgery. His letter to Dr. Jenter of that date includes: "I would not recommend surgical treatment because [his] condition is not very effectively treated with surgery by way of fusion. I have suggested that he visit with Dr. Lawlor/Simonson for a cortisone infiltration of the facet joints."

On January 21, 2003, Dr. Simonson concluded, "From an injection standpoint, I really do not have much further to offer Mr. Jorensen."

By March 25, 2003, Dr. Teuber was still not recommending surgery. His treatment plan at that time stated: "At this point I don't have a good surgical option. This would involve a multi-level lumbar fusion, which I think is excessive for his age and the degree of improvement of his pain

he would expect after surgery. I have offered him the opportunity of a second opinion and we will arrange for him to see one of my associates."

On April 28, 2003, Jorensen was seen in consultation by Dr. Rice at the request of Dr. Teuber. Dr. Rice concluded, after Jorensen had again not responded to months of conservative care and injections, there were "no options other than surgery. Fusion from L4-S1." Although Jorensen indicated that he did want to proceed with surgery as soon as possible, Insurer did not authorize the surgery.

Dr. Rice admits the recommended surgery will not relieve all of Jorensen's symptoms, but that Jorensen should have some relief from his pain. Dr. Rice wrote to William Traeger at Wausau Insurance on May 12, 2003, stating that Jorensen should expect improvement in his pain, but "it is unlikely that [he] would achieve complete relief. . . . In summary[,] this represents a very complex situation without any great choices and an ideal outcome is unlikely." Insurer did not authorize the surgery at that time.

Since the surgery was initially recommended, Jorensen's condition has continued to worsen. Dr. Rice noted on October 27, 2003, that Jorensen's pain had not improved: "He states that his functional level continues to deteriorate and his ability to ambulate has declined." Diagnosis: "1. Severe low back pain. 2. Discogenic pain at L4-5 and L5-S1. Plan: 1. I do not believe that conservative measures are indicated. The patient is clearly not improved over the course of the past five months. Surgery was recommended in May, however it has not been authorized because of insurance conflicts. 2. We will again attempt to authorize this procedure, specifically a PILF at L4-S1."

Dr. Rice continues to recommend surgery. It is Employer/Insurer's burden to establish the recommended treatment is not necessary or suitable and proper. Krier, 473 NW2d at 498.

Employer/Insurer have failed to meet that burden. Dr. Eckrich opines only that the benefit of "a two-level fusion is likely to be minimal[.]" Jorensen has established that the surgery has not been offered as a "cure-all", and that he is entitled to any benefit he may receive from this procedure.

Counsel for Jorensen 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. Counsel for Employer/Insurer shall have an additional 10 days from the date of receipt of Jorensen'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 Jorensen shall submit such stipulation together with an Order consistent with this Decision.

Dated: January 4, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge