

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

MARVIN BRAGG

HF No. 83, 2020/21

Claimant,

v.

DECISION

**LAYTON CONSTRUCTION, CO.
Employer,**

and

**XL SPECIALTY SERVICE, CO.,
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 27, 2023. Claimant, Marvin Bragg, was present and represented by Jon J. LaFleur of Zephier & LaFleur, P.C.. Employer and Self-insurer were represented by Jeff Shultz of Woods, Fuller, Shultz & Smith P.C..

Facts:

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

1. On May 18, 2020, Marvin Bragg (Bragg) was working for Layton Construction, Co. (Employer) which was at all times pertinent insured for workers' compensation purposes by XL Specialty Service, Co. (Insurer) when he fell while on four-foot stilts and injured his right shoulder. He was taken to urgent care for drug testing. Urgent care referred him elsewhere for treatment of his right shoulder injury. He was seen at the Monument Health emergency room

- (ER) where they diagnosed and treated a dislocated shoulder. Bragg returned to work the next day.
2. On May 19, 2020, Bragg was seen by Dr. Bryan Larson at Black Hills Orthopedics. Dr. Larson noted the anterior dislocation of the humerus and ordered an arm sling and Codman's exercises. He also assigned the following work restrictions: (1) no overhead lifting, (2) minimal use of affected extremity, (3) restricted crawling and kneeling, (4) no lifting greater than 10 lbs, (5) no climbing, and (6) return to modified duty on May 20, 2020.
 3. On May 25, 2020, Bragg was seen at the ER for persistent pain. He was prescribed Hydrocodone.
 4. On May 27, 2020, Dr. Larson ordered Bragg off work until June 2, 2020. Bragg did not follow Dr. Larson's order and did not miss a day of work.
 5. On June 2, 2020, Bragg was seen by Dr. Larson who noted that new X-rays revealed a small chip fracture, Bragg was unable to do all his Codman's exercises, and his boss was asking him to do more with his right upper extremity than what was recommended with the work restrictions. He prescribed physical therapy and recommended a follow-up with orthopedics in one month. The work restrictions assigned that day were: (1) no overhead lifting, (2) no use of the right arm, (3) sedentary job only, and (4) off work until June 8, 2020. Bragg did not follow Dr. Larson's instruction and continued to work.
 6. On June 8, 2020, Bragg started physical therapy. He rated his pain 7/10 while stretching his shoulder. After this date, Dr. Larson authorized Bragg to return to work with restrictions.
 7. From June 12, 2020, to June 25, 2020, Bragg attended five physical therapy

sessions.

8. June 25, 2020, Bragg was seen by Dr. Larson who noted that Bragg still had some pain but had been back at work with limited duty. He still experienced pain and stiffness in his shoulder. Dr. Larson continued Bragg's physical therapy. He prescribed Tramadol for pain.
9. From June 29, 2020, to July 13, 2020, Bragg attended four physical therapy sessions.
10. On July 15, 2020, Bragg was seen by Dr. Larson who noted that he would continue with physical therapy and home exercises. Dr. Larson refilled the Tramadol prescription and scheduled a follow-up in one month. From July 20, 2020, to August 3, 2020, Bragg attended three physical therapy sessions.
11. On August 4, 2020, Bragg was seen by Dr. Larson who noted he continued to progress with his exercises. Dr. Larson noted that Bragg had informed him that he had been released from his employer and was planning on going on his own eventually for his own company.
12. On August 6, 2020, and August 26, 2020, Bragg attended physical therapy.
13. On September 22, 2020, Dr. Larson noted that Bragg informed him he had started his own business with his brother because he was let go by previous employment. He further noted the issue was related to workers' compensation and Bragg had not heard from the workers' compensation people for some time.
14. On January 4, 2021, the Department of Labor & Regulation (Department) received Bragg's Petition for Hearing.
15. On September 1, 2021, Bragg was seen by Dr. Lew Papendick because Dr. Larson was no longer at Black Hills Orthopedic. Dr. Papendick noted Bragg

- had been dealing with pain and discomfort for a year and he still had stiffness and pain. Bragg reported that he could not do his work at or above shoulder level. Dr. Papendick ordered an MRI.
16. On September 9, 2021, an MRI of Bragg's shoulder revealed a high-grade tearing in the anterior supraspinatus tendon.
 17. On September 10, 2021, Dr. Papendick telephoned Bragg to discuss the MRI results as well as the risks and benefits of surgery.
 18. On November 15, 2021, Bragg's attorney wrote a letter to Dr. Papendick asking for an opinion letter to provide Insurer.
 19. On December 21, 2021, Dr. Papendick responded opining that with a high degree of medical probability the May 18, 2020, work injury was a major contributing cause for Bragg's need for rotator cuff surgery. He further opined that individuals in the 40-year range are more likely to experience rotator cuff tears after a dislocation as he did. He noted that it was over a year since the injury and surgery may be difficult to achieve successfully.
 20. On January 11, 2022, Dr. Papendick noted that it had been a year and a half since Bragg's shoulder dislocation and that he should have surgery to repair the cuff tear. He recommended Bragg to Dr. Steven Giuseffi for evaluation and treatment recommendations.
 21. On February 7, 2022, Dr. Giuseffi saw Bragg and explained to him that after surgery he may have some stiffness and even if the surgery is successful, he may not be able to return to work as an electrician.
 22. On March 7, 2022, Dr. Giuseffi noted that Bragg's surgery scheduled for the next day was canceled, as Insurer had not approved the operation.
 23. On April 5, 2022, Dr. Giuseffi performed an arthroscopic rotator cuff repair on

Bragg's shoulder.

24. From April 5, 2022, to October 17, 2022, Bragg was off work and receiving physical therapy.

25. On August 4, 2022, Dr. Papendick was deposed in this matter. He testified that the restrictions Dr. Larson set on May 19, May 27, and June 2, 2020, would have been the limitations that claimant had from June 2020 until he saw Dr. Papendick in September 2021.

26. On October 17, 2022, Dr. Giuseffi noted that he thought it was probably that Bragg would be unable to return to activities that require prolonged or repetitive outstretch or overhead lifting or heavy lifting. He further noted that Bragg was unable to return to his work as an electrician and was studying to become a home inspector. He referred Bragg to pain management in part due to his right shoulder, and he recommended a functional capacity evaluation and impairment rating.

27. On November 23, 2022, Dr. Giuseffi wrote an opinion letter clarifying why he referred Bragg for pain management. One reason was his ongoing right shoulder pain, the other reason was left arm pain, numbness, and tingling into the left hand. He opined that the left arm was unrelated to the prior workers' compensation claim but the right shoulder was related to the injury.

28. On December 1, 2022, Bragg was seen by Dr. Lance Douden for pain management. At that time, Bragg's left-sided symptoms had resolved, and his main complaint was right anterior shoulder pain and numbness as well as right posterior shoulder blade pain. Bragg did not have that pain prior to the surgery. Dr. Douden put him on Cymbalta.

29. On December 30, 2022, Bragg was seen by Dr. Douden. He reported

headache, anxiety and insomnia due to the Cymbalta. Dr. Douden discontinued the medication. He informed Bragg that his options included right suprascapular nerve block or a prescription for Lyrica. Bragg wished to proceed with the nerve block.

30. On January 10, 2023, Dr. Douden performed a suprascapular nerve block on Bragg's shoulder. Bragg experienced a 60% relief of pain.

31. On February 3, 2023, Dr. Douden saw Bragg for right shoulder pain referring into his bicep. He gave the options of topical medications like lidocaine vs spinal cord stimulation. The notes indicate that Bragg did not meet the diagnostic criteria for CRPS at that point, however he did have dysesthesias in his right upper extremity. Dr. Douden believed he would improve with time and recommended lidocaine patches.

Other facts will be determined as necessary.

The issue presented at hearing was Bragg's entitlement to indemnity benefits for 2020, 2021, and 2022. Bragg asserts he is entitled to workers' compensation benefit for temporary partial disability (TPD) pursuant to SDCL § 62-4-5 for the years 2020, 2021, and 2022. "In a worker's compensation case, the claimant has the burden of proving all the facts essential to compensation." *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992)

SDCL § 62-4-5 provides,

If, after an injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if the employee has been released by the employee's physician from temporary total disability and has not been given a rating to which § 62-4-6 would apply, the employee shall receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3, equal to one-half of the difference between the average amount which the employee earned before the accident, and the average amount which the employee is earning or is able to earn in some suitable employment or business after the accident. If the employee has not received a bona fide job offer that the employee is physically capable of

performing, compensation shall be at the rate provided by § 62-4-3. However, in no event may the total calculation be less than the amount the claimant was receiving for temporary total disability, unless the claimant refuses suitable employment.

Bragg's work restrictions in May and June of 2020 were no overhead lifting, no use of right arm, sedentary work only, restricted crawling and kneeling, no lifting greater than 10 lbs, and no climbing. In September of 2021, Dr. Papendick discovered that Bragg had a torn rotator cuff and bicep tendon when he ordered an MRI of his shoulder. Dr. Papendick testified at deposition that the assigned work restrictions would have been reasonable up through September of 2021. Bragg asserts that Dr. Larson did not tell him not to work in July of 2020, but Dr. Larson also was unaware of the torn rotator cuff and torn bicep tendon.

At hearing, Bragg testified that after his fall at work, his arm was injured, and he could not keep up with his workload. He was limited to paperwork and other less demanding tasks and was unable to do the things he had done before. On the day he terminated his employment, his supervisor and a couple of the vice presidents tried to convince him to stay. They offered him light duty jobs, and offered him a raise in pay to stay on as foreman. However, Bragg testified that he could not help them anymore.

Bragg contends that the reason his employment with Employer ended was because the work was no longer suitable due to his work injury, pain, and limitations. He was no longer able to do the physical labor the job required, and he decided to leave the job because he felt he could not help. Employer offered light duty, but he concluded he could not do it. Although he had restrictions, no doctor has opined that Bragg could not work at all.

Employer and Insurer assert that Bragg is not entitled to TPD because he quit his

job (a) after returning to work following his injury and (b) without any lost time from work. They contend that Bragg quit his job with Employer for reasons unassociated with the work injury. Employer and Insurer urge the Department to consider the case *Hendrix v. Graham Tire Co.*, 520 N.W.2d 876. In *Hendrix*, the claimant suffered a compensable injury while at work, was treated, and released from the hospital the same day. *Id.* at 878. After the accident, the claimant returned to work with light duties, covering for his manager at the store while the manager was on vacation. *Id.* When his manager returned, claimant's request for continued light work was denied. *Id.* The claimant then quit his job and asserted multiple claims for workers' compensation, including TPD *Id.* at 878-81. The Department denied the claim for TPD. *Id.* at 882. The South Dakota Supreme Court (Court) affirmed. *Id.* The Court stated, "Hendrix offered no medical evidence that he was temporarily, totally disabled at any time since he terminated his employment and therefore, he failed to sustain his burden of proof in regard to the claim for temporary benefits." *Id.* at 881. The Court also stated, "[w]hile [the claimant's physician] suggested that he get out of a line of work that involved heavy lifting and driving, he was never completely restricted from work by [the physician] or any other physician" *Id.* at 880.

Employer and Insurer have also offered the case *Wellman v. Schad Excavation, LLC.*, 2009 S.D. 46, ¶ 2, 768 N.W.2d 149. In *Wellman*, the claimant suffered a compensable injury and was ordered off work by medical professionals for approximately one month. *Id.* ¶ 3. After returning to his job, the claimant was fired for poor attendance. *Id.* The claimant did not seek other employment and claimed he was unable to perform manual labor. *Id.* He then made a claim for TPD, alleging he was entitled to compensation from the time he returned to work until he received his impairment rating. *Id.* ¶ 5. The Department denied his claim. *Id.* ¶ 6-7.

Upon appeal, the Court noted, "The purpose of workers' compensation is to

provide for employees who have lost their ability to earn because of an employment-related accident, casualty, or disease.” *Id.* ¶ 11. “By its very nature, [SDCL § 62-4-5] carries at least two logical implications: first, that the claimant realized a loss of income or earning ability after suffering a compensable injury; and second, the loss of income or earning ability was attributable to the compensable injury.” *Id.*

The Department agrees that the situations in *Hendrix* and *Wellman* are analogous to Bragg’s. Like *Hendrix*, Bragg was not taken off work by a physician, and he made the decision himself to terminate his employment. As stated above, both his supervisor and the company vice president asked Bragg to stay and tried to accommodate his condition. Additionally, like both *Hendrix* and *Wellman*, Bragg has not provided evidence that he has searched for a job that works with his restrictions after leaving Employer. Bragg testified at hearing that he thought that his brother started the company West River Innovation¹ on August 20, 2020. Bragg’s discovery responses indicate he last worked on or about July 26, 2020. It appears that Bragg left his employment by choice and began working with his brother on their other venture. As Bragg is entitled to TPD only if his loss of income is related to the work injury, he is not entitled to those benefits because he decided to voluntarily leave his employment even though there was no medical opinion directing him to do so.

Conclusion:

Bragg has failed to prove he is entitled to indemnity benefits for 2020, 2021, and 2022.

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. Bragg shall have an additional twenty (20) days from the date of receipt of

¹ Bragg and his brother are fifty-fifty partners in West River Innovation

Bragg'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 day of February 13, 2024

SOUTH DAKOTA DEPARTMENT OF
LABOR & REGULATION



Michelle M. Faw
Administrative Law Judge