

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

NOHEMI SANCHEZ,

HF No. 27, 2016/17

Claimant,

DECISION

v.

INTERBAKE FOODS, LLC

Employer,

and

**AMERICAN ZURICH INSURANCE
CO.**

Employer,

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 February 17, 2023. Claimant, Nohemi Sanchez, was present and represented by Jolene Nasser of Nasser Law Offices. Employer, Interbake Foods, and Insurer, American Zurich Insurance, was represented by J.G. Shultz of Woods, Fuller, Shultz & Smith.

Background:

1. On or about July 15, 2014, Nohemi Sanchez (Sanchez) suffered a work-related injury while working for Interbake Foods (Employer) which was at all times relevant insured for workers' compensation purposes by American Zurich Insurance (Insurer). Sanchez fell backward off a step stool at her workstation,

striking her back, neck, and head in the fall, and suffering bruising and scrapes to her knees, upper extremities, legs and buttocks. She reported the injury immediately.

Sanchez then took a taxi to obtain urgent medical treatment at Mercy Medical Center once a replacement was found to cover her position. She was seen by Dr. Leonel H. Herrera, at TriState Specialists who ordered a cervical spine CT, which revealed an extruded disc at C4-5 with an abnormal neurological exam that corresponded to the findings.

2. On August 14, 2014, Sanchez was seen by Dr. Herrera for a neurologic follow-up. He noted that she had herniation of the disc in her cervical spine at C4-5 that was causing cord compression and was consistent with her examination and the history of her injury. He considered her condition to be work-related. Dr. Herrera referred Sanchez to Dr. W.O. Samuelson.
3. On August 18, 2014, Dr. Samuelson noted that the mechanism of injury as described by Sanchez was consistent with the signs and symptoms presented. He further noted that the July 15, 2014, events are a major contributing factor in her current diagnosis and level of disability. He prescribed epidural injection, cervical traction, and physical therapy. Dr. Samuelson gave Sanchez a work note that she was meant to be off work until her next appointment.
4. On August 28, 2014, Dr. Herrera recommended that Sanchez continue with the work restrictions provided by Dr. Samuelson. He also recommended bilateral SI joint injections.
5. On September 4, 2014, Dr. Samuelson noted that surgery was planned, and Sanchez was given a work note to be off work until her first follow up visit.

6. On September 19, 2019, Sanchez was seen for an independent medical examination (IME) with Dr. Huy D. Trinh for a second opinion with the option to treat. Dr. Trinh examined Sanchez and concluded that she had experienced only a cervical and lumbar strain as the result of the July 15, 2015, work injury. He was not certain that the posterior central protrusion at C4-5 was the cause of her neck complaints. He recommended physical therapy three times a week for four weeks. He opined that she should be able to resume light duty starting on September 22, 2014, with a lifting restriction of 10 pounds frequently, up to 15 pounds occasionally, minimal overhead work, and no repetitive or sustained trunk flexion/extension. Sanchez also saw Dr. Trinh on October 20, 2014, and November 11, 2014.
7. On November 20, 2014, Sanchez was seen by Dr. Trinh who noted that he believed that her fall on July 15, 2014, caused an aggravation of her pre-existing isthmic spondylolisthesis at L4-5, L5-S1, and foraminal stenosis at L5-S1. In light of Sanchez's persistent disabling pain and failed conservative treatment, he recommended a 360-degree fusion with instrumentation at L4-5-S1. He further noted that he informed Sanchez that her work injury was
8. responsible for 40% of her current back symptoms and the need for surgery, the remaining 60% should be considered related to her pre-existing grade 1 isthmic spondylolisthesis at L4-5 and L5-S1
9. On November 25, 2014, Insurer informed Sanchez that as a result of her testing, treatment, and the opinions of Dr. Trinh, her claim was denied for any medical benefits relative to the requested 360-degree fusion with instrumentation, and

- any medical care for the preexisting isthmic spondylolisthesis at L4-5, L5-S1, and foraminal stenosis at L5-S1 must be submitted to her primary insurance.
10. On March 10, 2015, Sanchez completed a functional capacity evaluation (FCE) which resulted in her being assigned to medium physical demands.
 11. On May 26, 2015, Sanchez was seen by Dr. Grant Shumaker who ordered various imaging tests and attempted conservative care.
 12. On or about August 13, 2015, Dr. Shumaker ordered a lumbar CT which revealed instability and severe left, moderate, right foraminal narrowing and bilateral L5 nerve compression. He recommended a plan to proceed with the L4-S1 pedicle screw fusion.
 13. On October 5, 2015, Dr. Shumaker performed a lumbar laminectomy at L4-5, pedicle screw fusion at L4-5 S1, and lateral fusion of L4-S1.
 14. On October 28-29, 2015, Sanchez was admitted to Mercy Medical Center for low back and right leg pain she described as "excruciating." An MRI showed a fracture of the S1 vertebral body which was treated with bed rest and a brace through December 23, 2015.
 15. On or about December 23, 2015, Sanchez requested a return to work with the March 10, 2015, FCE work restrictions.
 16. On March 7, 2016, Dr. Shumaker recommended proceeding with anterior discectomy and fusion at C4-5.
 17. On March 31, 2016, Dr. Shumaker performed an anterior cervical discectomy and fusion at C4-5. He prescribed physical therapy.

18. From June 13, 2016, to August 4, 2016, Sanchez returned to work with the FCE restrictions. She continued to report low back pain with radiating pain, numbness, and weakness as well as upper extremity symptoms and weakness.
19. On August 5, 2016, Sanchez slipped on a spill in the work cafeteria and fell. She was diagnosed with a contusion and sprain of her knee, an acute myofascial cervical strain. She was taken off work until Dr. Shumaker could examine her.
20. On August 16, 2016, Sanchez submitted a Petition for Workers' Compensation Benefits to the Department of Labor & Regulation (Department).
21. On August 18, 2016, Sanchez was seen by Dr. Shumaker who ordered a CT noting possible non-union at L4.
22. On or about August 19, 2016, Sanchez returned to work with FCE restrictions.
23. On September 8, 2016, Sanchez was seen by Dr. Shumaker who ordered a CT and Lumbar MRI which showed halo formation around L4 screws without evidence of solid lateral mass fusion at L4-L5 interface with screw-bone interface failure.
24. On October 3, 2016, Dr. Shumaker performed a revision of the L3-4 pedicle screw fusion, with removal and replacement of L4 screws, placement of interbody device at L4-5 and lateral mass fusion L4 to L5. He prescribed physical and occupational therapy and a lumbar corset brace post-surgery.
25. On October 15, 2016, Sanchez was seen at the emergency department for increasing low back pain post-surgery. An MRI showed impingement on L5 nerve roots by interbody device.
26. On October 16, 2016, Dr. Shumaker performed an L4-L5 pedicle screw fusion and exploration with repositioning of interbody device.

27. On October 25, 2016, an MRI without contrast was done for severe intractable right leg pain, which showed some signal posterior to the disc space, which was believed to be blood.
28. On November 1, 2016, Dr. Shumaker assessed Sanchez with retropulsion of interbody device at L4-5 with recurrent right leg pain. Urgent surgery was scheduled due to her clinic presentation.
29. On November 4, 2016, Dr. Shumaker performed a surgical exploration of fusion with the removal of inter-body device at L4-L5, and a PICC line for antibiotics was placed. Sanchez was discharged with in-home healthcare and IV antibiotics.
30. On November 18, 2016, due to ongoing infection, Sanchez was admitted to Mercy Medical Center with complaints of nausea and vomiting, diagnosed with acute pancreatitis, hypokalemia, and suspected sepsis managed by an infectious disease specialist.
31. From December 20, 2016, to March of 2017, Dr. Shumaker kept Sanchez off work and continued to treat her issues and pain related to wound infection. She was diagnosed with clostridium difficile treated with PICC line and oral antibiotics. Sanchez continued with in-home physical therapy.
32. On April 11, 2017, Sanchez attended a Witter WorkForce FCE. The results were considered invalid as the findings were not always consistent with anatomical and physiological principles during the evaluation. Sanchez scored positive on 4 of 5 Waddell signs indicating there was a non-organic component to her pain and disability. She passed the Blankenship reliability criteria with a 62% suggesting poor effort that is not necessarily related to pain, impairment, or disability. The FCE results indicate that Sanchez was estimated to be able to work at light

- medium physical demand level on a full-time basis. The notes also reflect that as a high percentage of the validity criteria were failed during the FCE, Sanchez's true functional capacity must be left to professional conjecture.
33. In June 2017, Dr. Chad A. Stadvold, DO limited Sanchez to light-medium job duties based on the FCE.
 34. On August 28, 2017, Sanchez's MRI results showed a small right subarticular foramina disc herniation that was new since the July 15, 2016, MRI. She was put on light duty work by Employer during this time.
 35. On September 12, 2017, Dr. Shumaker noted that Sanchez reported an incident of horseplay that happened at work on September 7, 2017, that aggravated her neck, thoracic, and lumbar spine pain. He referred her to Dr. Frederick C. Fisher as a potential candidate for spinal cord stimulator.
 36. On October 30, 2017, Dr. Fisher installed a trial spinal cord stimulator. Sanchez's pain reduced by 5% initially, and 30% by November 2, 2017.
 37. On December 12, 2017, Employer sent a letter to Sanchez informing her that there were no jobs that would meet her permanent restrictions or her inability to meet overtime requirements. The letter stated she would be put on leave of absence for up to two years and that she may be eligible for up to twelve weeks of short-term disability and other benefits. She was invited to contact Employer if her circumstances changed.
 38. On January 3, 2018, Dr. Shumaker performed a surgical placement of an epidural spinal stimulator electrode via T8 laminotomy.

39. By October 2017, Dr. Stadvold further limited Sanchez to light duty only. In that month, Dr. David G. Wolff advised Sanchez that she needed one day off for every six days she worked.
40. By February 8, 2018, Dr. Shumaker restricted Sanchez to light duty, no lifting greater than 20 pounds, no repeated bending or twisting, and no overtime.
41. As of April 18, 2019, the Social Security Administration found that Sanchez has a residual functional capacity to perform sedentary work, except she must recline for two hours in an eight-hour day. She cannot perform bending, stooping, kneeling, crawling, climbing or the use of ladders. Sanchez was ultimately awarded SSDI benefits due to the lack of “unskilled sedentary occupational base” jobs that she could perform.
42. On May 22, 2019, Sanchez was seen by Dr. Kristen E. Jost who evaluated her for chronic pain related to the July 15, 2014, work incident. Dr. Jost noted that she felt there was a strong psychogenic component to her pain complaints at that time and that Sanchez would benefit from a dedicated pain psychologist.
43. On March 6, 2020, Daryl Short, DPT performed an FCE on Sanchez the results of which were deemed valid. The findings reflected that she gave consistent effort with all test items, was cooperative, and gave a consistent performance. Short also noted that her heart rate changes, and body mechanic adjustments were reflective of her effort. He concluded that due to her decreased range of motion, strength, and endurance of her neck and lower back and due to her uncoordinated gait pattern Sanchez does not meet the capabilities of the sedentary category of physical demand.

44. On February 15, 2021, Tom Audet produced his expert vocational report which relied on the restrictions from the 2020 FCE performed by Short. He concluded that Sanchez was unemployable, and that retraining would not be feasible.

45. On July 28, 2021, Dr. Bruce Elkins issued a report following his medical record review of Sanchez's medical records.

46. On August 5, 2021, James Carroll produced his expert vocational report which relied on the restrictions from the 2017 FCE as well as the opinions of most of Sanchez's treating physicians and surgeons who found her to be capable of working in the light-to-light medium physical demand on a full-time basis. Sanchez's physician, Dr. Sunil Bansal, concluded that she was not capable of working on a regular basis. Carroll listed six employment opportunities he felt she could perform. Sanchez applied to the six jobs listed by Carroll but was not hired.

Other facts will be determined as necessary.

Issues:

The issues presented at the hearing were:

1. Nature and extent of Sanchez's injuries
2. Entitlement to Permanent and Total Disability

Nature and extent of Sanchez's injuries:

To prevail in this matter, Sanchez must first prove that her work-related injury is a major contributing cause of her 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.

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

Sanchez has been seen by numerous medical practitioners and the Department will consider their opinions and testimony to resolve the medical question of causation. “The testimony of professionals is crucial in establishing this causal relationship because the field

is one in which laymen ordinarily are unqualified to express an opinion.” *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992).

Dr. Samuelson noted that the mechanism of Sanchez’s injury is consistent with the signs and symptoms she presented. He concluded that the July 15, 2014, injury is a major contributing cause of her diagnosis and level of disability. Dr. Herrera opined that Sanchez had a herniated disc in her cervical spine at C4-5 that was causing cord compression and was consistent with her examination as well as her history of work-related injury. Both Dr. Samuelson and Dr. Herrera pursued conservative treatment in the form of medication, injections, and physical therapy before ultimately recommending surgery for Sanchez’s neck.

Dr. Trinh initially concluded that Sanchez had sustained cervical and lumbar strains due to her work injury and that she could return to work with medium-level restrictions. By November 13, 2014, Dr. Trinh had expanded his diagnosis. He concluded that she had cervical and lumbar strain, isthmic spondylolisthesis at L4-5 and L5-S1, moderately severe bilateral foraminal stenosis at L5-S1, and posterior central disc protrusion at C4-5. On November 20, 2014, Dr. Trinh opined that Sanchez suffered progressive disabling low back pain with a possible component of bilateral intermittent lumbar radiculopathy. He further opined that based on the history provided by Sanchez, he believed her fall on July 15, 2014, caused an aggravation of her pre-existing isthmic spondylolisthesis at L4-5, L5-S1 as well as foraminal stenosis at L5-S1. Following failed conservative treatment, Dr. Trinh recommended a lumbar fusion. He concluded that the work injury was responsible for 40% of her current back symptoms and the necessary surgery. Dr. Herrera, Dr. Samuelson, and Dr. Trinh did not raise concerns related to Sanchez’s psychological condition.

Sanchez was seen by Dr. Shumaker who stated that he did not have paperwork to assess whether her condition was work-related, and thus he deferred the question of work-relatedness to Drs. Samuelson, Herrera, and Trinh. Dr. Shumaker also attempted extensive conservative measures of injections, therapy, and medications, before recommending surgery on Sanchez's cervical and lumbar spine.

Dr. Shumaker performed a lumbar fusion on October 5, 2015, which was complicated by a fracture of Sanchez's S1 vertebral body requiring hospitalization from October 18 to October 31, 2015. On March 20, 2016, Dr. Shumaker performed a C4-5 cervical discectomy and fusion surgery. On August 5, 2016, Sanchez suffered a work-related slip and fall in the employee break room. After the fall she was examined by Dr. Shumaker who identified a non-union in her lumbar fusion site and proceeded to perform a revision surgery on October 3, 2016. An additional surgery was necessary on October 16, 2016, due to hardware migration. The hardware ultimately had to be removed on November 4, 2016, due to infection. Four to five months later, Sanchez returned to Dr. Shumaker. She had been attempting to return to work under the 2017 Witter WorkForce FCE Restrictions and was complaining of significant pain and difficulty functioning in the work environment. Dr. Shumaker referred Sanchez to Dr. Fisher for consideration of a spinal cord stimulator, which was implanted, with Dr. Shumaker's assistance, on January 1, 2018.

Sanchez's primary care physician, Dr. Wolff opined that her work injuries of July 15, 2014, and August 5, 2016, were, and continue to be, a major contributing cause of her conditions and need for treatment for her cervical and lumbar spine. Dr. Wolff further opined that the work injuries are a major contributing cause of Sanchez's physical limitations and resulting disability. On November 15, 2017, Dr. Wolff sent Sanchez a letter restricting her to light duty work, with only occasional lifting/pushing/pulling up to 20 lbs., frequent

lift/push/pull up to 10 lbs., and consistent lift/push/pull only negligible. Dr. Wolff had previously restricted Sanchez to only 8 hours per day, light duty, with one day off for every 6 days worked. He ultimately concluded that Sanchez was not physically capable of regular, gainful employment.

Physical therapist, Collin Wiggins, testified that Sanchez's pain levels are functionally limiting and that he observed weakness which limited her ability to walk and stand. He also stated that the 2020 FCE contained findings that were consistent with his own observations from working with Sanchez for years, as well as Dr. Wolff's opinions, and Dr. Stadvold's recommendations for use of a motorized cart.

Dr. Bansal conducted an IME of Sanchez and her medical records. He opined that Sanchez's work injuries were, and continue to be, a major contributing cause of her condition and need for medical treatment for her cervical and lumbar spine, including all complications and resulting chronic pain. Dr. Bansal concluded in his IME report that Sanchez is not physically capable of returning to regular active employment and he endorsed the restrictions set forth in her valid FCE performed by Short Physical Therapy on March 6, 2020. Employer and Insurer argue that Dr. Bansal's opinion is flawed because Sanchez did not tell him that she was being treated for mental health problems. They also contend that Dr. Bansal did not include the opinion of Dr. Jost that there was a psychogenic component to Sanchez's complaints. Dr. Bansal was asked about whether psychogenic factors would affect his opinions.

Q: Do you feel that neuropsychological reports — let's say there's information you didn't have. Would reading neuropsychological reports change any of your opinions about medical causation or reasonable and necessary care?

A: No. Like I've stated several times in this deposition, she had a spinal mechanical problem that would be dangerous not to perform surgery, regardless of any underlying mental issues.

Bansal Depo 61: 10-20

Dr. Bansal further testified that his conclusions would not change based on any neuropsychological reports as they are based on Sanchez's physical condition including her advanced spondylosis at C4-C5, disc herniation, and neuro foraminal impingement.

Dr. Elkins performed an Independent medical record review of Sanchez's medical records and produced a report dated July 28, 2021. Dr. Elkins concluded that he could not determine within a reasonable degree of medical probability what treatment was reasonable and necessary for Sanchez, because he did not have records related to Sanchez's psychological status. Dr. Elkins asserts that he is missing her past neuropsychological testing which he stated can provide an objective tool to guide both evaluation and treatment of chronic pain. He noted that Sanchez was treated for anxiety and depression. Dr. Elkins also found it significant that Sanchez's Social Security disability benefits were granted partly based on psychological factors. He reports that Sanchez had four separate surgical procedures where neuropsychological testing has been viewed as important to determine the appropriateness and likelihood of success. Dr. Elkins stated that no results of neuropsychological testing had been produced to him for review.

Sanchez asserts that Dr. Elkins had all available neuropsychological testing results, and in his report, he specifically lists a letter written by her counselor, Mary Buhman to Dr. Fisher in support of her proceeding with the spinal cord stimulator trial. He also listed that he reviewed the Disability Determination Services Report by psychologist Michael P. Baker dated April 18, 2018, and the Psychological Evaluation by Lindsey Cutler, NP-C dated April 29, 2019.

Dr. Elkins further opined that there was no objective confirmation of a surgical source of Sanchez's pain before the fusions were performed as the electro-diagnostic

testing that was done was negative and did not confirm the anticipated lumbar or cervical radiculopathies. He concluded that the only identified surgical issue was her pre-existing isthmic spondylolisthesis. Dr. Elkins concluded that treatment cannot be suitable and proper if it is inadequate. He noted that Sanchez suffered a number of complications related to her treatment including retropulsion of the caging used with the lumbar fusion, wound infection, pseudoarthrosis, and migration of the battery of the spinal cord stimulator. While Dr. Elkins admits that he does not have a surgical background, but he noted the unlikelihood of that number of complications occurring if proper surgical procedures were followed and proper patient selection was carried out. He opined that the appropriateness of the pre-surgery screening may be moot if the lumbar fusion was not justified based on Sanchez's psychological state. Dr. Elkins concluded that Sanchez's more recent treatments were not suitable or proper due to incompleteness and the worsening of her condition.

Drs. Samuelson, Herrera, Trinh¹, Shumaker, Wolff, and Bansal all concluded that Sanchez's work injuries are a major contributing cause of her condition and need for treatment. The doctors tried conservative methods to treat Sanchez and ultimately, surgery was considered the best course of action. Dr. Elkins is the only medical expert who has concluded there are insufficient objective findings on imaging to justify surgical intervention. Additionally, regarding alleged psychological factors, the treating surgeons who performed the spinal fusions and the spinal stimulator implantation chose to proceed in Sanchez's neuropsychological state as it was at the time. Sanchez's counselor supported proceeding with the spinal cord stimulator. It appears that Dr. Elkins has based his conclusions on his belief that Sanchez has a psychological element to her condition which none of the other

¹ Dr. Trinh's assessment that 40% of Sanchez's injury indicates that it is a major contributing cause pursuant to the SD Supreme Court's holding in *Hughes*.

doctors considered pertinent. Multiple treating doctors and a history of post-injury imaging, assessment, and treatment support the conclusion that Sanchez's condition is physical and that her work-related injury is a major contributing cause of her condition. Employer and Insurer point to the few instances in the record that reference some sort of psychological element to Sanchez condition. Such as Dr. Jost who felt there was a psychogenic component to Sanchez pain complaints, the report from her April 11, 2017, FCE where the results indicated a non-organic component to her pain and disability, and the granting of her Social Security benefits which were granted at least partially on a psychological element.

Between the two IME doctors, Dr. Bansal's conclusions are best supported and most persuasive. While he did not consider Sanchez's psychological state prior to his deposition, he considered it both during and after ultimately concluding that additional psychological data would not change his opinion which was based on her physical condition. Dr. Bansal's conclusions are also supported by the medical record including all the imaging studies, the effect of conservative treatments, and the conclusions of the other doctors including Dr. Trinh.

Additionally, the South Dakota Supreme Court (Court) in *Hughes*, established that a work incident need only be a major contributing cause. There is no indication from Dr. Jost, the 2017 FCE, or the SSI proceedings that Sanchez's alleged mental issues would stop her work-related injury from being a major contributing cause of her condition or need for treatment. Individuals with mental health concerns are still entitled to workers' compensation benefits if they meet the criteria of arising out of and major contributing cause pursuant to SDCL 62-1-1(7). Sanchez was working in the course and scope of her employment when she suffered falls and the majority of the medical opinion supports the conclusion that her injuries are a major contributing cause of her condition and need for

treatment even considering her pre-existing spondylolisthesis at L4-5, L5-S1, and foraminal stenosis at L5-S1. The Department concludes that Sanchez has proven by a preponderance of the evidence that her work-related injury is a major contributing cause of her current condition, work restrictions, and need for treatment.

Further, Sanchez has proven that her medical treatment, including multiple spinal surgeries, was reasonable and necessary. As noted above, her treating doctors pursued conservative care that was unsuccessful before concluding that surgery was the best option for Sanchez. The second opinion from Dr. Trinh supported the same conclusion. Dr. Trinh recommended a lumbar fusion to treat Sanchez's back due to her persisting pain and failed attempts at conservative treatment. Dr. Elkins has raised concerns about necessity and reasonableness based on the complications she experienced from surgery. The fact that there were issues with the surgical process does not prove that pursuing surgery was not reasonable and necessary. The bulk of the available medical expert opinion found surgery to be necessary to treat Sanchez's symptoms. Therefore, the Department concludes that Sanchez has proven that her treatment, including multiple surgeries, were reasonable and necessary.

Entitlement to Permanent and Total Disability:

Sanchez asserts that due to her injury and restrictions she is permanently and totally disable. SDCL 62-4-53 defines permanent total disability:

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.

If an employee chooses to move to an area to obtain suitable employment that is not available within the employee's community, the employer shall pay moving expenses of household goods not to exceed four weeks of compensation at the rate provided by § 62-4-3.

It is Sanchez's burden to establish a prima facie case that she is in the "odd-lot category"

Tiensvold v. Universal Transp., Inc., 464 N.W.2d 820, 822 (S.D. 1991)

This Court recognizes two avenues by which a claimant can meet his or her prima facie showing of entitlement to odd-lot disability benefits—(1) claimant is obviously unemployable due to his or her physical condition, coupled with his or her age, training, and experience,⁴ 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

The test to determine whether a prima facie case has been established is whether there "are facts in evidence which if unanswered would justify persons of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain."

Eite v. Rapid City Area Sch. Dist. 51-4, 2007 S.D. 95, ¶ 23, 739 N.W.2d 264, 271

As her physical condition, capability, and restrictions are critical to the issue of permanent and total disability, the Department will begin with a summary of the FCEs² Sanchez has undergone.

The March 10, 2015, FCE was performed by Witter WorkForce and took place after Sanchez's July 15, 2014, injury but prior to her surgeries. The results indicated that

² The July 8, 2008, FCE was performed by Human Performance Testing in connection with a right upper extremity injury with a different employer.

Sanchez could work medium physical demand level according to the Dictionary of Occupational Titles. Sanchez scored positive on 3 of 5 Waddell signs and 7 of 21 criteria utilizing Korbon's SARs Protocol, indicating the presence of non-organic signs during the evaluation. She passed 36 of 50 validity criteria during the test which suggested fair effort and borderline valid results and was considered a conservative representation of her current functional abilities. Sanchez self-reported that she was limited to standing and walking for no greater than 10-minute intervals. The recommendation was made that Sanchez returned to work, she would alternate between standing and sitting at least every 30 minutes during the initial phase of job acclimation.

The April 11, 2017, FCE was also performed by Witter WorkForce. The results indicated Sanchez could work restricted, part-time light-medium physical demand level according to the Dictionary of Occupational Titles. The test results were considered invalid because Sanchez's findings were not always consistent with anatomical and physiological principles during the evaluation. She scored 4 of 5 Waddell signs during the test, indicating a non-organic component to her pain and disability. She passed 31 of 50 Blankenship reliability criteria which suggested poor effort that is not necessarily related to pain, impairment, or disability. The report indicated that based on her profile, other data must be considered to help understand her true functional abilities and to assist with medical and vocational planning. Due to the high percentage of validity criteria failed during the evaluation, Sanchez was estimated to be able to work at light-medium physical demand on a full-time basis.

The March 6, 2020, FCE was performed by Daryl Short for WorkWell who found that she provided a valid effort during the examination. Short concluded that if Sanchez's condition did not improve to where she was able to demonstrate increased strength and

endurance of her neck and lower back and to ambulate with a more coordinated gait pattern she is essentially in an unemployable condition. He further concluded that she does not meet the capabilities of the sedentary category of physical demand. He recommended that Sanchez limit material and non-material activities that require reaching out at shoulder height or higher to an occasional basis. Sanchez was recommended to be able to change between sitting, standing, and walking as needed.

Employer and Insurer encourage the Department to consider the results and recommendations from the 2015 and 2017 FCEs over the 2020 FCE performed by Short. They contend that both the 2015 and 2017 results raised questions about Sanchez's ability and the validity of her performance.

Employer and Insurer assert that Witter WorkForce uses specific criteria to assess effort and validity. They contend that Short's FCE did not have such specific test criteria. They further contend that Short did not consider the previous FCE results when forming his report. Short testified that he did not review the previous FCEs prior to his deposition. However, at the deposition, he reviewed the 2017 Witter WorkForce FCE and testified that while his FCE of Sanchez did not involve specific testing to assess effort level he looked for other behaviors to make his assessment.

I look for pain behavior. I look for overreactions. I look for movement patterns of injured body parts . . . I do strength testing, look for deficits, look for movement patterns, not by distraction. Look for general attitude, were they willing to work with me or not, motivations to cooperate. Deliberate use of poor body mechanics to increase stress — again, looking for body mechanics changes that are consistent for what I am looking — based on their injury, yeah. So I'm looking for the majority of those things in my assessment.

Short depo 59:14- 60:2.

He testified that his methods objectively measure an examinee's ability to work and do not merely rely on his or her subjective reports.

They point to another case involving questionable FCE results, *Streeter v. Canton School District*, 2004 S.D. 30. In that case, Streeter underwent an FCE with questionable findings such as “discrepancies between the pain Streeter reported and pain behaviors she exhibited.” *Id* at ¶ 11, 677 N.W.2d 221, 223–24. The South Dakota Supreme Court (Court) found the FCE to be critical in its analysis of the case and whether Streeter was malingering. “A claimant’s credibility may be affected by evidence of ‘malingering.’” “Factors that may indicate malingering include a marked discrepancy between the claimed injury and objective findings by a medical expert, and lack of cooperation during evaluations and during the claimant’s prescribed treatments.” *Id* at ¶ 19, 677 N.W.2d 221, 225 (Citing *Albertson’s*, 2000 SD 47 at ¶¶ 27–29, 610 N.W.2d at 455–456.) Ultimately, the Court found that the Department’s determination that Streeter was not permanently and totally disabled was correct and supported by the evidence including the FCE.

Sanchez’s situation is distinguishable from Streeter’s. In *Streeter*, it appears that there was only one questionable FCE and then medical experts who were unable to define Streeter’s functional capacity. In Sanchez’s case, we have two FCEs with results that raise questions regarding the validity of her effort and ability and one where the results were found to be valid. While Short testified that the FCE he performed did not involve specific criteria to test for effort, his methodology regarding how he assesses validity and effort appears sound. Further, there has been no testimony from an expert in the field of FCEs that has provided evidence that Short’s test was ineffective or improper. The 2020 FCE is the most recent and only one with results deemed to be valid. Additionally, the 2020 FCE is consistent with Dr. Bansal’s physical examination of Sanchez and his review of her medical history. The 2020 FCE is also consistent with the opinions and assessments of Drs. Wolff and Stadvold, or PT Wiggins. Dr. Stadvold recommended Sanchez obtain a motorized

cart for longer distances outside of the home. PT Wiggins recommended Sanchez consider using a cane or walker as needed for ambulation. The Department finds it appropriate to rely on the results of the 2020 FCE as the most recent and most reliable set of permanent physical restrictions for Sanchez.

Sanchez has offered the vocational expert opinion of Tom Audet who provided his report on February 15, 2021. Audet reviewed Sanchez's medical records, FCEs, and also conducted a telephonic interview with her. He relied on the 2020 FCE because it is the most recent and had a valid result. Audet also reviewed Sanchez education and work history as well concluding that she is a high school graduate with a work history mostly in assembly line work which is classified in the OASYS Software Program as medium work. Audet entered Sanchez's information into the system considering the Sioux City metropolitan area job market and the results showed no job that fit her physical and hourly limitations. He specifically considered her limitations with sitting, standing, walking, and reaching out in front of her and using her hands. He testified that even if she could sit all day long, she has never done a sedentary occupation so there would be no semiskilled or skilled sedentary work she could do. He stated that there could be unskilled sedentary jobs. However, those jobs usually involved assembling small parts which would require Sanchez to be able to be seated with her hands out in front of her for most of the day which would not fit her restrictions. Audet did recommend that Sanchez apply for an unskilled sedentary position if she thought she could do it. He was doubtful that such a job would exist as it would likely be an assembly job that would require her to be seated and to have scheduled instead of as-needed breaks.

Audet also testified that his vocational opinion would not change if there was additional information about a psychological or neuropsychological report for Sanchez. He

opined that that psychological factors may affect the validity of an FCE, but a valid FCE will show what a person is physically capable of doing which does not have anything to do with mental abilities or psychology. Audet concluded from his analysis that Sanchez's limitations are physical in nature, and she is unemployable. Employer and Insurer assert that Audet's reliance on the 2020 FCE is misplaced as the validity of the examination was based on Short's opinions rather than specific validity criteria. However, as stated above, Short has testified to how he reaches his conclusions regarding validity and the Department finds it well supported. Audet testified that his opinion was not only based on the 2020 FCE restrictions but also on the fact that Sanchez tried to work under the 2017 FCE and did poorly.

Employer and Insurer have offered the vocational opinion of Jim Carroll who provided his report on August 5, 2021. To perform his assessment, Carroll reviewed Sanchez's medical records, the FCEs, Dr. Elkins's IME, and Audet's report. Carroll noted that Sanchez has gone through multiple FCEs and all but the 2020 FCE placed Sanchez in the light to light-medium physical demand level. He further noted that Sanchez's treating physicians including Dr. Shumaker and Dr. Stadvold allowed her to return to work with light or light-medium duty. The only physician who opined that Sanchez was incapable of working was Dr. Bansal who only saw Sanchez for the IME. Carol concluded that if you believe Dr. Bansal then Sanchez is incapable of working on a regular basis and would thus be incapable of making her compensation rate. If the other treating doctors were believed, then Sanchez is capable of working light to light-medium physical demand on a full-time basis.

Carroll relied on the 2017 FCE to establish Sanchez's work restrictions. As the 2017 FCE limited Sanchez to light-medium restrictions, that is what Carroll used as a basis for his

vocational assessment and job search for Sanchez. However, in addition to the restrictions set by the 2017 FCE, Sanchez's treating physicians, Drs. Shumaker and Stadvold ordered additional restrictions not reflected in that FCE. Dr. Shumaker restricted Sanchez to light duty with no lifting over 20 lbs., no repeated bending or twisting, and no overtime. On March 22, 2018, after Employer informed Sanchez that there were no jobs that would meet her permanent restrictions or her inability to meet overtime requirements, Dr. Shumaker wrote a note advising her to discontinue vocational rehabilitation.

Carroll continued his analysis by applying the opinion of the treating physicians. He found six jobs available that would meet the light to light-medium duty restriction and would meet her compensation rate of \$381.00 a week or the \$388.54 benefit rate cited by Audet. He stated that those six jobs were just a sampling of her potential employment opportunities as she has routinely traveled to work in Sioux City, North Sioux City, and Le Mars so those would all be part of her community as well.

Audet responded to Carroll's suggested jobs and opined that they did not fit the most recent functional evaluation. He stated that the jobs are not sedentary but light. He was critical of the suggested cashier jobs because they would require standing all day and even if a stool was provided, Sanchez still could not perform them due to her being restricted to reaching on an only occasional basis. There would also be bending and lifting beyond her restrictions. Audet was also critical of Sanchez's ability to work at a car dealership as she does not have any computer skills and she would not be able to move as needed.

Sanchez applied to the jobs on Carroll's list of potential employment opportunities based on the 2017 FCE restrictions and some other similar positions. None of the job searches resulted in a job offer to Sanchez, although she did receive one in-person interview. She also reached out to Carroll for further suggestions of positions she could

apply to, and he did not respond. At hearing, Sanchez testified that she would tell potential employers about her medical condition. Audet did not think Sanchez should tell potential employers about her surgeries. He concluded that she should get a job offer first and then explain her condition.

The Department finds Audet's vocational analysis to be more consistent with the medical evidence and the valid 2020 FCE. Carroll did not consider specific medical recommendations such as Dr. Stadvold's recommendation for a motorized cart for longer distances or PT Wiggins's testimony that Sanchez's physical capabilities are more consistent with the 2020 FCE. Audet's opinion is based on the valid 2020 FCE, the medical recommendations, as well as Sanchez's own account of her abilities. Carroll agreed in his report that if the 2020 FCE and Dr. Bansal are correct then Sanchez is incapable of working and earning her compensation rate. As stated above, the Department has concluded the 2020 FCE and Dr. Bansal's opinions are well supported and persuasive. Based on the medical opinion, the 2020 FCE, Dr. Bansal's IME opinion as well as the opinions of various other medical and physical therapy practitioners, and Sanchez's failed attempt to find work that meets her restrictions the Department finds that Sanchez has established a prima facie case of "obvious unemployability." Sanchez has proven that she is entitled to permanent and total disability.

Conclusion:

Sanchez has proven by a preponderance of the evidence that her work injury is a major contributing cause of her current condition and need for treatment.

Sanchez has proven by a preponderance of the evidence that her treatment was reasonable and necessary.

Sanchez has proven by a preponderance of the evidence that she is obviously unemployable under the odd-lot category and is entitled to permanent and total disability.

Sanchez is entitled to the following benefits:

1. Permanent total disability benefits pursuant to SDCL 62-4-7 and 7.1, *et seq.*; past-due benefits in the amount of \$138,702.82 plus \$41,724.00 in pre-judgment interest pursuant to SDCL 21-1-11 through 13.1, *et seq.*, as well as entitlement to future benefits paid weekly;
2. Payment of all past medical expenses pursuant to SDCL 62-4-1, plus interest pursuant to SDCL 21-1-11 through 13.1, *et seq.*, as reflected in the medical bill exhibit and medical bills summary, with consideration for subrogation amounts as appropriate under SDCL 62-1-1.3; and
3. Entitlement to future medical expenses for all work-related medical needs.

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

Dated this 3 day of November 2023.

BY THE DEPARTMENT:



Michelle M. Faw
Administrative Law Judge