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

ANDREW B. LARSGAARD, **HF No. 15, 2015/16**

Claimant,

v. **DECISION**

CAJ ENTERPRISES, INC.,
d/b/a DAKOTALAND HOMES

Employer,

and

AUTO OWNERS INSURANCE
COMPANY OF PITTSBURGH

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 remotely by Michelle M. Faw, Administrative Law Judge, on May 26, 2021. Claimant, Andrew B. Larsgaard, was present and represented by Bram Weidenaar of Alvine|Weidenaar LLP. The Employer, CAJ Enterprises, Inc. d/b/a Dakotaland Homes and Insurer, Auto Owners Insurance Company of Pittsburgh were represented by Charles A. Larson of Boyce Law Firm, LLP.

Background:

1. In September of 2003, Andrew B. Larsgaard (Larsgaard) presented to the Swenson Chiropractic Center complaining of constant, dull pain.
2. On May 3, 2004, he presented again to Swenson Chiropractic Center.
3. On August 14 and 16, 2007, he again visited Swenson Chiropractic Center with lower back pain and pain when stretching.

4. On and before February 10, 2011, while Larsgaard was working for CAJ Enterprises, Inc. d/b/a Dakotaland Homes (Employer) which was insured for workers' compensation purposes by Auto Owners Insurance Company of Pittsburgh (Insurer), he felt a popping sensation in his lower back and pain in his lower back radiating into his legs.
5. On February 11, 2011, Larsgaard was seen by Michael Swenson, DC, of Swenson Chiropractic Center for treatment of lower back pain.
6. On February 21, 2011, Larsgaard was seen by Dr. David Hoversten. Larsgaard reported a work-related injury which had occurred on February 10, 2011. Dr. Hoversten ordered a Medrol dose by phone, but Larsgaard symptoms continued. Dr. Hoversten noted that Larsgaard had episodic back pain from 2003 and degenerative back disease at T11-12. Dr. Hoversten then ordered an x-ray which revealed a 50-60% narrowing of Larsgaard's L5-S1 vertebrae. Larsgaard was diagnosed with bulging at the L5-S1 level. He was prescribed Medrol and Lortab.
7. On March 23, 2011, Larsgaard underwent an MRI which revealed a right paracentral 9mm disc herniation at the L5-S1 which posteriorly displaced the right S1 nerve root contributing to mild central stenosis.
8. On March 30, 2011, Larsgaard followed up with Dr. Hoversten complaining of right hip and lower back pain. Dr. Hoversten noted that Larsgaard's symptoms had not improved so he recommended an epidural injection.
9. On April 7, 2011, Larsgaard was seen by Dr. Scott Lockwood for an epidural injection. Dr. Lockwood noted that Larsgaard injured his lower back at work in February 2011, while lifting a heavy object, and since that time Larsgaard had pain in his lower back radiating into his legs.
10. On April 26, 2011, Larsgaard returned to Dr. Hoversten after having three weeks off from work. Surgery was postponed six to nine months with the assumption that Larsgaard would heal without surgical intervention. Dr. Hoversten refilled his Lortab prescription and returned him to work with a thirty (30) pound lift restriction and no stooping, squatting, or bending.

11. On May 25, 2011, Dr. Hoversten noted that Larsgaard was responding to conservative treatment and so the Lortab and work restrictions were continued.
12. On August 23, 2011, Dr. Hoversten recommended a second epidural block and also prescribed Restoril.
13. On August 24, 2011, Larsgaard received a second epidural injection.
14. On November 17, 2011, Dr. Hoversten examined Larsgaard and noted that the previously prescribed medications were not helping with his symptoms. Dr. Hoversten prescribed hydrocodone and Restoril. Larsgaard was told to follow up in two months.
15. On January 16, 2012, Larsgaard sought a second medical opinion from Dr. Mitchell Johnson of the Orthopedic Institute in Sioux Falls, SD. Larsgaard complained of back and bilateral leg pain. Dr. Johnson opined that Larsgaard was suffering from lumbar radiculopathy caused by a large disc herniation midline to the right paracentral L5-S1. Larsgaard was able to work but needed pain medication at night due to the severity of the pain caused by work activities. Dr. Johnson recommended a second MRI which was conducted on January 16, 2012.
16. On January 23, 2012, Larsgaard visited Dr. Johnson for a follow-up appointment. Dr. Johnson noted a slight decrease in the size of the disc herniation. He recommended physical therapy and for Larsgaard to return to work with limitations.
17. On January 25, 2012, Larsgaard began physical therapy. Derrick Houdek, SPT, noted Larsgaard reported symptoms of local pain in his lumbar spine that radiated through posterior legs down to his calves. Larsgaard reported pain at a 9/10 at its worst.
18. From January 30, 2012 to February 28, 2012, Larsgaard attended ten physical therapy appointments.
19. On March 5, 2012, Leah Peterson at Sanford Canton Inwood issued a Physical Treatment Progress Report on Larsgaard. She noted ten total treatments, and that Larsgaard had weakness in core musculature and decreased trunk control during core exercises. She also noted Larsgaard had increased weakness

through his right lower extremity, continuous low back pain, and shooting pain into his bilateral calves.

20. On March 12, 2012, Larsgaard was seen by Dr. Johnson. Dr. Johnson noted that Larsgaard had not found any relief during his time at physical therapy, and that Larsgaard was experiencing predominant pain down both of his calves related to back pain. He recommended an additional epidural injection and that Larsgaard be considered for microdiscectomy.
21. On March 12, 2012, Larsgaard received an epidural injection.
22. On April 12, 2012, Dr. Cathy Hennies, Sanford Canton Inwood Medical, saw Larsgaard for heart palpitations and dizziness. Dr. Hennies noted that Larsgaard was painting a ceiling when he experienced lightheadedness. Larsgaard stated he was worried the symptoms could be related to a heart attack. Dr. Hennies concluded the symptoms were not consistent with a heart attack and no further testing was needed. Larsgaard was evaluated for pain by Tamara Haverhals, RN. Larsgaard reported pain in his back at a level of 6 out of 10.
23. On April 13, 2012, Larsgaard saw Dr. Johnson for an epidural injection. Dr. Johnson noted that Larsgaard had relief, but it had worn off by around 30%. They discussed the pros and cons of surgery. Larsgaard decided to wait before pursuing surgical options.
24. On April 20, 2012, Dr. Johnson authorized the use of TENS unit to help with Larsgaard's pain. Larsgaard used the unit once per week. Larsgaard was instructed to refrain from work until May 7, 2012.
25. On September 18, 2012, Larsgaard was seen by Dr. Johnson who noted that he was reporting the same pain as he felt the day his injury occurred. Larsgaard reported daily discomfort. Dr. Johnson recommended a microdiscectomy. Dr. Johnson assigned Larsgaard a 10% whole person impairment rating.
26. On February 11, 2013, Dr. Johnson examined Larsgaard and noted that Larsgaard experienced pain during a straight leg test. Dr. Johnson scheduled a new MRI and assigned Larsgaard a twenty (20) pound lifting restriction with limited bending and twisting.

27. On February 28, 2013, Larsgaard underwent an MRI which revealed a 5mm anteroposterior disc herniation at L5-S1.
28. On March 5, 2013, Larsgaard visited Dr. Johnson to discuss the MRI. Dr. Johnson noted a large inflammatory component to the disc protrusion, and he opined that Larsgaard's symptoms were consistent with his work injury.
29. On March 20, 2013, Dr. Johnson performed a microdiscectomy of Larsgaard's l5-S1.
30. On April 3, 2013, Larsgaard attended an Outpatient Therapy Evaluation. Larsgaard reported his worst pain was a 9 out of a 10. Larsgaard attend physical therapy 26 times through June 3, 2013.
31. On May 13, 2013, Larsgaard attended a follow-up with Dr. Johnson who noted that he had made improvement and physical therapy seemed to be doing well. Larsgaard's incision had healed, and he did not report pain during a straight leg test. Dr. Johnson returned Larsgaard to work with light work restrictions.
32. On June 28, 2013, Dr. Johnson allowed Larsgaard to work with medium work restrictions.
33. On July 2, 2013, Larsgaard telephoned Dr. Johnson reporting an aggravation in his lower back. Larsgaard stated he was carrying wall panels when he started feeling pain go down his leg with some numbness and tingling. Dr. Johnson prescribed Medrol and returned Larsgaard to light work restrictions.
34. On July 16, 2013, Larsgaard was seen by Dr. Johnson. He reported a recurrence of bilateral leg pain, increased pain in his right leg, and soreness in his midsection. Dr. Johnson noted tenderness in Larsgaard's SI joint, he scheduled an MRI.
35. On July 22, 2013, Larsgaard underwent an MRI of his lumbar spine which revealed a L5-S1 disc degeneration with osteophyte and bulge in the midline without herniation, stenosis, or neural compression.
36. From July 30, 2013 to September 3, 2013, Larsgaard attended ten physical therapy sessions.
37. On August 9, 2013, Larsgaard was seen by Dr. Johnson who noted that the MRI did not show a recurrence of disc herniation. Dr. Johnson opined that

Larsgaard's current job required a lot of bending and twisting and was thus not a reasonable option for him to continue. He maintained Larsgaard's light duty restrictions.

38. On September 23, 2013, Larsgaard was seen by Dr. Jonathon Stone upon referral by Dr. Johnson. Dr. Stone noted Larsgaard's lower back pain radiated into both of his legs and his pain level was 5 out of 10. He further noted that the symptoms were present since Larsgaard's work-related injury in February of 2011.He prescribed duloxetine and instructed Larsgaard to return in one month. He continued the light work restrictions.
39. On November 20, 2013, Larsgaard was seen by Dr. Stone. Larsgaard reported lower back pain radiating into the back of both of his legs and a pain rating of 4 out of 5. Dr. Stone diagnosed Larsgaard with piriformis syndrome and performed a right piriformis injection. Larsgaard was continued on light duty work restrictions.
40. Between December 2, 2013 and January 17, 2014, Larsgaard attended eleven therapy sessions.
41. On January 15, 2014, Larsgaard was seen by Dr. Stone who noted Larsgaard was reporting pain at a rate of 5 out of 10. He further noted that Larsgaard was taking hydrocodone, methocarbamol, nortriptyline, and temazepam. Dr. Stone opined that Larsgaard appeared to have plateaued. He ordered a functional movement assessment to identify what was preventing Larsgaard from improving. Dr. Stone stopped the methocarbamol and nortriptyline and prescribed tizanidine. Larsgaard continued light duty work restrictions.
42. On January 22, 2014, Larsgaard was discharged from physical therapy.
43. On January 24, 2014, Larsgaard was seen by Dr. Stone and he reported back pain radiating in his legs. Dr. Stone noted lower back pain, lumbar degenerative disc disease, lumbar spondylosis, and possible lumbar facet syndrome. He prescribed gabapentin, and intraarticular facet injections. Larsgaard continued on light duty.
44. On January 27, 2014, Larsgaard was seen by Dr. Cathy Hennies, Sanford Canton Inwood Medical. He reported electrical shock feelings behinds his eyes,

shoulders, arms, and legs. He further reported that he used Cymbalta for nerve pain but was unable to get a refill. Dr. Hennies advised that symptoms would take time to go away. At that visit, Larsgaard also reported chronic back pain and a pain rating of 3 out of 10.

45. On February 17, 2014, Larsgaard was seen by Dr. Lockwood who noted that Larsgaard had lower back pain which worsened at night and pain which radiated towards his hips and down the back of his legs. Dr. Lockwood performed facet joint injections.
46. On March 5, 2014, Larsgaard was seen by Dr. Stone noted that Larsgaard symptoms had improved. Dr. Stone continued Larsgaard on hydrocodone and gabapentin, and he placed Larsgaard on medium duty.
47. On March 19, 2014, Larsgaard was discharged from physical therapy, because he had plateaued in his progress. Larsgaard reported resting pain in his lower back at a 5 out of 10 with the highest pain point rating an 8 out of 10.
48. On March 16, 2014, Dr. Stone referred Larsgaard for radiofrequency ablation. He also continued the medium duty restrictions.
49. On April 14, 2014, Larsgaard was carrying a hacksaw at work when he felt a grinding sensation in his lower back which increased his lower back pain. He reported his pain as a 7 out of 10 to Dr. Stone. Dr. Stone prescribed Medrol and limited Larsgaard to light duty.
50. On May 6, 2014, Larsgaard returned to Dr. Stone with a pain rating of 4 out of 10. Dr. Stone ordered a hip x-ray to determine what was generating the pain. The x-ray revealed no acute abnormality. Larsgaard was continued on light duty.
51. On May 29, 2014, Dr. Stone placed an injection in Larsgaard's right hip to alleviate pain.
52. On June 11, 2014, Dr. Stone ordered an MRI which revealed disc desiccation with a small disc protrusion at the L5-S1.
53. On August 19, 2014, Larsgaard was seen by Dr. Jarron Tilghman at Avera Physical Medicine and Rehabilitation. Dr. Tilghman recommended a bilateral L2 through L5 medial nerve block with a progression to radiofrequency ablation. Dr.

Lockwood performed the nerve blocks. Dr. Tilghman returned Larsgaard to work on sedentary duty.

54. On September 11, 2014, Larsgaard was seen Dr. Melissa Alvarez-Perez at Avera Physical Medicine and Rehabilitation. Dr. Alvarez-Perez noted Larsgaard was experiencing lower back pain radiating into his legs. She recommended radio frequency ablation and prescribed Norco and Baclofen. She also returned Larsgaard to light duty.
55. On September 22, 2014, Dr. Lockwood performed bilateral L3, L4, and L5 medial branch block radiofrequency ablation for bilateral L4-L5 and L5-S1 facet joint pain.
56. September 17, 2014 through October 29, 2014, Larsgaard attended seven physical therapy sessions.
57. On October 30, 2014, Larsgaard was seen by Dr. Adil Shaikh at Avera Physical Medicine and Rehabilitation. Larsgaard reported the same lower back pain radiating into his legs since his work-related injury in February of 2011. Dr. Shaikh diagnosed Larsgaard with discogenic low back pain with radiculopathy and chronic pain. He discontinued amitriptyline and prescribed Cymbalta, a Lidoderm patch, and Flexeril. Dr. Shaikh referred Larsgaard to Dr. Donald Baum, Ph.D.
58. On November 19, 2014, Dr. Baum diagnosed Larsgaard with moderate anxiety secondary to chronic pain and related situational stressors.
59. On December 18, 2014, Larsgaard was seen by Dr. Shaikh who diagnosed discogenic lower back pain with radiculopathy, chronic low back pain, restless leg syndrome, and decreased sleep. Dr. Shaikh prescribed Tylenol and ibuprofen for pain, melatonin for sleep, and pramipexole for restless leg syndrome. He also discussed implantation of a neurostimulator device.
60. On February 9, 2015, Larsgaard was seen by Teresa Schelhaas, CNP, who noted Larsgaard’s long history of lower back pain. She prescribed prednisone with amitriptyline. She also suggested an epidural injection. She continued Larsgaard on light duty.
61. On March 3, 2015, Larsgaard received an epidural injection.

62. On March 26, 2015, Dr. Jeffrey Nipper conducted an independent medical evaluation (IME) of Larsgaard.
63. May 29, 2015, Larsgaard terminated his employment with Employer.
64. On June 29, 2015 and September 30, 2015, Ms. Schelhaas recommended prednisone, Mobic, Ambien, and epidural injection.
65. On July 8, 2015, Insurer denied Larsgaard's claim for further workers' compensation benefits.
66. On July 22, 2015, Larsgaard submitted a Petition for Hearing to the Department of Labor & Regulation.
67. In January 2016, Larsgaard began working for Lowe's Home Improvement.
68. On February 25, 2016, Larsgaard was examined by Dr. Christopher Janssen
69. On March 4, 2016, Larsgaard received an epidural injection.
70. On July 25, 2016, CNP Schelhaas recommend an MRI.
71. On November 24, 2016, CNP Schelhaas saw Larsgaard who reported that he did not have the MRI because he did not have insurance. Larsgaard reported right hip pain. CNP Schelhaas recommended amitriptyline, Ambien, and a right hip injection. Dr. Shaikh injected Larsgaard's right hip.
72. On October 31, 2016, Larsgaard visited Dr. Shaikh and CNP Schelhaas. Larsgaard reported that he had been feeling well since stopping Norco, and that he did not wish to use narcotics anymore. He had not taken Norco for two weeks.
73. On January 13, 2017, Larsgaard was seen by CNP Schelhaas for chronic lower back pain. She noted that Larsgaard's lower back symptoms had stabilized. Larsgaard reported that he had been feeling well. She continued the amitriptyline. She also noted that Larsgaard could lift 40 pounds frequently and 70 pounds occasionally.
74. On March 8, 2017, Larsgaard returned to CNP Schelhaas and was continued on Norco at 1-2 tabs per day.
75. On April 21, 2017, Larsgaard experienced an exacerbation of his lower back pain after lifting a bag of concrete while working at Lowe's. He reported the

incident at Lowe's as a work-related injury and filled out some paperwork. He stopped working at Lowe's soon after.

76. On April 21, 2017, Larsgaard was seen by CNP Schelhaas. He reported a worsening of his pain since the Lowe's incident and rated his pain as an 8 out of 10. He stated he was taking about eight Norco tablets a day. She prescribed prednisone, and continued hydrocodone, Ambien, amitriptyline, and ibuprofen.
77. On August 3, 2017, Larsgaard had increased his Hydrocodone medication from 1-2 hydrocodone 5.0 mg pills a day to 4 times a day 7.5 mg.
78. On August 15, 2017, Larsgaard went to Avera McGreevy Clinic complaining of panic attacks. He reported taking hydrocodone, amitriptyline, omeprazole, Ambien, Ativan, and ibuprofen. He was continued on Ativan and told to follow up.
79. On August 30, 2017, Larsgaard was seen by CNP Schelhaas for lower back pain which he reported had returned to the level it had prior to his injury at Lowe's. CNP Schelhaas continued amitriptyline and Norco, and she suggested a right S1 joint injection if the pain worsened.
80. On August 16, 2017, Larsgaard was seen by Travis Slaba, PA-C at the Avera McGreevy Clinic. He reported sleeplessness and anxiety, and that his biggest stressor was dealing with the workers' compensation insurer. He rated his back pain as a 4 out of 10. PA Slaba assessed Larsgaard with anxiety and depression. He started Larsgaard on sertraline for anxiety and depression.
81. On August 30, 2017, Larsgaard returned to PA Slaba for anxiety. He reported back pain at 4 out of 10. PA Slaba assessed Larsgaard again with depression. He prescribed sertraline and clonazepam.
82. On September 27, 2017, PA Slaba again saw Larsgaard for anxiety. Upon assessment, he opined that Larsgaard's anxiety was improving. He prescribed suvorexant for use at bedtime.
83. On November 17, 2017, Larsgaard visited PA Slaba who deduced that the anxiety was improving. PA Slaba discontinued the clonazepam and prescribed Belsomra.

84. On November 17, 2017, Larsgaard saw PA Slaba for medication management. Larsgaard reported pain of 4 out of 10 with anxiety improving. PA Slaba discontinued the clonazepam and suvorexant and prescribed Lunesta.
85. On December 3, 2017, PA Slaba performed an annual assessment on Larsgaard who reported back pain rated at 4 out of 10. He also reported taking hydrocodone, Lunestra, sertraline, trazodone, methocarbamol, omeprazole, and ibuprofen. PA Slaba noted that his impression was that Larsgaard was suffering from chronic lower back pain, failed back surgery syndrome, and facet arthropathy related to his work injury.
86. Between December 5, 2017 and May 7, 2020, Larsgaard saw CNP Schelhaas seven times. She reported his symptoms were consistent and continued his medication.
87. On April 10, 2019, Larsgaard was examined by Dr. Janssen.
88. On September 19, 2019, Larsgaard underwent a second IME with Dr. Nipper.
89. On July 15, 2020, Larsgaard was seen by PA Slaba for medication management. He reported taking hydrocodone, ketoconazole, Lunestra, sertraline, trazodone, methocarbamol, omeprazole, and ibuprofen. PA Slaba noted that Larsgaard's chronic lower back pain was due to his work-related injury. He continued the previously prescribed medications and added Losartan for high blood pressure.
90. On October 22, 2020, Larsgaard underwent a third IME with Dr. Nipper.
91. On February 9, 2021, Larsgaard was examined by Dr. Janssen.
92. On August 13, 2020, Larsgaard was examined by Dr. Janssen.

Major Contributing Cause

To prevail in this matter, Larsgaard must first prove his work-related injury which occurred on February 10, 2011 is a major contributing cause of his current condition. He has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry Inc.*, 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367. "The fact that an employee may have suffered a work-related injury does not

automatically establish entitlement to benefits for his current claimed condition." *McQuay v. Fischer Furniture*, 2011 S.D. 91, ¶ 11 808 N.W.2d 107, 111 (citations omitted).

Larsgaard has offered the expert medical opinion of Dr. Janssen. "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). Dr. Janssen is licensed to practice medicine in South Dakota, North Dakota, Minnesota, and Texas. He routinely practices medicine at Sanford USD Medical Center seeing patients with lower back injuries. He is currently a staff interventional physiatrist at the Sanford Brain & Spine Center in Sioux Falls, SD. In his capacity as staff interventional physiatrist, he focuses on neurologic and orthopedic problems, injuries, and pathology.

At his deposition, Dr. Janssen testified that Larsgaard felt lower back pain that radiated into his right leg when he twisted while lifting a thirty-pound cinder block while working on February 10, 2011. Dr. Janssen observed that prior to the injury, Larsgaard was not taking any pain medication for back pain nor was he subject to any physical restrictions provided by a physician. After his examination and review of Larsgaard's medical records, Dr. Janssen provide a report dated February 25, 2016. In the report, Dr. Janssen diagnosed Larsgaard with a work injury on February 10, 2011, lumbar sprain/strain with subsequent L5-S1 disk herniation and radiculopathy, status post L5-S1 microdiscectomy, chronic recurrent lumbar radiculopathy, bilateral L4-5 and L5-S1 facet pain with relief from radiofrequency procedure, and L5-S1 discogenic pain.

Dr. Janssen opined that to a reasonable degree of medical certainty, Larsgaard had suffered a lumbar spine injury on February 10, 2011, and that Larsgaard's work-

related injury combined with a preexisting disease or condition or prolonged disability, impairment, or the need for treatment such that Larsgaard's work-related injury is and remains a major contributing cause for the need for treatment. He further opined that the medical treatment Larsgaard had received after his work-related injury on February 10, 2011, was reasonable and necessary. He concluded that Larsgaard is at maximum medical improvement (MMI) and currently in the management phase of his treatment. He further concluded that Larsgaard has and will experience continual and severe debilitating pain as a result of the work-related injury he suffered on February 10, 2011, and he will require continued medical treatment for the management of his pain symptoms related to the injury. Dr. Janssen has opined that Larsgaard will require the following medical care to maintain his current back condition: gym membership with access to aquatics, medications, physician/CNP visits on average of four (4) times per year plus monitoring of labs including urine drug screens, radiofrequency ablations, epidural injections, MRI of the lumbar spine every 5 years, and a possible lumbar fusion.

Employer and Insurer have offered the expert opinion of Dr. Nipper. Dr. Nipper is a board-certified staff orthopedic surgeon providing specialized clinical and surgical orthopedic care for veterans at the United States Department of Veteran Affairs, VA Medical Center in St. Cloud, Minnesota. He is licensed in Minnesota and South Dakota. Dr. Nipper has served as the president of the single specialty orthopedic group for the Minnesota Bone and Joint Specialists for the last ten years. He was previously the Director of Orthopedic Surgery and Sports Medicine with the Coon Rapids Medical Center for ten years from 1991 through 2011. He also served as the President of the Twin Cities Orthopedic Society and the Medical Director of Orthopedic surgery for

Mercy Medical Center. Dr. Nipper currently conducts orthopedic research and has traveled across the country to educate the medical community regarding advanced techniques in orthopedic surgery.

Following an IME on March 26, 2015, Dr. Nipper produced a report on Larsgaard on June 11, 2015. The report provided that Larsgaard appeared to be essentially normal without any objective abnormalities. He noted that the February 10, 2011 injury caused an L5-S1 herniation, which was revealed in the MRI on March 31, 2011. He opined that the MRI also showed degeneration around the herniation, but that there was no evidence that the disc degeneration was attributable to the February 2011 injury. He further opined that the February 10, 2011 work injury was a major contributing cause of Larsgaard's L5-S1 herniation, but that the surrounding degeneration was not attributed to the work injury. He diagnosed Larsgaard with failed back syndrome.

At the second IME on September 19, 2019, Dr. Nipper reviewed the MRI performed on October 23, 2017 which showed that there was disc desiccation and small disc protrusions at the L5-S1 and T11-12 levels and mild chronic wedging of the T11 and T12 vertebrae. He also reviewed Larsgaard's treatment documents dated from April 12, 2016 through December 6, 2018. Dr. Nipper opined that Larsgaard's diagnosis remained failed back syndrome with subjective complaints that were not supportable by objective medical evidence. He specifically noted that there was no evidence of any objective abnormalities of Larsgaard's hips.

Dr. Nipper conducted a third IME of Larsgaard on October 22, 2020. In addition to the examination, Dr. Nipper was provided information regarding Larsgaard's April 21, 2017 incident at Lowe's. He opined that Larsgaard's additional procedures were unrelated to the February 10, 2011 work injury. He further opined that the April 21, 2017

injury at Lowe's caused a status change, because Larsgaard required more pain medication to treat increased pain. He believed that the injury could have aggravated the pathology that was already there. He concluded that the Lowe's injury contributed independently to Larsgaard's condition and need for treatment.

The Department finds Dr. Janssen's opinion and assessment of objective findings to be more persuasive than that of Dr. Nipper. Dr. Nipper attributes Larsgaard's condition to failed back syndrome, functional overlay, and degeneration, and he stated that there were no objective findings to account for Larsgaard's pain symptoms. However, Dr. Janssen pointed out three objective findings that could explain Larsgaard's back and leg pain. First, the MRI Larsgaard underwent after surgery showed an annular protrusion at the L5-21 level. Second, Dr. Janssen opined that Larsgaard's response to the medial branch nerve blocks also objectively explained the pain he was experiencing. Third, during examination, Dr. Janssen observed that Larsgaard presents with a loss of range of motion in his lumbar spine and tenderness over his low back area. Dr. Janssen testified that these objective findings could explain Larsgaard's ongoing symptoms and pain.

The South Dakota Supreme Court has recently clarified the major contributing cause standard stating,

> A claimant is not required to prove that his or her work activities are at least 50% attributable to his or her condition in order to show that those activities were a major contributing cause of the condition. A claimant also does not need to show there was a single cause of injury. Accordingly, a claimant is "not required to prove his or her employer was the proximate, direct, or sole cause of his injury." *Smith v. Stan Houston Equip. Co.*, 2013 S.D. 65, ¶ 16, 836 N.W. 2d 647, 652. Further, the claimant's work activities do not have to be "'the' major contributing cause" of the injury; they only have to be "'a' major contributing cause." *Peterson*¸ 2012 S.D. 52, 21, 816 N.W.2d at 850.

> *Hughes v. Dakota Mill and Grain, Inc. and Dakota Truck Underwriters*, 2021 S.D. 31, ¶20.

Thus, Larsgaard does not have to prove his February 10, 2011 injury is "the" major contributing cause of his current condition, but merely that it is "a" major contributing cause. The Department concludes that Larsgaard has shown by medical evidence that the work-related injury was and remains a major contributing cause of his current condition even with disk degeneration prior to injury pursuant to SDCL 62-1-1(7) (b) which provides,

> (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

SDCL 62-1-1 (7)(b).

Last Injurious Exposure Rule

Employer and Insurer have asserted that the incident that occurred at Lowe's in April of 2017 was an independent aggravation of his injury rather than a recurrence. An independent aggravation occurs when the evidence shows that (1) there is a second injury; and (2) the second injury contributed independently to the final disability. *Truck Insurance Exchange v. CNA*, 2001 S.D. 46, ¶ 20, 624 N.W.2d 705, 709. "If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second." *Id* at ¶ 18. Employer and Insurer assert the last injurious exposure rule applies to Larsgaard. "[w]hen a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or

exposure bearing a causal relation to the disability is usually liable for the entire compensation." *Enger v. FMC*, 1997 S.D. 70, ¶ 12 565 N.W.2d 79, 83.

Employer and Insurer provide that Larsgaard has stated that he was physically able to perform the work when he began working at Lowe's. He had reduced the amount of narcotic medication he was taking down to 5-10 mg a day and his pain was rated at 3 out of 10. Then, after he injured his back lifting and twisting a heavy bag of concrete in April 2017, his pain level rose to an 8 out of 10, and he increased his pain medication dosage from 5-10 mg per day to 30 mg per day. After the Lowe's incident, Larsgaard was also prescribed back injections and prednisone dose packs. He stopped working for Lowe's soon after the incident occurred. Employer and Insurer assert that Larsgaard never returned to baseline after the injury at Lowe's, and he has required increased medication dosages and frequency ever since. They argue this indicates that the Lowe's injury was a specific incident explaining Larsgaard's onset of increased symptoms, not a mere recurrence, and an independent aggravation.

Larsgaard argues that the incident at Lowe's caused a mere recurrence of injury. "In successive injury cases, the original employer/insurer remains liable if the second injury is a mere recurrence of the first." *Enger* at ¶17. At hearing, Larsgaard testified that the incident at Lowe's aggravated his pain and caused it to flare up. Dr. Janssen testified at his deposition that the Lowe's incident caused an increase in symptoms, but then Larsgaard returned to baseline. Larsgaard asserts that the use of pain medication following the Lowe's incident is consistent with an ongoing pattern of increased and decreased usage that began prior to the incident.

The Department must establish whether the incident at Lowe's was merely a recurrence or whether it contributed independently to Larsgaard's current condition and need for treatment. SDCL 62-1-1(7)(c) provides,

> (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.

To determine that the second episode was a 'recurrence' of the prior injury the evidence must show:

(1) There have been persistent symptoms of the injury;

(2) No specific incident that can independently explain the second onset of symptoms.

Paulson v. Black Hills Packing Co., 1996 S.D. 118, ¶ 12, 554 N.W.2d 194, 196.

Following the February 10, 2011 injury Larsgaard spent many years pursuing medical treatment and pain relief. He was prescribed prednisone and both narcotic and non-narcotic pain relievers. He received multiple epidural injections and attended physical therapy. Prior to the injury at Lowe's, Larsgaard's use of narcotic pain relief had decreased, and CNP Schelhaas noted that his lower back symptoms had stabilized. Larsgaard was able to work at Lowe's from January of 2016 to April 21, 2017. Following the injury at Lowe's, Larsgaard's requirement for narcotic pain relief increased, and he was no longer able to continue his employment. Then on August 30, 2017, Larsgaard reported to CNP Schelhaas that his pain had returned to the level it had been prior to his injury. He rated his pain at 4 out of 10. Dr. Janssen testified that after the incident at Lowe's, Larsgaard's pain eventually returned to normal, his treatment regimen did not significantly change, and the post-incident MRI did not show worsening disc herniation

or new pathology. The MRI results countered Dr. Nipper's assumption that the Lowe's incident caused a change in pathology.

From this history, the Department concludes that the incident at Lowe's was merely a recurrence of the previous work injury. Following the incident, Larsgaard required an increase of treatment and pain relief of the sort he had received the years following the February 10, 2011 injury. The pain levels fluctuated over time, but the symptoms were persistent. Then he returned to baseline as noted by CNP Schelhaas. The incident at Lowe's was merely a recurrence of the original February 10, 2011 injury. Employer and Insurer remain responsible for Larsgaard's work injury and need for treatment.

Conclusion:

Larsgaard has proven by a preponderance of the evidence that his work-related injury is and remains a major contributing cause of his current condition. Therefore, his request for benefits related to his February 10, 2011 injury is GRANTED.

Larsgaard is hereby awarded $24,813.40 in past medical expenses plus prejudgment interest.

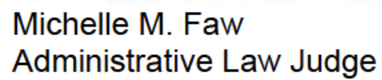
Employer and Insurer are also responsible for Larsgaard's continued medical treatment in accordance with Dr. Janssen's opinion.

Larsgaard 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. CAJ Enterprises, Inc. d/b/a Dakotaland Homes and Insurer, Auto Owners Insurance Company of Pittsburgh shall have an additional twenty (20) days from the date of receipt of Larsgaard's Proposed Findings and Conclusions to submit objections

thereto and/or to submit his 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, Larsgaard shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 23rd day of September, 2021.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION



Michelle M. Faw
Administrative Law Judge