CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
P.O. BOX 1238
PIERRE, SOUTH DAKOTA 57501-1238

CHRISTINA KLINGER
CIRCUIT COURT JUDGE
Phone: (605) 773-4014
Fax: (605) 773-6492
Christina.Klinger@ujs.state.sd.us

JESSICA PAULSEN
COURT REPORTER
Phone: (605) 773-8227
Jessica.Paulsen@ujs.state.sd.us

JOSEY BLARE
Sixth Circuit Law Clerk
Josey.Blare@ujs.state.sd.us

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Laura T. Brahms
Kading, Kunstle & Goodhope, LLP
7400 S. Bitterroot Pl. Ste. # 100
Sioux Falls, SD 57108

Timothy J. Von Wald
Boyce Law Firm, L.L.P.
300 S. Main Ave.
P.O. Box 5015
Sioux Falls, SD 57117

RE: 32CIV20-166 – Cindy Whitcomb v. The Evangelical Lutheran Good Samaritan Society d/b/a Good Samaritan Society – Sioux Falls Village, and Sentury Insurance.

MEMORANDUM OPINION

Claimant Cindy Whitcomb (Whitcomb) appeals from the South Dakota Department of Labor's (Department) decision in favor of The Evangelical Lutheran Good Samaritan Society d/b/a Good Samaritan Society - Sioux Falls Village (Employer), and Sentry Insurance (Insurer) (collectively referred to as Employer). The Department concluded that Whitcomb failed to prove by a preponderance of the evidence that her May 29, 2016, injury was a major contributing cause of her condition and need for treatment. The Department also concluded that Whitcomb had not proven that she was permanently and totally disabled. The Court heard oral argument on January 31, 2022. After reviewing the administrative record and considering the arguments raised by the parties, the Court now issues this Memorandum Opinion.

FACTUAL BACKGROUND

Whitcomb is a 57-year-old female residing in Sioux Falls, South Dakota. Whitcomb graduated from high school in Mesa, Arizona, in 1983, and moved to Sioux Falls in 2001. She was certified in Mohs surgery in 1998 in California and certified as a medical assistant in 2009.[1]

[1] Mohs surgery is defined as "a technique for removal of skin tumors with a minimum of normal tissue, by prior necrosis with zinc chloride paste, mapping of the tumor site, and excision and microscopic examination of frozen section of thin horizontal layers of tissue, until all of the tumor is removed." Whitcomb described the procedure as freezing the tissue and then cutting and staining it so that it can be examined by the doctor.

Whitcomb has no other educational training. Prior to moving to South Dakota, she was employed at White Mountain Dermatology to perform Mohs surgeries and front office duties. After moving to South Dakota, she was employed at Dakota Dermatology in Sioux Falls for approximately two years. Whitcomb assisted with patient histories, assisted the doctors with surgeries and procedures, and preformed Mohs surgeries. From 2002-2009 Whitcomb also worked part-time doing office work for C&R Plumbing. C&R Plumbing was Whitcomb's husband's, Richard Berno's (Berno), business. During this time Whitcomb also worked 32 to 40 hours at Employer from approximately 2002 to the May 29, 2016 injury.

A. Preexisting Conditions

a. Shoulder and Neck

On October 18, 1999, Whitcomb sustained a work-injury in which she was electrocuted and thrown backwards three-feet into a wall. After the incident, Whitcomb began experiencing pain in her right shoulder. A magnetic resonance imaging (MRI) was done of Whitcomb's shoulder on July 16, 2001, which revealed mild degenerative changes in the acromioclavicular joint and a lesser amount to the head of the humerus.[2] The MRI showed that Whitcomb's rotator cuff tendons were intact.

In 2002, Whitcomb began treatment for her right shoulder pain at the Orthopedic Institute ("Orthopedic Institute" or "the OI") in Sioux Falls. On January 10, 2002, Whitcomb received a cortisone injection, which gave her some pain relief. In March 2002, Dr. Walter Carlson of the Orthopedic Institute reviewed Whitcomb's July 2001 MRI, and noted that "as a result of her injuries, that she may need surgical treatment[.]" On July 18, 2002, Dr. Carlson referred Whitcomb to Dr. Timothy Zoellner for a possible arthroscopy of the right shoulder after Whitcomb had returned to the OI complaining of right shoulder pain, stiffness, and decreased range of motion.[3]

On July 23, 2002, Dr. Zoellner noted that Whitcomb had "right neck, shoulder and arm pain, numbness, tingling and weakness" since her 1999 incident. An April 2002 MRI of Whitcomb's, showed "mild AC joint changes." Dr. Zoellner discussed the risks and benefits of the arthroscopy with Whitcomb, and advised that she had "at best [a] 50% chance of being improved[.]" Whitcomb saw Dr. Zoellner several more times in 2002, complaining of shoulder and neck pain "with even slight movement[.]" On November 5, 2002, Dr. Zoellner again recommended the scope to Whitcomb, but again advised that Whitcomb had "a low likelihood of improvement and a low likelihood of long-term physical labor type work." On January 15, 2003, Whitcomb underwent a right shoulder arthroscopy and debridement of the subscapularis and subacromial bursa.[4]

Whitcomb returned to the Orthopedic Institute post-arthroscopy for similar shoulder pain. In February 2003, she had complaints of increased pain and had begun dropping items, but had a full and active range of motion. Dr. Zoeller believed she had post electrocution pain with an

[2] The acromioclavicular joint is the joint between the acromion (outer edge of the scapula) and the clavicle.
[3] An arthroscopy is an endoscopic examination of the interior of a joint. It is used for visual examination and to treat various conditions or injuries of the joint.
[4] The subscapularis is the muscle of the shoulder joint contributing to the formation of the rotator cuff. The subacromial bursa is located between the acromion and the capsule of the shoulder joint.

unknown, and likely undefinable, cause. Dr. Zoeller had Whitcomb off-of-work until she could be seen by a rehab doctor.

Throughout 2003, Whitcomb continued to be treated for worsening neck and shoulder pain. On March 6, 2003, she was diagnosed with a bulging disc at the C5-C6 level and a limited range of motion of her neck. On May 1, 2003, Dr. K.C. Chang of the Orthopedic Institute recommended a permanent restriction of lifting no more than 10 pounds, no over-head activity with the right shoulder, and working a maximum of 5 hours out of 8 in a day. On August 5, 2003, Dr. Chang again provided that Whitcomb had a "permanent restriction of no lifting up to 10# and no overhead activity with the right shoulder, working maximum 5 hours out of 8 hours a day." There is no medical evidence that this permanent restriction was ever lifted.

On January 26, 2004, Dr. Chang placed Whitcomb at maximum medical improvement, and again noted her limitations. Whitcomb was thereafter treated by her primary care physician, Dr. Bruce Schulz, for her right shoulder pain. On November 18, 2004, Dr. Schulz noted that Whitcomb had pain in her right neck and shoulder and some tingling in her arms, but that she also had a full range of motion on her neck and equal handgrip in both of her hands. Dr. Schulz approved chiropractic massage for Whitcomb's shoulder and neck. Whitcomb was subsequently treated several times at Jones Chiropractic & Wellness Center in Sioux Falls. On January 5, 2006, Whitcomb was reevaluated by Dr. Schulz for her right shoulder pain. At that time, he recommended additional massage therapy. On October 9, 2006, Dr. Schulz diagnosed Whitcomb with "chronic neck pain."

On May 8, 2008, Whitcomb was seen by Dr. Michell Johnson of the Orthopedic Institute for "neck pain down the base of the neck, slightly off to the right hand side." Whitcomb had indicated that she had the problem "for about the last 2-6 months or so." Subsequent scans showed that Whitcomb had degenerative disc changes at the C4-5, C5-6, and C6-7 discs. Dr. Johnson thought that such degeneration could be responsible for her right shoulder and neck pain. Whitcomb received an injection into her right shoulder. The last record regarding Whitcomb's right shoulder, prior to her May 29, 2016, injury, was from May 29, 2008, which provided that Whitcomb had experienced relief of her right shoulder pain after the injection.

b. Right Knee

On April 24, 2003, Whitcomb was first seen at the Sioux Valley Clinic in Sioux Falls for right knee pain caused by Whitcomb twisting her knee. An x-ray showed bony abnormalities, and Whitcomb was diagnosed with a knee strain. Whitcomb was next treated for knee pain on May 12, 2007 at Sanford Health in Sioux Falls for a knee injury Whitcomb had sustained the day before the appointment. An MRI showed a meniscal tear. Dr. Carlson recommended a right knee arthroscopy, which was completed on May 26, 2007. Whitcomb was seen four more times by the Orthopedic Institute in 2007. Whitcomb stated her pain was largely resolved after the surgery.

On June 21, 2010, Whitcomb was treated for complaints of hip, leg, and right knee pain. An MRI of Whitcomb's low back showed evidence of degenerative disc disease. Dr. Craig Smith recommended physical therapy for four weeks and anti-inflammatories. On July 8, 2010, Whitcomb called the Orthopedic Institute requesting an epidural block, which she received. Whitcomb provided to the Orthopedic Institute that she felt nearly 100% better after receiving the epidural block.

On November 19, 2013, Whitcomb was again treated by the Orthopedic Institute for right knee pain after sustaining a work place injury at Employer. Whitcomb denied experiencing any issues with her right knee since the May 26, 2007 arthroscopy. An MRI showed medial and lateral meniscus tears and "mild generalized thinning of both the medial and lateral compartments." PA Heath Reinke recommended a right knee arthroscopy with partial lateral and medial meniscetomy and compartment chondroplasties.[5]

On January 11, 2014, Whitcomb was limited to four hours a day of work until her pain decreased or her surgery. On January 27, 2014, Dr. Carlson performed a right knee arthroscopy, partial medial meniscectomy, partial lateral meniscectomy, and medial fibrous plicectomy on Whitcomb.[6] Whitcomb was released for work-related activities without restriction on February 18, 2014. Whitcomb continued to be treated by PA Reinke and Dr. Carlson for pain to her right knee until April 14, 2014. Whitcomb received cortisone injections during this time. Dr. Carlson also discovered during this time that Whitcomb had retorn her meniscus, and recommended an additional scope of her right knee.

On May 12, 2014, Whitcomb sought a second opinion from Dr. Keith Baumgarten of the Orthopedic Institute. Dr. Baumgarten obtained a radiographic image of Whitcomb's right knee, which showed "lateral joint space narrowing consistent with osteoarthritis." Dr. Baumgarten noted that there was a significant progression of degeneration to her knee from her preoperative to postoperative radiographs, and advised that any further arthroscopic interventions would be less reliable due to her joint space narrowing. Dr. Baumgarten recommended treating her pain initially with physical therapy and an unloader brace, however Whitcomb requested an arthroscopy in an effort to relieve her pain. Dr. Baumgarten advised that another arthroscopy would not likely provide relief, and that the most reliable further surgical intervention would be a total knee arthroplasty, but that she could seek an additional opinion.[7]

On May 15, 2014, Dr. Michael Adler of the Orthopedic Institute evaluated Whitcomb. Dr. Adler noted that Whitcomb had known degenerative changes of her knee. Whitcomb informed Dr. Adler that Dr. Baumgarten had aspirated some fluid off of her knee and that had improved her symptoms, but that she had not tried Dr. Baumgarten's recommended unloader brace. Dr. Adler informed Whitcomb that doing anything arthroscopically for known arthritis has unpredictable results, and tried "to make it frankly clear that in no way we can guarantee her that we are going to completely relieve her symptoms and she is likely going to have problems with her knee in the future, but [that they] could hopefully improve her mechanical symptoms at this point in time."

On June 6, 2014, Dr. Adler preformed a right knee diagnostic arthroscopy, partial medial meniscectomy, lateral compartment chondroplasty, and patellofemoral chondroplasty. Dr. Adler noted in his report that the patellafemoral joint showed some chondromalacia under the patella, and that he discovered a range of cartilage loss, ranging from some loss to complete loss.[8] On June 19, 2014, Whitcomb returned to Dr. Adler for a postoperative check, informing him that she was "doing fantastic" and that her symptoms from before the surgery were gone. Dr. Adler again advised Whitcomb that there was a high chance that she would have future problems with her knee. On July 17, 2014, Whitcomb returned to Dr. Adler for an additional postoperative

[5] A chondroplasty is a reparative surgery of the cartilage.
[6] A meniscectomy is an excision of a meniscus. A plicectomy is the removal of a plica (a fold in the membrane lining a joint).
[7] An arthroplasty is the operative formation or restoration of a joint.
[8] Chondromalacia is a softening of any cartilage.

evaluation, where he recommended Whitcomb find a new employment that would be gentler on her knees.

On December 18, 2014, Whitcomb was seen by Dr. Adler and PA Courtney Linton for an impairment rating. Whitcomb advised Dr. Adler she was able to work only three days in a row since her surgery. In his notes, Dr. Adler provided a brief summary of Whitcomb's right knee pain. According to Dr. Adler's notes, Dr. Baumgarten believed on May 15, 2014, that Whitcomb's pain was mainly due to her osteoarthritic changes. Dr. Adler noted that Dr. Baumgarten advised Whitcomb that she may need a total knee replacement in the future. Dr. Adler noted that since the surgery Whitcomb has had constant pain while walking, difficulty going down stairs, was unable to play with her grandkids, had difficulty getting off the ground, and on severe days had continued pain throughout the night. Whitcomb also informed Dr. Adler that she had difficulty giving patients of Employer's showers due to not being able to bend down and kneel on her right knee. From November 19, 2013, to May 12, 2014, Whitcomb lost 3 mm of joint spacing in her knee. Dr. Adler felt that Whitcomb's arthritis had significantly progressed due to her 2013 work injury. Dr. Adler rated Whitcomb as having a 13% total impairment of the lower extremity, equating to a 5% whole person impairment.

Whitcomb returned to the Orthopedic Institute on May 7, 2015, for complaints of bilateral knee pain, with more severe pain in her right knee. Dr. Adler found that new x-rays showed joint space narrowing with sclerosis and small osteophyte formation in both knees, with the right being more severe. Whitcomb received a corticosteroid injection in both knees. On November 17, 2015, Whitcomb was again treated by Dr. Adler for bilateral knee pain. Whitcomb told Dr. Adler that the May 7, 2015, corticosteroid injections had helped but that her symptoms were slowly returning. Whitcomb requested and received additional bilateral corticosteroid injections. From November 17, 2015, to May 29, 2016, Whitcomb was not treated for any knee pain.

c. Hands, thumbs, and wrists.

On June 21, 2012, Dr. Schulz ordered an x-ray of Whitcomb's right hand, and diagnosed her with right hand pain. Whitcomb's x-ray showed no acute fractures or soft tissue swelling. On August 16, 2012, Dr. Jason Hurd of Sanford Health ordered an x-ray of Whitcomb's hands, and discovered mild degenerative changes of the first carpometacarpal (CMC) joint of both her right and left hand.[9] Dr. Hurd discovered no fractures, soft tissue abnormalities, or misalignments, and diagnosed Whitcomb with bilateral hand pain.

On January 29, 2013, Whitcomb was treated by Dr. Robert Van Demark Jr. for hand pain. Dr. Van Demark diagnosed Whitcomb with arthritis, and recommended a variety of treatment options, ranging from conservative to progressive. The last listed recommendation included "Surgery: Depending on the joints that are most problematic, surgery may be an option for you." On February 15, 2013, Dr. Van Demark performed a right thumb CMC arthroplasty with ligament reconstruction.[10] Dr. Van Demark noted there was synovitis and degenerative changes in Whitcomb's thumb.[11] Whitcomb was diagnosed with arthritis of the right thumb. Dr.

[9] The first CMC joint is the saddle joint at the base of the thumb, or colloquially the joint at the thickest part of the palm.

[10] Between January 29, 2013, to February 15, 2013, there is no record of what treatment recommendations Whitcomb followed.

[11] Synovitis is an inflammation of a synovial membrane, especially of a joint.

Van Demark ordered four weeks of immobilization of the right thumb, and ordered her off work from February 26, 2013, until her next appointment.

On February 26, 2013, Whitcomb was seen by Dr. Van Demark for a postoperative evaluation. Whitcomb complained of intermittent stabbing and burning pain in her right hand, and "worsening left basilar thumb pain since her right hand surgery due to increased use." Dr. Van Demark determined after an examination of the left hand that Whitcomb also had left thumb CMC arthritis. On March 7, 2013. Dr. Van Demark noted that in Whitcomb's left thumb CMC joint there was mild degenerative joint changes, joint space narrowing, and subluxation.[12] Whitcomb requested and received an injection in her left thumb CMC joint, however "alternatives to steroid injections were discussed." The continuity of care documents Whitcomb received discussed her recommendations and provided "Surgery: the risks and benefits of surgery for thumb CMC arthroplasty can be discussed if you continue to have symptoms that interrupt your daily activities regardless of the above conservative measures. It is a big surgery with a long recovery period of about 3 months." On March 14, 2013, Dr. Van Demark again noted that Whitcomb had left thumb CMC joint arthritis.

Whitcomb was allowed to return to work on April 11, 2013, with initial physical and temporal limitations. With her right hand she was not to lift, push, or pull anything over five (5) pounds, nor grip or grasp anything 5 pounds of pressure. She was authorized to work 32 hours of work a week. Whitcomb's limitation regarding grabbing anything 5 pounds of pressure ended on April 30, 2013, but she was still restricted from lifting, pushing, or pulling anything over 5 pounds and limited to 32 hours of work a week. At Whitcomb's April 30, 2013, appointment she was diagnosed with carpal tunnel of her right hand. PA Vanessa Smith provided Whitcomb with a continuity of care document for a carpal tunnel diagnosis, that provided surgery as a treatment option.

On May 1, 2013, Whitcomb was treated by Dr. Van Demark for hand pain, but no notes or further information is provided in the record. Whitcomb was again seen by Dr. Van Demark on June 3, 2013 for hand pain. Dr. Van Demark authorized Whitcomb to return to work on June 4, 2013, with no limitations. Whitcomb saw Dr. Van Demark again on July 2, 2013 for a surgical follow-up.

On November 25, 2015, Whitcomb was treated for finger pain. Dr. Van Demark ordered an x-ray of the left thumb. He noted that Whitcomb had pantrapezial arthritis with metacarpal subluxation, and minimal joint narrowing. Whitcomb's images showed that her alignment was normal and no fractures were noted. The x-rays were originally ordered under an order diagnosis of "thumb pain, left[.]" Whitcomb received a continuity of care document for thumb CMC arthritis. One of the recommendations was surgery for the thumb CMC arthroplasty. On February 24, 2016, Whitcomb was again seen by Dr. Van Demark for finger pain. At this appointment, Whitcomb was prescribed a gel to apply twice a day as needed for pain. There is no other information in the record regarding this visit. This was the last treatment Whitcomb sought for hand, thumb, and wrist pain prior to her May 29, 2016, injury.

B. May 29, 2016 Work Related Injury

On May 29, 2016, Whitcomb was employed as a universal worker for Employer. Her job duties included giving the residents medications and showers, cleaning the residents' apartments,

[12] Subluxation is an incomplete luxation or dislocation; although a relationship is altered, contact between joint surfaces remains.

serving them meals, and washing dishes after the lunch meal. Whitcomb was considered a full-time employee, working between 32 and 40 hours per week. On May 29, 2016, Whitcomb was running into the office break room to clock out of her shift for the day on time. Whitcomb tripped over a shepherd's hook on her way into the break room and "flew forward onto the floor in the lockers. [The lockers] were on [her] right, and then [she fell] on the floor, the tile floor." Whitcomb hit the shepherd's hook with her knees and her knees struck the ground. Whitcomb landed on the outstretched palms of her hands. Whitcomb testified that "I hit the floor and my shoulder hit the lockers, and then I – my head hit the lockers after my shoulder."

Whitcomb began to feel pain immediately in her right shoulder, hands, wrists, thumb area, and knees. Whitcomb reported the incident immediately to her supervisor. Whitcomb, Berno, and Whitcomb's co-worker Barb Trevz took pictures of her knees, hands, and hips the day of the incident. Three hours after the incident, Whitcomb went to the emergency room at Avera McKennan Hospital and University Health Center in Sioux Falls and was treated by Dr. John Travnicek, who noted that Whitcomb had pain in her wrists, knees, and right shoulder. Dr. Travnicek determined that the right knee had some swelling and mild bruising, but found no external signs of trauma or cause of concern after an x-ray of her right knee was done. Whitcomb was treated for a mild contusion and sprain to the bilateral knees, wrist, and right shoulder from a mild mechanical fall. Dr. Josie Alpers determined that Whitcomb's x-ray showed "moderate degenerative change of the patellofemoral joint with osteophytes […] also mild joint space narrowing in the medial and lateral compartments […] No acute fracture or dislocation [was] seen." On discharge, Whitcomb was advised to see her doctor in one-two weeks after the incident if her symptoms did not improve.

Two days after her fall, Whitcomb sought chiropractic treatment at ChiroSport in Sioux Falls, where she was initially seen by Dr. Christopher Miickelsen for concerns of neck, right knee, right shoulder, bilateral wrist, and first metacarpal pain, and constant headaches. Dr. Miickelsen found that Whitcomb had suffered a sprain-strain to the cervical and lumbar regions with myofascial abnormalities of the mechanical joint dysfunction, a sprain-strain to the right shoulder joint with functional restrictions and pain, and right knee swelling with a resisted range of motion. Dr. Miickelsen recommended Whitcomb treat with conservative treatments of therapy and tool work. Whitcomb returned to ChiroSport approximately 40 times from June 2016 through November 22, 2019.

On June 11, 2016, Whitcomb was treated by PA Linton of the Orthopedic Institute.[13] PA Linton ordered x-rays, and found that Whitcomb had advanced CMC joint arthritis and CMC osteoarthritic changes in her left wrist. PA Linton noted the left thumb had "[a]dvanced/severe arthritis of thumb CMC joint: Complete loss of joint space with subluxation ½ width of metacarpal." Right shoulder x-rays revealed that she had some AC joint arthritic changes. PA Linton found no evidence of a fracture or injury anywhere, and determined that Whitcomb had an "[a]ggravation of left thumb CMC arthritis following contusion […] flare-up of osteoarthritis, bilateral hands […] right shoulder pain and right knee pain." Whitcomb was given an injection and a brace for her thumb.

Whitcomb was seen by Dr. Paul Cederberg for an independent medical evaluation on August 4, 2016. Dr. Cederberg determined that Whitcomb's compensable injuries sustained on May 29, 2016, were a right shoulder contusion with mild stiffness, contusion to both hands, and

[13] PA Linton noted that Whitcomb had no history of carpal tunnel. It is unclear whether this assessment is from a review PA Linton did of Whitcomb's medical records, or if PA Linton relied on the information Whitcomb provided.

contusions to both knees. Dr. Cederberg determined that her injuries were temporary.[14] He placed a temporary work related limitation to her right shoulder, recommending no use of her right arm above chest level and no lifting more than 30 pounds of the right arm in any position until May 29, 2017. Dr. Cederberg believed that Whitcomb did not sustain an impairment rating based on the May 29, 2016 injury. Dr. Cederberg believed that Whitcomb's need for surgery was due to arthritis of the left thumb that existed prior to her fall, and that the fall did not cause any new fractures or pathology. Dr. Cederberg determined that there was no need for surgery to Whitcomb's knees or right shoulder.

a. Hands, thumbs, and wrists

On June 21, 2016, Whitcomb was treated by Dr. Van Demark regarding her hand, thumb, and wrist pain after the May 29, 2016, injury. Dr. Van Demark noted that Whitcomb had stated her thumbs were asymptotic before her fall. Dr. Van Demark diagnosed Whitcomb with bilateral thumb pain following a fall, left thumb CMC arthritis, and post-arthroplasty status of the right thumb CMC, and recommended a therapy program for treatment. PA Smith also believed Whitcomb was experiencing "[e]stablished left thumb CMC joint arthritis that was asymptomatic prior to the fall[.]"

Whitcomb was again treated by Dr. Van Demark on July 7, 2016. Dr. Van Demark noted that "[h]er right thumb continues to be symptomatic. Her left thumb has also become much *more* painful *following* her work-related fall." (emphasis added). Whitcomb indicated that she would like to proceed with a left thumb CMC joint arthroplasty. Dr. Van Demark opined "I feel that her left thumb pain is an aggravation of her pre-existing arthritis caused by the fall on 5/29/16."

On July 25, 2016, Dr. Van Demark authorized Whitcomb to return to work as tolerated, limited to answering phones. Dr. Van Demark diagnosed Whitcomb with CMC degenerative joint disease in her left hand, and CMC joint arthritis in her left thumb. On July 26, 2016, Whitcomb informed Dr. Van Demark's staff that her boss had sent her home from work because of the pain she was experiencing. Dr. Van Demark then ordered her off of work until after her surgery.

Dr. Cederberg thereafter conducted the IME of Whitcomb. Employer/Insurer subsequently denied coverage of the left thumb arthroplasty. However, Whitcomb scheduled the left thumb arthroplasty, which was completed on September 19, 2016. Dr. Van Demark noted degenerative changes in Whitcomb's left hand ST joint. Whitcomb returned several times for post-surgical follow-ups, and in November 2016 became concerned about losing the use of her hands due to increased pain when doing pinching or grabbing activities. On December 20, 2016, Whitcomb indicated that she would like to proceed with an additional surgery for potential pain relief. A left thumb trigger finger release and radial sesamoid excision was performed on December 27, 2016. At a post-operative follow-up in January 2017, Whitcomb rated her pain at 1 and believed her old pain to be gone. Dr. Van Demark noted however he was unsure if she would be able to return to 40 hours of work a week with her hand condition.

[14] Dr. Cederberg initially determined that Whitcomb had suffered a permanent injury to her right shoulder, as she had not regained normal motion in her shoulder. On August 30, 2016, Dr. Cederberg filed an addendum to his IME, and provided that he believed that Whitcomb did not have a permanent injury to the right shoulder but that she needed initial limitations on the use of her right arm due to the restricted motion in her right shoulder, but that she did have function range of motion.

Whitcomb thereafter contacted Dr. Van Demark's staff and stated she was having unbearable pain in her left hand. Whitcomb returned to Dr. Van Demark for several follow-up visits with continued complaints of pain in her left hand. During this time, Whitcomb received several injections, but to no avail. On March 13, 2017, Dr. Hillary Becker discussed potential further treatment options. Whitcomb indicated she was unsure if she wanted an additional surgery.

On April 12, 2017, Dr. Van Demark referred Whitcomb to Dr. Marco Rizzo of the Mayo Clinic Orthopedics. On July 14, 2017, a bone scan of Whitcomb's hand was completed, and Dr. Rizzo and Whitcomb agreed that a revision surgery would be the best course of treatment to address Whitcomb's pain. Dr. Rizzo diagnosed Whitcomb with "significant left basal thumb pain status post previous trapeziectomy[.]" The revision surgery was conducted by Dr. Rizzo on September 14, 2017. On October 27, 2017, Dr. Rizzo noted that Whitcomb had a defect in gripping, and that all activities of daily living needed modification. Dr. Rizzo believed that occupational therapy could improve Whitcomb's participation in daily occupations, and that she had an excellent chance at rehabilitation due to her prior functional status, ability to learn, support, motivation, and chronic symptoms. Whitcomb was seen once more by Dr. Rizzo on March 5, 2018, where Dr. Rizzo noted diminishment of her trapozicetomy space from the September 2017 scan to present. Whitcomb indicated that she initially had relief after the revision surgery, however she was starting to have increased difficulties with her thumb. Dr. Rizzo advised Whitcomb that it was early in her recovery, and invited her back in August or September 2018. There is no record that Whitcomb returned to Dr. Rizzo.

On October 10, 2017, Dr. Van Demark wrote a letter in support of Whitcomb's application for disability. He stated that Whitcomb continued to be "unable to work due to continued pain and swelling in her hands and […] limited use of her upper extremities." Whitcomb returned for several follow-up visits in 2018 and 2019, and her last documented treatment by Dr. Van Demark was August 1, 2019, where she complained of more pain and swelling. Dr. Van Demark recommended conservative treatments including therapy and braces and injections. Whitcomb chose injection treatments.

Dr. Van Demark thereafter did an updated impairment rating, rating her digit impairment at 34%, hand impairment at 14%, upper extremity impairment at 12%, and whole person impairment at 7%. He found that she had reached MMI as of September 25, 2018.

b. Right knee

On June 23, 2016, Whitcomb was treated by Dr. Adler for bilateral knee pain, with more severe right knee pain. Dr. Adler noted that Whitcomb had bilateral knee pain status post impact injury with known degenerative changes. Dr. Adler found that Whitcomb's symptoms were multifactorial, and he believed that "[Whitcomb had] degenerative arthritis pain with also soft tissue contusion." Whitcomb received a corticosteroid injection to alleviate "some of the arthritis pain." In an MRI done of Whitcomb's right knee, Dr. Adler found that there was degenerative arthrosis with joint space narrowing.

On August 4, 2016, Whitcomb described her symptoms to Dr. Adler as mechanical, however she did admit to chronic dull achiness. Dr. Adler advised that that was likely caused from her degenerative arthritis. Whitcomb requested a knee arthroscopy in order to decrease her mechanical symptoms, however Dr. Adler advised that an arthroscopy would likely not alleviate a significant amount of her degenerative symptoms, and was not certain to alleviate her

mechanical problems. Whitcomb requested to proceed with the arthroscopy. Dr. Adler noted it was his opinion that her symptoms were exacerbated by the fall.

Dr. Adler preformed a bilateral knee scope with debridement on October 31, 2016. On November 15, 2016, Whitcomb was seen by PA Scott Rawson. PA Rawson made the following notes regarding the visit.

> She was hoping just to buy some more time before she had to do anything bigger like a total knee. The last time she had a scope done she said she bought three years but she doubts she is going to make it that far. She might even look at doing the total knees in the upcoming year here […] We did discuss that she has significant arthritis on both knees the right worse than the left and more likely she will have a total knee in the near future. She knows that. She was trying to buy some time if at all possible but she realizes now that it may not be much longer before she needs to do something more major especially on the right side.

On August 4, 2017, Dr. Adler preformed a left knee total arthroplasty. Dr. Adler noted in his procedure notes that "[a] long discussion was held with the patient about different treatment options. At this point in time, she wished to proceed with left total arthroplasty." Dr. Adler noted severe degenerative joint changes. Whitcomb participated in post-surgery physical therapy. On November 22, 2017, Dr. Adler also performed a right knee total arthroplasty. Whitcomb continued to experience pain in her legs. She participated in post-operative physical therapy.

c. *Right Shoulder*

On June 30, 2016, Whitcomb was seen by Dr. Baumgarten. Dr. Baumgarten reviewed radiographic images of Whitcomb, and noted AC joint arthrosis and spondylosis. Dr. Baumgarten allowed Whitcomb to return to work with limitations, however those limitations are not noted. Dr. Baumgarten advised that Whitcomb's treatment plan would include physical therapy and subacromial injections, and Insurer authorized nine physical therapy appointments. Whitcomb's physical therapist, Dr. Jeremy Zens noted on July 11, 2016, that Whitcomb had a decreased shoulder range of motion, weakness, and pain with overhead activity.

On December 8, 2016, an MRI of Whitcomb's right shoulder showed rotator cuff tendinopathy and AC joint arthrosis. Dr. Baumgarten opined that the work injury remained a major contributing cause of Claimant's right shoulder symptoms, but not any potential need for surgery. Whitcomb received injections to her right shoulder on April 1, 2017, and November 20, 2018.

On September 8, 2016, Whitcomb submitted a Petition for Hearing to the Department of Labor & Regulation. A hearing was held on April 15, 2020 before Administrative Law Judge Joe Thornson. The Department received live testimony from Whitcomb and Berno, copies of Whitcomb's medical records from 2001 to 2019, and depositions from Dr. Henry, Dr. Van Demark, Dr. Baumgarten, Dr. Cederdale, and Clara Miller. The Department also admitted into evidence the photographs taken of Whitcomb immediately following her injury, and her Social Security Administration (SSA) disability file.

Whitcomb sought temporary total disability, permanent partial disability, permanent total disability, and medical expenses. Whitcomb also sought recovery of her attorney's fees and disbursements pursuant to SDCL 58-12-3. Employer argued that Whitcomb failed to meet her

burden of proving by a preponderance of the evidence that the May 29, 2016, injury was a major contributing cause of her need for treatment, and was therefore not compensable. Employer reasoned that Whitcomb's preexisting conditions caused her impairment and need for treatment.

The Department concluded that Whitcomb had failed to prove by a preponderance of the evidence that the May 29, 2016, injury was a major contributing cause of her need for treatment. The Department concluded that Whitcomb's case was comparable to *Armstrong v. Longview Farms*. The Department found that Whitcomb had degenerative arthritis in each of her allegedly injured body parts, and that the evidence proved that her condition grew worse in the years leading up to her injury. The Department found the expert opinion of Dr. Cederberg more credible and persuasive than that of Dr. Adler, Dr. Baumgarten, Dr. VenOsdel, Dr. Van Demark, and Dr. Henry, as it was supported by the medical evidence. Having failed to prove that her work injury was a major contributing cause of her need for treatment, the Department denied Whitcomb's benefits.

Whitcomb appealed the Department's decision, raising several issues. Whitcomb's arguments are summarized as follows, that the Department erred by: 1) finding that she failed to prove by a preponderance of the evidence that her work injury was a major contributing cause of her impairment, 2) failing to find that her injury contributed independently to her prior work-related injuries, 3) finding that Whitcomb failed to show by a preponderance of the evidence that she was entitled to disability benefits, 4) finding that Whitcomb was not obviously unemployable, 5) finding that the opinions of Dr. Cederberg more persuasive than the opinions of Dr. Adler, Dr. Baumgarten, Dr. Van Demark, Dr. VenOsdel, and Dr. Henry, 6) failing to consider the decision of the Social Security Administration that Whitcomb was disabled 7) failing to find that Whitcomb's work injury was compensable as a subsequent injury.

The Court heard argument on January 31, 2022. Finding that Whitcomb has failed to prove that her work injury was a major contributing cause of her need for treatment and that the medical evidence in the record is subject to de novo review of this Court, Whitcomb's additional issues are moot. For the fore coming reasons, the Department's decision is affirmed.

QUESTIONS PRESENTED

I. WHETHER THE DEPARTMENT ERRED IN FINDING THAT WHITCOMB FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HER WORK INJURY WAS A MAJOR CONTRIBUTING CAUSE OF HER NEED FOR TREATMENT

II. WHETHER THE DEPARTMENT ERRED BY FAILING TO CONSIDER WHITCOMB'S INJURY AS A SUBSEQUENT WORK INJURY INDEPENDENTLY CONTRIBUTING TO HER NEED FOR TREATMENT.

III. WHETHER THE DEPARTMENT ERRED IN REJECTING THE DECISION OF THE SOCIAL

SECURITY ADMINISTRATION THAT WHITCOMB WAS DISABLED.

IV. WHETHER THE DEPARTMENT ERRED BY FINDING THE OPINION OF DR. CEDERBERG MORE PERSUASIVE THAN THAT OF DR. ADLER, DR. BAUMGARTEN, DR. VENOSDEL, DR. VAN DEMARK, AND DR. HENRY.

LEGAL STANDARD

This Court's review of a decision from an administrative agency is governed by SDCL 1-26-36.

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> > (1) In violation of constitutional or statutory provisions;
> >
> > (2) In excess of the statutory authority of the agency;
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Clearly erroneous in light of the entire evidence in the record; or
> >
> > (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

SDCL 1-26-36. When findings of fact are made based on live testimony, the clearly erroneous standard applies. *See Brown v. Douglas School District*, 2002 SD 92, ¶ 9, 650 N.W.2d 264, 267–68. Deference and great weight are given to the hearing examiner on fact questions. *Id*. at 267. The Department's factual determinations based on documentary evidence, such as medical records and depositions, is reviewed de novo. *Hughes v. Dakota Mill and Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907 (further citations omitted).

ANALYSIS

I. THE DEPARTMENT DID NOT ERR IN FINDING THAT WHITCOMB FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HER WORK INJURY WAS A MAJOR CONTRIBUTING CAUSE OF HER NEED FOR TREATMENT.

Whitcomb must prove by a preponderance of the evidence that she is entitled to workers' compensation benefits. *Darling v. West River Masonry, Inc*., 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367. SDCL 62–1–1(7) sets forth the standard a claimant must meet to prevail in a workers' compensation case. To be awarded benefits, an employee must first establish that she has suffered an "injury arising out of and in the course of the employment[.]" *Id. See also Horn v. Dakota Pork*, 2006 SD 5, ¶ 14, 709 N.W.2d 38, 41 ("Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained"). "This causation requirement does not mean that the employee must prove that [his] employment was the proximate, direct, or sole cause of [his] injury; rather the employee must show that [his] employment was a '*contributing factor*' to [his] injury." *Orth v. Stoebner & Permann Const., Inc.*, 2006 S.D. 99, ¶ 32, 724 N.W.2d 586, 592-93 (quoting *Brown*, 2002 SD 92, ¶ 19, 650 N.W.2d at 270).

> If the injured claimant suffers from "a preexisting disease or condition" unrelated to the injury, and the injury combines with the preexisting condition "to cause or prolong disability, impairment, or need for treatment," the injury is compensable only if the claimant can prove that his "employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment."

Id. at ¶ 33, 724 N.W.2d at 593 (citing SDCL 62-1-1(7)(b)).

It is undisputed that Whitcomb's injury was work-related. Whitcomb argues however, that the Department erred by concluding she did not prove by a preponderance of the evidence that her work injury was a major contributing cause of her need for treatment pursuant to SDCL 62-1-1(7)(b), and by failing to apply SDCL 62-1-1(7)(c). Employer argues that Whitcomb's prior workers' compensation injuries were limited to her right shoulder and right knee and that Whitcomb's experts have admitted that there is no further medical treatment necessary for either of these body parts as related to the May 29, 2016, injury and therefore the issue is moot. Employer argues that Whitcomb has failed to prove by a preponderance of the evidence that her work-related injury was a major contributing cause for her need for treatment, Employer argues that Whitcomb's degenerative arthritis, and not the May 29, 2016, injury, was a major contributing cause of her need for treatment for any of her injured areas.

Whitcomb was not required to prove that the May 29, 2016, injury was at least 50% attributable to her condition and need for treatment in order to show that the injury was a major contributing cause of her condition. *Hughes*, 2021 S.D. 31, ¶ 20, 959 N.W.2d at 909. Nor was Whitcomb required to prove that the May 29, 2016, injury was *the* major contributing cause of her condition and need for treatment, but instead she was required to prove that the May 29, 2016, injury was and remains *a* major contributing cause of her disability, impairment or need for

treatment. *Orth*, 2006 S.D. 99, ¶ 41-42, 724 N.W.25 at 595-96 (citation omitted). Causation must be established by a reasonable degree of medical probability. *Id.* Because all of the expert witnesses' testimony was presented by documentary evidence, the Court reviews that evidence de novo. *Id.* Miller's testimony is also reviewed de novo. Whitcomb and Berno's testimonies, offered as live testimony, are reviewed under a clearly erroneous standard. *Gerlach v. State*, 2008 S.D. 25, ¶ 6, 747 N.W.2d 662, 665. (further citations omitted). Having reviewed the evidence accordingly, the Court finds that the Department did not err in finding that Whitcomb failed to prove by a preponderance of the evidence that her May 29, 2016, work injury was a major contributing cause of her need for treatment.

a. SDCL 62-1-1(7)(b)

A. Medical Evidence

The Court considers whether Whitcomb has proven by a preponderance of the evidence that her May 29, 2016, injury was a major contributing cause of her need for treatment. In an opinion letter dated December 16, 2016, from Dr. Van Demark to Whitcomb's counsel, Dr. Van Demark opined that Whitcomb's injury was a major contributing cause of her need for treatment, as well as an independent cause. Initially at his deposition on December 3, 2019, Dr. Van Demark testified that it was still his opinion the injury was a major contributing cause of her need for treatment, as well as an independent cause of her need for the left-hand surgery. Dr. Van Demark testified that he believed that the work injury caused the subsequent surgery for the CMC joint arthritis and ST joint decompression. He provided that in his practice that patients with similar problems as Whitcomb's are usually related to wear and tear and not an acute injury. Dr. Van Demark testified that he believed a major contributing cause occurs when "someone was asymptomatic before they were injured and then became symptomatic after their injury[.]" He testified that he disagreed with Dr. Cederberg's opinion that Whitcomb already had a need for surgery on her left hand, because she was asymptomatic before her injury. On cross-examination however, Dr. Van Demark admitted that he would not have treated Whitcomb's left hand as he did in the months immediately prior to her work-injury if she was not experiencing symptoms in that hand. Dr. Van Demark thereafter testified that he believed Whitcomb's need for treatment was due to an aggravation of her pre-existing arthritis caused by her fall, and that the fall did not create any further structural damage. Dr. Van Demark testified that her impairment remained the same as his September 25, 2018, impairment rating and that she remained at maximum medical improvement.

Dr. Baumgarten also testified by deposition about Whitcomb's shoulder injury and need for treatment. Dr. Baumgarten testified that a rotator cuff inflammation can be caused by trauma, but that Whitcomb did not sustain a fracture. Dr. Baumgarten determined that Whitcomb's need for treatment of her right shoulder condition was "likely […] associated with her injury" based on the information she provided him, his physical examination of her, and a review of radiographic images. Dr. Baumgarten testified that Whitcomb indicated her problems began on May 29, 2016, and that "based on the history that was provided to me" it was his opinion that Whitcomb's work injury caused her right shoulder pain and need for treatment. Dr. Baumgarten testified that his causation opinion came "purely from the history that Cindy provided to me with a lack of evidence that contraindicated that." He testified that he was aware of her prior degenerative conditions but knew of no other treatment she may have received after the 2003 arthroscopy conducted by Dr. Zoellner. After agreeing that Whitcomb disclosed she smoked half a pack of cigarettes a day, Dr.

Baumgarten opined that smoking can increase rotator cuff tears. He also agreed that depression, something that Whitcomb had been treated for, can have an effect on how a person perceives pain. Dr. Baumgarten testified that very rarely are conditions like Whitcomb's permanent.

Dr. Henry also provided depositional testimony. Dr. Henry testified that he believed that Whitcomb's May 29, 2016, injury was a major contributing cause of her need for chiropractic treatment. Dr. Henry testified that Whitcomb's initial diagnosis by ChiroSport was a sprain/strain of the cervical and lumbar regions and the right shoulder joint, as well as joint dysfunction to the lumbar spine and knee. He further testified that her prior treatment as outlined in her records did not change his opinion that chiropractic treatment was necessary as a result of her May 29, 2016, injury. Dr. Henry testified that his chiropractic adjustments assist in making the joint move better, and work on different muscle areas, inflammation, scar tissue, and pain treatment. Dr. Henry testified that even though chiropractic treatment will not fix arthritis, it will relieve symptoms of it. Dr. Henry again opined that Whitcomb's treatment with him in 2017-2019 "was related to that original work injury on May 29th [2016.]"

On May 6, 2017, Dr. Nicholas VenOsdel conducted a disability examination of Whitcomb in relation to her SSA disability determination. Dr. VenOsdel noted that the examination was solely to provide information to the state disability office. Dr. VenOsdel found that Whitcomb had several limitations but did not offer what he believed caused those limitations. Based on Dr. VenOsdel's examination and other evidence it received, the SSA determined that Whitcomb was disabled and had severe impairments of osteoarthritis, degenerative joint disease, and bilateral knee surgery. The SSA made its determination under 20 CFR 404.1520(d), which provides that if an individual has an impairment lasting or expected to last for twelve months and is one of the listed impairments, the person will be considered disabled *without considering their age, education, or work experience.* 20 CFR 404.1520(d) (emphasis added).

Dr. Cederberg testified by deposition on behalf of Employer/Insurer. Dr. Cederberg testified that Whitcomb's June 2016 x-rays showed moderate to severe arthritis in her left hand, and that such arthritis would not be the result of an acute injury but would occur after years of progression. Dr. Cederberg testified that it was his opinion that Dr. Adler believed Whitcomb's right knee issues were because of degenerative changes and no obvious fractures or dislocations. Dr. Cederberg opined that Whitcomb's right shoulder issues were due to spondylosis and wearing out of the discs of her neck, and not any new injury. Dr. Cederberg testified that Whitcomb's November 2015 x-rays showed that the arthritis in her left thumb had progressed so severely that the bone at the base of her thumb had slipped out of place. Dr. Cederberg testified that Whitcomb's injuries were limited to a right shoulder contusion with temporary mild stiffness in the right shoulder, and temporary contusions to both her hands and knees. Dr. Cederberg opined that Whitcomb's work injury may have caused a temporary aggravation of her preexisting arthritis in her hand, and that any permanent aggravation would have been evidenced by structural changes within her hand.

Whitcomb's medical records prove that she suffered degenerative arthritis in all of her claimed areas prior to her May 29, 2016, injury. The South Dakota Supreme Court has held that the fact that a work injury may be the unfortunate tipping point in a claimant's symptoms, does not mean that it displaces the degenerative effects of a preexisting disease. *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, ¶ 24, 938 N.W.2d 425, 431. In *Armstrong*, the claimant had degenerative arthritis to his knee; claimant subsequently suffered a work-related injury to his knee. *See generally Armstrong*, 2020 S.D. 1, 938 N.W.2d 425. No major acute injury was discovered, and it was established from the claimant's medical records that he was aware prior to the injury that he would

need a knee replacement eventually. *Id.* at ¶ 25, 938 N.W.2d at 431. Armstrong's expert, Dr. Adler, opined that Armstrong's work injury was a major contributing cause to his need for a knee replacement because he was asymptomatic before the injury and was able to do heavy work. *Id.* at ¶¶ 12, 27, 938 N.W.2d at 428, 431. Dr. Adler determined that the need for a knee replacement was due to osteoarthritis with an acute knee injury of swelling and pain with no definitive medical diagnosis. *Id.* at ¶ 12. The Court found that the record was insufficient to satisfy the causation requirements of SDCL 62-1-1(7)(b) and failed to determine how the injury contributed independently to claimant's condition, especially considering that the claimant was suffering the effects of osteoarthritis at the time of his injury. *Id.* at ¶¶ 28, 32, 938 N.W.2d at 432-33.

Whitcomb has similarly failed to meet the causation requirement of SDCL 62-1-1(7)(b). Dr. Van Demark believed that the May 29, 2016, injury was a major contributing cause of her need for treatment, based on Whitcomb's assertion that she was asymptomatic prior to her injury. She was last treated for pain to her hands on February 26, 2016, less than three months before her injury. There is no evidence from her medical records that her pre-existing arthritis, pain, and degenerative issues spanning over several years was cured. Rather, the records show that her hand conditions were worsening before May 29, 2016. On November 25, 2015, Dr. Van Demark conducted x-rays of Whitcomb's left hand. Dr. Van Demark testified that he would not have done so had she not been complaining of pain. Dr. Van Demark first testified that the injury was a major contributing cause of her need for treatment, then testified it was an independent cause for treatment, and then that it was an aggravation of her preexisting arthritis. Dr. Van Demark's causation opinion substantially changed when he was confronted with Whitcomb's medical records and his prior treatment of her. Similar to *Armstrong*, Whitcomb was informed prior to her work injury, via several continuing documents she was given, that surgery was a treatment option regarding her left thumb issues. Dr. Van Demark testified that Whitcomb was close to the highest degree of arthritis a person can have in their hand prior to her injury. Further, Whitcomb tried conservative treatments for less than one month after her injury before electing to have surgery. Dr. Van Demark testified that conditions similar to Whitcomb's are usually caused by wear and tear over time, and not acute injuries. Dr. Cederberg similarly testified that if Whitcomb's work-related injury was a case of her need for treatment to her hands, there would have been evidence of structural changes to her hands after the fall. Pursuant to *Armstrong*, although the work-related injury may have been the tipping point to Whitcomb's hand condition, it does not displace the severe preexisting degenerative arthritis she had and which caused her need for surgery in her hands.

Whitcomb also failed to prove by a preponderance of the evidence that the May 29, 2016, injury was a major contributing cause of the need for treatment Whitcomb received in her right knee. Whitcomb treated frequently since 2003 for right knee pain, and was repeatedly informed that she would experience problems with her knee in the future. She was advised in 2014 to seek less strenuous employment but chose to not do so. Significant worsening of her degenerative arthritis was recorded in the years leading up to her injury. She was advised prior to her work injury that arthroscopies would likely no longer treat her symptoms and that she may need a total knee replacement in the future. There is no evidence that her right knee pain ceased from November 2015 to May 2016. Whitcomb's preexisting disease, and not the May 29, 2016 injury, was a major contributing cause for the treatment she required to her knee.

Further, the evidence presented by Whitcomb fails to prove by a preponderance of the evidence that her work-related injury was a major contributing cause of her need for shoulder treatment. Dr. Baumgarten testified that his causation opinion was based on a lack of contradictory

evidence to what Whitcomb represented to him. Dr. Baumgarten testified that Whitcomb disclosed to him that her symptoms of right shoulder pain began on May 29, 2016. While Dr. Baumgarten testified that he knew of Whitcomb's degenerative disease, it appears Whitcomb failed to disclose such to him. Dr. Baumgarten testified that he knew of no other treatment she received other than the arthroscopy conducted by Dr. Zoellner in 2003. From the record it is not evident that Dr. Baumgarten knew that Whitcomb had been permanently restricted to not lifting anything over 10 pounds and no overhead activity with her right shoulder, and working a maximum of 5 hours a day in 2003, or of any of her treatment and conditions for the thirteen years between her right shoulder arthroscopy and her work-injury. Nor does it appear that Dr. Baumgarten was aware that Whitcomb was advised that she would likely not be able to do long-term physical labor. Dr. Baumgarten also stated that he reached his conclusion based on Whitcomb telling him that prior to the fall she was experiencing no shoulder pain. Dr. Baumgarten's opinion is not supported by the medical evidence in the record.

Further, Dr. Henry ultimately failed to address what about Whitcomb's fall caused her pain, and Dr. VenOsdel further failed to make a determination regarding causation. Whitcomb has failed to prove by a preponderance of the evidence that her May 29, 2016, injury was a major contributing cause of her need for treatment.

C. Non-Medical Testimony

When findings of fact are made based on live testimony, the clearly erroneous standard applies. *See Brown*, 2002 S.D. 92, ¶ 9, 650 N.W.2d at 267–68. Deference and great weight are given to the hearing examiner on fact questions. *Id*. at 267. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 12, 827 N.W.2d 859, 864 (further citations omitted).

Whitcomb and her husband both testified regarding Whitcomb's condition after the May 29, 2016, injury. Whitcomb testified via deposition and by live testimony before the Department. In her deposition, when asked about her efforts in seeking employment, Whitcomb provided that she "can't do anything for more than a few minutes because of the pain in [her] hands and thumb joints." Whitcomb stated that after the surgeries by Dr. Van Demark, she experienced pain in her thumb and weakness of the left hand. She provided that she had relief after her surgery by Dr. Rizzo while having a cast on her left hand, however once the cast was removed the pain "started right back" within a "couple days, few days, a week" and it was the same pain she experienced before the surgery.

During the hearing before the Department, Whitcomb testified that she only had problems with her left hand prior to her work-injury while she was utilizing it more after her right thumb arthroplasty. She testified that she was feeling great and was not limited at all regarding her left hand prior to the May 29, 2016, injury. She described her pain following the May 29, 2016, injury as "pain in my hands and thumbs, joint, thumb. It was terrible." Whitcomb also provided that she did not have any strength in her hands and had difficulties getting dressed, bathing, dusting, or any activity that involved her hands. She stated that her right knee "was in terrible pain" and that she could hardly walk. Whitcomb testified that regarding her right shoulder she was unable to "lift above [her] head or try to lift anything up" because the pain was so severe.

At the hearing, Whitcomb was asked on cross-examination about whether at her deposition she had stated she "[w]as going to have surgery on [her] left thumb because it helped [her] right

thumb, but [she] quit having problems with [her] left thumb so [she] did not have it done." Whitcomb admitted to making that statement but clarified that her left thumb issues were only when she overused it because she had on the brace after her right thumb arthroplasty. Whitcomb was also questioned about being treated by Dr. Van Demark for pain in her left hand in February 2016 but stated she did not recall being treated during that time.

At the hearing Whitcomb described the pain she currently felt in her right shoulder as a constant stabbing pain, that increases in severity whenever she tries to use it. She testified that her knee pain was better until she bent down or had walked on cement for an extended period of time. She further testified that her hands and wrists "ach[e] all the time" and have a constant stabbing pain.

Berno testified at the hearing that prior to her injury Whitcomb had the "normal restrictions [such as] […] the brand new jar of jelly is – the lid is too tight" and that he would have to open it, but that she had no other limitations. Berno testified that after the injury, he would have to reach anything above the midlevel for Whitcomb and have to carry anything heavy, and that she was in a lot of pain regarding her shoulder. Berno testified that the restrictions Whitcomb had to her hands after her May 29, 2016, injury were too extensive to fully list, but included having issues with dishes, laundry, cleaning, holding anything bigger than a small water bottle, pouring liquids, and chopping and cutting foods. Berno testified that Whitcomb has problems with anything involving her knees, and that she has problems with stairs, crouching, picking items up, and sitting too long.

Clara Miller testified via deposition and therefore any of the Department's factual determinations based on her testimony are reviewed de novo. *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d at 907. Miller, a former co-worker of Whitcomb, testified regarding Whitcomb's work abilities prior to the May 29, 2016, injury, but provided no testimony regarding Whitcomb's ability after the injury. Miller testified that Whitcomb seemed capable of completing all of her tasks without limitation after her 2013 right thumb surgery. She believed Whitcomb to be working fulltime up until the injury, but thereafter did not see her again at work. Miller testified that Whitcomb would complain about pain prior to her 2013 surgery, but that she was still able to complete her job. Miller did testify that she did not spend all of the time during a work shift in the presence of Whitcomb, but that Whitcomb had never asked for her help with a task after the 2013 surgery.

From the decision and findings of fact and conclusions of law issued by the Department, the record does not reflect that the Department considered the testimony of Whitcomb, Berno, or Miller. "Witness credibility is a question of fact." *Baier v. Dean Kurtz Const., Inc.*, 2009 S.D. 7, ¶ 12, n. 1, 761 N.W.2d 601, 604-05. "Even where specific credibility findings are absent, we defer to the Department's overall assessment of the weight of the evidence when it is based upon live witness testimony." *Billman v. Clarke Machine, Inc.*, 2021 S.D. 18, ¶ 28, 956 N.W.2d 812, 820.

Whitcomb testified both at the hearing and via deposition. Whitcomb's testimony does not provide sufficient evidence to prove that her May 29, 2016, injury was a major contributing cause of her need for treatment. Whitcomb testified primarily about the pain she was experiencing both prior to and subsequent to the injury. Both Whitcomb's and Employer/Insurer's experts agree that the fall may have aggravated the pain she experienced. However, her testimony regarding pain does not support the conclusion that her fall was a major contributing cause for three left hand surgeries, a knee arthroscopy, two knee arthroplasties, and the additional treatment she received. Whitcomb testified that she did not experience left hand pain other than in 2013 after her right thumb arthroplasty, and that overall her hand pain was asymptomatic. The medical records discredit this testimony, as Whitcomb was seen by Dr. Van Demark three months prior to her

injury for left thumb pain. It is evident that Whitcomb's testimony is not sufficient compared to the weight of the medical evidence provided. Berno and Miller's testimonies also do not provide sufficient evidence that Whitcomb's May 29, 2016, injury was a major contributing cause of her need for treatment. Whitcomb is not entitled to workers' compensation benefits or payment of her medical expenses.

II. THE DEPARTMENT DID NOT ERR BY FAILING TO CONSIDER WHITCOMB'S CLAIM AS A SUBSEQUENT WORK INJURY COMBINING WITH A PREXISTING WORK INJURY, BUT CONTRIBUTING INDEPENDENTLY, TO THE NEED FOR TREATMENT.

Whitcomb asserts that the Department erred by failing to consider her claim under the causation standard put forth by SDCL 61-1-1(7)(c). Subsection (c) reflects South Dakota's adoption of the last injurious exposure rule, which is applied when considering successive injuries in workers' compensation cases. *Armstrong*, 2020 S.D. 1, ¶ 30, 938 N.W.2d at 432 (citations omitted). Whitcomb sustained two prior compensable workers' compensation injuries, one in 1999, and one in 2013 with Employer. In adopting subsection (c), the Legislature intended to assist with assigning responsibility between a former or subsequent employer or insurer, not determine causation between an employer and employee. *Id.* (citations omitted). The applicable causation requirement is dependent on whether a second work-related injury contributed independently to the workers' current impairment, disability, or need for treatment. *Martz v. Hills Material*, 2014 S.D. 83, ¶ 25, 857 N.W.2d 413, 420 (citations omitted).

Dr. Van Demark responded to correspondence from Whitcomb's attorney on January 11, 2017, indicating that he thought that Whitcomb's May 29, 2016, injury was an independent major contributing cause of her symptoms. However, the following exchange occurred between Dr. Van Demark and Whitcomb's counsel at his deposition on December 3, 2019.

> Q: So just to clarify, as it relates to her left thumb and hand, the work injury contributed independently to the need for that surgery and medical treatment thereafter?
>
> A: Could you explain what you mean by "independent"?
>
> Q: Sure. I guess let me kind of clarify. It's my understanding that she did have some form of pre-existing arthritis in the right hand. Is that correct?
>
> A: Yes.
>
> Q: And you treated her for that condition?
>
> A: She had – we did treat her for it, but she had it.
>
> Q: Independent of that pre-existing arthritis in the right-hand, the treatment that you saw her for after the May 29th, 2016 injury – let me rephrase. I'm sorry. I can tell you are confused by my question.
>
> Did Cindy have pre-existing arthritis in her left hand, thumb or wrist?
>
> A: Yes.
>
> Q: Despite that pre-existing arthritis, was the May 29th, 2016 work injury the major contributing cause of her need for treatment?
>
> A: Yes.

Dr. Van Demark substantially changed his testimony regarding whether or not he believed Whitcomb's May 29, 2016, in jury was an independent cause of her need for treatment. Dr. Baumgarten also responded to correspondence from Whitcomb's attorney, and opined that the May 29, 2016, injury was not an independent cause of Whitcomb's need for treatment.

None of Whitcomb's experts provided a causation opinion that Whitcomb's injury was an independent cause of her need for treatment. Whitcomb did not provide sufficient evidence to prove that the May 29, 2016, contributed independently to her condition and need for treatment, especially considering that she was suffering the effects of degenerative arthritis at the time of her injury. *See Armstrong*, 2020 S.D. 1, ¶ 32, 938 N.W.2d at 433. The Department was correct in not applying the causation standard purported in SDCL 62-1-1(7)(c).

III. THE DEPARTMENT DID NOT ERR BY REJECTING THE DECISION OF THE SOCIAL SECURITY ADMINISTRATION THAT WHITCOMB WAS DISABLED.

Whitcomb asserts that the Department failed to consider the determination of the SSA. Whitcomb relies on the Court's holding in *Davidson v. Horton Indus., Inc.*, 2002 S.D. 27, 641 N.W.2d 138. The Court in *Davidson*, held that it was improper for the Department to disregard similar opinions of numerous medical experts in favor of one expert hired by the insurer under the specific circumstances in *Davidson*. *Id.* at ¶ 19, 142. In *Davidson*, seven doctors had given a similar diagnosis of the claimant's issue, however the Department failed to properly address the testimony of four of the claimant's witnesses. *Id.* at ¶ 22.

The Department admitted into the record evidence from Whitcomb's SSA hearing. Whitcomb was questioned at the hearing about the physical examination conducted by Dr. VenOsdel. The Department addressed the opinions of Dr. Baumgarten, Dr. Adler, Dr. VanDemark, and Dr. VenOsdel. The Department found that that Dr. Cederberg's opinion was more persuasive than that of Whitcomb's experts, as it was better supported by her medical records. The Department found that Dr. VenOsdel was the only one of Whitcomb's experts that evaluated her whole body, and that each of Whitcomb's experts addressed an individual area of Whitcomb. The Department found that Dr. VenOsdel also attributed Whitcomb's pain to her preexisting degenerative arthritis.

The Department considered the evidence presented by Whitcomb. Any evidence not considered by the Department was subject to review by this Court, and the Court does not find reversible error. The Department noted in its decision that Dr. VenOsdel did not determine that Whitcomb's disability was caused by her May 29, 2016, injury. The Department considered the evidence before it from Whitcomb's SSA determination. The Department concluded that the decision of the SSA was not persuasive, as SSA hearings are non-adversarial and do not require the same level of causation as workers' compensation claims. Further, SSA disability claims do not consider the individuals education, age, or work experience. These factors are heavily considered in workers' compensation benefits.

The Court has recognized that SSA determination are not binding on the Department. *Vilhauer v. Dixie Bake Shop*, 453 N.W.2d 842, 846 (S.D. 1990). The Department did not fail to consider the determination of the SSA, but rather considered the determination non-persuasive due to the standard of proof required in SSA disability claims. Based on the evidence presented by Employer/Insurer, and the evidence of Whitcomb's degenerative disease in her medical records and the testimony of her experts, the Department found that Whitcomb had failed to prove by a preponderance of the evidence that the May 29, 2016, injury was a major contributing

cause of her need for treatment. The Department's findings are supported by the evidence in the record.

IV. THE DEPARTMENT DID NOT ERR BY FINDING THE OPINION OF DR. CEDERBERG MORE PERSUASIVE THAN THAT OF DR. ADLER, DR. BAUMGARTEN, DR. VENOSDEL, DR. VAN DEMARK, AND DR. HENRY.

Whitcomb argued that the Department erred by finding the opinions of Dr. Cederberg more persuasive than that of Dr. Adler, Dr. Baumgarten, Dr. VenOsdel, Dr. Van Demark, and Dr. Henry. The South Dakota Supreme Court in *Helm v. Lynn's Inc.*, recognized that a non-treating physician's opinion can be more persuasive than that of a treating physician regarding causation issues. *See* Helm *v. Lynn's Inc.*, 1996 S.D. 8, ¶ 21, 542 N.W.2d 764, 768. The Department found the opinion of Dr. Cederberg more persuasive than Whitcomb's physicians, to the extent there was disagreement in the opinions, because Dr. Cederberg's opinions were supported by the medical evidence.

The Department's factual determination based on documentary evidence is reviewed de novo. *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d at 907 (citations omitted). All of the causation opinions were provided by medical records and depositions. Reviewing the record de novo, this Court finds that the testimony of Dr. Cederberg is more persuasive than that of Whitcomb's experts. The opinion of Dr. Cederberg is supported by Whitcomb's medical records. Whitcomb sought treatment *three months* prior to her injury. In the years leading up to the work injury, her records show that she had degeneration in all three affected areas. Dr. Van Demark substantially changed his causation opinion when confronted with Whitcomb's extensive medical records. Dr. Baumgarten's opinion was based on what Whitcomb choose to disclose to him and his limited knowledge of her prior treatments. Dr. Adler provided that he thought that her symptoms were exacerbated by her fall but did not provide whether the fall was a major contributing cause or related to a subsequent injury. Dr. VenOsdel did not provide a causation opinion. The Court finds Dr. Henry's testimony not insightful regarding causation. All of the experts recognized that Whitcomb had a degenerative disease prior to her May 29, 2016, injury. Dr. Cederberg and Dr. Van Demark both recognize that Whitcomb's necessary hand treatment is more often caused by wear and tear (or degeneration) than a trauma. No significant trauma was found in the hand. Dr. Cederberg's causation opinion is supported by the medical evidence in the record. The Court therefore finds Dr. Cederberg's opinion more persuasive than that of Dr. Adler, Dr. Baumgarten, Dr. VenOsdel, Dr. Van Demark, and Dr. Henry.

CONCLUSION

Whitcomb argued that the Department erred by concluding she had failed to prove by a preponderance of the evidence that her May 29, 2016, injury was a major contributing cause of her need for treatment. Whitcomb raised several issues with the Department's determination. The Department did not err in its determination. The medical records and credible expert testimony prove that Whitcomb's injury was not a major contributing cause of her injury. Whitcomb has

failed to meet her burden and is not entitled to disability benefits or medical expenses. The Department's decision is affirmed.

Dated this 10th day of March 2022.

BY THE COURT

Christina Klinger
Circuit Court Judge