

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

JODY PHAM,

HF No. 8, 2020/21

Claimant,

v.

DECISION

SMITHFIELD FOODS, SIOUX FALLS

Employer/Self-Insurer,

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on September 28, 2022. Claimant, Jody Pham, was present and represented by David King and Kirk D. Rallis of King Law Firm. The Employer/Self-Insurer, Smithfield Foods, Sioux Falls, was represented by Laura K. Hensley of Boyce Law Firm, L.L.P.

Facts:

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

1. In 1996, Jody Pham (Pham) began working for Smithfield Foods, Sioux Falls (Smithfield) as a day laborer. As of September 28, 2022, she had been working in the bacon department for 14 years.
2. On January 6, 2011, Pham was seen by Dr. Tricia Knutson for daily headaches.
3. On January 20, 2011, Pham underwent an MRI.

4. On March 4, 2014, Pham was seen by Dr. Michael Stotz for right neck and shoulder discomfort.
5. On August 18, 2014, Pham was seen for headaches in and above her right eye.
6. On April 4, 2015, Pham was seen for pain in her right shoulder area. Physical therapy was ordered.
7. From August to October 2015, Pham received conservative treatment for right neck and shoulder pain.
8. On October 14, 2015, Pham was changing the packaging film on the bacon line and the film fell on her. She was seen by Dr. Bruce Elkins who noted Pham had pain on the right side of her neck and shoulder. He diagnosed her with a sprain of ligaments in her cervical spine and recommended physical therapy. He cleared Pham for full duty noting that Pham preferred to continue her regular duties. The injury was accepted as compensable by Employer and Insurer.
9. On October 22, 2015, Pham had a physical therapy evaluation.
10. On November 5, 2015, Pham returned to work full duty with no restrictions.
11. On November 8, 2015, Pham was seen by Dr. Elkins reporting her neck and shoulder were doing well, and she was doing her regular job duties without difficulty.
12. On December 30, 2015, Pham saw Dr. Elkins for worsening headaches. She denied neck and shoulder pain. She continued to work full duty without restrictions.

13. On January 27, 2016, Pham was seen by Dr. Lisa Viola complaining of headaches. An MRI was performed of Pham's C-spine which showed C5-6 broad-based right central protrusion with mild compression of the right ventral thecal sac without significant stenosis.
14. On February 22, 2016, Pham was seen by Dr. Wissam Asfahani who noted her symptoms were suggestive of carpal tunnel syndrome. He opined that the MRI results were not impressive with only a small bulge that he did not think was contributing to her neck pain. He did not feel she would benefit from neurosurgical intervention.
15. On March 20, 2016, Pham saw Dr. Thomas Ripperda at the request of Dr. Asfahani. Dr. Ripperda recommended oral steroids and for Pham to continue to work without restrictions.
16. On May 2, 2016, Pham was given a cervical injection and allowed back to work for full duty.
17. On December 13, 2016, Pham underwent an MRI that showed a new paracentral to foraminal disc extrusion with potential mass effect upon the exiting C-6 nerve root.
18. On January 19, 2017, Pham was seen by Dr. Asfahani who noted Pham was experiencing worsening neck pain. He recommended a cervical discectomy and fusion.
19. On January 31, 2017, by letter, Dr. Asfahani was asked to opine on causation. He also reviewed a DVD showing Pham's job activities.
20. On March 6, 2017, Dr. Asfahani responded to the January 31 letter opining that Pham had degenerative disc disease of the cervical spine and a disc

herniation at C5-6. He further opined that it was difficult to say the cause of her cervical condition, and he did not opine that the work activities were a major contributing cause of her condition and need for treatment.

21. On April 19, 2017, Pham underwent surgery paid for by Smithfield. Pham was ordered off work for three months. Smithfield paid benefits.

22. On July 21, 2017, Pham underwent an MRI of her right shoulder.

23. On August 17, 2017, Pham was seen by Dr. Travis Liddell for her right shoulder pain. He diagnosed her with adhesive capsulitis of the shoulder and recommended an injection.

24. On September 15, 2017, Pham demonstrated a functional range of motion and strength.

25. On November 9, 2017, Pham was seen by Dr. Liddell complaining of the same symptoms as before the surgery.

26. On December 1, 2017, Pham underwent a cervical CT scan which revealed previous ACDF at C5-6 without evidence of failed fusion or residual spinal stenosis. Dr. Liddell performed a C6-7 epidural injection.

27. On January 4, 2018, Dr. Liddell saw Pham noting she showed no response to any of the treatments provided and a negative EMG. He diagnosed her with adhesive capsulitis of the right shoulder. He performed a right shoulder injection which was paid for by Employer and Insurer.

28. On March 20, 2018, Pham underwent an MRI of her brain which showed migrainous changes.

29. On April 20, 2018, Pham underwent an MRI of her cervical spine which showed no changes since her surgery.

30. On June 7, 2018, Pham was seen by PA-C Brett Bastian who released her to return to work full duty without restrictions.
31. On June 12, 2018, Employer and Insurer made their final TTD payment to Pham.
32. On July 27, 2018, Pham had a normal EMG.
33. On August 21, 2018, PA-C Bastian noted Pham had continued neck and shoulder pain, but there was no evidence of a failed fusion. He opined that no neurosurgical intervention would be helpful.
34. On August 30, 2018, Dr. Ryan Noonan assigned Pham an 8% impairment rating.
35. On October 2, 2018, Pham was seen by Dr. Ripperda who assessed her with thoracic outlet syndrome of the right thoracic outlet. He referred Pham for evaluation of possible thoracic outlet syndrome.
36. On June 24, 2019, on the recommendation of Dr. Ripperda, Pham underwent an MRI of her cervical spine. No changes were noted.
37. On July 9, 2019, Pham was seen by PA-C Bastian who assessed her with radiculitis of the right cervical region. He recommended conservative treatment.
38. On September 3, 2019, Pham saw Dr. Steven Feldhaus. He noted that the exam was not indicative of thoracic outlet syndrome and opined Pham would not respond to any type of thoracic outlet decompression.
39. On September 26, 2019, Pham was seen by Dr. Asfahani who noted her ongoing pain in her right suprascapular region, right shoulder, and right elbow with numbness into the right hand. He referred her to Dr. Liddell.

40. On December 10, 2019, Pham was seen by Dr. Liddell who diagnosed her as having elbow cubital tunnel syndrome and recommended right elbow subcutaneous ulnar nerve transposition.
41. On January 14, 2020, Dr. Knutson ordered Pham off work until her surgery.
42. On January 24, 2020, Dr. Liddell performed a right elbow ulnar nerve decompression and subcutaneous transposition surgery. Smithfield denied coverage for the surgery because no doctor had opined that Pham's work activities were a major contributing cause of her need for the surgery.
43. On February 26, 2020, Pham received a cervical epidural steroid injection.
44. On March 6, 2020, Pham was released to work with the limitation that she could not lift any plastic film for two months.
45. On May 21, 2020, Pham was seen by Dr. Liddell. She reported the same pain complaints. He recommended she follow up with spine surgery for her neck issues.
46. On June 23, 2020, Pham received a cervical epidural steroid injection.
47. On July 17, 2020, Pham filed her Petition for Hearing with the Department of Labor & Regulation (Department). In the Petition, she alleged she was permanently and totally disabled as a result of her work-related activities.
48. On October 5, 2020, Pham saw Dr. Knutson who noted that Pham had been having constant headaches for years and she was diagnosed with chronic migraines.
49. On December 18, 2020, Dr. Ripperda ordered another EMG of Pham's upper right extremity which showed some changes with the right C6 myotome, and he referred her to the pain clinic.

50. On February 2, 2021, Pham underwent a functional capacity evaluation at the request of her attorney. The results showed she was capable of working full-time.

51. On February 9, 2021, Pham saw Dr. Michael Pudenz for chronic pain. He recommended a spinal cord stimulator.

52. On March 1, 2021, Pham received a spinal cord stimulator trial placement.

53. On March 5, 2021, Dr. Pudenz noted Pham reported no improvement in her pain, and the stimulator was removed.

54. On November 16, 2021, Dr. Ripperda assigned Pham a 15% whole-person impairment related to her right cervical radiculopathy and adhesive capsulitis.

55. On January 15, 2022, Dr. Wade Jensen performed a review of Pham's medical records. He could not determine that her work activities were a major contributing cause of the neck and right arm pain or the need for cervical surgery.

56. On July 14, 2022, the Department approved a stipulation by the parties to Dismiss the Permanent and Total Disability claim, because Pham continued to work full-time at Smithfield.

Other facts will be determined as necessary.

Issues Presented at Hearing

On August 15, 2022, the parties met telephonically with the Department regarding the Prehearing Order in this matter. The parties were asked what issues would be presented at hearing. The two issues the parties agreed were to be presented are:

- 1.** Causation; and

2. Entitlement to Medical Benefits.

Pham has attempted to raise other issues and arguments in her brief but as they were not included in the Prehearing Order the Department will not address them.

Causation

To prevail in this matter, Pham must first prove that her 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;

The testimony must establish causation to "a reasonable degree of medical probability, not just possibility." *Jewett v. Real Tuff, Inc.*, 2011 S.D. 33, ¶ 23, 800 N.W. 2d 345, 350.

Pham is "not required to prove [her] 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. She must prove "that employment or employment-related activities [are] a major contributing cause of the condition of which she complained, or, in cases of preexisting disease or condition, that employment or employment-related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." *Norton v. Deuel School Dist. No. 19-4*, 674 N.W.2d 518, 521 (S.D. 2004). "[She] must do more than prove that an injury sustained at her workplace preceded her 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.

Additionally, the South Dakota Supreme Court has held 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. "The fact that an employee may have suffered a work-related injury does not automatically establish entitlement to benefits for his current claimed condition." *McQuay v. Fischer Furniture*, 2011 S.D. 91, ¶ 11 808 N.W.2d 107, 111 (citations omitted). 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.

Causation is a medical question, and both parties have offered expert medical opinions. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992). Pham has offered the opinion of Dr. Ripperda and Smithfield has offered the opinion of Dr. Jensen.

Dr. Ripperda

Dr. Ripperda is one of Pham's treating physicians. He is board certified in physical medicine and rehabilitation as well as pain medicine. On February 2, 2022, he provided an opinion by letter in which he opined that to a reasonable degree of medical certainty, Pham had suffered injuries to her right shoulder, right elbow, neck, and right arm as a result of her October 14, 2015, work injury. He further opined that the medical

services she had received including physical therapy, acupuncture, injections, and multiple surgeries were necessary due to the work injury. Dr. Ripperda stated that Pham's migraines were secondary to her cervical radiculopathy. He testified by deposition that her work injury was a major contributing cause of her right shoulder adhesive capsulitis, radiculopathy, ulnar nerve entrapment, and radiculitis. Dr. Ripperda also testified that Pham's work activities put her at risk for the development of ulnar nerve-related problems.

Dr. Ripperda adopted the permanent restrictions established at Pham's February 2, 2021, functional capacity assessment. These restrictions include restricting lifting 15 pounds occasionally and 5 pounds frequently, hand coordination must be self-paced, reaching only within a 20-second time frame, and elevated activity limited to 60 inches with necessary breaks. Additionally, Dr. Ripperda was not aware of any of Pham's prior medical history of the treatment of her shoulder or headaches. Smithfield asserts that Dr. Ripperda's opinion is based merely on confusing sequence with consequence.

Dr. Jensen

Dr. Jensen is a board-certified orthopedic surgeon specializing in spine surgery who has been in practice for 16 years. He handles approximately 400 cases a year, roughly 150 of them cervical patients. To form his opinion, he reviewed Pham's medical records. He noted Pham's diagnoses including neck pain, right arm pain, ulnar neuropathy of the right arm, chronic headaches, thoracic outlet syndrome, and right shoulder adhesive capsulitis. At hearing, Dr. Jensen testified that Pham's MRI from January 17, 2016, showed only a small disc bulge at C5-6 that was not compressing on the nerves. He also testified that the difference between the January 2016 and December 2016 MRIs was the latter showed disc herniation with some mass effect on

the C-6 nerve root that had enlarged from the previous MRI. Dr. Jensen opined that Pham's disc herniation had happened just prior to the MRI in December 2016, and well after her date of injury. Dr. Jensen further opined that if symptoms persist after an anterior cervical discectomy and fusion then there was a different source of the symptoms. He also opined that he believed, as does Dr. Asfahani, that there is a myofascial component as she had neck pain since 2014. He concluded that her symptoms are probably related to progressive degenerative changes. He found it significant that her symptoms were present before the injury, and he opines that the progression resulted in the eventual herniation.

Dr. Jensen also reviewed the video of Pham's work activities and he concluded that her job did not show stressors to her neck. He opined that her work activities are not a major contributing cause of her neck condition or need for treatment. He also noted that her right upper extremity pain did not appear until 6-8 weeks after the cervical spine surgery. Dr. Jensen opined that the finger symptoms Pham experiences do not fit the distribution pattern for ulnar nerve issues. He also opined that her work activities are not a major contributing cause of her ulnar nerve condition or need for surgery. He reached the same conclusion regarding Pham's headaches. He testified that the injections she received did not resolve the headaches and that indicated her headaches are chronic migraines. Regarding thoracic outlet syndrome, Dr. Jensen found no evidence in the records indicating Pham suffered from the condition. She had not been treated for thoracic outlet syndrome. He opined that Pham's work activities are not a major contributing cause of any potential diagnosis of thoracic outlet syndrome.

Dr. Jensen also addressed Pham's right shoulder referring to the treatment she had received going back to 2008. He stated that Pham's range of motion was normal

throughout her treatment with guarding for the first time in July 2017. He opined that adhesive capsulitis is a diagnosis where someone cannot move her shoulder either actively or passively beyond a certain position. It usually happens between the ages of forty and sixty and only about twenty percent of cases have a reason or comorbidity. Eight percent are idiopathic. Dr. Ripperda concluded that the adhesive capsulitis developed after the surgery. Dr. Jensen disagreed. He testified that Dr. Ripperda's conclusion did not make biomechanical or biological sense. He offered two reasons in support of his conclusion. First, adhesive capsulitis or "frozen shoulder" requires an injury and the surgery would not have caused the shoulder to freeze automatically. Second, if it were going to freeze due to the surgery it would have occurred much sooner instead of two-three months after. He opined that Pham's work activities are not a major contributing cause of her right shoulder condition and need for treatment. Dr. Jensen does not believe that Pham sustained any impairment as a result of her work injury, nor does she have any work restrictions as a result of the work injury.

The Department finds Dr. Jensen's opinion more persuasive. Dr. Ripperda was unaware of Pham's medical records prior to injury regarding treatment for her shoulder or for headaches. Dr. Jensen, however, reviewed all of Pham's medical records in forming his opinion. "Expert testimony is entitled to no more weight than the facts upon which it is predicated." *Darling v. W. River Masonry, Inc.*, 2010 S.D. 4, ¶ 13, 777 N.W.2d 363, 367. Both doctors are experts in their fields, but without knowing Pham's history of treatment in these relevant areas, Dr. Ripperda's opinion is not well-supported. Dr. Jensen considered both the timeline of her symptoms and the diagnostic tests conducted. The Department also finds his analysis of the herniation forming between the January 2016 MRI and the December 2016 MRI particularly significant regarding

whether the herniation is the result of work activity. For these reasons, the Department concludes that Pham has failed to meet her burden of proving that her work-related injury is a major contributing cause of his condition pursuant to SDCL § 62-1-1(7). Thus she is not entitled to additional benefits.

Conclusion

Pham has failed to prove by a preponderance of the evidence that her work-related injury is and remains a major contributing cause of her current condition.

Smithfield is not responsible for payment of any additional indemnity or medical benefits.

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. Pham 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 15 day of May, 2023.

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