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

JOSHUA J. BREWER, **HF No. 3, 2016/17**

Claimant,

v. **DECISION**

TECTUM HOLDINGS, INC. d/b/a TRUXEDO,

Employer,

and

BERKSHIRE HATHAWAY
HOMESTATE 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 24, 2022. Claimant, Joshua J. Brewer, was present and represented by Renee Christensen of Christensen Law Office. The Employer, Tectum Holdings, Inc. d/b/a Truxedo and Insurer, Berkshire Hathaway Homestate Insurance Company were represented by Thomas J. Von Wald of Boyce Law Firm.

Facts:

1. Joshua J. Brewer (Brewer) was born on May 31, 1988. He completed his General Educational Development (GED) a year after dropping out of high school as a sophomore.
2. Around January of 2012, Brewer attended Southeast Technical College in Sioux Falls, SD for a two-year Computer Systems Administration Training Program.

Six months before graduating Brewer quit the program and returned to Yankton, SD.

3. On May 30, 2015, Brewer was seen at First Chiropractic Center with reports of pain in the right thoracic and lumbar region. Dr. T.J. Stotz noted Brewer had misalignments in his T3, T4, T5, and T6 vertebrae. He also noted misalignments in Brewers L4, L5, and right ilium posteriorly. Brewer rated his pain as a 7 out of 10.

4. On June 6, 2015, Brewer was again seen by Dr. Stotz complaining of right-sided symptoms.

5. On June 2, 2015, Brewer was hired by Truxedo (Employer).

6. On June 13, 2015, Brewer returned to Dr. Stotz with the same complaints as his previous visit. Brewer also complained of muscle spasms.

7. On September 22, 2015, Brewer was working as a shipping clerk at Employer which was at all times pertinent, insured for workers' compensation purposes by Berkshire Hathaway Homestate Insurance Company (Insurer). He felt a pop in the lowest part of his back as he was moving a truck liner box kit.

8. On September 25, 2015, Brewer was seen by Dr. Jim Fitzgerald at First Chiropractic Center. Dr. Fitzgerald noted that Brewer had an acute left lumbopelvic complaint after picking something up and twisting three days before. Brewer rated his pain as 2/10 but that it would get as bad as 7/10. Brewer denied past episodes. Dr. Fitzgerald found a left L5 sacrum and left pelvis dysfunction, pain, and tenderness along the lumbosacral and sacroiliac examination. Brewer also had concerns regarding his range of motion. Brewer continued to treat with the chiropractor.

9. On October 8, 2015, Brewer was seen by Dr. Stotz who noted Brewer had reported having hardly any pain in his low back and indicated a 95% improvement.
10. On October 28, 2015, Brewer was seen by Dr. Stotz reporting that his symptoms waxed and waned. Dr. Stotz recommended an MRI and ordered Brewer off work.
11. Brewer continued to perform work at Truxedo as a shipping clerk through December of 2015.
12. On January 6, 2016, Dr. Stotz at First Chiropractic Center took Brewer off work until he could be seen by an orthopedist.
13. On January 7, 2016, Brewer was seen by Dr. Brent Adams at Yankton Medical Clinic at the request of Employer and Insurer. Dr. Adams ordered an MRI of Brewer's lumbar spine and noted that the MRI showed multilevel degenerative disc disease specifically in the L4-5 and L5-S1 vertebrae. Dr. Adams ordered additional physical therapy and recommended an SI joint injection and an SI joint belt. The injections provided 10% relief. Dr. Adams opined that the only surgical option would be fusion, which was not recommended.
14. In March 2016, Dr. Adams concluded that Brewer could perform a sit-down or light-duty work job. He referred Brewer for physical therapy in order to return to the workforce.
15. In May 2016, Brewer attended an Independent Medical Examination with Dr. Douglas Martin who found Brewer suffered from mild multilevel degenerative lumbar disc disease. Dr. Martin diagnosed Brewer with back strain which should have resolved within a maximum of 8 to 12 weeks, and he did not find objective

findings to explain Brewer's continued symptoms. He noted that there was a strong possibility that Brewer had outside psychosocial factors affecting his recovery. He placed Brewer at Maximum Medical Improvement (MMI) with a whole-person impairment rating of 1%. He advised Brewer to return to normal activities without further treatment.

16. On May 25, 2016, after the IME with Dr. Martin, Brewer was seen by Dr. Adams for low back pain. Brewer requested SI joint injections, but Dr. Adams felt that the complaints stemmed from the lower back. Dr. Adams agreed that SI joint injections could eliminate the SI joint as the cause of the symptoms, but if they failed, the only option was a fusion of the L4-5 and L5-S1 vertebrae. Brewer requested that the injections be billed through his health insurance instead of workers' compensation because they had not been approved.

17. June 6, 2016, Brewer received bilateral SI joint injections.

18. On June 21, 2016, Brewer was seen by Dr. Adams reporting that he had initially had 60%-70% relief, but the pain had returned despite physical therapy and medication.

19. Brewer was kept off work until June 21, 2016. Brewer was still listed as an employee at Truxedo until this time. His employment ended because he was asked to return to work but did not do so.

20. On June 23, 2016, Brewer was seen by Dr. J. Posch at Lewis & Clark Specialty Hospital. He requested x-rays of his SI joint. The x-rays showed no degenerative changes in his SI joints and his hip joints appeared normal.

21. On June 27, 2016, Brewer received bilateral SI joint injections.

22. On July 12, 2016, Brewer reported bilateral SI joint pain to Dr. Mitchell Johnson, at the Orthopedic Institute. Dr. Johnson noted the incident at Truxedo where Brewer heard a pop as he moved a box. He recommended a follow-up with Dr. Lukken.

23. In September 2016, Brewer underwent radiofrequency ablation of his bilateral SI joints with Dr. Lukken at Siouxland Pain Clinic.

24. On October 7, 2016, Brewer was able to do heavy lifting, repetitive lifting, walking, squatting, and quick-rotational activities.

25. On October 25, 2016, Brewer returned to Siouxland Pain Clinic for treatment. He reported having facet pain without radicular symptoms in his back. Brewer received bilateral intraarticular facet injections for his L4-5 and L5-S1 vertebrae for diagnostic and therapeutic purposes. After the injections, Brewer was doing well but felt he could only work 20 hours per week.

26. In November of 2016, Brewer returned to Dr. Lukken complaining of new onset of radiating low-back or leg-joint pain radiating down both legs to the knee. Dr. Lukken did not note any radicular symptoms.

27. In December 2016, Brewer had ablation of his lumbar facets and found that he had about 75% relief from the procedure.

28. On May 2, 2017, Brewer had bilateral SI joint fusion surgery performed by Dr. Corey P. Rothrock. Immediately after surgery, Brewer showed significant improvement and had no pain in his left side. However, several months after the surgery, Brewer reported soreness in his left buttock and lower back on his right side.

29. On February 12, 2018, Brewer had a post-operative MRI of his lower back and PET scan of his pelvis. The MRI showed a disc herniation at L5-S1 and an annular fissure, as well as moderate degeneration at L4-5 and L5-S1. Dr. Rothrock noted that the MRI showed no evidence of hardware complications in the SI joint and that there was excellent incorporation of the SI joint implants. He referred Brewer to physical therapy.

30. From March 2018 to July 2018, Brewer continued physical therapy with Fyzical Therapy. By July he had no complaints of SI joint pain during exercise.

31. In September 2018, Brewer had an MRI of his spine and a CT scan of his pelvis. The MRI showed disc dehydration and slight narrowing at the L4-5 level with mild bulging, and a mild to moderate protrusion at L5-S1 with annular fissure, slightly more prominent than that shown in the January 2016 MRI.

32. On October 9, 2018, Brewer had an injection which provided little relief.

33. From January 2019 through July 2019, Brewer began soft tissue trigger point injections.

34. On August 12, 2019, Dr. Wade Jensen performed an IME of Brewer.

35. In August 2019, Brewer returned to Orthopedic Institute complaining of lower back pain with radiation down the left buttock.

36. On September 20, 2019, Brewer was given bilateral L5-S1 facet injections which provided 90% pain improvement for three weeks. Brewer denied any radicular symptoms and Dr. James Brunz recommended medial branch blocks with possible ablation of the L5-S1 level facet joints.

37. In November 2019, Brewer reported 80-90% relief following the injections.

38. On May 11, 2020, Brewer was seen at Orthopedic Institute and noted 70% relief of his low back pain and an x-ray revealed endplate changes and anterior osteophytes in Brewers midthoracic region.

39. On December 9, 2020, Brewer had an MRI which showed multilevel intervertebral disc disease with narrowing at L5-S1 and lumbar spine degeneration at L4-5 and L5-S1, with no complications from the SI joint surgery.

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

Issues:

a. Whether Brewer's injury is a major contributing cause of his need for medical treatment; and

b. Whether Brewer is permanently and totally disabled.

Whether Brewer's injury is a major contributing cause of his need for medical treatment:

Both parties have offered expert medical testimony to establish whether Brewer's injury is a major contributing cause of his need for medical treatment. "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.

Brewer has offered Dr. Rothrock as his expert. Dr. Rothrock is a board-certified orthopedic surgeon at the Orthopedic Institute in Sioux Falls. He attended the University of Nebraska School of Medicine from 1997 to 2001 and served his orthopedic residency at Orlando Regional Medical Center in Orlando, Florida from July 2001 to June 2006.

He then became a Musculoskeletal Oncology Fellow at Memorial Sloan-Kettering Cancer Center in New York, New York from August 2006 to August 2007. In February of 2010, he began his private practice at the Orthopedic Institute. The majority of his practice involves total joint replacement including hip and knee replacement. Dr. Rothrock is a fellow of the American Academy of Orthopedic Surgeons.

Dr. Rothrock first saw Brewer on April 7, 2017. Before that visit, Brewer had tried several intraarticular injections of corticosteroids, ablation, a pelvic stabilization belt, core physical therapy, core musculature, pelvic physical therapy, and lumbar spine flexibility over the previous year without long-term, significant improvement in his pain level. Dr. Rothrock conducted a FABER test to examine Brewer's flexion, abduction, and external rotation. The test showed that Brewer had pain in his SI joint which was consistent with the symptoms Brewer had reported. At his deposition, Dr. Rothrock opined that the work incident was a major contributing cause of Brewer's bilateral SI joint pain. He specifically mentioned that Brewer had reported not having back issues prior to the incident and Dr. Rothrock had not seen any documentation of such issues and had not performed a complete medical record or IME report review. When it was brought to his attention that Brewer had pursued chiropractic care just prior to starting his job with Employer and again, shortly after the work incident, Dr. Rothrock reviewed documentation related to those visits and stated that they did not change his assessment. Dr. Rothrock opined that the chiropractic care Brewer received prior to the work incident was for a general spinal dysfunction. Dr. Rothrock also testified that SI joint pain complaints were difficult to diagnose without a significant pelvic trauma such as a fracture or dislocation. He added that in acute settings an injury is generally caused by a lifting, twisting event.

Dr. Rothrock opined that the medical treatment Brewer had received was consistent with treatment for SI joint pain. He further opined that SI joint injections are the most powerful diagnostic tools to confirm the SI joint is the source of the pain and even more so than a physical exam or patient history. He added that patients with SI joint dysfunction tend to show other spinal pathology. Dr. Rothrock stated that non-trauma-based injuries to the SI joints are extremely rare, and in most cases, the patient has significant arthritis in their hips or a have had a prior lumbar fusion that transferred stress onto the SI joint. He opined that Brewer's spine was not particularly degenerative nor does he have other pathology that would explain his posterior pelvic pain.

An April 7, 2017, x-ray showed sclerosis, an abnormal hardening and thickening of the bone, which Dr. Rothrock stated is attributed to inflammation of the joint over a sustained period. He opined that the time frame could be between the year or year-and-a-half between the work incident and when he saw Brewer, but he would have to rely on prior radiographs rather than assume a time frame.

Dr. Rothrock performed bilateral fusion surgery for Brewer's SI joint on May 2, 2017. The surgery involved placing hardware from the iliac bone across the joint and securing it into the tailbone. Following surgery, Dr. Rothrock referred Brewer to his partner, Dr. Brunz, for continued treatment including physical therapy, pain medication, and different injections. He opined that if Brewer continued to have low back pain after the surgery that could indicate the problem is somewhere other than the SI joint.

Employer and Insurer have offered Dr. Jensen as their expert. Dr. Jensen is a board-certified Orthopedic Spine Surgeon currently working at the Center for Neurological and Orthopedic Sciences (CNOS). Dr. Jensen attended medical school at the University of Washington in Seattle and then performed a five-year orthopedic

residence at the University of Wisconsin. He then became an orthopedic and neurosurgeon spine fellow at the University of Utah where he focused on spinal surgery. Dr. Jensen has been trained in most musculoskeletal components of the entire body including the spine, foot, ankle, sports medicine, oncology, and pediatrics. He is licensed to practice in South Dakota, Nebraska, Iowa, Idaho, and Utah. Dr. Jensen practices full-time and sees between 35-40 patients during the week. He performs an average of three to six surgeries a day for two to three days out of the week. The spine is the focus of 80% of his practice, but he also does general orthopedics for smaller outlying communities. He performs many hip replacements, knee surgeries, and shoulder scopes.

Dr. Jensen's recertification examination score ranked in the 97th percentile in the country. He also has designed numerous patents related specifically to neurosurgery and orthopedics and published articles in 2005 and 2009 related to the spine. In addition to his practice, he is a staff professor with the University of South Dakota School of Medicine.

Dr. Jensen performed an IME of Brewer on August 12, 2019. He discussed Brewer's medical history and conducted a physical examination. He also reviewed all records and imaging studies, including MRIs, conducted on Brewer. Following his examination and records review, Dr. Jensen diagnosed Brewer with post SI joint fusion with posterior left buttock pain, high-intensity zone annular strain at the L5-S1 level with possible overlying S1 radiculopathy, and after being asymptomatic after the SI joint fusion, a recent recurrence of back and buttock symptoms without any specific event. He also opined that Brewer may have radiculopathy which is the result of the natural progression of Brewer's underlying degenerative disc disease and pre-existing medical

condition. Dr. Jensen recommended S1 selective nerve root block on the left side to address Brewer's pain concerns.

Dr. Jensen concluded that the September 22, 2015, work incident was not a major contributing cause of Brewer's diagnosis and need for treatment. He opined that Brewer suffered a muscle strain or sprain which had resolved by approximately October 8, 2015, or, at the latest, by May of 2016, consistent with Dr. Martin's opinions. Dr. Jensen also agreed with Dr. Martin's assessment of a 1% whole-person impairment rating. Dr. Jensen opined that the mechanism of injury and the fact he was feeling much better by October 8, 2015, was consistent with a muscle strain.

He specifically noted that Brewer's pain levels in his lower back and SI joint area prior to beginning to work for Employer was a 7 out of 10, and that he continued to experience pain in that area through June 2015. Dr. Jensen further noted that Brewer's pain has stayed in the same area since that time. He opined that persistent pain confined to those areas along with a history of heavy labor activity is typically indicative of degeneration. He also testified at his deposition that the muscle spasms Brewer complained of are common with degenerative disc disease and that Brewer's description of the injury was a classic example of the mechanism for an eccentric muscle load resulting in muscle spasms. He explained that Brewer's muscle was contracting as he brought the box upward with his hands and lengthening at the same time as he turned to the left. Dr. Jensen testified that was the easiest way to get a muscle strain. He further testified that Brewer's medical records after the incident were consistent with the mechanism of injury for a muscle strain or spasm. He noted that Brewer reported he was able to work and did not feel more pain for a couple of days following the incident, and that was consistent with a muscle strain. Dr. Jensen opined

that bilateral SI joint problems are very uncommon and are almost always associated with some underlying condition. Those caused by an injury would require a traumatic injury such as a massive car accident. He further opined that to have bilateral SI joint problems from the injury Brewer described would be rare enough to be worth publishing in literature.

Dr. Jensen used medical records to support his diagnosis and opinion, and he opined that the x-rays and MRIs from 2016 through 2020 showed disc desiccation and other forms of degeneration. Disc desiccation involves the loss of hydration and water content which prevents the disc from functioning normally and results in the disc degenerating in height and on the facet joints. There would also be more pain and discomfort as the desiccated disc collapses. Dr. Jensen further opined that disc desiccation is the result of an underlying genetic condition or a degenerative process that would not occur from a singular event like Brewer's work incident. He also testified that Brewer's post-operative MRI in 2018 showed signs of continued degenerative changes in the spine. The 2018 MRI compared to the 2016 MRI also showed more degeneration specifically at the L5-S1 disc level due to underlying arthritis. Similarly, the 2020 post-operative MRI also showed signs of progressive degenerative disc disease. Dr. Jensen also noted that Brewer is a smoker and there is a strong association between smoking and degenerative disc disease.

To prevail in this matter, Brewer must first prove that the injury sustained on September 22, 2015, is a major contributing cause of his condition pursuant to SDCL 62-1-1(7). He is "not required to prove his employer was the proximate, direct, or sole cause of his injury." *Smith v. Stan Houston Equip. Co*., 2013 S.D. 65, ¶ 16, 836 N.W. 2d 647, 652. He also does not need to prove that his 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. He must prove "that employment or employment-related activities [are] a major contributing cause of the condition of which [he] complained, or, in cases of preexisting disease or condition, that employment or employment-related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." *Norton v. Deuel School Dist. No. 19-4*, 674 N.W.2d 518, 521 (S.D. 2004). The 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.

In Dr. Jensen's opinion, Brewer's condition is the result of degeneration and not the work incident. Brewer had normal x-rays of his low back and pelvis on January 7, 2016. However, the MRI report from February 2, 2018, showed moderate disc degeneration at L4-5 and L5-S1, and the MRI report from December 9, 2020, showed multilevel intervertebral disc disease with narrowing at L5-S1 and lumbar spine degeneration at L4-5 and L5-S1, with no complications from the SI joint surgery. The South Dakota Supreme Court has recently reasserted 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. SDCL 62-1-1(7) provides, in pertinent part,

> An injury is compensable only if it is established by medical evidence, subject to the following conditions … (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;

Thus, if the work incident is *a* major contributing cause it would still be compensable even if Brewer also suffered from disc degeneration.

Dr. Jensen and Dr. Martin both assert that Brewer suffered a sprain or strain which was resolved by October 8, 2015, or at least by May of 2016. On October 8, 2015, Dr. Stotz diagnosed Brewer with sprain of the lumbar spine and pelvis. Dr. Stotz noted that Brewer reported hardly any pain and a 95% improvement. He was also no longer experiencing sharp pain, but he returned on October 28, 2015, reporting that his symptoms waxed and waned.

Dr. Rothrock performed the bilateral SI joint fusion surgery, but he has not reviewed Brewer's complete records or IME reports. He opined that acute SI joint complaints are generally caused by a lifting, twisting event such as Brewer's work incident. He also reviewed the chiropractic records at his deposition and noted that prior to the incident Brewer's chiropractic complaints were more generalized. The complaints became specific to the SI joint after the incident. Dr. Rothrock's analysis of the injury is not based on an understanding of Brewer's complete spinal history, but instead on unexplained symptoms and temporal sequence. Specifically, Dr. Rothrock testified that someone with an acute injury to an SI joint would experience significant pain either immediately or shortly after the event, and he could not explain why Brewer did not experience extreme pain until two days had passed after the incident. Dr. Rothrock also considers Brewer's surgery a success and that it should have, thus, resolved his pain issues in that area. He agreed that if Brewer continued to have pain after the surgery, then the problem could be somewhere other than the SI joint. The South Dakota Supreme Court has established mere temporal sequence is not sufficient 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. Dr. Jensen reviewed Brewer's record and opined that the mechanism of injury and the fact Brewer was feeling much better by October 8, 2015, was more consistent with a muscle strain. The record appears to support this conclusion.

Brewer required treatment to his back prior to the injury and continued treatment afterward. He has not shown that the injury was a major contributing cause of his condition or need for treatment. Therefore, Brewer has not proven by a preponderance of the evidence that his work incident on September 22, 2015, is a major contributing cause of his SI joint condition and need for treatment.

Whether Brewer is permanently and totally disabled.

While Brewer has not proven that his condition is work-related, the next issue raised was whether Brewer is permanently and totally disabled. Even if Brewer had established by a preponderance of the evidence that his workplace injury was a major contributing cause, the Department finds that he is not permanently and totally disabled pursuant to SDCL 62-4-53. 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.

To make a prima facie showing that he is entitled to odd-lot benefits, Brewer must prove either that due to his physical condition, coupled with his education, training, and age it is obvious that he is obviously unemployable, or 2) that he is in the kind of continuous severe and debilitating pain which he claims. *Eite v. Rapid City Area Sch. Dist. 51-4*, 2007 SD 95, ¶21, 739 N.W.2d 264, 270-71. *Haynes v. Ford*, 2004 S.D. 99, ¶ 15, 686 N.W.2d 657, 661 (citations omitted). Brewer asserts that he is obviously disabled when considering his functional capacity limitation to a less than 40-hour work week and his limited education. He asserts that due to his lack of education, his back condition, pain, and physical limitations he is unable to work a job that would meet his compensation rate. To alleviate the pain in his back, Brewer feels he must move from a squatting position to a standing position almost constantly, and he must be able to lay down to ease the pain. Therefore, he would need a job that allows him to do that. At hearing, Brewer testified that he could stand for 45-minute increments up to 2-3 hours per day, and, in a 12-hour period, he could sit or stand for 7-8 hours out of the day from 8 AM to 8 PM at home then lay down for the other four hours.

After his SI fusion surgery in 2017, Brewer was able to get a job at Pathways Homeless Shelter where he worked for a year and a half. While working for Pathways, Brewer was able to sit the majority of the time and had opportunities to lie down while at work. He also performed tasks such as filling groceries, laundry, remodeling, staining floors, demolishing walls with a hammer, and providing PBTs to residents. Pathways

lost funding and cut his position. Brewer also took jobs at Domino's and Starbucks, each for about a month, but was unable to physically perform the duties. He left the positions without asking for accommodations. While working at these positions, Brewer did not make his compensation rate.

Dr. Rothrock cleared Brewer to work six-hour days, with limited bending, stooping, heavy lifting, or repetitive twisting and turning. He underwent a Functional Capacity Evaluation (FCE), which showed that he could sit for 60-minute durations up to 5-6 hours per day, lift up to 19 pounds repetitively, push or pull 44 pounds, and carry 27 pounds. Dr. Rothrock approved the restrictions established by the FCE, which allow Brewer to work 30-hour work weeks. At 30 hours per week, Brewer would need to earn $12.90 per hour to reach his compensation rate.

Brewer has offered the vocational expert, Tom Audet. He is a Certified Rehabilitation Counselor with a bachelor's degree in Rehabilitation and Related Services from Montana State University. Audet opined that Brewer would be able to perform 20-25 hours of work a week, which is what he worked at Pathways. At 25 hours a week, he would need to earn $15.47 per hour to meet his compensation rate. Audet also opined that Brewer is retrainable. Audet was able to find jobs available for Brewer based on the FCE results and a 30-hour work week.

Employer and Insurer have provided Katie Medema as their vocational expert. Medema is a licensed medical health and certified vocational rehabilitation counselor with OHARA Managed Care. She also has experience as an ADA specialist with Sanford Health, and as a Mental Health Counselor. Medema has a bachelor's degree in sociology and a master's degree in vocational and mental health counseling from South

Dakota State University. She is a certified Employment Support Professional and provides vocational analysis in South Dakota, Iowa, and Nebraska.

Medema interviewed Brewer and reviewed his medical records. She also looked through various job sources to perform a broad search for suitable jobs. She then personally contacted potential employers to find jobs that fit Brewer's restrictions. Medema concluded that Brewer had the education, skills, and ability to be trained on the job or in the classroom for suitable employment at a sedentary position within his restrictions. She determined that Brewer was retrainable via online courses at Southeast Tech and such training would make more jobs available to him.

Brewer testified that he takes care of, at least, two of his and his partner's children during the day. The children were aged between two and six years old at the time of the hearing. He also testified that he is able to do various activities at home including riding a bike, doing household chores, driving a car, operating a computer, playing with his kids, going to the park, and engaging in outdoor activities including shore fishing and hunting for deer.

Brewer has a GED and has shown that he is capable of learning both on-the-job and in the classroom. He was only six months from completing his degree at Southeast Tech when he left the program. Brewer was able to work at Pathways for a year and a half which shows that he is capable of working a job that accommodates his restrictions and he is, therefore, not obviously unemployable.

As Brewer has failed to make a prima facie showing that he is obviously unemployable, he must next show that there is no suitable employment available to him in his community. SDCL 62-4-53 requires Brewer to show that the type of work available

in the employee's community renders him unable to secure anything more than sporadic employment resulting in an insubstantial income. He must also show evidence of a good faith job search:

> [i]f 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.

Eite v. Rapid City Area Sch. Dist. 51-4, 2007 SD 95, ¶21, 739 N.W.2d 264, 270-71.

Brewer applied for the positions identified by Medema. He interviewed for positions but was not offered a job. From September 1, 2021, to March 11, 2022, Brewer applied to 79 different positions. He asserts that his search was in good faith, and he did not limit the work he applied for by geographical scope, type of position, or physical requirements. Audet reviewed Brewer's job search logs and the labor market in Brewer's community. He concluded that Brewer had made a good faith attempt to apply for work. Brewer argues there are no suitable positions available to him with his limitation of only 30 hours a week and need to move frequently, stretch, and lie down.

Employer and Insurer assert that Brewer has not conducted a reasonable, good faith job search. In his resume, Brewer noted that he was disabled from a workplace injury in 2015 and listed his restrictions. He also stated he was unable to perform certain

tasks, thus limiting the type of work he could perform. He also failed to list relevant education history and job skills. Audet agreed that it is not normal to include the fact that a job seeker is injured or has restrictions on the resume. He opined that such information likely would be considered a “red flag” to employers, and without that information, the resume would be more successful. Employer and Insurer argue that as Brewer had not included the information when applying to Starbucks in April of 2019, he added it to intentionally limit his job offers. They further argue that even if it was not intended to limit job offers, Brewer should have known that the information would reduce the likelihood of being hired.

Furthermore, they argue, Brewer did not begin a job search until September 2021, which was four years after his SI joint surgery. He then performed less than one job search a week. Brewer also listed several employers in his job search to which he did not apply or which were inconsistent with viable sedentary positions. Medema followed up on Brewer’s job searches in December 2021 and found that of the fifteen job applications he reported on his log, only four of them were credible job searches. Brewer also used the website, Indeed, to apply for jobs, but some of the positions to which he applied only accepted applications through their own sites or by other means. He also submitted paper applications to four employers that were not hiring. Further, Medema stated that Brewer failed to provide references when requested by O’Reilly’s Auto Parts. He also incorrectly submitted an application to Sturdevant’s in person instead of by mail or email as required and filed an incomplete application to MCI by failing to follow up on their MCI Career Site as required. In summary, Brewer submitted applications to businesses that were not actively hiring, did not complete the application process for several positions, and did not utilize the required website or application

process for several positions. Thus, he successfully applied to only four open positions in sixteen weeks. Medema found similar issues with Brewer's March 2022 search log.

"South Dakota has generally applied a reasonableness standard when analyzing the job search of an odd-lot claimant." *Johnson v. Powder River Transp.*, 2002 S.D. 23, ¶ 15, 640 N.W.2d 739, 743. The Court has "also considered the intent of the claimant, to the extent that he or she must show some motivation to become re-employed." *Id*. Many actions by Brewer in his search for employment show his job search was not reasonable. Brewer and Audet have both asserted that he included his disability information and restrictions on his resume to be honest and forthcoming about his capabilities, which is understandable. However, when viewed in conjunction with the other issues with his resume, his failure to follow through with applications or apply by the correct methods, and his application for positions that are not suitable to his FCE limitations, it brings into question his motivation and interest in becoming re-employed. While he did work at both Domino's and Starbucks until he felt he could not do the job, but he did not ask for accommodations for any issues he was having. For these reasons, the Department concludes that Brewer did not complete a reasonable, good-faith job search.

Employer and Insurer have also shown "the existence of 'specific' positions 'regularly and continuously available' and 'actually open' in 'the community where the claimant is already residing' for persons with *all* of claimant's limitations." *Stang v. Meade Sch. Dist. 46-1*, 526 N.W.2d 496, 499 (S.D. 1995). Medema found jobs available for 25 hours per week at $15.47 per hour, which would meet his compensation rate. She further identified multiple potential employers offering employment for part-time work, six hours a day, that were light-duty and sedentary positions. She also found

numerous full-time and part-time jobs that would allow Brewer to adjust his position, work from home, lay down, or utilize a sit-to-stand desk to accommodate his restrictions. Medema specifically identified positions with Duluth Trading company that offered hours for 4 days a week and every other weekend and with MCI that offered various flexible shifts and sit-to-stand desk accommodations. Medema's suggested positions included Concentrix, Select Quote, MCI, Sesdac, and First Premier Bank. All of which paid above Brewer's compensation rate, fit his restrictions, and were open and available within his community. Audet agreed that the jobs both experts found were similar to what Brewer could do. Brewer was able to get interviews or, as of the time of the hearing, was waiting to be interviewed. Therefore, Employer and Insurer have shown that there are specific positions in Brewer's community that are available to him, fit his FCE requirements, and meet his compensation rate.

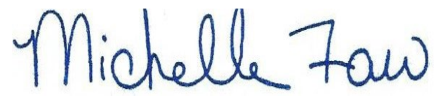
Conclusion:

Brewer has not proven the work injury of September 22, 2015, is a major contributing cause of his need for medical treatment or that he is permanently and totally disabled pursuant to SDCL 62-4-53.

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

Dated this 10 day of August 2022.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION



Michelle M. Faw
Administrative Law Judge