

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

DAVID DAHL,

HF No. 81, 2020/21

Claimant,

v.

DECISION

TWIN CITY FAN COMPANIES, LTD,

Employer,

and

TRAVELERS INDEMNITY 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 June 21, 2023. Claimant, David Dahl, was present and represented by Bram Weidenaar of Alvine Law Firm. The Employer, Twin City Fans Companies, LTD., and Insurer, Travelers Indemnity Company were represented by Laura K. Hensley of Boyce Law Firm.

Facts:

1. David Dahl (Dahl) sustained injuries in a car accident in either 1995 or 1996, including whiplash and left knee issues.
2. On August 31, 2015, Dahl was seen at Sanford acute care in Brookings, S.D. reporting left knee pain that started suddenly the day before.
3. On February 3, 2016, an X-ray was taken of Dahl cervical spine which revealed moderate facet joint narrowing and spondylolisthesis at the C3-5 levels.

4. On April 1, 2017, Dahl began working for Twin City Fans Companies, LTD. (Employer) which was, at all times pertinent to this matter, insured for workers' compensation purposes by Travelers Indemnity Company (Insurer).
5. On April 24, 2017, Dahl was seen at Sanford Acute Care reporting low back pain that started the day before with no known injury and he work up with that pain.
6. On April 27, 2017, Dahl was working as a shipper and crater for Employer when he was struck by a forklift. The forklift struck his left shoulder and left knee knocking him to the floor and trapping his left leg. Following the incident, Dahl's floor manager took him to human resources. Dahl finished the day by sitting in the office.
7. On May 2, 2017, Dahl was seen for a follow-up for the April 24, 2017, visit. He presented with acute low back pain. He denied any recent trauma and noted his pain did not radiate into his lower extremities.
8. On May 15, 2017, Dahl saw Sarah Kenyon, D.C. at Willert Chiropractic (WC) for shoulder pain. Dr. Kenyon diagnosed Dahl with segmental and somatic dysfunction of the left upper extremity, sprain of the left rotator cuff capsule, left rotator cuff strain, pain in the left shoulder and segmental and somatic dysfunction of the cervical and thoracic regions as well as radiculopathy. She treated him with chiropractic manipulative treatment (CMT), electrical muscle stimulation (EMS), ultrasound, and a cold pack.
9. From May 17, 2017, to November 16, 2017, Dahl had roughly sixty-seven visits with Dr. Kenyon for issues with his left shoulder. He was treated with CMT, EMS, and ultrasound.
10. On June 27, 2017, Dr. Kenyon returned Dahl to work without restrictions.
11. On July 25, 2017, following complaints of pain doing overhead work, Dahl was given light duty with no overhead work.

12. On August 14, 2017, Dahl was seen at WC reporting that he went to Sturgis on his motorcycle and his left shoulder tightened up.

13. On August 16, 2017, Dahl was seen at WC. The notes indicate that he had been avoiding overhead work and his shoulder continued to improve since the flare up he had on his ride out to Sturgis.

14. On October 16, 2017, Dahl was seen at WC. He reported that he was helping a friend fix a trailer home over the weekend, and his shoulder got a lot of use, therefore, he noted some pain traveling down his left arm.

15. On December 8, 2017, Dahl underwent an MRI of his cervical spine which revealed, in part,:

C2-3: moderate left and right facet hypertrophy. No significant stenosis.

C3-4: left greater than right facet hypertrophy, mild grade 1 anterior subluxation and small central protrusion. No significant canal stenosis. Left foraminal stenosis from facet and unciniate hypertrophy.

C4-5: central protrusion indenting the ventral thecal sac without significant canal stenosis. Foramen do not appear significant narrowed.

C6-7: left central disk extrusion compressing the ventral thecal sac and extending caudally behind the left of the C7 vertebral body with a craniocaudal extent of 7 mm which mildly flattens the left ventral cord producing mild canal stenosis. There is bilateral foraminal stenosis from unciniate hypertrophy.

16. On February 28, 2018, Heath Reinke, PA-C at Avera Orthopedics saw Dahl for neck pain, left shoulder pain, and left arm pain with numbness and tingling. PA Reinke diagnosed Dahl with herniated nucleus pulposus on the left C6-7 and

cervical radiculopathy. He referred Dahl to Dr. Matthew Wingate at Orthopedic Institute for further treatment.

17. On March 15, 2018, Dahl was seen by Cassandra Swan, PA-C at Orthopedic Institute. She understood that a forklift struck Dahl causing him to land directly on his left shoulder and shoulder blade. PA Swann diagnosed Dahl with neck pain and bilateral arm pain greater on the left than on the right that traveled in the C7 distribution following a work injury. She also diagnosed him with left carpal tunnel syndrome. She recommended Dahl proceed with an EMG and an epidural spinal injection.
18. On April 5, 2018, Dahl underwent a C6-7 cervical epidural steroid injection under fluoroscopy guidance performed by Dr. James Brunz.
19. On May 10, 2018, Dahl was seen by PA Swann who diagnosed him with left-sided C-spine neck pain with left arm pain in the C7 distribution with a herniated nucleus pulposus noted at C6-C7 as well as left carpal tunnel syndrome, left proximal bicipital pain with calcific tendinitis.
20. On June 7, 2018, Dahl underwent a C6-7 cervical epidural steroid injections under fluoroscopy guidance performed by Dr. Brunz.
21. On June 26, 2018, PA Swan saw Dahl for neck pain. She noted that his left-sided neck pain that radiated into his left arm was from the C7 distribution which was likely due to degenerative disk disease with C7 radiculopathy. She reviewed his X-rays and noted that showed global arthritis through his neck, but most notably at C5-6 and C6-7. She recommended he undergo medial branch blocks.
22. On June 27, 2018, Dahl went to Acute Care in Brookings, S.D. complaining of pain and swelling in his legs and neck pain. He was diagnosed with basilar parenchymal

stranding and bilateral leg edema. It was recommended that he use compression stockings and follow up with Dr. Zoilo Lansang, a family medicine specialist.

23. On July 30, 2018, Dr. Thomas Ripperda performed an independent medical examination (IME) and medical records review. He opined that Dahl had a left C7 cervical radiculopathy related to cervical disorder herniation which occurred at the time of the work injury.
24. On October 15, 2018, Dahl was seen by Dr. Lansang for bilateral knee pain with swelling in the left knee. Dr. Lansang aspirated the left knee and injected Hyalgan into both knees. He noted that Dahl's X-rays showed bilateral osteoarthritis.
25. On October 18, 2018, Dr. Wingate saw Dahl for neck pain, left shoulder pain, and left arm pain with tingling and numbness. He noted Dahl was struck by a forklift which cause the acute onset of his neck pain, shoulder pain, and trapezial pain with radicular symptoms from the C7 distribution. Dr. Wingate recommended an MRI of the left shoulder, to repeat the cervical epidural injection, and repeat bicep injections. He also recommended EMG.
26. On October 23, 2018, Dr. Lansang saw Dahl for bilateral knee pain and swelling. He ordered X-rays and diagnosed Dahl with prepatellar bursitis of the left knee and primary osteoarthritis of both knees. Dr. Lansang aspirated the fluid on Dahl's left knee and injected both knees with Hyalagan.
27. On November 2, 2018, Dahl underwent an MRI of his left shoulder which revealed:
 - a. A moderate tendinosis with full-thickness tear anteriorly which measured 6.9 mm;
 - b. Mild infraspinatus tendinosis with focal articular surface tear of the far anterior aspect with delaminating intrasubstance fluid extending back to the myotendinous junction;

- c. Mild subscapularis tendinosis without tear; moderate to severe tendinosis of the intra-articular long head biceps tendon;
- d. Circumferential degeneration and tearing of the glenoid labrum with discrete tear superiorly and inferiorly;
- e. Moderate acromioclavicular joint arthrosis; mesoacromion of acromiale with fluid cleft with synchondrosis; and
- f. Mild to moderate degenerative changes of the glenohumeral joint with 5x10 mm intra-articular body in the subscapularis recess.

28. On November 5, 2018, Dahl underwent a C6-7 interlaminar epidural steroid injection under fluoroscopy and left proximal biceps tendon injection performed by Dr. Brunz. He also underwent an EMG which revealed moderate bilateral carpal tunnel syndrome and left C7 radiculopathy/radiculitis.

29. On November 15, 2018, Dahl was seen by PA Swann who diagnosed him with neck pain with left-sided C7 radiculopathy, left bicipital tendinitis, and a left rotator cuff tear and tendinitis following his work injury. She provided work restrictions of lifting, pushing, and pulling 20 pounds, no overhead activity, and no internal rotation.

30. On December 6, 2018, Dahl had an MRI on his left knee which revealed MCL with inflammation and a complex extensive tear of the medial meniscus with free edge fraying and probably tear of the lateral meniscus. There was also mild lateral and medial compartment arthritis. On that same date, he saw PA Lucas J. Mikkelson for bilateral knee pain. Dahl reported having pain starting several years prior and noted it was getting worse. PA Mikkelson recommended conservative treatment with over-the-counter medication, bracing, reduction of weight and activity modification.

31. On December 11, 2018, Dahl was seen by Dr. Looby for left shoulder weakness and pain. Dr. Looby recommended surgery.
32. On December 20, 2018, Dahl followed up with orthopedic surgeon, Dr. Carl Bechtold for pain in his right knee. He recommended Dahl continue with Tylenol and Aleve and to not bear weight on his right knee. He prescribed crutches.
33. On January 28, 2019, Dahl underwent a left-shoulder arthroscopic operation performed by Dr. Looby.
34. On February 11, 2019, PA Trae Berg saw Dahl for a follow-up on his left shoulder rotator cuff repair. PA Berg's notes indicate that Dahl was healing well and that he should have progress with a home exercise program. Dr. Looby indicated that Dahl could return to work to do only right-handed work.
35. On March 13, 2019, PA Berg saw Dahl for another follow-up after his left shoulder rotator cuff repair. Dahl continued to heal appropriately. Also, that day, Dr. Looby recommended physical therapy and returned Dahl to work with restrictions that he could only work with his right arm and no work above his shoulders.
36. On March 19, 2019, Dr. Wingate saw Dahl for neck pain. He noted that Dahl showed significant arthrosis of his cervical spine and referred pain from the degeneration of his C-spine. Dr. Wingate recommended facet injections.
37. On March 20, 2019, Dahl began physical therapy for his left shoulder. He completed seventeen sessions of physical therapy and was discharged with a home exercise program on May 9, 2019.
38. On April 24, 2019, Dahl was seen by Dr. Looby following his left shoulder arthroscopic cuff repair. His shoulder was doing well, and his main complaint was knee pain. Dr. Looby indicated that Dahl had bone on bone osteoarthritis which

was not responding to non-operative treatment. He recommended a left total knee arthroplasty and for Dahl to continue physical therapy of his left shoulder.

39. On May 2, 2019, Dahl was seen by Dr. Brunz for neck pain with occasional numbness in his thumb and index finger in his left hand. He assessed Dahl with cervical facet arthropathy and disk degeneration. He scheduled Dahl for cervical facet injections.
40. On May 8, 2019, Dahl underwent a left C3-4 and C4-5 facet block by Dr. Brunz.
41. On May 13, 2019, Dahl underwent a left total knee arthroplasty and prepatellar bursectomy.
42. From May 15, 2019, to February 28, 2020, Dahl participated in 40 sessions of physical therapy.
43. On May 24, 2019, Dahl was seen by Dr. Erik Peterson because his knee was infected following his arthroplasty. Dahl was admitted to the hospital. X-rays were taken of Dahl's left knee which showed prepatellar soft tissue swelling with no acute osseous abnormality.
44. On May 25, 2019, Dr. Peterson performed a revision of the arthroplasty.
45. On June 5, 2019, Dahl saw Dr. Looby who noted that Dahl had reaccumulated a significant amount of prepatellar fluid. He aspirated Dahl's knee and recommended he follow up with an infectious disease specialist for antibiotic treatment.
46. On June 10, 2019, Dr. Looby admitted Dahl to Sioux Falls Specialty Hospital where he performed an irrigation, debridement, and poly exchange of the left knee. Dahl was discharged the next day.
47. On June 25, 2019, Dahl was seen by PA Bergh who noted that Dahl was staying at a nursing home in Brookings while receiving intravenous antibiotics. He noted that

the knee wound was healing well. X-rays revealed a well-placed left knee arthroplasty.

48. On July 9, 2019, Dr. Looby saw Dahl and noted that he a one-inch area on the middle aspect of the incision where his bursa was still healing. He recommended continued antibiotics as recommended by the specialist. He also recommended physical therapy once the wound healed.

49. On August 8, 2019, Dr. Looby irrigated, debrided, and closed Dahl's left knee wound.

50. On August 13, 2019, PA Bergh saw Dahl and noted that the wound was healing well. He recommended physical therapy and took Dahl off work for four weeks.

51. On October 2, 2019, Dahl was seen by Dr. Looby who recommended continued wound care and antibiotics. X-rays revealed a small avulsion fracture at the inferior pole of the patella with a small, displaced piece but not osteomyelitis. He kept Dahl off work until his next appointment.

52. On October 3, 2019, Dahl was seen by Pamela Kendall, DNP for neck pain which radiated into his left arm and hand. She diagnosed him with cervical facet arthropathy and cervical disk degeneration and recommended that he have repeated cervical facet injections.

53. On October 16, 2019, Dahl was seen by Dr. Looby for a follow-up on his left knee arthroplasty. He noted that he wanted him to progress to normal activity and he gave work restrictions of four hours per day with limited walking, no kneeling, and that Dahl be allowed to sit as needed.

54. On October 30, 2019, Courtney Linton, PA assigned Dahl an impairment rating of 8% permanent medical impairment to his left upper extremity.

55. On November 4, 2019, Dahl reported to his physical therapist that he was installing windows which involved climbing ladders even though he had an off work note from Orthopedic Institute from the period of October 30, 2019, to November 13, 2019.
56. On November 15, 2019, Dahl reported to his physical therapist that he had increased pain from working on cars and installing window which occasionally required him to kneel.
57. On November 22, 2019, Dahl reported to his therapist that he had been installing flooring and working his knees throughout the day.
58. On November 29, 2019, Dr. Looby saw Dahl for right knee swelling and pain after working four to five hours. X-rays revealed a small avulsion fracture of the left patella that was healing and well-positioned total left knee arthroplasty. He recommended that Dahl continue with physical therapy and home exercise. Dahl informed Dr. Looby that he had two jobs, one was a part-time as a carpenter and the other was standing on concrete during the day. He said he was considering retiring from the job with Employer. Dahl was taken off work until his next appointment.
59. On December 4, 2019, Dahl underwent a left C4-5 and C4-5 facet joint injection fluoroscopy done by Dr. Brunz.
60. On December 27, 2019, Dr. Looby saw Dahl for a follow-up of his left knee arthroplasty. Dahl reported pain in the anterior and lateral aspects of his left knee. Dr. Looby suspected Dahl suffered from distal iliotibial band syndrome and an avulsion fracture of the distal patella which was healing. Dahl was prescribed physical therapy and ordered off work for four weeks.
61. On January 15, 2020, Dahl was seen by Ms. Kendall reporting neck pain that radiated into his head causing headaches as well as a reduced grip strength. Ms.

- Kendall's impression was that he had cervical facet arthropathy and increasing cervical radiculopathy. She ordered a CT scan and prescribed Voltaren topical gel.
62. On January 23, 2020, an MRI of Dahl's cervical spine revealed a moderate broad-based posterior disk bulge eccentric slightly to the left, very mildly effacing the ventral spinal cord, and small paracentral disk extrusion with small extruded disk fragment migrating slightly left caudally potentially contacting the C7 nerve root.
63. On January 27, 2020, Dr. Looby performed irrigation, debridement, and closure of Dahl's left knee. Dahl indicated that he did not think he could return to work because he was on his feet all day walking on concrete. Dr. Looby recommended additional physical therapy three times a week for four weeks. He also provided work restrictions indicating that Dahl should avoid prolonged walking or standing on concrete.
64. On February 5, 2020, Dahl saw Dr. Brunz for neck and upper extremity pain. Dr. Brunz noted that the previous MRI revealed a disk bulge at C6-7 to the left with possible contact to the left C7 nerve root. He further noted that Dahl had received cervical facet injections which did not relieve his symptoms. He recommended a trial of epidural steroids and follow up with him one month after the injections.
65. On February 6, 2020, Dahl reported to his therapist that he completed a mudding/taping job two days prior which made his symptoms worse and informed the therapist he recently let his employer know of his intentions to retire.
66. On March 16, 2020, Dahl underwent a C6-7 interlaminar epidural steroid injection under fluoroscopy by Dr. Brunz.
67. On April 16, 2020, Dr. Brunz saw Dahl for neck pain with radiculopathy. He noted that Dahl did not experience any improvement after his previous epidural injection. He diagnosed Dahl with myofascial pain and cervical spondylosis. Dr. Brunz

performed trigger point injections in Dahl's left and right cervical paraspinous and superior trapezius muscles.

68. On May 21, 2020, Dahl saw Dr. Brunz for neck pain. He diagnosed myofascial pain and cervical spondylosis and performed trigger point injections and facet blocks.

69. On June 4, 2020, Dr. Brunz provided Dahl with a right and left C6-C7 facet block injection.

70. On July 15, 2020, Dahl had a follow-up with Dr. Brunz and reported a 30-40% relief. He reported neck pain with radiculopathy.

71. On August 6, 2020, Dr. Brunz performed right and left medial branch blocks at C5-7 levels.

72. On August 20, 2020, Dahl was seen by Dr. Brunz for neck pain with bilateral upper extremity radiculopathy. He referred him to Dr. Wingate.

73. On October 29, 2020, Dahl saw Dr. Wingate for continued neck pain with bilateral hand numbness and tingling in both upper extremities. X-rays revealed multilevel spinal listhesis at the C3-C6 levels. Dr. Wingate reviewed the MRI which was done on January 23, 2020. He recommended epidural steroid injection in Dahl's cervical spine.

74. On November 18, 2020, Dahl had a C7-T1 interlaminar epidural steroid injection under fluoroscopy.

75. On January 6, 2021, Dahl was seen by Dr. Janssen for an IME he paid for himself. Dr. Janssen found the work injury was a major contributing cause of the neck and shoulder injuries. He did not give an opinion on Dahl's knee condition.

76. On January 29, 2021, Dahl submitted his Petition for Hearing to the Department of Labor & Regulation (Department).

77. On February 18, 2021, Dr. Brunz saw Dahl for chronic neck pain and left upper extremity radiculopathy. He evaluated Dahl for a spinal cord stimulator trial. A psychological evaluation was performed in connection with the spinal cord stimulator trial. The testing found that Dahl's somatization score was above average, and a mental health consultation was recommended.
78. On May 3, 2021, Dahl had a Functional Capacity Evaluation (FCE) with Joan Hanson. She noted that Dahl demonstrated deficits in all areas of lifting except pushing and pulling, and she said he can work up to 6 hours a day. She noted he could do not crawling, crouching, or kneeling.
79. On May 21, 2021, Dahl spoke with Tom Audet regarding a vocational assessment. Audet opined that due to Dahl's pain complaints no work was readily available.
80. On July 29, 2021, Dahl was seen by Dr. Brunz for chronic neck pain and left upper extremity radiculopathy. He noted that Gabapentin had not helped with the neck pain. Dr. Brunz performed five trigger point injections into Dahl's left superior trapezius and thoracic muscles.
81. On December 28, 2022, Dahl saw Michelle J. Holtquist, APRN-CNP for chronic neck pain. She prescribed a Medrol Dosepak and indicated that Dahl should follow up with Dr. Shaina L. Riggs at Orthopedic Institute if he was not improving for physical therapy and injections.
82. On January 26, 2023, Dr. Riggs saw Dahl for chronic neck and left shoulder pain. She noted that he had been struck by a forklift at work and subsequently had numerous surgeries and injections. She prescribed gabapentin and also injected his left shoulder.

Additional facts may be developed in the issue analysis below.

Issues:

The issues presented at hearing are:

- a. Nature and extent of injury
- b. Permanent and total disability

Nature and Extent of Injury

To prevail in this matter, Dahl must first prove that his work-related injury is a major contributing cause of his condition. SDCL § 62-1-1(7) provides, in pertinent part:

"Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

- (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
- (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment;

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. A work incident does not need to be "the" major contributing cause but need only be "a" major contributing cause. *Hughes v. Dakota Mill Grain, Inc. and Hartford Insurance*, 2021 S.D. 31, ¶ 22, 959 N.W.2d 903. "The fact that an employee may have suffered a work-related injury does not automatically establish entitlement to benefits for his current claimed condition." The standard of proof for causation in a worker's compensation claim is a preponderance of the evidence. *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, ¶ 21, 938 N.W.2d 425, 430. "Expert witness testimony must be used to establish the causal

connection between one's employment and subsequent injury where 'the field is one in which laymen are not qualified to express an opinion.'" *Hanten v. Palace Builders, Inc.*, 1997 S.D. 3, ¶ 10, 558 N.W.2d 76, 78 (citations omitted).

Joan Hanson (Hanson), PT DPT, administered an FCE of Dahl on May 3, 2021. Dr. Hanson is a licensed physical therapist who has been practicing in Sioux Falls for 31 years. She has a masters in physical therapy from the Mayo Clinic and a doctorate from University of St. Augustine. She has performed approximately a thousand FCEs as a physical therapist. When conducting these assessments, she uses the KEY Whole Body Assessment which she prefers because it compares the patient being assessed with other patients that have taken the test to provide a measure of objectivity.

Dr. Hanson opined that Dahl exhibited a full effort and the results were valid. The FCE testing revealed Dahl is capable of (1) working a six-hour day within certain parameters; (2) sitting for 6 hours with a 5-minute break every hour; (3) standing for 3 hours in 30-minute increments; and (4) walking 2-3 hours occasionally within the 6-hour workday. The FCE further revealed that Dahl had deficits in all areas of lifting except pushing and pulling when compared with uninjured male in the 60-69 age group. The assessment also showed he has a limited use of his left hand.

At hearing, Dr. Hanson testified that Dahl self-reported that he was unable to kneel or crawl because of his total knee replacement, that he could not frequently kneel or crawl, and that he did not feel comfortable doing those activities. She stated that her assessment was at least partially based on what Dahl told her he could do. When asked whether her opinion would change if she knew Dahl was able to crawl, Dr. Hanson acknowledged that if he was performing the activity then we at least know he could do it occasionally. Dahl testified at hearing that could kneel and crawl.

Employer and Insurer assert that Dr. Hanson's opinion is lacking the adequate foundation and is therefore unreliable. Expert testimony is entitled to no more weight than the facts upon which it is predicated. "The value of the opinion of an expert witness is no better than the facts upon which they are based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Schneider v. S. Dakota Dep't of Transp.*, 2001 S.D. 70, ¶ 16, 628 N.W.2d 725, 730 (citations omitted). The Department agrees. The inconsistencies between what Dahl asserted he could do at the FCE and what he admitted to doing at the hearing lead the Department to conclude that the results of the FCE are questionable. Therefore, the Department cannot rely on them to establish Dahl's capabilities in relation to his physical condition.

Dahl has offered the expert medical opinion of Dr. Chris Janssen. Dr. Janssen attended medical school at Tulane University in New Orleans. Following medical school, he completed a year of internship in internal medicine at Tulane. Dr. Janssen completed his residency at Rehabilitation Institute of Chicago at Northwestern University. He then completed a pain fellowship at UCLA. Since completing his pain fellowship, Dr. Janssen has practiced in Sioux Fall at Sanford as an interventional physiatrist.

Dr. Janssen performed an IME of Dahl on January 6, 2021. In preparation for the examination, he reviewed Dahl's medical records, Dr. Ripperda's IME, Dr. Hanson's FCE, and spoke with the individual who made the referral. During the examination, he took a history from Dahl. Dahl reported that he was having pain in his neck that radiated into his left shoulder and arm to the first digits of his left hand. The pain increased with activity, sleep, and overhead activity. Dr. Janssen testified at his deposition on April 21, 2023 that Dahl's mechanism of injury was that, while working, he was struck by a forklift primarily on his left side on April 27, 2017. Then Dahl was treated with chiropractic treatment before eventually having a series of injections and ultimately surgery. Since surgery he has had

continued treatment for his neck and left shoulder. During his examination, Dr. Janssen noted that Dave had decreased range of motion in his left shoulder and cervical spine.

After his examination and review, Dr. Janssen produced a report of his findings and conclusions. He opined that work injury was the cause of Dahl's physical condition in his arm and neck. He found that Dahl had a pre-existing cervical facet arthropathy, but it was largely asymptomatic prior to the work injury. Dahl was not having significant consistent symptoms in his neck, left shoulder, or left arm prior to the work injury. Then symptoms began very soon after the injury, and Dahl saw his chiropractor within several days. He has had symptoms ever since. Additionally, the MRI showed a new disk herniation at the C6-C7 level. Dr. Janssen noted that Dahl had fallen into the basket of a forklift onto his left side and that mechanism of injury is consistent with his causation analysis. The objective findings in the MRI of left C6-C7 disk herniation, electrodiagnostic findings of left C7 radiculopathy, left shoulder rotator cuff repair and labral tear are also consistent with the work injury as the cause.

He opined to a reasonable degree of medical certainty that Dahl's treatment was medically necessary, he was at maximum medical improvement (MMI), and had suffered a 16% whole person impairment. Dr. Janssen concluded that the restrictions and limitations established by the FCE are Dahl's permanent work restrictions, and Dahl suffers from severe, continuous, and debilitating pain in his neck and left arm. He concluded that in the future Dahl will need to see his physician for flare ups, medication management, diagnostic testing, and possible physical therapy. He would also need a prescription for Cymbalta, and a spinal cord stimulator as indicated by Dr. Brunz.

Employer and Insurer assert that the South Dakota Supreme Court (Court) has directed the Department to consider the opinions of Drs. Brunz, Looby, and Wingate as Dahl's treating physicians over that of Dr. Janssen who performed the IME. Dr. Brunz and

Dr. Looby did not assign permanent restrictions for Dahl for his neck or shoulder. Dr. Wingate deferred to the opinion of Dr. Looby. The treating doctors have not offered a medical opinion that Dahl's ongoing issues are a result of his work injury.

The Court has held "[t]he opinion of an examining physician should be given substantial weight when compared to the opinion of a doctor who only conducts a review of medical records." *Peterson v. Evangelical Lutheran Good Samaritan Soc.*, 2012 S.D. 52, ¶ 23, 816 N.W.2d 843, 850 (citations omitted). However, the Court has also held that a non-treating physician's opinion can be more persuasive than the opinion of a treating physician on causation issues. *Helms v. Lynn's Inc.*, 1996 S.D. 8, 542 N.W. 2d 764. Therefore, it is to the Department to weigh the medical evidence and decide what is most persuasive.

Employer and Insurer assert Dr. Janssen relied heavily on the mere sequence of events which is not sufficient to prove causation. That two incidents occurred in sequence does not prove that one caused the other. "[A claimant] must do more than prove that an injury sustained at her 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.

The Department disagrees that he relied merely on sequence, and instead finds that Dr. Janssen has offered a well-reasoned and well-supported analysis of Dahl's physical condition. While he does consider the sequence of events, it is merely one factor in his analysis. He found the lack of pre-existing condition, timeline, mechanism of injury, objective findings, his evaluation, and other physicians' opinions to be consistent with his causation analysis. Dr. Janssen's causation opinion is also consistent with the opinion of Dr. Ripperda who opined that Dahl had left C7 cervical radiculopathy related to cervical

disorder herniation which occurred at the time of the work injury on April 7, 2017. The Department is persuaded by Dr. Janssen's conclusion that the work-related injury on April 27, 2017, is a major contributing cause of Dahl's neck and shoulder injuries. However, regarding restrictions, Dr. Janssen affirmed the FCE findings and as the FCE results have been disregarded as they lack foundational support, his opinion affirming them will also not be considered.

Thus, the Department concludes that Dahl has proven by a preponderance of the evidence that pursuant to SDCL § 62-1-1(7) his injury arose out of and in the course of his employment and the employment is a major contributing cause of his condition.

Permanent and Total Disability

To prove he is entitled to permanent and total disability benefits, Dahl must 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 fact in the kind of continuous, severe and debilitating pain which he claims." *Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶¶ 67, 915 N.W.2d 707, 725. The Court has provided two ways a claimant can make a prima facie showing of entitlement to benefits under the odd-lot category. "(1) claimant is obviously unemployable due to his or her physical condition, coupled with his or her age, training, and experience, or (2) unavailability of suitable employment by showing that he or she has made reasonable efforts to find work and was unsuccessful." *Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, ¶¶ 25, 956 N.W.2d 812, 820.

Dahl offered the opinion of Tom Audet (Audet), a certified vocational rehabilitation counselor, to assess his employability. Audet interviewed Dahl in February 2021 to obtain his medical history, educational background, work experienced, and functionality. He learned that Dahl graduated from Estelline High School in 1972 as a certified welder. Dahl

had performed physically demanding work throughout his life. At the time of the work injury, Dahl was working as a shipping clerk which is considered as requiring medium exertion. Medium exertion requires lifting 25 pounds frequently and 50 pounds occasionally. Dahl also worked as an assembler for Employer, a farmer, and a welder. All three jobs required medium to heavy exertion levels. Audet opined that applying the exertion levels established by the FCE, Dahl could not return to his past work.

Audet further opined that Dahl would not be able to do other work in light of the limitations and would not be able to earn his compensation rate of \$490.55 a week. Dahl's chronic pain negatively affected his ability to reenter the competitive work force, and to function in a work environment. The pain would also likely lead to absenteeism at levels not tolerated by an employer. In his report, Audet concluded that Dahl is permanently and totally disabled.

Employer and Insurer asked Audet at hearing whether he thought Dahl was permanently and totally disabled, and he did not clearly state his answer. Additionally, Audet based much of his opinion on the FCE results which have been dismissed as questionable. Therefore, Audet's opinions based on the FCE have the same unsupported foundation and are therefore unreliable. However, his opinions that are supported by Dr. Janssen's IME which has been found persuasive and well-supported will still be considered.

Employer and Insurer contend that there are jobs available that would meet Dahl's compensation rate even if he would only work a 30-hour work week. He would need a job earning \$16.50. Dahl testified that he could operate a forklift and may have a license for it. Audet testified that there are likely jobs in Sioux Falls where someone could operate a forklift. Audet admitted at hearing that he did not call any jobs to see if they could accommodate Dahl. He further admitted that he did not review the report of Employer and

Insurer's vocational expert, Certified Rehabilitation Counselor, Katie Medema, or call any of the jobs she identified as available within Dahl's restrictions.

Medema opined that by Dahl's own report he was completing job tasks in 2020 that consisted of medium to heavy physical demand levels such as mechanic work, fencing, sheet rocking, and climbing ladders to wire fencing, which contradicts his abilities according to the FCE. Medema contends that Audet did not complete a full medical record review and did not consider which injury was compensable when performing his analysis. She found jobs available in Dahl's labor market and met his workers' compensation benefit rate and his physical abilities identified in the FCE. The Department finds that Dahl has failed to prove he is in the odd-lot category. Audet's assessments based on the FCE are invalid and Medema was able to find jobs in his labor market that he could perform and meet his benefit rate.

Regarding the second test for obvious unemployability, severe, continuous, and debilitating pain, Audet opined that Dahl's pain could result in absenteeism which would affect his employability. However, while the Department is persuaded by Dr. Janssen's opinion, including that Dahl suffers from severe, continuous, and debilitating pain in his neck and left arm, that pain is not why Dahl is not working.

At hearing, Dahl testified that he retired from his job with Employer because Dr. Looby told him he could only work a job off concrete due to his issues with his knee. At hearing, he was asked why he had not applied to any jobs in the last several years. He answered, "...I'm retired and I'm supposed to be." Hearing Transcript pg 104. Therefore, the Department cannot conclude that Dahl is unemployable due to his condition or chronic pain related to the work injury. He voluntarily left the labor market when he retired from Employer, due to issues with his knees. There is no medical opinion causally connecting Dahl's knee condition to his need for treatment to the work injury. Dahl testified at his

deposition on August 18, 2021, that the problems with his gait, squatting and walking upstairs were all related to his knee and not his neck or shoulder.

Dahl further testified that Employer attempted to accommodate his restrictions by providing him a rubber mat to stand on to assist with his knee complaints, but he never tried the accommodation as he decided it would not work. Employer was willing to accommodate Dahl, but he instead chose to leave the job. Dahl is not entitled to benefits when he chose to forgo accommodation and retired thus voluntarily leaving the job market.

Conclusion

Dahl has proven by a preponderance of the evidence that work injury he sustained on April 27, 2017, is a major contributing cause of the condition of his neck, left shoulder, and left arm.

Dahl has failed to prove he is permanently and totally disabled.

Dahl has failed to make a prima facie showing of entitlement to benefits under the odd-lot category.

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

Dated this day of January 26, 2024.

SOUTH DAKOTA DEPARTMENT OF
LABOR & REGULATION

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge