

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

KATHLEEN ROHDE,
Claimant,

HF No. 101, 2004/05

v.

DECISION

GATEWAY,
Employer,

and

CHUBB INSURANCE COMPANY,
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 Elk Point, South Dakota. Claimant, Kathleen Rohde appeared personally and through her attorneys of record, William Horneber and Alice Horneber. Timothy Clausen represented Employer, Gateway and Insurer Chubb Insurance Company.

Issues

1. Causation and Compensability
2. Nature and Extent of Claimant's Disability
3. Reasonable and Necessary Future Medical Expenses

Facts

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

Claimant, Kathleen Rohde (Rohde), was born on September 6, 1957. At the time of the hearing she was 52 years old. Rohde has lived in Sioux City, Iowa for all her life. Rohde received her GED and has a past employment history working as a home health aide and jailer in Woodbury County.

In 1991, Rohde was involved in a motor vehicle accident. Rohde treated with Dr. Barrie Purves for the injuries to her low back as a result of that motor vehicle accident. Dr. Purves performed a lumbar discectomy and decompression in 1994. Ms. Rohde recovered from those injuries and she later obtained employment with Gateway in North

Sioux City, SD, as a security guard with no restrictions on her activities. As a security guard, Rohde's job duties included walking the property hourly, checking the out buildings, checking the doors, unlocking and locking, and handling any emergencies that would occur. The security guards also picked up the checks at the bank and handled the security tapes. Rohde's job included lifting up to 100 pounds.

On August 27, 1996, Ms. Rohde was performing her duties as a security guard at Gateway. Rohde testified that as part of her job duties she was required to turn on a radio in the out building where she was working. The radio was on a tall shelf, and Rohde had to climb on a chair to reach it. The chair was on wheels, and while standing on the chair, it went out from underneath Rohde and she fell forward and went down the wall, scraped her hand and sustained injuries to her arms, legs, feet, ankles, neck, shoulders, back, and body as a whole.

Rohde reported her injury to her employer and saw the nurse after she finished her shift. Rohde then sought treatment from Dr. James Bjork, a chiropractor in Sioux City, IA. Dr. Bjork treated Rohde's symptoms with chiropractic adjustments to her neck, right wrist and right elbow, thoracic spine and right hip. Dr. Bjork was not able to treat Rohde's lower back injuries with chiropractic manipulations due to her previous low back surgeries.

In November, 1996, Rohde had reached a stable stage of healing. As a result, Dr. Bjork released her from his care although Rohde was still experiencing low back problems. Rohde advised Gateway of her low back injuries at the time of her fall and requested approval to see another physician. In April, 1997, Gateway approved Rohde to see Dr. Purves.

On April 22, 1997, Rhode saw Dr. Purves complaining of low back pain and pain going down her legs from her back, with the right side being worse than the left. Dr. Purves noted "I think it unlikely that Ms. Rhode does have any recurrence of disk protrusion but given her past history and chronic nature of her symptoms I think we need to do an MRI scan to reassess her lumbar spine." Dr. Purves ordered an MRI which revealed no evidence of recurrent disk and minimal scarring at the site of her previous surgery, Dr. Purves recommended an active exercise program because he believed her symptoms were primarily muscular. Rhode returned for a follow up in July 1997, complaining of pain in the mid lumbar region, but no pain into her legs. Dr. Purves recommended an epidural flood. Dr. Purves' records indicate other than that, her symptoms were "something she would have to learn to live with."

In November, 1997, Rohde's back and leg pain returned and she sought treatment at the Marian Health Center emergency room in Sioux City, Iowa. She was seen by Dr. Quentin Durward who diagnosed right L4-5 herniated extruded disc with long-standing low back pain syndrome. Dr. Durward performed surgery including a complete L4

laminectomy and bilateral L4-5 facetectomies, repeat right L4-5 discectomy and bilateral BAK instrumented cage fusion.

Rhode continued to complain of low back pain following her surgery. Dr. Durward ordered a repeat MRI on April 6, 1998. The MRI revealed slight bulging and degeneration of the L3-4 disk above the level of her fusion. Dr. Durward noted that the disk bulging was unchanged from the previous scan and stated that some of her pain could be from the bulging or could be facet pain. Dr. Durward recommended facet blocks. Rhode continued to present with what Dr. Durward called an "inordinate degree of pain with minimal structural findings," and recommend that she seek a second opinion.

Rhode saw Dr. J.R. Cass on July 6, 1998 for a second opinion. Dr. Cass noted in the medical records,

It is my impression that this woman has had two back surgeries, one with success and one without success...I think she falls into the failed back category obviously, but I told [her] after that it becomes difficult to ascertain what would be the best route of treatment. I think anything that would be attempted would be of uncertain success and her estimated success rate at best 50-60%.

In September 1998, Rhode underwent additional surgeries to the L3-4 and L4-5 levels of her spine. Despite the surgery showing no signs of failure, Dr. Durward noted that Rhode complained of an inordinate amount of pain following surgery, which he attributed to fibromyalgia or possible trochanteric bursitis. Dr. Durward recommended physical therapy and medications. Throughout his records, Dr. Durward correlated Rhode's musculoskeletal soft tissue injuries and her pain as secondary to her fall.

On April 23, 1999, Dr. Durward stated in the medical records that Rhode had reached maximum medical improvement (MMI) and gave an impairment rating of 18% to the whole body. At that time, Rhode continued to work at Gateway with some restrictions. Rhode voluntarily ended her employment at Gateway in August 1999.

Employer/Insurer paid medical bills through the second surgery and some bills after that. Employer/Insurer paid temporary total benefits through 1999 and also paid permanent partial disability benefits in accordance with the impairment rating provided by Dr. Durward.

Over the next several years, Rhode continued to present to Dr. Durward with complaints of back pain, despite repeated testing which revealed no problems with her previous grafts or surgeries, and no additional herniation. Dr. Durward recommended removal of the screw heads and hardware and extension of the fusion at L2-3 level. By May 2, 2007, Dr. Durward noted that Rhode's preoperative pain syndrome had resolved and she was well healed from the last surgery, however the medical records indicate the

pain had returned later in the year. In 2008, Rhode had another surgery to remove screws and instrumentation at L2-3. In February 2009, Dr. Durward recommended a re-fusion at L2-3, however Rhode's complaints of pain remain unchanged. At the request of Employer/Insurer, Dr. John Sabow conducted a review of Rhode's medical records and prepared a report. Dr. Sabow never conducted a physical examination of Rhode. Dr. Sabow opined to a reasonable degree of medical probability,

The alleged falling incident at Gateway on 8/27/96 was NOT a major contributing cause of Ms. Rhode's current back condition and was NOT a major contributing cause of her need for her multiple surgeries or medical care.

...

The fall at Gateway on 8/27/96 was, at best, a temporary aggravation of her back pain and was certainly not a major contributing cause to any permanent injury, condition or disability. I reiterate that Ms. Rhode's back condition and her resulting medical care are as a result of her chronic degeneration of long standing nature in the presence of a transitional vertebra and not an isolated fall that occurred on 8/27/96.

Other facts will be determined as necessary.

Analysis

Causation and 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 she 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.

This causation requirement does not mean that the employee must prove that [her] employment was the proximate, direct, or sole cause of [her] injury; rather the employee must show that [her] employment was a contributing factor to [her] injury.

If the injured claimant suffers from a preexisting disease or condition unrelated to the injury, and the injury combines with the preexisting condition to cause or prolong disability, impairment, or need for treatment, the injury is compensable only if the claimant can prove that his employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.

Orth v. Stoebner & Permann Construction, Inc., 2006 S.D. 99, ¶ 32-33, 724 N.W.2d 586 (citations omitted); SDCL 62-1-1(7)(b).

In applying the statute, we have 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 [her] employment. We have 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).

[T]he 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.

Westergren v. Baptist Hospital of Winner, 1996 S.D. 69, ¶31, 549 N.W.2d 390, 398 (quoting *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (SD 1992)).

The claimant must prove the essential facts by a preponderance of the evidence. *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 358 (SD 1992). In support of her burden, Rhode relied on the testimony of Dr. Quentin Durward, her primary treating physician and surgeon. Dr. Durward presented testimony via deposition. Dr. Durward testified that Rhode presented with "progressive and persistent pain since that injury and at various times had been found to have various pathologic changes in her spine subsequently to that injury, not all showing up immediately."

When asked to a reasonable degree of medical certainty if the disc herniation was a result of the fall on August 27, 1996, Dr. Durward testified, "it's unlikely to be the sole cause of the disc herniation, but I certainly think it was a factor in the injury to the disc level I believe." He went on to say, "based on the history that she has given me, that the root cause of the ongoing and worsening pain syndrome she has originated with the fall, I have to accept that within a reasonable degree of medical certainty that was a major factor in that disc causing her to come to a second surgery for herniation."

Employer/Insurer points out that as of April 23, 1999, Dr. Durward believed Rhode had reached maximum medical improvement (MMI) from both the August 1996 fall and the subsequent surgeries. Rhode was released to work at Gateway as a security officer, and at that time, he saw no reason for her not to be able to do that job. By the time Rhode returned in 2003 complaining of low back pain, it was some 4 years after he had released her to work. Dr. Durward was asked during his deposition,

Q: Are you able to say with a reasonable degree of medical certainty that the fall in August of 1996 was a major contributing factor for the symptoms that you saw her for in – or that your clinic saw her for in June 2003?

A: Only by her history that she had never got rid of completely the pain that she had had from the original fall injury. It had been a continuum, although worsened prior to me seeing her in June 2003.

Employer/Insurer argues that Rhode had an MRI in April 1997 which showed no evidence of recurrent disc, and minimal scarring at the site of her previous surgery. It was not until November 1997, some 13 months after the fall at Gateway, that Rhode developed a large disc extrusion at L4-5 causing severe right paracentral canal stenosis and effacement of the thecal sac and transversing right L-5 nerve root.

Employer/Insurer also argues that the testimony of Dr. Durward is conflicting as he has difficulty with what constitutes a major contributing cause. Dr. Durward was asked if he could say to a reasonable degree of medical certainty that the fall on August 27, 1996 was a major contributing cause of the L3-4 disc protrusion that appeared on November 6, 1997. Dr. Durward responded that he could not say that within a reasonable degree of medical certainty. He did testify that having had a fusion done at L4-5, there's a risk for increased deterioration at the L3-4 level, and it may have been a factor in the L3-4 level becoming more symptomatic and eventually requiring surgical procedure. He further testified,

Q: We know the discectomy performed in 1994 put her at risk for becoming more symptomatic and a resulting disc herniation at L4-5. The fusion at L4-5 put her at risk to becoming more symptomatic at L3-4. Why is it that this fall that occurs in August of 1996 is a major contributing factor but not this earlier fusion and motor vehicle accident back in 1994?

A: I think – I think those are also factors. I - - when you say major, it doesn't mean to say its exclusively major. I would say rather leave the term major out. I think it was a factor in development of - - - the changes at L3-4.

...

Well, you know, I'll say this, that you know, it is a bit of a stretch to say that the fall that she had at Gateway in 1996 led to the disc herniation changes at L3-4 requiring surgery.

Q: You've indicated it was a stretch to relate L3-4 to the August 1996 fall, are we talking about an even greater stretch going to L2-3 and any problems she had at that level relating that to a fall back in August of 1996?

A: Well, again, the unfortunate thing is that people who do have fusions are probably at increased risk for having degenerative changes occurring at other

levels in their spine. And the fact is that she's now had a two level fusion at 3-4 and 4-5. And it is – the level at L2-3 does show now some early degenerative changes. So in that way you could - - you could relate them.

Dr. Durward testified that the motor vehicle accident in 1991, the multiple surgeries that Rhode had over the years, as well as age and degeneration in her back were all factors that have led to her current disability.

A: It's very hard for me to say it's a major cause, but I do think it's a factor that she's had previously had the fusions at the lower levels which has likely added to stresses at the L2-3 level leading to their degeneration and eventually further surgery at that level.

Q: If we use that logic, if we go clear back to a motor vehicle accident in 1994, that started weakening the back; right?

A: That—that is also a factor, yes, you are correct about that.

Q: And presumably age and just degeneration in her back which she seems to be predisposed to could also be a factor?

A: Yes.

Q: And again the further we get away from a fall in 1996, especially in light of the normal MRI findings in April of 1997, it's less likely that these back problems would be causally related to that fall, isn't it?

A: Yes, that is probably true.

The case at hand is analogous to that of *Horn*, 2006 S.D. 5, 709 N.W.2d 38. In that case, the Claimant relied on the testimony of treating physician Dr. Benson. Claimant suffered from a degenerative condition as well as injuries sustained in a work related incident. When questioned about causation of Claimant's current condition, Dr. Benson testified,

Q: And just so that I keep that straight, this man worked at one place from 1990 to 1997, seven years, and I can represent to you that he worked, this was at Dakota Pork where he did a significant amount of twisting, bending and stooping, although the lifting that he did wasn't all that heavy but it was continuous. Then after that he worked for a three-year period from about 1997 or 1998, about a two year period, from 1997 to '98 where he was doing a welding job that I don't believe there was a lot of heavy lifting there either but there was a lot of lifting, bending and stooping. Are you going to be able to tell us which one of those two positions, the first seven years at Dakota Pork or the last two years at Riverside Manufacturing, which one of those two working positions or the work activities, would you be able to tell us which one of those places the work activities were a

major contributing cause of the progression of the degenerative disc disease, Doctor?

...

A: I cannot be specific on that issue.

Q: Would it be your opinion that both of those previous employments then contributed on an equal basis to the progression of the disease, Doctor?

...

A: I believe all of these repetitive jobs are contributory, but I would place that over a lifetime rather than just over a ten-year period.

Q: ... the part that I'm struggling with, Doctor, is this gentleman was able to work and then at some point got into a situation where he was no longer able to continue to work, and I guess the question we have for you is whether the cumulative work activities over the last ten years, were those activities, it doesn't have to be 'the' major contributing factor but simply "a" major contributing factor in his resultant disability and the reason he's not working today?

A: Oh, I believe it is a contributing factor.

Q: And I know this gets a little difficult and I know it's not an exact science, but is it fair for me to state that you're not able to quantify from a percentage standpoint if we were trying to apportion it how much of this problem is related to his first seven years at Dakota Pork and the following two, two and a half years at Riverside Manufacturing? Are you able to apportion that for us, Doctor?

A: I don't believe so.

Id. ¶17. The South Dakota Supreme Court found Dr. Benson's opinion insufficient to establish causation because he was unable to state that Horn's degenerative disc or his employment was a major contributing cause of his current disability." *Id.* ¶18.

Similar to the facts in *Horn*, in the present case Dr. Durward testified that he believed the fall on August 27, 1996, was a contributing factor, however, he was unable to state whether the previous motor vehicle accident, the multiple surgeries Rhode had over the years, age and degeneration in her back, or the work related fall in 1996 remained a major contributing cause of her current disability, impairment or need for treatment. Dr. Durward's opinion was insufficient to establish causation by a preponderance of the evidence.

Causation is a threshold question and must be established before claimant is entitled to benefits. Rhode has failed to prove the compensability of her disability claim and Rhode is not entitled to additional benefits. Analysis on the remaining issues is not necessary.

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 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 11th day of February, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR

/s/ Taya M Runyan

Taya M. Runyan
Administrative Law Judge