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

KEITH MCCAULEY,
Claimant,

HF No. 189, 2015/16

v.

DECISION

GREEN 4 EVER, INC.,
Employer,

and

NATIONWIDE MUTUAL INSURANCE COMPANY,
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 Joseph Thronson, Administrative Law Judge, on April 26, 2018, in Sioux Falls, South Dakota. Claimant, Keith McCauley, was present and represented by Jami Bishop of Johnson, Janklow, Abdallah, and Reiter. Employer, Green 4 Ever, Inc., and Insurer, Nationwide Mutual Insurance Company, were represented by Sarah Kleber, of Heidman Law Firm.

ISSUES PRESENTED

I. WAS CLAIMANT'S JUNE 2013 INJURY A MAJOR CONTRIBUTING CAUSE OF HIS CURRENT CONDITION?

II. IS CLAIMANT PERMANENTLY AND TOTALLY DISABLED?

FACTS

Claimant, Keith McCauley, was 41 years old at the time of the hearing. He dropped out of high school at in 1993 or 1994 and later completed a GED. Over the course of his adult life, Claimant worked a number of production and retail jobs. At the time of the hearing, Claimant had not completed any other education though he testified that he enrolled in an automotive maintenance program in 2006. Claimant stayed in the program for six months but dropped out before its completion.

In 2007, Claimant suffered a work place injury while employed by John Morrell in Sioux Falls, South Dakota. Claimant was working in the kill house when he fell backwards off a platform landing on his right ankle. Claimant suffered an injury to his brevis tendon. That injury was treated as compensable and Claimant underwent a total of three surgeries to repair the damaged tendon. The last surgery to Claimant's foot was in 2010 after which Claimant did not seek treatment for his foot until his injury in 2013.

Claimant began working for Employer, Green 4 Ever, in approximately 2011 or 2012. Claimant's duties included spraying and aerating lawns. This job required Claimant to be on his feet nearly all day and at times required working with machinery. On June 27, 2013, Claimant suffered an injury to his right foot when he stepped in a hole. That day, Claimant sought medical treatment at Urban Indian Health in Sioux Falls where doctors completed an MRI of Claimant's foot. The MRI showed an injury to Claimant's brevis tendon and doctors placed Claimant on sedentary duty.

Claimant began treating with Dr. David Watts in July 2013. Dr. Watts performed a right ankle arthroscopy with synovectomy of anterolateral ankle and lateral gutter. However, the surgery failed to alleviate Claimant's pain. Dr. Watts then referred Claimant to Dr. James Brunz for pain management issues. Claimant completed physical therapy and was prescribed pain medication. Dr. Watson completed a second surgery on Claimant in March of 2015. After this surgery failed to alleviate Claimant's pain, Claimant underwent a nerve block in June 2015. Dr. Brunz also opined that no further surgery would alleviate Claimant's pain.

For a time after his injury, Employer attempted to accommodate Claimant's work restrictions by allowing him to drive other workers between job sites and stuff envelopes in the office. However, Employer later informed Claimant that it could no longer accommodate him. Since that time, Claimant has applied for several positions but has failed to secure employment.

ANALYSIS

I. WAS CLAIMANT'S JUNE 2013 INJURY A MAJOR CONTRIBUTING CAUSE OF HIS CURRENT CONDITION?

"To be awarded benefits, an employee must first establish that he has suffered an 'injury arising out of and in the course of the employment[.]'" *Orth v. Stoebner & Permann Const., Inc.,* 2006 S.D. 99, ¶ 32, 724 N.W.2d 586, 592 (Quoting SDCL 62-1-1)(7). In addition, "claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability. *Horn v. Dakota Pork*, 2006 S.D. 5, ¶ 14, 709 N.W.2d 38, 41.

> [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.

Orth, at ¶ 34 (internal citations omitted).

To support his claim that his injury was a major contributing cause of his current condition, Claimant relies on his medical records and a letter from Dr. Brunz. In a letter dated July 5, 2017, Claimant's attorney outlines Claimant's medical history from his 2007 injury to the present. The letter pulls verbatim sections of Claimant's medical records detailing his problems with his right ankle. At the end of the letter, Claimant's attorney posed the following question to Dr. Brunz: "Dr. Brunz, do you agree with Dr. Watson that the June 27, 2013, work injury is a major contributing case of Keith's current medical treatment, condition or impairment? "Below this question are two blanks, one followed by the word "yes" and the other with "no". The blank next to "yes" is marked with an "x". The letter signed by Dr. Brunz and dated January 1, 2018.

Claimant also focuses on a note from his medical records from Dr. Watson, dated June 5, 2015 and marked as exhibit 4, in which Dr. Watson noted "I do also feel that [Claimant's] most recent surgery and his chronic pain are related to his prior work comp injury." It is not specified whether the letter is referring to the 2013 injury Claimant suffered while working for Employer or the previous injury from 2007. However, Claimant also submitted a letter from Dr. J. David Watts of CORE Orthopedics dated November 5, 2013 in which Dr. Watts states:

> [Claimant] did have pre-existing problems with his peroneal tendons back form his previous injury… As far as my opinion is concerned, it is not an

> aggravation of [Claimant's] previous underlying tendon problem and was not an aggravation of his previous underlying tendon problem…

Claimant's letters from Dr. Brunz and Dr. Watson are barely sufficient to meet his burden of proving his injury was a major contributing cause of his condition. While Brunz indicates he agrees with the information provided in the letter, he provides no independent explanation as to how Claimant's 2013 injury was a major contributing cause of his current condition. However, Since Employer/Insurer's expert report was excluded, the Department accepts Dr. Brunz's opinion.

At the beginning of the hearing, Claimant made a motion to exclude Employer/Insurer's IME. After Claimant failed to participate in two previous IME's, Employer/Insurer opted instead to complete an independent medical review of Claimant's medical records. Under the scheduling order entered by the Department, Employer/Insurer's designation of an expert was due September 29, 2017. Several e-mails admitted into evidence indicate that Claimant requested Employer/Insurer disclose its expert several times with no definitive answer from Employer/Insurer. The South Dakota Supreme Court dealt with a similar issue in *Lagge v. Corsica Co-Op*, 2004 S.D. 32, ¶ 24, 677 N.W.2d 569, 575. *Lagge* was a worker's compensation case in which the insurer sought to introduce surveillance evidence at the hearing without prior disclosure. The Department excluded the evidence as did the circuit court. In upholding the Department's original ruling, the Court noted:

> Finally, we note that Co-op and Travelers had almost a year from the time of the Prehearing Order to the time of the hearing itself in which they could have made a motion to the Department to amend the Prehearing Order to include the private investigators and videotapes. "Discovery rules are designed 'to compel the production of evidence and to promote, rather than stifle, the truth finding process.'" *Dudley v. Huizenga,* 2003 SD 84, ¶ 11, 667 N.W.2d 644, 648. The

> Workers' Compensation Act is intended to provide injured employees a remedy that is expeditious and relatively inexpensive. *Harn v. Continental Lumber Co.,* 506 N.W.2d 91, 95 (S.D.1993). Allowing Co-op and Travelers to present evidence that was not disclosed in the Prehearing Order would contradict those intentions.

Lagge, at ¶ 24.

The Department acknowledges that unlike *Legge*, Claimant in this case had physical possession of the independent record review before trial. However, Employer/Insurer did not designate Dr. Paskoff as their expert despite requesting two extensions. The reports were included as part of over one thousand pages of documents provided to Claimant during discovery. Claimant could not reasonably have been expected to conclude these reports would be the basis for Employer/Insurer's defense prior to the actual designation of Dr. Paskoff as Employer/Insurer's expert witness, nor could he have been expected to mount a sufficient response on the eve of the hearing. Such disclosure does not comport with the purpose of the State's workers compensation scheme as outlined by the Court.

The Department also acknowledges that on two occasions, Claimant failed to cooperate with Employer/Insurer's attempts to have Dr. Paskoff perform an IME. The first was in May 2014 in which Claimant arrived at Dr. Paskoff's office. Claimant testified that he felt uncomfortable with proceeding because Dr. Paskoff was located in a chiropractor's office. Claimant went home and called Sue Olson, the claims adjuster assigned to his case. Ms. Olson was unavailable, and her supervisor said he would speak with her and get back to Claimant. Claimant also missed a second scheduled IME with Dr. Paskoff after an apparent miscommunication, at which time Employer/Insurer temporarily suspended Claimant's temporary benefits.

Claimant's initial refusal to cooperate no doubt made Employer/Insurer's obtaining an IME more difficult. However, this alone does not excuse Employer/Insurer's late designation of Dr. Paskoff. After Claimant failed to appear for a second scheduled IME with Dr. Paskoff, Employer/Insurer cut off temporary benefits to gain Claimant's compliance, as was Employer/Insurer's right under SDCL 62-7-3. Instead of scheduling a third IME appointment, Employer/Insurer opted for a document review. Dr. Paskoff completed a review of Claimant's records in 2015. In a letter to Claimant dated March 31, 2015, Insurer explained: "We have enclosed the rating report of Dr. Paskoff. This report was based on a review of your records, since you failed to appear for the appointment of March 9, 2015." Employer/Insurer therefore has no excuse for waiting until the eve of trial to designate Dr. Paskoff as its expert in this case.

Employer/Insurer also argues in its brief that Claimant's current condition is because of his prior work injury from 2007. However, Dr. Watson specifically opined in his letter that Claimant's current condition was not from the previous injury. As Employer/insurer provide nothing as a counter-weight to Dr. Watson's letter, the Department accepts his opinion. The Department finds that Claimant has met his burden of proving that his 2013 injury was a major contributing cause of his current condition.

II. IS CLAIMANT PERMANENTLY AND TOTALLY DISABLED?

An award of permanent total disability benefits is governed by SDCL 62-4-53:

> An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to

> secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

SDCL 62-4-52 defines sporadic employment as "employment that does not offer an employee the opportunity to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury."

Rick Ostrander, a vocational rehabilitation specialist, testified at the hearing that Claimant is unable to procure employment which would allow him to earn his current benefit rate. Claimant's work history consisted mostly of entry-level or low-skilled jobs. Ostrander opined that Claimant's condition made holding a full-time job in any of his previous occupations difficult because they required him to be on his feet for extended periods of time. In Ostrander's opinion Claimant education and condition made him "noncompetitive" even in a traditionally sedentary job environment such as operating phones or computers because Claimant could not sit for extended time periods either.

Ostrander's opinion that Claimant was unable to find suitable employment was reinforced by the fact that Claimant qualified for Social Security disability benefits. Ostrander testified that the Social Security Administration's position is that a person under 50 should be able to transfer to any position. The fact that Claimant qualified for

disability under the more stringent guidelines set by the Social Security Administration were significant to Ostrander. It was also Ostrander's opinion that Claimant's condition made it unlikely that he would benefit from any form of training. Ostrander testified that Claimant's condition would make sitting through a training or educational program difficult.

The Department finds Ostrander's testimony that Claimant is unable to find employment which would allow him to earn his weekly benefit rate credible. The burden then shifts to Employer/Insurer to show that some form of employment is available in Claimant's community. Employer/Insurer did not cross-examine Ostrander at the hearing. Neither does Employer/Insurer provide any evidence to refute Ostrander's report and testimony. Employer/Insurer points out that Dr. Brunz advised Claimant not to apply for disability and further opined Claimant was capable of finding full time employment. However, Dr. Brunz is not an employment expert and the Department does not accept his opinion as to Claimant's employability. Ostrander is an expert and consulted Claimant's medical records in formulating his opinion. Claimant has proven that he is completely and permanently disabled.

ORDER

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Employer/Insurer shall have an additional 20 days from the date of receipt of Claimant'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 Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated this 22nd day of August 2018.

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge