

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

BRENDA BELL,

HF No. 94, 2012/13

Claimant,

v.

DECISION

ASSURANT, INC.,

Employer,

and

LIBERTY INSURANCE CORP.,

Insurer.

A hearing in the above-entitled matter was on the May 14, 2014, before the Honorable Catherine Duenwald, Administrative Law Judge, South Dakota Department of Labor, Division of Labor and Management. Claimant, Brenda Bell, was present with her attorney, Michael J. Simpson. Employer, Assurant, Inc., and Insurer, Liberty Insurance Corp., were represented by their attorney, Rick W. Orr. The Department, having received and reviewed all evidence and argument in this case hereby makes this Decision.

The witnesses present at hearing were: Claimant, Claimant's husband Tim Bell, Nancy Britton, Kathleen Scanlon, Dr. Brett Lawlor, Jesse Ham, Dr. Nolan Segal, and Tobias Macera.

The issues to be determined are (1) whether employment with Employer was a major contributing cause of Claimant's current condition and need for treatment, and (2) whether Claimant is entitled to past, present, and future medical expenses associated with her treatment of the condition.

FACTS

Claimant is a 43 year old female, who has worked for Employer as a customer service representative since 2007. Employer is an insurance company in Rapid City, that sells funeral expense insurance.

Claimant first hurt her neck in a car wreck in 2003. She received medical treatment and physical therapy until December 2004. Following this treatment, she did not have any medical treatment for her neck until June 23, 2010. On June 23, 2010, Claimant slipped and fell at work, striking her back, neck, and shoulder. The following day, during an office meeting, Claimant passed out from the pain and fell off the office chair. Claimant received emergency medical treatment on June 24, 2010. She was treated with conservative medical treatment and physical therapy.

Claimant was referred to Dr. Stuart Rice, a local neurosurgeon. He assessed Claimant as having a "lateral disk herniation on the left at C6-7" and a "left C7 radiculopathy with weakness in the tricep." In August 2010, after noting Claimant had not improved with physical therapy, Dr. Rice recommended an anterior cervical discectomy and fusion.

On September 9, 2010, Dr. Schleusener saw Claimant for a second opinion. He agreed that the recommended surgery was appropriate. Dr. Schleusener provided the opinion that any ongoing problems Claimant had prior to the fall were asymptomatic. On November 3, 2010, Dr. Schleusener performed the discectomy and fusion surgery at C6-7. The surgeon recommended physical therapy and noted that she could return to light duty work in about three weeks.

After Claimant returned to work, Dr. Schleusener changed Claimant's restrictions that Claimant would only work half days on Monday, Wednesday, and Friday, attending physical therapy on Tuesday and Thursday. On January 27, 2011, it was noted Claimant was still having neck pain, occipital headaches, and left arm pain. Claimant continued with physical therapy and working three half-days per week. Dr. Schleusener and Dr. Lawlor continued to look for reasons for Claimant's pain. Claimant was taken off work for longer periods of time.

Dr. Brett Lawlor is board certified in the areas of physical medicine, rehabilitation, and pain medicine. Claimant was referred to him by Dr. Schleusener for rehabilitation and chronic pain treatment. On July 27, 2011, Dr. Lawlor gave Claimant permission to start working five hours per day with restrictions, with the goal of working full time. On October 19, 2011, Dr. Lawlor discharged Claimant from physical therapy and continued treatment placing her at maximum medical improvement and returning her to full-time work with permanent lifting restrictions, changing positions frequently, and no overhead lifting.

On October 26, 2011, Dr. Lawlor gave Claimant a 15% whole person impairment rating.

Over the next few months, Claimant had worsening neck pain. She returned to Dr. Lawlor on April 18, 2012. Dr. Lawlor prescribed physical therapy and pain medication. On June 6, 2012, Claimant was sent to an independent medical examination with Dr. Nolan Segal on June 6, 2012. He issued an initial report on July 24, 2012 agreeing that her condition at that time was a direct result of her alleged work injury, as it aggravated a pre-existing condition. Dr. Segal was of the opinion that she could accomplish her physical therapy at home instead of seeing a physical therapist, and that she should be weaned off Hydrocodone.

Dr. Lawlor continued to prescribe Hydrocodone as it had the least side effects and was the most efficacious. On October 15, 2012, Dr. Lawlor referred Claimant to physical therapy at ProMotion Physical Therapy. On December 27, 2012, Claimant began seeing Jesse Ham for physical therapy at Black Hills Orthopedic and Spine Center. He moved his practice in March 2013, to About You Physical Therapy. Claimant continued to see Mr. Ham through February 2014.

At hearing, Dr. Lawlor gave the opinion that Claimant's spine has degeneration, as it is his opinion that almost everyone's spine has degeneration after age 30. He also notes that Claimant has some narrowing and crowding of her left C7 nerve root. She did not have a lot of room for the nerve because of degeneration, but when she fell in 2010, the space around the nerve collapsed and the nerve "got crunched, got squeezed." This squeezing of the C7 nerve root caused much of Claimant's problems.

Dr. Lawlor testified that physical therapy was to (1) decrease or eliminate pain; (2) improve mobility in her neck; and (3) improve her strength and stability with the ultimate goal of improving her overall function. He also testified that the MRI performed in 2014 showed a breakdown above the fusion at C5-6 and retrolisthesis. This, he testified, was due to the fusion at the level below. The fusion surgery was a major contributing factor of these problems at the higher cervical level. Dr. Lawlor recommends continued physical therapy on an as-needed basis and continuing pain medications, "tweaking" as necessary.

It is Dr. Lawlor's opinion, to a reasonable degree of medical certainty, that Claimant's June 2010 work injury is a major contributing cause of her current neck condition and need for treatment.

Mr. Jesse Ham, PT, testified that Claimant was very consistent in her treatment and her work ethic regarding the therapy. Mr. Ham viewed the surveillance video submitted by Employer and Insurer showing Claimant working in her yard on July 4 and 5, 2013. He testified that the video showed Claimant working in a manner representative of her capabilities shown during physical therapy.

Dr. Nolan Segal also testified at hearing. Dr. Segal is a board certified orthopedic surgeon who, for the last 20 years, mostly performs IME's for insurance companies and employers. He has not had an active surgical practice since 2010 and has not performed a back surgery since 1994. Dr. Segal performed the independent medical exam of Claimant, at the request of Employer and Insurer. He disagreed with Dr. Lawlor and stated with a reasonable degree of medical certainty, that the work injury is no longer a major contributing cause of Claimant's condition and need for treatment. He believes that Claimant's multi-level degenerative disc disease is the cause for her flare-ups and need for treatment. He also believes Claimant is no longer in need of physical therapy and should taper off the Hydrocodone.

Dr. Segal did testify that the June 2010 work injury was a major contributing cause of Claimant's need for fusion surgery as well as the follow-up care that followed the surgery. He testified that by June 2012, at the time Claimant first was examined by Dr. Segal, Claimant's symptoms were no longer caused by the work injury but by the degenerative disc disease. Dr. Segal performed two evaluations on Claimant, June 6, 2012 and October 24, 2013. His initial opinion did not change from one exam to the next, but rather was updated.

Additional facts may be listed in the analysis below.

ANALYSIS

Claimant has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry, Inc.* 777 N.W. 2d 363, 367 (S.D. 2010). Under SDCL 62-1-1(7)(b), a work injury is compensable if it "combines with a pre-existing disease or condition to cause or prolong the disability, impairment, or need for treatment, so long as the injury is and remains a major contributing cause of the disability, impairment, or need for treatment."

This level of proof required of Claimant "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. To meet his degree of proof "a possibility is insufficient and a probability is necessary." *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

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).

Employer and Insurer acknowledged that Claimant had a work-related injury in June 2010. Claimant received medical treatment, physical therapy, and surgery because of this injury. In June 2012, Insurer's expert, Dr. Segal, gave the opinion that Claimant's pain and ongoing condition was no longer caused by the work-related injury, but by the pre-existing condition of degenerative disc disease. By June 2012, Claimant was having pain in approximately the same location as she had prior to the work-related injury. Claimant had a discectomy, decompression, and a two-level fusion at C6-7 in November 2010.

The most recent MRI shows some "slippage" or retrolisthesis at the disc above the fusion, C5-6. The experts disagree whether this is caused by the work-related injury and subsequent surgery or the on-going degenerative disc disease. In 2003 and 2004, Claimant received treatment for back pain at these levels. MRI's were available for the experts to see and compare the condition of Claimant's back in 2004 as opposed to post-work-injury in 2010 and post-surgery in 2012.

The opinion given by Dr. Lawlor, during hearing, is that the fusion surgery can cause the levels above and below to become unstable. Dr. Segal presented his opinion that because the fusion surgery was successful and the fused spine level is stable, that the instability at C5-6 is a progression of the previous issues Claimant had at that level in 2004.

The radiologist reading the post-surgical MRI indicated in his report that the retrolisthesis at C5-6 was new. Claimant's cervical and lumbar spine has other indications that degeneration was occurring. The neurologist indicated that this instability at C5-6 affected the right C6 nerve root and was new, in comparison to previous MRIs.

Dr. Segal gave the opinion that Claimant's capabilities were greater than what her physical therapist and treating physician indicated. It was his opinion that the video surveillance of Claimant working outside was in contradiction to Claimant's self-reports of continuous pain. Claimant continues to see a physical therapist and takes pain medication on an as-needed basis. Dr. Segal believes Claimant could utilize home exercises and wean off the hydrocodone. It is noted in the record and Dr. Segal agrees that Claimant is on the lowest dose of hydrocodone available. He also approves of Claimant working full-time, but notes that the restrictions are not due to the work injury, but are because of the degenerative disc disease.

Although both doctors presented credible testimony, the opinions of Claimant's doctor, Dr. Lawlor, are more persuasive than those of Dr. Segal. Dr. Lawlor is a pain management specialist. He sees Claimant on a regular basis due to the medications, and does not see any inconsistencies between Claimant usual pain behaviors and her actions on the video surveillance. Claimant's PT, Jesse Ham, confirmed that when the video surveillance was taken of Claimant, she was doing fairly well at PT and her motions on the tape were consistent with her abilities at therapy sessions. Claimant presented credible testimony regarding her capabilities and her limitations.

In this case, the treating physician's opinion is given greater weight and is conclusive, as it is supported by clinical and diagnostic data. *Matthews v. Bowen*, 879 F.2d 422, 424 (8th Cir. 1989). The explanation of Dr. Lawlor regarding the new retrolisthesis of Claimant's spine was credible, logical, and persuasive. The degeneration of Claimant's spine had not caused any retrolisthesis on any other levels, but had caused symptoms of hypertrophy and herniation as seen on the MRI reports. The retrolisthesis is new and is contained at the level just above a two-level fusion.

Conclusion

Claimant has proven by a preponderance of the work-related injury that occurred in June 2010 is a major contributing cause of her current condition and need for treatment. Employer has not shown by a preponderance of the evidence that the treatment by Claimant's treating physician is medically unnecessary or unreasonable.

Employer and Insurer are responsible for the medical treatment of Claimant's cervical spine; the past, present, and future medical treatment of the cervical and thoracic levels affected by the June 23, 2010 work-related injury. Employer and Insurer are responsible for reimbursement of the amount of medical bills paid to providers, plus interest at the Category B level. SDCL 62-1-1.3.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated this 27th day of January, 2015.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Catherine Duenwald
Administrative Law Judge