

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

TONYA SCHOENFELDER

HF No. 56, 2019/20

Claimant,

v.

DECISION

**POWER WELLNESS MANAGEMENT,
LLC,**

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL § 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on November 14, 2023. Claimant, Tonya Schoenfelder, was present and represented by Jolene Nasser of Nasser Law Office. Employer and Insurer were represented by Kerri Cook-Huber of Gunderson, Palmer, Nelson & Ashmore.

Facts:

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

1. Beginning June 24, 2006, Tonya Schoenfelder (Schoenfelder) was an employee of Power Wellness Management, LLC (Employer) which was at all times pertinent insured for workers' compensation purposes by Zurich American Insurance Co. (Insurer). She worked on average 40 hours per week and was paid hourly at differing rates depending on the type of training performed.

2. Beginning in the fall of 2009, Schoenfelder became an employee of Southeast Technical College (Southeast).
3. On January 23, 2015, Schoenfelder slipped on ice and had right knee pain, right hip pain, and swelling.
4. On March 2, 2015, Schoenfelder reported right hip pain, right hip giving out, and difficulty with stairs.
5. On May 6, 2015, she reported issues with her right hip.
6. On June 15, 2015, while working for Employer, Schoenfelder slipped on the pool deck and fell backwards, falling onto her outstretched hands, injuring her right hip, right hand, left knee, left low back, and left shoulder. The injury was found to be compensable by Insurer.
7. In the 52 weeks prior to June 15, 2015, Schoenfelder earned \$42,304.55 while working for Employer and \$5,880 for her teaching position at Southeast.
8. Schoenfelder was seen by chiropractor, Dr. Christine Wakefield within a day or two of the injury and she continued chiropractic care through late October 2015. At that time, all the conditions had improved except for her right hip.
9. In October 2015, Dr. Wakefield referred Schoenfelder to a physical therapist, who recommend a referral to Dr. Travis Liddell, an orthopedic surgeon.
10. From approximately October 5, 2015 to January 8, 2016, Schoenfelder reduced her hours working with clients for Employer due to pain and other difficulties associated with her hip. Her hip condition also prevented her from performing her duties at Southeast.
11. On January 11, 2016, Schoenfelder underwent surgery for a right hip labral tear that had been diagnosed by Dr. Liddell. Following the surgery, Schoenfelder was taken off work completely from both Employer and

Southeast for a few weeks.

12. By January 16, 2016, Schoenfelder was experiencing abnormal heat and redness at the surgical site, and her foot was cold and swollen.

13. On February 4, 2016, Schoenfelder was allowed to return to teaching at Southeast, but was unable to return to work for Employer for approximately 11 months following the January 11, 2016, surgery.

14. In February and March of 2016, Schoenfelder began struggling with worsening hip pain in physical therapy. She also reported to her chiropractor and Dr. Liddell that she was having increasing shoulder pain, back spasms, and continued issues with the cold foot. Dr. Liddell ordered an MRI.

15. Schoenfelder was seen by Dr. Leonard Gutnik, an internal medicine doctor, who ran various tests and diagnosed her with Reflex Sympathetic Dystrophy (RSD)¹, an older term for the condition currently known as Complex Regional Pain Syndrome (CRPS). Dr. Gutnik also referred Schoenfelder for medical acupuncture with Dr. Myung Cho.

16. On July 18, 2016, Schoenfelder attended an Independent Medical Examination (IME) with Dr. Bruce Elkins.

17. On or about July 28, 2016, Dr. Gutnik referred Schoenfelder for a physical medicine and rehabilitation evaluation with Dr. Thomas Ripperda.

18. In September of 2016, Schoenfelder was seen by Dr. Ripperda who ordered an intra-articular hip injection and prescribed Norvasc medication.

19. On October 26, 2016, Dr. Cho noted Schoenfelder experienced improvement following the first hip injection which lasted about a week, followed by

¹ As both terms refer to the same condition, the Department will use both terms interchangeably as referenced by the various medical providers in this matter.

- worsening pain that made it difficult to walk. Dr. Cho further noted Schoenfelder showed objective muscle atrophy of the right lower extremity.
20. On November 4, 2016, Dr. Ripperda noted Schoenfelder reported significant, though temporary, improvement with the first hip injection.
21. On November 18, 2016, Schoenfelder received a second hip injection. Dr. Ripperda recommended a gradual return to the pool for up to 2 hours per day for work duties, as well as continued therapy.
22. On December 7, 2016, Schoenfelder's primary care physician, Dr. Carilyn Van Kalsbeek noted a red macular rash consistent with CRPS as well as muscle atrophy of the right leg.
23. On December 12, 2016, Schoenfelder reported to Dr. Ripperda that she could not handle the pool duties at Employer.
24. On or about December 16, 2016, Dr. Ripperda restricted her to sedentary office duties. He also ordered a new MRI to look for the continued cause of her pain.
25. On January 1, 2017, Schoenfelder underwent MRI which showed recurrent complex tear of the superior and anterior acetabular labrum and new deep partial-thickness cartilage defects of the superior acetabulum and femoral head articular cartilage.
26. On March 6, 2017, Schoenfelder attended a Functional Capacity Evaluation (FCE). Schoenfelder's nurse case manager advised the Insurer that the test was inappropriate at that time due to her newly diagnosed damage to the joint with a surgical recommendation. The physical therapist (PT) asked to perform the FCE required a physician's order to proceed and advised she likely would be limited in the amount of functional testing she could do. Dr. Ripperda

refused to order the FCE as he did not think it was appropriate and would not take on the liability given her current status. He also refused to lift her restrictions for the purposes of the FCE. However, Insurer required the FCE or Schoenfelder would lose her benefits. The PT's report noted that during the exam Schoenfelder showed "good nature even though she was demonstrating signs of pain." She also noted that Schoenfelder was cooperative and tried all the tests. The FCE result was valid and confirmed that Schoenfelder's restrictions were to sedentary duty only.

27. On April 18, 2017, Schoenfelder underwent a second hip surgery performed by Dr. Evan Hermanson. Following the surgery, she was taken off work.

28. On July 13, 2017, Dr. Benjamin Bissell performed an IME on Schoenfelder.

29. Beginning in November 2017, Schoenfelder began reporting a feeling of rubbing and pressure in her hip joint, with a sharp pain similar to how it felt before the second surgery. She was also failing in physical therapy. During this time, Dr. Ripperda was gradually increasing her work hours up to 4 hours per workday. Schoenfelder reported to her doctors that she was exhausted at the end of the four hours.

30. On January 11, 2018, Schoenfelder asked Dr. Ripperda if another hip injection might be an option. He indicated that an X-ray was needed to determine if there was adequate joint space preserved prior to proceeding with another injection, and advised if there was not, that a total hip replacement may be the next step in her treatment. The X-ray showed right hip joint space narrowing such that an injection was not recommended.

31. On January 31, 2018, Dr. Hermanson advised Schoenfelder imaging showed end stage arthritis for which the only treatment was a total hip arthroscopy. He

- referred her to Dr. Corey Rothrock.
32. On February 9, 2018, Dr. Rothrock recommended a total hip replacement.
33. On March 1, 2019, Schoenfelder underwent a total hip replacement performed by Dr. Rothrock. She remained hospitalized for an extra three days due to some complications with her blood pressure.
34. On June 4, 2018, Dr. Rothrock authorized Schoenfelder to return to work for two hours per day, three days a week as tolerated with the ability to alternate positions and take breaks to stretch.
35. On June 27, 2018, Dr. Rothrock noted that he had discussed with Schoenfelder that the multitude of symptoms were that of arthritis and not because of the fall. She was “destined” to have these symptoms at some point.
36. On April 14, 2018, Dr. Ripperda created a plan to eventually increase Schoenfelder’s work hours. He continued to order acupuncture, chiropractic, and a physical therapy/home exercise plan.
37. On November 14, 2018, Dr. Ripperda noted that Schoenfelder was struggling to maintain 4 hours at work, and he declined to further advance her hours beyond that.
38. On December 5, 2018, Insurer sent a letter to Dr. Ripperda asserting that Insurer considered Dr. Ripperda to have a conflict and requesting that he refer her back to Dr. Rothrock for her ongoing treatment.
39. On December 18, 2018, Insurer sent a letter to Schoenfelder stating that Insurer had been informed that Dr. Ripperda and his family are close friends of Schoenfelder, and due to that relationship, it was a conflict of interest for him to continue to treat her. She was also told that her next appointment with Dr. Ripperda was canceled, and Insurer would work with her to establish a new

treating physician.

40. On January 21, 2019, Schoenfelder's counsel wrote a letter to Insurer advising that the interference with her doctor-patient relationship was inappropriate, requesting that her care be transferred to Dr. Kristin Jost, and requesting that Schoenfelder be assigned a different nurse case manager.
41. On March 7, 2019, Schoenfelder transferred her care to Dr. Jost who agreed with Dr. Ripperda's assessment, continued the same work restrictions, and continued to recommend acupuncture, chiropractic care, massage therapy, and physical therapy. Dr. Jost also recommended therapeutic yoga, a lymphedema therapy specialist, and an at-home pneumatic compression device.
42. In July 2019, Schoenfelder experienced a frozen shoulder which Dr. Cho explained was related to and caused by the CRPS condition. The treatment for the frozen shoulder included injections, trigger point injections, acupuncture, and physical therapy.
43. On July 2, 2019, Schoenfelder attended an IME with Dr. Douglas Martin. Ten days after the examination, Schoenfelder received a copy of his report and a denial letter from Insurer based upon Dr. Martin's opinions.
44. On November 15, 2019, Schoenfelder submitted her Petition for Workers' Compensation Benefits to the Department of Labor & Regulation (Department).

Other facts will be determined as necessary.

Nature and Extent of Injury

To prevail in this matter, Schoenfelder must first prove that her work-related injury is a major contributing cause of her 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 standard of proof for causation in a worker's compensation claim is a preponderance of the evidence. *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, ¶ 21, 938 N.W.2d 425, 430.

Both parties have offered medical expert testimony. "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). Claimant has offered the IME opinion of Dr. Janssen as well as the treating physicians, Drs. Jost and Cho. Employer and Insurer have offered the IME opinions of Drs. Bissell, Elkins, and Martin.

Dr. Janssen is double board certified in pain medicine and physical medicine and rehabilitation. Dr. Janssen testified live at hearing. He opined that Schoenfelder's CRPS diagnosis is correct and that CRPS is a valid diagnosis generally accepted by the medical community. He further opined that her treating physicians ran sufficient and appropriate tests to rule out other potential causes. Dr. Janssen concluded that the work-related injury is the major contributing cause of Schoenfelder's CRPS condition. He also opines that she did not have any pre-existing conditions which limited her ability to function or work prior to the date of injury. She now has permanent work limitations since her date of injury and that that would be expected for a person with chronic CRPS. He opined that working 20 hours per week may be better than average function for her condition.

In his diagnosis, Dr. Janssen applied the Budapest Criteria which he testified is the “gold standard” for diagnosis of CRPS. The Budapest Criteria has four different areas. The first criterion is continuing pain which is disproportionate to the inciting event. He found that Schoenfelder met the first area as she has had symptoms since 2015 when it would have been expected for her to have healed. The second criterion is the patient shows symptoms in at least three of four categories: sensory, vasomotor, pseudomotor, and motor. Dr. Janssen found that Schoenfelder showed hypersensitivity with just a light touch over her hand and her lower extremity. She showed asymmetry in temperature and problems with skin color changes as well as swelling. She also presented with lost range of motion, dysfunction, and weakness. Thus, Dr. Janssen concluded she reported at least one symptom in each of the four categories. The next criterion is what signs are observable by a physician on examination. He testified that he observed hypersensitivity, color and temperature changes, edema, loss of range of motion in both upper and lower right extremity. He stated that to meet the signs criterion she only needed to meet two of the four categories, but in his examination, she met all four. Dr. Janssen further testified that the final criterion is that there is no other diagnosis that better explains the signs and symptoms and, in his opinion, CRPS is the best diagnosis. Additionally, he opined in his report that CRPS is most commonly caused by an injury to the upper or lower extremity. Schoenfelder suffered an injury and had subsequent surgery. Therefore, the mechanism of injury is consistent with a diagnosis of CRPS. Dr. Janssen opined that the continued use of acupuncture, physical therapy, chiropractic, and lymphedema management are appropriate, medically necessary treatments to maintain Schoenfelder’s functional status. Without the treatments her condition would likely worsen, and she would not be able to work 20 hours a week.

At hearing, Dr. Janssen was asked if Schoenfelder had a preexisting condition prior

to her work injury. He answered that she had a problem with her right hip prior to the injury. He did not know if her right hip complaints after the fall in January of 2015 had resolved, but he knew she had returned to work and was no longer receiving treatment for it prior to the work injury. In his report, he noted that she was not receiving treatment for the right hip, right lower extremity, or right upper extremity prior to the injury. She was not taking any medications for pain and did not have a history of hip labral tear or CRPS. He concluded that no pre-existing condition explained the ongoing symptoms that presented immediately after the June 15, 2015, injury and then became chronic.

Schoenfelder's treating physician, Dr. Jost, opined that Schoenfelder's hip injury, need for hip surgeries, and development of CRPS is attributable to her work injury. She noted that objective signs of CRPS have been documented by Dr. Gutnik, Dr. Ripperda, Dr. Cho, and Dr. Metz, as well as in photographs Schoenfelder shared with her in the clinic. Dr. Jost further opined that Schoenfelder was at maximum medical improvement (MMI) and that her work restrictions of 20 hours per week were considered permanent.

Dr. Cho opined that Schoenfelder's work injury is the major contributing cause of her condition. She further opined that medical acupuncture treatment has improved Schoenfelder's pain levels, activity tolerance, and overall functional level along with objective changes such as decreased swelling, as well as better skin color and temperature of the right extremity.

Dr. Elkins is a Certified Independent Medical Examiner who conducted an IME of Schoenfelder on July 18, 2016. His written report supported the diagnosis of RSD based on objective findings of color and temperature changes of Schoenfelder's right lower extremity. He opined that her condition and the RSD was a result of the June 15, 2015, work injury and subsequent treatment. He further opined that she would need additional treatment due to the RSD, and that she had not reached MMI. At his deposition on May

22, 2023, Dr. Elkins opined that the RSD was related to the work injury, but he questioned the necessity of continued medical care to manage RSD symptoms indefinitely. He opined that Schoenfelder's case was unusual for multiple reasons. He concluded it would be unusual for someone to be permanently and totally disabled from RSD after a period of seven years or to be treating the condition at that point. It was also unusual for RSD to develop in another extremity. However, he did opine that if she had long-term problems from RSD then it would be reasonable for her to have ongoing care.

Dr. Bissell, an orthopedic surgeon, conducted an IME of Schoenfelder on July 13, 2017. He examined her and reviewed the medical records available to him. Dr. Bissell assessed Schoenfelder with right hip degenerative joint disease. He recommended she continue with advancing weight bearing physical therapy, and chiropractic and acupuncture treatment as needed. He related her discomfort to her degenerative condition. He noted that he did not have any evidence of injury or hip problems prior to her injury. The noted history in Dr. Bissell's report does not include the January 2015 fall on the ice or Schoenfelder's pre-work injury complaints of right hip pain. He attributed her condition to the work injury. He specifically noted that she had consistent right groin pain since the incident which was clinically correlated to a labral tear and articular damage found on an MRI on December 22, 2015. He concluded that her subjective complaints were consistent with the objective findings. He opined that she was not at MMI and deferred her restrictions to her treating physicians.

On July 2, 2019, Dr. Martin performed an IME of Schoenfelder. He is a Fellow of the American College of Occupational and Environmental Medicine, the American Academy of Disability Evaluating Physicians, and the American Academy of Family Physicians. He is also a certified Independent Medical Examiner. Dr. Martin's written report concluded that Schoenfelder could not be properly diagnosed with CRPS because

he does not “believe it actually exists.” In support of his claim, he cites to articles as well as to a book he authored. He suggested that she may instead have a rheumatological condition, a small fiber neuropathy, or a mental health diagnosis none of which would be related to her work injury. He further opined that the “traveling” complaints Schoenfelder reported were a red flag that there is an alternative to better explain the diagnosis. At his deposition on May 24, 2023, Dr. Martin agreed upon questioning from Schoenfelder’s counsel that there is a constellation of symptoms which is a real phenomenon seen in patients which is generally labelled as CRPS. However, he disputes the diagnosis of CRPS and some of the treatment. Dr. Martin believed Schoenfelder suffered from arthritis which is consistent with the findings of Dr. Hermanson in 2018 who diagnosed her with severely symptomatic end-state arthritis. Dr. Martin agreed with Dr. Rothrock who placed Schoenfelder at MMI on February 25, 2019. He assigned her a 9% impairment rating. Additionally, at his deposition, Dr. Martin admitted that he did not remember details about Schoenfelder, her records, or his examination of her.

Schoenfelder testified at hearing regarding her examination with Dr. Martin. She testified as to multiple discrepancies in his report compared to her experience during the IME. First, she recalls failing the balance test, and Dr. Martin commenting that she should ask her therapist for BAPS board to help with balance. However, Dr. Martin did not note any balance issue in his report. Second, Schoenfelder recalls that her right hand and foot were extremely cold after the long drive, and Dr. Martin seemed startled and “flinched away” when he first touched her colder hand. His report noted that there was no temperature discrepancy. Third, Dr. Martin noted that Schoenfelder’s strength was full and equal on both sides while she testified that the strength is different on the left compared to the right. The hearing testimony of Sharon Shuster, Schoenfelder’s friend, corroborates her condition the day of Dr. Martin’s examination.

Dr. Martin also testified at deposition that he disagrees with the use of the Budapest Criteria for diagnosis of CRPS, yet he specifically looked for and noted signs and symptoms referenced in the Budapest Criteria in his examination and report of Schoenfelder. He agreed that the photo of Schoenfelder's hand was abnormal, red, and likely swollen. Dr. Martin did not dispute that Schoenfelder experienced the symptoms she reported or the mechanism of injury. He did not know if her various issues with chronic pain, numbness, tingling, swelling, coolness, balance and coordination, muscle cramping, or edema would require work restrictions. He suggested that her symptoms would be better described as Amplified Musculoskeletal Pain Syndrome (AMPS) which would have been cause by her hip injury. He was asked at deposition if there are specific criteria for an AMPS diagnosis. He answered, "Not yet. That particular phrase was introduced in the book on CRPS that I was the lead editor for, but it was intended to introduce the concept." Martin trans. 6:9-11. He concluded that he did not have an answer regarding Schoenfelder's proper diagnosis.

Dr. Janssen testified at hearing that he disagreed with Dr. Martin's assertion that AMPS would be the more appropriate diagnosis. He provided three reasons for his disagreement: 1. AMPS does not happen after an injury; 2. AMPS would not show the characteristic signs of swelling or hypersensitivity; and 3. the American College of Rheumatology, Mayo Clinic, and Cleveland Clinic call AMPS a diagnosis for adolescents and children. He also disagreed that Schoenfelder's issues could be rheumatological as her x-ray findings did not show damage to the joint which would be common for a rheumatological condition. He also did not know of such a condition that would fit all her symptoms.

The Department having considered the medical expert opinion in this matter finds Dr. Janssen's conclusions and rationale the most well-supported. While Employer and

Insurer have raised issues with the foundation of Dr. Janssen's opinion, the Department finds that his reasoning is based on both subjective and objective findings. He was aware of the fall in January 2015 and her subsequent issues which resolved prior to the work injury. Dr. Janssen's explanation and application of the Budapest Criteria are particularly persuasive. He has outlined the criteria and pointed to both Schoenfelder's reported complaints and his observations to support his conclusion that she has met the Budapest Criteria. He also acknowledged that she had a hip issue after a fall in January 2015, but he pointed to the different presentation of the symptoms before and after the work injury. Prior to the work injury she was able to work and had no history of labral tear or CRPS. The timeline of her CRPS condition in relation to the work injury is persuasive.

Dr. Martin's opinion stands out among the medical experts in this matter as he does not believe CRPS exists. Both Dr. Elkins and Dr. Janssen have concluded that Schoenfelder has CRPS. Although, Dr. Elkins raised doubt in his deposition after the condition continued longer than he would have expected. Dr. Martin's assertion that Schoenfelder's correct diagnoses could be rheumatological or neurological are not supported. He admitted at deposition that he found no evidence of peripheral neuropathy on exam, and she had no predisposing factor for a small fiber neuropathy. He further admitted that she did not have any pre-disposing mental health factors. He opined that mental health conditions should be considered after all medical explanations have been fully exhausted, and her treating physicians have identified medical explanations for Schoenfelder's symptoms including chronic pain, numbness, tingling, dysesthesia, burning pain, swelling, coolness of extremities, balance and coordination issues, muscle cramping, edema, and nail and hair changes. Due to the above inconsistencies, the Department concludes that Dr. Martin's conclusions are unreliable and unsupported.

Dr. Bissell's opinion supports the conclusion that the work injury is a major

contributing cause of Schoenfelder's condition and need for treatment. He concluded that her condition is causally related to the June 15, 2015, injury.

While Schoenfelder had a fall in January 2015, Dr. Janssen's presentation of the timeline of her symptoms as well as the fact she was able to work prior to the work injury and unable to after indicates that the work injury is the source of her current complaints. Additionally, the record shows that Schoenfelder's hip is arthritic. Whether the arthritis is the result of trauma or a degenerative process is unclear. However, the fact that Schoenfelder may have a degenerative condition in her hip does not prevent the work injury from being a major contributing cause of her condition. Schoenfelder is "not required to prove [her] employer was the proximate, direct, or sole cause of [her] 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). In 2021, the South Dakota Supreme Court clarified 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 Department is persuaded that Schoenfelder suffers from CRPS and the work injury is a major contributing cause of her condition and need for treatment.

Permanent Total Disability and Permanent Partial Disability

To make a prima facie showing that she is entitled to odd-lot benefits, Schoenfelder must prove either that due to her physical condition, coupled with her education, training, and age, it is obvious that she is obviously unemployable, or 2) that

she is in the kind of continuous severe and debilitating pain which she claims. *Eite v. Rapid City Area Sch. Dist. 51-4*, 2007 SD 95, ¶21, 739 N.W.2d 264, 270-71. (citations omitted). SDCL § 62-4-53 provides,

An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.

An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

SDCL § 62-4-52 defines "sporadic employment resulting in an insubstantial income,"

as: employment that does not offer an employee the opportunity to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury. Commission or piece-work pay may or may not be considered sporadic employment depending upon the facts of the individual situation. If a bona fide position is available that has essential functions that the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury the employment is not sporadic. The department shall retain jurisdiction over disputes arising under this provision to ensure that any such position is suitable when compared to the employee's former job and that such employment is regularly and continuously available to the employee.

The Court has provided two ways a claimant can make a prima facie showing of entitlement to benefits under the odd-lot category. "(1) claimant is obviously unemployable due to his or her physical condition, coupled with his or her age, training, and experience,

or (2) unavailability of suitable employment by showing that he or she has made reasonable efforts to find work and was unsuccessful.” *Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, ¶ 25, 956 N.W.2d 812, 820.

Schoenfelder offered the expert opinion and report of vocational rehabilitation expert, Tom Audet. In forming his opinion, Audet interviewed Schoenfelder, reviewed her medical records, the expert reports, and earnings record. He also relied on the 20 hour per week work restriction set by Dr. Ripperda and Dr. Jost which were endorsed by Dr. Janssen. During his interview, Audet noted that Schoenfelder was continually transitioning between sitting, standing, leaning, and walking. He concluded that she could not earn at or above her compensation rate, because she is limited to 20 hours per week, and she is limited to performing sedentary work. She also is unable to maintain back-to-back workdays as she needs time to recover in between. Audet did not explore any work from home positions that might be available to Schoenfelder though he admitted hypothetically, there may be some home position available to her. However, he stated it would still not make her compensation rate, and she would also still have the same issues of needing to move around and change position.

The Department concludes that Schoenfelder meets both requirements for making a prima facie showing that she is entitled to odd-lot benefits. Due to her physical condition, coupled with her education, training, and age, she is obviously unemployable at a level that would meet her compensation rate. Audet concluded that she could not earn her compensation rate at any position of which she is qualified while working only 20 hours per week. He also testified that her current position at Southeast is an excellent fit as it allows her to have the necessary recovery days between workdays, while few, if any, other positions would allow that type of schedule. Audet’s conclusions are well supported by his analysis of Schoenfelder’s abilities and his experience in the vocational area.

Additionally, from the medical record, medical expert testimony, vocational opinion, and the testimony of Schoenfelder herself the Department concludes that she meets the second criterion for meeting for entitlement to odd-lot benefits. The Department finds that as a result of her work injury, Schoenfelder is in continuous severe and debilitating pain and discomfort which limits her to only 20 hours of work a week and requires recuperation time.

“If it is ‘obvious’ that [Reede] is in the odd-lot category, then the burden shifts to the employer to show that suitable employment is available in the community for persons with [Reede’s] limitations.” *Id.* If it is not “obvious” that Reede falls within the odd-lot category, then the burden remains on her to demonstrate “the unavailability of suitable employment by showing that [she] has unsuccessfully made ‘reasonable efforts’ to find work.” *Id.* *Reede v. State Dep’t of Transp.*, 2000 S.D. 157, ¶ 11, 620 N.W.2d 372, 375 (brackets in original).

Employer and Insurer did not provide a vocational expert, and they did not provide proof of the existence of specific jobs available that meet her requirements which would pay at or above her compensation rate.

The Department concludes that Schoenfelder is permanently and totally disabled. Schoenfelder asserts that as she was assigned a 9% rating by Dr. Martin on July 2, 2019, marking the transition from temporary total disability/permanent partial disability benefits to permanent total disability benefits it is appropriate to calculate for unpaid indemnity benefits beginning on the date. The Department agrees. Schoenfelder has been permanently and totally disabled since July 12, 2019 pursuant to SDCL § 62-4-53.

Future Medical Benefits

As the Department has found her condition to be related to her work injury, Schoenfelder is entitled to future medical expenses for all work-related medical needs. Drs. Janssen, Jost, and Cho have opined that her ongoing care is reasonable and necessary. This includes chiropractic care, physical therapy, supplements, acupuncture,

physician visits, and future physician-recommended care. Dr. Janssen opined these treatments are appropriate for the continued management of Schoenfelder's condition to maintain her functional status. Employer and Insurer argue that the acupuncture procedures and physical therapy do not affect her condition, and the acupuncture causes the pain to subside temporarily. However, SDCL § 62-4-1 does not require a claimant be cured by the care for it to be necessary, suitable, and proper.

The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title. ...The employee shall have the initial selection to secure the employee's own physician, surgeon, or hospital services at the employer's expense. If the employee selects a health care provider located in a community not the home or workplace of the employee, and a health care provider is available to provide the services needed by the employee in the local community or in a closer community, no travel expenses need be paid by the employer or the employer's insurer.

SDCL § 62-4-1

Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. It is in the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.

Hanson v. Penrod Const. Co., 425 N.W.2d 396, 399 (S.D.1988).

The Department concludes that it is the intention of SDCL § 62-4-1 for the selected physician to determine what is necessary, suitable, and proper. Pain management and maintaining physical ability are necessary, suitable, and proper intentions of medical procedures.

Employer and Insurer assert that there is no evidence that Dr. Cho is a licensed health care provider pursuant to SDCL § 62-1-1. If Dr. Cho is properly licensed, then her acupuncture treatments are appropriate for the purposes of pain

relief and management. Employer and Insurer are not responsible for medical treatments provided by individuals who are not medical practitioner pursuant to SDCL § 62-1-1.

Whether the work injury prevented Schoenfelder from performing her duties at her Southeast Technical College

The Department has previously determined that at the time of the June 15, 2015, injury, Schoenfelder was concurrently employed by both Employer and Southeast. Both employments were year-round and not seasonal employments, and she was actively working in both. The Department concluded that additional facts were needed to determine whether the work injury prevented Schoenfelder from performing her duties at Southeast, as required by SDCL § 62-1-25 for aggregation of wages.

Schoenfelder has provided the following additional facts to support her claim.

1. In her position as a Fitness/Wellness/Nutrition instructor at Southeast, she prepares law enforcement students to pass their fitness assessments. She teaches a classroom portion and a lab portion which is approximately an hour of physical education on an obstacle court or in the gym doing workouts. Prior to her injury, she would physically demonstrate exercises, she would accompany the students outdoors to do activities in different locations on campus some of which were a distance from the building or requires climbing or hill descending for access. Schoenfelder was also responsible for monitoring the students for safety, checking blood pressure, administering CPR, or other first aid as needed.
2. Initially following the injury, Schoenfelder was forced to remove one of the green space options from her students' outdoor workouts due to her inability

to walk up and down the hill requires to access it. She also had to modify other portions of the workouts because of her limitations in walking the length of the longer courses so that she could see all the students for safety and grading purposes.

3. Since the date of injury, she has had various limitations and restrictions, and multiple periods of time she was off work from both jobs, and/or limited in the number of hours and type of job duties she could perform.
4. Following each of her surgeries, Schoenfelder was taken completely off work for both of her concurrent employments for a period of weeks. Following the January 11, 2016, labral repair surgery, she was taken off work from both employers and Southeast had to obtain a substitute instructor for her students.
5. She was returned to work for Southeast on February 4, 2016, with restrictions. After each surgery she was limited to a combination of crutches and a wheelchair for several weeks to months. She was restricted from bearing any weight on her right leg and was required to maintain a reclining position. These limitations significantly interfered with her ability to perform her job duties at Southeast.
6. Today, Schoenfelder continues to be limited in her performance of her duties at Southeast. She has difficulty standing or walking for extended periods or distances, and must constantly transition from sitting to standing, to brief walking, etc. During the transition between classes, she lies down on a wrestling mat, stretches, and rests. She is also very limited in demonstrating movements, exercises, and activities. Instead, she shows videos or photographs instead of demonstrating herself. She is limited in

handling equipment and cannot participate in exercises if there is an odd number of students. Schoenfelder struggles to get up and down off the floor/ground and requires assistance from a student. This affects her ability to effectively manage an emergency or administer first aid.

7. Following a day of teaching at Southeast, she must deliberately take steps to recover from the day's activities. She cannot handle back-to-back days of work or other activity.

At hearing, Schoenfelder testified that she continues to teach the same classes that she was teaching before the date of injury. She has missed no workdays at Southeast due to her CRPS symptoms.

Dr. Benjamin Valdez, Vice President of Academic Affairs at Southeast testified by deposition that it was his understanding that there were periods of time that Schoenfelder was not able to work at all for Southeast due to her injury². He also confirmed that she continued to be limited in what she can physically do in class. He testified that she tries to provide the students a very well-rounded educational experience.

SDCL § 62-1-25 provides,

For a workers' compensation claim arising after May 5, 2015, if an employee was working for more than one employer, the employee's earnings used to calculate the employee's average weekly wage in §§ 62-4-24, 62-4-25, or 62-4-26 shall include the amount of compensation for the number of hours commonly regarded as a day's work for each employer in which the person was concurrently employed at the time of the person's injury; however, an employee's earnings from concurrent employment are aggregated only if the injury occurred when the employee was actively working in the concurrent employment and when the injury prevents the employee from performing the employee's duties at the employee's other concurrent employment.

² Dr. Valdez stated that these instances happened prior to him starting his employment with Southeast.

The Department concludes that while Schoenfelder requires accommodations and must change the way she gives instruction, she is still performing her duty of providing an education to her students. Therefore, she is not prevented from performing her duties pursuant to SDCL § 62-1-25. Schoenfelder is only entitled to compensation for her concurrent employment with Southeast for the times when she was unable to work such as while recuperating from surgery.

Compensation Rate and Pre-Judgment Interest

The appropriate compensation rate for Schoenfelder is \$542.39. Earnings with Employer from 5/15/2014 to 5/15/2015 total \$42,304.55

$\$42,304.55 / 52 \text{ weeks} = \$813.55 \text{ Average Weekly Wage}$

$\$813.55 \text{ AWW} \times 2/3 = \$542.39 \text{ Compensation Rate}$

Pursuant to SDCL § 21-1-13.1 Schoenfelder is entitled to pre-judgment interest on her unpaid workers' compensation benefits.

Any person who is entitled to recover damages, whether in the principal action or by counterclaim, cross claim, or third-party claim, is entitled to recover interest thereon from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt.

SDCL § 21-1-13.1. *Tischler v. United Parcel Service*, 1996 SD 98.

Conclusion:

Schoenfelder has proven by a preponderance of the evidence that her work-related injury on June 15, 2015, is a major contributing cause of her condition pursuant to SDCL § 62-1-1(7).

Schoenfelder has also proven that she is permanently and totally disabled pursuant to SDCL § 62-4- 53, and she has been so since July 12, 2019.

Schoenfelder is entitled to future medical benefits related to her work injury. Both acupuncture and physical therapy are reasonable and necessary if provided by a licensed

medical practitioner pursuant to SDCL § 62-1-1.

Schoenfelder has continued to perform her required duty as a teacher at Southeast to provide an education to her students and is therefore only entitled to benefits from her concurrent employment for the periods she was unable to work pursuant to SDCL § 62-1-25.

Schoenfelder's compensation rate is \$542.39.

Schoenfelder 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. Employer and Insurer shall have an additional twenty (20) days from the date of receipt of 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, Schoenfelder shall submit such Stipulation along with an Order consistent with this Decision.

Dated this day of April 8, 2024

SOUTH DAKOTA DEPARTMENT OF
LABOR & REGULATION



Michelle M. Faw Administrative Law Judge

