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

**MICHAEL ARNESON** **HF No. 1, 2019/20**

**Claimant,**

**v.** **DECISION**

**GR MANAGEMENT, LLC, d/b/a**
**MINERAL PALACE CASINO.**
**Employer,**

**and**

**RISK ADMINISTRATION SERVICES,**

**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 September 14, 2022. Claimant, Michael Arneson, was present and represented by Brad J. Lee, Connor Casey, and Michael S. Beardsley of Beardsley, Jensen, & Lee. Employer and Self-insurer were represented by Charles A. Larson of Boyce Law Firm.

***Facts:***

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

Michael Arneson (Arneson) was born on August 24, 1955. In 1972, Arneson left school to join the United States Navy. He received his GED. 45 Days after enlisting in the Navy, he was honorably discharged due to an issue with his eyesight. He then attended

several six-month courses wherein he achieved training in electrical systems, plumbing, machine operation, and swimming pool systems. He received OSHA training and received multiple professional certifications. Arneson also earned an Associate degree in finance. Arneson applies his education to various occupations.

- From 1974 to 1989, Arneson worked at Atlas Mill as a machine operator and part technician.
- From 1989 to 1991, Arneson worked for Dusheck Trucking as an over-the-road truck driver.
- From 1991 to 2006, Arneson started his own business called Arnie's All Season Repair and Arneson Engine Rebuilders where he rebuilt engines and performed auto repair.
- From 2006 to 2014, Arneson worked for Harley Davidson as head of maintenance and cleaning of machinery.
- From 2014 to 2015, Arneson worked for Rivers Hotel Group as the maintenance manager.

On September 15, 2015, Arneson began working as the maintenance manager for GR Management, LLC, d/b/a Mineral Palace Casino (Employer) which was at all times pertinent to this matter insured for workers' compensation purposes by Risk Administration Services (jointly, Employer and Insurer). His duties included overseeing maintenance personnel, cleaners, and valet; painting, tiling, carpentry, snow removal, lawn care, and miscellaneous cleaning; servicing exhaust units, A/C units, and kitchen equipment; and also monitoring the plumbing and electrical units.

On July 17, 2018, an electrical storm caused a power outage at the Mineral Palace. Arneson checked out the facility and its equipment. He then shut off the equipment with the plan to return in the morning to check everything again. The next morning, on July 18, 2018, Arneson arrived at the Mineral Palace at 6:30 a.m. to assess the damage from the electrical storm. He checked the exhaust fan and then went on the roof to turn off the shunt which cuts power to the fan. After checking there were no shorts in the wires, he turned the breaker on and confirmed all three lines had power. He then went back on the roof to turn the shunt back on. When Arneson touched the shunt, it shorted which caused electrocution. Initially, he did not feel anything but shortly after his hand started to tingle. He removed his gloves and observed that his fingers were burned on his right hand.

Arneson went home, showered, washed his right hand with soap and water, and then applied an antibiotic ointment to his hand before going to the Lead-Deadwood Emergency Department. At the Emergency Department, he reported the burns on his hand as well as a hole in his left foot which represented where the electricity exited his body. He also reported a tingly feeling in the fingertips of his right hand. His doctor noted that his hand complaints were likely to be related to carpal tunnel syndrome. The medical staff performed an electrocardiogram of Arneson's heart which was normal. His heart rate was regular with a normal sinus rhythm. He was sent home with information about electrical injury and burn care, and it was recommended that he change his dressings as directed, apply antibiotic ointment, and to take over-the-counter pain relievers.

On July 20, 2018, Arneson went to Black Hills Orthopedic reporting that he was riding his motorcycle and his thumb, index, and middle fingers went numb. Dr. Zachary Jager examined Arneson and noted the burns on his fingers were improving. He also

discussed with Arneson that the numbness in his middle fingers may be associated with carpal tunnel syndrome. Dr. Jager noted that Arneson did not display any cardiovascular symptoms. Arneson was encouraged to call if his symptoms were not improving, but there was no record he contacted Dr. Jager after that day.

Arneson completed and signed an employee injury report on July 24, 2018. The report did not include any references to heart problems after the electrocution.

Arneson continued to work at the Mineral Palace. Over the next ten or so days after the electrocution incident, he began to feel heart palpitations. He was not concerned about the palpitations until July 30, 2018, when he and his co-worker were moving slot machines at the Mineral Palace. Arneson experienced an episode of supraventricular tachycardia (SVT).

Arneson immediately went to the Lead-Deadwood Emergency Department. His heart rate was 195 beats per minute, blood pressure was only 76/48, and he was experiencing chest pain, dizziness, and heart palpitations. Arneson was then sent to the intensive care unit (ICU) where he was treated for the next two and a half days. Arneson was treated by Dr. Mark Ptacek who noted Arneson had no heart issues until July 30, 2018. Dr. Ptacek noted that the context provided by Arneson for his condition was caffeine.

On July 31, 2018, Arneson was treated by his doctor, Dr. James Holloway, who diagnosed him as suffering from atrial fibrillation (AFib) and hyperthyroidism. Dr. Holloway wrote to Arneson on August 5, 2018, informing him that the echocardiogram showed Arneson’s heart findings were normal, and he was encouraged that Arneson would be able to maintain a normal heart rhythm once his hyperthyroidism was under control.

After being discharged from the hospital, Arneson continued to experience heart palpitations which caused him to feel fatigued. At first, the AFib occurred approximately four times a day which caused Arneson to require rest from a few minutes to half an hour. Arneson's doctors attempted to treat the AFib and episodes of SVT with medications and by destroying his thyroid without success. Arneson had not had any episodes of heart palpitations, thyroid issues, or heart issues prior to the electrocution incident on July 18, 2018. There were no medical records indicating heart complaints prior to July 30, 2018.

On August 22, 2018, Dr. Holloway confirmed that Arneson had hyperthyroidism and Graves' Disease. A week later, he started Arneson on medication to treat hyperthyroidism. Arneson continued to report episodes of AFib and so his medication was adjusted on September 26, 2018. By December 10, 2018, Dr. Holloway noted that Arneson's thyroid levels were normal, and there had been no recent episodes of AFib. Arneson also had increased energy levels and reported no unusual tiredness or fatigue. He was advised to contact the office if he noticed palpitations or rapid heart rate which were signs of too little hyperthyroid medication.

On January 18, 2019, Arneson was provided a heart monitor which monitored his heart rhythm for a continuous 48-hour period. The results were normal, and he reported no symptoms during that time. He did not report having issues with his heart again until March 7, 2019, when he reported an episode of palpitation that had occurred a few days prior. He stated that he had missed his medication two days prior to the episode. He was advised not to miss doses of his medication.

On June 1, 2019, Arneson left his job at Mineral Palace because of the AFib, fatigue, and right-hand numbness led him to conclude he could no longer perform his job

duties. On April 9, 2019, Dr. Holloway noted the results of a Ct Angiogram performed on Arneson revealed a diffuse nonobstructive 20-30% plague throughout all three of his coronary arteries.

On September 17, 2020, Arneson visited Dr. Holloway complaining that he was tired. He stopped taking his medication on August 16, 2020, because they were causing a rash. His hyperthyroidism was no longer regulated. On October 8, 2020, Dr. Holloway noted that Arneson reported his heartbeat would “take off” now and then but did not race. He was back on hyperthyroid medicine. His heart sometimes skipped beats later in the evening, but he did not experience a rapid heart rate. On April 21, 2021, Arneson was treated with radioactive iodine therapy which caused him to develop hypothyroidism instead of hyperthyroidism. On February 24, 2022, Arneson was seen by Dr. John Palmer who noted that he had suffered an electric shock and subsequently developed significant heart arrhythmias. Dr. Palmer noted that Arneson continued to have frequent heart complaints.

Employer and Insurer denied Arneson’s workers’ compensation claim on May 10, 2019. Arneson submitted his Petition for Hearing to the Department of Labor & Regulation on June 28, 2019.

Other facts will be determined as necessary.

***Issues:***

The issues presented at the hearing were

1. Nature and extent of injury;
2. Major contributing cause; and
3. Permanent total disability

***Nature and Extent of Injury and Major Contributing Cause:***

To prevail in this matter, Arneson 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;

Arneson 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). "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 S.D. 1, ¶ 21, 938 N.W.2d 425, 430. "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). Arneson has offered the opinions of Dr. Holloway. Employer and Insurer have offered the opinions of Dr. Brody and Dr. Elkins. The medical experts opined on Arneson's AFib, fatigue, and hand issues. The Department will address the issue of the AFib first.

**Dr. Holloway**

Dr. Holloway graduated from Indiana University Medical School in 1979. He performed an internal medicine residency for the next three years then did a two-year internal medicine fellowship at Johns Hopkins. Dr. Holloway has been a practicing internist at the Deadwood Regional Medical Clinic from 1992 to the present.

Dr. Holloway has been Arneson's primary treating doctor following his electrocution. Prior to his deposition on September 18, 2020, he reviewed all of Arneson's medical records from Regional Health, Black Hills Orthopedic, and Spine Center, as well as the medical records summary identified as Hearing Exhibit 2. At his deposition, Dr. Holloway was asked if he had conducted any independent research related to electrical injuries and AFib. He answered that he had reviewed an online resource called UpToDate Textbooks on Cardiology. He specifically mentioned that he researched electrical injury and cardiac arrhythmias as well as the relationship between thyroid conditions and cardiac arrhythmias including AFib. Dr. Holloway opined that the electrical work injury suffered by Arneson was a major contributing cause of his AFib.

At his deposition, Dr. Holloway also reviewed a form regarding electric shock injury that Arneson was provided when he was discharged from the Lead-Deadwood Emergency Department. The form specifically mentioned that a strong electric shock could harm the heart. It specifically listed the following symptoms: tingling and numbness, very bad pain; skin burns, chest pain; and very fast irregular heartbeat. Dr.

Holloway discussed how the most common injuries that manifest following the passage of an electrical current through the body, are related to the heart because the heart is an electrical organ as well as a muscular organ. He testified that most serious electrical shock injuries occur with a voltage over 600 volts. He also testified that any time there is a passage of electrical current through the body it can cause damage to the cells it passes through. He stated that cellular damage caused by the electrical current can often cause long-term lasting effects. Dr. Holloway provided that he did not know the type of current Arneson was exposed to or the duration of that exposure. Dr. Holloway found it significant that Arneson presented with the AFib a short time after having had the electrical injury. He stated it was very common for people to have rhythm disturbances after an electrical injury. Dr. Holloway testified that AFib may cause issues with dizziness, lightheadedness, and inability to stand. People can get very dizzy or even collapse with AFib.

Dr. Holloway was also asked to discuss the relationship between the work injury and Arneson's thyroid condition. He stated that the thyroid issue was not related to the electrical injury. He also stated that hyperthyroidism is a predisposing factor for the development of AFib, but only about 5 to 15 percent of patients with hyperthyroidism develop AFib. Further, he testified that thyroid issues often present quickly because a person reaches a certain threshold where symptoms occur.

He further testified that he was unaware of any data that would give a specific time for AFib to occur following a shock. He stated that he would not consider AFib occurring a year later to be related, but weeks to a few months afterward, he would probably attribute the AFib at least in a large part to the shock. He opined that it was more likely than not that Arneson would not have developed AFib without the electric

shock, because the majority of people with hyperthyroidism do not develop AFib. Dr. Holloway testified that the fact that Arneson smokes a pack of cigarettes a day probably increased his risk of AFib. Dr. Holloway has not reviewed Arneson's recent medical records since his deposition, and he has not reviewed Dr. Elkins' or Dr. Brody's opinions. Employer and Insurer contend that Dr. Holloway's understanding of the mechanism of injury is flawed because he has mistakenly assumed that Arneson experienced a high-voltage electrical shock. However, Dr. Holloway testified that he did not know the specific voltage or duration of the shock, but he presumed the type of current Arneson was exposed to be a standard outlet with AC current such as would be in a home. Thus, it is not clear from his testimony that he assumed it was high voltage.

**Dr. Brody**

Dr. Brody attended medical school at the University of Minnesota graduating in 1983. He then attended an internal medicine internship at the New England Deaconess Hospital in Boston, Massachusetts for one year. He became a resident of internal medicine at Hennepin County Medical Center at the University of Minnesota for two years and then attended a fellowship in cardiovascular medicine at the West Roxbury VA in Boston for two years. He returned to Hennepin County Medical Center for a cardiology fellowship. Dr. Brody then practiced cardiology in St. Paul, Minnesota. He is also board certified in internal medicine and cardiology.

Dr. Brody performed a review of Arneson's medical records on March 20, 2020. He was also provided supplemental records and was deposed on January 6, 2021. At deposition, Dr. Brody answered no to questions regarding whether he considered himself an expert in treating and testifying about thyroid problems or individuals that had hyperthyroidism that had been subject to electrical shock. Dr. Brody testified at

deposition that he was very familiar with AFib and that of the 100 patients he had seen in the last two months, 32 had AFib. He also stated he was familiar with the issues that can occur with the heart after an electrical shock.

Regarding the July 18, 2018, work-related injury, Dr. Brody addressed the records from the emergency department which did not note abnormal findings or indicate an injury to Arneson's heart. Arneson's EKG was normal which indicated to Dr. Brody that there was no evidence the electrical shock caused structural damage to his heart. Dr. Brody concluded that the electrical shock Arneson experienced was not a major contributing cause of the AFib. He based his opinion on two factors: (1) AFib generally occurs on the same day as the electrical injury; and (2) there are essentially no reports of an association of AFib occurring 12 days after an electrical injury in his research or in his experience as a treating physician. Dr. Brody looked at the results of Arneson's EKG and found that it was normal. He also reviewed Arneson's medical records and found no indication of cardiac symptoms prior to July 30, 2018. He stated there was no evidence that the electrical shock caused any structural heart disease that triggered AFib.

Dr. Brody testified that it may be possible for an electrical injury to cause AFib, but he has seen less than five cases of it happening in his forty years of practice. He also stated that based on his research AFib after the electrical shock was very rare. One study he reviewed stated a .6% chance of getting AFib from an electrical shock. Although, he did find an article concerning a patient who suffered a low-voltage shock and then developed AFib six weeks after the event. Dr. Brody was also asked about hyperthyroidism and AFib. He considered the 10 to 15 percent chance of AFib with hyperthyroidism to be a fairly common thing in medicine. He testified that it was most

likely that Arneson had hyperthyroidism prior to the July 18 incident, and he did not have symptoms or AFib prior to the electrocution. He did not know what caused Arneson's hypothyroidism to become symptomatic and caused him to go into AFib.

**Dr. Elkins**

Dr. Elkins graduated medical school in 1993 at the University of Wisconsin. He then performed a preventative medicine residence at the Loma Linda University Medical Center and was selected as chief resident. He is board certified in occupational medicine and was board certified in preventative medicine. Dr. Elkins practice occupational medicine in Bettendorf, Iowa until he became Medical Director for Occupational medicine at Avera in Sioux Falls, SD in 2004. He practiced at Avera for 12 years. He currently practiced at the Sioux Falls VA hospital and Elkins Medical Services.

Dr. Elkins testified live at the hearing. Dr. Elkins performed a review of all Arneson's available medical records. He also reviewed the depositions of both Dr. Holloway and Dr. Brody. To aid him in forming his opinion, he also researched Graves' Disease, hyperthyroidism, electrical shock injuries, and the incidence of arrhythmias caused by both hyperthyroidism and electrical injuries. He produced three medical record review reports, and all his opinions were provided within a reasonable degree of medical certainty or probability.

He testified that the shock Arneson experienced was DC current, and DC current is less medically destructive than AC current. He opined that had Arneson sustained a heart injury from the electrical shock, he would have had symptoms of damage within the first 12-24 hours following the incident, but he did not show signs of damage or

arrhythmia until twelve days later. He further agreed upon questioning that it was common for people who have developed sustained AFib to have brief “transient palpitations” that they ignore, but then suffer a full-blown AFib episode. (HT 273:20-274:7[1]). Dr. Elkins testified that suffering from Graves’ Disease, along with his age and that he is a white male made Arneson more likely to develop AFib. He added that Arneson’s history as a smoker increased his risk. He further opined that most electrical shock injuries causing serious damage to the body require greater than 600 volts and the shock Arneson received 440 volts. In his opinion, the electrocution was not a major contributing cause of Arneson’s condition, need for treatment, or need for work restrictions. He also stated that it was possible that somebody could experience arrhythmia days after electrocution. He also agreed that an article he referenced to prepare his opinion showed that low-voltage electrocution could cause cardiac injuries. He further conceded that prior to the electrocution, Arneson’s hyperthyroidism and Graves’ disease were asymptomatic. He also testified that Arneson’s condition was worsening, and the reason was unknown.

At hearing, Dr. Elkins was asked a series of questions about his expertise. He answered that he did not consider himself an expert in treating patients with AFib, Graves’ Disease, thyroid problems, or cardiac problems. He was also asked if he had special training in these areas or whether he treated thyroid problems on a continuing basis. His answer indicated that he did not. Arneson contends that due to his lack of expertise in these specific areas, Dr. Elkins is not qualified to testify whether Arneson’s injuries were caused by the electrocution.

[1] References to the hearing transcript will be indicated with “HT”.

**Analysis:**

The Department will first address whether the experts' opinions are supported by the necessary foundation. "The value of the opinion of an expert witness is no better than the facts upon which they are based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Schneider v. S. Dakota Dep't of Transp.*, 2001 S.D. 70, ¶ 16, 628 N.W.2d 725, 730 (citations omitted). Dr. Holloway is Arneson's treating physician and he reviewed medical records prior to his deposition. He has not reviewed records since his deposition or provided an updated opinion. The South Dakota Supreme Court (Court) has clarified that experts are not "required to consider all of a claimant's medical records to establish an adequate foundation for their opinions." *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 38, 984 N.W.2d 127, 138–39. The Department concludes that Dr. Holloway's opinion is based on adequate foundation.

Dr. Brody and Dr. Elkins are not treating physicians, but they have reviewed Arneson's medical records and reports. The Court has held that a non-treating physician's opinion can be more persuasive than the opinion of a treating physician on causation issues. *Helms v. Lynn's Inc.*, 1996 S.D. 8, 542 N.W. 2d 764. Both doctors have sufficient foundation for their opinions.

The Court has held that causation must be proven 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. The data provided by the doctors shows that developing AFib whether due to electrical shock or hyperthyroidism is uncommon. Arneson developed an uncommon condition and the question before the department is whether it is probable that the electrical shock he experienced on July 18, 2018, was a major

contributing cause of that condition. Having reviewed the record and the doctors' opinions, the Department finds that it is probable that the electric shock experienced by Arneson is a major contributing cause of his development of AFib and his current condition.

Dr. Brody and Dr. Elkins opined that it was very rare for AFib to be caused by an electrical shock and had the injury caused the AFib, the symptoms would have appeared soon after the shock. However, both doctors testified that there have been cases of AFib after an electrical shock and cases where an individual's shock related AFib developed later. Regarding the development of Arneson's palpitations, Employer and Insurer point to an employee injury report completed and signed by Arneson on July 24, 2018. The report required Arneson to note all injuries he received from the accident on July 18, 2018. He did not include any references to heart concerns. Arneson testified at the hearing that he was experiencing minor palpitations for the first couple of days following the shock but considered them to be a "fluke." (HT 29:22). Dr. Holloway opined that it was not uncommon for people to disregard those kinds of brief palpitations. He also testified that he had witnessed Arneson minimizing symptoms and failing to report conditions or problems such as when he developed a rash due to a medication. Dr. Elkins also confirmed that it was common for individuals to develop transient palpitations that they ignore. The Department finds Arneson's testimony to be credible and believes that he did experience palpitations that he disregarded until they became serious enough that he went to the emergency department on July 30, 2018.

While Arneson has multiple conditions, traits, and habits that increase the likelihood he would develop AFib such as Graves' disease, his smoking habit, and that

he is a white male, the Department finds that the electrical shock he experienced was a major contributing cause. 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, ¶ 22, 959 N.W.2d 903. Dr. Holloway testified that the most common injuries following an electrical injury are to the heart and such injuries can cause long-term effects. Additionally, he considered the fact Arneson developed heart palpitations within a short time period significant. The Department is persuaded by Dr. Holloway's analysis and his conclusion that it is more likely than not that Arneson developed AFib as a result of the electric shock. Thus, the Department is persuaded that the electrical injury Arneson sustained is a major contributing cause of his current condition.

The Department will next address the issue of Arneson's hand injury. Dr. Holloway opined that the numbness was not the same as it was when it first started, but it was still present. He further testified that Arneson had recovered some function, and his numbness is present but not as bad as it had been when it first started. Dr. Holloway mentioned that Arneson has difficulty with fine motor skills, and he cannot feel things that he is picking up or touching with his dominant hand. This can result in breaking things in the hand. He further stated that Arneson is more likely to drop things due to his lack of feeling. He had observed that Arneson grabs things differently than most people. Specifically, he will not use the tip of his thumb to grab things because he cannot feel it so he uses the thumb joint. Dr. Holloway testified that this could result in future arthritic problems. Arneson is also unable to feel hot and cold well. Dr. Holloway opined that the reduced sense of pain in his hand could result in injury because he would not recognize

pain immediately and could sustain a serious injury due to the lack of sensation. He testified that if a damaged nerve is going to recover, it usually happens within the first six to twelve months, but it can take up to a couple of years. Arneson has experienced partial recovery, but he still has limitations.

Dr. Brody was asked whether he agreed that the work injury was the cause of the numbness Arneson was experiencing after the electrical shock, and he agreed that it was. Dr. Elkins opined that the electrocution was not a major contributing cause of Arneson's hand issue with the possible exception of some fingertip numbness. He stated that Arneson's hand symptoms are inconsistent with electrical injury and his current symptoms are different than what he presented with at the time of the incident. He also testified that Arneson was able to work and ride his motorcycle cross-country following the incident, but he now complains of incoordination which was not present in the days, weeks, and months after the injury. Dr. Elkins opined that Arneson's worsening symptoms cannot be explained by an electrical injury. Dr. Elkins mentioned the possibility of carpal tunnel syndrome due to the distribution of the numbness in Arneson's hand. Arneson has not been diagnosed with carpal tunnel syndrome. He also opined that Arneson did not complain of incoordination initially and that when symptoms change over time the diagnosis should be reconsidered.

The Department is persuaded by Dr. Holloway's testimony that the electrical shock injury is a major contributing cause of Arneson's ongoing issues with numbness and sensation in his right hand. It appears that the electrical shock caused nerve damage that has only partially healed and as of the time of the hearing, he was still experiencing significant issues with his hand. Additionally, the medical record shows

that Arneson has consistently complained of finger numbness and paresthesia since the injury. The electrical injury is a major contributing cause of Arneson's right-hand issues.

***Permanent and Total Disability:***

To make a prima facie showing that he is entitled to odd-lot benefits, Arneson must prove either that due to his physical condition, coupled with his education, training, and age, it is obvious that he is obviously unemployable, or 2) that he is in the kind of continuous severe and debilitating pain which he claims. *Eite v. Rapid City Area Sch. Dist. 51-4*, 2007 SD 95, ¶21, 739 N.W.2d 264, 270-71. (citations omitted). SDCL 62-4-53 provides

> 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 resulting in an insubstantial income," 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. Commission or piece-work pay may or may not be considered sporadic employment depending upon the facts of the individual situation. If a bona fide position is available that has essential functions that

> the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury the employment is not sporadic. The department shall retain jurisdiction over disputes arising under this provision to ensure that any such position is suitable when compared to the employee's former job and that such employment is regularly and continuously available to the employee.

The Court has provided two ways a claimant can make a prima facie showing of entitlement to benefits under the odd-lot category. "(1) claimant is obviously unemployable due to his or her physical condition, coupled with his or her age, training, and experience, or (2) unavailability of suitable employment by showing that he or she has made reasonable efforts to find work and was unsuccessful." *Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, ¶ 25, 956 N.W.2d 812, 820.

**Age, Training, and Experience**

Arneson asserts that he is permanently and totally disabled, obviously unemployable and that his physical condition, education, training, and age place him in the odd-lot total disability category. He was born in 1955 and as of the time of the hearing was 67 years old. He received his GED, and his work history has mainly been hands-on maintenance work, over-the-road trucking, and mechanical repair. He also has an Associate of Arts degree in finance but none of his past jobs have applied the degree.

Employer and Insurer contend that Arneson is not obviously unemployable and his skills as a supervisor are extremely marketable, uncommon, and easily transferrable to different employment opportunities. Additionally, he has an excellent work history and a degree in finance that makes him marketable for sedentary-type work. Arneson also

has a number of licenses including electrical, plumbing, and federal MACS. Arneson continued to work full-time for Employer for over ten months after the accident at which time he voluntarily retired. At the time of his retirement, he had no medical restrictions and he had not requested an accommodation. Arneson testified that he had employees that could help him with certain duties such as heavy work with which he struggled. He was not reprimanded at work for delegating too much to employees and was, in fact, encouraged to do so more often. Employer and Insurer assert these facts indicate that he would have been able to continue in his position as a supervisor. His manager, Diana Prado (Prado), testified that prior to his retirement, Arneson's performance was between good and exceptional for 2018.

Since retiring, Arneson has performed mechanical work on vehicles belonging to his wife or friends. He testified he is able to work on projects using his right hand including working on vehicles and motorcycles. He was also able to help his friends move. At one point, he was able to ride his motorcycle on a trip lasting 15 hours.

**Physical Condition**

Arneson has offered the expert vocational opinion of Tom Audet. Audet spoke with Arneson regarding his limitations and produced a Physical Capacities Form. Audet then asked Dr. Holloway to review the form and sign it if he agreed. The Physical Capacities Form, as signed by Dr. Holloway, reflects Arneson's abilities regarding his right hand as occasional handling, feeling, firm grasping, and pushing or pulling. It further indicates that Arneson can never perform fine finger manipulation or light grasping and that Arneson is able to occasionally bend, squat, kneel, or climb. Arneson's lack of sensation results in an inability to detect heat and cold. Due to the

AFib and his medications, Arneson is at risk while using dangerous machinery. Additionally, Dr. Holloway testified that Arneson could work an eight-hour day if it was within his other restrictions. He also stated if Arneson experiences AFib he has to stop and rest for between five and twenty minutes and it typically occurs three to four times per week. He further testified that on the Physical Capacities Form, the noted limitations regarding standing/ walking and sitting were referring more to individuals in general and not Arneson specifically. Additionally, the medical record shows multiple instances of Arneson reporting experiencing fatigue. Employer and Insurer provided the expert vocational opinion of Jim Carrol who asserted that it was inappropriate for Audet to fill out the form and have Dr. Holloway sign it. He testified that Audet should have sent a blank form for Dr. Holloway to fill out himself. Dr. Elkin's testified that he considered the restrictions indicated on the form were reasonable.

Arneson hired Audet to perform a vocational assessment. Prior to issuing his opinion, Audet reviewed Arneson's file and related exhibits. He also reviewed the depositions of Dr. Holloway, Dr. Elkins, and Dr. Brody as well as the reports of Jim Carroll. He reviewed Arneson's medical records as well. Audet spoke with Arneson on three occasions. He then assessed Arneson's Residual Functional Capacity based on the Physical Capacities Form he discussed with Arneson and was then approved by Dr. Holloway. Audet was unable to find jobs that Arneson could perform with his restrictions, education, and work history. However, he opined that given Arneson's age and restrictions it was futile for him to seek a job and retraining was not feasible. He concluded that Arneson is permanently and totally disabled and not capable of earning

his workers' compensation rate.

The Department concludes that Arneson is obviously unemployable. The Court has guided the Department to consider a claimant's situation in the aggregate. *Billman* at ¶ 41. Arneson has physical limitations that restrict what sorts of jobs he can do involving his hands, and he must take regular, unpredictable breaks of between 10 and 30 minutes. In *Billman*, the Court held, "outside of physically accommodating Billman, an employer would likely have to spend time and resources to train him—a person set to retire in a few years." *Id* at ¶ 39. The same can be said for Arneson who is within the age of retirement and would require training in a new position. Based on these facts, the Department finds that Audet's conclusion that Arneson is permanently and totally disabled is accurate.

However, Department is unable to conclude that Arneson was permanently and totally disabled prior to February 3, 2020, when Dr. Holloway signed the Physical Capacities Form establishing his restrictions. Arneson willingly retired from his position with Employer on June 1, 2019, without any medical restrictions in place and without asking for any accommodations. He had been able to perform the job satisfactorily before retiring from the position. Arneson's coworker, Kurt Hall (Hall) testified that Employer would have been willing to address accommodations he might have needed. During Prado's testimony, she stated that Arneson was a good, reliable worker whose knowledge she considered a valuable asset. Prior to his retirement, he had been delegating more to other staff which was something he had been encouraged to do more often. She stated that he was eligible for rehire. Arneson has not proven that he was permanently and totally disabled between the time he chose to leave his

employment and when Dr. Holloway signed off on the restrictions. Therefore, any benefits he is entitled to regarding past permanent and total disability benefits will not include the time between June 1, 2019, and February 3, 2020. Arneson's past disability benefits shall be calculated from February 3, 2020, at his compensation rate of $575.16 per week. Additionally, as Arneson has met his prima facie showing of permanent and total disability it is unnecessary for the Department to consider the availability of suitable employment in his community.

***Conclusion:***

Arneson has proven by a preponderance of the evidence that the electrical shock he experienced on July 18, 2018, is a major contributing cause of his condition.

Arneson has proven he is permanently and totally disabled and made a prima facie showing of entitlement to benefits under the odd-lot category.

Arneson is entitled to past disability benefits from February 3, 2020, at his compensation rate of $575.16 per week.

Arneson is entitled to ongoing medical and disability benefits unless, and until, Employer and Insurer can show there was a change of condition pursuant to SDCL 62-7-33.

Arneson 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 Arneson'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, Arneson shall submit such Stipulation along with an Order consistent with this Decision.

Dated this day of March 21, 2023.

SOUTH DAKOTA DEPARTMENT OF
LABOR & REGULATION

Michelle M. Faw
Administrative Law Judge