

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

CHERYL FROST

HF No. 105, 2017/18

Claimant,

v.

DECISION

**TENTEXKOTA, LLC, d/b/a
DEADWOOD MOUNTAIN GRAND,**

Employer,

and

AMTRUST NORTH AMERICA,

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 June 3, 2022. Claimant, Cheryl Frost, was present and represented by Dave L. Claggett of Claggett & Dill, Prof. LLC. The Employer, Tentexkota, LLC d/b/a Deadwood Mountain Grand, and Insurer, Amtrust North America were represented by Kerri Cook Huber of Gunderson, Palmer, Nelson & Ashmore, LLP.

Facts:

1. On November 18, 1956, Cheryl Frost (Frost) was born.
2. On November 17, 2006, Frost presented to Rapid City Medical Center LLP, Midtown Family Medicine with complaints of neck and back pain related to a previous work injury separate from that at issue in this matter. The treating doctor took her off work for one month and prescribed physical therapy.

3. On January 24, 2007, Frost underwent an MRI due to neck pain with bilateral numbness. The MRI revealed broad-based disc displacement, mild right foraminal narrowing at both C3-4 and C4-5. At C6-7 the images revealed broad-based central right paracentral protrusions that indented the thecal sac and resulted in mild right paracentral cord compression and mild central canal stenosis. A 1-2 mm micro syrinx was noted at the C-6 level extending into the mid-portion of T-1.

An additional MRI was taken that day of Frost's lumbar spine due to her history of back pain with right leg pain. Renal cysts were revealed. The MRI also showed at T11-12, where a left paracentral protrusion indented the thecal sac and deformed the left paracentral cord along with mild degenerative disc disease at L5-S1.

4. On February 5, 2007, Frost was seen for a neurosurgical consult for neck pain associated with headaches, left facial tingling, bilateral upper extremity sensory changes, left more than right, low back pain with bilateral sensory changes, and right leg pain. Frost attributed her complaints of low back pain and neck pain to her work activities as a flagger that started on June 6, 2006. She had been off work since November 17, 2006, due to the symptoms and her inability to sustain her job duties.
5. On March 12, 2008, MRIs of Frost's cervical and lumbar spine were taken. The cervical MRI revealed a central bulging disc at C3-4 and central disc spurs at C4-5. It also revealed a micro syrinx in the lower cervical cord measuring 2 mm. The lumbar MRI revealed desiccation of the cervical discs in the lower lumbar spine at L5-S1 and a disc protrusion at T11-12. A small left-sided bulge was

noted at L10-11 and a more prominent small left disc herniation at L11-12.

There was a central disc protrusion at L5-S1.

6. On March 19, 2008, Frost was seen at Black Hills Orthopedic & Spine Center for an evaluation due to whole body pain, including back with right leg and neck pain. She reported having intermittent numbness in both of her hands for over a year. She was diagnosed with cervical myelopathy.
7. In December 2008, an MRI of Frost's spine revealed degenerative disc changes greatest at C6-7.
8. On January 6, 2009, an MRI also revealed mild to moderate diffuse degenerative changes.
9. On November 4, 2010, Frost was seen by Dr. Richard Little to review the results of the functional capacity test he conducted on her. The workers' compensation case carrier nurse was also present. Dr. Little assigned Frost with a permanent work restriction of no push, pull, or lift great than 10 to 20 pounds and limited her to light-duty work on the right side.
10. On March 8, 2011, Frost filed for disability due to herniated discs, degenerative disc disease, bulging discs, kidney problems, right rotator cuff tear, and glaucoma. She alleged her disability began in October 2009.
11. On April 1, 2011, Frost completed a Function Report in the process of seeking Social Security Disability benefits.
12. On April 8, 2011, an MRI revealed central disc herniation at C5-6 with mild indentation of the anterior spinal cord with borderline stenosis and central disc herniation at C6-7 with mild indentation of the anterior spinal cord and borderline stenosis. Imaging of Frost's thoracic spine revealed a large central disc

herniation at T6-7 resulting in spinal stenosis and mild indentation of the spinal cord; mild left-sided disc herniation resulting in mild spinal stenosis and mild indentation of the spinal cord at T10-11; and a fairly large left-sided disc herniation resulting in spinal stenosis with an AP diameter of the canal centrally measuring 7 to 8 mm at the T11-12 level. The notes indicate there was likely compression or impingement of the exiting nerve root on the left and diffuse degenerative disc disease at multiple levels. The lumbar spine MRI found disc desiccation at L4-S1 and T11-12, resulting in spinal stenosis and some cord compression.

- 13.** In June 2011 Frost was hired by Tentexkota, LLC, d/b/a Deadwood Mountain Grand (Employer) as a prep cook.
- 14.** In August 2011, Frost left her job with Employer due to shoulder surgery related to a previous workers' compensation injury.
- 15.** On September 7, 2011, Frost was seen by PA-C Mark Heine for ongoing back pain. She reported chronic spinal pain from neck to coccyx which started after a motor vehicle collision in 1993. PA-C Heine opined that no surgery would improve her symptoms and he recommended physical therapy.
- 16.** On July 2, 2014, Frost was rehired by Employer which was at all times pertinent insured for workers' compensation purposes by Amtrust North America (Insurer).
- 17.** On January 22, 2016, Frost alleges she suffered work injuries to her left shoulder, neck, and back while lifting a 50-pound bag of flour in the course of her employment.
- 18.** On January 28, 2016, Frost visited Dr. Thomas Groeger for a stomach ache. His notes indicate that Frost mentioned she had injured her shoulder at work, but he

did not have time to look at it that day. She was told to make a separate appointment. The notes do not mention a work-related back or neck injury.

19. On February 5, 2016, Frost visited Dr. Groeger with complaints related to the alleged January 22, 2016, injury to her left shoulder and low back. He planned to have her evaluated and treated with physical therapy.

20. On February 16, 2016, Frost was seen by Dr. Groeger for a headache. She requested an MRI of her neck.

21. On March 22, 2016, Dr. Groeger noted that he had reviewed Frost's MRI results and concluded that there was nothing that could be done surgically at that point to improve her discomfort.

22. May 27, 2016, Frost found employment at the Mineral Palace as a gyro sandwich cook. Mineral Palace knew of her physical limitations and attempted to accommodate them.

23. June 28, 2016, Frost was seen by neurosurgeon, Dr. Wayne Wittenberg, for low back pain. Dr. Wittenberg recommended a lumbar disc surgery. Frost verbally stated she wanted the surgery, specifically to address the T11-12 disc protrusion.

24. On October 4, 2016, Frost saw Dr. Samuelson as Dr. Wittenberg had fallen ill. Dr. Samuelson noted Frost's history of thoracic disc herniation. Frost's chief complaint was thoracic and lumbar disc disease, and there was no indication of cervical or neck pain at the visit. Dr. Samuelson diagnosed Frost as myelopathic related to the thoracic spine. Dr. Samuelson placed Frost on work restrictions of lifting no more than 10-pounds, no bending, straining, twisting, or turning. He also identified sacroiliitis.

- 25.** On March 16, 2017, Frost received work restrictions from Dr. Little including restrictions of no pushing, pulling, or lifting greater than 10 pounds with bilateral upper extremities.
- 26.** On March 24, 2017, Frost was let go from her employment at Mineral Palace due to her physical condition and being unable to perform her duties. Employer and Insurer began paying Frost \$208.57 per week for temporary total disability (TTD) benefits.
- 27.** On July 11, 2017, Frost received work restrictions from Dr. Samuel L. Mortimer with restrictions of no overhead lifting and no lifting over 5 pounds.
- 28.** On September 6, 2017, Dr. Samuelson saw Frost for SI joint pain. She made no complaint of cervical pain. He assigned restrictions allowing Frost to return to work with activity as tolerated. He ordered cervical and lumbar MRIs.
- 29.** On September 25, 2017, Insurer refused Frost's request for approval to seek care at Mayo Clinic, in Rochester, Minnesota.
- 30.** On September 29, 2017, Frost underwent an MRI.
- 31.** In January 2018, a CT of Frost's cervical spine revealed cervical degenerative disc disease.
- 32.** On January 25, 2018, Dr. Samuelson performed spinal surgery on Frost. After the neck surgery, he did not provide any additional restrictions for her.
- 33.** On April 4, 2018, Frost received her last TTD check dated March 29, 2018, for the period through April 4, 2018.
- 34.** On May 2, 2018, Frost submitted a Petition for Hearing to the Department of Labor & Regulation (Department).
- 35.** On September 9, 2019, Dr. Jensen performed an IME of Frost

36. Additional facts may be developed in the issue analysis below.

Issue:

The issues presented at hearing were

- a. Whether Frost's alleged January 22, 2016, work injuries to her left shoulder, neck, and low back are a major contributing cause of her condition; and
- b. Whether Frost is permanently and totally disabled under the odd-lot doctrine; and
- c. Whether Frost is entitled to medical expenses and attorney fees.

Major Contributing Cause Analysis:

To prevail on the issues of causation and nature and extent of injury, Frost must first prove that the work-related injury on January 22, 2016, is a major contributing cause of her condition. Frost is "not required to prove [her] employer was the proximate, direct, or sole cause of [her] injury." *Smith v. Stan Houston Equip. Co.*, 2013 S.D. 65, ¶ 16, 836 N.W. 2d 647, 652. She must prove "that employment or employment-related activities [are] a major contributing cause of the condition of which she complained, or, in cases of preexisting disease or condition, that employment or employment-related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." *Norton v. Deuel School Dist. No. 19-4*, 674 N.W.2d 518, 521 (S.D. 2004).

The standard of proof for causation in a worker's compensation claim is a preponderance of the evidence. *Armstrong v. Longview Farms, LLP*, 2020 SD 1, ¶ 21, 938 N.W.2d 425, 430. The South Dakota Supreme Court has recently reasserted that a work incident does not need to be "the" major contributing cause but need only be

“a” major contributing cause. *Hughes v Dakota Mill Grain, Inc. and Hartford Insurance*, 2021 S.D.31, ¶ 21, 959 N.W.2d 903.

Causation is a medical question, and both parties have offered expert medical opinion. “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). The parties have offered the medical opinions of Dr. Samuelson, Dr. Groeger, and Dr. Wade K. Jensen

Dr. Samuelson is a board-certified neurosurgeon who practices at Monument Health in Rapid City, South Dakota. He received his medical degree from the University of Kansas in 2002, and he conducted a neurosurgery residency in Richmond, Virginia in 2006. He also has a fellowship in endovascular neurosurgery from Buffalo, New York, and open cerebral vascular surgery from Phoenix, Arizona. He specializes in general neurosurgery. Dr. Samuelson is a member of the Congress of Neurological Surgeons and the American Association of Neurologic Surgeons. He is also an assistant professor at South Dakota State University.

Dr. Samuelson first examined Frost on October 4, 2016. He noted that Frost’s chief complaint that day was of thoracic and lumbar disc herniation and that she had a history of thoracic disk herniation. She was not making a claim for neck pain. Although, he testified that her symptoms of myelopathy and urinary urgency could be related to cervical or thoracic spine issues, later he concluded that she would most likely to benefit from neck surgery. After his examination, Dr. Samuelson assigned work restrictions for Frost even though she had permanent restrictions

from Dr. Little on January 8, 2011. The restrictions were listed as no lifting more than 10 pounds, and no twisting, turning, bending, or straining for two months. The restrictions were to be reevaluated at her next appointment. On September 6, 2017, Dr. Samuelson again saw Frost, he conducted an examination and reviewed her imaging results. He also ordered additional MRIs. On January 25, 2018, Dr. Samuelson performed surgery on Frost's cervical spine after the neck surgery, he did not provide any restrictions for her, and he released Frost to work with activity as tolerated.

At his deposition on June 25, 2021, Dr. Samuelson testified that he understood Frost's injury to have occurred while she was lifting and straining at work. He was asked if Frost's condition had resolved, and he stated he did not have a precise answer to the question. He further testified that Frost showed degenerative changes in her spine and such degeneration could make an injury, such as a work-related injury, more likely. Dr. Samuelson testified that he was unaware that Frost had permanent work restrictions prior to her injury. He further testified that he was unaware that she had complained of neck pain before the injury. He opined that Frost's injury on January 22, 2016, is a major contributing cause of her current condition and her current chronic pain, and he was satisfied with Frost's representation of how the injury occurred. Dr. Samuelson opined that Frost would continue to have lifelong chronic pain and is likely to require additional treatments. He further opined that she is not at maximum medical improvement (MMI), and she continues to suffer chronic neck pain, cervical root disorder, and hardware failure of

her anterior column of the spine. He also stated that as of the last time he saw her there were no additional cervical spine treatments needed.

Dr. Groeger is a board-certified physician who has practiced family medicine at the Monument Lead/Deadwood Clinic and Hospital for 31 years. He attended medical school in Denver, Colorado. He attended a family practice residency training at the University of Wyoming in Casper, Wyoming from 1986 through 1989. Dr. Groeger is licensed to practice in South Dakota.

Frost was first seen by Dr. Groeger in 2010. He is currently her primary care physician. He understood her injury to have occurred when she was lifting a 50-pound bag of flour and she felt shoulder pain and later back pain. At his deposition on September 21, 2020, Dr. Groeger was asked if Frost received an injury on January 22, 2016, and he stated that she did. He opined that she sustained chronic pain from the injury and had injured her shoulder. Dr. Groeger was asked if he agreed that Frost had a long history of back pain, and he agreed that she did. He opined that her January 2016 injury may have worsened an already existing condition. He added that Frost had problems with her right shoulder but had not complained of issues with her left shoulder prior to the injury.

Dr. Groeger was asked whether there were times during his treatment of Frost when her complaints were not supported by objective evidence, and he answered that there were. However, he added that he saw that in patients where some people were more sensitive to pain even though he could not find anything that would coincide with their complaints. He further stated that, at the time of his deposition, he had recently started pain management with Frost. He explained that

the pain management was not necessarily for her shoulder but for her body in general. Dr. Groeger was also asked if her treatment had been reasonable and necessary. He stated that it was, specifically because they had tried conservative treatment first. Dr. Groeger further testified that he was unaware that as of January 8, 2011, Frost has permanent work restrictions including a 10–20-pound upper extremity restriction. He opined that lifting a 50-pound bag of flour would be outside of that restriction.

Dr. Jensen is a board-certified orthopedic spine surgeon practicing at the Center for Neurosciences, Orthopedics, and Spine. He attended medical school at the University of Washington in Seattle, Washington. He went through an orthopedic surgery residency at the University of Wisconsin and then underwent training as a neurosurgery and orthopedic spine fellow at the University of Utah. His practice primarily consists of spine surgery with some general orthopedics. 98% of his time is spent with surgery-related duties. He handles about one Independent Medical Examination (IME) per week. He is licensed to practice in South Dakota, Iowa, Nebraska, Utah, and Idaho.

Dr. Jensen performed an IME of Frost on September 9, 2019, and he produced his report on September 25, 2019. For the IME, Dr. Jensen examined Frost and reviewed her medical records and imaging studies. At his deposition, Dr. Jensen testified that Frost had informed him about the work injury from 2014 as well as the injury from 2016. In his report, Dr. Jensen noted that Frost had been determined to be disabled by the Social Security Administration in 2011. She was

also assigned a 10-pound lifting restriction at that time. He further noted that she had voluntarily violated her restriction in order to sustain the injury she was claiming. At the exam, she told him she hurt her neck, back, and left shoulder while lifting a 50-pound bag of flour from a lower shelf onto a cart. Frost also told him she felt pain in many places including her left shoulder and primarily in her low back. Dr. Jensen opined that the exam of her left shoulder was normal. In his report, Dr. Jensen diagnosed Frost with left shoulder sprain/strain which had resolved and longstanding underlying cervical, thoracic, and lumbar degenerative changes which he opined were unrelated to work activities. Dr. Jensen also opined that in regard to her back, Frost magnified her symptoms and was hyper-exaggeratory to touch points. He concluded that the work injury on January 22, 2016, was not a major contributing cause of her current condition. He testified that her condition was complex and preexisting, with myelopathy, radiculopathy, and multilevel degenerative changes. He further opined that no additional treatment would be necessary for the 2016 work injury, and she does not have work restrictions related to that injury.

The record shows that Frost has a history of back, neck, and arm problems as well as degeneration issues. She also had a previous work injury related to neck and back pain. SDCL 62-1-1(7) provides,

- (7) "Injury" or "personal injury," only 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;
or
 - (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition

- complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment;
- (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

Therefore, as long as the lifting incident on January 22, 2016, is a major contributing cause of her condition then Frost will prevail on the issue of causation. Dr. Samuelson and Dr. Groeger opined that the work injury is a major contributing cause of her current condition. Dr. Samuelson was unaware that Frost had complained of neck pain prior to her injury, and therefore, his opinion regarding a major contributing cause of Frost's neck injury is not well supported. Dr. Groeger is Frost's treating physician and claims to be familiar with her and her history. However, at their depositions, both doctors stated they were unaware that Frost had been assigned permanent restrictions prior to her injury. It appears that both doctors were lacking important information regarding Frost's medical history. Without this information, their opinions do not have the support needed to be persuasive. Frost has not proven by a preponderance of the evidence that her work injury is a major contributing cause of her current condition.

Dr. Jensen's opinion that the work injury on January 22, 2016, is not a major contributing cause of Frost's current condition is persuasive. Dr. Jensen did not treat Frost. However, The South Dakota Supreme Court has held that a non-treating physician's opinion can be more persuasive than the opinion of a treating physician on causation issues. *Helms v. Lynn's Inc.*, 1996 S.D. 8, 542 N.W. 2d 764. Dr. Jensen examined Frost and reviewed her medical record. He was aware of her previous injuries and pre-injury work restrictions. His diagnosis of left shoulder sprain/strain and underlying

cervical, thoracic, and lumbar degenerative changes is supported by his knowledge of Frost's record. Therefore, his conclusion regarding major contributing cause is well supported.

Hearing Objection Regarding Department's File

At hearing, Employer and Insurer attempted to admit Claimant's entire Department file into evidence. Specifically, Employer and Insurer attempted to admit the Settlement Agreements, Order of Approval and Dismissal of previous workers' compensation claims made by Frost dated February 27, 2008, and May 25, 2012. Frost objected on multiple grounds including but not limited to, timeliness, the fact the previous agreements involved different injuries and employers, and the inclusion of the report of Dr. Jeffrey Nipper. The Department sustained Frost's objection. Employer and Insurer have asked the Department to reconsider.

Employer and Insurer argue the applicability of the Apportionment Rule pursuant to SDCL 62-4-29 which provides, "[a]s to an employee who before the accident for which the employee claims compensation was disabled and drawing compensation under the terms of this title, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which the employee may have suffered." They also raise the Last Injurious Exposure Rule. "If an employee who has previously sustained an injury, or suffers from a preexisting condition, receives a subsequent compensable injury, the current employer shall pay all medical and hospital expenses and compensation provided by this title." SDCL 62-1-18. Employer and Insurer assert that the best evidence of compensation and permanent total disability under Title 62 is the Settlement Agreement and Order for Approval and Dismissal. As Frost has not prevailed on the issue of causation, the above motion,

arguments provided by Employer and Insurer, and the objections in response are thus moot.

Conclusion:

Frost has failed to prove by a preponderance of the evidence that her January 22, 2016, work injuries to her left shoulder, neck, and low back are a major contributing cause of her current condition. As she has not proven causation, the issues of permanent total disability, medical expenses, and attorney's fees are therefore moot.

Employer and Insurer 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. Frost shall have an additional twenty (20) days from the date of receipt of Employer and Insurer'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, Employer and Insurer shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 31st day of October, 2022.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION



Michelle M. Faw
Administrative Law Judge