

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

DUANE A. YORK

HF No. 84, 2017/18

Claimant,

v.

DECISION

CODINGTON COUNTY ,

Employer,

and

SDML WORKERS' COMPENSATION FUND,

Provider.

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 October 1, 2019, in Watertown, South Dakota. Claimant, Duane A. York, was present and represented by Seamus Culhane of Turbak Law Office, P.C. The Employer, Codington County and SDML Workers' Compensation Fund were represented by Laura Hensley, Boyce Law Firm, LLP.

Legal Issue:

The legal issues presented at hearing are stated as follows:

- a. Whether the injury sustained by York on December 12, 2016, was a major contributing cause of York's deep vein thrombosis and possible pulmonary embolism; and
- b. Whether York is entitled to Medical Benefits; and
- c. Whether York is entitled to Temporary Partial Benefits.

Facts:

Based upon the testimony at the hearing and the record, the following facts are found by a preponderance of the evidence:

1. On December 12, 2016, Duane York (York or Claimant) was injured in his capacity as a volunteer with Codington County Search and Dive Rescue (CCSDR) team. Codington County was at all time pertinent insured for workers'

compensation purposes by SDML Workers' Compensation Fund (jointly as Employer/Provider). York was assisting one of the teams, when he turned around and his right leg went down a hole in the ice. He landed on his elbow with his left foot staying on the ice causing him to sustain an impact to his shoulder. He also twisted his left knee. York reported the injuries to emergency manager, Jim Sutton. He was taken to the Watertown emergency department where he was provided a sling for his right shoulder and brace for his left knee. He was told to perform what activities he can, as tolerated. York was not ordered off work. He was told to follow up with Dr. Casey Johnston, an orthopedic surgeon.

2. On December 16, 2016, York had a follow-up visit with Dr. Johnston, who ordered an MRI as a result of York's need of a sling, ongoing pain, inability to sleep, weakness and lost mobility in his arm and shoulder. York was also given work restrictions but not ordered off work.
3. On December 22, 2016, York received an MRI which revealed a rotator cuff tear in his right shoulder. The next day, Dr. Johnston told York to use the arm sling as tolerated.
4. Sometime between December 22, 2016 and January 18, 2017, York took a week-long trip to Mexico with his wife.
5. On December 29, 2016, Kelly Rud (Rud), RN, the Nurse Case Manager assigned to York's case, first contacted York by letter regarding his workers' compensation claim.
6. On January 18, 2017, York underwent a right shoulder arthroscopy and subacromial decompression. He was given restrictions regarding the use of his right arm but not ordered off work.
7. On January 23, 2017, York reported to the Emergency Department at Prairie Lakes Hospital complaining of left-side chest pain that comes and goes, difficulty catching his breath, and an unsatisfying cough. York was diagnosed with deep vein thrombosis (DVT) in his right forearm, pneumonia, and probable left chest pulmonary embolism (PE). York was hospitalized at Prairie Lakes Hospital for two days, then put on a six-month course of anti-coagulant medication to prevent clotting and dissolve any existing clots.
8. On January 31, 2017 York saw Dr. Johnston who opined that claimant may work with restrictions of office work and no lifting with his right arm.
9. On February 28, 2017, York saw Dr. Johnston who stated that York should attend physical therapy, noting he could transition out of his sling, but York was told not to do any heaving lifting, and to see Dr. Johnston in six weeks.
10. On April 3, 2017, Rud contacted Dr. Johnston regarding York's DVT and PE diagnosis. Dr. Johnston responded the he was unable to determine if the DVT was related to the surgery on January 18, 2017.
11. On April 11, 2017, York was seen by Dr. Johnston and was instructed to continue some light restrictions but not ordered off work.
12. On April 12, 2017 Rud sent a letter to Dr. Catherine Leadabrand, the hospitalist that monitored treatment of York at Prairie Lakes. Dr. Leadabrand did not respond.
13. On April 25, 2017, Rud sent a second request to Dr. Leadabrand requesting her medical opinion regarding the DVT. Dr. Leadabrand did not respond.

14. Rud sent a third request to which Dr. Leadabrand did not respond.
15. May 30, 2017, York was seen by Dr. Johnston and was instructed to continue some light restrictions but not ordered off work.
16. On July 11, 2017, Dr. Johnston wrote York a return to work note with no restrictions.
17. On July 24, 2017, after receipt of an opinion by Dr. Elkins opining that the work injury of December 12, 2016 and the surgery of January 18, 2017 were not a major contributing cause of York's DVT and PE, Employer/Provider denied payment of medical bills associated with that condition and treatment.
18. On August 1, 2017, York was able to discontinue the anti-coagulant medication.
19. On June 5, 2018, Rud asked Dr. Johnston to provide an impairment rating for York.
20. On July 16, 2018, Rud wrote to Dr. Johnston asking for clarification regarding whether the 9% permanent partial disability was correct based on Rud's understanding of the AMA Guides to the Evaluation of The Permanent Impairment, 6th Edition. Dr. Johnston responded by fax, having checked the box marked "Yes," regarding the question whether the 5% impairment of the right upper body extremity based up on the full thickness rotator cuff tear was appropriate.
21. On February 20, 2018, York filed the Petition for Hearing in this matter.

Additional facts may be developed in the issue analysis below.

Issue I: Whether York's work injury and subsequent shoulder surgery were a major contributing cause of his DVT and PE

The Department must first decide whether York's injury and subsequent surgery is a major contributing cause of his DVT and PE. "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). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." *Orth v. Stoebner & Permann Const., Inc.*, 2006 SD 99, at ¶ 34, 724 N.W. 2d 586, 593 (citation omitted). Additionally, "our law does not require objective findings in order to sustain a workers' compensation claim." *Vollmer v. Wal-Mart*, 729 N.W.2d 377, 385 (S.D. 2007). The proper standard is a preponderance of the evidence. *Wise v. Brooks Constr. Serv.*, 2006 SD 80, 721 N.W.2d 461, 466. York asserts that his December 12, 2016 injury is a major contributing cause of the DVT/PE and subsequent treatment. Employer/Provider argue that York likely has a pre-existing condition that made him susceptible to blood clotting.

York has provided the expert opinions of Dr. Casey Johnston, and treating family physician, Dr. Clark Likness. Dr. Likness is board certified in family medicine, and he practiced for thirty-seven years at the Brown Clinic in Watertown. He was one of the two medical advisors for the CCSDR, and he has known York since the late 90s. York was treated by Dr. Likness after he developed the DVT and PE. Dr. Likness testified that he

believes the DVT was a result of the work injury, subsequent surgery, and immobilization of York's arm. Dr. Likness further opines that there has been no evidence of York having a clotting disorder, and that he would expect such a disorder to have manifested itself in some way prior to York's work injury. When York had a scope surgery of his knee as an adult and an appendectomy as a child, there was no issue with clotting in either of those surgeries. York stated that he had a maternal grandmother who had some type of clotting disorder, but he was not sure about it. The grandmother is not alive and so Dr. Likness was unable to investigate her supposed clotting disorder. York was tested for one of the most common type of clotting disorders. Dr. Likness chose not to have a full panel of tests done because of the expense, results would not have affected the treatment, and a positive result would require a retest six to twelve weeks later. If the test is negative, then there is no sure answer regarding the possibility of a clotting disorder. Dr. Likness also opines that even if York has a clotting disorder, the work injury, immobilization, and surgery were still a major contributing cause.

Dr. Johnston has worked as an orthopedic surgeon in Watertown since 2010, and he has performed between fifty and one hundred shoulder surgeries over the last nine years. He performed York's shoulder surgery on January 18, 2017. Dr. Johnston opined that York's development of a DVT following surgery does not necessarily mean that there is an underlying condition such a clotting disorder. He stated that he has seen people develop blood clots after surgery without any underlying cause, and in those instances, it is presumed that the time that passes following surgery was probably the cause of the blood clot. He confirms that immobilization during and after surgery is one of those potential causes. Dr. Johnston also stated that there is no evidence of a blood clot disorder or other preexisting issue. Dr. Johnston opines that it is unlikely that York would have spontaneously developed a blood clot and have it travel to the lungs without surgery.

Rud asked Dr. Johnston by a form faxed on April 3, 2017, whether the DVT and PE were causally related to the work injury. Dr. Johnston responded by stating on the form, "It is difficult to draw a direct conclusion from the surgery. I would say it's more likely than not that surgery was a major contributing factor, but I cannot say it is for sure." York also asked Dr. Johnston for a letter confirming causation. On August 9, 2017, Dr. Johnson responded to York's request with a letter that stated that the DVT was directly related to York's work-related injury and surgery. Dr. Johnston confirmed his opinion that the surgery was a major contributing cause of the DVT and PE on July 9, 2019 during his deposition. He explained that when Rud first asked him, he was unable to state a definitive opinion, but later, after reviewing additional information, he concluded that it was a major contributing cause.

Employer/Provider have offered the opinion of Dr. Bruce Elkins. Dr. Elkins is a board-certified occupational medicine physician who currently works at the Veterans Administration (VA). Prior to working for the VA, Dr. Elkins worked at Avera in the workers' compensation clinic for twelve years. While working for Avera, Dr. Elkins was an occupational medicine physician, which required him to do employment related

physicals, deal with employment related injuries, and provide impairment ratings for workers' compensation cases. Dr. Elkins attended medical school at the University of Wisconsin, followed by a residency in preventative medicine at Loma Linda University. Prior to issuing his medical opinion, Dr. Elkins performed a literature review to find similar cases to that of York's. Following a review of the literature and the records pertaining to York, Dr. Elkins opined that the work injury on December 12, 2016 and the subsequent surgery was not a major contributing cause of York's DVT and PE. He concedes that York's surgery was a contributing factor to the development of the DVT and PE, but, in his medical opinion, it is not a major contributing cause.

Dr. Elkins concluded from his review of both York's medical records and medical literature that DVT in the arm is very uncommon, and extremely rare, especially after an arthroscopic surgery such as that undergone by York. In the study referenced by Dr. Elkins in his report, over 10,500 participants were studied, resulting in one in roughly 5,000 participants developing a DVT in the arm. Of the eight total cases identified in the study of over 10,500 patients, six of those participants were found to have a clotting disorder and the other two did not develop a DVT until three weeks of immobilization after the arthroscopy. Dr. Elkins responded to Dr. Johnston's opinion that if York were to have another surgery, York would need to be placed on a prophylactic to prevent clotting. Dr. Elkins stated that the need for prophylaxis does not mean the surgery risk is any different, it is still very low, but that the risk associated with York is now unacceptably high due only to his prior development of a DVT. Therefore, Dr. Elkins opines, the only thing that has changed is York now has a history of clotting. Dr. Elkins believes that York has some other underlying issue that was a greater cause of the DVT, and therefore, he does not believe that the work injury was a major contributing cause.

Analysis:

To be entitled to benefits, York must prove that the work injury is and remains a major contributing cause of his condition and need for treatment. Employer/Provider assert that Dr. Johnston's opinion is insufficient, because it was inconsistent. Dr. Johnston initially said he could not speak with certainty about causation, but then changed his opinion to state definitively that the work injury and surgery were a major contributing cause. Employer/Provider assert that this inconsistency shows that causation was not clear. The Department is persuaded by Dr. Johnston's explanation that his first opinion was done hastily. In addition to the letter Dr. Johnston wrote for York on August 9, 2017, he affirmed his opinion that the injury and surgery were a major contributing cause at deposition under oath. The Department is persuaded that Dr. Johnston's medical opinion is that the injury and surgery are a major contributing cause of the DVT and PE.

Dr. Johnston did not read Dr. Elkins' report and merely skimmed the article cited by Dr. Elkins. Dr. Johnston disagreed with the article, believing that it only reviewed eight case studies which is inaccurate. Dr. Johnston cited a different article that he opined supported his position that DVT in arms is more common than Dr. Elkins' opinion made it seem. Dr. Elkins reviewed Dr. Johnston's cited article and concluded that it did not refute his opinion that arm DVT's are rare in shoulder arthroscopic surgeries absent

another underlying issue. He further pointed out that the article cited by Dr. Johnston included medical situations beyond arthroscopies, including shoulder replacements; included DVTs that developed in the leg, as well as the arm; and, looked at DVTs that were asymptomatic, not just ones causing symptoms. Dr. Elkins also testified that Dr. Johnston's cited study showed an even lower risk of developing a DVT, noting it to be 1 in 10,000.

Employer/Provider further assert that both Dr. Johnston's and Dr. Likness' opinions are based on the inaccurate belief that York's arm was immobilized for the entire period of time after surgery and before surgery. Dr. Likness opined that the DVT was definitely related to the injury, surgery, and subsequent immobilization. Like Dr. Johnston, Dr. Likness based his opinion partially on the belief that York's shoulder was immobilized in a sling for the weeks leading up to surgery. In actuality, York's shoulder was not immobilized in the sling the entire time before the surgery. He was directed to wear the sling as tolerated by Dr. Johnston, and between December 12, 2016 and January 18, 2017, York testified that he wore the sling approximately twelve hours a day. However, Dr. Likness opined that even if York's shoulder was not immobilized for that time, he would not change his opinion. Dr. Likness' opinion is consistent with Dr. Johnston's opinion that immobilization during the surgery itself could also be a factor in the development of the DVT.

Employer/Provider argue that Dr. Likness only saw York one time after his surgery for post-operative medication management. Employer/Provider assert that Dr. Likness' opinion that if York had a clotting disorder, it would have manifested prior to the work injury is not supported by medical evidence. Dr. Elkins opined that simply because a person did not develop a clot in the past is not indicative of whether there will be the development of a clot in the future and there is no medical support to establish otherwise. Employer/Provider also argue that Likness' opinion that DVT is definitely related to the surgery is not sufficient to establish major contributing cause.

The theory of Employer/Provider in this matter is that York has an underlying clotting disorder that is the cause of his DVT and PE, and that this disorder is the major contributing cause. Dr. Likness tested for what he believed to be the most common clotting disorder. Dr. Elkins' opined that while the extra testing may not have changed treatment, it was still relevant for purposes of establishing causation of York's DVT and PE. Dr. Likness agreed that the tests results could possibly affect causation.

Dr. Elkins disagreed with other conclusions made by Dr. Likness. Dr. Elkins agreed that the test Dr. Likness conducted on York was for the most common inheritable clotting disorder. However, Dr. Elkins opined that unless an individual has the rare circumstance where they receive the genetic defect from both of their parents, then the risk for developing a clot only goes up a little bit, but less than most of the other clotting disorders. Dr. Elkins disagrees with Dr. Likness' opinion that strict immobilization is the therapy and treatment for the type of injury sustained by York. Dr. Elkins testified that immobilization is not the treatment for that type of injury, and that putting someone in a sling or immobilizing the arm such that there is no movement day

after day would put an individual at the risk for other complication like frozen shoulder. Further, Dr. Likness testified that the trauma sustained by York during the fall on December 12, 2016 would have caused venous swelling and this impacted Dr. Likness' causation opinion. Dr. Elkins opined that the injury sustained by York would not cause venous swelling to a deep vein and that no medical records documented any trauma sufficient to injure a deep vein, noting that the injury, alone, would not have placed York at a higher risk of developing a DVT.

Employer/Provider have argued that temporal sequence is not enough to establish causation. "The axiom '*post hoc, ergo propter hoc*,' refers to 'the fallacy of ... confusing sequence with consequence,' and presupposes a false connection between causation and temporal sequence." *Rawls v Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶ 20, 653 N.W.2d 247, 252 citing Black's law dictionary 1186 (7th ed 1999). While it is true that causation cannot be presumed merely because a condition develops after an injury, the Department finds the sequence of events in this case, along with the medical evidence, to be very significant. York had two surgeries earlier in his life, a knee surgery and an appendectomy. He did not have issues with clotting during those surgeries, nor did he have issues with clotting any other point prior to the shoulder surgery in question. While Dr. Elkins' opines that issues with clotting failing to present themselves is not medical proof that there is no clotting condition, the Department does not find this persuasive. Dr. Likness and Dr. Johnston both agree that there is no evidence that York has an underlying condition. Dr. Johnston also specifically opined that he has seen people develop blood clots after surgery without an underlying cause. Both the article cited by Dr. Johnston and the article cited by Dr. Elkins found that DVTs are very rare following surgeries like York's. The fact that York did not have an issue with clotting during either of his two prior surgeries, nor did clotting present as an issue at any other point in his life except following this shoulder surgery leads the Department to conclude that York's is one of the rare cases where DVT occurs following surgery without an underlying cause.

SDCL 62-1-1(7) establishes that an injury is only compensable if it remains a major contributing cause of the worker's condition. SDCL 62-1-1(7), in pertinent part, states:

"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[.]

"A cause which cannot be exceeded is a major contributing cause." *Orth* at ¶ 42. The Department is persuaded that the surgery York underwent on January 18, 2017

was a major contributing cause of the development of the DVT and PE. The Department finds Dr. Likness' and Dr. Johnston's opinions persuasive and does not agree with Dr. Elkins' opinion that York must have an underlying clotting condition. Therefore, York has proven by a preponderance of the evidence that the injury on December 12, 2016 which led to the surgery on January 18, 2017 is a major contributing cause of his DVT/PE and subsequent need for treatment.

Issue II: Benefits to which York is entitled

The Department's second task in this matter is establishing the benefits to which York is entitled. York asserts that he is entitled to medical benefits in the amount of \$14,009.25. In addition to these medical benefits, York argues that he is entitled to thirty weeks of temporary partial disability (TPD). York received permanent partial disability (PPD) benefits but did not receive TPD. There are two South Dakota Codified Laws that apply to volunteers under Title 62. York asserts that the appropriate law in this matter is SDCL 62-1-5 which states:

Fire department, ambulance service, and rescue squad volunteers--Employees of county, municipality, special purpose district, or township--Imputed wage. All persons providing voluntary service to a fire department, ambulance service, or rescue squad for any county, municipality, special purpose district, or township if regularly organized under the law shall be deemed employees of such county, municipality, special purpose district, or township while in the performance of their duties as members, if recommended by the person in charge to the governing body of such county, municipality, special purpose district, or township for membership and appointed by such governing body, and has not been removed by such governing body as members. For the purpose of computing compensation, the members shall be considered to be earning a wage that would entitle the members to the maximum compensation for death or injury allowable under this title. But in no event may payments to the members exceed the maximum limitations for benefits as set out in this title.

For purposes of determining compensation, any remuneration received by a member who voluntarily serves may not be considered.

Employer/Provider argue that the proper law is, instead, SDCL 62-1-5.1 which states:

Volunteers serving state or political subdivision without pay--Computing or imputing wage--Certain persons not deemed volunteers. Any volunteer worker rendering services in or for any agency, department, institution, or instrumentality of the state or of any of its political subdivisions, including counties, townships, school districts, or municipalities, whose services have been duly recommended to the officer or governing body responsible for employment of personnel for the respective entity and duly appointed thereto by such officers or governing body, shall for purposes of this title be deemed an employee of the state or the political

subdivision, as the case may be. The appointment shall be entered into the official records or minutes of the entity.

In the event of injury or death, for the purposes of computing compensation for volunteer workers other than volunteer firefighters, a volunteer uncompensated worker's employment earnings from all sources during the last six months of employment shall be used. In the event the volunteer uncompensated worker has never been employed, the worker shall be considered to be earning the state minimum wage over a forty-hour week. The worker's average weekly wage shall be calculated by one of the methods in §§ 62-4-25 to 62-4-27, inclusive. In no event may payments to volunteer uncompensated workers exceed the maximum limitations for benefits as set out in this title. No local prisoner, state inmate, or federal inmate providing services to the state or any of its political subdivisions may be considered a volunteer worker under this section.

The Court has said, "When interpreting a statute, 'we begin with the plain language and structure of the statute.'" *Magellan Pipeline Company v. South Dakota Department of Revenue and Regulation* 2013 S.D. 68, 837 N.W.2d 402, 404 at ¶ 8. The Department finds that looking to the plain language of the statutes, SDCL 62-1-5 applies to York as he was acting as a member of the CCSDR team, which would fall under "rescue squad". Therefore, if the Department finds that York is entitled to temporary benefits, he "shall be considered to be earning a wage that would entitle the members to the maximum compensation for death or injury allowable under [title 62]." SDCL 62-1-5.

To be entitled to benefits, York must have been at least incapacitated for seven consecutive days as provided by SDCL 62-4-2 which stated in pertinent part, "[n]o temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the seven day waiting period is met, benefits shall be computed from the date of the injury." Employer/Provider argue that York has not proven that he was incapacitated for seven days. *Hendrix v. Graham Tire Co.*, 94 SD 654, 520 N.W.2d 876 establishes a three-part test for the receipt of temporary partial benefits as provided by SDCL 62-4-5. In order to receive TPD under *Hendrix*, the employee must establish:

1. That the employee is partially incapacitated from pursuing his or her usual and customary line of employment due to the employee's work-related injury; or
2. That the employee has been released by his or her physician from temporary total disability and has not yet been given a permanent partial disability; and
3. That the employee's present average earned income or that amount the employee is capable of earning at some suitable employment or business is less than what his or her average earned income was prior to the disability.

Regarding the first part of the test, the Department must decide whether York has proven he was at least partially incapacitated from pursuing his usual line of employment due to the work injury. Employer/Provider agree that it is uncontroverted

that York was likely incapacitated from work from January 23, 2017 to January 25, 2017 when he was hospitalized for treatment of his DVT and PE. However, Employer/Provider argue that York has not shown he missed seven consecutive days of work at any time, nor evidence to support that he was incapacitated such that it rendered him unable to work. York was given restrictions by Dr. Johnston, but he was not ordered off work. York responds that he was generally maintaining the use of his sling between December 12, 2016 and surgery on January 18, 2017. York testified that the injury to his shoulder resulted in an inability to lift his arm, that immobility combined with pain made it difficult working throughout the day. He also stated that he usually works with and trains employees. Following the surgery, York was on blood thinners for the DVT and lifting restrictions which limited his ability to perform his customary work. The Department agrees that York was at least partially incapacitated before and after his surgery. He was unable to lift the flooring materials used in his business, and while on the anti-coagulant medication, he was instructed not to use the cutting implements commonly used when working with flooring. Due to his injury, York was unable to fully perform his usual and customary employment.

To receive TPD for the time in question, the second part of the *Hendrix* test requires that York have been released by his physician from temporary total disability but had not yet been given permanent partial disability. On July 12, 2017, York was removed from all lifting restrictions. York was not given his permanent impairment rating by Dr. Johnston until June 15, 2018. Therefore, York meets the requirements of the second part of the test.

The third part of the *Hendrix* test requires that York's average earned income or the amount he was capable of earning at some suitable employment or business was less than what his average earned income was prior to his disability. York receives a salary from Duane's Floor Covering, the business which he owns. He received that salary during the weeks in question when he was partially incapacitated. He did not experience any income loss during this time. York argues that SDCL 62-1-5 prevents the consideration of this salary. SDCL 62-1-5 says "[f]or purposes of determining compensation, any remuneration received by a member who voluntarily serves may not be considered." Reading the plain language of the statutes, SDCL 62-1-5.1 states that it refers to "Volunteers serving state or political subdivision without pay," and provides guidance regarding paid volunteers benefit calculations by stating, "a volunteer uncompensated worker's employment earnings from all sources during the last six months of employment shall be used." SDCL 62-1-5 refers to "Fire department, ambulance service, and rescue squad volunteers- Employees of county, municipality, special purpose district, or township--Imputed wage," and it establishes that "the members shall be considered to be earning a wage that would entitle the members to the maximum compensation for death or injury allowable under this title." The use of the word "remuneration" instead of income, earnings, or salary appears to indicate that it is referring to reimbursement for volunteering. The Legislature appears to have intended that it did not want any earnings received for volunteering to interfere with SDCL 62-1-5 allowing these volunteers to collect benefits at the maximum rate. Therefore, York is incorrect in his assertion that this applies to the salary York received at his regular job.

The remuneration referred to by this section of SDCL 62-1-5 refers to pay that a volunteer might receive for volunteer activities, not pay they received at other jobs.

However, if the Department were to apply this section of SDCL 62-1-5 to mean that salary could not be considered, the statute would require that the salary merely not be used to calculate benefit rate. The Department would still be able to use the salary to establish whether York meets the third part of the *Hendrix* test, which since his earned income was not less, he is unable to do. York did not suffer a loss of income as required by the third part of the *Hendrix* test, and therefore, he has not shown that he is entitled to TPD.

Conclusion:

York has proven by a preponderance of the evidence that the injury of December 12, 2016 and the subsequent surgery were the major contributing cause of his DVT/PE and need for treatment. He is hereby entitled to medical expenses related to the DVT/PE and related treatment.

York has not proven that he is entitled to TPD as he did not suffer a loss of income while partially incapacitated.

York 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/Provider shall have an additional twenty (20) days from the date of receipt of York's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, York shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 5 day of March, 2020

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle M. Faw
Administrative Law Judge

