

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

TONYA HAUKAAS,

HF No. 122, 2015/16

Claimant,

v.

DECISION

**LE HOLDING, LLC, D/B/A ASPEN
GROVE ASSISTED LIVING,**

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on October 13, 2016, in Rapid City, South Dakota. Claimant, Tonya Haukass, was present and represented by Michael J. Simpson of Julius & Simpson, L.L.P., Law Firm. The Employer, LE Holding LLC and Insurer, Liberty Mutual Insurance Company, were represented by Cassidy M. Stalley of Lynn, Jackson, Shultz & Lebrun, P.C, Law Firm.

Legal Issue:

The legal issues presented at hearing are stated as follows:

- a. Whether Claimant's work-related injury is or remains a major contributing cause of her current condition;
- b. Whether Dr. Lawlor's medical treatment is reasonable and necessary; and
- c. Whether Claimant is entitled to Temporary Total Disability benefits (TTD) beginning on December 31, 2015.

Facts:

Based upon the testimony at the hearing and the record, the following facts are found by a preponderance of the evidence:

1. On and before January 31, 2015, Tonya Haukaas (Haukaas or Claimant) worked for Aspen Grove (Employer) which was at all times pertinent insured by Liberty Mutual Insurance Company (Insurer) for Worker's Comp purposes. Haukaas worked as a Certified Nursing Assistant (CNA.)
2. On January 31, 2015, Haukaas and a co-worker were assisting a resident at Aspen Grove who had fallen. After they had gotten the resident up, she started to fall back again. Haukaas grabbed the resident to stop her fall which caused a popping sound and pain in Haukaas's lower back.
3. On January 31, 2015. Haukaas completed an employee incident report.
4. On February 3, 2015, Haukaas saw PA Carlson complaining of significant pain in her low back after the January 31, 2015 work injury. Carlson prescribed Lyrica and increased Haukaas's Tramadol to one every six hours and also started Naproxen twice daily. Carlson released Haukaas to light duty work for 10 days.
5. On February 5, 2015, Haukaas was seen by Dr. Arban. She complained of low back pain and reduced range of motion more on the left. He gave her a Toradol injection and recommended the use of non-steroidal anti-inflammatory drugs. He also replaced her Soma prescription with Diazepam. Dr. Arban took Haukaas off work until February 11, 2015.
6. On March 2, 2015, Dr. Stock took Haukaas off work "until MRI completed and resulted."
7. On March 4, 2015, Haukaas had a lumbar MRI performed.
8. On March 10, 2015, Dr. Stock released Tonya to light duty work.
9. On March 12, 2015, Haukaas saw Dr. Lawlor. She reported "lifting heavy lady on job and she started to fall back and I twisted and popped." Haukaas complained of left low back and hip pain since the injury.
10. On April 2, 2015, Haukaas filled out an incident report claiming she re-injured her low back when she and a co-worker lifted a heavy resident.
11. On April 22, 2015, Haukaas has last day of work with Employer.
12. On May 5, 2015, Dr. Lawlor noted that Haukaas had had a flare up in her pain after the April 2, 2015 incident. He also noted Haukaas had pain with weight bearing on her left leg.
13. From June 5, 2015 to July 7, 2015, Haukaas received physical therapy. At the initial visit, the physical therapist noted that Haukaas had "severe tightness of left ilium and severe limitation of lumbar extension."

14. On July 9, 2015, the physical therapist noted that Haukaas was following up with Dr. Lawlor and had been ordered to stop physical therapy until her next follow up appointment with him in September.
15. On July 9, 2015, Dr. Lawlor noted that Haukaas was not experiencing much improvement. He replaced the Hydrocodone with Cataflam.
16. On July 21, 2015, Dr. Lawlor gave Haukaas an epidural steroid injection.
17. On August 11, 2015, Dr. Lawlor noted that Haukaas did not get sustained relief from the epidural injection. He noted that Haukaas continued to have predominantly left sided low back pain.
18. On August 27, 2015, Dr. Lawlor performed multiple facet injections on Haukaas.
19. On October 7, 2015, Dr. Lawlor noted that Haukaas initially got relief from the lumbar facet injections. He recommended proceeding with a diagnostic medial branch block with a possible rhizotomy if she gets appropriate relief.
20. On October 15, 2015, Haukaas was seen by Dr. Nipper for an Independent Medical Examination (IME.) Dr. Nipper reviewed medical records through August 11, 2015. He wrote that Haukaas had sustained a lumbosacral strain/sprain during the event of January 31, 2015 which would have resolved by six weeks following the event in question. He concluded that her current symptoms were attributable to a “degenerative condition in her low back which goes back many years.” He opined that Haukaas did not require any additional medical treatment, diagnostic evaluation, or any other forms of therapy relative to the injuries sustained on January 31, 2015.
21. On November 3, 2015, Insurer sent Dr. Nipper’s report to Haukaas and informed her no further medical treatment would be paid.
22. On December 30, 2015, Haukass visited Dr. Lawlor. Dr. Lawlor disagreed with Dr. Nipper’s assessment. He concluded that Haukaas’s left sided low back pain was caused by the work injury and a reasonable next step in treatment was a diagnostic medial branch block. He continued to prescribe Hydrocodone, Tramadol, and Flexeril for pain.
23. On March 17, 2016, Haukaas saw Dr. Dietrich, Dr. Lawlor’s partner, for follow up. Dr. Dietrich noted she had significant tenderness in the low back/lumbosacral region, trouble with activities and prolonged standing, walking or activity. He noted neither Hydrocodone and Tramadol were providing any benefit. He discontinued Tramadol and noted that if symptoms continued to worsen they would discuss more facet injections or medial branch blocks on to radiofrequency neural ablation.

24. On August 1, 2016, Dr. Dietrich again saw Haukaas. He noted diffuse tenderness in the low back and pain with back extension and with forward flexion as well as radicular complaints in the left great than right L4-5 and L5-S1 distributions. He further noted that she had continued low back and left radicular pain and had not been able to work.

25. On October 11, 2016, Dr. Lawlor examined Haukaas and noted that she had had no change in her medical condition and if anything, she feels her pain is a little bit worse. He noted predominantly left side back, buttock, and posterior thigh pain. He wanted her to continue with her current medications and talked about proceeding with medial branch block and radiofrequency ablation as an option going forward.

Additional facts may be developed in the issue analysis below.

Analysis:

Issue I: Whether Claimant's work-related injury is or remains a major contributing cause of her current condition

The Department's first inquiry is whether Claimant's work injury on January 31, 2015, is a major contributing cause of her current condition. Haukaas, as the claimant, has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry Inc., 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353, 358 (S.D. 1992). SDCL §62-1-1(7) defines "injury" or "personal injury" as:

[O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

- (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of;

SDCL §62-1-1 (7).

"The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted). Additionally, "our law does not require objective findings in order to sustain a workers' compensation claim." Vollmer v. Wal-Mart, 729 N.W.2d 377, 385 (S.D. 2007). The proper standard is a preponderance of the evidence. Wise v. Brooks Constr. Serv., 2006 SD 80, 721 N.W.2d 461, 466.

Haukaas visited Dr. Lawlor multiple times for issues related to pain in her back following the work injury on January 31, 2015. Dr. Lawlor is a physical medicine and rehabilitation and pain medicine specialist. He is board certified in physical medicine rehabilitation as well as pain medicine and has been in practice in those specialties for 21 years. He has stated that 60% to 70% of his patients suffer from low back pain.

Employer/Insurer has asserted that Dr. Lawlor's opinion regarding whether the work injury is a major contributing cause is based on incorrect standard of law. During his testimony, Dr. Lawlor was asked whether he had an opinion, "within a reasonable degree of medical probability, regarding whether the January 31, 2015 work injury, is a major contributing cause of [Haukaas's] low back condition with which you treated?" Employer/insurer assert that this question improperly asks about a condition that had been treated instead of Claimant's current condition. Dr. Lawlor had seen Haukaas two days before the hearing and his opinions were, at least in part, based on that examination. It is reasonable to conclude that when he stated his opinion regarding a low back condition which he had treated, he was referring to the condition of Haukaas at the time of that examination.

Therefore, Dr. Lawlor has opined within a reasonable degree of medical certainty that the January 31, 2015 work injury is a major contributing cause of Haukaas's low back condition. He has stated that the mechanism of injury is consistent with her current condition. Haukaas's description of her injury involved lifting a resident who had fallen and a resulting twist that caused a pop in her back. Dr. Lawlor stated that he has seen such injuries involving a sudden movement and twist of the back cause injury many times. Dr. Lawlor has further concluded that although Haukaas had previous injury to the low back area, the current condition is the result of the work injury in question. He bases his conclusions on the location of the pain Haukaas is experiencing. Her previous injuries, pain, and treatment related to those injuries were located predominately on the right side of her lower back. He opines that the current condition is the result of injury to the left side of her back specifically her left sacroiliac (SI) joint and lower lumbar facet joint.

Dr. Nipper performed an independent medical examination on Haukaas on October 15, 2015. Dr. Nipper is a board-certified orthopedic surgeon who has worked in the field of orthopedic medicine for over 26 years. He opines that Haukaas's current condition is a result of degeneration in her SI joint and lower back. To support his opinion, Dr. Nipper referenced Haukaas's numerous previous injuries and pain complaints in the lower back, hip, and legs. The x-rays taken on March 2, 2015, show previously assessed mild degenerative disease of the lumbar spine remained "unchanged" following the work injury. Dr. Nipper stated that such degeneration could cause pain, muscle spasms, and radiating pain. He also stated that it is the nature of a degenerative condition to progress and worsen over time. He concluded that the January 31, 2015 injury caused lumbosacral strain or sprain which healed after only six weeks. However, he acknowledged that the records showed Haukaas's pain did not get better within that time frame, and in fact, her symptoms seemed to get worse. He conceded that his conclusion of sprain/strain was based on his perception of the injury

and the usual healing process for that type of injury. He maintains that the current pain Haukaas is experiencing is caused by the degenerative condition.

The medical records indicate that Haukaas had pain in her lower back prior to the injury on January 31, 2015. The medical records show that Haukaas visited Massa Berry Regional Medical Clinic on November 26, 2014, complaining of pain in her low back which radiated into her thighs. This record indicates that Haukaas was experiencing pain in her lower back that radiated into her thighs. The records show other instances of Haukaas seeking treatment for pain that was present in both sides of her lower back. Haukaas visited Dr. Gould around March of 2014 for an orthopedic consult regarding bilateral knee pain. Dr. Gould's examination and x-rays revealed Haukaas had mild lumbar facet arthrosis, mild lumbar degenerative disk disease, and mild to moderate SI joint arthritis, slightly greater on the right compared to the left. Dr. Gould diagnosed her with SI joint dysfunction and low back pain. He treated her with a steroid injection into her right SI joint. Haukaas had visited Dr. Nesbit in January of 2014 following a previous visit where she had received an injection into her right SI joint. Dr. Nesbit noted that he suspected "that she has additional issues coming from her lumbar spine." He recommended radiofrequency ablation for her right SI joint. From this record, it is apparent that, although, he suspected she may have additional issues in her spine, Dr. Nesbit still believed the proper path for pain relief involved treating her right SI joint. There was no mention of suggested treatment for her left SI joint. The fact that the treatment was limited to her right SI joint and not her left indicates that while some pain may have been present in her left side it was not severe enough to require treatment even just one month before her January 31, 2015 injury.

Dr. Lawlor reviewed the results of Haukaas's MRI which showed an annular tear and disc protrusion. Dr. Lawlor testified that these were the most likely cause of only her right sided pain. He decided to treat Haukaas with an epidural injection. When the epidural failed to provide sustained relief, Dr. Lawlor performed L3-4, L4-5, and L5-S1 left facet injections. These injections provide Haukaas with some relief from the pain, and further led Dr. Lawlor to conclude that the left facets were the cause of most of her pain.

Diagnosing lower back pain is often difficult. It is up to the medical professional to use a combination of objective evidence, subjective patient response, and medical history to conclude the cause of the pain. Just as it is the medical professional's duty to deduce the cause of pain, it is this Department's duty to weigh the certainty of the medical opinion. In Orth id., the Court stated, "[t]his Court has indicated that "[t]here are no 'magic words' needed to express an expert's degree of medical certainty, and the test is only whether the expert's words demonstrate that he or she was expressing an expert medical opinion." Stormo v. Strong, 469 N.W.2d 816, 824 (S.D.1991). Both Dr. Lawlor and Dr. Nipper are experts in their field. Both have examined Haukaas and her medical records. Both have expressed their opinions based on their expertise and their interpretation of the facts. The Department finds Dr. Lawlor's opinion to be more persuasive. While Haukaas has had lower back pain that presented on both sides, she did not require treatment on her left side until after the work injury. Dr. Lawlor's interpretation of the MRI, X-ray, medical records, and Haukaas's subjective pain

response to the left sided facet injections has persuaded the Department that his diagnostic conclusions are the most accurate. Therefore, the Department holds that Haukaas's injury on January 31, 2015 remains a major contributing cause of her current condition.

Issue II: Whether Dr. Lawlor's medical treatment is reasonable and necessary

Dr. Lawlor has recommended left facet blocks to treat Haukaas's current condition. Dr. Lawlor also stated that if the proposed blocks do provide sufficient temporary pain reduction, Haukaas would be a good candidate for radiofrequency ablation. He considers this course of treatment to be medically necessary and appropriate. While Dr. Nipper, as stated above, believes that Haukaas's condition is caused by degeneration and not the work injury, he has stated that he agrees that that branch blocks may be a reasonable next step. Dr. Lawlor's analysis and diagnostic methods have persuaded the Department that the course of treatment proposed by Dr. Lawlor is necessary to treat Haukaas's condition.

Issue III: Whether Claimant is entitled to Temporary Total Disability benefits (TTD) beginning on December 31, 2015.

Dr. Lawlor has opined that after Haukaas's treatment was stopped in October of 2015, her condition has worsened to the point she is suffering from severe pain. Dr. Nipper agrees that Haukaas is in pain as she claims. The Court has held that a worker's compensation claimant who persuades the trier of fact that he or she is in continuous, severe, and debilitating pain has made a prima facie case for being in the odd-lot category. Shepherd v. Moorman Mfg., 467 N.W.2d 916, 919 (S.D. 1991). In order to overcome Haukaas's prima facie showing that she is entitled to TTD under the odd-lot category, Employer/Insurer has the burden to show that there is work available in her community that would accommodate her needs. While Dr. Lawlor did not opine what specific accommodations Haukaas would require, he did state that she would need accommodations. Dr. Lawlor has stated that Haukaas is in pain as she claims and is required to lie down for a substantial portion of each day. The combination of Haukaas's pain and her need to recline during the day has persuaded the Department that she falls under the odd-lot category. Employer/Insurer have not shown the availability of regular employment in her community that would accommodate Haukaas's limitations.

Conclusion:

Haukaas has demonstrated that the injury of January 31, 2015 remains a major contributing cause of her current condition, the medical treatment proposed by Dr. Lawlor is both reasonable and necessary, and she is entitled to Temporary Total Disability benefits beginning on December 31, 2015.

Counsel for Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer/Insurer shall have an additional twenty (20) days from the date of receipt of Claimant's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. 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 an Order consistent with this Decision.

Dated this 9 day of May, 2017.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/Michelle Faw/
Michelle M. Faw
Administrative Law Judge