SOUTH DAKOTA DEPARTMENT OF LABOR

DIVISION OF LABOR AND MANAGEMENT

DENISE S. RAVE, **HF 78, 2004/05**
Claimant,

v.

DECISION

NASH FINCH,
Employer, and

TRAVELERS,
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. Michael J. Simpson, of Julius & Simpson, L.L.P. represents Claimant, Denise Rave [Rave]. Sandra Hoglund Hanson, of Davenport, Evans, Hurwitz & Smith, L.L.P., represents Employer/Insurer.

Issues

1. Whether Rave's August 1996 work injury is a major contributing cause of her current condition and need for treatment.
2. Whether Rave is entitled to temporary total disability benefits beginning on or about August 17, 2004.

Facts

Rave was working as a checker/stocker at the Prairie Market grocery store in Rapid City when she suffered an injury to her low back on August 9, 1996. She was reaching and twisting at work when she felt immediate intense low back pain. Over the next two weeks, she developed left buttock pain, which progressed into radicular left leg pain. She underwent chiropractic treatment and physical therapy, but did not respond to conservative treatment. She underwent an L5-S1 microdiskectomy on September 28, 1996, performed by Dr. Edward L. Seljeskog.

Although Rave continued to have some low back pain after this surgery, she improved and returned to work on a part-time, light duty basis by the end of November 1996. As Dr. Seljeskog noted, she was working seven hours per day and had significantly improved by January 21, 1997.

Rave continued to have aching back pain and intermittent leg pain. Dr. Seljeskog administered epidural steroid injections on March 31, 1997, and on April 11, 1997.

Dr. Brett Lawlor evaluated Rave for an impairment rating and assigned a ten percent whole person impairment rating on May 1, 1997.

Rave experienced severe radicular left leg pain and had a recurrence of excruciating low back pain in early June 1997. An MRI read by Dr. Seljeskog on June 12, 1997, showed a recurrent

disk herniation at the level of Rave's previous surgery, L5-S1. Dr. Seljeskog performed Rave's second low back microdiskectomy at L5-S1 in June 1997.

Rave was improved after surgery and had a complete resolution of her leg pain. She began work hardening in August 1997, and physical therapy in September 1997. Following a short period of continued improvement after surgery, Rave began experiencing severe left leg pain again in September 1997. Dr. Seljeskog's September 16, 1997, note refers to a repeat MRI, which revealed a "very sizeable recurrent disk at L5-S1 on the left."

Dr. Seljeskog performed Rave's third microdiskectomy at the L5-S1 level on October 3, 1997. Dr. Seljeskog, according to his surgery report, "incised what was left of the ligament and extracted a very sizeable disk recurrence along with a bit of cartilaginous end plate."

Again Rave improved after surgery. She was released to return to work half-time in January 1998, progressing to full time by the end of that month.

Dr. Lawlor saw Rave on May 1, 1997, September 11, 1997, September 22, 1997, and on March 5, 1998, when he evaluated her for an impairment rating. Dr. Lawlor added two percent for her second surgery and an additional one percent for her third surgery, for a total of thirteen percent whole body impairment.

On September 18, 1998, Rave was complaining of recurrent severe left leg pain. Dr. Lawlor provided work limitations and prescribed medication for pain relief.

Dr. Lawlor noted on October 14, 1998, that another MRI revealed no recurrent disk herniation but did indicate a "scar surrounding the S1 nerve root." On October 20, Dr. Lawlor performed a left S1 selective nerve root block. Rave reported significant relief. The selective nerve root block was repeated on November 12, 1998. On November 19, Dr. Lawlor noted Rave's pain had been reduced to the point that it was tolerable.

Rave saw Dr. Lawlor on September 20, 1999, complaining of worsening back and left leg pain. Dr. Lawlor took Rave off work pending the results of another MRI. On September 24, 1998, Dr. Lawlor noted the MRI again revealed no recurrent disk herniation, but did again show scar tissue surrounding the S1 nerve root. Lawlor placed Rave under increased work restrictions because she was having difficulty with her work activities. He again recommended selective nerve root block at the S1 level to attempt to reduce her pain. Dr. Lawlor performed an epidural steroid injection on September 28, 1998.

Rave continued to have episodes of low back and leg pain. She returned to Dr. Lawlor on September 11, 2000, when her left leg pain got worse. Dr. Lawlor continued Rave on her then current medications and started her on Oxycontin. The Oxycontin was helpful in reducing her pain.

On January 10, 2001, Rave again returned to Dr. Lawlor, who noted that she had experienced a gradual worsening of her pain over the previous week or so. Rave could not identify any specific cause for the increase in her pain. Dr. Lawlor noted on January 26 and February 6, 2001, that

Rave was significantly improved. She had been doing her exercises, working in physical therapy, and continuing on her pain medications. Dr. Lawlor gradually returned Rave to full-time work.

On March 6, 2001, Dr. Lawlor noted that Rave had been involved in a motor vehicle accident since her last appointment, but that she had not suffered any injury to her back in this accident. Rave had returned to her baseline level of function. She was back to work and tolerating her regular work duties.

By August 27, 2001, Rave was again experiencing worsening back and leg pain. She was not able to handle her work activities. Again she did not have any specific event or episode that had caused her increased pain. Her increased pain had come on gradually.

An August 30, 2001, MRI showed a new herniated disk at L4-5 to the left, compressing the transversing left L5 nerve root. There were post surgical changes at L5-S1 with no recurrent disk fragments.

Rave saw Dr. Seljeskog on September 5, 2001, for a surgical consultation. Dr. Seljeskog recommended a microdiskectomy at L4-L5.

Dr. Seljeskog performed a microdiskectomy at L4-L5 on September 17, 2001. He noted complete resolution of Rave's leg on September 19, October 16 and November 11. He planned to return her to work as of December 8, 2001. Rave did return to work at Prairie Market.

Dr. Lawlor saw Rave on December 10, 2002, for another impairment rating. He noted back pain, leg pain, numbness, a perception of weakness, decreased sensation in the L4-L5 dermatome on the left, and limited lumbar spine range of motion in all directions due to pain. Dr. Lawlor added another 2 percent, for a total of 15 percent whole body impairment.

Rave returned to Dr. Seljeskog on September 11, 2003, complaining of increased low back and leg pain over the previous six weeks. A new MRI showed post-operative changes at both the L4-L5 and L5-S1 levels, but no recurrent disk herniation at either level.

On October 7, 2003, Rave saw Dr. Lawlor complaining of increased back and leg pain that had started in September. Again, Rave denied any specific injury or event which led to her increased pain. Dr. Lawlor recommended an epidural steroid injection and physical therapy. The epidural injection was performed by Dr. Lawlor on October 8. Rave was somewhat better after the injection, but continued to have significant pain and limitations. Dr. Lawlor released her to half-time work with restrictions. He recommended a second epidural injection and continued physical therapy. He administered the second epidural on October 22.

On November 4, 2003, Rave was working 4 hour days and having trouble tolerating her work activities, particularly squatting and bending. Dr. Lawlor further limited her activities, prohibited her from bending at the waist, squatting or crawling, limited her lifting to no more than 10 pounds, and recommended more breaks and position changes.

Rave had worsened by December 2, 2003. She was working four hour days and not tolerating it well. Dr. Lawlor noted on December 2, 2003: "At this point, she wants to do anything to avoid surgery. I told her, at this point, I do not think it is reasonable for her to go back to her job at the grocery store." Rave did not return to Prairie Market after that date.

On March 12, 2004, after an FCE, Dr. Lawlor was provided a form to fill out regarding Rave's work capabilities. It was Dr. Lawlor's opinion on that date that Rave "could not work as a checker."

Dr. Lawlor released Rave to full-time work, with restrictions, including a ten pound lift restriction, on April 20, 2004. She eventually obtained employment, starting a job at Microtel Motel as a front desk clerk on June 1, 2004. She was to work five eight hour days weekly. Her shifts were split: 7 a.m. to 11 a.m. and 5 p.m. to 9 p.m. She went home to rest her back between shifts.

Rave returned to Dr. Lawlor on July 28, 2004, with complaints of increased low back and left leg pain. She reported that approximately two weeks before "she stretched, heard and felt a pop, and had instant pain in her low back." Dr. Lawlor diagnosed a "probable new disk herniation" and recommended yet another lumbar spine MRI.

A July 28, 2004, MRI did, in fact, show a recurrent disk herniation at L4-5 and a recurrent disk fragment. On July 29, 2004, Dr. Lawlor performed yet another epidural injection and released Rave to work with continued restrictions, including the ten pound lift limitation and the need for frequent position changes. Rave experienced improvement for a time after the injection, and continued at work; but within two weeks, as noted by Dr. Lawlor on August 17, she was experiencing "god awful throbbing."

Dr. Seljeskog saw Rave on August 6, 2004. His impression was lumbar degenerative disk disease including a collapsed L5-S1 disk and a sizeable central disk herniation at L4-5. Dr. Seljeskog wrote to Dr. Lawlor on that date: "[I]n view of the recurring symptoms both at L4-5 and L5-S1, I think the patient should strongly be considered for diskectomy with decompression, interbody fusion, and stabilization."

Surgery was scheduled, then cancelled when Insurer requested an independent medical examination [IME]. Rave saw Dr. Stephen Eckrich, an orthopedic surgeon, on September 20, 2004, for her IME.

Based on Dr. Eckrich's report, Insurer refused to pay for Dr. Lawlor's July 28, August 17, August 23, and September 2, 2004 medical treatment, totaling $1,032. Rave has limited her medical treatment since this time because Insurer is refusing to pay for treatment.

Analysis and Decision

Issue 1: Whether Rave's August 1996 work injury is a major contributing cause of her current condition and need for treatment.

Rave must prove by a preponderance of the evidence that her August 9, 1996, work-related injury is a major contributing cause of her current condition and need for treatment. SDCL 62-1-1(7)(a).

"Where there is no obvious causal relationship the testimony of a medical expert may be necessary to establish the causal connection." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶ 19, 571 NW2d 376 (citations omitted).

To determine if Rave established by a preponderance of medical evidence that her original work injury remains a major contributing cause of her condition and need for treatment, it is necessary to examine the medical evidence and testimony.

Rave's two treating physicians, Dr. Lawlor and Dr. Seljeskog, have each expressed the opinion that her original work injury remains a major contributing cause of her current condition and need for treatment, including the two level fusion at L5-S1 and L4-5.

Dr. Lawlor wrote a responsive letter to Rave's attorney on April 5, 2005. This letter included the following response to the following question:

> *Is the work injury of August 19, 1996, the* [sic] *major contributing cause of Ms. Rave's current condition, including her need for two level fusion surgery at L4-5 and L5-S1?* Yes. Ms. Rave has suffered numerous injuries to her lumbar spine, including injury to the L5-S1 disc which has required multiple microdiscectomies. These surgeries have all contributed to the destabilization of her spine and increased risk of injury at other levels. It is my opinion, with a reasonable degree of medical certainty, that her L5-S1 disc injury and multiple surgeries is a major contributing cause of her L4-5 disc injury and need for surgery at this level.

Dr. Seljeskog stated his opinions in his May 19, 2005, letter to counsel. He agrees that the original August 1996 work injury is a major contributing cause of Rave's condition and need for treatment at both the L4-5 and L5-S1 levels of Rave's low back, and opines that it is medically necessary to fuse both levels:

> In my opinion, the patient's August 1996, injury is a major and continues to be a major contributing cause of Ms. Rave's current condition and past several operative procedures. Very clearly the L5-S1 abnormality was the original problem, with several recurrent disc herniations. The L4-5 level subsequently developed problems and in my view this was related to the original injury although the findings were not that apparent back in 1996.

> In view of the patient's ongoing disability in regard to both the above levels, I have also recommended at this point a more aggressive approach with a complete diskectomy with fusion and stabilization at L5-S1. In view of the problem also noted at L4-5 it would be inadvisable not to include this level also in the fusion.
>
> As you know, the patient has had numerous injuries to her back. I think it is quite apparent that the spine was originally destabilized at the L5-S1 level, which certainly then contributed to the developing problems at L4-5.

Dr. Eckrich agrees that Rave's original work injury is a major contributing cause of her continuing problems at L5-S1 and that any fusion surgery must involve both the L4-5 and L5-S1 levels.

Dr. Eckrich wrote a November 1, 2004, letter to Melissa J. Nash, RN, medical case manager for St. Paul Travelers. First, he opined that surgical intervention is a reasonable alternative, and:

> As stated in my original dictation, symptoms which she is describing and the recommendation for treatment is in my opinion related to the original injury in 1996 and is the major causative factor for the need for a fusion at L5-S1. The need for a fusion at L4-5 appears to be due to a non-on-the-job injury incident that subsequently occurred. However, one cannot treat these as two separate problems and in the event that she chooses to have a fusion then an L4-5 and L5-S1 fusion would be indicated.

Dr. Eckrich met with another Corvel rehab nurse, Dena Valentine, and on January 5, 2005, and wrote:

> She had three previous decompressive procedures done at L5-S1. This is the level for which she is being treated for her workman's comp injury. The general standard is that after two decompressive procedures, and certainly by three, the fusion operation is generally done in conjunction with the decompression. This was not done in her case, she subsequently developed an injury at L4-5 for which a fusion is now being contemplated. Given the fact that she had three previous decompressive procedures at L5-S1 and in many instances a fusion would have been recommended primarily for that problem, one cannot do a fusion at 4-5 and not fuse 5-1. I think the L4-5 instance was essentially the straw that broke the camel's back.

Dr. Eckrich testified for Employer/Insurer through his March 7, 2005, deposition. Dr. Eckrich testified that he could not opine which level, L4-5, or L5-S1 was causing Rave's current symptoms. He agrees that both levels contribute to Rave's current symptoms and need for treatment. He agrees that the contribution of each level to Rave's condition is at or about 50 percent. He agrees that the 1996 work injury remains a major contributing cause of Rave's condition and need for treatment at L5-S1. He testified that the injury at L4-5 appeared to be unrelated to Rave's work duties.

Where the opinion of Dr. Eckrich departs from the treating doctor is on the ultimate question:

Q. [C]ould you say to a reasonable degree of medical certainty that the work injury remains a major contributing cause for a two-level fusion at this time?

A. I can't answer that question yes or no. But this is the way that I approach this, particularly when I was asked the most recent time in January of this year, and that is that if surgical intervention is to be contemplated, which it is, and the surgery is going to be a fusion surgery, which, in my opinion, if one is going to do surgery, that would be an appropriate operation, that you cannot just fuse one of those levels regardless of whether one is causing pain or not. Because if you just fuse one level, the other level will cause pain. If you just fused L5-S1, because of the degeneration and because of what happened at the previous surgeries at L4-L5, that level is certain to cause pain. You can't just fuse L4-5 because of the previous surgery and the condition of the disk at L4-5 and S1. One cannot do a fusion and stop at one level. So if the original pathology at L5-S1 was due to an on-the-job injury, the reason you're fusing that is because of the pathology at that level.

At L4-5, the same is true. If one were to say, well, we're fusing your back at L5-S1 because now we feel that's where your pain is coming from, you still cannot stop and not fuse L4-5 because of the condition of the disk and the condition of that level at L4-5. And she has reasonably good levels, based on at least my interpretation of the MRI, at L3-4 of the proximal levels. So I think that if one were to do a fusion, that is a reasonable alternative given her history, but you can't just stop at one level. And the whole issue is which - - is the fusion surgery for a work-related injury or not? And based upon my interpretation of where the fault has been given for each of these, the L5-S1 was a work - - has been a work-related injury, L4-5 apparently has not been, and so they're equally important and I don't think that you can say we're doing - - I don't think that you can say that one or the other is the major contributing cause. And the best I can say is that it's 50/50.

Dr. Eckrich, later in the deposition, acknowledged that Rave had undergone three prior surgeries at the L5-S1 level, and testified "to be honest with you, I think many people, if not most, would have done a fusion at that level sooner. And, the follow-up question:

Q. All right. And so there's no question here that the work injury is a direct cause for the need for a low back fusion at L5-S1, true?

A. That's a true statement.

Q. And the only surgery we can do for this particular woman given her anatomy that she has is a two-level fusion, true?

A. That's correct.

Q. And to do a one-level fusion would be medically - - it wouldn't be done because that would cause harm to the patient, it that - -

A. It would not make her better. Or I think you're correct. One would not do a single level fusion.

Q. Okay. It's just not an option medically?

A. Yes. That's correct.

Employer/Insurer argue: "Because the fusion would be 50% related to this non-work-related incident and 50% related to the previous L5-S1 surgeries, Claimant fails to show, by a preponderance of the evidence, that work is a major contributing cause of her current condition and need for treatment."

Employer/Insurer's argument is misplaced. Rave does not need to prove that her work-injury remains the sole cause or even the greater cause for her need for treatment.

Rave has proven by a preponderance of the evidence that her work-related injury remains a major contributing cause of her condition and need for treatment.

Issue 2: Whether Rave is entitled to temporary total disability benefits beginning on or about August 17, 2004.

Rave was scheduled for two-level back fusion surgery in September 2004 because she was suffering from severe back and low left leg pain. She did not get Insurer's approval for this surgery and it was cancelled. Employer/Insurer argue that because Rave voluntarily quit her last job and because no doctor has since taken her off work, she is not entitled to temporary total disability benefits.

Dr. Lawlor limited Rave to lifting no more than 10 pounds occasionally, indicated that she needs frequent position changes during the day. He expressed his opinion that Rave has been unable to work, even part-time, since August 17, 2004. Dr. Seljeskog agreed with Dr. Lawlor. Rave testified at the hearing that her condition has worsened since August 2004. She remains on strong pain medication. She described her activities of daily living as being extremely limited due to pain. Rave was a credible witness.

Dr. Eckrich did not address work limitations and did not question Rave's complaints of pain.

The opinions of Dr. Lawlor and Dr. Seljeskog are uncontroverted and will not be disregarded. *Foltz v. Warner Transp*., 516 NW2d 338 (SD 1994).

Rave has established, by a preponderance of the evidence, her entitlement to temporary disability benefits from and after August 17, 2004.

Counsel for Rave shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Employer/Insurer shall have an additional 10 days from the date of receipt of Rave's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a

waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Rave shall submit such stipulation together with an Order consistent with this Decision.

Dated: November 16, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge