

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

BRIAN ALLEN

HF No. 18, 2019/20

Claimant,

v.

DECISION

**O'REILLY AUTO ENTERPRISES LLC,
d/b/a O'REILLY AUTO PARTS.**

Employer,

and

SAFETY NATIONAL CASUALTY CORP,

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 August 31, 2022. Claimant, Brian Allen, was present and represented by Cesar A. Juarez, Ross M. Wright, and Josey Blare of Lynn, Jackson, Shults, & Lebrun, P.C. Employer and Insurer were represented by Jennifer L. Wosje of Woods, Fuller, Shultz & Smith, P.C.

Facts:

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

On and before February 5, 2018, Brian Allen (Allen) was involved in a motor vehicle accident that occurred in the course and scope of his employment with O'Reilly Auto Enterprises, LLC d/b/a O'Reilly Auto Parts (Employer) which was at all times pertinent insured for workers' compensation purposes by Safety National Casualty

Corp. (Insurer). Insurer accepted the claim as compensable and medical treatment was paid under the claim.

The accident occurred in Lyman County, SD, on US Highway 83. Allen had been traveling south on Highway 83 between Pierre and Vivian, SD. As Allen approached the intersection at 238th Street and Highway 83, another driver, Justin Boyle (Boyle), entered the median in between the north and southbound lanes of Highway 83. Boyle failed to yield to Allen's vehicle before crossing Highway 83, and the vehicles collided at the intersection. Allen had been driving the speed limit of 70 mph and Boyle had been crossing the intersection at approximately 10 mph. Boyle was cited for failing to yield at a yield sign.

Following the accident, Allen declined to be transported by ambulance and was taken to Avera Medical Group Pierre (AMG) in Pierre, SD by a Highway Patrol officer who offered him a ride. About two hours after the accident, he was seen by Dr. Darrell Plumage who noted that Allen had complaints of pain in the right hand, left shoulder, lower back, and bilateral knee pain. Dr. Plumage further noted that Allen had a contusion of the chest wall, an abrasion of the right hand, and a visible hematoma to the left cheek and chest wall from the seatbelt strap. X-rays were taken of Allen's chest and right hand which did not show issues with his right hand but did show mild degenerative changes in his spine. Allen was advised to take the next 24 hours off and to use ice for his right hand, and that a heating pad across his lower back would be beneficial. Dr. Plumage directed Allen to follow up with his primary care doctor in the next 5-10 days if his symptoms did not improve.

On February 14, 2018, Allen was seen by PA Darcy McClelland at AMG. The notes for that appointment indicated that Allen was being seen for a routine annual exam and that Allen reported that he continued to be bruised and sore, especially in his right hand following the accident. Allen contacted AMG on February 26, 2018, asking what he could do to help with the ongoing aches, pains, and stiffness he was experiencing since the accident. He mentioned he continued to have knee and elbow pain. PA McClelland ordered physical therapy for Allen. Insurer's case manager (case manager) who was handling Allen's claim canceled his physical therapy appointment scheduled for February 27, 2018

On March 1, 2018, Allen attended physical therapy at Avera St. Mary's Hospital in Pierre. The appointment notes state that Allen had left low back pain around his lower left ribs as well as pain in both knees and elbows. Allen had two more physical therapy sessions in March 2018 before being discharged. Then, on March 19, 2018, Allen was seen by Dr. Anthony Blake at Oahe Chiropractic and Wellness in Pierre. Dr. Blake's note provides that Allen stated he was involved in a motor vehicle accident and immediately after he had pain in his feet, knees, wrists, and stomach to his neck. Allen also expressed his elbows, wrists, and hands had been sore since the accident, and he had experienced pain in both knees. He told Dr. Blake that he had no upper extremity pain or knee problems before the accident. Dr. Blake opined that Allen's injuries were likely to progress without care. Dr. Blake recommended Allen have two visits that week and then one visit weekly for four weeks at which time he would be reevaluated.

Allen was unable to see Dr. Blake until May 21, 2018, as the case manager wanted an opinion from a pain management doctor. The pain management doctor's recommendations were denied pending Insurer's review of Allen's past two years of

medical records. Allen was seen by Dr. Blake several times in May 2018. Then he was unable to be seen by Dr. Blake from June 2018 to November 2018 due to issues with Insurer. He was again able to see Dr. Blake regularly in January 2019 up to the date of the hearing on August 31, 2022.

Allen was seen by Dr. Daniel Rasmussen at AMG on April 20, 2018. Dr. Rasmussen noted that Allen complained of bilateral knee, bilateral elbow, right wrist, bilateral ankle, and back pain. Allen was not sure if he had hit something during the accident, but bruises were present afterward. Allen was again seen by Dr. Rasmussen on May 4, 2018. He complained of increased knee pain, and he had developed pain and numbness in his right elbow radiating down into his hand. Dr. Rasmussen ordered MRIs after the visit. Dr. Rasmussen also referred Allen to physical therapy which he attended in June and July of 2018.

On June 28, 2018, Allen underwent an MRI of his lumbar spine which showed a disk herniation at L5-S1 with compression of the left S1 nerve root. No central canal stenosis or disk degenerative changes were revealed at that disk level. Dr. Rasmussen found the results unremarkable, but the MRI explained some of Allen's symptoms. Allen received an epidural steroid injection and epidural anesthesia for his back and leg pain. An MRI was also done of Allen's left knee which showed a small Baker's cyst, and a small area of cartilage fissure of the medial patellar facet.

On July 24, 2018, Dr. Paul Cederberg conducted an independent medical examination (IME) of Allen at the request of Employer and Insurer. Dr. Cederberg's issued his reports on September 7, 2018. He attributed a cut on Allen's right hand, a neck strain, and a mild low back strain to the February 5, 2018, accident. He noted that Allen had complained of some bilateral knee pain at the time of the accident, but he did not complain

of right elbow pain until approximately two months after the accident. Dr. Cederberg opined that no objective findings warranted further treatment or indicated Allen had any permanent partial disability to his whole person or affected body parts.

Dr. Cederberg also watched surveillance footage of Allen outside of his house in his yard moving a sprinkler, playing with his child at a park, and working at the Cattleman's Club Steakhouse (Cattleman's) in Pierre as a bartender. The surveillance shows Allen mixing drinks, dispensing food and drinks, twisting, bending, lifting, moving quickly about the bar without difficulty. He concluded that Allen shows no difficulties performing activities because of the accident. He further opined that Allen's symptoms were not proportional to the objective exam findings. On September 7, 2018, Employer and Insurer denied further workers' compensation benefits to Allen based on Dr. Cederberg's IME reports.

Allen was seen by Dr. Rasmussen on November 7, 2018. Dr. Rasmussen noted that he had not seen Allen for three months due to Insurer delays. Allen provided him with a copy of Dr. Cederberg's IME. Dr. Rasmussen considered the IME to be extremely brief.

On October 3, 2019, Allen was seen by PA McClelland for continued bilateral elbow and knee pain. The notes indicate that Allen had tried physical therapy, chiropractic therapy, acupuncture therapy, and massage therapy for his pain, but that his overall symptoms remained unchanged. She referred him to Dr. Gonzalo Sanchez in orthopedics at Avera in Pierre.

Allen saw Dr. Sanchez on October 23, 2019. Dr. Sanchez noted Allen had complaints of bilateral knee pain, and that films of his knees showed only subtle early degenerative changes and his joint spaces were generally well maintained. Dr. Sanchez recommended an MRI of the right knee. Allen saw Dr. Sanchez again on November 4,

2019, for his elbow pain which resulted in a recommendation for injections in both elbows. Dr. Sanchez noted that x-rays of Allen's elbows showed subtle calcifications and spur formation, but no acute findings. Allen underwent the recommended MRI of his right knee on November 13, 2019. It showed a horizontal medial meniscus tear and grade 1 patella chondromalacia. Allen saw Dr. Sanchez on November 18, 2019, to go over the MRI results. Allen mentioned he was concerned about his left knee. Dr. Sanchez opined that the left knee MRI performed a year before showed chondromalacia patella which was consistent with a dashboard-type injury from a frontal impact. He further opined that Allen's right knee showed similar changes, and his right knee medial meniscus showed a compressive-type tear. Dr. Sanchez attributed Allen's symptoms to the tear and a patellofemoral contusion. He stated the next treatment option would be right knee arthroscopy and likely partial medial meniscectomy.

Allen attended physical therapy for his elbows at Avera Therapy in Pierre from January 9, 2020, to July 10, 2020. On February 12, 2020, Dr. Sanchez performed surgery on Allen's right knee. Allen's articular cartilage showed no apparent degenerative changes. Allen had a follow-up appointment with Dr. Sanchez on February 20, 2020. He told the doctor that he still had mild pain intermittently in his right knee which was continually improving.

June 14, 2021, Allen was seen by PA McClelland for continued complaints of bilateral elbow pain, with his left being worse than his right. She referred him to Dr. Mark Diamond with Avera Orthopedics in Sioux Falls. Allen saw Dr. Diamond on July 1, 2021. The doctor noted that Allen's elbow x-rays from several years ago showed some enthesopathy, but no significant degenerative changes. Dr. Diamond started Allen on a nitroglycerin patch and a strengthening program noting that if Allen did not experience

relief from those treatments they would discuss percutaneous tenotomy. On August 26, 2021, Dr. Diamond concluded that the conservative treatment had failed. He recommended the tenotomy which was performed on September 14, 2021. At his follow-up on November 1, 2021, Allen indicated he felt 50% better since the surgery.

On August 4, 2021, Allen reached a settlement agreement with Boyle, and his automobile insurance carrier, State Farm, in the amount of \$100,000. The Department of Labor & Regulation (Department) received Allen's Petition for Hearing on August 5, 2019. In their Amended Joint Answer, Employer and Insurer admitted that Allen received a compensable injury, but he had received all the benefits to which he was entitled. They also asserted their statutory right to reimbursement for workers' compensation benefits already paid to Allen pursuant to SDCL § 62-4-39, as well as their statutory right to an offset of like damages from Allen's settlement with Boyle pursuant to SDCL § 62-4-38 against any future workers' compensation benefits that could be determined to be compensable in this case.

Another MRI was performed on Allen's spine on October 29, 2021, which revealed similar results as the 2018 MRI, but it also showed a new paracentral disk herniation at the L2-3 level. On November 10, 2021, Allen received an epidural injection at the L5-S1 level which resulted in about two weeks of relief before the pain returned. He received two more injections in December 2021. The injections gave him 50% improvement for one week.

Allen had also begun to experience left leg pain for which Allen saw Dr. Joshua Schwind at Avera Orthopedics. On February 15, 2022, Dr. Schwind noted that Allen's pain was consistent with nerve root irritation due to the disk herniation and stenosis present at L5-S1. He also noted that Allen reasonably did not want to pursue surgical

options. Allen saw Dr. Schwind again on July 6, 2022, for back pain that he also elected to treat with non-surgical options.

As of July 6, 2022, Allen's left elbow was continuing to do well, but he was experiencing pain in his right elbow. On July 20, 2022, Allen was seen by Dr. Sanchez for bilateral knee pain. In his notes, Dr. Sanchez referenced the findings from Allen's knee surgery of cartilage damage and that the cartilage damage in the patellofemoral joint was to be expected after a dashboard-type injury. Dr. Sanchez noted that since the surgery, his mechanical symptoms had improved but he still had pain complaints in his knee. The doctor recommended a diagnostic arthroscopy of the left knee. He opined that most of Allen's problems were from his dashboard injury. Allen had not had the surgery as of the date of hearing.

Dr. Cederberg provided supplemental reports to his IME, on July 28, 2020, and May 24, 2022. In his reports, he opined that he believed Allen did not sustain a dashboard injury, because there had been no bruising when he was seen by Dr. Rasmussen. He did not believe that the injury Allen received was plausible for his right knee or his elbows. He concluded that the accident on February 5, 2018, caused a temporary aggravation of a preexisting degenerative condition on the left L5-S1 which had resolved by the date of the IME.

Allen continued to work for O'Reilly's until October 2019. His salary was \$55,000. He went to work for W.W. Tire without taking time off. At W.W. Tire his salary was \$62,000. Allen began working for Ecolab in April 2020 for \$65,000. Before that accident and through the time of the hearing, Allen also worked as a bartender at Cattlemen's. He typically worked two nights a week from 5 p.m. to 10 p.m. His duties include serving food

and drink to customers, stocking alcohol, cleaning his work area, filling ice, cleaning up food plates, pouring drinks, mixing drinks, serving beer, and washing glasses.

Other facts will be determined as necessary.

Issues:

The issues presented at the hearing were

1. Medical Causation;
 - a. major contributing cause and compensability;
 - b. whether the treatment has been reasonable and necessary;
 - c. whether Allen has reached maximum medical improvement; and
 - d. nature and extent of disability.
2. Whether Employer and Insurer have an offset under SDCL § 62-4-38 or a claim for reimbursement under SDCL § 62-4-39

Medical Causation and Compensability Analysis:

To prevail in this matter, Allen must first prove that his work-related injury is a major contributing cause of his condition. SDCL § 62-1-1(7) provides, in pertinent part:

"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;

The testimony must establish causation to "a reasonable degree of medical probability, not just possibility." *Jewett v. Real Tuff, Inc.*, 2011 S.D. 33, ¶ 23, 800 N.W. 2d 345, 350.

Allen is “not required to prove his 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. He must prove “that employment or employment-related activities [are] a major contributing cause of the condition of which [he] 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). Additionally, the Court has held 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. “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). 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.

Causation is a medical question, and both parties have offered expert medical opinions. “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). Allen has offered the opinions of Dr. Diamond, Dr. Blake, Dr. Sanchez, and Dr. Rasmussen. Employer and Insurer have offered the opinion of Dr. Cederberg. The Department will address each of the body parts to which Allen is claiming injury separately.

Major Contributing Cause and Compensability- Bilateral Knees

Dr. Sanchez first saw Allen on October 23, 2019, and he treated him for bilateral knee pain. He opined that Allen's November 3, 2019, knee MRI showed a compressive-type meniscal tear, and a suprapatellar pouch showing a large medial plica. He testified at his deposition that a medial plica is a vestigial fold of the joint lining that is the primary cause of knee pain in some people, but most of the time it is an incidental finding. He explained that some people have them and some do not. He testified that he reviewed some of Allen's medical records, but he did not review records from before the accident. He opined that there was nothing in the record to indicate a preexisting condition in Allen's knees.

He further testified that he received a depiction of the mechanism of injury from Allen, and the symptoms were consistent with the motor vehicle accident as the mechanism of injury. Dr. Sanchez stated that he treated Allen's right knee which showed a medial meniscal tear and chondromalacia patella. He explained that a medial meniscus tear is either chronic or acute and for individuals older than a teenager, it is generally chronic. He opined that the tear may be associated with the accident, but he could not directly tie them together. He also treated Allen for chondromalacia patella or cartilage damage under the patella. Dr. Sanchez testified that wearing down of the cartilage in the knee may be degenerative and occur as someone ages. However, he opined that Allen's chondromalacia patella was caused by the motor vehicle accident, as that type of accident, a dashboard injury, is a classic mechanism for that injury. He further stated that the condition does not resolve and tends to worsen over a person's lifetime.

At his deposition, Employer and Insurer asked Dr. Sanchez if he was aware that the examination performed by Dr. Plumage shortly after the accident did not indicate any bruising on Allen's knees. Dr. Sanchez was not aware that the notes did not mention bruising. He stated that if the knees had been examined, bruising would be expected if they had hit the dashboard in the accident. However, it was possible for somebody to not show external evidence of injury. He also opined that it was possible that Allen's knees were not examined at the initial visit by Dr. Plumage.

Dr. Rasmussen also treated Allen for bilateral knee pain. He first saw him on April 20, 2018, for knee, elbow, wrist, ankle, and back pain following a motor vehicle accident. Allen was treated by someone else for three years and then returned to Dr. Rasmussen for continued back treatment. At his deposition, Dr. Rasmussen was asked if he regularly treated patients who have been in motor vehicle accidents. He said he did. He also said that Allen had gone over the mechanics of the accident with him, and his symptoms were consistent with such an accident. He opined that after an accident there is initial widespread pain, then as some of the soreness is eliminated, more precise complaints are identifiable. He was asked if he had an opportunity to review Allen's records from before the accident, and he said he had. He did not recall having seen any complaints of knee pain in the prior records. Dr. Rasmussen opined that the motor vehicle accident was a major contributing cause of Allen's condition.

Dr. Cederberg conducted an IME of Allen. His IME reports note that he reviewed records and imaging reports, but they do not mention specific examinations he conducted of Allen's knees during the IME. In his September 7, 2018, IME report, he opined that Allen's knee complaints were due to preexisting degenerative joint disease. He also issued a report on July 28, 2020, in which he opined that the mechanism of

injury for Allen's right knee was not plausible for a meniscal tear and that the synovial plica is a developmental defect of the knee. At deposition, he testified that he did not ask Allen about the mechanism of injury. Dr. Cederberg also mentioned that Dr. Plumage had found bruising on Allen's shoulder but not on his knees. In his IME report on July 28, 2020, he stated that patellofemoral chondromalacia is common in men of Allen's age, and when it occurs from a trauma it is often associated with a fracture of the patella or arthritis. He further explained that chondromalacia is a disease that progresses gradually and is the early stage of arthritis. Through his multiple IME reports, Dr. Cederberg maintained that the February 5, 2018 accident did not remain a major contributing cause of Allen's condition or need for treatment. At his deposition, he opined that the accident was not at all a contributing factor.

From the above medical opinion, the Department is unable to conclude that the meniscal tear or the plica are related to the accident. Dr. Sanchez opined that the meniscal tear in Allen's knee could not be definitively tied to the accident, and Dr. Cederberg agreed. Additionally, the plica is unlikely to be a result of the accident. Thus there does not appear to be sufficient medical opinion to support a conclusion that the meniscal tear or the plica are related to the accident.

Allen's doctors and Dr. Cederberg disagree regarding the chondromalacia. The Department finds Dr. Sanchez's opinion more persuasive in this matter. Dr. Sanchez treated Allen for his bilateral knee pain, and he found the chondromalacia to be consistent with the mechanism of injury. While bruising of the knees would be expected in a dashboard accident, he stated it is possible to have an injury without bruising. Additionally, Dr. Plumage did not note whether he examined Allen's knees, but he did note that Allen was complaining of bilateral knee pain.

In his examination notes, Dr. Rasmussen expressed criticism of the IME conducted by Dr. Cederberg. He was specifically critical of Dr. Cederberg's conclusions regarding Allen's knee due to the lack of palpation of the knee. He stated that the IME was "easily the shortest and least detailed independent medical examination [he had] ever seen." (*Hearing Ex. 1* at AMG PMR 000020). The Department agrees that Dr. Cederberg's IME reports lack an explanation of how he drew his conclusions. His first report dated September 7, 2018, is only four pages long, and the section in which he recounts his examination of Allen's lower extremities is a single paragraph. His only comment specifically about Allen's knees is "He did not have unusual swelling or effusion of the right knee." (*Hearing Ex. 3* at Ex. 1.) Although he also mentions he had "full extension flexion to 120," he does not specify which body part he is referring to with that statement as it also mentions hips. At his deposition, he stated that he conducted a physical orthopedic examination, but he does not clarify what that examination entailed. His report also noted that he reviewed numerous imaging studies done on Allen's knees, but he does not show how those studies informed his opinion. Additionally, in his report, Dr. Cederberg concluded that Allen's knee condition was caused by a pre-existing degenerative condition, but he does not explain how he came to that conclusion. At his deposition, he was asked about the degenerative condition, and he admitted that there were no records or imaging from before the accident indicating Allen had a degenerative condition. The Department does not find Dr. Cederberg's limited and unsupported analysis persuasive regarding Allen's knees.

As the mechanism of injury is consistent with chondromalacia and Allen complained of knee pain immediately following the accident while he did not have knee pain prior, the Department is persuaded that the accident is and remains a major

contributing cause of Allen's need for treatment of his bilateral knee condition. Further, the injury meets the requirements of compensability under SDCL § 62-1-1(7).

Major Contributing Cause and Compensability - Bilateral Elbows

Dr. Diamond treated Allen for his elbow condition. He diagnosed him with common extensor tendinopathy which is generally known as tennis elbow. Dr. Diamond performed an ultrasound-guided tenotomy of Allen's elbow to remove pathologic degenerative tissue. At this deposition, Dr. Diamond testified that tennis elbow is a common overuse syndrome and Allen's x-rays showed small calcifications in the tendon which indicate chronic tendinopathy. However, he also stated that tennis elbow is generally a chronic condition, but it could present more acutely. The x-rays also revealed bone spurs which Dr. Diamond testified is a degenerative process.

Dr. Diamond further testified that it was uncommon for an elbow injury to manifest itself weeks after a motor vehicle accident. He also stated that generally someone in a high-speed motor vehicle accident will experience pain all over and thus focus on areas of extreme pain immediately after the accident. Then days or weeks later, the individual will start focusing on mild to moderately painful areas. Dr. Diamond reviewed Allen's medical records and x-rays. He opined that it was highly likely that the accident remains a major contributing cause because Allen did not complain of elbow pain prior to the accident. While Dr. Diamond stated that he could not say for sure whether the calcifications found on the x-rays were there before the accident, it was very possible they were there but were asymptomatic. Then, he proposed, the accident could have set the process in motion for them to become symptomatic.

Employer and Insurer argue Dr. Diamond lacks foundation because while he concluded that the conditions of Allen's elbow were not indicative of acute injury, he was unable to say the bone spurs were present prior to the accident due to the time between the accident and the x-rays. He testified that calcification could have developed after the accident. He testified that it was possible the motor vehicle accident caused the symptoms related to the calcification. Additionally, Dr. Diamond opined in a letter to Allen's counsel that it was possible Allen had changed his body mechanics due to his other injuries which resulted in his common extensor tendinopathy. Employer and Insurer argue that his conclusions that Allen did not mention the elbow pain because he was focused on other areas of pain and that he changed his body mechanics are merely speculation.

Dr. Sanchez was also asked about Allen's elbow condition. At his deposition, Dr. Sanchez testified that he did not recall reviewing Allen's records from before the accident. Dr. Sanchez opined that tennis elbow, lateral epicondylitis is generally a chronic condition. However, he did not offer an opinion regarding whether the motor vehicle accident was a major contributing cause of Allen's tennis elbow.

Allen was treated by Dr. Rasmussen for bilateral elbow pain. At his deposition, Dr. Rasmussen opined to a reasonable degree of medical certainty that the motor vehicle accident was a major contributing cause of the bilateral elbow pain. He stated that he did not see evidence that Allen had medical visits or imaging related to chronic elbow pain prior to the accident.

Dr. Blake¹ first saw Allen in March of 2018. Allen came to Dr. Blake with complaints of pain throughout his body mainly his back but also bilateral knee and elbow pain. At his deposition, Dr. Blake stated that as far as he knew Allen did not have chronic complaints concerning those body parts prior to the accident. He opined that Allen's symptoms were consistent with someone involved in a high-speed collision. Dr. Blake reviewed some of Allen's medical records but not all of them. At his deposition, he opined that it was common for a patient to wait to seek treatment for one body part when another is hurting worse. He further opined that it would be plausible for an individual to experience pain in the elbows following a high-speed motor vehicle accident.

At the request of Employer and Insurer, Dr. Cederberg performed an independent medical examination on July 24, 2018. At his deposition, he opined that Allen's bilateral elbow conditions are not related to the motor vehicle accident. He testified that Allen had tennis elbow mostly on the right side and that tennis elbow is an age-related degenerative condition that is often related to repetitive motions or overuse. He also reviewed the x-rays taken on November 4, 2019 and opined that they showed subtle calcification and bone spur formation but no acute formations. He further testified that the mechanism of injury did not support an injury to the elbows. Dr. Cederberg had initially stated in his report that Allen did not complain of right elbow pain until approximately two months after the accident. At his deposition, he stated that he had "misdictated" that statement and he likely meant two weeks. However, he was

¹ Allen is the husband of Dr. Blake's wife's cousin.

asked if the difference in time altered his opinion regarding whether the motor vehicle accident was and remains a major contributing cause of Allen's condition and he said that it did not.

Dr. Cederberg also viewed surveillance videos taken of Allen while he was working at Cattleman's as a bartender. He testified that he observed Allen moving quickly, mixing drinks, twisting, and bending at the Cattleman's. He opined that Allen was able to use his elbows and that the bartending activities were likely contributing to his elbow pain.

The Department also finds Allen's medical expert opinions persuasive on the issue of bilateral elbow pain. Allen may have had pre-existing degeneration or calcification in his elbows that were asymptomatic, but as long as the accident combined with the condition to cause or prolong his injury, it would still be compensable under SDCL § 62-1-1(7)(b). Significantly, Allen did not complain of elbow issues until after the accident. He specifically mentioned elbow pain in his call to AMG on February 26, 2018. "[A claimant] must do more than prove that an injury sustained at [his] workplace preceded [his] medical problems. The axiom '*post hoc, ergo propter hoc*,' refers to 'the fallacy of ... confusing sequence with consequence,' and presupposes a false connection between causation and temporal sequence." *Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶ 20, 653 N.W.2d 247, 252. Here, Allen's doctors have shown a probable course of events stemming from the accident and resulting in his condition. Further, both Dr. Diamond and Dr. Blake testified that it was common for an individual to focus on areas of greater pain first and then less painful areas later. Therefore, the fact that Allen did not emphasize his elbow pain immediately

following the accident is not unusual. The course of his complaint of symptoms and treatment supports the doctor's conclusions. The Department is persuaded by the doctors' opinions that the accident is a major contributing cause for Allen's condition and the need for treatment in his elbows. Additionally, the injury meets the requirements of compensability under SDCL § 62-1-1(7).

Major Contributing Cause and Compensability – Back

At deposition, Dr. Rasmussen testified about Allen's claimed back condition. He examined Allen for the first time on April 20, 2018, and he did not find abnormal neurologic findings. Then on November 7, 2018, he again saw Allen and he noted that Allen reported back pain radiating down his left leg. Dr. Rasmussen testified that he was not aware that Allen had reported to his chiropractor that the pain radiating into his legs had resolved. Allen was ultimately diagnosed with an L5-S1 disk herniation. As mentioned above, Dr. Rasmussen did not see Allen for about three years. He performed nerve root block injections to relieve Allen's back symptoms.

Dr. Rasmussen testified that he had reviewed Allen's records from before the accident and he did not recall having seen any records relating to back pain or disk herniation at L5-S1. He opined to a reasonable degree of medical certainty that the accident is the major contributing cause of Allen's disk herniation and bilateral back pain. He opined that the accident caused an acute disk herniation. He further opined that over time everyone will have disk degeneration, but disk herniation takes an additional event such a motor vehicle accident.

Employer and Insurer argue that Allen has been inconsistent on whether he had prior back pain. At the hearing, he testified that he had a work incident at a different

employer that resulted in a little pain in his back. He was asked if he had back or neck pain prior to the accident². He answered:

I don't recall ever having any neck pain. Back pain, I mean, constantly kind of have back pain depending on what you, you know, do of lifting, moving. Nothing specific.

(HT³ at 61-62)

Dr. Blake also treated Allen for chronic back pain. He opined based on his experience treating individuals who had been involved in motor vehicle accidents that the accident was a major contributing cause of Allen's condition. Dr. Blake found it significant that Allen had not required care, including chiropractic care, for his back prior to the accident. He also opined that the accident caused an exacerbation of a preexisting degenerative disease which resulted in back pain and disk herniation.

Dr. Cederberg opined that the disk herniation at L5-S1 is a degenerative condition of the lumbar spine that can occur spontaneously with or without trauma. He further opined that had the accident caused the herniation, Allen would have reported extreme pain to Dr. Plumage following the accident. Additionally, he opined that if Allen had the disk herniation, he would not have been able to move as quickly as he was observed to do in the surveillance video. At most, he felt the accident caused a temporary aggravation of a pre-existing degenerative condition in the low back which was resolved by the date of his IME. Dr. Cederberg concluded that the accident was not a major contributing cause of Allen's back complaints or disk herniation.

² In his answers to interrogatories, Allen was asked if he had ever filed a workers' compensation claim before the February 5, 2018, accident and he answered "no".

³ References to the Hearing Transcript will be denoted with HT.

The Department finds that Dr. Rasmussen and Dr. Blake are more persuasive than Dr. Cederberg. Dr. Rasmussen and Dr. Cederberg agree that Allen was not treated for chronic back pain prior to the incident. Dr. Cederberg's assertion that Allen merely suffered a temporary aggravation which was resolved by the time of the IME does not fit the course of the treatment he has received. As stated above, if the accident aggravated a preexisting condition as Dr. Cederberg and Dr. Blake have proposed, it is still compensable under SDCL § 62-1-1(7)(b).

Whether the treatment has been reasonable and necessary;

The South Dakota Supreme Court has held,

It is in the doctor's province to determine what is necessary or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.

Engel v. Prostrullo Motors, 2003 S.D. 2, ¶ 32, 656 N.W.2d 299, 304 (Citations omitted and emphasis original).

Allen's doctors believe the treatment he has received has been reasonable and necessary to treat his condition. The Department does not find any evidence to support a conclusion to the contrary. Therefore, the Department finds that his treatment has been reasonable and necessary.

Whether Allen has reached maximum medical improvement

Dr. Cederberg opined that Allen reached MMI as of the date of his IME on July 24, 2018. Dr. Rasmussen opined that Allen reached MMI related to the work injury and his back condition on September 20, 2021. However, he explained at deposition, that his opinion that Allen had reached MMI was based on what he knew at the time, and he did not know that Allen was still seeing other physicians for back

treatment. He also stated that, at the time, he did not see any further treatment, but Allen eventually was sent back to him for injections. Therefore, it appears Dr. Rasmussen was lacking the necessary information to make an informed opinion on whether Allen had reached MMI. Dr. Diamond opined that Allen had not reached MMI in his right elbow and he would continue to need treatment. Dr. Blake opined that Allen had not reached MMI, but admitted it was difficult to say as his conditions were chronic and will worsen as he ages. Dr. Sanchez opined that Allen would likely require future treatment for his knee. Considering the record and the medical opinion, the Department finds that Allen has not yet reached MMI for his complained conditions in his knees, elbows, and back.

Nature and Extent of Allen's Disability

Allen claims he is entitled to permanent partial disability (PPD). As Allen has not reached MMI and none of his treating physicians have assigned permanent partial disability ratings for his knees, elbows, or back, the Department finds that the issue of PPD is premature and not ripe for consideration at this time.

Whether Employer and Insurer have an offset under SDCL § 62-4-38 or a claim for reimbursement under SDCL § 62-4-39

In August of 2021, Allen negotiated a settlement for \$100,000 in exchange for the release of all claims against Boyle and his insurance carrier. Per the settlement agreement, \$39,216.35 is being held in Allen's counsel's law firm trust account until the outstanding lien for workers' compensation benefits is satisfied. Allen claims that his medical bills at the time of the hearing totaled \$82,695.28. His net proceeds from the settlement are in the amount of \$60,048.05.

Employer and Insurer assert they are entitled to an offset of the amount of Allen's net proceeds, and that the recovery constitutes "like damages" for which they are entitled to a future offset, under SDCL § 62-4-38.

SDCL § 62-4-38 provides,

Right of action when third person is liable--Election by employee--Offset of recovered damages. If an injury for which compensation is payable under this title has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at the employee's option, either claim compensation or proceed at law against such other person to recover damages or proceed against both the employer and such other person. However, in the event the injured employee recovers any like damages from such other person, the recovered damages shall be an offset against any workers' compensation which the employee would otherwise have been entitled to receive.

Allen contends that his complaint against Boyle asserted claims not only for physical injuries and medical expenses but also non-economic damages including pain and suffering, emotional anguish, and loss of enjoyment of life. He asserts that these damages are not "like damages" under SDCL § 62-4-38, and therefore, Employer and Insurer are not entitled to an offset for them. Additionally, he argues that the total fees, costs, and taxes incurred in obtaining the settlement agreement were \$36,618.62, and any offset should be adjusted to reflect this amount.

The South Dakota Supreme Court (Court) addressed SDCL § 62-4-38 in *Dakota Plains AG Center, LLC v. Smithey*, 2009 S.D. 78, 772 N.W.2d 170. In *Smithey*, an employee's surviving spouse, Marcia, entered into a settlement agreement related to her husband's death. *Id.* at ¶ 5. The workers' compensation insurer, Nationwide, declined to be part of the settlement agreement reached in the wrongful death action. *Id.* After the settlement agreement had been approved

by the federal court, Nationwide moved to reconsider. *Id* at ¶ 8. After the denial of its motions, Nationwide filed for declaratory judgment against Marcia in the First Judicial Circuit. *Id* at ¶ 9. In its petition, Nationwide assert it was entitled to its full requested lien representing the amount it had paid in workers' compensation benefits pursuant to SDCL § 62-4-38. *Id*. Nationwide alleged that the settlement agreement did not allocate between economic and non-economic losses. *Id* at 10. Marcia argued she should be able to present evidence of the value of the non-economic losses. *Id* at ¶ 12.

The holding in *Zoss I* requires the employee or personal representative to proceed under one of two alternative courses of action: either obtain an express allocation in the settlement or a judicial determination of the non-economic losses to which a workers' compensation lien cannot attach.

Id at 170, 180. (quoting *Zoss I*, 1998 S.D. 23, ¶ 13, 575 N.W.2d at 262)

The Court further remanded the matter back to the circuit court for a full evidentiary hearing to resolve the issue of "like damages" related to Marcia's claim of non-economic damages. *Id* at ¶ 30.

Moreover, our statutory scheme does not permit Nationwide a recovery against any portion of the non-economic loss damages obtained by Marcia and her sons in a suit against third party tortfeasors, as Nationwide did not pay workers' compensation benefits that represented an award for these damages.

Id at ¶ 34.

In this matter, as the settlement with Boyle did not specifically allocate which were economic and non-economic damages, the other available course of action would be for Allen to pursue judicial determination of the non-economic losses. At the hearing, Allen, his wife, his father-in-law, and his boss at the Cattleman's testified regarding his alleged non-economic damages. Although the Department found the witness testimony

to be credible, the Department's authority is purely statutory, and it is not provided jurisdiction over tort claims. Allen's personal injury claim was filed in Lyman County, Sixth Judicial Circuit, CIV. No. 19-14, and therefore, that court holds jurisdiction over the determination of economic and non-economic damages in that matter. While SDCL § 62-4-38 provides that Employer and Insurer are entitled to an offset, Allen must proceed in the Sixth Judicial Court for determination of the damages to which the offset would apply. If Allen does not take the issue to the circuit court for allocation, the offset will be presumed to apply to the entire settlement amount less the fees and costs.

Employer and Insurer further contend they are entitled to reimbursement for the workers' compensation benefits already paid in the amount of \$1,169.87 less any amounts owed under statute for pro rata fees and costs associated with Allen's counsel's collection of that amount. Allen asserts that any offset would be reduced by expenses incurred in obtaining the settlement agreement pursuant to SDCL § 62-4-39, including the claim for 35% of the award amount in attorneys' fees plus taxes and expenses. The amount totals \$36, 618.62. Employer and Insurer argue that reducing the offset by the total amount of attorneys' fees, costs, and taxes would result in a windfall for Allen which would not be authorized by statute.

If compensation has been awarded and paid under this title and the employee has recovered damages from another person, the employer having paid the compensation may recover from the employee an amount equal to the amount of compensation paid by the employer to the employee, less the necessary and reasonable expense of collecting the same, which expenses may include an attorney's fee not in excess of thirty-five percent of compensation paid, subject to § 62-7-36.

SDCL § 62-4-39

"[W]orkers' compensation statutes should be construed liberally in favor of injured employees." *Welch v. Auto. Co.*, 528 N.W.2d 406, 409 (S.D. 1995). The plain language

of the statute provides that Employer and Insurer may recover an amount equal to the compensation paid to the employee less the reasonable expenses including attorneys' fees. Therefore, attorneys' fees are not included in Employer and Insurer's potential recovery and shall be subtracted from the total amount of a potential offset and reimbursement.

Conclusion:

Allen has proven by a preponderance of the evidence that the accident on February 5, 2018, was and remains a major contributing cause of his condition and need for treatment in his bilateral knees, bilateral elbows, and back, and that the injuries to those body parts are compensable pursuant to SDCL § 62-1-1(7).

Allen has proven by a preponderance of the evidence that the treatment he received for his bilateral knees, bilateral elbows, and back has been reasonable and necessary.

By a preponderance of the evidence, the Department concludes that Allen has not reached maximum medical improvement. Additionally, the Department finds that the issue of PPD is premature and not ripe for consideration at this time.

SDCL § 62-4-38 provides that Employer and Insurer are entitled to an offset, however, Allen must proceed in the Sixth Judicial Court for determination of the damages and like damages to which the offset would apply before the Department could conclude the appropriate amount of the offset. If Allen does not take the issue to the Circuit Court for allocation, the offset will be presumed to apply to the entire settlement amount less the fees and costs.

Pursuant to SDCL § 62-4-39, Employer and Insurer are entitled to reimbursement less the total of attorneys' fees, costs, and taxes expended in the collection of the amount from the third party.

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

Dated this day of February 21, 2023.

SOUTH DAKOTA DEPARTMENT OF
LABOR & REGULATION



Michelle M. Faw
Administrative Law Judge