SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

KAREN WAGNER,
Claimant,

HF No. 148, 2006/07

v.

DECISION

RAPID CITY REGIONAL HOSPITAL,
Employer,

and

FARM BUREAU FINANCIAL SERVICES,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL §62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Rapid City, South Dakota. Claimant, Karen Wagner appeared personally and through her attorney of record, Wm. Jason Groves. Comet H. Haraldson and Jennifer L. Wollman represented Employer, Rapid City Regional Hospital and Insurer, Farm Bureau Financial Services.

Issues

1. Causation & compensability of L4-5 disc injury
2. Extent & degree of claimant's disability, Odd-Lot
3. Reasonable medical expenses
4. Causation of ankle, shoulder, and bladder injuries

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

Claimant, Karen Wagner is 59 years old. Wagner has an extensive medical history unrelated to her work injury. As a child, Wagner suffered abuse resulting in multiple skull fractures, a jaw fracture and other injuries that were left untreated into adulthood. Wagner later received surgery to correct her jaw fracture and two craniotomies related to the skull fractures. Wagner had a variety of other medical problems over the years. Wagner has been a smoker for over 40 years.

Wagner attended the University of Iowa and Kirkwood Community College where she obtained a nursing certificate. She practiced as a RN in Rapid City and in Iowa. Wagner worked as an ICU nurse, and was later promoted to charge nurse and then assistant director of nursing while working in Iowa.

Wagner began working for Rapid City Regional Hospital (RCRH) in 1991. On April 4, 2002, Wagner was working full time as a registered nurse in the surgical intensive care, or SICU unit at RCRH. Wagner and another nurse were turning a 450 pound patient and changing “chucks”, or padding under the patient, when Wagner experienced back pain. After the incident, Wagner was unable to finish her shift and was seen in the emergency room by Dr. Hinkson. In the emergency room, a MRI was ordered; she was prescribed pain medications and sent home. Wagner treated with Dr. Gary Gamache, a chiropractor after the April 4, 2002 incident for chiropractic adjustments and acupuncture.

On April 9, 2002, five days after the incident at work, a MRI was done which revealed facet degenerative changes at L3-L4 with mild stenosis, severe facet changes with bulging disc at L4-L5 causing moderate stenosis and bilateral formaminal stenosis and bulging disc at L5-S1.

On May 6, 2002, Wagner saw Dr. Steven Schwartz for low back pain. Dr. Schwartz recommended conservative therapy including pain medication and pool therapy. Wagner was advised to refrain from heavy lifting, pulling, pushing, twisting, or other physical activity that may be strenuous. Wagner remained off work until May 17, 2002, after which she returned to work at light duty for eight hours per day, with no lifting over 10 pounds. At a follow up appointment with Dr. Schwartz on August 21, 2002, he determined that Wagner’s gross motor strength, sensation and neurological function was intact. Wagner was returned to work.

When Wagner returned to work, she did not return to her regular job duties with SICU. Wagner became a Hospital Coordinator. This position did not entail direct patient care, but rather more administrative duties. Wagner testified at the hearing that the stress of the Hospital Coordinator job affected her back negatively and resulted in her increased number of absences from work.

On March 12, 2003, Wagner saw Dr. Brett Lawlor for the purpose of assigning an impairment rating. Dr. Lawlor diagnosed multilevel degenerative disc disease and joint disease, spinal stenosis at L4-L5 and mild stenosis at L3-L4. Dr. Lawlor concluded that Wagner had reached maximum medical improvement (MMI) and assigned a 5% whole person impairment rating for injuries to Wagner’s spine. As a result of the impairment rating, Wagner was paid the sum of $7,300.80 based on a weekly compensation rate of $468.

On June 18, 2004, Wagner returned to Dr. Lawlor for a reevaluation. With conservative treatment, Wagner had improved at first, but since then, Wagner reported more intense pain in her back, tingling and numbness down her legs. Dr. Lawlor gave Wagner a prescription for pain and discussed a surgical consultation with Dr. Seljeskog.

On June 28, 2004, Dr. Wayne Anderson completed an independent medical evaluation (IME) at the request of the Employer/Insurer. Dr. Anderson diagnosed chronic low back pain and bilateral lower extremity edema with stasis dermatitis. Dr. Anderson opined that the work injury on April 4, 2002, was a major contributing cause of her chronic low back pain and spinal stenosis, however the stasis dermatitis and was not related to the April 4, 2002 injury. Dr. Anderson stated that her dermatitis was caused by her weight issues in conjunction with venous insufficiency. He concluded that the work injury on April 4, 2002, was a major contributing cause of her pain and need for treatment. Dr. Anderson also agreed with Dr. Lawlor's determination that Wagner had reached MMI and 5% impairment rating. Dr. Anderson also agreed that Wagner should continue to see Dr. Seljeskog for further treatment.

On July 9, 2004, an MRI of Wagner's lumbar spine revealed severe stenosis of the spinal canal at L4-L5 with prominent hypertrophic degenerative facet joint changes and anterior subluxation of L4- L5 with likely impingement of the transversing nerve root. Also noted was a midline disc herniation at L5-S1. X-rays also showed degenerative changes with L4- L5 spondylolisthesis.

On July 13, 2004, Wagner saw Dr. Seljeskog. He reviewed the July 9, 2004 MRI and noted evidence of disc degeneration at several levels with some level of protrusion at L1- L2, L3-L4 and very slight sponylolisthesis at L4-5 with a degenerated disc. He concluded that any or all of these could be the source for Wagner's complaints. Dr. Seljeskog stated that there was no immediate need for surgical intervention and recommended formal therapy and some epidural steroids.

On August 27, 2004, Dr. Anderson issued an addendum letter indicating that his IME findings and conclusions in the June 28, 2004 report were incorrect. Dr. Anderson indicated that he had made an error in his original report because he confused the two levels (L4-L5 and L5-S1) and that he believed the changes at L4-L5 were degenerative and the spinal stenosis at L4-L5 was not caused by the April 4, 2002 injury. Dr. Anderson opined to a responsible degree of medical certainty that the L5-S1 disc bulge and herniation were related to Wagner's reported injury of April 4, 2002. At the hearing Dr. Anderson provided live testimony and further explained,

> Q: And you were asked to explain—she's got problems at L4-L5 as well as L5-S1. Is that True?
>
> A: That's true

Q: Do you delineate there as to the cause of those two different disc levels?

A: I do.

Q: And can you explain your response No. 3 there to the Department please.

A: [I]t was my opinion the—the April '02 injury was the cause of her back pain. She didn't have back pain before; she did have back pain after. I was asked to Clarify my opinion regarding—she had multilevel problems on the MRI. So they said, well, explain what you mean, what was injured on that day. So I went back through and looked at the MRI, and there was one finding on the MRI that was logically related to the April '02 injury, and that's the L5-S1 herniated disc. And when you look at the remainder of the lumbar spine, she has numerous changes which were there before this date, and you can tell by looking at the MRI. She has degenerative changes, listhesis, slippage that are all old. So my clarification was yes, it's the cause of her pain. The MRI finding, then in my opinion was the cause then was the disc at L5- S1.

Q: So you opined basically that the L4-L5 disc problems were not related to the work injury of '02?

A: Correct.

Dr. Anderson further testified on cross examination,

Q: --which of the findings on the MRI are related to her work related injury of April 4th. And your response was, Doctor?

A: The L5-S1 disc herniation.

Q: Why did you focus on that level?

A: Because the other findings were all obviously chronic and preceded the date of her injury.

On August 26, 2004, Wagner was admitted to the hospital where Dr. Seljeskog performed a right frontal craniotomy with patching and sealing of a cribform plate cranial defect. The assessment was posttraumatic cerebral fluid rhinorrhea. Wagner was returned to work on October 7, 2004. Wagner was moved to a desk job as a research nurse for cancer patients of Lakota heritage. Prior to her surgery, starting as early as 2004, Wagner had a number of work related absences due to her back injury as well as her cerebral spinal problems. After Wagner returned to work, the problem with absences had resolved.

On January 18, 2005, Wager saw Seljeskog for a follow up. Dr. Seljeskog noted an incident where Wagner bumped her head and had since experienced nasal discharge consistent with cerebrospinal fluid (CSF) leakage. Wagner continued to treat with Dr. Seljeskog for her CSF leakage issues and on March 29, 2006, Wagner was admitted to the hospital where she underwent a second right frontotemporal craniotomy with closure and patching of a small defect with related rhinorrhea. On April 7, 2006, Wagner was returned to work, again as a research nurse for cancer patients of Lakota heritage. This position was 40 hours per two week pay period and allowed Wagner to sit, stand, walk about and change positions as needed. Her job duties included desk work, gathering patient information, and did not include any lifting of more than a few pounds. Wagner earned $27.90 per hour at that position and worked there for 16 months before resigning.

On June 9, 2006, Dr. Seljeskog opined that Wagner was not totally disabled, but had significant permanent partial disability as a result of her two craniotomies. Wagner had other medical factors that when taken into account would make her a candidate for early retirement.

On September 14, 2006, Wagner saw Dr. Lawlor for her low back pain and bilateral leg pain. Dr. Lawlor noted that since Wagner's craniotomies she had been experiencing some balance issues. He also concluded that she needed cataract surgery which compounded her imbalance. Wagner related to Dr. Lawlor that she had missed a step the previous week and fell down some steps twisting her back. Dr. Lawlor diagnosed lumbar stenosis, low back pain, and radicular pain. Dr. Lawlor recommended continued pain medication and referred her back to Dr. Seljeskog for surgical options due to her severe stenosis.

On September 20, 2006, Wagner wrote to Dr. Seljeskog requesting that he write a letter detailing her current medical status and "write whatever you honestly can to make my medical conditions as close to full disability as possible." She asked him to write about the two cranis and her upcoming back surgery and cataract surgery. Wagner summarized her health and medical conditions as follows:

1. Crani- 8/26/04
2. Crani- 3/29/06
3. Back surgery needed
4. Cataract surgery
5. Depression
6. Psoriasis and hx colitis
7. PTSD- history of abuse related to crani's
8. Currently being treated for large boil on belly
9. Physical and emotional exhaustion
10. Circulatory problems with black lower legs and feet
11. Inability to handle stress anymore especially RCRH

12. Too many absences secondary to back spasms and falling

Wagner worked for RCRH for four and a half years following the April 4, 2002 incident. She never requested any sort of accommodations or reduced hours. On September 23, 2006, Wagner submitted her resignation to Rapid City Regional Hospital. Wagner's letter of resignation stated that she was "currently under care for personal conditions." Wagner testified that after she resigned her job at the hospital she pursued her interest in writing, and has sought to have several works of fiction published. She testified that she spends nearly 6 hours a day working on a 1,100 page novel. She also paints and plays several instruments. Wagner testified that she typically reads one book per day. She is able to shower, care for herself and perform tasks around the house including cooking, laundry etc.

At Wagner's request, Dr. Seljeskog wrote a letter dated September 26, 2006, updating her current health status. Dr. Seljeskog noted that Wagner had undergone two cranial operative procedures for a problem with post traumatic CSF rhinorrhea. Dr. Seljeskog stated that Wagner seemed to be getting along reasonably well with her symptoms and the "leak" had been sealed. He went on to say,

> In addition to the above and the mental stress related to this type of cranial surgery, the patient also has a longstanding low back disability. All of this is preventing her from any significant gainful employment. In my view the patient does have an ongoing and permanent major disability.

On October 12, 2006, a second MRI was taken of Wagner's lumbar spine, which revealed spondylolisthesis at L4-L5 producing rather significant spinal stenosis, in addition, a very significant midline disc herniation at L5-S1. Dr Seljeskog noted that either or both of these are obviously the source of the patient's complaints. Dr. Seljeskog recommended surgery at the L4-L5 and L5-S1 levels.

On October 19, 2006, Wagner saw Dr. Anderson for an updated IME exam. Dr. Anderson's assessment was that of L5-S1 disc protrusion/herniation and L4-L5 degenerative disc disease with Grade I spondylolisthesis. Dr. Anderson's opinion to a reasonable degree of medical certainty remained consistent with his earlier opinion, that the "April 4, 2002 injury remains a major contributing cause of her L5-S1 disc abnormality, but not her L4-L5 degenerative disc disease with spondylolisthesis." He determined that surgery at the L5-S1 level would be related to the April 4, 2002 injury, but that surgery at the L4-L5 level would not be related. Dr. Anderson further opined the April 4, 2002, injury was a major contributing cause for Wagner's use of pain medication, the use of a TENS unit and NMES. Based on Dr. Anderson's examination and report, Employer/Insurer, by letter dated November 29, 2006, denied medical treatment relating to the L4-L5 condition and the purported surgery as being unrelated to the work injury.

On April 25, 2007, Dr. Seljeskog performed low back surgery which consisted of a L3-L4 fusion, L4-L5 decompression and fusion as well as a diskectomy and hemilaminectomy at L5-S1. In September of 2007, Wagner returned to Dr. Seljeskog complaining of low back pain and hip pain. X-rays and a CT scan revealed slippage at the L4-L5 level.

On May 1, 2007, Wagner saw Dr. Rand Schleusener complaining of right ankle pain and swelling. Dr. Schleusener referred Wagner to Dr. Stephen Eckrich. Following her back surgery, Wagner reported that she tripped over the walker that was prescribed to her by Dr. Seljeskog. Wagner indicated that she was "walking toward the fireplace and all of a sudden my right leg went out. And I didn't trip over the walker, the leg just went down and I hit the floor. And my right foot was turned under me and I fell right square on my foot, which fractured my ankle." Dr. Eckrich diagnosed a right distal fibula fracture with syndesmosis disruption. Wagner was taken to surgery to repair the fracture. Following this surgery, Wagner began to experience significant problems with incontinence.

On March 18, 2008, Wagner saw Dr. Anderson for another updated IME. Dr. Anderson's assessment was that of L5-S1 herniated disc, status post L4-L5 fusion with migration into the canal at L4-L5, fibular fracture, urinary incontinence and depression. Dr. Anderson opined to a reasonable degree of medical certainty that Wagner's work related injury on April 4, 2002, was not a major contributing cause of her current low back, leg, and right foot pain and need for treatment. He concluded that her current problems were due to migration of the graft at L4-L5, which was a non-work related condition. When asked about Wagner's fall and subsequent ankle injury, Dr. Anderson stated that the work injury of April 4, 2004, was not a major contributing cause of her the fall. Dr. Anderson also concluded, that the medication and use of TENS unit and NMES unit were reasonable treatments and related to the April 4, 2002, work related injury.

Dr. Seljeskog performed another surgery on April 15, 2008. The first operation at the L4-L5 level involved an implant between the vertebrae along with bone to facilitate fusion between the two slipped vertebrae. That implant had slipped. While Dr. Seljeskog did not feel that this slippage contributed to her symtomatology, it could lead to problems in the future and needed to be repaired.

On July 7, 2008, Wagner saw Dr. Brett Lawlor at the request of Employer/Insurer for the purpose of assigning an impairment rating. Dr. Lawlor diagnosed back pain and bilateral radicular pain and a history of L4 to S1 fusion. Dr. Lawlor assigned a 10% whole person impairment. On September 17, 2008, Wagner returned to Dr. Lawlor at the request of Claimant's counsel for an impairment rating on her ankle. Dr. Lawlor assigned a 15% right lower extremity impairment. He further stated, "it is my impression, based on the history she provided to me, that this fall is causally related to her lumbosacral spine injury. It is my opinion that she has additional functional limitation as a result of her ankle injury. "

On April 21, 2009, Wagner saw Kathleen Boyle, OT/L who performed a functional capacity evaluation (FCE) and prepared a report. Ms. Boyle concluded that Wagner functions below the standard of sedentary level. On June 30, 2009, Wagner saw Nano D Johnson, PT who performed a FCE and prepared a report. Ms. Johnson concluded that Wagner is able to work at the sedentary physical demand level for an 8 hour day. Vocational rehabilitation counselors, Mr. Rick Ostrander and Mr. James Carroll evaluated Wagner. Both experts reviewed Wagner's medical records and conducted a personal interview with Wagner. Mr. Ostrander testified by deposition and opined that Wagner was obviously unemployable. Mr. Carroll conducted a labor market study and prepared a report. Mr. Carroll opined that it would be reasonable to expect Wagner to be capable of sedentary/light level duty positions following recuperation from her low back surgery. Mr. Carroll identified several positions in the Rapid City labor market that were available and pay a salary that exceeds Wagner's workers' compensation benefit rate. Mr. Carroll also offered live testimony at the hearing.

Other facts will be determined as necessary

Analysis

Admissibility of Claimant' Exhibit 16

At the hearing, Claimant offered Claimant's Exhibit 16 into evidence several times. Exhibit 16 is a letter written by Cathy Rost, claimant's supervisor when she worked as a research nurse. The letter is signed by Ms. Rost, but no recipient is identified. Ms. Rost was not identified as a witness in the prehearing order nor was she called to testify. Judy Warnke testified that she was not the author or recipient of the letter, but rather that the information in that letter had been forwarded to her. Employer/Insurer objected that that letter lacked foundation and was hearsay. Claimant argued that it was a business record of the hospital. The Department refused to admit Claimant's Exhibit 16. At the hearing, Claimant again asked the Department to reconsider its ruling and requested the opportunity to brief the issue in post hearing briefs. Having reconsidered the parties' arguments, the original ruling of the Department not to admit Claimant's Exhibit 16 into evidence will stand.

Causation & Compensability

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that he sustained an injury "arising out of and in the course of the employment." SDCL §62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520. The phrase "arising out of and in the course of employment" is construed liberally by the South Dakota Supreme Court. *Id.* at, ¶10, 674 NW2d at 521.

SDCL §62-1-1(7) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]" Because an injury is a subjective condition, an expert opinion is required to establish a causal connection between the incident or injury and disability. *Truck Ins. Exchange*, 2001 SD 46, ¶20, 624 NW2d 705, 709; *Day v. John Morrell & Co*., 490 NW2d 720, 724 (SD 1992). The South Dakota Supreme Court has stated,

> 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, 724 NW2d 586 (citations omitted).

> In applying the statute, [The South Dakota Supreme Court] has held a worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [his] employment. [The Supreme Court] further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted). The South Dakota Supreme Court went on to say,

> We have consistently required expert medical testimony in establishing causation for workers' compensation purposes, and we have held that when the medical evidence is not conclusive, the claimant has not met the burden of showing causation by a preponderance of the evidence. Causation must be established to a reasonable medical probability, not just a possibility.

Enger v. FMC, 1997 SD 70, ¶18, 565 NW2d 79 (citations omitted).

Employer/Insurer does not dispute that Claimant suffered a work related injury on April 4, 2002. Employer/Self-Insurer have accepted compensability for the L5-S1 injury based on the opinions of Dr. Anderson, however it denies that the L4-L5 condition, ankle, shoulder, and bladder injuries are related to the work related injury on April 4, 2002.

Causation and Compensability of Claimant's L4-L5 disc injury

The first question addressed by the parties is whether the work related injury sustained on April 4, 2002, remains a major contributing cause of Claimant's continued pain and need for treatment related to her L4-L5 disc injury.

Claimant argues that the low back complaints and symptoms which led Claimant to undergo surgery with Dr. Seljeskog were produced by her work injury of April 4, 2002, including the symptomatic L4-L5 disc space. In support of her burden, Claimant relied on the testimony and opinions of Dr. Anderson, Dr. Seljeskog and Dr. Lawlor.

Claimant contends that Dr. Anderson's opinions were flawed because of Dr. Anderson's reliance on the radiologist's impression on the April 9, 2004, MRI which did not indicate any disc bulging above the L5-S1 level. There was evidence of bulging discs at the L4-L-5 level as well as other levels. And while Dr. Anderson did not reach the conclusion that the L4-L5 condition was related to the work related injury on April 4, 2004, he did conclude that the chronic low back pain resulted from the work injury of April 4, 2002.

Dr. Seljeskog, a neurosurgeon with 39 years of experience and a PhD in anatomy was one of Wagner's treating physicians. Dr. Seljeskog testified by deposition on April 4, 2008. In his July 13, 2004, report Dr. Seljeskog notes that Wagner showed evidence of disc degeneration at several levels, he opined that "any or all of the above could obviously be the source of the patient's complaints." When asked about Wagner's L4-L5 degenerative disc problems, Dr. Seljeskog testified in his deposition,

> A: Well, I don't know that we can say it's long standing. At least to my knowledge of evaluation her medically, they all go back to what she referred to as her accident of 2002. Admittedly, much of this, at least on x-ray and scan standpoint was present prior to that time. But certainly that—I really wouldn't say they were long-standing. They were a couple years old, but this is, I wouldn't say really many, many, many years old. That's what I would mean by longstanding.
>
> …
>
> Q: Can you state with a reasonable medical certainty that the discectomy at L5-S1 was necessitated by an injury at work February 02?[1]
>
> A: I can't say that it was a result. I think her preexisting condition was aggravated by the injury. In other words, we have—we've already talked about a long-standing, by that I mean several years, problem involving her back, and they she had an incident. And we see this all the time. Somebody that we know the problem did not occur at the time of her injury, but rather it was aggravated by the injury.

[1] Dr. Seljeskog incorrectly referred to February 14, 2002, as the Claimant's date of injury during his deposition.

Dr. Seljeskog offered an opinion as to the causation of Wagner's condition during his deposition. When asked if the incident involving moving a 450 pound patient while at work was a major contributing cause of her back symptoms, Dr. Seljeskog testified,

A: Yes.

Q: Why?

A: Because I have no evidence, or at least no knowledge of, significant problems of the low back prior to that date, and her symptoms became evident once the incident had occurred [.]

Dr. Lawlor provided deposition testimony on June 12, 2008. Dr. Lawlor testified that Wagner presented to him with no history of low back pain prior to the April 2002 work related injury. He identified severe stenosis at L4-L5 with impingement of the traversing nerve root and a midline disc herniation at L5-S1, either of which could have been a potential source for her pain. Dr. Lawlor testified,

Q: What's the significance, in your clinical judgment, of an event apparently producing onset of symptoms in the absence of other work injury or injury conditions preceding that event.

A: The significance to me would be that it caused the onset of symptoms.

…

A: It is my opinion that the work is a major contributing cause of her pain, the work injury is a major contributing cause of her pain and need for treatment.

Q: Why?

A: Because prior to that episode she sis not have back pain sufficient to necessitate treatment or to contribute to disability, and since that time she has continued pain and continued need for treatment.

Dr. Lawlor further testified that there is considerable overlap in the symptomatology from the L4-L5 and L5-S1 segments, and clinically he did not see how they could be distinguished. There were radiographic abnormalities at both levels, both of which could be causing her symptoms, but he was unable to make that determination just based on her history and exam. Dr. Lawlor testified that he agreed with Dr. Anderson that there was preexisting pathology, but he emphasized that the important thing was her

symptoms as they related to that pathology and that in this case her symptoms came on as a result of her work injury.

Employer/Insurer relied upon the testimony of Dr. Anderson, who testified live at the hearing. Dr. Anderson was a credible witness. Dr. Anderson testified that the MRI taken on April 9, 2002, just days after the work related injury, showed findings that were obviously chronic and preceded the date of the injury.

Neither Dr. Seljeskog nor Dr. Lawlor was able to state to a reasonable degree of medical certainty the cause of Wagner's pain and need for treatment. While they both testified that either the L4-L5 or the L5-S1 condition could possibly cause her pain, their opinions were based on Wagner's subjective complaints of pain following the work related injury. Dr. Anderson was able to testify that a review of the MRI revealed objective medical evidence that the L5-S1 injury was the result of the work related injury, while the L4-L5 condition was degenerative. The Department finds the testimony and opinions of Dr. Anderson persuasive.

The expert medical testimony presented by Claimant was not conclusive. No physician has been able to conclusively state that the work related injury remains a major contributing cause of her pain and need to treatment. When the medical evidence is not conclusive, the claimant has not met the burden of showing causation by a preponderance of the evidence.

While it is clear that Wagner suffered from a myriad of medical problems and has a significant disability, she has failed to show by a preponderance of the medical evidence that the work related injury on April 4, 2002, remains a major contributing cause for her current disability and need for treatment as it related to the L4-L5 disc problems, as required by SDCL§62-7-1(b) to sustain an award of compensation.

Causation of ankle injury

Wagner contends that Dr. Seljeskog provided an opinion establishing the causation necessary to show that her ankle injury is compensable. Dr. Seljeskog testified during his deposition that "I believe that certainly the fall, when she fractured her ankle, is the result of the operative procedure that she had on the low back. She was only a few days post-op." When asked to elaborate, he testified,

> Q: How can you say that? I mean what is there about this procedure in the low back that might cause her to lose the support of her leg?
>
> A: Well, if she has pain, and it's not unusual, and she was very anxious to get home or get out of the hospital, needed help, this sort of thing. This is a major operation that she had which we did not undertake lightly, and its

not surprising that she had some difficulty in ambulating and, perhaps, some degree of weakness in the legs which caused her to fall.

When further questioned about the causation of Wagner's ankle injury, Dr. Seljeskog testified,

Q: Now her description of that is stated under oath in her deposition, she says that her leg suddenly became paralyzed and she fell. Now, is there anything about the surgery you performed in the fall of '07 that would have led to or caused her leg to become paralyzed resulting in that fall at home as she is describing?

A: Well, I think the term "paralyzed" is probably a misstatement, because we have no evidence that it was paralyzed. I suspect that she probably had some pain and it got a bit weak and she collapsed and fell. I think that's the more likely scenario.

When Claimant reported to Dr. Schleusener immediately following her ankle injury, a history and physical was taken. The medical records reflect that Wagner reported she tripped over the walker resulting in her fall. Dr. Eckrich, the doctor that ultimately treated the ankle injury and performed ankle surgery was unprepared to express and opinion as to the causation for the ankle injury.

Dr. Lawlor testified in his deposition that he did not know the specifics of Wagner's fall. He testified, "I know that people that have back pain and leg numbness are more prone to falls, but I don't know the specific history of her fall."

Dr. Anderson testified to a reasonable degree of medical probability that he did not believe the fall and subsequent ankle injury was related to the work related injury of April 4, 2002. Dr. Anderson pointed out several instances documented in her medical records, in which Wagner had suffered from previous falls and previous episodes of dizziness following her craniotomies.

Based upon the evidence presented, Claimant has failed to show by a preponderance of the medical evidence that the work related injury on April 4, 2002, remains a major contributing cause of her ankle injury and need for treatment as required by SDCL §62-7-1(b) to sustain an award of compensation.

Shoulder (withdrawn)
Claimant has withdrawn any claim for the shoulder injury.

Bladder injuries
Wagner contends that her incontinence issues are related to the work related injury and the resulting back surgery.

Dr. Seljeskog testified during his deposition,

> Q: And is there anything about the area of her painful symptoms in her low back, anything about your surgery that was done or a complication of the procedure that would cause you to believe this is a causal relationship between her incontinence and whether the injury she had in February[2] or the procedures that were undertaken to correct and relive her symptoms?
>
> A: I can't really answer that. I'm not certain that there's any relationship at all. Certainly people who have pain, a lot of medications, have some problems with incontinences. But beyond this, I don't believe that she's got any major nerve damage, so to speak, to cause that.

On January 26, 2009, Dr. Keith G. Bryson, an urologist, evaluated Wagner at the request of Employer/Insurer. He stated that the history provided by Wagner was consistent with back surgery resulting in decreased bladder sensation. However he could not make a conclusive statement about the degree of neurogenic bladder. He went on to state that "an urologist could not determine the cause of a neurogenic deficit, only the effect," therefore he was not able to make any conclusions as to the cause of Wagner's bladder issues.

Dr. James Meyer, another urologist stated that he was unable to causally relate Wagner's urinary incontinence to her back surgeries. Dr. Meyer opined,

> As stated above, I do not believe the back surgeries are a major contributing cause of Ms. Wagner's urinary incontinence. Her urinary difficulties began in 2003 and preceded these operations. In addition, I have already mentioned the obvious reasons for Ms. Wagner's urinary problems which include her morbid obesity, tobacco abuse, and her in general poor health, which are all unrelated to her injury and/or the back surgeries. My diagnosis for her stress incontinence is all based on pelvic relaxation secondary to her obesity and chronic tobacco abuse. In my opinion there is no evidence of neurogenic bladder dysfunction and the urodynamic studies would confirm that.

Based upon the evidence presented, Claimant has failed to show by a preponderance of the medical evidence that the work related injury on April 4, 2020, remains a major contributing cause of her bladder issues and urinary incontinence and need for treatment as required by SDCL §62-7-1(b) to sustain an award of compensation.

Causation is a threshold issue and must be met before benefits are awarded.

[2] Dr. Seljeskog incorrectly referred to February 14, 2002, as the Claimant's date of injury throughout his deposition.

Medical Expenses
The last question briefed by the parties is whether Claimant is entitled to reasonable and necessary medical expenses pursuant to SDCL 62-4-1.

Pursuant to SDCL §62-4-1, the employer must provide reasonable and necessary medical expenses. It is well established by the South Dakota Supreme Court that the Employer has the burden to demonstrate that the treatment rendered by the treating physician was not necessary or suitable and proper.

> Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. 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.

Hanson v. Penrod Construction Co., 425 NW2d 396,399 (SD 1988).

Claimant is entitled to reasonable and necessary medical treatment related to the L5-S1 back issues. Additionally Dr. Anderson, the Employer/Insurer's expert testified that the April 4, 2002 injury was a major contributing cause of Wagner's pain and use of pain medication a TENS unit and NMES. The medical expenses related to treatment of her pain including medication, TENS unit and NMES are all reasonable and necessary medical expenses.

Dr. Seljeskog, Wagner's treating physician indicated that it was necessary and proper for Wagner to submit to an examination by a urologist to determine whether the bladder and incontinence issues were causally related to the April 4, 2002, work related injury. The investigation of Wagner's incontinence issues was a reasonable medical expense, however it was subsequently determined that Wagner failed to meet her burden to show that the Bladder issues were causally related, therefore no further treatments of the incontinence issues constitute reasonable and necessary medical expenses under workers' compensation.

Conclusion
Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within thirty (30) days from the date of receipt of this Decision. Claimant shall have fifteen (15) days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit 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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 18th day of November, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M. Dockter
Administrative Law Judge