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

FERN Y. STANTON JOHNSON, **HF No. 62, 2010/11**

Claimant,

v. **DECISION**

UNITED PARCEL SERVICE,

Employer,

and

LIBERTY MUTUAL INSURANCE GROUP,

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 June 7, 2011 at 9:00 am MT in Rapid City, South Dakota. Attorneys, Jason Groves and David S. Barari represent Claimant, Fern Y. Stanton Johnson (Claimant). Attorneys, Eric C. Shulte and Justin T. Clarke represent Employer, United Postal Service, and Insurer, Liberty Mutual (Employer and Insurer). Testifying at hearing were Steven G. Frost, MD; Scott Sogge; Fern Stanton Johnson; Bruce Norback, MD; and Ross Johnson.

ISSUES:

The Issues before the Department are:

1. Whether Claimant's work-related injury is the major contributing cause of Claimant's current condition and need for treatment?

2. Whether the pool and enclosure at Claimant's home is necessary, suitable, or proper and whether Claimant should be reimbursed for the cost of the pool and enclosure?

3. Whether continued radiofrequency ablation treatments are necessary, suitable, or proper?

4. Whether Claimant is entitled to payment of certain other expenses?

FACTS:

Claimant suffers from chronic groin pain. The record indicates that Claimant started suffering from this particular pain in 1995. While at work, Claimant suffered a sharp pain in her groin in January 1996. Claimant's doctor, in January 1996, found endometriosis implants on both pelvic side walls, as well as a 2.5 centimeter inguinal hernia, which was operated on at that time. Claimant was off work for periods of time throughout 1996 and 1997. Claimant left her job with Employer in December 1997, after a separate and unrelated injury. Claimant returned to work for one month since that time.

The causation of Claimant's pain was litigated extensively from 1997 through February 2006. The final legal proceedings included a remand to the Department by the Seventh Judicial Circuit and the issuance of Findings and Conclusions that were ordered by the Circuit Court. The Department also adopted the Findings and Conclusions made by the Circuit Court. These final Findings of Fact and Conclusions of Law entered by the Department on February 27, 2006 were not appealed by Employer/ Insurer. The Findings and Conclusions found that Claimant's groin pain was caused by a work-related injury. The exact name of the condition or the injury was not a finding, but it was found that doctors' had diagnosed it as a neuroma (impingement of nerve scar tissue) or a "causalgia" or "neuralgia" (nerve-related pain).

An IME was performed on Claimant at the request of Employer/Insurer on June 10, 2010. Dr. Bruce Norback, the IME physician and board certified neurologist, produced a written report. In that report, Dr. Norback reviews Claimant's full medical history and the results of a physical exam of Claimant. Dr. Norback's opinions were by a reasonable degree of medical certainty. He found that there was still no definitive diagnosis for Claimant's groin pain. Dr. Norback wrote that he would expect a neuroma to have grown over time; or in the converse, if the pain was exacerbated with activity, her pain would be expected to decrease. He also opined that Claimant's radiofrequency ablation treatments do not seem to be helping and that Claimant has no need for an in-home pool for hydrotherapy.

On August 9, 2010, Employer/Insurer sent a letter of denial to Claimant. This denial was for any additional benefits including payment of present and ongoing medical expenses for the January 1996 neuroma/groin injury. Employer/Insurer has also denied Claimant's request for reimbursement of the installation of a heated pool at her home and in-town mileage expenses.

Claimant's treating physician, Dr. Steven Frost, prescribed hydrotherapy for Claimant on an "as needed" basis. Claimant uses her pool two to three times per day. The hydrotherapy in combination with the TENS unit and her other therapies, including meditation and regular radiofrequency ablation treatments, has reduced her use of narcotics and her pain. Claimant installed a pool in her home for her hydrotherapy. To install the pool, she and her husband remodeled their attached garage/shop. The complete cost of remodeling and installation, without accumulated interest, was $20,570.97.

Employer/Insurer argues that the hydrotherapy can be accomplished at public facilities within Rapid City. According to the Nurse Case Manager assigned to Claimant's case, there are four public facilities in Rapid City available: High Plains Physical Therapy can be booked three

times per week at a rate of $36 per month; Rapid City Regional Hospital Rehab can be attend 2 times per week at a cost of $35 per month; Roosevelt Swim Center is available Monday through Sunday at a cost of $78 per month; YMCA is available Monday through Sunday at a rate of $46 per month. The Roosevelt Swim Center and the YMCA pools are slightly cooler than what Claimant prefers, 85 and 89 degrees respectively, however there are hot tubs available for use at both of these facilities. Claimant prefers to have her pool at 97 to 98 degrees.

Dr. Steven Frost continues to be Claimant's primary medical provider for her groin pain. Dr. Frost has been treating Claimant's chronic pain for many years. Dr. Frost is of the opinion, by a reasonable degree of medical certainty, that Claimant's groin pain and related medical expenses continue to be related to or caused by the original groin injury suffered while employed by Employer. Dr. Frost is also of the opinion that Claimant's treatment by radio-frequency ablation is a reasonable treatment for chronic pain. Claimant's other possible treatments are an implanted spinal cord stimulator or regular use of narcotic painkillers. Dr. Frost also recommends hydrotherapy over "dry-land" physical therapy and recommends that the pool be warm and located indoors, as the therapy results are more positive. The home pool is a convenience according to Dr. Frost, and not a medical necessity.

Further facts may be developed in the Analysis below.

ANALYSIS

1. Is Claimant's work-related injury still a major contributing cause of Claimant's current condition and need for treatment?

Employer/Insurer denied Claimant's disability payments and medical payments because an IME determined that Claimant's current need for treatment was not caused by her work-related injury. Claimant makes the argument that the causation issue has already been determined by the Department and the Courts on appeal, and that the issue is res judicata absent a showing of change of condition by Employer/Insurer pursuant to SDCL §62-7-33.

Employer/Insurer argue that §62-7-33 does not apply to this situation because Employer/Insurer do not seek to prove a change in condition. They assert that a "change in condition" is not necessary to deny workers' compensation coverage. They argue that SDCL §62-7-1 applies each time an IME is conducted and does not link the current need for treatment to the original injury.

The new IME was conducted by Dr. Bruce Norback. Dr. Norback testified at the hearing. Dr. Norback is board certified in neurology and clinical neurophysiology and practices at the Minneapolis Clinic of Neurology. Dr. Norback reviewed Claimant's medical file and history including the depositions of the doctors deposed in the previous hearing file before the Department. Dr. Norback's opinion is that Claimant's pain is "idiopathic" in nature, or in other words, he does not know the cause of the pain. This is the same opinion expressed by other doctors that saw Claimant in 2000. Dr. Norback could not see or feel the neuroma, even though neuromas may or may not grow over time. Neuromas may or may not be visible to an examining

physician, according to Dr. Norback. Claimant also stopped working at a job with repetitive movements, which was originally one of the many proposed reasons for the suspected neuroma.

Dr. Norback also spoke about his suspicions of why the neuroma is thought to exist. He detailed a number of potential causes for the groin pain for which Claimant suffers, some of which were discussed in the previous hearing before the Department, such as hidden endometriosis and hysterectomy scarring. Dr. Norback cannot say with medical certainty that there is a neuroma present which is causing Claimant's pain.

Dr. Norback also testified about the treatment that Claimant has been prescribed, the hydrotherapy and the radiofrequency treatments. These treatments are not a cure for the pain and only provide temporary relief of Claimant's symptoms. For that reason, Dr. Norback is of the opinion that other treatments should be attempted that could potentially cure Claimant's pain, including the potential for exploratory surgery. Dr. Norback testified that the long-term use of temporary treatments for an unknown condition is not medically appropriate.

Claimant's treating physician, Dr. Steven Frost testified at the hearing. He is board certified in pain management and anesthesiology and is the medical director of Pain Management Services at Rapid City Regional Hospital. Dr. Frost has treated Claimant for approximately 14 years for her chronic groin pain. According to Dr. Frost's tests, Claimant's pain involves the ilioinguinal nerve and the genitofemoral nerve. Dr. Frost, in 2000, gave the opinion that Claimant's groin pain was chronic and caused by a work injury. He still holds that opinion. Claimant has been treating with Dr. Frost since shortly after her work-related injury. Dr. Frost's treatment is acknowledged to only temporarily dull or reduce the chronic pain. Dr. Frost is still of the opinion that Claimant's groin pain, as it is chronic, will continue indefinitely. In his opinion, the hydrotherapy and the radiofrequency ablation treatments are the best possible treatments, with the least amount of side effects, for Claimant. He is of this belief because Claimant's pain is significantly reduced with these treatments.

Dr. Frost does not know the exact etiology of the pain. He has pinpointed the specific nerves from which the pain originates. He does not believe, with a reasonable degree of medical certainty, that Claimant can be cured. It is Dr. Frost's medical opinion that chronic neuropathic pain can result from an inguinal hernia, such as Claimant suffered on the job. Dr. Frost has offered one other treatment to Claimant, which Claimant has yet to try because of the required surgery; a surgically implanted spinal cord stimulator.

Dr. Frost recommended that Claimant use hydrotherapy, or pool therapy. Claimant has found that treatment to be successful when the water is warm and the treatment is used on a regular basis. Claimant uses pool therapy three times per day and an electronic stimulator or TENS unit once a day. Dr. Frost did not order that Claimant install a pool at her home, but did recommend that she try to find a location with an indoor, heated pool.

This case between Employer/Insurer and Claimant has been heard by the Department and Circuit Court on a previous occasion. The resulting decision was made with the Final Findings of Fact and Conclusions of Law back in February 2007. The Final Findings were that Claimant's groin pain was chronic and idiopathic, in that the nerve pain could be a neuroma, causalgia, or

neuralgia. Basically, Claimant's pain stemmed from her nerves because of a work-related injury. That fact has not changed. The IME by Dr. Norback is in agreement with the rest of the qualified doctors that examined Claimant. None of them know the exact etiology of Claimant's chronic groin pain. No change has occurred with Claimant's diagnosis since 2007.

Employer/Insurer chooses to utilize SDCL §62-7-1 to deny Claimant's workers' compensation benefits. This is the statute that requires a claimant to submit to a medical exam at the request of the employer and insurer. This type of exam cannot be conducted more often than every four weeks and "shall be for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this title." SDCL §62-7-1.

Employer/Insurer's argument, taken to the logical conclusion, is that an employer or insurer may, based upon a compulsory medical exam, deny benefits to a claimant every four weeks no matter the Court's Finding of causation. This potentially can continue until a claimant stops collecting workers' compensation benefits.

Claimant makes the argument that Employer/Insurer has the burden of proving change of condition under SDCL § 62-7-33. The statute reads:

> Any payment, including medical payments under § 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the Department of Labor pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action. Any case in which there has been a determination of permanent total disability may be reviewed by the department not less than every five years.

SDCL § 62-7-33. In this case, Employer/Insurer did not make a request to the Department for a review of the medical or disability payments being made to Claimant. They denied based upon an IME that found exactly the same diagnosis (or lack thereof) as most of the IME's taken 10 years previous.

The South Dakota Supreme Court recently ruled on the applicability of SDCL §62-7-33 in the review of workers' compensation benefits. They wrote, "When [Claimant] incurs medical expenses in the future, Employer may reimburse her or challenge the expenses as not necessary or suitable and proper under SDCL 62-7-33." Stuckey v. Sturgis Pizza Ranch, 2011 S.D. 1, ¶27, 793 N.W.2d 378.

According to *Stuckey*, the use of SDCL §62-7-33 is the proper method of challenging the payment of medical or disability expenses, by an employer or insurer, after the issuance of a final judgment by the Department or a Court. Following §62-7-33 and *Stuckey*, Employer/Insurer has the burden to prove a change in Claimant's condition or that the medical expenses are not

"necessary or suitable and proper." This reasoning also follows SDCL §62-4-1 which reads, "The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care …during the disability or treatment of an employee within the provisions of this title." SDCL §62-4-1. After a ruling has been made regarding workers' compensation benefits, Employer/Insurer does not have the authority to approve or deny medical treatment or deny disability benefits without proper notice to the Department for a review.

Without a change in condition, the Findings and Conclusions issued in this matter in the prior hearing as ordered on appeal to Circuit Court, stand as res judicata. When considering claims involving res judicata, the courts in South Dakota apply four factors to determine if the doctrine applies:

> (1) was the issue decided in the former adjudication identical to the present issue; (2) was there a final judgment on the merits; (3) are the parties in the two actions the same or in privity; and (4) was there a full and fair opportunity to litigate the issues in the prior adjudication?

Herr v. Dakotah, Inc., 613 NW 2d 549,554 (citing *D.G. v. D.M.K.*, 1996 SD 144, ¶ 27, 557 N.W.2d 235, 240; *Springer v. Black*, 520 N.W.2d 77, 79 (S.D.1994)).

In Claimant's previous case before the Department, the issue of causation of Claimant's groin pain was determined; there was a final judgment on the merits; the parties were the same; and there was a full and fair opportunity to litigate the issues. Claimant continued to suffer from the same pain in the intervening period after the final order by the Department. Employer/Insurer has shown no change in Claimant's condition, only a subsequent medical exam. The medical exam follows the same reasoning as the prior compulsory medical exams ordered by Employer/ Insurer. The only difference between the causation issue decided in 2007 and the causation issue presented now is the passing of time.

Employer/Insurer would like a second opportunity to litigate the causation of Claimant's pain by arguing that the work-injury is no longer a major contributing cause of Claimant's pain. But that argument presumes that there has been some sort of change. In other cases, perhaps the passing of time would be pertinent fact and a plausible argument for an injury to remain a "major contributing cause" of the condition. But in this case, with these facts that have been presented, it is not. Dr. Norback was of the opinion that he did not know the cause of the groin pain. He also stated that time may or may not cause a neuroma to grow; that time may or may not have healed the purported cause of the pain. The doctors' opinions do not state that the passage of time will definitively cause Claimant's case of chronic pain to go away, when the source of the chronic pain is still unknown.

"Workers' compensation awards are res judicata as to all matters considered unless Department has reserved continuous jurisdiction over one or more questions." *Herr v. Dakotah Inc*., 2000 SD 90, ¶24, 613 N.W.2d 549, 554. Furthermore, "Where a claimant, however, fails to show a change in condition, a final compensation award is res judicata with regard to the condition of the injured employee at the time the award was entered." *Owen v. F.E.M. Elec.*

Ass'n, Inc, 2005 SD 35, ¶18, 694 N.W.2d 274, 280 (citation omitted). The ruling in *Owen* may also be applied to employers and insurers, or so the ruling in *Stuckey* indicates.

The Courts have already determined that a work-related injury is a major contributing cause of Claimant's condition. See *Johnson v. United Parcel Service and Liberty Mutual*, Seventh Circuit Decision, Findings of Fact and Conclusions of Law, dated April 12, 2005. Claimant's condition has not changed. Therefore, Claimant's work for Employer is still a major contributing cause of that chronic condition.

2. Whether the pool and enclosure at Claimant's home is necessary, suitable, or proper and whether Claimant should be reimbursed for the cost of the pool and enclosure?

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"

> In interpreting this statute, we have stated that "[i]t is in the doctor's province to determine what is necessary or suitable and proper." *Streeter v. Canton Sch. Dist.*, 2004 S.D. 30, ¶25, 677 N.W.2d 221, 226 (quoting *Krier v. John Morrell & Co.*, 473 N.W.2d 496, 498 (S.D. 1991)). And "[w]hen 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." Id. (quoting *Krier*, 473 N.W.2d at 498).

Stuckey at ¶23 (citation omitted).

Both expert physicians are of the opinion that hydrotherapy, as a prescribed treatment or therapy for pain, is reasonable or necessary. Employer/Insurer are responsible for the payment of "necessary … and suitable and proper care". SDCL § 62-4-1. However, neither physician has said that home-based hydrotherapy is required or medically necessary. Dr. Frost has recommended that Claimant utilize a warm indoor pool as frequently as necessary, although it is not a medical necessity. Claimant has a therapy regime that includes pool therapy three times per day, meditation twice per day, and the use of a TENS unit once per day.

The Nurse Case Manager with Alaris, Julie Bradford, presented evidence that shows that there are two therapy pools in Rapid City. The High Plains Physical Therapy pool is available for Claimant three times per week. The Rapid City Regional Hospital Rehab pool is available two times per week. Neither location can accommodate Claimant's required pool therapy of three times per day, 7 days per week.

Ms. Bradford's report also showed two public indoor swimming pools available for Claimant's use, with a paid membership. The Roosevelt Swim Center has a leisure pool with a temperature of approximately 85 degrees and a hot tub. The YMCA has a leisure pool heated to 89 degrees and has a steam room and hot tub available. These facilities are open 7 days per week.

Because there is no public swimming pool, heated to her preferred temperature, that can accommodate Claimant's hydrotherapy at the required frequencies, Claimant took it upon herself to install a pool in her home. Claimant's husband performed the remodeling of the home and installation of the swimming pool at a cost of approximately $20,570.97. Claimant received an estimate from a local contractor for cost of the work performed. The estimate for materials and labor was approximately $17,596 (not including overhead and profit). To hire the contractor to perform the work would have cost about $21,620.

Hydrotherapy is suitable and proper for the relief of Claimant's pain and continued treatment for the injury. However, Claimant's community has two public facilities that have a hot tub or spa available for use, seven days per week, or a leisure pool that may be used on a regular basis. Both of these facilities require a paid membership. Because home-based hydrotherapy is not specifically recommended by the treating physician, and because Employer/ Insurer have shown that a pool in the Claimant's home is not necessary or suitable and proper, Claimant's petition for repayment of her home remodeling and cost of pool installation is denied.

3. Whether continued radiofrequency ablation treatments are necessary, suitable, or proper?

SDCL 62-4-1 provides that "the employer shall provide necessary ... medical ... care." Similar to the hydrotherapy, Employer/Insurer have the burden of proving that the radiofrequency ablation treatments prescribed by Claimant's treating physician, Dr. Frost, is not necessary or suitable and proper. *Stuckey* at ¶23. Dr. Frost has been treating Claimant's pain for a number of years through a series of ablation treatments to the nerve. Dr. Frost is treating Claimant's pain as a chronic condition that has no cure. He believes that a reasonable long-term treatment for this chronic pain is to manage the pain or the symptoms through a series of therapies, including periodic radiofrequency ablation treatments.

Dr. Norback gave the opinion that treatments such as radiofrequency ablation treatments should not be continued if they are only for therapeutic purposes. Dr. Norback is of the opinion that Claimant should continue to look for the cause of her pain and an appropriate cure. He is not a surgeon, but gave the opinion that a surgeon should be consulted as to whether surgical procedures could be possible in this case. He is also not an expert in radiofrequency ablation, but is of the belief that too frequent treatments of the nerve could cause more damage to the nerve.

Dr. Norback opined that because the etiology of the pain, from the beginning of her claim, is not conclusive, that the pain management therapies are not reasonable or medically proper. He would like Claimant to investigate the possibility of exploratory surgery to find the cause of the groin pain and eliminate the cause of the pain instead of treating the pain as chronic. This is the same opinion that Employer/Insurer presented in the previous hearing on this matter. By adopting or following Dr. Norback's opinion would require the Department to reopen the original case that was heard in front of the Department and the Circuit Court and the Court's finding of causation. Dr. Norback did not just say that Claimant's current pain was not caused by her work-related injury, but is of the opinion that Claimant's past and current pain was not caused by her work-related injury. The doctrine of res judicata prevents the Department from

following that opinion in regards to the etiology of Claimant's pain, past and current, as it stems from the same source.

Employer/Insurer has not met the required burden of showing that the radiofrequency ablation treatments, as prescribed by the treating physician, are not reasonable, suitable and proper. Employer/Insurer is responsible for the payment of Claimant's radiofrequency ablation treatments.

4. Whether Claimant is entitled to payment of certain other expenses?

Claimant's petition also requests payment for certain other expenses. Due to the above opinions, Employer/Insurer is responsible for the reimbursement of unpaid medical bills in the amount of $6,973.50 as of June 7, 2011. The annual interest rate of 10% is granted. SDCL §62-1-1.3. If there are other outstanding medical bills, Claimant is required to submit them to Employer/ Insurer.

Employer/Insurer are responsible for the expenses related to Claimant's purchase of a prescribed 200-hertz E-Stim or TENS unit. Employer/Insurer provided a 40-hertz unit to Claimant, but she was prescribed a 200-hertz unit by her treating physician. There was no evidence or argument that that size of TENS unit was not reasonable or proper. The cost of the unit and related expenses as of June 7, 2011, was $514.87. Annual interest of 10% is granted. Other outstanding bills related to the TENS unit should be submitted to Employer/Insurer.

Claimant's requested mileage expenses for in town travel are not compensable. SDCL §62-4-1. Claimant's requested reimbursement for remodeling her home and installation of the pool is also denied, as set out above.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision on Issues 1, 3, and 4, as well as Proposed Findings of Fact and Conclusions of Law and Order. Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision on Issue 2 and 4; as well as Proposed Findings of Fact and Conclusions of Law and Order. The initial submissions shall be filed with the Department within thirty (30) days from the date of receipt of this Decision. The opposing parties 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 ____1st____ day of__ December, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

_____/s/_____
Catherine Duenwald
Administrative Law Judge