

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

KRISTI HELEN THOMPSON,

HF No. 29, 2014/15

Claimant,

v.

DECISION

JC PENNEY,

Employer,

and

NATIONAL UNION FIRE INS. CO. OF PITTSBURG,

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 7-8, 2016, in Sioux Falls, South Dakota. Claimant, Kristi Helen Thompson, was present and represented by Bram Weidenaar of Alvine Weidenaar, LLP, Law Firm. The Employer, JC Penney and Insurer, National Union Fire Ins. Co., of Pittsburg, were represented by Heather Lammers Bogard of Costello, Porter, Hill, Heisterkamp, Bushnell, & Carpenter, LLP, Law Firm.

Legal Issue:

The legal issues presented at hearing are stated as follows:

- a. Whether claimant was injured to the extent she claims on or about February 21, 2011;
- b. Whether claimant is entitled to any worker's compensation benefits, including permanent total disability benefits, permanent partial disability benefits, temporary total disability benefits, and temporary partial disability benefits; and
- c. Whether claimant is entitled to prior and future medical benefits.

Facts:

Based upon the testimony at the hearing and the record, the following facts are found by a preponderance of the evidence:

1. On and before February 21, 2011, Kristi Helen Thompson (Thompson or Claimant) worked for JC Penney (Employer) which was at all times pertinent insured by National Union Fire Insurance Co. of Pittsburg (Insurer) for Worker's Comp purposes. Thompson worked as a manager and supervisor.
2. On February 21, 2011, Thompson was squatting down to put jewelry in a safe. Upon rising, she struck the top of her head on the bottom of a cabinet. Thompson made a timely report to Employer and a First Report of Injury was filed.
3. Also on February 21, 2011, Thompson sought treatment from Steven Clites, D.C. at Brookings Chiropractic for pain in her neck and shoulders.
4. On February 23, 2011, Dr. Clites assessed Thompson with cervical sprain/strain with cervical facet syndrome with associated thoracic myofascial pain secondary to her injury at work.
5. On February 24, 2011, Thompson informed Dr. Clites that she was experiencing tenderness and tightness to her left neck and shoulder as well as some headaches. Dr. Clites treated Thompson with gentle manipulation and myofascial release followed by ultrasound to her left upper trapezius cervical paraspinal trigger point.
6. On February 25, 2011, Thompson returned to Dr. Clites and complained of tenderness to the left side of her neck and upper back.
7. On March 23, 2011, Thompson sought treatment from Chad Munsterman, D.C. Thompson reported soreness and pain in her neck and upper back as well as some headaches to Dr. Munsterman also of Brookings Chiropractic. Dr. Munsterman treated Thompson with manipulation and myofascial release to specific trigger points followed by ultrasound.
8. On March 24, 2011, Thompson returned to Dr. Munsterman complaining of constant pain and headaches since injury. Dr. Munsterman treated Thompson with manipulation, myofascial release followed by acupuncture.
9. On March 25, 2011, Thompson returned to Dr. Munsterman reporting migraines and pain between her shoulder blades. Dr. Munsterman treated Thompson with manipulation, myofascial release followed by acupuncture.
10. On March 29, 2011, Thompson saw Dr. Munsterman for pain on the right side of her neck to her mid back as well as headaches. Dr. Munsterman treated

Thompson with manipulation, myofascial release and electrostimulation to the left side of her neck and shoulder.

11. On April 21, 2011, Thompson returned to Dr. Munsterman with pain on her left side from her neck to mid back. Thompson reported that she continued to have significant pain. Dr. Munsterman documented that Thompson was suffering from cervical sprain strain with cervical thoracic subluxation with myofascial component complicated by possible cervical disc involvement. Dr. Munsterman treated Thompson with manipulation, myofascial release and mechanical cervical traction.
12. On April 26, 2011, Thompson returned to Brookings Chiropractic reporting pain in the left side of from her neck into her left upper back and left should with mild pain in her right mid neck. Thompson was treated with manipulation, myofascial release and mechanical cervical traction.
13. On April 28, 2011, Thompson returned to Dr. Munsterman complaining of pain on the left side of her neck into her left upper back and left shoulder with mild pain in her right mid neck. Thompson was treated with manipulation, myofascial release and mechanical cervical traction.
14. On April 29, 2011, Dr. Munsterman noted Thompson was experiencing pain on the ride side and left sides of her neck with less pain into her shoulder blades. Thompson was treated with manipulation, myofascial release and mechanical cervical traction.
15. On May 2, 2011, Thompson reported to Dr. Munsterman feeling very sore and having pain her neck. Thompson was treated with manipulation and myofascial release, passive stretching and started on isometric strengthening exercises followed by mechanical cervical traction.
16. On July 22, 2011, Thompson underwent an MRI at Sioux Falls Open MRI. The MRI revealed straightening of the cervical spine narrowing at C4/5, C5/6, and C6/7 disc space levels.
17. On July 27, 2011, Thompson returned to Dr. Munsterman complaining of pain to her left side of her neck and upper back and shoulder region which she stated was worse than it had been. Thompson said she had difficulty completing a shift at work due to the pain. Dr. Munsterman assessed Thompson with cervical sprain strain with cervical thoracic subluxations with myofascial component complicated by cervical disc involvement and loss of cervical curve. Dr. Munsterman treated Thompson with manipulation and myofascial release.
18. On August 2, 2011, Thompson followed up with her primary care physician, Dr. Merritt G. Warren. Dr. Warren diagnosed Thompson with neck pain and left shoulder pain, prescribed Mobic and Flexeril and ordered physical therapy.

19. On August 8, 2011, Thompson called Dr. Warren's office to request a note limiting her work hours to day shifts only because her pain increased at night. Dr. Warren provided the requested note to cover four weeks.
20. During August 2011, Thompson participated in five physical therapy sessions with Kip Kludt, PT, at Avera Brookings Medical Clinic. Mr. Kludt evaluated Thompson for left-sided neck pain potentially caused by the injury at JC Penney's. Mr. Kludt noted Thompson demonstrated postural deficit. Mr. Kludt recommended a physical therapy plan that involved seeing Thompson two times a week for four to six weeks for cervical range of motion and postural correction exercises. At these appointments, Thompson stated that her neck continued to both hurt and she was experiencing significant pain at night. Mr. Kludt treated Thompson with ultrasound and therapeutic exercise.
21. On August 18, 2011, Thompson contacted Dr. Warren requesting a note limiting her work hours to 8:00 a.m. to 5:00 p.m. Dr. Warren agreed with this shift through August 26, 2011.
22. On August 30, 2011, Thompson returned to Dr. Warren for a recheck. Dr. Warren stated her neck pain was decreasing slowly with the physical therapy and ordered Thompson to continue the therapy.
23. On October 5, 2011, Employer and Insurer required Thompson to undergo an Independent Medical Examination (IME) with Paul Cederberg, M.D.
24. As a result of the October 5, 2011 examination, Dr. Cederberg produced a report on January 23, 2012. In this report, Dr. Cederberg opined that the February 21, 2012 injury was a major contributing factor for a contusion on Thompson's scalp, neck strain, and a mild closed head injury. Dr. Cederberg also opined that the February 21, 2012, injury was a major contributing cause for Thompson's current condition and the need for medical evaluation and treatment. Dr. Cederberg recommended an MRI for Thompson's neck.
25. On October 10, 2011, Thompson again saw Dr. Warren complaining of severe pain and stiffness in the left side of her neck. Dr. Warren continued Thompson's medications and physical therapy. Dr. Warren took Thompson off work for three days. Thompson attended three additional physical therapy sessions after this visit with Dr. Warren.
26. On October 11 and 14, 2011, began another round of physical therapy for left-sided neck pain. Thompson's treatment consisted of ultrasound to left mid trapezius and cervical paraspinal region and therapeutic exercise.
27. On December 6, 2011, Thompson returned to Dr. Warren complaining of neck pain. Dr. Warren continued Thompson's physical therapy and indicated she could return to work with a 30 lbs. lifting/pushing/pulling restriction.

28. On March 5, 2012, Thompson returned to Dr. Warren claiming she still suffered from severe neck pain. Dr. Warren prescribed Flexeril, warm packs, and Advil. Dr. Warren also ordered an MRI.
29. June 21, 2012, Thompson underwent a second MRI.
30. On August 1, 2012, Thompson was seen by Dr. Muranga. Thompson complained of continued neck pain and numbness into both hands. Thompson was seen by Dr. Muranga who referred her to physical therapy and prescribed Cymbalta.
31. On August 16, 2012, Thompson returned to Dr. Warren with complaint of constant severe neck pain. Thompson rated her pain a 10 out of 10. Dr. Warren referred her to Dr. Ripperda to consider epidural injections, because the physical therapy was not helping her.
32. On October 5, 2012, Employer and Insurer directed Thompson to Dr. Cederberg for a second IME.
33. On October 11, 2012, Dr. Cederberg's produced a report on his October 5 examination of Thompson. Dr. Cederberg opined that the February 21, 2012 injury was not a major contributing cause of Thompson's current condition and it was degeneration of the cervical spine. Dr. Cederberg further opined that Thompson did not require any additional medical treatment, had reached maximum medical improvement, and did not sustain any impairment as a result of her injury. As a result of Dr. Cederberg's report, Insurer denied any further compensation benefits to Thompson.
34. On October 29, 2012, Thompson returned to Dr. Warren. In the exam, Dr. Warren noted that Thompson showed marked tenderness in her paraspinal muscles and over areas of the cervical spine. She also noted that Thompson showed limited range of motion, that her hand grasp, especially the left, was weak, and that she has pain radiating down her left arm. Thompson reported her pain level as a 9 out of 10. Dr. Warren assessed Thompson with neck pain due to disk disease. Dr. Warren provided Thompson with a Work Ability Report taking her off work. Dr. Warren referred Thompson to a neurosurgeon for consultation and renewed her Ultram for pain.
35. On November 20, 2012, Thompson was evaluated by Dr. Wilson Asfora at Sanford Neurosurgery. Dr. Asfora noted left sided neck pain, left sided trapezius and shoulder pain with radiation down to the top of hand. Dr. Asfora noted Thompson was very apprehensive and depressed about her chronic neck pain. Dr. Asfora further noted that Thompson's neck had limited range of motion in all directions associated with cervical paraspinal muscle spasm.
36. On December 20, 2012, a nerve conduction study was conducted.

37. On January 23, 2013, Thompson returned to Dr. Asfora with extremely severe neck pain with radiation to the interscapular region, associated with severe headaches. X-rays revealed no abnormal motion. EMG and nerve conduction studies were consistent with bilateral carpal tunnel syndrome. Upon Dr. Asfora's recommendation, Thompson decided to proceed with an anterior cervical discectomy and fusion of three cervical vertebrae, left carpal tunnel release, and right carpal tunnel release.
38. On February 22, 2013, Dr. Asfora performed a cervical fusion with plating to three cervical vertebrae with an anterior cervical discectomy and fusion with allograft. Dr. Asfora also performed a bone and lift spine plate and right carpal tunnel release.
39. On February 24, 2013, Thompson returned to Dr. Asfora. Dr. Asfora noted Thompson's long history of severe neck pain and headaches. Thompson reported posterior/lateral left neck pain, denied hand pain, and reported not migraine for the first time in two years.
40. On February 28, 2013, Thompson's husband contacted Dr. Asfora because Thompson was having severe shoulder pain and nausea. Dr. Asfora recommended taking medications on schedule to keep ahead of pain and muscle spasms. Dr. Asfora also recommended Zofran for nausea and ordered ultrasound and heat physical therapy.
41. On March 1, 2013, Thompson went to Rachel Rydell, PA for a physical therapy evaluation at Sanford USD Medical Center for muscle spasms of the neck post cervical fusion. Thompson was treated with ultrasound and heat.
42. On March 8, 2013, Thompson returned to Sanford USD Medical Center for physical therapy and received electrical stimulation and ultrasound to bilateral upper traps.
43. On March 12, 2013, Thompson was seen by Dr. Asfora. Thompson states that since the surgery she had not experienced any headaches and was very happy with the outcome of the surgery. She was advised to continue to wear her cervical collar at times. Dr. Asfora returned Thompson to work on March 18, 2013, with a ten pound weight lifting restriction for one month. Thompson rated her pain a 7 out of 10 at that visit.
44. On March 15, 2013, Thompson called Dr. Asfora complaining of shoulder pain. Thompson was advised to continue taking muscle relaxers on schedule as well as using ice and heat.
45. Between March 18 and April 3, 2013, Thompson attended six sessions of physical therapy. Thompson was treated with electrical stimulation, ultrasound, soft tissue mobilization and warm pool therapy.

46. On April 9, 2013, Thompson returned to Dr. Asfora. Thompson stated that since the surgery she had not experienced any headaches. However, she continued to experience some neck discomfort. She had completed a course of physical therapy. Dr. Asfora referred her to Dr. Cho. Dr. Asfora advised Thompson to continue wearing her cervical collar for an additional six weeks at which point she was to resume all previous physical activities.
47. On April 18, 2013, Dr. Cho evaluated Thompson regarding neck pain, upper back pain, and headaches. Dr. Cho documented the injury at JC Penny. Dr. Cho noted surgery had not improved Thompson's constant neck pain, and Thompson was having difficulty sleeping and was anxious and depressed. Dr. Cho recommended more physical therapy and continued use of Hydrocodone and muscle relaxant.
48. On May 22, 2013, Thompson was seen by Dr. Asfora. She stated that she still had residual neck discomfort and had completed a course of physical therapy.
49. On May 28, 2013, Thompson called Dr. Asfora stating that she was not getting any sleep and was in considerable pain at night. Dr. Asfora advised her to discuss her neck and shoulder pain with her physical therapist.
50. Thompson attended fourteen physical therapy sessions with Kent Nelson, PT, at Midwest Pain and Rehabilitation. Throughout the treatment, Thompson complained of severe neck pain, upper back pain, and headaches of the migraine type.
51. On June 18, 2013, Thompson consulted with Dr. Boetel at Sanford Physical Medicine and Rehabilitation Specialist. Dr. Boetel recommended trigger point injections. He performed an injection into Thompson's bilateral levator scapula and right mid trapezius. He planned more injections but had to stop secondary to Thompson's severe pain symptoms.
52. Following the injections, Thompson called Dr. Asfora's office complaining of continued neck and head pain. She was unable to sleep. The symptoms had worsened since the trigger point injection.
53. In September of 2013, Thompson began seeing psychologist, Dr. Shelley Sandbulte.
54. On September 23, 2013, Thompson was seen by Dr. Peter Johnson at Sanford Physical Medicine and Rehabilitation. Dr. Johnson's impression was of neck pain and paresthesia to the right arm.
55. On October 7, 2013, Thompson saw Dr. Boetel. Dr. Boetel noted Thompson has extensive treatment for her neck without improvement.

56. On October 28, 2013, Thompson returned to physical therapy with Kent Nelson. Thompson reported the TENS unit aggravated her symptoms.
57. On November 7, 2013, Thompson saw Dr. Assam for acupuncture treatment.
58. On December 3, 2013, Thompson returned to Sanford Neurosurgery and was seen by Michelle Healy, PA-C for neck pain. Healy ordered a CT of Thompson's cervical spine.
59. On December 10, 2013, following the CT scan, Dr. Asfora noted a failed cervical fusion. Dr. Asfora limited Thompson to working four to six hours a day as tolerated and advised Thompson to follow up with a CT scan in six months. Dr. Asfora also scheduled Thompson more physical therapy.
60. On March 18, 2014, Thompson requested a new note from Dr. Asfora limiting her to working only part time no more than five days per week. Dr. Asfora wanted Thompson to obtain a function capacity evaluation to establish her work restrictions.
61. On June 4, 2014, Thompson returned to Dr. Asfora. The CT scan indicated there was a broken screw at C7, and that there was a non-union at the cervical fusion site. Dr. Asfora continued physical therapy and advised her to work only four hours a day.
62. On June 5, 2014, Dr. Asfora recommended a 10 pound weight restriction, no overhead work, no pushing a lawn mower and to wear a cervical collar with any strenuous activity.
63. On July 9, 2014, Thompson was seen by Michelle Healy, PA-C for continued neck pain and numbness/tingling in both hands.
64. On September 2, 2014 Thompson filed a petition with the Department of Labor and Regulation (Department).
65. On December 2, 2014, Thompson saw Dr. Garnaas from Neurology Associates at the request of Dr. Warren. Dr. Garnaas noted Thompson had been dealing with ongoing chronic cervical myofascial pain with resultant chronic migraines and had very limited mobility and a lot of guarding that perpetuates her symptoms. Secondary sleep issues and reactive depression were noted as contributing factors. Dr. Garnaas administered occipital nerve blocks.
66. On December 3, 2014, Thompson had a CT scan. Following the scan, Thompson saw Dr. Asfora for complaints about severe neck pain. The scan revealed a fracture and lack of fusion.

67. On December 26, 2014, Dr. Asfora performed a surgery to facet joint fusion, bilaterally for three cervical vertebrae. Dr. Asfora indicated Thompson should remain off work for six weeks.
68. On February 25, 2015, Thompson had a follow up appointment with Dr. Asfora. Thompson reported some improvement but was still experiencing neck discomfort. Dr. Asfora indicated that Thompson should wear her cervical collar at all times, continue to use the bone growth stimulator, and take vitamin D and calcium. Dr. Asfora also prescribed Lyrica.
69. On April 8, 2015, Thompson had a CT scan of her cervical spine.
70. On May 8, 2015, Dr. Cederberg again examined Thompson.
71. On May 7, 2016, Thompson returned to Dr. Warren claiming greater fatigue and increased neck pain.
72. Thompson has continued physical therapy at the time of hearing.
73. Other facts may be discussed in analysis below.

Analysis:

- a. Whether claimant was injured to the extent she claims on or about February 21, 2011;
- b. Whether claimant is entitled to any worker's compensation benefits, including permanent total disability benefits, permanent partial disability benefits, temporary total disability benefits, and temporary partial disability benefits; and
- c. Whether claimant is entitled to prior and future medical benefits.

Issue I: Whether claimant was injured to the extent she claims on or about February 21, 2011.

The Department's first inquiry is whether Claimant's work injury on February 21, 2011, is a major contributing cause of her current condition. Thompson, as the claimant, has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry Inc., 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353,358 (SD 1992).

SDCL §62-1-1(7) defines "injury" or "personal injury" as:

[O]nly 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

SDCL §62-1-1 (7).

“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). “A medical expert’s finding of causation cannot be based upon mere possibility or speculation. Instead, “[c]ausation must be established to a reasonable medical probability.” Orth v. Stoeber & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted).

It is not disputed that Claimant suffered a work injury on February 21, 2011. What is in dispute is the extent and severity of Claimant’s injury and any continuing effects that Thompson suffers. Thompson has seen a variety of medical professionals in the time since her injury. Dr. Merritt Warren has been Thompson’s primary physician for many years. Dr. Wilson Asfora performed Thompson’s neck surgery. Dr. Christopher Janssen and Dr. Paul Cederberg each conducted an Independent Medical Examination (IME) of Thompson. Dr. Warren and Dr. Janssen opine that the injury in question is a major contributing cause of Thompson’s current condition. Dr. Cederberg opines that long term degeneration of the cervical spine is the major contributing cause. Dr. Asfora has stated that he believes degeneration to be the “main cause” of Thompson’s condition. The Department finds Dr. Warren and Dr. Janssen’s opinions the more persuasive.

Dr. Warren, as Thompson’s long term primary care physician, is in the best position to note changes in Thompson’s condition over time. Dr. Warren has treated Thompson for a variety of neck injuries and conditions. These injuries ranged from falls to vehicle collisions. Many of these injuries involved a course of muscle relaxants, pain relievers, and various therapies. Each treatment ran its course over a matter of months. In contrast to the previous injuries, Thompson now has had continued pain and treatment for many years. Thompson has visited with Dr. Warren multiple times since her injury. She first saw him for her current condition after she had undergone six months of treatments with the chiropractors at Brookings Chiropractic which included undergoing an MRI. In his deposition, Dr. Warren opined that Thompson has continued to experience severe and debilitating pain that is unlikely to improve over time. He further opined within a reasonable degree of medical certainty that the injury Thompson suffered on February 21, 2011 is the major contributing factor to Thompson’s current condition.

Dr. Janssen examined Thompson on three separate occasions. He was also able to view her medical records. Dr. Janssen also opines that the February 21, 2011 injury is a major contributing factor in Thompson's current condition. In his testimony, he outlined six reasons why he concludes that the injury remains a major contributing factor. First, he does not see a preexisting condition that explains her current condition. She had previous injuries and treatments that exacerbated the degeneration of her cervical spine, but they were resolved. After the February 21, 2011 injury, Thompson continually visited chiropractors, her primary physician, as well as other medical practitioners such as an acupuncturist. She has had ongoing physical therapy and pain medication prescriptions. Second, is the time course of the injury. Thompson began treating within a few days of the injury itself. Third, the mechanism of injury is consistent with the symptoms she now suffers. Without an MRI prior to the injury there is no way to be certain what her condition was prior to the injury. However, from the records and most recent tests, Dr. Janssen concludes that bumping her head on the underside of a surface could, and most likely did, cause the pressure on her cervical spine resulting in her current condition. Fourth, Thompson consistently sought care for her condition following this injury. For prior injuries, including a vehicle accident and falls from ladders, she treated for a short time and then recovered. After the injury on February 21, 2011, Thompson sought repeated treatment and relief for her symptoms. Fifth, Thompson's current condition is, as Dr. Janssen stated in his testimony, "objectively run-down." She worked multiple jobs before the injury and now she asserts that she is only able to work a limited number of hours a day. The sixth and final reason for concluding that the injury remains a major contributing cause of Thompson's current condition is the opinion of two of her doctors, Dr. Warren and Dr. Asfora. Dr. Janssen believed that both doctors had stated that they too believed that the injury is a major contributing cause. When informed by Employer/Insurer at the hearing that Dr. Asfora actually believes that the long term degeneration of the cervical spine is the "main cause" of her condition, Dr. Janssen maintained his opinion in light of the combined factors he had already stated. He assigned her a 21% whole person impairment rating. He further opined that Thompson is currently at maximum medical improvement.

Dr. Cederberg examined Thompson three times. After the first visit, he concluded that the injury on February 21, 2011 was a major contributing factor. However, he altered his opinion after the second visit with Thompson and a review of her medical records. Dr. Cederberg does not agree that the mechanism of injury would cause Thompson's current condition. He believes that the pre-existing degeneration is the major contributing cause of her condition. Dr. Cederberg stated, in support of his theory of her condition, that intermittent periods of episodic pain and then relief are typical of degenerative disc disease. However, Dr. Warren and Dr. Janssen have agreed that Thompson is currently at maximum medical improvement and is unlikely to improve with time. Her current condition and resulting treatment has been ongoing since the injury and would not be considered episodic or intermittent. Dr. Cederberg further opines that the mechanism of injury was not enough to cause the current condition. However, Dr. Janssen and Dr. Asfora disagree. Both doctors believe that such an injury could be sufficient to cause the current condition.

Dr. Asfora performed the surgeries on Thompson. He concluded that the degeneration he saw on the MRI is the main cause of injury. Dr. Asfora expressed uncertainty whether the mechanism of injury was enough to cause necessity for the surgery or Thompson's current condition. He said that if the injury was severe enough it could be, but he did not speak definitively about the issue.

In addition to the medical professionals, Thompson has been seeing a psychologist, Dr. Shelley Sandbulte. Thompson has been attending counseling sessions roughly once a month since September of 2013. Dr. Sandbulte has opined that the injury at JCPenney remains a major contributing cause of Thompson's need for counseling and the diagnosis of generalized anxiety disorder and major depressive disorder. Dr. Sandbulte has stated that Thompson's chronic pain as well as the loss of her ability to work full time has resulted in Thompson's current mental state

All the doctors have provided their medical or psychological opinion to the best of their knowledge and experience. Due to the long-term care of Thompson, access to full medical records, or more thorough explanation of rationale, the Department finds Dr. Warren's and Dr. Janssen's assessments more persuasive. The Department concludes that the injury that occurred on February 11, 2011 is a major contributing cause of Thompson's current condition.

Issue II: Whether claimant is entitled to any worker's compensation benefits, including permanent total disability benefits, permanent partial disability benefits, temporary total disability benefits, and temporary partial disability benefits.

The Department must determine whether Thompson is entitled to permanent total disability benefits (PTD), permanent partial disability benefits (PPD), temporary total disability benefits, and temporary partial disability benefits. It is Thompson's initial burden to establish a prima facie case that she is obviously unemployable. 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.

The South Dakota Supreme Court has recognized at least two avenues by which a claimant may make the required prima facie showing for inclusion in the “odd-lot” category. Eite v. Rapid City Area Sch. Dist. 51-4, 2007 SD 95, ¶21, 739 N.W.2d 264, 270-71.

First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment within claimant’s limitations is actually available in the community. A claimant may show obvious unemployability by: 1) showing that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category, or 2) persuading the trier of fact that he is in the kind of continuous severe and debilitating pain which he claims.

Second, if the claimant’s medical impairment is so limited or specialized in nature that he is not obviously unemployable or regulated to the odd-lot category, then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has made reasonable efforts to find work and was unsuccessful. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant. Even though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

Id. (quoting Wise, 2006 SD 80, ¶28, 721 N.W.2d at 471 (citations omitted)).

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.” Sandner v. Minnehaha County, 2002 SD 123, ¶13, 652 N.W.2d 778, 783. However, the fact that an employee may have suffered a work related injury does not automatically establish entitlement to benefits for his current claimed condition. Darling, 2010 S.D. 4, ¶11, 777 N.W.2d 363, 367.

To establish that Thompson is in the odd-lot disability category, she must prove that “[her] physical condition, in combination with [her] age, training, and experience, and the type of work available in [her] community, causes [her] to be unable to secure anything more than sporadic employment resulting in insubstantial income.” Fair v Nash Finch Company, 2007 SD 16, ¶34, 728 NW .2d 623. Sporadic employment resulting in an insubstantial income is defined in SDCL 62-4-52(2) 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.

At the time of the hearing, Thompson was 53 years old. She has an associate's degree in International Marketing. While in high school, Thompson worked as a babysitter, teacher's aide, fast food worker, and at her family's farm. After high school, Thompson began her career in retail working at various retail stores. At the time of injury, Thompson was working for JCPenney as a manager as well as other side jobs. Following her injury on February 11, 2011, she continued to work for JCPenney until January of 2012. After leaving JCPenney and moving to Sioux Falls, Thompson held a variety of positions. However, she states that her pain and limitations forced her to leave those jobs. Thompson is currently working twenty hours a week in a customer service position at Premier Bankcard.

Since the injury on February 11, 2011, Thompson has had lift and work hour restrictions placed on her by her treating doctor. She has claimed that her chronic pain and physical limitations have kept her from working as many hours and as many jobs as she otherwise would. Employer/Insurer claim Thompson's account of her injury and her subsequent condition are false. Thompson has stated that she bled and passed out after the injury. These claims have been countered by other witnesses including fellow employees at the scene. However, following the rationale applied in regards to causation, in addition to finding Thompson herself credible, the Department does not find these inconsistencies persuasive.

Employer/Insurer offered the testimony of vocational expert James Carroll. Mr. Carroll concluded that Thompson is capable of working full time in sedentary to light level work. However, Mr. Carroll had not met with Thompson prior to making his assessment. He also had not known of the restrictions placed on Thompson by Dr. Warren or that Dr. Asfora had not said Thompson did not require restrictions. Dr. Asfora had insisted Thompson receive a functional capacity evaluation (FCE) before he would place restrictions on Thompson. Mr. Carroll was unaware that Thompson was still receiving treatment at the time of the hearing, and he lacked her most recent medical records. He was also unaware of what medications Thompson had been prescribed and their various side effects. Many of the side effects could affect her ability and function in a work environment. Mr. Carroll's assessment of Thompson is unpersuasive.

Thompson offered the testimony of vocational expert Tom Audet. Mr. Audet met with her in November of 2015. At the meeting, Mr. Audet took a detailed history of Thompson including her education, work history, and medical treatment. From this history, he concluded that because of her chronic, debilitating pain, Thompson is not a candidate for vocational rehab. Due to the pain and the work restrictions, Mr. Audet has concluded that Thompson is not able to earn a wage equal to her compensation rate. He also concluded that given her condition, a good faith work search to find a position that would pay more than her rate would be futile. The fact that Mr. Audet met with Thompson and knew her background leads the Department to find his testimony effectively persuasive in regards to Thompson's ability to work.

Employer/Insurer assert that the lack of an FCE requires the Department to conclude that Thompson is not disabled. However, Thompson's chronic pain and the restrictions applied by Dr. Warren indicate that an FCE is not necessary to make a decision regarding disability. Thompson has met her burden of showing a prima facie case that she is obviously unemployable.

Therefore, the burden shifts to the Employer to show that some suitable work is regularly and continuously available to Thompson. 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)." SDCL 62-4-53. Employer must demonstrate the specific position is "regularly and continuously available" and 'actually open' in 'the community where the claimant is already residing' for persons with *all* of claimant's limitations." *Eite v Rapid City School District* 51-4 739 NW .2d 264, 2007 SD 95 (citing *Shepherd v. Moorman Mfg.*, 467 N.W.2d 916.) Employer/Insurer has not identified any form of suitable work that is regularly available or presented any witnesses, experts or otherwise to refute the evidence presented by Claimant.

The Department finds that Employer/Insurer have not met their burden of showing that suitable work within Claimant's limitations is actually available in the community. Thompson's physical restrictions, chronic pain, and lack of available work within her restrictions to meet or exceed her benefit rate, establishes that Thompson is unable to secure meaningful employment or at least nothing more than sporadic employment resulting in an insubstantial income.

Issue III: Whether claimant is entitled to prior and future medical benefits.

The Court has held "the injury is compensable only if the claimant can prove that his "employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment [.]'" *Orth id*, at 33. Thompson has shown that the injury at JCPenney on February 11, 2011 is a major contributing cause of her current condition.

Thompson has had multiple therapies and treatments since the injury. She summarizes the amount of these past medical treatments as \$347,320.72. However, the record is unclear regarding to which procedures this amount applies. While the Department agrees that Thompson is entitled to prior medical payments for procedures directly related to her work injury, she has failed to adequately show which payment applies to which procedure. There was no testimony at hearing about this issue and Thompson's post hearing brief did not offer an explanation. In order for the Department to make an accurate decision regarding prior medical benefits, Thompson must show to which bills and procedures this amount applies.

Thompson has shown that the injury of February 11, 2011 remains a major contributing cause of her condition. She is entitled to future medical benefits related to this condition and injury. These future medical benefits include medications, therapies, and procedures that are related to her post-injury physical and mental condition.

Conclusion:

Thompson has demonstrated that she is permanently and totally disabled pursuant to SDCL 62-4-53. Thompson's request for permanent total disability benefits is granted and Employer is responsible for payment of permanent total disability benefits to Claimant. As the weekly rate is in dispute, the parties shall include their calculations in the findings of fact and conclusions of law. The Department shall retain jurisdiction as to future and past medical benefits.

Counsel for Claimant 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/Insurer shall have an additional twenty (20) days from the date of receipt of Claimant'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, Claimant shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 24 day of February, 2017.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/Michelle Faw

Michelle M. Faw
Administrative Law Judge