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

NEUROLENS, INC., **HF No. 123, 2021/22**

Employer,

and **DECISION**

INDEMNITY INS. CO. OF NORTH AMERICA,

Insurer,

v.

MARTY ANDREWS,

Employee.

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 remotely by Michelle M. Faw, Administrative Law Judge, on August 14, 2024. Claimant, Marty Andrews, was present and represented by his attorney, James D. Leach. The Employer, Neurolens, and Insurer, Indemnity Ins. Co. of North America were represented by Kerri Cook Huber of Gunderson, Palmer, Nelson & Ashmore.

Facts:

1. In December of 2019, Marty Andrews (Andrews) began working for Neurolens, Inc. (Employer) which was insured at all times pertinent for workers' compensation purposes by Indemnity Insurance Company of North America (Insurer).

2. On October 7, 2020, Andrews sustained a work injury to his lower back when the rear-end suspension failed on his vehicle and he went off road through a barbed-wire fence.
3. Employer and Insurer received legally adequate notice of Andrews' injury, found the injury to have arisen out of and in the course of Andrews employment, and that it was compensable.
4. On February 7, 2022, Dr. Timothy Ungs performed an Independent Medical Exam (IME) of Andrews. He determined Andrews to be at maximum medical improvement (MMI).
5. On March 16, 2022, Dr. Ungs produced his IME report. In the report, he assigned Andrews a permanent whole-person impairment rating of 14% as a direct result of his work-related injury.
6. Employer and Insurer paid benefits to Andrews including benefits for the 14% impairment rating.
7. On June 13, 2022, Employer and Insurer filed a Petition for Hearing with the Department of Labor & Regulation (Department).

Andrews' Relevant Medical History:

Andrews was treated for low back pain after a slip and fall on ice in January of 2011. He was treated for back pain on June 27, 2011, and the physical therapy note provides that he was suffering pain ranging from a 4/10 to 10/10. The physical therapist's impression was SI joint dysfunction and possible low lumbar disc derangement. On December 6, 2011, Andrews treated for back pain and radicular pain that failed to improve with conservative treatment and was provided injections. By January 2012, Andrews was diagnosed with sacroiliac dysfunction after complaints of

bilateral buttock pain which were also treated with injections. He was again provided injections for radiating back pain on July 3, 2012.

On November 19, 2018, Andrews had an MRI of the lumbar spine due to his history of chronic right lumbar pain and a new injury in April 2018 that reported increased his back pain. The MRI revealed moderate acquired/genital canal stenosis at L4-5, moderate degenerative disc disease at L4-5 and L5-S1, and moderate lower lumbar accompany facet arthropathy most prominently at L4-5. On October 4, 2018, Andrews fell at work which caused an exacerbation of his low back pain. He underwent another MRI which resulted in a diagnosis of lumbar spondylosis and was treated with facet joint injections. He received further injections in May 2019 and in August 2019. Andrews underwent an additional MRI on July 14, 2020, due to low back pain among other issues.

Andrews received injections following the work-related injury at issue in this matter. An MRI taken November 13, 2020, which showed mild prominence in the lumbar lordosis with subtle anterolisthesis redemonstrated at L4-5. Andrews received an injection on November 17, 2020.

On November 18, 2021, Andrews was seen by a neurosurgeon for reevaluation of his low back pain. He described his pain as sharp, shooting, stabbing in his low sacral area that wrapped around across and down his buttocks and down into his medial thigh. The neurosurgeon was unable to determine what was Andrews underlying chronic back pain history prior to the exacerbation from the work-related motor vehicle accident.

Issue:

The issue presented at hearing is whether Andrews' condition has changed and the October 7, 2022, injury no longer is nor remains a cause of his current condition, disability, impairment, or need for treatment pursuant to SDCL § 62-7-33.

Analysis:

Employer and Insurer have brought this Petition asserting that Andrews' work-related injury no longer is a cause of his current condition pursuant to SDCL § 62-7-33. Therefore, the burden is on them to prove that Andrews has sustained a change of condition. "The party asserting a 'change in condition' bears the burden of proving it." *Kasuske v. Farwell,* 2006 S.D. 14, ¶ 11, 710 N.W.2d 451, 455. Change of condition is a medical question. "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).

Employer and Insurer have offered the expert opinion of Dr. Ungs, who is board certified in Occupational and Environmental Medicine, Aerospace Medicine, and Public Health and Preventative Medicine. Dr. Ungs is employed by Monument Health Occupational Medicine. He conducted a review of Andrews' medical records and performed an IME on February 7, 2022. In his IME report, Dr. Ungs opined that Andrews suffered from pre-existing chronic lumbar disease and that the low back pain had reached MMI. He noted that following Andrews' neurosurgical intervention on January 12, 2021, he experienced new adverse signs and symptoms which resulted in a redo of the surgery on March 6, 2021.

At his deposition on May 3, 2024, Dr. Ungs stated that Andrews' medical record support his claims of past and current pain as well as several possible causes for that

pain. He further stated that it was difficult to specifically distinguish the cause. Dr. Ungs opined that the work injury event contributed to his condition but not exclusively. He concluded it was difficult to apportion the pain given Andrews previous issues with pain. However, he responded “yes” to the questions of whether Andrews’ work injury is a major contributing cause of his condition and whether his opinion was being provided to a reasonable degree of medical certainty. In his report, he specifically stated that the injury caused acute exacerbation and aggravation of chronic lower back pain severity and L4-5 compression of the exiting L4 nerves resulting in bilateral L4 radiculopathy. Dr. Ungs opined that the work-injury acutely worsened Andrews low back complaints. He opined that the chronic back pain that existed prior to the accident was permanently aggravated by the event. Dr. Ungs stated that Andrews’ current pain condition is comprised of: 1) residual SI Joint pain signals; 2) L-4 radiculopathy signals; 3) residual pain signals from chronic disease which pre-dates the October 6, 2021 work-related injury; 4) pain signals from the aggravation of pre-existing chronic pain resulting from the work-related injury; and 5) aggravation of possible signals due to post MVA clinical interventions, treated discitis, and pathology or abnormalities currently identified by imaging.

The Department concludes that Employer and Insurer have failed to meet their burden to prove that Andrews’ work injury is no longer a major contributing cause of his condition. 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. Dr. Ungs has opined that Andrews’ work-related injury is a major contributing cause of his condition. While Andrews had preexisting back issues, and the

sources of his pain may be complex, the work-related injury on October 6, 2021, is and remains a major contributing cause of his condition. Therefore, Andrews is entitled to reimbursement plus appropriate interest for medical expenses he has incurred from October 7, 2020, to the present including the amount of $22,598.89 itemized in Hearing Exhibit 4.

Andrews shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision within thirty (30) days from the date of receipt of this Decision. Employer and Insurer shall have an additional thirty (30) days from the date of receipt of Andrews' proposed Findings and Conclusions to submit objections thereto and/or to submit its 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, Andrews shall submit such Stipulation along with an Order consistent with this Decision.

Dated this day 3 of December 2024.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION



Michelle M. Faw
Administrative Law Judge