

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

JENNIFER C. SANDERS,

HF No. 35, 2020/21

Claimant,

v.

DECISION

MANPOWER,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Insurer

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on March 30, 2022. Claimant, Jennifer C. Sanders, was present and represented by Bram Weidenaar of Alvine Law Firm. The Employer, Manpower and Insurer, New Hampshire Insurance Company were represented by Charlie Larson of Boyce Law Firm.

Facts:

- 1.** In 2005, Jennifer C. Sanders (Sanders) was seen at Community Health Clinic and Heartland Chiropractic for lower back pain.
- 2.** On March 21, 2005, Sanders' Community Health Clinic records indicate she had a problem with morbid obesity going on for many years and that the back and

knee pain she was experiencing were the usual problems for persons with morbid obesity. Sanders weighed 347 pounds and was 5'5 ½" tall.

3. On April 7, 2005, Sanders reported to Midland clinic complaining of low back pain, and it was recommended that she undergo gastric bypass on April 25, 2005. At that time, Sanders was taking ibuprofen and seeing a chiropractor on a regular basis for her back pain.
4. On August 26, 2005, Sanders reported to Family Health Care complaining of recurrent low back pain and was advised to continue chiropractic care. Sanders did not continue care at that time.
5. On April 28, 2008, Sanders was seen at Community Health Clinic for midback pain. At that time, she was taking over-the-counter pain medication, applying ice, and massage to treat her symptoms. She saw a massage therapist five or six times in 2008 and 2009.
6. In November 2010, Sanders received chiropractic treatment for pain in her L3, L4, and L5 vertebrae.
7. On June 30, 2015, Sanders returned for chiropractic treatment for her lower back, middle back, and neck.
8. In November of 2015, Sanders again reported back pain in the same areas and rated her lower back and/or leg pain as an 8 out of 10.
9. In January 2015, Sanders reported to a plastic surgeon that she had been seeing a chiropractor off and on since 2000 on a bi-monthly basis and had undergone massage therapy every three to four months for the last three years.
10. On May 19, 2017, Sanders was in a motor vehicle collision.

- 11.** On May 23, 2017, she was seen by Dr. Shauna Lafleur at Indian Hills Clinic for back pain, headache, dizziness, and a stiff neck. Dr. Lafleur prescribed cyclobenzaprine, hydrocodone, and physical therapy. Sanders also followed up with chiropractic treatment for lower back pain and left hip pain.
- 12.** On September 18, 2017, Sanders was treated by Dr. Kristin Carlson at Triumph Chiropractic, P.C. for neck, right hip, and back pain, as well as headaches as a result of the automobile collision. Dr. Carlson noted segmental dysfunction of Sanders' spine and loss of segmental range of motion at L3 and L5 levels. Sanders was experiencing bilateral muscle spasms in the L3 and L5 levels of her lumbar spine, and pain in the sacrum and sacral region. Dr. Carlson noted that due to Sanders' deteriorated health and condition, she expected only a partial recovery of symptoms and functional deficits.
- 13.** On September 20, 2017, Dr. Carlson saw Sanders. She provided chiropractic manipulation to the cervical and lumbar spine and noted that Sanders' symptoms had improved.
- 14.** On October 1, 2018, Sanders reported bilateral back pain to Kristen Marrow, NP. Marrow prescribed cyclobenzaprine.
- 15.** On January 15, 2019, Sanders was seen at Horizon Health Care, Inc. complaining of back pain.
- 16.** On September 9, 2019, Sanders was working for Manpower (Employer) which was at all times pertinent insured for workers' compensation purposes by New Hampshire Insurance Company (Insurer). Employer is a temporary work agency that placed Sanders at Polaris. While working, Sanders alleges she felt a popping sensation in her lower back along with pain in her left leg when she

twisted and put an item in a box. Sanders immediately informed Employer of her injury. Employer instructed her to be seen by the employee of Fyzical Physical Therapy who visited the plant. The employee instructed her to apply ice and take ibuprofen.

- 17.** On September 11, 2019, Sanders was seen by Sarah Aurich (APRN-CNP) at the Sanford Clinic. Aurich indicated in her notes that Sanders complained of mid-back pain that had been present intermittently for the past month, but significantly worsened in the prior three days. Sanders was instructed to rest and avoid lifting anything heavy. Sanders denied any specific injury. Aurich prescribed ibuprofen, a Medrol Dosepak, and cyclobenzaprine. She also took Sanders off work from September 13 to September 16, 2019.
- 18.** On September 13, 2019, Sanders returned to Aurich complaining of worsening left side lower back pain into the buttock area. Sanders again denied injury or trauma. Aurich gave Sanders an injection of Toradol, and instructed her to continue the Medrol Dosepak, cyclobenzaprine, and ibuprofen as instructed.
- 19.** On September 26, 2019, Sanders saw Aurich again complaining of left lower back pain that radiated into her left leg. Aurich diagnosed Sanders with sciatica and provided her with an injection of Toradol. Sanders continued to deny injury or trauma. She did not show any gait problems, joint swelling, weakness, or numbness. Sanders was referred to physical therapy. Aurich took Sanders off until September 27, 2019.
- 20.** In October, 2019, Sanders was terminated from Manpower and Polaris.
- 21.** On October 7, 2019, Sanders returned to Sanford Clinic and was seen by Dr. Anastasia Searcy. Dr. Searcy noted Sanders complained of back pain and left

leg numbness following an injury at work. She referred Sanders to physical therapy.

- 22.** Between October 9, 2019, and October 17, 2019, Sanders attended three physical therapy sessions at Sanford Vermillion Medical Center.
- 23.** On December 5, 2019, Sanders was seen by Aurich who noted that she complained of continued lower back pain and left leg numbness. She further noted that Sanders had stopped physical therapy because she lost insurance coverage. Aurich recommended Sanders continue with ibuprofen and Flexeril. She also recommended that Sanders resume physical therapy when she obtained health insurance.
- 24.** On January 9, 2020, Sanders returned to Aurich with left lower back pain that radiated down her left leg into her toes. Aurich noted that Sanders was scheduled with an orthopedic physician at the end of the month. Sanders received a Toradol shot and was instructed to continue Flexeril and ibuprofen.
- 25.** On January 30, 2020, Dr. Jeffrey Nipper conducted an Independent Medical Examination (IME) of Sanders at the request of Employer and Insurer.
- 26.** On February 25, 2020, Sanders was seen by Aurich. She complained of worsening left lower back pain with left leg numbness and tingling. She informed Aurich that she had fallen twice in the last two weeks because of her left leg giving out. Aurich administered another Toradol injection and recommended the continuation of ibuprofen and Flexeril. Aurich also recommended that Sanders undergo an MRI and follow up with an orthopedic consultation. X-rays showed moderate arthritis of Sanders' lumbar spine with diffuse disc space narrowing and osteophyte formation. The x-rays further showed facet arthritis of the lower

lumbar spine and decreased lumbar lordosis with minimal retrolisthesis of the L3 and L4 vertebrae. No fracture or pars defect was revealed. Sanders was diagnosed with spondylosis without myelopathy or radiculopathy.

27. On February 27, 2020, Sanders was seen by Dr. Thomas Flesher III for worsening lower back pain and numbness. He noted that Sanders had a good range of motion, did not have significant numbness, and her leg strength was reasonable. He further noted that she exhibited loss of normal lumbar lordosis with a straight lumbar spine, and that there was moderate degenerative arthritis throughout with hypertrophic spurring of vertebral bodies and arthritic change of facets. He ordered an MRI and limited Sanders to lift no more than ten (10) pounds.

28. On February 28, 2020, Dr. Nipper produced his report. He diagnosed Sanders with a low-grade lumbar myoligamentous strain/sprain. He opined that Sanders had recovered and that any further back pain was due to ongoing degenerative disease, obesity, and Sander's deconditioned status.

29. On March 27, 2020, Sander returned to Aurich complaining of lower back pain that radiated into her left leg causing numbness. Aurich noted that they were waiting for approval from Insurer for an MRI. Aurich discontinued the Tramadol and started Sanders on Norco. She also provided a Toradol injection. Aurich referred Sanders to Dr. Samuelson in Sioux City, IA, for an orthopedic consultation.

30. On May 6, 2020, Aurich spoke with Sanders by phone. Aurich noted that Sanders had received a denial letter from Insurer. She referred Sanders to the

Siouxland Pain Clinic. Sanders did not have health insurance and could not afford the \$500 fee. Aurich refilled Sanders' prescriptions for Norco and Flexeril.

31. On May 21, 2021, Dr. Christopher Janssen conducted an IME of Sanders.

32. On June 17, 2021, Sanders reported to Aurich that the pain in her left lower back was worse and felt different.

33. On August 2, 2021, Dr. Walter O. Carlson conducted a review of Sanders' medical records.

34. On November 23, 2021, Sanders reported she had recently started to experience right-sided lower back pain that radiated down into her right leg. She also reported numbness in both legs, lower back pain, and right leg pain that was worse than pain in her left side.

35. Additional facts may be developed in the issue analysis below.

Issue:

This matter was bifurcated, and the only issue presented at hearing was Causation.

Medical Causation Analysis:

Causation is a medical question and both parties have offered medical expert opinions. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992). "Expert testimony is entitled to no more weight than the facts upon which it is predicated." *Darling v. West River Masonry Inc.*, 2010 S.D. 4, ¶ 13, 777 N.W.2d 363, 367. The medical evidence provided "must not be speculative, but rather must be

'precise and well supported.'" *Vollmer v. Wal-Mart Store, Inc.*, 2007 S.D. 25, ¶ 14, 729 N.W.2d at 382 (citations omitted).

Sanders has offered Dr. Janssen as her medical expert. Dr. Janssen is a University of Augustana graduate who obtained his medical degree from Tulane University. After medical school, Dr. Janssen became a resident in physical medicine and rehabilitation at the Rehabilitation Institute of Chicago and Northwestern University. He then completed a pain fellowship at UCLA. In 2009, Dr. Janssen returned to Sioux Falls he currently works as an interventional physiatrist and assistant at USD Sanford Medical Center.

Dr. Janssen conducted an IME of Sanders on May 21, 2021. He noted that Sanders had been lifting a part and then while bending and twisting, she felt a pop in her back which was associated with pain in her back and left leg. He also conducted a review of Sanders' medical records and Dr. Nipper's IME report. He noted that Sanders denied consistent low back, left-sided hip and leg pain prior to the work incident. He also noted that she had a history of some chiropractic care.

Following his IME and review, Dr. Janssen opined that to a reasonable degree of medical certainty, her ongoing left-sided low back, hip, and left leg pain are secondary to her work-related injury on September 9, 2019. He based his opinion on the following factors: (1) Sanders was not taking medications, seeing a physician, chiropractor, or physical therapist for low back pain or left leg pain prior to the injury; (2) Sanders experienced lower back and left leg pain immediately after her work-related injury and sought medical treatment within a day; and (3) Sanders suffered an injury while lifting, bending and twisting which is a common mechanism of injury to the spine. Dr. Janssen's examination of Sanders also revealed decreased range of motion in her

lumbar spine, positive straight leg raise maneuver, and slump sit testing. He concluded that these findings were consistent with lumbar radiculitis and supported his conclusion that the injury was work-related.

Dr. Janssen stated that lower back pain is common, and an injury is not necessary to have lower back pain. He also stated that degeneration can cause pain. Regarding Sanders' weight, Dr. Janssen opined that while Sanders is classified as obese or severely obese, she had obesity for many years but did not have much in the way of back pain. He further opined that while there is a correlation between obesity and back pain, not everybody with back pain is obese nor does every obese person suffer from lower back pain. Dr. Janssen stated that an injury is not necessary to cause a person with degenerative disc disease to move from asymptomatic to symptomatic. Dr. Janssen asked Sanders if she was taking medication for pain prior to her work incident, and she said that she was not as she was not experiencing symptoms. However, Sanders' medical history indicates that she received treatment for back pain in the months and years prior to the work incident.

Dr. Janssen opined that the treatment and testing Sanders has undergone were the results of the work-related injury. He further opined that Sanders is not at maximum medical improvement (MMI), and an MRI would be appropriate to evaluate her condition. He also recommended work restrictions of lifting no greater than 12 pounds, no repetitive bending, lifting, or twisting, no operating of dangerous or heavy machinery, no climbing or balancing, no commercial driving, and for her to sit and stand as needed.

Employer and Insurer have offered the expert medical testimonies of Dr. Walter Carlson and Dr. Nipper. Dr. Carlson is a board-certified orthopedic surgeon specializing in the spine and pediatrics. He received his medical degree from the University of

Minnesota Medical School in 1977. He performed an orthopedic residency at the Mayo Clinic in 1983. Dr. Carlson then completed a pediatric Orthopedics Fellowship with the Scottish Rite Hospital for Crippled Children in Dallas, Texas, where he focused on orthopedics and spine surgery. Following the fellowship, he moved to Sioux Falls where he was a founding partner of what is now known as the Orthopedic Institute. He worked with the Orthopedic Institute from 1984 to 2020. He retired from active practice in 2020 to practice forensic orthopedics. Prior to retirement, the majority of Dr. Carlson's work was with adult spinal surgery.

Dr. Carlson is licensed in South Dakota, Iowa, Nebraska, Minnesota, and Florida. He is an Emeritus Staff member at Avera McKenna Hospital, Sanford University Center, and Sioux Falls Specialty Hospital. He is also affiliated as a clinical professor at the USD Medical School. He has also been published numerous times in the area of orthopedics, including specific publications regarding the effect of obesity on orthopedic conditions.

Dr. Carlson reviewed Sanders' medical records from before and after the work incident. He also reviewed the depositions of Dr. Janssen and Aurich. After his review, Dr. Carlson opined that Sanders was diagnosed with a lumbar sprain/strain as a result of the incident. Dr. Carlson opined that Sanders reached MMI within 6-12 weeks following the work incident. Dr. Carlson further found that the x-rays taken on May 18, 2021, showed facet arthritis in her lumbar spine and diffuse disc space narrowing, and osteophyte formation with moderate arthritis. He also found that her lumbar x-rays showed degenerative spine changes and that such degeneration gets slowly worse over time. Dr. Carlson opined that degenerative disease of the lumbar spine and facet arthritis commonly cause intermittent episodes of chronic pain, leg pain, numbness, and

tingling such as what Sanders had been experiencing. He stated that degenerative arthritis is a chronic and progressive condition, and Sanders' condition worsening over time was consistent with degenerative disc disease. Additionally, Dr. Carlson noted that those with degenerative disc disease did not require an injury to go from asymptomatic to symptomatic. He also concluded that Sanders' weight likely had a negative impact on her spine, because when someone is heavier it naturally puts greater stress on the facet joints. He recommended that Sanders lose weight to decrease her symptoms.

Dr. Carlson opined that the pop sound she heard during the work incident is not clinically significant, because a pop could simply be the nitrogen gas being released from the facet joint in the spine. Dr. Carlson concluded that Sanders may have strained her back by lifting, but it was just a temporary exacerbation of her underlying degenerative arthritis. He also noted that Sanders had a normal range of motion, and no swelling or edema which indicated the injury was not severe. He found it significant that her exam a few days after the work incident, on September 13, 2019, showed she had normal strength and reflexes, and her back spasms had subsided. Additionally, at his deposition, Dr. Carlson was asked about Sanders' denial of a specific injury. Dr. Carlson found the denial confusing because in her work report she had indicated that something had occurred to cause discomfort in her back.

Dr. Carlson also looked at Sanders' past medical history and noted that she had complained of back pain for a month prior to the work incident. He further noted that she had recurrent lower back pain that she had treated off and on for approximately 15 years prior to the alleged work injury. He opined that this treatment was a response to the degenerative changes in her spine. He noted that Sanders had required 800 mg of

ibuprofen to treat her back, and that supported his conclusion that she had arthritis of the spine.

He ultimately concluded that the work-related incident was not a major contributing cause of Sanders' condition or need for treatment. Dr. Carlson was unsure about Dr. Janssen's conclusions based on a straight-leg test as he was not certain how the test was conducted. He said straight-leg tests are standard tests that provide objective findings, but without knowing how the test was administered he could not say what the results indicated. He opined that the best way to provide a clinical diagnosis for Sanders was by lumbar MRI.

Employer and Insurer have also offered the opinion of Dr. Nipper, a board-certified orthopedic surgeon with over thirty years of clinical experience who is currently practicing with the United States Department of Veterans Affairs. Dr. Nipper graduated from Minnesota Medical School. He performed his residency at Lutheran Hospital of Indiana. Dr. Nipper has been the president of the single-specialty orthopedic surgery group of the Minnesota Bone and Joint Specialists since 2011. He is licensed in Indiana, Minnesota, and South Dakota.

Dr. Nipper conducted an IME of Sanders on January 30, 2020. He took Sanders' history and reviewed her job description, injury report, and treatment records. He also performed a physical and neurological examination of Sanders. He concluded that Sanders displayed normal phases of gait, non-antalgic, and she was able to heel walk, toe walk, invert, and evert with full function and strength. He found her neurological examination was normal, and that Sanders displayed normal motor strength. He further found her to have a negative straight leg test bilaterally, and that her reflexes were symmetric throughout all of her extremities. Sanders displayed a normal range of

motion and was able to side bend, forward flex, and rotate 45-65 degrees in each direction without difficulty. Dr. Nipper diagnosed Sanders with a low-grade lumbar myoligamentous strain/sprain caused by the work incident. He opined that her low-grade sprain or strain injury would have resolved within five or six weeks and that she reached MMI within six weeks of the injury. He noted that Sanders' description of the work event was consistent with a lumbar sprain or strain and that higher grade strains or sprains included impact injuries such as falling off of a one-story building resulting in high force injury.

He opined that Sanders' condition at the time of the IME was not related to the lifting incident at work, but due to underlying degeneration of her spine. He noted that degenerative disease and facet arthritis get worse over time and an injury is not necessary to cause pain from degenerative back issues. Dr. Nipper further opined that Sanders' x-rays revealed arthritis and osteophytes which were consistent with the natural progression of the degenerative disc disease and that for them to develop it takes many months to years. He also noted that Sanders' excessive weight would cause the axial skeleton to become loaded through the pelvis and into the knees and ankles which would lead to more rapid degeneration and arthritic processes. Dr. Nipper determined the additional pressure and arthritic changes commonly cause lower back pain. He further determined that as Sanders' reports of pain were non-specific, it was difficult to establish a specific cause-and-effect correlation between the work incident and her current condition. He noted that the pain she experienced could be caused by sleep position, temperature change, and regular daily activities. Dr. Nipper also noted that Sanders had reported bilateral lower-thoracic pain intermittently in the month prior to the work incident. He concluded that Sanders' history of chiropractic treatment and

low back pain, along with the results of the x-ray indicated her condition was the result of the degenerative disc disease and that her work incident was not a major contributing cause of her current condition or need for treatment.

To prevail in this matter, Sanders must first prove that the injury sustained on September 9, 2019, is a major contributing cause of [her] condition pursuant to SDCL 62-1-1(7) which provides,

- (7) "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;
 - (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

As the claimant, Sanders is "not required to prove [her] employer 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 also does not need to prove that her work activities were "the' major contributing cause" of the injury; they only have to be "'a' major contributing cause." *Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 S.D. 52, 21, 816 N.W.2d 843 at 850. 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).

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.

The question before the Department is whether Sanders’ work-related incident on September 9, 2019, is a major contributing cause of her condition and need for treatment. Sanders had a significant history of back issues and treatment prior to the work incident, and her imaging reports show signs of degeneration and arthritic processes. Dr. Carlson opined that the work incident may have been a temporary exacerbation of her underlying degenerative arthritis. The South Dakota Supreme Court clarified 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. Therefore, her condition may still be compensable if her work injury was a major contributing cause of her condition even with the prior treatments and degeneration. The medical opinion presented by both parties has indicated that an MRI would be the most effective method of assessing Sanders’ condition. However, without it, the Department must look to the medical opinion, records, and imaging reports that are currently available.

The Department finds it significant that even with her history of back issues and obesity, Sanders was able to work at Manpower and Polaris for six months without problems, but she was ultimately terminated from her position due to the companies’ inability to accommodate her work restrictions. The Court has stated that temporal sequence is not enough to prove causation. “[A claimant] must do more than prove that

an injury sustained at [his] workplace preceded [his] medical problems. The axiom “*post hoc, ergo propter hoc*,” refers to ‘the fallacy of ... confusing sequence with consequence,’ and presupposes a false connection between causation and temporal sequence.” *Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶ 20, 653 N.W.2d 247, 252. However, Dr. Janssen’s assessment is particularly persuasive regarding Sanders’ course of injury and condition. He opined that her condition is consistent with the mechanism of injury. Additionally, while she had been treated before for back issues, she was not being treated in the months prior to her work injury but required immediate and ongoing treatment. Sanders was obese and likely had degeneration and arthritis before the incident. She also required various back treatments over the years. Dr. Carlson and Dr. Janssen agreed that an injury is not required for someone with preexisting conditions to go from being asymptomatic to symptomatic. However, in Sanders’ case, the lifting incident did occur and that incident majorly contributes to her condition and need for treatment. Therefore, Sanders has proven by a preponderance of the evidence that her work-related injury on September 9, 2019, is a major contributing cause of her condition and need for treatment.

Sanders 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 Sander’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, Sanders shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 7 day of September, 2022.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION



Michelle M. Faw
Administrative Law Judge