IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30859

SMITHFIELD FOODS, SIOUX FALLS, Employer/Self-Insurer and Appellant,
v.
JODY PHAM, Claimant and Appellee.

APPELLANT'S BRIEF

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Douglas Hoffman

BOYCE LAW FIRM, LLP
Laura K. Hensley
Kristin N. Derenge
300 South Main Avenue, Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424
lkhensley@boycelaw.com
knderenge@boycelaw.com
Attorneys for Appellant

KING LAW FIRM, P.C.
David J. King
101 N. Phillips Ave. Ste 602
Sioux Falls, SD 57104
(605) 332-4000
David@davidkinglaw.com
Attorneys for Appellee

NOTICE OF APPEAL FILED October 2, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

PRELIMINARY STATEMENT

Appellant, Smithfield Foods, shall be referred to as "Smithfield." Appellee, Jody Pham, shall be referred to as "Claimant." The South Dakota Department of Labor shall be referred to as the "Department." The Second Judicial Circuit Court, Minnehaha County, shall be referred to as the "Circuit Court." The Department's decision issued May 15, 2023, shall be referred to as "the DLR Decision." The Circuit Court's Memorandum Decision and Order Reversing the Department of Labor issued on August 16, 2024, shall be referred to as the "the CC Decision." The settled record transmitted by the Circuit Court shall be referenced as "SR" followed by the page number assigned by the Circuit Court.

JURISDICTIONAL STATEMENT

Smithfield seeks review of the CC Decision issued on August 16, 2024, as well as the DLR Decision issued on May 15, 2023. Smithfield received notice of entry of the CC Decision on September 18, 2024, and timely filed a Notice of Appeal on October 2, 2024. (SR 2590). This Court has jurisdiction over this appeal pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

There are three issues in this Appeal.

i. *Whether the Circuit Court erred in raising and deciding an issue that was not raised or disputed by the parties.*

The Circuit Court did not address this issue.

State v. Mulligan, 2007 S.D. 67, 736 N.W.2d 808
Elliott v. Bd. of Cnty. Comm'rs of Lake Cnty., 2005 S.D. 92, 703 N.W.2d 361

ii. *In deciding that issue, whether the Circuit Court erred in holding SDCL 62-7-33 placed the burden on Smithfield to show Claimant was not entitled to benefits when Smithfield voluntarily paid Claimant some workers' compensation benefits.*

The Circuit Court did not address this issue.

Sopko v. C & R Transfer Co., 1998 S.D. 8, 575 N.W.2d 225
Thurman v. Zandstra Const., 2010 S.D. 46, 785 N.W.2d 268
SDCL 62-7-33
SDCL 62-7-35.1

iii. *Whether the Department erred in finding that Claimant failed to meet her burden of establishing that her working conditions were a major contributing cause of her current conditions and need for treatment.*

The Circuit Court held in the affirmative.

Kuhle v. Lecy Chiropractic, 2006 SD 16, 711 N.W.2d 244
Wagaman v. Sioux Falls Const., 1998 SD 27, 576 N.W.2d 237
SDCL 62-1-1(7)

STATEMENT OF THE CASE

Claimant filed a Petition for Hearing, alleging she was entitled to workers' compensation benefits for right elbow, arm, shoulder, neck, or head pain due to a work injury on October 14, 2015. (SR 49). The Department denied the Petition in full, finding Claimant had failed to sustain her burden to show entitlement to benefits. (SR 2033). Claimant appealed to the Circuit Court, Honorable Douglas Hoffman, which held the Department erred by placing the burden on Claimant to prove entitlement to benefits pursuant SDCL 62-7-33—although that argument was not raised by either party—and reversed. Smithfield now appeals the CC Decision. (SR 380).

STATEMENT OF THE FACTS

A. October 14, 2015 – the Injury

Smithfield hired Claimant to work in the bacon processing department of its Sioux Falls pork processing plant in 2008. (SR 224, 1773, 1854, 2025). Her job was to make sure bacon coming down the packaging line was turned in the correct position and,

if the bacon was not correctly positioned, to turn the bacon to its correct position. (*Id.*). Claimant's job did not require much overhead work. (SR 224). Claimant was also responsible for adjusting a plastic film packaging reel on the line whenever that reel shifted out of place, which she testified occurred about four times a day. (SR 1858). On October 14, 2015, Claimant was working on the bacon processing line when the package reel fell out of place. (*Id.*). When Claimant reached up to push the film package reel back in its place, the reel fell back toward her, reportedly causing pain to the right side of her neck and right shoulder (the "Injury"). (*Id.*).

Claimant saw Dr. Bruce Elkins at Avera Occupational Medicine that day for an evaluation. (SR 730, 1858). Dr. Elkins diagnosed Claimant with a ligament sprain in her cervical spine, recommended physical therapy, and cleared Claimant for full duty work. (SR 730–31). At a follow up appointment in December 2015, Claimant reported her neck and shoulder were doing well, and she could perform her job without difficulty. (SR 736). Smithfield voluntarily paid for Claimant's treatment under workers' compensation. (SR 1755–58).

B. January 2016 to March 2018—Smithfield continues to voluntarily pay for Claimant's treatment related to her neck pain and shoulder pain.

Unfortunately, Claimant continued to report neck and shoulder pain in the years after the Injury. During this time, Claimant also began to raise new complaints of right arm pain. Smithfield voluntarily paid for Claimant's diagnostic tests and treatments related to her neck and right shoulder pain until March 2018 when, as discussed below, Smithfield began rejecting requests for payments related to neck and shoulder pain as well as other reported conditions.

In January 2016, Claimant underwent an MRI of her cervical spine. (SR 669–70). Dr. Wissam Asfahani reviewed the MRI and concluded Claimant had a small disc bulge in her C5-6 vertebrae. (*Id.*). Dr. Asfahani did not believe that the small bulge accounted for Claimant's neck pain. (*Id.*). However, he referred Claimant to Dr. Thomas Ripperda for another opinion. (SR 791). Dr. Ripperda agreed the MRI showed Claimant had a "broad-based slightly right-side central disc protrusion at the C5-C6 location" and recommended a follow up appointment. (SR 792). In the meantime, Dr. Ripperda recommended that Claimant take oral steroids. (*Id.*).

At her follow up appointment, Claimant stated the oral steroids had not alleviated her neck and shoulder pain. (SR 797). Dr. Ripperda recommended Claimant undergo a cervical epidural steroid injection. (SR 798) In May 2016, Claimant underwent the injection. (SR 895). Claimant reported her right neck pain and right shoulder pain persisted after the injection. (SR 802–03). Additionally, Claimant stated she began suffering from right arm pain as well. (*Id.*). In September 2016, Claimant stated she was no longer having right arm pain but continued to have pain on the right side of her neck. (SR 808). In October 2016, Claimant reported sharp neck pain and right arm pain. (SR 813). At a December 2016 appointment, Claimant stated that her right arm pain had returned, and she still suffered from neck and right shoulder pain. (SR 818).

Because Claimant's cervical injection had not appeared to relieve her pain, Dr. Ripperda ordered another MRI of Claimant's cervical spine in December 2016. (SR 814). This MRI revealed Claimant had a new disc extrusion with potential mass effect upon the existing right C6 nerve. (SR 942–43). In January 2017, Dr. Asfahani reviewed Claimant's December 2016 MRI and agreed that the MRI showed right C5-6 disc herniation and a

compression of the C6 nerve root. (SR 673–74). Based on his assessment, Dr. Asfahani recommended that Claimant undergo a C5-6 cervical discectomy and fusion ("the Surgery"), which was submitted to Smithfield for payment under workers' compensation. (SR 673–74, 676).

Upon receipt of the request for payment, Smithfield sent Dr. Asfahani a letter providing a description of Claimant's job and asking Dr. Asfahani to provide an opinion on whether Claimant's job was, in his opinion, a "cause" of Claimant's need for the Surgery. (SR 676). Dr. Asfahani responded by stating Claimant had degenerative disc disease of the cervical spine and a disc herniation at C5-6. (SR 677). However, he declined to provide an opinion on causation, stating it was difficult to diagnose the cause of her cervical condition but that neck flexion in her job could put strain on her neck. (*Id.*). Although Dr. Asfahani did not provide a legally sufficient medical opinion that Claimant's job was a major contributing cause of her need for the Surgery, Smithfield voluntarily paid for the Surgery under workers' compensation. (SR 1755–58).

Dr. Asfahani performed the Surgery on April 19, 2017. (SR 946). Claimant also underwent physical therapy after the Surgery. (SR 231, 1920–23). Unfortunately, Claimant reported the Surgery and follow up care failed to alleviate her right shoulder and arm pain. (SR 231). In July 2017, in response to Claimant's continued complaints of shoulder pain, Danielle Reiff, DNP, ordered an MRI of Claimant's right shoulder. (SR 1135). In August 2017, Claimant visited Dr. Travis Liddell for her right shoulder pain. (SR 1566–68). Dr. Liddell diagnosed Claimant with shoulder adhesive capsulitis. (SR 1568). He recommended a steroid injection and ordered that Claimant continue physical

therapy. (*Id.*). At a physical therapy appointment in September 2017, Claimant had functional range of motion and strength in her shoulder. (SR 1541).

In November 2017, during another follow up visit with Dr. Liddell, Claimant continued to complain of the same neck and shoulder pain as she had before the Surgery. (SR 1572–74). At a follow up in January 2018, Dr. Liddell noted Claimant had not responded to the treatment provided for her shoulder and neck pain. (SR 1577). Dr. Liddell also noted that the EMG of the muscles and nerves of Claimant's shoulder were normal. (*Id.*).

As discussed, Smithfield paid for Claimant's medical treatments until March 2018. (SR 1755–58). Around March 2018, Smithfield began denying Claimant's requests for medical payment under workers' compensation because Claimant's providers were unable to establish the cause of her condition nor was there evidence the Injury or Claimant's work activities were a major contributing cause of her condition. (*Id.*).

C. March 2018 to November 2021—Claimant continues to seek care for neck pain and right shoulder pain, as well as care for right arm pain, headaches, elbow pain, and Smithfield stops voluntarily paying for Claimant's treatment under workers' compensation.

After Smithfield stopped paying for Claimant's medical treatment, Claimant continued to seek medical care from numerous providers related to her right shoulder and neck pain but also for headaches, right arm pain, and right elbow pain.

In March 2018, Claimant saw Leslie Wilson, DNP ("DNP Wilson") to report that she was suffering from headaches. (SR 1877, 1120–21). DNP Wilson ordered Claimant to undergo a brain MRI. (SR 1120–21). Dr. Daniel Crosby reviewed the MRI and found it showed no "characteristic demyelinating lesions" that may account for Claimant's headaches. (*Id.*). In April 2018, Dr. Tricia Knutson ordered that Claimant undergo

another MRI of her cervical spine. (SR 1206). Dr. Jeffery Baka reviewed the MRI and noted that it showed no significant changes from the December 2017 MRI. (*Id.*).

At an appointment with Physician's Assistant, Brett Bastian ("PA Bastian"), on June 7, 2018, Claimant reported right sided-neck and arm pain. (SR 703). PA Bastian reviewed Claimant's cervical spine MRI and recommended Claimant return to work without restrictions and undergo an EMG nerve conduction study. (SR 705).

In July 2018, Claimant underwent the EMG nerve conduction study. (SR 635). The exam came back normal with "no convincing electrophysiologic evidence of radiculopathy, plexopathy or mononeuropathy affecting the bilateral upper or lower extremities." (*Id.*). In August 2018, at a follow up with PA Bastian, Claimant continued to report right neck and right arm pain. (SR 711–12). However, again, PA Bastian noted there was no evidence of a failed cervical fusion and that he did not believe any additional neurosurgical inventions would benefit Claimant. (SR 714).

Around August 2018, Claimant saw Dr. Leslie Voila complaining of persistent headaches. (SR 636). Dr. Viola noted the pain medicine Claimant was taking for headaches up to that point did not appear to be managing her pain. (*Id.*). In October 2018, April 2019, and June 2019, Claimant also saw Dr. Ripperda for routine follow up appointments for her neck, shoulder, headaches, and arm pain and discomfort. (SR 833–34, 828–29, 833–34). During Dr. Ripperda's June 2019 visit with Claimant, he ordered another MRI of Claimant's cervical spine. (SR 833). Dr. Crosby reviewed that MRI and found it showed "normal morphology of the cervical and upper thoracic spinal cord." (SR 1237–38).

Because Claimant's providers were unable to identify an anatomical cause of her reported symptoms, in September 2019, Claimant was referred to Dr. Steven Feldhaus for an evaluation of whether thoracic outlet syndrome could explain her symptoms. (SR 1710). Claimant told Dr. Feldhaus that her symptoms got worse after the Surgery. (*Id.*). Claimant also told Dr. Feldhaus that she had "tingling from her shoulder and right neck down her arm and also down the right side of her body into her right leg." (*Id.*). Dr. Feldhaus noted Claimant's self-reported tingling from her right arm to hand and continuing down to her right leg did not make anatomical sense. (SR 1710, 1713). Dr. Feldhaus also noted Claimant's EMG was normal and her MRI was also "fairly normal." (SR 1713). After his exam, Dr. Feldhaus concluded he did not find "overwhelming" evidence for thoracic outlet syndrome and was "unimpressed with the potential for thoracic outlet syndrome." (*Id.*)

In December 2019, Claimant saw Dr. Liddell again for a follow-up on her right shoulder and neck pain, which Claimant stated had not gotten any better. (SR 746–751). Dr. Liddell recommended a right elbow subcutaneous ulnar nerve transposition surgery to manage her pain, which took place on January 24, 2020. (SR 750, 1270).

In October 2020, Claimant saw Dr. Knutson complaining of headaches and presented disability paperwork for those headaches. (SR 570). Claimant also saw Dr. Viola for headaches in October 2020. (SR 647). Dr. Viola recommended Botox injections for her headaches, and Claimant began to receive Botox injections in December 2021. (SR 647, 651).

Claimant continued to report right-sided neck and shoulder pain in January 2021 to Dr. Ripperda. (SR 848). Because Claimant did not respond to treatments for her right-

side neck and shoulder pain until that point, Dr. Ripperda referred Claimant to a pain clinic. (*Id.*). In February 2021, Dr. Michael Pudenz saw Claimant for her chronic pain complaints and recommended Claimant undergo a spinal cord stimulator trial to manage her pain. (SR 1475–76). On March 1, 2021, Dr. Pudenz placed the spinal cord stimulator. (SR 1489–90). The stimulator was removed four (4) days later. (SR 1509). When Claimant returned for the removal of the stimulator, she reported no improvement in her pain. (*Id.*).

D. The Petition for Hearing and DLR Decision

Claimant filed the Petition for Hearing on July 17, 2020. (SR 53). Therein, Claimant claimed that the Injury, five years before, was the cause of her "right elbow, arm, shoulder, neck, back and head" pain and demanded workers' compensation benefits for treatment of these conditions.[1] (SR 49–53).

1. Dr. Ripperda's opinion on causation

In February 2022, Claimant retained Dr. Ripperda, one of her many treating providers, to provide an opinion on whether the Injury and her work activities were a major contributing cause of her condition. (SR 1773–1777, 1788). In a short letter, Dr. Ripperda provided an opinion that the Injury was a major contributing cause of Claimant's right shoulder, right elbow, right hand, and right neck pain, as well as her headaches. (SR 1775). This was the first time Claimant obtained a supportive medical opinion connecting the Injury to her work activities.

[1] Claimant also stated she was permanently and totally disabled. (SR 52). However, Claimant later dropped that claim. (SR 2012). Claimant has continued to work at Smithfield since the Injury. (SR 2006). Additionally, in February 2021, Claimant underwent a functional capacity evaluation at the request of her attorney, which showed Claimant was capable of full-time work. (SR 2012).

In his deposition, Dr. Ripperda explained the basis for his written opinion. (SR 1788–89). Although Dr. Ripperda did not review Claimant's medical records before the Injury, Dr. Ripperda opined that Claimant's "right shoulder adhesive capsulitis" was "secondary to the radiculopathy" in her cervical spine, which was "related to the work [I]njury." (SR 1789). Further, Dr. Ripperda opined Claimant's migraine headaches stemmed from "nerve irritation and surgery, [and] persistent muscular pain," which stemmed generally from Claimant's work. (*Id.*). Dr. Ripperda also opined that the Injury was a major contributing cause of Claimant's ulnar nerve entrapment in her elbow. (*Id.*). In support of this conclusion, Dr. Ripperda merely stated that the "[a]ctivity [Claimant] was doing at work certainly put her at risk of development of ulnar-related problems." (*Id.*). Dr. Ripperda did not testify at the administrative hearing. (SR 222).

2. Dr. Wade Jensen's ("Dr. Jensen") opinion on causation.

In January 2022, Smithfield retained Dr. Wade Jensen to perform a comprehensive medical review and provide an opinion on whether the Injury and Claimant's working conditions were a major contributing cause of her condition and need for treatment. (SR 1870). Dr. Jensen is a Board-certified orthopedic surgeon. (SR 1867). In his 15 years of practice, Dr. Jensen estimated he performed surgery on 2,200 patients with cervical spine issues like Claimant. (SR 244).

In performing his review, Dr. Jensen reviewed over 1,600 pages of Claimant's medical records, including her medical history before the Injury. (SR 243). Those records showed that in the years preceding the Injury, Claimant had a lengthy history of medical complaints for which she sought treatment, including complaints for headaches, right neck pain, and right shoulder pain. (SR 232–33). For instance, in January 2011, Claimant

saw Dr. Knutson reporting chronic daily headaches for the past month. (SR 511–13). In March 2014, Claimant saw Dr. Michael Stotz and reported suffering from right shoulder pain and right neck pain. (SR 4454–56). Several months later, in August 2014, Claimant saw Physician's Assistant, Kimberly Lunder ("PA Lunder") and complained she had been suffering from headaches for the past three weeks. (SR 446). Claimant also stated that she had suffered from similar types of headaches five or six years before. (SR 446). PA Lunder noted that Claimant may suffer from migraine headaches at that time and prescribed Imitrex.[2] (SR 449). In addition to reviewing Claimant's medical history, Dr. Jensen also reviewed a video of Claimant's job to determine whether Claimant's job created "stressors" that could be major contributing cause of her neck, shoulder, arm, and head pain. (SR 246, 1883).

After his review, Dr. Jensen determined Claimant had (1) neck pain and right arm pain; (2) ulnar neuropathy of the right arm – resolved; (3) headaches, chronic; (4) symptoms of thoracic outlet syndrome, not evidence of thoracic outlet syndrome; and (5) right shoulder adhesive capsulitis. (SR 243, 1883). Dr. Jensen further concluded that the Injury and Claimant's job were not a major contributing cause of any of her current conditions to a reasonable degree of medical certainty and probability. (SR 246–49, 1883–87). Dr. Jensen also appeared at the Administrative Hearing to testify about his conclusions and to respond to Dr. Ripperda's deposition and written opinion. (SR 242).

[2] Although the medical record is clear, Claimant testified untruthfully during her deposition that she did not suffer from shoulder pain, neck pain, and headaches before the Injury or seek medical treatment for these conditions. (SR 1856). Likewise, at the Administrative Hearing, Claimant testified untruthfully that she did not have right shoulder problems, neck issues, or migraine headaches before the Injury. (SR 226).

a. Neck pain and right arm pain.

Concerning neck pain and right arm pain, Dr. Jensen opined, like Dr. Asfahani noted in Claimant's medical record in 2017, that Claimant's neck and arm pain was likely a combination of (1) degenerative disk disease and (2) either psychosomatic or myofascial pain. (SR 245, 1884–85). Psychosomatic pain is pain for which there is no anatomical explanation. (SR 1885). Myofascial pain is pain related to a soft tissue disorder, such as a disorder in muscle fibers. (SR 245).

At the Administrative Hearing, Dr. Jensen testified that Claimant's neck and arm pain were "a very classic presentation of . . . a progressive degenerative problem in her neck, both on imaging and on history." (*Id.*) Dr. Jensen further explained that Claimant's neck and arm pain were not consistent with the Injury because, based on the medical record, Claimant had reported "these symptoms" of neck and arm pain to her medical providers "18 months prior to her date of [the I]njury." (*Id.*). Dr. Jensen testified that the degenerative disc disease causing Claimant's pain started around 2014 when Claimant first reported neck and shoulder pain and progressed over time. (*Id.*). Additionally, Dr. Jensen explained that Claimant's January 2016 MRI taken after the Injury showed no evidence of herniation to Claimant's cervical spine. (SR 243–44). However, Claimant's December 2016 MRI showed herniation, leading Dr. Jensen to conclude the degeneration in Claimant's cervical spine "progressed along [in 2016] until finally the disk gave way and herniated" prior to Claimant's December 2016 MRI. (SR 244–45).

Additionally, Dr. Jensen explained that Claimant's job was not likely to cause Claimant's degenerative disc disease because Claimant's work, based on the video he reviewed, did not have "a lot of stressors to the neck," explaining:

> The neck is really responsible to hold your head up. So movements in your arms [*i.e.*, turning the bacon on the packaging line] don't necessarily translate a lot of force to your neck unless you're doing a lot of very, very heavy manual labor that your muscles that attach to your neck can influence that.

(SR 246).

Dr. Jensen also testified that Dr. Ripperda's opinion—that the Injury and Claimant's working conditions were a major contributing cause of Claimant's neck and arm pain—was deficient in part because Dr. Ripperda did not review Claimant's medical history before the Injury. (SR 245–56). Dr. Jensen explained that Claimant's medical history ***before*** the Injury was "relevant to have an opinion" on whether the Injury and Claimant's working conditions were major contributing cause of Claimant's conditions, but Dr. Ripperda did not review any of these medical records. (*Id.*).

b. Ulnar neuropathy of the right arm—resolved.

Dr. Jensen likewise opined that the Injury and Claimant's working conditions were not a major contributing cause of Claimant's ulnar neuropathy of the right arm, which had been resolved at the time of his review. (SR 246–47, 1886). Ulnar neuropathy affects the pinky finger and half of the fourth finger, which are connected to the ulnar nerve. (SR 246). Dr. Jensen explained that Claimant did report any pain related to ulnar neuropathy until June 2017, almost two years after the Injury, so there was no correlation between Claimant's ulnar neuropathy and the Injury. (SR 246, 1886). Additionally, Dr. Jensen opined that Claimant's symptoms related to her ulnar neuropathy occurred when she was not working and as such were also not correlated with her working conditions. (SR 1886). At the Administrative Hearing, Dr. Jensen explained that ulnar neuropathy

could be "identified and "pick[ed] up" during "neuromonitoring" while in the operating room, but there was no evidence of ulnar neuropathy from Claimant's medical records:

> [U]lnar neuropathy's probably the most common finding in the operating room when we're even doing lumbar surgeries or cervical surgeries. And so I think [Claimant] did have neuromonitoring during her cervical surgery and did not have any signs of ulnar neuropathy at that time, and that's a very sensitive way to pick that up. So I don't think [Claimant's ulnar neuropathy of the right arm] existed at the time of [S]urgery and certainly wasn't caused by the [S]urgery and/or positioning from the [S]urgery.

(SR 246). Additionally, in his written report, Dr. Jensen explained that "[a]lmost all ulnar nerve compression is identifiable on an EMG study. [But Claimant] had 2 EMG studies that were normal." (SR 1186). In conclusion, Dr. Jensen could not find a correlation between Claimant's ulnar neuropathy and her work activities and opined that her work activities were not a major contributing cause of her ulnar neuropathy. (SR 247, 1186).

c. Headaches, chronic.

Dr. Jensen concluded that the Injury and Claimant's working conditions were not a major contributing cause of her headaches. (SR 247, 1886). Dr. Jensen noted that Claimant had reported chronic headaches back in 2011, which preexisted the Injury, and those headaches had persisted into the present. (SR 247). In 2014, Dr. Voila also diagnosed Claimant with migraine-origin headaches. (*Id.*). Dr. Jensen agreed with Dr. Voila's opinion rather than Dr. Ripperda's opinion that Claimant's headaches were "cervical in nature" or originated from her neck, testifying:

> I think as we've walked through her medical records, it's become very clear that her problem with her headaches are chronic migraine headaches. The neurologist that has seen her recently, Dr. Viola, has stated that. And the treatments . . . in [Claimant's] neck to get rid of headaches, like Botox injections or trigger point injections or those sorts of things haven't

> resolved her headaches. So I'm only left to conclude that these are what they were in the beginning [before Claimant's Injury], which is chronic migraine headaches.

(*Id.*).

d. Thoracic outlet syndrome symptoms, without evidence of thoracic outlet syndrome.

Like Dr. Feldhaus, Dr. Jensen opined that Claimant did not have thoracic outlet syndrome but had some symptoms of that syndrome. (SR 247, 1886). Dr. Jensen explained:

> Thoracic outlet syndrome can cause numbness and tingling in the arm, specifically when the arm is elevated to the shoulder level or above. [But t]ypically you do not get symptoms when your hands are down by your side or working at waist level. It's almost always a vascular-related phenomenon. . . . It's a fairly uncommon diagnosis and there's only one little note in [the medical record] that looks like [one of Claimant's providers] think[s] she has it, but most everybody else that's seen her does not think she has it.

(SR 247). Dr. Jensen also stated that Claimant had been through an "extensive workup, including an CT Angiogram, and provocative physical exam" to determine whether she had thoracic outlet syndrome, but the tests were negative. (SR 1886). Even if Claimant had thoracic outlet syndrome, Dr. Jensen opined that Claimant's work at Smithfield would not have been a major contributing cause of that condition, as Claimant's work did not require the kind of movement associated with thoracic outlet syndrome. (SR 247–48, 1886).

e. Right shoulder adhesive capsulitis—resolved.

Finally, Dr. Jensen opined that Claimant's work activities and the Injury were not a major contributing cause of her right shoulder adhesive capsulitis, which he concluded had been resolved at the time of the hearing. (SR 248–49, 1887). Dr. Jensen explained that adhesive capsulitis is a "very specific diagnosis" that occurs:

> when you can't move your shoulder either actively or passively beyond a certain position. So it has to do with some capsular scarring that happens inside of your shoulder, and that's a *very, very, very common* problem that we see in orthopedics.

(SR 248 (emphasis added)). Dr. Jensen then observed that the medical record showed Claimant began to show the early stages of this condition in July 2017, almost two years after the Injury, when her physical therapist first noted that Claimant's right shoulder range of motion was "just a little bit guarded." (SR 248, 1887). Further, Dr. Jensen explained that 80% of all cases of adhesive capsulitis are "truly idiopathic" meaning they don't have a known origin. (SR 248). While Dr. Ripperda opined Claimant's adhesive capsulitis was in the minority of cases with a known cause or comorbidity, Dr. Jensen, a surgeon, disagreed. (*Id.*). At the Administrative Hearing, Dr. Jensen testified:

> [Dr. Ripperda] gave . . . [an opinion] . . . that after surgery of her neck, [Claimant] must have been guarding her right shoulder and therefore [the guarding] caused her shoulder to develop adhesive capsulitis. That biomechanically and biologically doesn't make any sense for a couple of reasons. No. 1, for a shoulder to freeze up, it would have to have had an injury. So, you know, because you had a surgery on your neck, . . . [that does not cause your shoulder to] have an underlying condition . . . [causing it to] freeze automatically. And. . . .if that were the case, then [the shoulder] would freeze relatively soon after the operation and [Claimant's shoulder] didn't do that. . . . . So I really believe this is an idiopathic condition like most of them are.

(*Id.*). Additionally, Dr. Jensen stated that repetitive work, such as the kind Claimant performed at Smithfield, was not a cause or mechanism of adhesive capsulitis. (*Id.*). In sum, Dr. Jensen opined that Claimant's adhesive capsulitis began around July or August of 2017, was idiopathic in origin, and that Claimant's work at Smithfield and her Injury were not a major contributing cause of that condition. (SR 247–48, 1887).

i. DLR Decision

In May 2023, the Department issued the DLR Decision denying Claimant's petition for workers' compensation benefits in full. (SR 2006–18). As a matter of law, the Department found that Claimant had the burden to show entitlement to benefits. (SR 2013). Then, after reviewing the medical record, Claimant's testimony, and the expert testimony of Dr. Jensen and Dr. Ripperda, the Department found that Claimant failed to meet her burden. (SR 2012–18). The Department found Dr. Jensen's opinion "more persuasive" than Dr. Ripperda's opinion. (SR 2017). The Department further found it significant while Dr. Jensen "reviewed all of [Claimant]'s medical records in forming his opinion," Dr. Ripperda had not and "was unaware of [Claimant]'s medical records prior to injury regarding treatment for her shoulder or for headaches." (*Id.*). The Department also found it significant that Claimant did not suffer a herniation in her cervical spine until sometime in 2016, well after the Injury. (SR 2017–18).

3. The Circuit Court Appeal

In July 2023, Claimant filed an appeal of the DLR Decision denying her request for workers' compensation benefits. (SR 2079). On appeal, Claimant raised three issues: (1) whether the Department erred in determining Claimant had failed to show entitlement to compensation; (2) whether Smithfield met its "burden of proving" the recommendation of Claimant's medical providers were improper;[3] and (3) whether Smithfield violated

[3] This argument was based on *Hanson v. Penrod Const. Co.*, 425 N.W.2d 396 (SD 1988), in which the Court held an employer who opposes recommended treatment must show why the treatment is improper. (SR 122-23). As explained in Smithfield's brief to the Circuit Court, this argument has no application. (*Id.*). Smithfield never objected to Claimant's requests for treatment on grounds the treatment was improper. (*Id.*). Smithfield denied requests for payment because it had a reasonable belief that Claimant was not entitled to compensation because causation was not established. (*Id.*).

SDCL 62-4-1.1 by failing to provide "written notice" of denial of medical bills.[4] (SR 3–4).

The Circuit Court then held two hearings on the matter and requested additional briefing on the applicable standard of review, which the parties provided. (SR 161, 678). Neither during the administrative proceedings, nor during the Circuit Court proceedings, did either party dispute that Claimant had the burden to show entitlement to benefits, nor argue that SDCL 62-7-33, on petitions to modify an award based on a change in circumstances, applied in this case. (SR 161–229, 678–94). Nor did the Circuit Court request briefing on that issue. (*Id.*).

Nonetheless, the Circuit Court issued the CC Decision reversing the Department on these grounds. (SR 645–664). The Circuit Court *sua sponte* held that SDCL 62-7-33 shifted the burden to Smithfield to show Claimant was not entitled to workers' compensation benefits. (SR 654–56). In invoking SDCL 62-7-33, the Court seemed to assume, without justification, Claimant had already shown entitlement to benefits because Smithfield voluntarily paid workers' compensation benefits to Claimant. (*See id.*). The Circuit Court provided no authority for its holding that an employer's voluntarily payments of benefits—*i.e.*, payment of benefits not required pursuant to any order of the Department as set forth in SDCL 62 chapter 7—invokes SDCL 62-7-33.

---

[4] As explained in Smithfield's brief to the Circuit Court, this argument is also without merit. (SR 23-24). The plain language of SDCL 62-4-1.1 merely requires an employer to promptly pay, deny, or request additional information on a bill submitted for reimbursement as compensation under workers' compensation within 30 days. It does not require an employer to submit any "written denials." SDCL 62-4-1.1. As such, Smithfield's denial was compliant with South Dakota law. *See id.* Under South Dakota law, failure to submit a written denial merely extends the statute of limitations for a claimant to bring a petition for benefits to within three years of the last payment of benefits under SDCL 32-7-35.1 rather than, in cases where a written denial is provided, within two years from the written denial of benefits under SDCL 32-7-35. *See Faircloth v. Raven Indus., Inc.*, 2000 S.D. 158, ¶ 7, 620 N.W.2d 198, 201.

(*Id.*). Nonetheless, the Circuit Court found the Department plainly erred in requiring Claimant to show she was entitled to benefits and that this error "would require reversal and remand" to the Department "for a redetermination of the evidence under the proper burden of proof." (SR 656).

Notwithstanding, the Circuit Court did not remand the issue but instead reviewed the Department's factual findings for clear error. (SR 656–64). Under this standard, the Circuit Court held the Department committed clear error in accepting Dr. Jensen's opinion over Dr. Ripperda's because, in the Circuit Court's view: (1) Dr. Ripperda's opinion was more consistent with Claimant's medical record; (2) Dr. Jensen did not perform his record review until four years after the Injury; (3) Dr. Jensen's opinions were inconsistent with Claimant's treating providers;[5] and (4) Dr. Ripperda was Claimant's treating provider. (SR 661–64). The Circuit Court further found that the Department's determination that "Dr. Jensen had a more complete knowledge of [Claimant's] medical history" because he reviewed Claimant entire medical record, while Dr. Ripperda did not, "is weak and clearly insufficient to overcome the deference the trier of fact must afford [Dr. Ripperda] as the examining physician." (SR 663). The Circuit Court cited no authority for this proposition. (*Id.*). Based on these findings, the Circuit Court reversed the DLR Decision and remanded to the Department for entry of an order in favor of Claimant. (SR 664). Smithfield timely appealed. (SR 639).

STANDARD OF REVIEW

On reviewing an appeal of administrative agency ruling under SDCL chapter 1-26, the Supreme Court and circuit courts apply the same standard of review. *Hughes v.*

[5] This opinion is not supported by the medical record. As noted in Part D, Section 2, Dr. Jensen, concurred with many of Claimant's treating providers on the nature of Claimant's conditions.

Dakota Mill & Grain, Inc., 2021 SD 31, ¶ 12, 959 N.W.2d 903, 907. Under this standard, the Court gives the Department's factual findings "great weight" and overturns those finding only if "clearly erroneous." *Id.* (citing SDCL 1-26-36). The Department's factual findings are clearly erroneous "only if [the Court is] definitely and firmly convinced a mistake has been made." *Kuhle v. Lecy Chiropractic*, 2006 S.D. 16, ¶ 15, 711 N.W.2d 244, 247. However, "[q]uestions of law" decided by the Department "are reviewed *de novo*." *Id.* The Supreme Court also reviews the Circuit Court's conclusions of law de novo. *Selway Homeowners Ass'n v. Cummings*, 2003 S.D. 11, ¶ 16, 657 N.W.2d 307, 312.

ARGUMENT AND ANALYSIS

I. The Circuit Court erred by raising and deciding an issue not raised by the parties.

First and foremost, the CC Decision should be vacated because, by raising and deciding an issue not raised by either party, the Circuit Court fundamentally disregarded its role and assumed the role of an advocate for Claimant. As a general rule, "an appellate court may review only the issues specifically raised and argued in an appellant's brief." *State v. Mulligan*, 2007 S.D. 67, ¶ 25, 736 N.W.2d 808, 818. When a court abandoned its role "by raising and deciding other arguments *sua sponte* . . . [, the court] disregards [its] appellate function and becomes an advocate for a party." *Id.* This Court has recognized a limited exception to this general rule on jurisdictional issues. *See Elliott v. Bd. of Cnty. Comm'rs of Lake Cnty.*, 2005 S.D. 92, ¶ 16, 703 N.W.2d 361, 368; *Pennington Cnty. v. State ex rel. Unified Jud. Sys.*, 2002 S.D. 31, ¶ 9, 641 N.W.2d 127, 130. However, that exception does not apply here. Further, when an exception to the general rules applies and permits an appellate court to consider arguments and issues *sua sponte*, the unraised

issue should be submitted to the parties for briefing. *See Elliott*, 2005 S.D. 92, ¶ 18, 703 N.W.2d at 368–69 (remanding an issue that was raised for the first time by the appellate court to the circuit court to permit the parties to brief the issue).

Here, the Circuit Court violated this fundamental principle, so the CC Decision must be vacated. Although the parties agreed Claimant had the burden to show entitlement to compensation, the Circuit Court rejected the parties' position and imposed its own legal theory: that the parties were mistaken, and that Smithfield actually had the burden of proof. (SR 645–664). Additionally, upon belief that the parties had failed to spot a fundamental issue, the Circuit Court, rather than imposing its *sua sponte* argument and analysis, should have first raised the issue to the parties and permitted the parties to brief the issue. *See Elliott*, 2005 S.D. 92, ¶ 18, 703 N.W.2d at 368–69. The Circuit Court's failure to request briefing is particularly notable because the Circuit Court requested additional briefing by the parties on the applicable standard of review. (SR 161–229, 678–94). The Circuit Court's violation of its role as a neutral decision-maker alone requires vacation of the CC Decision.

II. The Circuit Court's interpretation of SDCL 62-7-33 cannot be sustained.

A. SDCL 62-7-33 was enacted to give the Department jurisdiction to modify final awards and has no application to voluntary payments.

SDCL 62-7-33, entitled "Review of payment by [D]epartment," allows the Department to modify or terminate a final award of workers' compensation *benefits entered by the Department* upon proof of a change in condition. *Johnson v. United Parcel Serv., Inc.*, 2020 S.D. 39, ¶¶ 39–45, 946 N.W.2d 1, 10–12 (citing SDCL 62-7-33). SDCL 62-7-33 states in full:

> Any payment, including medical payments under § 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, *made or to be made under this title may be reviewed by the Department of Labor and Regulation* pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased, or awarded subject to the maximum or minimum amounts provided for in this title, *if the department finds that a change in the condition of the employee warrants such action. Any case in which there has been a determination of permanent total disability may be reviewed by the department not less than every five years.*

Under SDCL 62-7-33, the party seeking a change in a final award bears the burden of showing a change in circumstance. *See Hayes v. Rosenbaum Signs & Outdoor Advert., Inc.*, 2014 S.D. 64, ¶ 29, 853 N.W.2d 878, 886.

But here, the Circuit Court held SDCL 62-7-33 applies not to final awards of compensation entered by the Department, but to an employer's *voluntary* payments of benefits to a claimant. (SR 654–56). This is contra to decades of precedence in which this Court has held SDCL 62-7-33 applies only to final awards of workers' compensation benefits entered by the Department. In *Sopko v. C & R Transfer Co.*, this Court explained that SDCL 62-7-33 and its predecessor statute were enacted to give the Department "continuing jurisdiction" of claims that were already determined to be compensable. 1998 S.D. 8, ¶5, 575 N.W.2d 225, 227–28. The Legislature enacted SDCL 62-7-33 as an exception to the rule of res judicata or "finality rule" prohibiting relitigation of final awards entered by the Department. *Id.* at ¶¶10–14, 575 N.W.2d at 229–32); *see also Middleton v. City of Watertown*, 70 S.D. 158, 160, 16 N.W.2d 39, 40–42 (1944) (interpreting SDCL 62-7-33's predecessor statute). Further, in *Johnson v. United Parcel Serv., Inc.*, this Court affirmed that SDCL 62-7-33 was enacted to apply to only final awards entered by the Department. 2020 S.D. 39, ¶¶ 39–45, 946 N.W.2d at 11–13

(collecting cases holding that "SDCL 62-7-33 [is] the means of invoking the Department's authority to modify final workers' compensation orders). In short, by invoking SDCL 62-7-33, the Circuit Court failed to follow precedent and incorrectly assumed Claimant had established entitlement to a final award of benefits by virtue of Smithfield's voluntary payments. However, as this Court has made clear, SDCL 62-7-33 was never intended to apply to voluntary payments but only to final awards entered by the Department.

B. The Circuit Court's interpretation of SDCL 62-7-33 cannot be read in conformity with other workers' compensation statutes and would repeal those statutes by implication.

The Circuit Court's interpretation of SDCL 62-7-33 also violates the rules of statutory construction because it cannot be read in conformity with the other provisions of workers' compensation procedure. If this Court were to hold SDCL 62-7-33 applies to voluntary payments, it would repeal SDCL 62-7-35.1 entirely and SDCL 62-7-35 and SDCL 62-7-12 in part. Therefore, for this reason as well, the CC Decision must be vacated.

In constructing the intent of a statute enacted by the Legislature, the court looks to "the statute as a whole, as well as enactments relating to the same subject." *Hayes v. Rosenbaum Signs & Outdoor Advert., Inc.*, 2014 S.D. 64, ¶ 28, 853 N.W.2d 878, 885. In doing so, "[s]tatutes are to be construed to give effect to each statute so as to have them exist in harmony." *Kauth v. Bartlett*, 2008 S.D. 20, ¶ 9, 746 N.W.2d 747, 750; *see also Abata v. Pennington Cnty. Bd. of Commissioners*, 2019 S.D. 39, ¶ 19, 931 N.W.2d 714, 721 (stating a "court should construe multiple statutes covering the same subject matter in such a way as to give effect to all of the statutes if possible"). "[R]epeal

by implication is strongly disfavored." *Thurman v. Zandstra Const.*, 2010 S.D. 46, ¶ 13, 785 N.W.2d 268, 272. As such, the court "should refrain from negating a legislative act unless it is demanded by manifest necessity." *Faircloth v. Raven Indus., Inc.*, 2000 S.D. 158, ¶ 10, 620 N.W.2d 198, 202. Instead, when statutes can be interpreted to co-exist rather than abrogate or repeal other statutes by implication, the Court should interpret such statutes to co-exist. *See id.* As such, to the extent the Court finds SDCL 62-7-33 ambiguous as to what kind of "payments" it applies to, the Court should construe SDCL 62-7-33 to exclude voluntary payments to avoid abrogating of other provisions of workers' compensation procedure.

Here, the statutes of limitations for workers' compensation claims—SDCL 62-7-35 and SDCL 62-7-35.1—show that the Legislature intended to permit employers to make voluntary payments without invoking liability or implicating SDCL 62-7-33. Therefore, the CC Decision cannot be sustained.

SDCL 62-7-35 requires a claimant to bring a petition for hearing under SDCL 62-7-12 within two years of an employer's written denial of benefits or "[t]he right to compensation under this title shall be forever barred." SDCL 62-7-35. As such, SDCL 62-7-35 requires a claimant to bring a petition for hearing to be entitled to benefits regardless of whether an employer made voluntary payments. *See id.* Further, SDCL 62-7-35.1, providing a three-year statute of limitations to bring a "written petition for hearing pursuant to § 62-7-12 with the [D]epartment . . . from the date of the last payment of benefits," *expressly permits employers to make voluntary payments without incurring liability.* Even further, the Legislature, to make unequivocally clear that voluntary payments do not relieve claimants of their burden to enforce their right to compensation,

stated that: "[t]he provisions of [SDCL 62-7-35.1] do not apply to review and revision of payments or other benefits under § 62-7-33." SDCL 62-7-35.1. This Court has also recognized that the Legislature, through SDCL 62-7-35 and SDCL 62-7-35.1, permits employers to make voluntary payments while retaining the right to later deny claims when additional evidence is discovered and/or a claimant's medical condition changes. *See Thurman v. Zandstra Const.*, 2010 S.D. 46, ¶10, 785 N.W.2d 268, 269 (recognizing that SDCL 62-7-35.1 was enacted to give a claimant additional time to bring a claim when an "employer provides the employee with benefits for a period of time, gives no denial notice, and then the matter lies inactive"). As such, there is no question that the Legislature did not intend to relieve a claimant of their burden of persuasion to show entitlement to benefits when an employer makes voluntary payments, and the CC Decision must be vacated.

Moreover, if the Court were to hold an employer's voluntary payments creates a judicial award, SDCL 62-7-12, SDCL 62-7-35, and SDCL 62-7-35.1 would be repealed by implication in whole or part. If an employer makes a voluntary payment followed by a written denial, a claimant would no longer need to file a petition for hearing within two years of a written denial, thereby abrogating SDCL 62-7-12 and SDCL 62-7-35 in those circumstances. Further, if a voluntary payment created an enforceable award, SDCL 32-7-35.1 would be repealed entirely by implication. Again, SDCL 32-7-35.1 gives a claimant three years from the "last payment of benefits" to file a petition for hearing under SDCL 62-7-12. But if a voluntary payment alone creates an enforceable award, SDCL 62-7-35.1 would not apply to bar claims in any circumstance. *See* SDCL 62-7-

35.1. Thus, this Court should hold SDCL 62-7-33 does not apply to voluntary payments to avoid abrogating these core provisions of workers' compensation procedure.

C. The Circuit's Court interpretation of SDCL 62-7-33 is fundamentally at odds with South Dakota public policy, which is intended to facilitate efficient resolution of claims.

The CC Decision is fundamentally at odds with the workers' compensation practice and policy in this state and throughout other jurisdictions. This Court has adopted the well-accepted view that workers' compensation statutes should not be construed to punish employers who make voluntary payments to claimants because such an interpretation discourages employers from compensating injured employees. As this Court has stated, "[a]ny statutory interpretation which would penalize an employer who voluntarily makes weekly payments to an injured employee in excess of his ultimate liability would certainly discourage voluntary payment by employers and would therefore constitute a disservice to injured workers generally." *Tiensvold v. Universal Transp., Inc.*, 464 N.W.2d 820, 25 (S.D. 1991); *see also Western Casualty and Surety Company v. Adkins*, 619 S.W.2d 502 (Ky. App. 1981).

This Court has also rejected a request to impose liability on employers who make voluntary payments. *See Martz v. Hills Materials*, 2014 S.D. 83, ¶ 21, 857 N.W.2d 413, 419 (finding voluntary payments of workers' compensation did not bind an employer to continue making such payments under a promissory estoppel analysis). In rejecting this argument, this Court recognized that imposing liability on an employer who makes voluntary payments to a claimant would adversely affect the expeditious payment of claims, harming both employers and employees. *See id.* (stating an employer's "obligation . . . to pay claims promptly . . . would be adversely affected if paying claims

precluded the later denial of liability when sufficient medical evidence developed to justify a denial"). In contrast, permitting an employer to provide benefits upon a reasonable belief such benefits are warranted, without obligating the employer to pay benefits in perpetuity, allows an employer to adjust payments as needed when more evidence is discovered and/or the work injury no longer remains a major contributing cause of the condition and need for treatment. *See id.*

As such, this Court should decline to abrogate *Tiensvold* and *Martz* and should continue to permit employers to voluntarily pay benefits quickly to injured employees in accordance with South Dakota law and public policy. If the Court were to hold otherwise, employers and insurers would be presented with an untenable choice: denying the claim and risking allegations of bad faith or paying claims and forfeiting the right to challenge compensability sometime in the future if and until more or new medical evidence becomes available. Such an interpretation of the law would do precisely what the Court in *Martz* in *Tiensvold* warned against. It would effectively prevent employers from making any voluntary payments or investigating a claim until a claimant has commenced litigation. Such an outcome is antithetical to South Dakota public policy and workers' compensation policy generally, which are intended to facilitate cost-effective and efficient resolution of claims for injured employees. *See* 7 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 124 (2003) (stating that workers' compensation procedures are intended to be informal to facilitate cost-effective and efficient resolution of claims for injured employees). For this reason as well, the CC Decision must be vacated.

III. The DLR Decision was not clearly erroneous.

As the CC Decision is properly vacated, the only issue left for this Court to decide is whether the DLR Decision was clearly erroneous.

A. Plain error review applies.

SDCL 1-26-36 sets forth that this Court may reverse the Department if the Department's factual findings are "[c]learly erroneous in light of the entire evidence in the record." SDCL 1-26-36; *see Hughes v. Dakota Mill & Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907. However, if the Department's "factual determinations [are] based on documentary evidence, such as depositions and medical records," then this Court has historically reviewed those findings de novo. *Id.* Here, the Department determined Claimant was not entitled to any benefits based on its review and acceptance of Dr. Jensen's live testimony and medical records. Therefore, plain error review applies. (SR 2017–18). Nonetheless, the DLR decision should be affirmed regardless of whether this Court applies plain error or de novo review.

B. The Department did not err in finding that Claimant failed to sustain her burden to show that the Injury or her working conditions were a major contributing cause of her current condition and need for treatment.

To receive workers' compensation benefits, a claimant must show that: (1) the Injury "ar[ose] out of and in the course of [her] employment," and (2) that the claimant's "employment or employment related activities are a major contributing cause of the condition" of which she seeks compensation. SDCL 62-1-1(7); *Steinberg v. South Dakota Dep't of Military Veterans Affairs*, 2000 SD 36, ¶ 9, 607 N.W.2d 596, 599. "A major contributing cause" is "not the only cause, not the most significant cause, just a major

contributing cause." *Hughes*, 2021 SD 31, ¶ 22, 959 N.W.2d 903, 910. "Ultimately, the Claimant retains the burden of proving all facts essential to compensation." *Kuhle v. Lecy Chiropractic*, 2006 SD 16, ¶ 16, 711 N.W.2d 244, 247.

"Expert witness testimony must be used to establish the causal connection between one's employment and subsequent injury where the field is one in which laymen are not qualified to express an opinion." *Hanten v. Palace Builders, Inc.*, 1997 SD 3, ¶ 10, 558 N.W.2d 76, 78. When considering expert testimony, a court "is free to accept all of, part of, or none of, an expert's opinion." *Wagaman v. Sioux Falls Const.*, 1998 SD 27, ¶ 18, 576 N.W.2d 237, 241. This Court has stated that "[t]he opinion of an examining physician should be given substantial weight when compared to the opinion of a doctor who only conducts a review of medical records." *Peterson v. Evangelical Lutheran Good Samaritan Soc.*, 2012 S.D. 52, ¶ 23, 816 N.W.2d 843, 850. However, the Department remains free to accept the testimony of non-treating providers over treating providers. *See Wagaman*, 1998 SD 27, ¶ 18, 576 N.W.2d at 241. In determining whether the Department erred in accepting expert testimony, a court should consider the evidentiary basis for testimony: "an expert's opinion is entitled to no more weight than the facts it stands upon." *Peterson*, 2012 S.D. 52, ¶ 24, 816 N.W.2d at 850. As such, the Department was free to find Dr. Jensen's opinion more persuasive than the opinion of Dr. Ripperda upon examining the factual basis of each expert's opinions or vice versa.

Dr. Jensen is a highly regarded Board-certified surgeon and was well-qualified to provide an expert opinion. (*See supra*, Part D.2). Dr. Jensen's expert opinions were well-supported by the medical records. (*Id.*). As such, the Department did not err in finding Dr. Jensen's opinions persuasive and determining that Claimant had not met her burden.

As the Department found, Dr. Jensen fully reviewed all Claimant's medical records both before and after the Injury, while Dr. Ripperda did not. (SR 2017). Additionally, Dr. Jensen explained in detail, in writing and in live testimony, the medical basis for each of his opinions. (SR 242).

As to Claimant's neck and arm pain, Dr. Jensen opined that it was the result of degenerative disk disease and psychosomatic or myofascial pain and not Claimant's work conditions. (*See supra*, Part D.2.a). Both findings were supported by medical evidence. (*Id.*). Claimant had previously been diagnosed with degenerative disc disease, and her providers were unable to identify the origin of her neck and arm pain. (*Id.*).

As to Claimant's diagnosis of ulnar neuropathy of the right arm, Dr. Jensen explained that there was no evidence of ulnar neuropathy from Claimant's medical records during her Surgery. (*See supra*, Part D.2.b). Dr. Jensen also noted that Claimant's symptoms related to ulnar neuropathy did not occur while she was working, which supports his opinion that Claimant's working conditions were not a major contributing cause of her ulnar neuropathy. (*Id.*).

As to Claimant's headaches, Dr. Jensen's opinion was consistent with the medical record. (*See supra*, Part D.2.c). The medical record showed Claimant's headaches started in 2011, well before the Injury in 2015 or when she was diagnosed with degeneration in the cervical spine in 2017, so these headaches were not associated with the Injury and Claimant's cervical issues. (*Id.*). Additionally, Dr. Viola, one of Claimant's treating providers, also found Claimant's headaches were of migraneous origin. (*Id.*).

As to Claimant's thoracic outlet syndrome symptoms, Dr. Jensen's opinion again was sufficiently supported by medical evidence. (*See supra*, Part D.2.d). Dr. Feldhaus, a

treating provider, agreed with Dr. Jensen that Claimant did not have thoracic outlet syndrome. (*Id.*).

Finally, as to Claimant's right shoulder adhesive capsulitis, Dr. Jensen's opinion again was sufficiently supported by medical evidence. (*See supra*, Part D.2.e). Based on his expertise in orthopedics, Dr. Jensen was very familiar with adhesive capsulitis. (*Id.*). Dr. Jensen opined that Claimant's adhesive capsulitis occurred well after the Injury and her working conditions were unlikely to cause strain that could lead to adhesive capsulitis. (*Id.*). Further, Dr. Jensen explained that most cases of adhesive capsulitis were idiopathic, which is consistent with his opinion that Claimant's adhesive capsulitis was also likely to be idiopathic in origin. (*Id.*).

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Smithfield respectfully requests that the DLR Decision be affirmed in full. The DLR Decision was based on sufficient medical evidence, expert testimony, and was not clearly erroneous. Further, the CC Decision to the contrary is fundamentally irreconcilable with South Dakota law and public policy allowing and encouraging employers to make voluntary payments of workers' compensation benefits.

Smithfield respectfully requests oral argument in this matter.

Dated this 20th day of December 2024.

/s/ Laura K. Hensley

Laura K. Hensley
Kristin N. Derenge
BOYCE LAW FIRM, L.L.P.
300 S. Main Avenue/P.O. Box 5015
Sioux Falls, SD 57117-5015
lkhensley@boycelaw.com
knderenge@boycelaw.com
Attorneys for Employer/Appellee and Insurer/Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said brief containing 9,063 words, Times New Roman Font, 12 point, and 47,885 characters (no spaces).

Dated this 19th day of December 2024.

/s/ Laura K. Hensley
Laura K. Hensley

CERTIFICATE OF SERVICE

I, Laura K. Hensley, do hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 20th day of December, 2024, the foregoing on:

David King
King Law Firm, PC
101 N. Phillips Ave, Ste. 602
Sioux Falls, SD 57104
david@davidkinglawfirm.com

via Odyssey File & Serve.

/s/ Laura K. Hensley
Laura K Hensley

APPENDIX-TABLE OF CONTENTS

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

JODY PHAM, **HF No. 8, 2020/21**

Claimant,

v. **DECISION**

SMITHFIELD FOODS, SIOUX FALLS

Employer/Self-Insurer,

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

Facts:

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

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

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

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

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

21. On April 19, 2017, Pham underwent surgery paid for by Smithfield. Pham was ordered off work for three months. Smithfield paid benefits.
22. On July 21, 2017, Pham underwent an MRI of her right shoulder.
23. On August 17, 2017, Pham was seen by Dr. Travis Liddell for her right shoulder pain. He diagnosed her with adhesive capsulitis of the shoulder and recommended an injection.
24. On September 15, 2017, Pham demonstrated a functional range of motion and strength.
25. On November 9, 2017, Pham was seen by Dr. Liddell complaining of the same symptoms as before the surgery.
26. On December 1, 2017, Pham underwent a cervical CT scan which revealed previous ACDF at C5-6 without evidence of failed fusion or residual spinal stenosis. Dr. Liddell performed a C6-7 epidural injection.
27. On January 4, 2018, Dr. Liddell saw Pham noting she showed no response to any of the treatments provided and a negative EMG. He diagnosed her with adhesive capsulitis of the right shoulder. He performed a right shoulder injection which was paid for by Employer and Insurer.
28. On March 20, 2018, Pham underwent an MRI of her brain which showed migrainous changes.
29. On April 20, 2018, Pham underwent an MRI of her cervical spine which showed no changes since her surgery.

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

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

50. On February 2, 2021, Pham underwent a functional capacity evaluation at the request of her attorney. The results showed she was capable of working full-time.
51. On February 9, 2021, Pham saw Dr. Michael Pudenz for chronic pain. He recommended a spinal cord stimulator.
52. On March 1, 2021, Pham received a spinal cord stimulator trial placement.
53. On March 5, 2021, Dr. Pudenz noted Pham reported no improvement in her pain, and the stimulator was removed.
54. On November 16, 2021, Dr. Ripperda assigned Pham a 15% whole-person impairment related to her right cervical radiculopathy and adhesive capsulitis.
55. On January 15, 2022, Dr. Wade Jensen performed a review of Pham's medical records. He could not determine that her work activities were a major contributing cause of the neck and right arm pain or the need for cervical surgery.
56. On July 14, 2022, the Department approved a stipulation by the parties to Dismiss the Permanent and Total Disability claim, because Pham continued to work full-time at Smithfield.

Other facts will be determined as necessary.

Issues Presented at Hearing

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

1. Causation; and

2. Entitlement to Medical Benefits.

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

Causation

To prevail in this matter, Pham must first prove that her work-related injury is a major contributing cause of his condition. SDCL § 62-1-1(7) provides, in pertinent part:

> "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment;

The testimony must establish causation to "a reasonable degree of medical probability, not just possibility." *Jewett v. Real Tuff, Inc.*, 2011 S.D. 33, ¶ 23, 800 N.W. 2d 345, 350. Pham is "not required to prove [her] employer was the proximate, direct, or sole cause of his injury." *Smith v. Stan Houston Equip. Co.*, 2013 S.D. 65, ¶ 16, 836 N.W. 2d 647, 652. She must prove "that employment or employment-related activities [are] a major contributing cause of the condition of which she complained, or, in cases of preexisting disease or condition, that employment or employment-related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." *Norton v. Deuel School Dist. No. 19-4*, 674 N.W.2d 518, 521 (S.D. 2004). "[She] must do more than prove that an injury sustained at her workplace preceded her medical problems. The axiom "*post hoc, ergo propter hoc*," refers to 'the fallacy of ... confusing sequence

with consequence,' and presupposes a false connection between causation and temporal sequence." *Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶ 20, 653 N.W.2d 247, 252.

Additionally, the South Dakota Supreme Court has held that a work incident does not need to be "the" major contributing cause but need only be "a" major contributing cause. *Hughes v. Dakota Mill Grain, Inc. and Hartford Insurance*, 2021 S.D. 31, ¶ 21, 959 N.W.2d 903. "The fact that an employee may have suffered a work-related injury does not automatically establish entitlement to benefits for his current claimed condition." *McQuay v. Fischer Furniture*, 2011 S.D. 91, ¶ 11 808 N.W.2d 107, 111 (citations omitted). The standard of proof for causation in a worker's compensation claim is a preponderance of the evidence. *Armstrong v. Longview Farms, LLP*, 2020 SD 1, ¶ 21, 938 N.W.2d 425, 430.

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

Dr. Ripperda

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

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

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

Dr. Jensen

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

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

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

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

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

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

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

Conclusion

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

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

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

Dated this 15 day of May, 2023.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle Faw

Michelle M. Faw
Administrative Law Judge

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota

Workers' Compensation

JODY PHAM, **Claimant,** **vs.** **SMITHFIELD FOODS, SIOUX FALLS** **Employer and Self-Insurer.**	**HF No. 8, 2020/21** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

Now, therefore, based upon all the files and records herein, the Department of Labor & Regulation makes the following findings of fact and conclusions of law:

Findings of Fact

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

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

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

20. On March 6, 2017, Dr. Asfahani responded to the January 31 letter opining that Pham had degenerative disc disease of the cervical spine and a disc herniation at C5-6. He further opined that it was difficult to say the cause of her cervical condition, and he did not opine that the work activities were a major contributing cause of her condition and need for treatment.
21. On April 19, 2017, Pham underwent surgery paid for by Smithfield. Pham was ordered off work for three months. Smithfield paid benefits.
22. On July 21, 2017, Pham underwent an MRI of her right shoulder.
23. On August 17, 2017, Pham was seen by Dr. Travis Liddell for her right shoulder pain. He diagnosed her with adhesive capsulitis of the shoulder and recommended an injection.
24. On September 15, 2017, Pham demonstrated a functional range of motion and strength.
25. On November 9, 2017, Pham was seen by Dr. Liddell complaining of the same symptoms as before the surgery.
26. On December 1, 2017, Pham underwent a cervical CT scan which revealed previous ACDF at C5-6 without evidence of failed fusion or residual spinal stenosis. Dr. Liddell performed a C6-7 epidural injection.
27. On January 4, 2018, Dr. Liddell saw Pham noting she showed no response to any of the treatments provided and a negative EMG. He diagnosed her with adhesive capsulitis of the right shoulder. He performed a right shoulder injection which was paid for by Employer and Insurer.

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

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

30. On June 7, 2018, Pham was seen by PA-C Brett Bastian who released her to return to work full duty without restrictions.

31. On June 12, 2018, Employer and Insurer made their final TTD payment to Pham.

32. On July 27, 2018, Pham had a normal EMG.

33. On August 21, 2018, PA-C Bastian noted Pham had continued neck and shoulder pain, but there was no evidence of a failed fusion. He opined that no neurosurgical intervention would be helpful.

34. On August 30, 2018, Dr. Ryan Noonan assigned Pham an 8% impairment rating.

35. On October 2, 2018, Pham was seen by Dr. Ripperda who assessed her with thoracic outlet syndrome of the right thoracic outlet. He referred Pham for evaluation of possible thoracic outlet syndrome.

36. On June 24, 2019, on the recommendation of Dr. Ripperda, Pham underwent an MRI of her cervical spine. No changes were noted.

37. On July 9, 2019, Pham was seen by PA-C Bastian who assessed her with radiculitis of the right cervical region. He recommended conservative treatment.

38. On September 3, 2019, Pham saw Dr. Steven Feldhaus. He noted that the

exam was not indicative of thoracic outlet syndrome and opined Pham would not respond to any type of thoracic outlet decompression.

39. On September 26, 2019, Pham was seen by Dr. Asfahani who noted her ongoing pain in her right suprascapular region, right shoulder, and right elbow with numbness into the right hand. He referred her to Dr. Liddell.

40. On December 10, 2019, Pham was seen by Dr. Liddell who diagnosed her as having elbow cubital tunnel syndrome and recommended right elbow subcutaneous ulnar nerve transposition.

41. On January 14, 2020, Dr. Knutson ordered Pham off work until her surgery.

42. On January 24, 2020, Dr. Liddell performed a right elbow ulnar nerve decompression and subcutaneous transposition surgery. Smithfield denied coverage for the surgery because no doctor had opined that Pham's work activities were a major contributing cause of her need for the surgery.

43. On February 26, 2020, Pham received a cervical epidural steroid injection.

44. On March 6, 2020, Pham was released to work with the limitation that she could not lift any plastic film for two months.

45. On May 21, 2020, Pham was seen by Dr. Liddell. She reported the same pain complaints. He recommended she follow up with spine surgery for her neck issues.

46. On June 23, 2020, Pham received a cervical epidural steroid injection.

47. On July 17, 2020, Pham filed her Petition for Hearing with the Department of Labor & Regulation (Department). In the Petition, she alleged she was

permanently and totally disabled as a result of her work-related activities.

48. On October 5, 2020, Pham saw Dr. Knutson who noted that Pham had been having constant headaches for years and she was diagnosed with chronic migraines.

49. On December 18, 2020, Dr. Ripperda ordered another EMG of Pham's upper right extremity which showed some changes with the right C6 myotome, and he referred her to the pain clinic.

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

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

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

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

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

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

56. On July 14, 2022, the Department approved a stipulation by the parties to

Dismiss the Permanent and Total Disability claim, because Pham continued to work full-time at Smithfield.

57. Dr. Ripperda is one of Pham's treating physicians.

58. He is board certified in physical medicine and rehabilitation as well as pain medicine.

59. On February 2, 2022, he provided an opinion by letter in which he opined that to a reasonable degree of medical certainty, Pham had suffered injuries to her right shoulder, right elbow, neck, and right arm as a result of her October 14, 2015, work injury.

60. He further opined that the medical services she had received including physical therapy, acupuncture, injections, and multiple surgeries were necessary due to the work injury.

61. Dr. Ripperda stated that Pham's migraines were secondary to her cervical radiculopathy.

62. He testified by deposition that her work injury was a major contributing cause of her right shoulder adhesive capsulitis, radiculopathy, ulnar nerve entrapment, and radiculitis.

63. Dr. Ripperda also testified that Pham's work activities put her at risk for the development of ulnar nerve-related problems.

64. Dr. Ripperda adopted the permanent restrictions established at Pham's February 2, 2021, functional capacity assessment. These restrictions include restricting lifting 15 pounds occasionally and 5 pounds frequently, hand coordination must be self-paced, reaching only within a 20-second

time frame, and elevated activity limited to 60 inches with necessary breaks.

65. Dr. Ripperda was not aware of any of Pham's prior medical history of the treatment of her shoulder or headaches.

66. Dr. Jensen is a board-certified orthopedic surgeon specializing in spine surgery who has been in practice for 16 years.

67. He handles approximately 400 cases a year, roughly 150 of them cervical patients.

68. To form his opinion, he reviewed Pham's medical records.

69. He noted Pham's diagnoses including neck pain, right arm pain, ulnar neuropathy of the right arm, chronic headaches, thoracic outlet syndrome, and right shoulder adhesive capsulitis.

70. At hearing, Dr. Jensen testified that Pham's MRI from January 17, 2016, showed only a small disc bulge at C5-6 that was not compressing on the nerves.

71. He also testified that the difference between the January 2016 and December 2016 MRIs was the latter showed disc herniation with some mass effect on the C-6 nerve root that had enlarged from the previous MRI.

72. Dr. Jensen opined that Pham's disc herniation had happened just prior to the MRI in December 2016, and well after her date of injury.

73. Dr. Jensen further opined that if symptoms persist after an anterior cervical discectomy and fusion then there was a different source of the symptoms.

74. He also opined that he believed, as does Dr. Asfahani, that there is a myofascial component as she had neck pain since 2014.

75. He concluded that her symptoms are probably related to progressive degenerative changes.

76. He found it significant that her symptoms were present before the injury, and he opines that the progression resulted in the eventual herniation.

77. Dr. Jensen reviewed the video of Pham's work activities and he concluded that her job did not show stressors to her neck.

78. He opined that her work activities are not a major contributing cause of her neck condition or need for treatment.

79. He also noted that her right upper extremity pain did not appear until 6-8 weeks after the cervical spine surgery.

80. Dr. Jensen opined that the finger symptoms Pham experiences do not fit the distribution pattern for ulnar nerve issues.

81. He also opined that her work activities are not a major contributing cause of her ulnar nerve condition or need for surgery.

82. He reached the same conclusion regarding Pham's headaches.

83. He testified that the injections she received did not resolve the headaches and that indicated her headaches are chronic migraines.

84. Dr. Jensen found no evidence in the records indicating Pham suffered from thoracic outlet syndrome

85. Pham had not been treated for thoracic outlet syndrome.

86. He opined that Pham's work activities are not a major contributing cause

of any potential diagnosis of thoracic outlet syndrome.

87. Dr. Jensen also addressed Pham's right shoulder referring to the treatment she had received going back to 2008.

88. He stated that Pham's range of motion was normal throughout her treatment with guarding for the first time in July 2017.

89. He opined that adhesive capsulitis is a diagnosis where someone cannot move her shoulder either actively or passively beyond a certain position. It usually happens between the ages of forty and sixty and only about twenty percent of cases have a reason or comorbidity. Eight percent are idiopathic.

90. Dr. Jensen disagreed with Dr. Ripperda conclusion that the adhesive capsulitis developed after the surgery.

91. He testified that Dr. Ripperda's conclusion did not make biomechanical or biological sense.

92. He offered two reasons in support of his conclusion.

    - First, adhesive capsulitis or "frozen shoulder" requires an injury and the surgery would not have caused the shoulder to freeze automatically.
    - Second, if it were going to freeze due to the surgery it would have occurred much sooner instead of two-three months after.

93. He opined that Pham's work activities are not a major contributing cause of her right shoulder condition and need for treatment.

94. Dr. Jensen does not believe that Pham sustained any impairment as a

result of her work injury, nor does she have any work restrictions as a result of the work injury.

95. Any finding of fact more properly designated as a conclusion of law is hereby incorporated as such.

Conclusions of Law

1. To prevail in this matter, Pham must first prove that her work-related injury is a major contributing cause of his condition. SDCL § 62-1-1(7) provides, in pertinent part:

> "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment;

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

3. Pham is "not required to prove [her] employer was the proximate, direct, or sole cause of his injury." *Smith v. Stan Houston Equip. Co.*, 2013 S.D. 65, ¶ 16, 836 N.W. 2d 647, 652.

4. 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).

5. "[She] must do more than prove that an injury sustained at her workplace preceded her medical problems.
6. 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.
7. 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.
8. "The fact that an employee may have suffered a work-related injury does not automatically establish entitlement to benefits for his current claimed condition." *McQuay v. Fischer Furniture*, 2011 S.D. 91, ¶ 11 808 N.W.2d 107, 111 (citations omitted).
9. The standard of proof for causation in a worker's compensation claim is a preponderance of the evidence. *Armstrong v. Longview Farms, LLP*, 2020 SD 1, ¶ 21, 938 N.W.2d 425, 430.
10. Causation is a medical question, and both parties offered expert medical opinions.

11. "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).

12. The Department finds Dr. Jensen's opinion more persuasive. Dr. Ripperda was unaware of Pham's medical records prior to injury regarding treatment for her shoulder or for headaches. Dr. Jensen, however, reviewed all of Pham's medical records in forming his opinion.

13. "Expert testimony is entitled to no more weight than the facts upon which it is predicated." *Darling v. W. River Masonry, Inc.*, 2010 S.D. 4, ¶ 13, 777 N.W.2d 363, 367.

14. Both doctors are experts in their fields, but without knowing Pham's history of treatment in these relevant areas, Dr. Ripperda's opinion is not well-supported.

15. Dr. Jensen considered both the timeline of her symptoms and the diagnostic tests conducted.

16. The Department also finds Dr. Jensen's analysis of the herniation forming between the January 2016 MRI and the December 2016 MRI particularly significant regarding whether the herniation is the result of work activity.

17. Thus, the Department concludes that Pham has failed to meet her burden of proving that her work-related injury is a major contributing cause of her condition pursuant to SDCL § 62-1-1(7).

18. Pham is not entitled to additional benefits.

19. Any conclusion of law more properly designated as a finding of fact is hereby incorporated as such.

Dated this 29th day of June, 2023.

BY THE DEPARTMENT:

Michelle Faw

Michelle M. Faw
Administrative Law Judge

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota

Workers' Compensation

JODY PHAM, **Claimant,** **vs.** **SMITHFIELD FOODS, SIOUX FALLS** **Employer and Self-Insurer.**	**HF No. 8, 2020/21** **ORDER**

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

The Department of Labor & Regulation having heard, reviewed, and considered all evidence, together with the files, records, pleadings, and exhibits, as well as the briefs of the parties, and being in all things duly advised, and having issued a written Decision dated May 15, 2023, and having entered its Findings of Fact and Conclusions of Law, and for good cause appearing, it is hereby:

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

It is further ORDERED AND ADJUDGED, that Smithfield is not responsible for payment of any additional indemnity or medical benefits on behalf of Pham.

Dated this 28th day of June, 2023.

BY THE DEPARTMENT:

Michelle Faw

Michelle M. Faw
Administrative Law Judge

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

JODY PHAM Claimant and Appellant, vs. SMITHFIELD FOODS, SIOUX FALLS, Employer/Self-Insurer and Appellee.	49CIV23-2047 **MEMORANDUM DECISION AND ORDER REVERSING DEPARTMENT OF LABOR**

The above-entitled appeal came before the Court for oral arguments on the 25th day of March and the 20th day of May, 2024. Appellant Jody Pham was represented by her attorney, David King, of King Law Firm. Appellee Smithfield Foods was represented by its attorneys, Laura K. Hensley and Kristin N. Derenge, of Boyce Law Firm, LLP. Following the second hearing, each party submitted a Supplemental Brief and Appendix. The final submissions were delivered to the Court on June 21, 2024. After having considered the administrative record, briefs, appendices, and arguments of the parties, the Court issues this *Memorandum Decision and Order*.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Jody Pham (Pham) was born and attended school in Vietnam. After moving to Sioux Falls, she began working for Smithfield Foods, Inc. (Smithfield) in 1996. She has worked at her current position on the bacon packaging line for fourteen

years. Her job requires that she push and pull bacon meat to ensure it is correctly positioned on the line before entering the packing machine. She is also responsible for replacing the film packaging reel, which weighs about a hundred pounds when full, whenever it breaks or runs out.

On October 14, 2015, the film reel fell onto Pham while she was changing it, causing injuries to her neck, right shoulder, and right arm. Pham initially went to Smithfield's on-site first aid office but was later sent by Smithfield to AMG Occupational Medicine for evaluation. There, Dr. Bruce Elkins diagnosed Pham with a ligament sprain of the cervical spine, as well as a sprain of the right shoulder and arm. Pham told Dr. Elkins that she had been experiencing discomfort in her right upper trap and neck musculature for over a year. She described the pain as having gradually increased over time, often starting in her neck and radiating up the right side of her shoulder and head. Pham also reported experiencing headaches for the same amount of time and taking Ibuprofen daily to relieve the pain. She was referred by Dr. Elkins for additional workup (a complete medical examination) and physical therapy, which she pursued.

On January 27, 2016, an MRI was conducted on Pham's cervical spine. On March 30, 2016, Pham was referred to Dr. Thomas Ripperda at Avera Physical Medicine and Rehab for ongoing neck and right arm pain. Dr. Ripperda reviewed Pham's MRI and noted it showed a broad-based, slightly right-sided central disc

protrusion, or herniation[1], at the C5-C6 vertebrae level of the spine. Dr. Ripperda opined that the herniation had created cervical radiculitis[2] potentially following the C5 or C6 nerve root distribution. After subsequent cervical epidural injections gave only transitory relief, Dr. Ripperda recommended a repeat MRI, because her continuing pain was constant, unchanged and exacerbated by activities such as "reaching, pushing and pulling." Conducted on December 20, 2016, Pham's second MRI showed that the disc herniation at the C5-C6 vertebrae level on Pham's spine was worsening and now was definitely affecting the C6 nerve root and causing her reported symptoms. That same day, Dr. Ripperda reviewed Pham's job description and noted that its frequent pushing and pulling motion requirements had put her at risk for the disc herniation that had occurred, and its subsequent worsening.

Smithfield accepted Pham's treatment from the October 14, 2015, injury as a compensable workers' compensation claim. Her injury was characterized as "cumulative", and she was approved for temporary total disability (TTD) payments and for related treatment. As such, it was recognized that her condition was of a nature that had developed over time and worsened as she continued working. *See,* Webster's Twentieth Century Dictionary (1933 Ed.) at 411 ('increasing or augmenting over time; as a cumulative action.") Over the next several years, Pham received extensive medical treatment for persistent pain in her neck, right arm, and right

---

[1] Cervical disc herniation is an acute spinal injury occurring between the base of the skull and the upper part of the back. Samir Sharrak & Yasir Al Khalili, *Cervical Disc Herniation*, National Library of Medicine, (Aug. 7, 2024), https://www.ncbi.nlm.nih.gov/books/NBK546618.

[2] "Radiculitis or radicular pain is transferred pain that is 'radiated' along the path of a nerve due to pressure on the nerve root at its connection to the spinal column." *Radiculitis*, Bonati Spine Institute, (Aug. 7, 2024), https://www.bonati.com/conditions/radiculitis.

shoulder, headaches, and right arm tingling. Her care included physical therapy, MRIs, CT scans, EMG studies, cervical epidural steroid injections, and on April 19, 2017, a C5-C6 Anterior Cervical Discectomy and fusion surgery. All these treatments were accepted as compensable by Smithfield and paid under Pham's workers' compensation claim.

Below is a non-exhaustive summary of the numerous diagnoses Pham received from physicians between 2017 and 2021:

Date of Assessment	Medical Professional	Medical Assessment of Pham's Condition
February 22, 2016	Dr. Wissam Asfahani, Avera Medical Group Neurosurgery	Carpal tunnel syndrome
August 17, 2017	Dr. Travis Liddel, CORE Orthopedics	Right shoulder adhesive capsulitis[3], right shoulder tendinitis, and right upper extremity radiculopathy
October 17, 2017	Dr. Liddel, CORE Orthopedics	Right shoulder tendinitis and cervical radiculopathy[4]
January 4, 2018	Dr. Liddel, CORE Orthopedics	Adhesive capsulitis of the right shoulder
April 5, 2018	Dr. Liddel, CORE Orthopedics	Right shoulder adhesive capsulitis and right-hand paresthesia
August 27, 2018	Dr. Garrison Whitaker, Avera Orthopedics and Sports Medicine	Cervical radiculopathy and definite ulnar nerve distribution involvement on the right side

[3] Commonly called "frozen shoulder," adhesive capsulitis "is an inflammatory condition causing shoulder stiffness and pain." John M. St Angelo et al., *Adhesive Capsulitis*, National Library of Medicine, (Aug. 7, 2024), https://www.ncbi.nlm.nih.gov/books/NBK532955.

[4] Cervical radiculopathy occurs "where the nerve root of a spinal nerve is compressed or impaired, causing the pain and symptoms to spread beyond the neck and radiate to other areas of the body, such as the arms, neck, chest, upper back, and shoulders." Warren Magnus et al., *Cervical Radiculopathy*, National Library of Medicine, (Aug. 7, 2024), https://www.ncbi.nlm.nih.gov/books/NBK441828.

October 2, 2018	Dr. Ripperda, AMG Physical Medicine and Rehabilitation	Thoracic outlet syndrome[5] of the right thoracic outlet and cervical disc herniation
November 14, 2018	Dr. Adil Shaikh, Avera Orthopedic and Sports Medicine	Right thoracic outlet syndrome and cubital carpal tunnel syndrome
April 30, 2019	Dr. Ripperda, AMG Physical Medicine and Rehabilitation	Thoracic outlet syndrome of the right thoracic outlet and cervical disc herniation
June 11, 2019	Dr. Ripperda, AMG Physical Medicine and Rehabilitation	Thoracic outlet syndrome of the right thoracic outlet and cervical disc herniation
July 9, 2019	Dr. Brett Bastian, AMG Neurosurgery	Radiculitis of right cervical region
October 22, 2019	Dr. Micheal Langston, AMG Orthopedic and Sports Rehabilitation	Ulnar neuropathy at elbow of right extremity
December 10, 2019	Dr. Liddel, CORE Orthopedics	Right elbow cubital carpal tunnel syndrome
February 26, 2020	Dr. Timothy Metz, Avera McKennan Hospital	Cervical paraspinous myofascial pain[6] involving splenius and trapezius muscle groups
June 23, 2020	Dr. Metz, Avera McKennan Hospital	Right cervical radiculopathy
August 20, 2020	Dr. Langston, AMG Orthopedic and Sports Rehabilitation	Positive Spurling test[7]
November 25, 2020	Dr. Ripperda, AMG Physical Medicine and Rehabilitation	Nerve root irritation on right side of neck
December 18, 2020	Dr. Ripperda, AMG Physical Medicine and Rehabilitation	Right shoulder pain, residual C6 nerve irritation

[5] Thoracic outlet syndrome "presents with arm pain and swelling, arm fatigue, paresthesias, weakness, and discoloration of the hand." Eric J. Panther et al., *Thoracic outlet syndrome: a review*, J Shoulder Elbow Surg., (Aug. 7, 2024), https://doi.org/10.1016/j.jse.2022.06.026.

[6] Myofascial pain syndrome is a chronic muscle pain disorder. Helgard P. Meyer, *Myofascial pain syndrome and its suggested role in the pathogenesis and treatment of fibromyalgia syndrome*, Current Pain and Headache Reports Vol. 6, (Aug. 7, 2024), https://doi:10.1007/s11916-002-0048-z.

[7] A positive Spurling Test indicates "a cervical nerve root compression commonly related to intervertebral disc pathology (e.g., herniation)." Steven J. Jones & John-Mark M. Miller, *Spurling Test*, National Library of Medicine, (Aug. 7, 2024), https://www.ncbi.nlm.nih.gov/books/NBK493152.

January 26, 2021	Dr. Ripperda, AMG Physical Medicine and Rehabilitation	Right cervical radiculopathy

Despite the wide-ranging medical care and support, Pham continued to report that her pain was constant and severe. On August 30, 2018, Smithfield requested that AMG Occupational Medicine perform an independent medical examination and impairment rating[8] of Pham. Dr. Ryan Noonan assessed a cervical-only eight percent permanent partial whole person (IOWP) impairment rating. Smithfield accepted the rating as compensable but did not provide Pham with permanent partial disability (PPD) payments until nearly six months later[9].

Around the same time, Smithfield seemingly made its own determination that there was no medical evidence to support Pham's work injury or activities being a major contributing cause of her current medical condition and ongoing treatment. As a result, Smithfield began submitting all of Pham's medical bills, starting with treatment occurring after August 30, 2018, to her health insurance instead of processing them through workers' compensation. Smithfield did not notify Pham of or provide an explanation for its unilateral decision to stop covering her medical costs. Smithfield never sent a formal denial of the previously accepted claim. Instead, Pham, a non-native English speaker, would only have known about this significant change in her workers' compensation benefits from Smithfield-issued health insurance statements.

[8] Dr. Ripperda testified that an impairment rating is "the evaluation for the amount of functional loss that you've had from the type of injuries that you have had." Admin. R. 1806.
[9] On March 1, 2019, Pham received PPD payments in the amount of $14,804.52.

Consequently, Pham continued seeking relief for her enduring pain, but Smithfield no longer paid the associated bills as work-related. Some of the more significant procedures she underwent include ulnar nerve decompression surgery on her elbow on January 24, 2020, and spinal cord stimulator trial placement on March 1, 2021. After Smithfield denied coverage for the elbow surgery, Pham filed a Petition for Hearing with the Department of Labor (Department) on July 17, 2020, arguing that her cumulative work-related trauma was and remained a major contributing cause of her ongoing medical treatment and condition. Pham alleged that she was permanently disabled as a result of the work-related injury and was entitled to coverage of all past, present, and future related treatment.[10]

A hearing was held before Administrative Law Judge Michelle Faw (ALJ) on September 28, 2022. Pham offered the testimony of her treating physician, Dr. Ripperda, through a video deposition and his written opinions, as well as all her relevant medical records. Dr. Ripperda opined that Pham's work was a major contributing cause of all her care and treatment, up through her current condition. Smithfield offered the live testimony of Dr. Wade Jensen, an orthopedic surgeon it retained on January 15, 2022, to conduct a comprehensive review of Pham's medical records. Dr. Jensen opined at the hearing that Pham's work activities were not a major contributing cause of any of her injuries or conditions, dating back to the initial claim in 2015, including her current condition or need for treatment. Dr. Jensen's

[10] On July 14, 2022, the Department approved a Joint Stipulation and Order between Pham and Smithfield, dismissing Pham's Permanent Total Disability benefits claim, leaving the issue of causation of her medical conditions to be litigated.

opinion was based wholly on his paper review, having never personally examined or treated Pham.

Ultimately, the ALJ found in her decision dated May 15, 2023, that Dr. Jensen's opinion was more persuasive than Dr. Ripperda's and determined that Pham failed to prove by a preponderance of the evidence that a work-related injury was and remained a major contributing cause of her condition and continuing need for treatment. The ALJ gave great weight to the fact that Dr. Jensen had reviewed Pham's entire medical record in forming his opinion, and described Dr. Ripperda's opinion, which she concluded was based on a less comprehensive knowledge of Pham's medical history, as "not well-supported." Accordingly, the ALJ ruled that Pham was not entitled to any further workers' compensation benefits. The Department adopted the ALJ's decision as its final determination in the case.

Pham appeals the Department's decision.

STANDARD OF REVIEW

SDCL § 1-26-36 governs the weight that a court gives to the Department's decisions:

> 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. The circuit court may award costs in the amount and manner specified in chapter 15-17.

SDCL § 1-26-36.

> The South Dakota Supreme Court has further explained:
>
> "[A]ctions of the agency are judged by the clearly erroneous standard when the issue is a question of fact." *Id.* (citing *Darling v. W. River Masonry, Inc.*, 2010 S.D. 4, ¶ 10, 777 N.W.2d 363, 366). "[A]ctions of the agency are fully reviewable when the issue is a question of law." *Darling*, 2010 S.D. 4, ¶ 10, 777 N.W.2d at 366 (citing *Orth v. Stoebner & Permann Constr., Inc.*, 2006 S.D. 99, ¶ 27, 724 N.W.2d 586, 592). Jurisdictional issues are questions of law and are reviewed de novo. *Martin[v. American Colloid Co.]*, 2011 S.D. 57, ¶ 8, 804 N.W.2d [65,] 67. *See O'Toole v. Bd. of Trs. of S.D. Ret. Sys.*, 2002 S.D. 77, ¶ 9, 648 N.W.2d 342, 345. Finally, "[w]e review statutory questions de novo, as they are questions of law." *Fredekind v. Trimac Ltd.*, 1997 S.D. 79, ¶ 4, 566 N.W.2d 148, 150 (citing *Permann v. Dept. of Labor, Unemp. Ins. Div.*, 411 N.W.2d 113, 117 (S.D. 1987)).

Knapp v. Hamm & Phillips Service Co., Inc., 2012 S.D. 82, ¶ 11, 824 N.W.2d 785, 788. However, "when 'an agency makes factual determinations on the basis of documentary evidence, such as depositions' or medical records," our review is de novo. *McQuay v. Fischer Furniture*, 2011 S.D. 91, ¶ 10, 808 N.W.2d 107, 110 (quoting *Darling*, 2010 S.D. 4, ¶ 10, 777 N.W.2d at 366-67 (quoting *Vollmer v. Wal–Mart Store, Inc.*, 2007 S.D. 25, ¶ 12, 729 N.W.2d 377, 382)).

LAW AND ANALYSIS

Burden shift

"In a workers' compensation proceeding, the claimant bears the burden of proving the facts 'necessary to *qualify* for compensation by a preponderance of the evidence.'" *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 20, 984 N.W.2d 127, 134 (quoting *Darling*, 2010 S.D. 4, ¶ 11, 777 N.W.2d at 367) (emphasis added). Pursuant to SDCL § 62-1-1(7), to be eligible for coverage, "[t]he claimant must establish that his work-related injury is a major contributing cause of his current claimed condition and need for treatment." *McQuay*, 2011 S.D. 91, ¶ 11, 808 N.W.2d at 111 (citing *Darling*, 2010 S.D. 4, ¶ 11, 777 N.W.2d at 366).

However, as articulated by our Supreme Court, the intent of SDCL § 62-1-1(7) "is not to place a continuous burden on a claimant once he or she proves a compensable injury." *Hayes v. Rosenbaum Signs & Outdoor Advert., Inc.*, 2014 S.D. 64, ¶ 28, 853 N.W.2d 878, 886. *See also Lloyd v. Brands*, 2011 S.D. 28, ¶ 4, 799 N.W.2d 727, 730 ("Generally, workers' compensation statutes are to be construed liberally in the employee's favor."). Thus, once an employee has satisfied its initial burden of proof, a payment under workers' compensation can only be "ended, diminished, increased, or awarded" by either party if, after a review, the "department finds that a change in the condition of the employee warrants such action." SDCL § 62-7-33.

In a petition governed by SDCL § 62-7-33, "[t]he party asserting a change in condition bears the burden of proving it." *Kasuske v. Farwell, Ozmun, Kirk & Co.*, 2006 S.D. 14, ¶ 11, 710 N.W.2d 451, 455 (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, ¶ 12, 575 N.W.2d 225, 230). "Thus,

> if a claimant proves a compensable condition under SDCL 62-1-1(7) and the employer subsequently feels claimant's condition no longer '*remains* a major contributing cause of the disability, impairment, or need for treatment[,]' SDCL 62-1-1(7)(b), the employer may assert a change-of-condition challenge under SDCL 62-7-33 where it bears the burden of proof."

Hayes, 2014 S.D. 64, ¶ 29, 853 N.W.2d at 886 (emphasis in original). Accordingly, upon notice of coverage and selection of a physician,

> 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) (emphasis added). "SDCL 62-7-33 provides the method for a party to assert [that] change in condition." *Hayes*, 2014 S.D. 64, ¶ 29, 853 N.W.2d at 886.

On October 14, 2015, Smithfield accepted Pham's injury as compensable and began paying for related treatment. Over the next several years, Pham saw numerous medical doctors and specialists and underwent many treatments for headaches and pain in her neck, shoulder, and arm, all of which were covered by workers' compensation without issue. However, in June 2018, Smithfield unilaterally determined that Pham's work-related injury was no longer a major contributing cause of her current condition and terminated workers' compensation coverage for related treatment. Smithfield did not provide Pham with any notice of or justification for its decision. Rather, Smithfield discreetly transferred Pham's medical bills to her health insurance.

This issue is a question of law and requires the application of a legal standard. Because Smithfield had already accepted Pham's injury as compensable, the only way for it to terminate coverage for related treatment was by requesting a review from the Department, pursuant to SDCL § 62-7-33. Smithfield did not move under SDCL § 62-7-33 and there is no reference to the statute in the administrative proceeding. The ALJ improperly shifted the burden to Pham to prove that her ongoing treatment was compensable, when it was Smithfield that should have been required to shoulder the burden to prove the contrary. This error, in and of itself, would require reversal and remand in this case for a redetermination of the evidence under the proper burden of proof.

Clearly erroneous

However, assuming Smithfield had properly submitted the requisite request, and the burden of proof had properly been shifted to Smithfield to establish a change in Pham's condition demonstrating that any current and future medical treatment was not work-related or was unsuitable or improper, it is the view of this reviewing Court that such burden cannot be met on this record, and to hold to the contrary would be clearly erroneous.

The ALJ's analysis and decision on the change in condition issue would require it to weigh the testimony of the parties' witnesses with the burden of proof on Smithfield, and in a subsequent appeal, the Court would review those findings. Here, the ALJ put the burden of proof on Pham, and found Dr. Jensen's opinion more persuasive than Dr. Ripperda's, primarily because Dr. Jensen reviewed Pham's entire

medical record in forming his opinion. The ALJ also found Dr. Jensen's opinion regarding the herniation forming between the January 2016 and December 2016 MRI's particularly important in its determination.

When findings of fact are made based on live testimony, the clearly erroneous standard applies. *Orth*, 2006 S.D. 99, ¶ 28, 724 N.W.2d at 592 (citing *Brown v. Douglas Sch. Dist.*, 2002 S.D. 92, ¶ 9, 650 N.W.2d 264, 267-68; *McQuay*, 2011 S.D. 91, ¶ 14, 808 N.W.2d at 111-12. As is the case with all factual inquiries, "[d]ue regard shall be given to the opportunity of the agency to judge the credibility of the witness." *Schoon*, 2022 S.D. 79, ¶ 32, 984 N.W.2d at 137 (citation omitted). Accordingly, agency findings from live testimony will only be reversed if "after careful review of the entire record, [the court is] definitely and firmly convinced that a mistake has been made[.]" *Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶ 18, 653 N.W.2d 247, 251 (citing *Sopko*, 1998 S.D. 8, ¶ 6, 575 N.W.2d at 228).

"When factual determinations are made on the basis of documentary evidence, however, [the court will] review the matter de novo, unhampered by the clearly erroneous rule." *Orth*, 2006 S.D. 99, ¶ 28, 724 N.W.2d at 592 (citing *Brown*, 2002 S.D. 92, ¶ 9, 650 N.W.2d at 268); *McQuay*, 2011 S.D. 91, ¶ 20, 808 N.W.2d at 112. While this general rule applies to transcripts of depositions and medical records, it does not pertain to depositions that are recorded on camera. "[V]ideo depositions are reviewed under a clearly erroneous standard because [the] Department had the opportunity to view [the witness'] credibility." *Maroney v. Aman*, 1997 S.D. 73, ¶ 6, 565 N.W.2d 70, 72. There is "no good reason to employ a de novo review when the testimony is by

videotape[,] and to use [a different] standard of review when the witness testifies in person." *Id.* (quoting *Curtis v. State*, 301 Ark. 208, 213-14, 783 S.W.2d 47, 50 (1990)). Such a review "loses sight of the purpose and goals of appellate review." *Id.* (quoting *Curtis*, 301 Ark. at 213-14, 783 S.W.2d at 50). Our Supreme Court has further explained,

> The use of video depositions in this case is similar to a jury's use of such depositions in a medical malpractice case, wherein they are allowed to assess the credibility of the deponent via video tape. *See State v. Barber*, 1996 S.D. 96, ¶ 23, 552 N.W.2d 817, 821 (stating it is the jury's responsibility to examine a witness' credibility). Just as a jury is allowed to assess a witness' credibility while watching a video deposition, so is [the] Department. *See, e.g.*, 44 AmJur *Model Trials* § 35, at 251 (1992) (stating videotaped testimony is "capable of preserving the demeanor of the witness").

Id.

Therefore, the ALJ's findings regarding the testimony of both Dr. Jensen, taken in person at the hearing, and Dr. Ripperda, pre-recorded and played at the hearing, are reviewed under the clearly erroneous standard. Dr. Ripperda's written opinions and Pham's medical records from her other providers are reviewed de novo.

Dr. Jensen is a board-certified orthopedic surgeon specializing in spine surgery. He has been in practice for 16 years and handles approximately 400 cases a year, roughly 150 of them cervical patients. In January 2022, Dr. Jensen was hired by Smithfield to perform an independent medical examination of Pham's medical records. At the hearing, Dr. Jensen opined that Pham's work activities were not, at any time, a major contributing cause of her shoulder, neck, or arm conditions, headaches, or need for related treatment. Dr. Jensen testified that the disc herniation and enlarged C6 nerve root present in Pham's December 2016 MRI likely occurred

not long before said MRI, and well after October 2015. Dr. Jensen stated further that if those symptoms persist after anterior cervical discectomy and fusion surgery, as they did for Pham, they must be caused by something other than damage to a nerve root originating from an injury like Pham's.

Additionally, noting that Pham showed a regular range of motion in her right shoulder up until July 2017, Dr. Jensen testified that Dr. Ripperda's conclusion regarding Pham's adhesive capsulitis diagnoses did not make biomechanical or biological sense. It was also Dr. Jensen's belief that the tingling and numbness Pham describes in her fingers does not fit the distribution pattern for ulnar nerve issues. Dr. Jensen also testified that the failure of injections to resolve Pham's headaches reflects that they are merely chronic migraines and not related to her work injury. This is further demonstrated, he opined, by the fact that, according to her medical records, Pham had reported headaches and neck and shoulder pain prior to October 2015. Dr. Jensen also testified that he reviewed a video of Pham's work activities and believed her job did not indicate any stressors to her neck.

Dr. Ripperda is board certified in physical medicine, pain medicine, and rehabilitation, and has been practicing medicine for nineteen years. On February 2, 2022, Dr. Ripperda provided a causation letter opinion in which he stated that to a reasonable degree of medical certainty, Pham had suffered injuries to her right shoulder, right elbow, neck, and right arm as a result of her October 2015, work injury. In his deposition, Dr. Ripperda testified more specifically:

> In regard[] to the injury she sustained, the right shoulder I felt was related to her work accident, specifically the adhesive capsulitis. The

> right elbow would be the ulnar nerve entrapment, which was related to her work injury. The neck pain[,] with the radiculopathy going down the right arm[,] was related. And then the migraine headaches, which stemmed from her cervical radiculopathy[,] were related to her work injury.

Admin. R. 1807.

Dr. Ripperda further opined that Pham's regular duties at Smithfield played a significant role in her worsening conditions and made them difficult to identify:

> Activity [Pham] was doing at work certainly put her at risk for development of ulnar nerve-related problems. And given her pain of the neck radiating down to her arm, those initial symptoms are likely masked, to some degree. And as she continued to have persistent problems that weren't improving, it took a while to identify that as a potential problem for her.

Admin. R. 1808. Dr. Ripperda explained that "any type of repetitive activity, looking up, looking down, rotation, pushing and pulling with the arm, can create enough muscular stabilization compressive force that can cause cervical disc herniations." Admin. R. 1811. He also testified to his belief that Pham's injury will likely have permanent, lifelong consequences:

> I would anticipate that every five to seven years, she'll need some additional imaging to her cervical spine to monitor what they call adjacent – adjacent level disease. Once she has that cervical fusion, there's potential that she could have breakdown at the level above or below that fusion[,] that will require additional intervention of symptom control. ... I don't anticipate that she'll be able to successfully wean away from the medications, given her persisting symptoms.

Admin. R. 1808.

It was Dr. Ripperda's opinion that the follow-up MRI in December 2016, depicting a worsening protrusion in Pham's spine, was "consistent with that irritation of the C6 nerve root" and "representative that there was probably more going on with

that than what that initial MRI showed." Admin. R. 1802, 1809. Additionally, on cross-examination, Dr. Ripperda explained why Dr. Jensen's opinion that Pham's neck pain was largely myofascial in origin was not supported by objective testing:

> It doesn't explain the – the abnormal EMG. I mean, the neurogenic recruitment that she had, the large – large amplitude motor units. They're two findings that you see from prior nerve trauma or irritation. ... she has a very objective reproducible finding on her EMG post[-]surgery that suggests there was nerve root involvement. So despite the impression that all her symptoms are just purely muscular in origin, she – she ended up having findings that were positive on the – or the EMG that suggests otherwise[.] I mean, it suggests there was nerve issues going on. Once you injure that nerve root, it may or may not completely recover and can give you persistent radicular symptoms.

Admin. R. 1817.

Finally, in response to whether Pham having experienced headaches or migraines prior to October 2015 would alter his diagnosis of causation, Dr. Ripperda testified:

> It would change my opinion depending on how frequently she's getting treatment for those migraine headaches, and what types of interventions she had had up to the point of her work-related injury. If she had a visit and her headaches were very well controlled and was not on any medications for migraine headaches, it would not change my opinion.

Admin. R. 1812.

After reviewing the conflicting medical testimony, the Court finds that the ALJ erred in placing more reliance on the opinion of Dr. Jensen rather than that of Dr. Ripperda. "The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition 'because the field is one in which laypersons ordinarily are unqualified to express an opinion.'" *McQuay*, 2011 S.D. 91, ¶ 20, 808 N.W.2d at 112 (quoting *Vollmer*, 2007 S.D.

25, ¶ 14, 729 N.W.2d at 382). However, "[t]he opinion of an examining physician should be given substantial weight when compared to the opinion of a doctor who only conducts a review of medical records." *Peterson v. Evangelical Lutheran Good Samaritan Soc.*, 2012 S.D. 52, ¶ 23, 816 N.W.2d 843, 850.

Dr. Ripperda's opinion supports, and is supported by, Pham's extensive medical record, which shows she experienced ongoing pain stemming from her work activities, and that the pain increased after her October 2015 injury. Dr. Ripperda's video deposition testimony is consistent with all of the medical evidence of a repetitive-use injury and considers the decades Pham has spent making the same push and pull motions. By contrast, Dr. Jensen's testimony that after watching a video of Pham working, he did not believe her job exposed her to any neck stressors, flatly contradicts the testimony of the treating expert and defies even common sense.

More importantly, Dr. Jensen did not conduct his comprehensive review until nearly four years after Smithfield's denial of Pham's treatment and is not supported by any treating care provider. Dr. Jensen never personally examined Pham, nor could he provide any alternative hypotheses for Pham's medical conditions, other than their being idiopathic or the result of progressive degenerative changes—i.e., normal wear and tear. This view ignores the fact that Pham's "normal" routine was daily repetitive work with her right arm for many years at Smithfield and is just flatly contradicted by the record. Dr. Ripperda, on the other hand, examined Pham on thirteen separate occasions over the course of five years. He diagnosed Pham's injury as work-related *while* treating her symptoms. He supervised all of Pham's many treatments and has

personal, intimate knowledge of her injury and pain. His testimony matches the majority of assessments made by the many medical professionals involved in Pham's treatment.

Dr. Ripperda's video deposition testimony was not given appropriate weight in the ALJ's decision compared to the testimony of Dr. Jensen, who appeared in person at the hearing but only reviewed Pham's medical record. The claim that Dr. Jensen had a more complete knowledge of Pham's prior medical history regarding the treatment of her shoulder or headaches than Dr. Ripperda is weak and clearly insufficient to overcome the deference the trier of fact must afford him as the examining physician. Those records, which Dr. Jensen and the ALJ found so compelling, upon review, disclose only some reported headaches in January of 2011 and August of 2014, and some neck and shoulder discomfort in March of 2014[11]. These symptoms occurred, albeit prior to the October 14, 2015 incident when the role of cellophane fell on her, while she was employed by Smithfield in the same job that she has had packaging bacon for the past 14 years. Dr. Ripperda addressed these "pre-injury" symptoms in his testimony and explained why they did not contra-indicate causation in this cumulative trauma case. Further, Dr. Ripperda explained why his training and board certification in physical medicine and rehabilitation qualified him as a superior expert in identifying causation of injuries, as compared to the neurosurgery specialty. "From a training standpoint their focus is primarily on correcting the problem, but not necessarily looking at mechanisms of- of causation injury where part of our

[11] *See* Smithfield Appx 1-11.

training in physical medicine and rehabilitation is looking at occupational activities as well as mechanisms of injury and their subsequent causes. Admin. R. at 1811.

Based upon all the above, and after careful review of the entire record, the Court is definitely and firmly convinced that the ALJ's decision to accept the opinion of the independent medical examiner following a post-denial paper review over that of the treating physician who has overseen all of the patient's care and treatment at issue in this particular case is clearly erroneous.

DECISION AND ORDER

After fully reviewing the entire record in this case, including all of the medical records, authorities, pleadings, affidavits, transcripts, and written submissions of the parties, as well as the oral arguments of counsel, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the decision of the ALJ entered on May 15, 2023, associated Findings of Fact and Conclusions of Law, and the Department's Order adopting the same entered June 28, 2023, were made upon unlawful burden-shifting procedure and are clearly erroneous in light of the entire evidence of record. The Court therefore reverses and remands for an award in favor of Pham under her petition with regard to compensability and for such further proceedings consistent with this ruling as are necessary to conclude this matter.

Dated this 16 day of August, 2024.

Douglas E. Hoffman
Circuit Court Judge

ATTEST:
Angelia Gries, Clerk of Courts

By: _____ Deputy

FILED
AUG 16 2024
Minnehaha County, S.D.
Clerk Circuit Court

MINNEHAHA COUNTY)
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office.

OCT 03 2024

Clerk of Courts, Minnehaha County

By _____ Deputy

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

Appeal No. 30859

JODY PHAM,

Claimant and Appellee,

vs.

SMITHFIELD FOODS, SIOUX FALLS,

Employer/Self-Insurer and Appellant.

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Douglas Hoffman

APPELLEE'S BRIEF

ATTORNEY FOR APPELLEE:

KING LAW FIRM, P.C.
David J. King
Brendan (Bo) F. Pons
101 N. Phillips Ave. Ste 602
Sioux Falls, SD 57104
(605) 332-4000
David@davidkinglawfirm.com
Bo@davidkinglawfirm.com
Attorneys for Appellee

ATTORNEYS FOR APPELLANT:

BOYCE LAW FIRM, LLP
Laura K. Hensley
Kristin N. Derenge
300 South Main Avenue, Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424
lkhensley@boycelaw.com
knderenge@boycelaw.com
Attorneys for Appellant

NOTICE OF APPEAL FILED October 2, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

PRELIMINARY STATEMENT

Claimant and Appellee, Jody Pham, shall be referenced as either "Pham" or "Appellee." Employer, Self-Insurer, and Appellant, Smithfield Foods, shall be referenced as either "Smithfield" or "Appellant." The South Dakota Department of Labor shall be referenced as the "Department." The Second Judicial Circuit Court, Minnehaha County, shall be referenced as the "Circuit Court." Citations to the settled record transmitted by the Circuit Court shall be either referenced as "SR" if from 30859.R01 (Department File) or "SR2" if from .R02 (Circuit Court file) and followed by the page number assigned by the Circuit Court.

JURISDICTIONAL STATEMENT

Appellant seeks review of the Circuit Court's Decision issued on August 16, 2024, as well as the Department's Decision issued on May 15, 2023. Appellant received notice of entry of the Circuit Court's Decision on September 18, 2024, and timely filed a Notice of Appeal on October 2, 2024. This Court has jurisdiction over this appeal pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

There are three issues in this Appeal.

i. *Whether the Circuit Court erred in raising and deciding an issue that Appellant claims was not raised or disputed by the parties.*

The Circuit Court agreed with Pham's position that Smithfield had the burden of proof as it accepted Pham's neck, right shoulder, and right arm injuries as an accepted workers' compensation claim.

Hanson v. Penrod Construction Co., 425 N.W.2d 396 (SD 1988).
SDCL § 62-4-1

ii. *Whether the Circuit Court was correct in holding SDCL § 62-7-33 placed the burden of proof on Appellant to show that Pham was not entitled to benefits*

when Smithfield stopped paying workers' compensation benefits.

The Circuit Court held that Smithfield had the burden to show that Pham had a change in condition following her accepted workers' compensation claim.

Hanson v. Penrod Construction Co., 425 N.W.2d 396 (S.D. 1988)
Hayes v. Rosenbaum Signs & Outdoor Advert., Inc., 2014 S.D. 64, 853 N.W.2d 878
Kasuske v. Farwell, Ozmun, Kirk & Co., 2006 S.D. 14, 710 N.W.2d 451
SDCL 62-7-33

iii. *Whether the Circuit Court was correct in determining that the Department erred in finding that Pham failed to meet her burden of proof establishing that her working conditions were a major contributing cause of her current conditions and need for treatment.*

The Circuit Court held the Department's findings were clearly erroneous because it rejected the testimony of Pham's treating physician in favor of a physician who only reviewed the records as the latter's testimony contradicted treating physicians' opinions and common sense.

Darling v. W. River Masonry, Inc., 2010 S.D. 4, 777 N.W.2d 363.
Peterson v. Evangelical Lutheran Good Samaritan Soc'y, 2012 S.D. 52, 816 N.W.2d 843

STATEMENT OF THE CASE

Pham sustained a cumulative work injury on October 14, 2015. Pham made a workers' compensation claim for her neck, right shoulder, right arm/elbow, and headaches. Smithfield accepted the claim and paid benefits for over three years. Without medial evidence/opinion or any denial letter, Smithfield secretly switched Pham's continuing medical bills for her work-related injury to health insurance. Smithfield did not file a SDCL § 62-7-33 petition to assert a change in condition. Smithfield did not hire a physician to examine Pham during this timeframe. Instead, Pham filed her Petition seeking benefits owed as Smithfield had the burden to show the treatment from its authorized treaters was unnecessary, improper, or unsuitable for her accepted claim. The Department improperly denied the Petition in full, finding Pham had failed to sustain her

burden to show entitlement to benefits. Pham appealed to the Circuit Court. The Honorable Douglas Hoffman held that the Department erred by placing the burden on Pham to prove entitlement to benefits on an accepted claim pursuant to SDCL § 62-7-33 and that the Department's adoption of Dr. Wade Jensen's opinion—an expert who only conducted a review of the records—over Dr. Thomas Ripperda—Pham's treating physician—was clearly erroneous. Smithfield now appeals the Circuit Court's Decision.

STATEMENT OF THE FACTS

Pham was born and attended school in Vietnam. SR 153. Her native language is Vietnamese. *Id.* She speaks some English as a second language. *Id.* She is currently 53 years old, thin, and slightly built. SR 1782. After moving to Sioux Falls, Pham started working at Smithfield in 1996. SR 1956. Before her work injury, Pham worked for Smithfield as a Bacon 26 Operator. SR 1738. This is a physically demanding position. SR 730. Her job required her to push and pull bacon to ensure it was correctly positioned on the line before entering the packing machine, packaging 12 to 20 packs of bacon per minute. SR 1738. She was also responsible for replacing the film packaging reel, which weighs about one hundred pounds when full, whenever it breaks or runs out. *Id.*

A. Pham sustained a cumulative injury on October 14, 2015.

It is undisputed that Pham sustained a work-related injury on October 14, 2015, when the film reel fell onto Pham, causing injuries to her neck, right shoulder, and right arm. SR 225, 1832. She also experienced headaches. Smithfield's own claim file describes Pham's October 14, 2015, injury as "repetitive motion of using r[ight] upper ext[remity] to reach too far and too often to get product" and "cumulative." SR 253, 1603, 1832. As such, it was recognized by Smithfield that her condition was of a nature

that had developed over time and worsened as she continued working. SR2 647. Pham was approved for TTD and TPD payments and related treatment. SR 1755-77.

On the day of her injury, Pham initially went to Smithfield's on-site first aid office but was later sent, by Smithfield, to AMG Occupational Medicine. SR 225. Pham saw Dr. Bruce Elkins who noted:

> CONTEXT/MECHANISM: repetitive movement. Same job for 7 years[.]... WORK HISTORY: Patient currently works full-time as a manual laborer, a physically demanding position for the past 7 years.

SR 730. Dr. Elkins initially diagnosed Pham with a cervical spine ligament sprain and a right shoulder and arm sprain. SR 731. Pham reported discomfort in her right upper trap and neck and was having headaches. SR 730. She described her symptoms as gradually increasing over time, often starting in her neck and radiating up the right side of her shoulder and head. *Id.* Dr. Elkins referred Pham to physical therapy. SR 731.

B. Smithfield accepted as compensable and paid medical benefits for Pham's neck, right shoulder, right arm, and headaches for almost three years.

On December 8, 2015, Dr. Elkins noted that Pham had been in physical therapy for her neck and right shoulder. SR 736. Pham had developed significant right-sided headaches. *Id.* His assessment was tension headaches. *Id.* On December 10, 2015, Pham saw Dr. Elkins for the same symptoms. SR 738. Pham reported the "pain came back quickly after therapy finished." *Id.* Dr. Elkins recommended more physical therapy. *Id.* On December 30, 2015, Pham saw Dr. Dustin Randall who noted:

> [Patient] works at [Smithfield] in a position that consists of pulling and pushing meat on the line. She has been working in this position for approximately 7 yrs, and reports in Oct 2015 she developed [right] shoulder and neck pain.... [Patient] is reporting that back in Oct 2015 when she developed neck pain she also developed headaches. [Patient] reports at the onset of neck pain she develops headaches to her [right] frontal and temporal areas[.]

SR 742.

On January 4, 2016, Pham saw Kimberly Lunder PA at AMG McGreevy for headaches she had over the last four to five months. SR 425. On January 27, 2016, Pham saw Dr. Lisa Viola for headaches associated with right neck and arm pain. SR 1707-09. Dr. Viola prescribed Amitriptyline and ordered a cervical MRI. *Id.* On January 27, 2016, Pham had a cervical spine MRI. SR 669-70. The MRI revealed a broad-based right central bulge/protrusion at C5-C6 without significant central or foraminal stenosis. SR 669. Dr. Wissam Asfahani put Pham on Flexeril, prescribed a TENS unit, and referred her to Avera Physical Medicine and Rehab. *Id.* On February 15, 2016, Pham saw PA Lunder to discuss the MRI results. SR 420.

On March 30, 2016, Pham saw Dr. Ripperda for her neck and right arm pain. SR 791. He reviewed the MRI and diagnosed Pham with cervical radiculitis following the C5 or C6 nerve root distribution. SR 792. On May 2, 2016, Pham saw Dr. Ripperda who noted Pham "continues to work at [Smithfield], but has been having some difficulty with ongoing work activities. The patient reports repetitive activities with that right arm will worsen her symptoms." SR 797. He recommended a cervical steroid injection. SR 798. On May 12, 2016, Pham had a cervical epidural steroid injection by Dr. Jose Santos at Avera McKennan Hospital. SR 895-96. On July 21, 2016, Pham saw Dr. Ripperda, who believed Pham had cervical radiculitis secondary to disc protrusion. SR 802. He recommended another epidural steroid injection. SR 804. On September 6, 2016, Pham saw Dr. Ripperda for continued right-sided neck pain. SR 808. Dr. Ripperda felt the C5-C6 disc herniation created cervical radiculitis with persistent neck pain. SR 809. He recommended a repeat injection. *Id.* On September 22, 2016, Pham had a cervical

epidural steroid injection. SR 920-21. On October 19, 2016, Pham saw Dr. Ripperda for her cervical radiculopathy, right arm, and neck pain. SR 813. Dr. Ripperda noted that the last injection did not give Pham any lasting relief from her pain. *Id.* He noted, "[s]he has worsening symptoms when she is working or using her right arm on a frequent basis." *Id.* Dr. Ripperda recommended Gabapentin and a repeat cervical MRI. SR 814. On December 13, 2016, Pham had a cervical MRI revealing the C5-C6 level worsened into disc herniation. SR 942-43. Pham's cumulative injury worsened because she continued to work and perform repetitive motions.

On December 20, 2016, Dr. Ripperda noted Pham's pain was "constant and worse with activity, reaching, pulling, and pushing" and the MRI showed worsening disc herniation at the C5-C6 level affecting the C6 nerve root. SR 818. He referred Pham to Neurosurgery. SR 819. Dr. Ripperda reviewed her job description during this appointment. *Id.* He noted her work activities worsened her symptoms, including, "put[ting] her on risk for disc herniation, particularly worsening disc herniation, which she had at C5-C6 location previously." *Id.* After reviewing both the December 2016 MRI and Pham's job description, Dr. Ripperda—as her treating physician—concluded: "Thus the job is the major contributing cause for the cervical spine condition and current herniation." *Id.*

On January 19, 2017, Pham saw Dr. Asfahani who recommended a C5-C6 anterior cervical discectomy and fusion. SR 672-74. In response to Smithfield's question, Dr. Asfahani responded: "upon my review of the DVD showing [Pham's] job, her daily functions involve a significant amount of neck flexion and lateral rotation which can put significant amount of tension on the neck joint and musculature making

her degenerative disc disease substantially worse and certainly aggravating her symptoms." SR 677. On April 19, 2017, Dr. Asfahani performed a C5-C6 anterior cervical discectomy and fusion, which Smithfield accepted as compensable and paid benefits. SR 946-49. Pham saw Brett Bastian, PA for post-surgery care on April 28, May 3, and June 2, 2017. SR 682, 685, 689. Pham did not receive lasting relief from this surgical procedure. SR 231.

On June 29, 2017, Pham saw Dr. Asfahani and reported pain in her right shoulder and arm. SR 694-95. On July 21, 2017, Pham had a right shoulder MRI revealing trace subacromial subdeltoid bursitis with trace bicep tendon synovitis. SR 1135-6. On August 17, 2017, Pham saw Dr. Travis Liddell for right shoulder pain and radicular right arm pain. SR 1565-68. Dr. Liddell noted Pham's repetitive work at Smithfield. SR 1566. His assessment was right shoulder adhesive capsulitis, right shoulder tendinitis, and right arm radiculopathy. SR 1568. He recommended a steroid injection and ordered a baseline EMG and physical therapy. *Id.* On August 31, 2017, Pham had an EMG. SR 617-22. On October 2, 2017, Pham had a right shoulder injection. SR 1570-71. On November 9, 2017, Pham saw Dr. Liddell for her neck, right shoulder, and right arm pain. SR 1572-74. Dr. Liddell noted that Pham's pain had been ongoing since her October 2015 work injury with no new injury or trauma. SR 1572. He saw evidence for adhesive capsulitis and recommended an EMG, MRI, and CT and believed the symptoms were coming from Pham's cervical spine. SR 1574. On December 1, 2017, Pham had a cervical CT scan which revealed no evidence of failed fusion or residual spinal stenosis. SR 2010. On December 7, 2017, Dr. Liddell performed a C6-C7 epidural injection. SR 1576. On December 19, 2017, Pham saw Dr. Scott Lockwood and had a cervical spine

injection. SR 1176-77. On January 4, 2018, Pham saw Dr. Liddell and had a right shoulder injection. SR 1577-79. Smithfield accepted Pham's workers' compensation claim for cumulative injuries to her neck, right shoulder, and right arm and paid for the foregoing treatment.

C. Despite accepting Pham's claim, Smithfield stopped paying medical benefits without medical evidence or written denial after March 2018.

After March 2018, and as the Circuit Court noted, "Smithfield seemingly made its own determination that there was no medical evidence to support Pham's work injury or activities being a major contributing cause of her current medical condition and ongoing treatment." SR2 650. Smithfield did not seek an IME to base a denial. Smithfield did not even ask Pham's physicians, like they did with Dr. Asfahani, what their opinions were. Smithfield did not issue a denial letter. SR 226. "Smithfield did not notify Pham of or provide an explanation of its unilateral decision to stop covering her medical costs." SR2 650. "Instead, Pham, a non-native English speaker, would only have known about this significant change in her workers' compensation benefits from Smithfield-issued health insurance statements." *Id.*

On March 13, 2018, Pham saw Leslie Wilson, DNP for headaches associated with her neck and arm pain, which worsened post-surgery. SR 623-24. DNP Wilson increased Pham's Amitriptyline prescription. SR 623. On March 20, 2018, Pham had a brain MRI revealing two small focal areas, possibly secondary to migraines. SR 1200-01. On April 5, 2018, Pham saw Dr. Liddell who recommended a follow up with neurology and/or Dr. Asfahani. SR 1581-83. On April 20, 2018, Dr. Tricia Knutson ordered Pham undergo another cervical MRI. SR 1206. Dr. Jeffery Baka reviewed the MRI and noted it showed no significant changes. *Id.* On June 7, 2018, Pham saw PA

Bastian and reported continued right shoulder pain and her diagnosis of adhesive capsulitis. SR 703-8. PA Bastian recommended an EMG study. SR 705. On July 29, 2018, Pham had an EMG study. SR 645. On July 12, 2018, DNP Wilson saw Pham for headaches and recommended occipital nerve blocks. SR 628. On August 15, 2018, Pham saw Dr. Viola for headaches. SR 636. On August 21, 2018, Pham saw PA Bastian who recommended continued treatment. SR 711-15. On August 27, 2018, Pham saw Dr. Garrison Whitaker who noted numbness and tingling in her right arm since her surgery. SR 758-61. Dr. Whitaker's assessment was cervical radiculopathy and right-side ulnar nerve distribution involvement. SR 761.

On August 30, 2018, Dr. Ryan Noonan assessed a cervical only 8% permanent partial whole person impairment rating. SR 1771. Smithfield then neglected to make the payment on the PPD payment of $14,804.52 without explanation, interest, or penalty until March 1, 2019, *i.e.* six months after Dr. Noonan's Impairment Rating. SR 1807.

On October 2, 2018, Pham saw Dr. Ripperda who noted Pham had persistent right arm numbness and tingling, right shoulder pain, and right-sided neck pain despite surgical intervention. SR 824. Dr. Ripperda referred Pham to Dr. Emran Sheikh for evaluation of possible thoracic outlet syndrome. SR 823, 1783. On October 3, 2018, Pham saw DNP Wilson for headaches secondary to cervical component and chronic neck pain. SR 641. On October 3, 2018, Pham had a repeat brain MRI. SR 1878. On November 14, 2018, Pham saw Dr. Sheikh who noted Pham "sustained injury at work October 2015" and Pham underwent C5-C6 fusion resulting in increased discomfort and paresthesia. SR 764. Dr. Sheikh's assessment was right thoracic outlet syndrome and

cubital carpal tunnel syndrome and recommended a right scalenectomy followed by right endoscopic cubital and carpal tunnel release. SR 765-66.

D. Despite accepting the claim, Smithfield stopped paying any medical benefits after February 2019 for Pham's neck, right shoulder, and right arm without medical evidence or written denial.

On February 20, 2019, Smithfield made its last payment of any medical bill related to paying PPD. SR 1803-1806. Medical bills for Pham's right shoulder, right arm, and neck occurring after August 30, 2018, were thereafter submitted to health insurance.

On April 30, 2019, Pham saw Dr. Ripperda who noted Pham's symptoms were worse with work and activity and improve when not working. SR 829. Dr. Ripperda assessed Pham as having thoracic outlet syndrome of right thoracic outlet, cervical disc herniation, status post cervical discectomy, status post cervical spinal fusion, and migraine. SR 828. Dr. Ripperda recommended starting Pham on Cymbalta. *Id.* On June 11, 2019, Pham saw Dr. Ripperda who recommended Pham start Savella instead of Cymbalta and a repeat cervical MRI. SR 833. On June 24, 2019, Pham had a repeat cervical spine MRI. SR 718. On July 9, 2019, Pham saw PA Bastian who referred her to an Avera specialist for right ulnar nerve decompression at the level of the elbow and thoracic outlet decompression. SR 716-19. On September 26, 2019, Pham saw Dr. Asfahani for right shoulder and right elbow pain with right-hand numbness following her surgery for her worker's compensation injury. SR 721. Dr. Asfahani referred Pham to Dr. Liddell for evaluation and to Dr. Timothy Mets for pain management and possible stimulator trial and implant. SR 722.

On October 22, 2019, Pham saw Dr. Michael Langston for her right shoulder, right upper trap, and neck pain. SR 751-58. He noted Pham had severe right medial elbow pain radiating into her third, fourth and fifth fingers. SR 754. His assessment was ulnar neuropathy at elbow of right upper extremity. SR 757. On December 10, 2019, Pham saw Dr. Liddell who found she had a clear elbow flexion compression test with significant numbness and tingling going into the pinky and ring finger of her right hand. SR 748. He noted Pham's symptoms started shortly after her workers' compensation fusion surgery. *Id.* Dr. Liddell assessed Pham as having right elbow cubital tunnel syndrome and recommended right elbow subcutaneous ulnar nerve transposition. SR 750. On January 24, 2020, Pham underwent a right elbow ulnar nerve decompression and subcutaneous transposition to repair her right elbow ligament/tendon/nerve. SR 1270-76.

On February 26, 2020, Pham saw Dr. Metz for right-sided neck pain. SR 1363-64. Dr. Metz found rigid right cervical paraspinous musculature, assessed cervical paraspinous myofascial pain involving the splenius and trapezius, and performed trigger point injections. SR 1363. On March 6, 2020, Pham saw Dr. Langston for a postoperative appointment following the right ulnar nerve decompression surgery. SR 776-79. Pham's numbness and tingling in her hand was improved but she continued to suffer from right arm radiculitis pain. SR 778. On March 9, 2020, Pham saw Dr. Michael Pudenz for chronic right-sided neck pain and received trigger point injections. SR 1388. On May 21, 2020, Pham saw Dr. Liddell who noted continued right elbow and neck pain. SR 780-83. On June 12, 2020, Pham saw Dr. Metz who noted Pham continued to suffer from persistent right-sided neck and shoulder pain and performed

right-sided trigger point injections. SR 1422. On June 23, 2020, Pham saw Dr. Metz who performed a cervical epidural steroid injection. SR 1445-46.

On July 17, 2020, Pham filed a Petition with the South Dakota Department of Labor specifically for the injuries alleged herein.

On August 20, 2020, Pham saw Dr. Langston for right arm and elbow pain. SR 784-89. Pham had a positive Spurlings test, indicating nerve root compression. SR 788. He referred Pham back to Dr. Ripperda. SR 789. On October 5, 2020, Pham saw Dr. Knutson who opined that Pham's chronic neck pain was "likely contributing to her daily headaches." SR 570. On October 29, 2020, Pham saw Dr. Viola who performed a right trigger point injection and occipital nerve block and recommended Botox injections. SR 647, 651. On November 25, 2020, Pham saw Dr. Ripperda who prescribed Voltaren Gel for her elbow and Lyrica for her neck and shoulder pain and ordered a repeat EMG. SR 837. On December 18, 2020, Pham saw Dr. Ripperda for her right shoulder. SR 842-47. The EMG results suggested remote C6 nerve root irritation. SR 844. These EMG results are objective and cannot be faked. SR 1798. On December 31, 2020, Pham saw Dr. Viola who performed Botox injections. SR 653-55.

On January 26, 2021, Pham saw Dr. Ripperda for right cervical radiculopathy. SR 848-52. Dr. Ripperda noted Pham tried a variety of conservative treatments yet continued to suffer from headaches secondary to neck pain and right upper extremity pain—giving consideration to the implantation of a spinal cord stimulator. *Id.* On February 9, 2021, Pham saw Dr. Pudenz for the possibility of a spinal cord stimulator implant. SR 1475-76. On March 1, 2021, Pham had a trial placement of a spinal cord stimulator. SR 1489-91. Pham did not receive lasting relief from this procedure. SR

1509. On March 5, 2021, Dr. Pudenz decided not to implant a permanent device. SR 1509. On March 25, 2021, Pham saw Dr. Viola and received Botox injections for chronic migraines. SR 656-58. On April 30, 2021, Pham saw Dr. Viola for chronic migraines associated with right neck and radicular pain. SR 659.

On November 16, 2021, Dr. Ripperda provided an Impairment Rating for Pham. SR 853-59. He evaluated Pham as having a 9% Impairment of Whole Person (IOWP) for right cervical radiculopathy. SR 853. For the right shoulder adhesive capsulitis, he provided a 7% IOWP. *Id.* Thus, a final impairment rating of 15%. SR 854.

On January 15, 2022, Smithfield hired Dr. Jensen for a record review. SR 1870-1888. He opined none of Pham's injuries were work related. SR 1885. This was the first time Smithfield had any medical opinion in support of its current position.

On February 2, 2022, Dr. Ripperda answered a causation letter opining Pham's working conditions were a major contributing factor for Pham's right shoulder, right elbow, right hand, and right neck pain. SR 1773-77. Dr. Ripperda opined Pham's "migraines are secondary to her cervical radiculopathy / persistent muscle spasms." SR 1776. Smithfield claims this is the first time Pham obtained a supportive medical opinion connecting her injury to her work activities. *See* Appellant Brief, 9. However, Dr. Ripperda made his causation opinion in December 2016 and documented it in the medical records when he was actively treating Pham. SR 819. Dr. Asfahani made similar conclusions about Pham's injury and her working conditions. SR 677. Importantly, Smithfield accepted those injuries and treatment as compensable.

STANDARD OF REVIEW

On reviewing an appeal of administrative agency ruling under SDCL chapter 1-26, the Supreme Court and circuit courts apply the same standard of review. *Hughes v. Dakota Mill & Grain, Inc.*, 2021 SD 31, ¶ 12, 959 N.W.2d 903, 907. The South Dakota Supreme Court has further explained:

> Actions of the agency are judged by the clearly erroneous standard when the issue is a question of fact. Actions of the agency are fully reviewable when the issue is a question of law. Jurisdictional issues are questions of law and are reviewed de novo. Finally, we review statutory questions de novo, as they are questions of law."

Knapp v. Hamm & Phillips Service Co., Inc., 2012 S.D. 82, ¶ 11, 824 N.W.2d 785, 788 (citations omitted. However, "when 'an agency makes factual determinations on the basis of documentary evidence, such as depositions' or medical records," the review is de novo. *McQuay v. Fischer Furniture*, 2011 S.D. 91, ¶ 10, 808 N.W.2d 107, 110 (quoting *Darling v. W. River Masonry, Inc.*, 2010 S.D. 4, ¶ 10, 777 N.W.2d 363, 366).

ARGUMENT AND ANALYSIS

I. Pham did raise the issue of Smithfield having the burden of proof before the Department.

Appellant claims that the Circuit Court's decision should be vacated because it raised and decided an issue not raised by either party. Specifically, Appellant claims that the Circuit Court *sue sponte* interposed its own legal theory that Smithfield had the burden of proof. This is not true. Rather, the record reflects Pham made this argument not only to the Circuit Court but also at the Department level. Pham's post-hearing brief to the Department discusses how Smithfield—after accepting a claim—had the burden to show treatment for her work-related injury was either unreasonable, unsuitable, or improper pursuant to SDCL 62-4-1 and *Hanson v. Penrod Construction Co.*, 425 N.W.2d

396 (SD 1988). SR 1943. This was also in the initial brief to the Circuit Court. SR2 24. At a hearing before the Circuit Court, Pham's counsel made this argument:

> Mr. King: Right. Right. And then once you accept a claim, *the employer and insurer has the burden* of showing that the treatment you know isn't necessary, is unsuitable.

See SR2 165 (emphasis added). The Circuit Court's decision incorporated this argument and statute. SR2 655.

Smithfield initially accepted and paid for Pham's injury for over three years and then started denying payment for Pham's treatment without a written denial. It was Smithfield's burden to show these contributing medical treatments with the same medical providers were not necessary, suitable, or proper for Pham's long-accepted work-related injuries. *See Hanson*, 425 N.W.2d at 399. The Circuit Court did not advocate for Pham or impose its own legal theory. It merely agreed with Pham that it was Smithfield's burden as it was an accepted claim without a written denial or identified medical evidence supporting a denial.

II. The Circuit Court properly determined that Pham met her burden and that the burden shifted when Smithfield denied benefits on an accepted claim.

"In a workers' compensation proceeding, the claimant bears the burden of proving the facts 'necessary to qualify for compensation by a preponderance of the evidence.'" *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 20, 984 N.W.2d 127, 134 (quoting *Darling*, 2010 S.D. 4, ¶ 11, 777 N.W.2d at 367). "The claimant must establish that his work-related injury is a major contributing cause of his current claimed condition and need for treatment." *Id.* (citing *Vollmer v. Wal-Mart Store, Inc.*, 2007 S.D. 25, ¶ 14, 729 N.W.2d 377, 382-83. "The claimant does not have to prove the work injury was *the* major contributing cause." *Arneson v. GR Management*, 2024 S.D. 61, ¶ 16, 13 N.W.3d 206,

213 (emphasis in original) (citing *Brown v. Douglas Sch. Dist.*, 2002 S.D. 92, ¶ 23, 650 N.W.2d 264, 271. "A claimant is not required to prove that his or her work activities are at least 50% attributable to his or her condition in order to show that those activities were a major contributing cause of the condition." *Hughes*, 2021 S.D. 31, ¶ 20, 959 N.W.2d at 909. "A claimant also does not need to show that there was a single cause of injury." *Id.* "Accordingly, a claimant is 'not required to prove that his employment was the proximate, direct, or sole cause of his injury.'" *Id.* (quoting *Smith v. Stan Houston Equip. Co.*, 2013 S.D. 65, ¶ 16, 836 N.W.2d 647, 652). "An employee need only prove his work-related injury is 'a' major contributing cause of his current claimed condition." *Darling*, 2010 S.D. 4, ¶ 11, 777 N.W.2d at 367 (citing *Brown*, 2002 SD 92, ¶ 23, 650 NW2d at 271).

A. Pham met her initial burden proving her work injury was a major contributing cause of her condition and need for treatment.

Pham was injured at work. Pham sustained cumulative injuries to her neck, right shoulder, and right arm. Smithfield-approved doctors noted her injuries were a result of her working conditions in the medical records and in their opinions. Smithfield accepted the cumulative neck, right shoulder, and right arm claim as compensable. Dr. Asfahani reviewed Smithfield's DVD of Pham's job and opined it would cause neck tension. Dr. Ripperda specifically noted in the medical records that Pham's working conditions were a major contributing cause of her injuries and need for treatment. Smithfield paid medical benefits for over three years, paid TTD, and PPD. Smithfield agreed that Pham's cumulative work injury was a major contributing factor to her condition and need for treatment.

As articulated by this Court, the intent of SDCL § 62-1-1(7) "is not to place a continuous burden on a claimant once he or she proves a compensable injury." *Hayes v. Rosenbaum Signs & Outdoor Advert., Inc.*, 2014 S.D. 64, ¶ 28, 853 N.W.2d 878, 886. However, that is what Smithfield wanted Pham to do. Smithfield wants employers to be able to arbitrarily stop paying for medical benefits on previously accepted claims without obtaining medical evidence in support of their decision. Smithfield believes claimants should continuously bear the burden to prove their medical treatment is compensable despite years of receiving benefits. Employers should be required to have medical evidence or opinion that a claimant's current condition and need for medical treatment was not related to the work injury after accepting a claim.

B. The Circuit Court properly determined that Smithfield had the burden to show that Pham had a change in condition under SDCL § 62-7-33.

Once an employee has satisfied its initial burden of proof when the claim is accepted, a payment under workers' compensation can only be "ended, diminished, increased, or awarded" by either party if, after a review, the "department finds that a change in the condition of the employee warrants such action." SDCL § 62-7-33. In a petition governed by SDCL § 62-7-33, "[t]he party asserting a change in condition bears the burden of proving it." *Kasuske v. Farwell, Ozmun, Kirk* & Co., 2006 S.D. 14, ¶ 11, 710 N.W.2d 451, 455 (citing *Sopko v. C & R Transfer* Co., *Inc.*, 1998 S.D. 8, ¶ 12, 575 N.W.2d 225, 230. Thus, if "employer subsequently feels claimant's condition no longer '*remains* a major contributing cause of the disability, impairment, or need for treatment[,]' SDCL 62-l-1(7)(b), the employer may assert a change-of-condition challenge under SDCL 62-7-33 where it bears the burden of proof." *Hayes*, 2014 S.D. 64, ¶ 29, 853 N.W.2d at 886 (emphasis in original). Accordingly, upon notice of

coverage and selection of a physician, "[o]nce 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.*" *Hanson*, 425 N.W.2d at 399 (emphasis added). "It is in the doctor's province to determine what is necessary, or suitable and proper." *Id.* "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.*" *Id.* (emphasis added. "SDCL 62-7-33 provides the method for a party to assert [that] change in condition." *Hayes*, 2014 S.D. 64, ¶ 29, 853 N.W.2d at 886.

The Circuit Court properly held that Smithfield accepted a compensable work-injury claim for Pham's headaches and pain in her neck, right shoulder, and right arm. Smithfield never showed how Dr. Ripperda's and other authorized providers' care was unnecessary, unsuitable, or improper. Rather, it simply—and arbitrarily—stopped paying benefits over three years later. Because Smithfield accepted the claim, the Circuit Court agreed the proper way for Smithfield to terminate coverage would be by requesting a review from the Department, pursuant to SDCL § 62-7-33. Instead of petitioning the Department of Labor and requesting Smithfield no longer be responsible for Pham's medical care because of a change in condition, Smithfield shifted those medical bills to health insurance without notice of any kind to Pham and certainly without written denial of benefits pursuant to SDCL § 62-7-35.

C. Appellant's argument on statutory construction is unfounded.

i. SDCL § 62-7-33 contemplates changing "any payment" of workers' compensation benefits, not just final awards.

Appellant claims SDCL § 62-7-33 applies to changing "final awards" by the Department, not "payments" paid by workers' compensation insurers. However,

Appellant artificially reads in the phrase "final award" into SDCL § 62-7-33. Rather, the statute specifically states, "*Any payment*, including medical. . . and disability payments . . ., made or to be made under this title may be reviewed by the Department of Labor and Regulation . . . ." SDCL 62-7-33 (emphasis added). Obviously, a "final award" is included as a subcategory of "any payment," but "any payment," as contemplated by SDCL § 62-7-33, is not exclusively "final awards."

Appellant cites various cases arguing SDCL § 62-7-33 only applies to final awards. However, these citations only support SDCL § 62-7-33 is the means to change a final award, *see e.g. Johnson v. UPS*, 2020 S.D. 39, ¶ 40, 946 N.W.2d 1, 12, or that it provides the statutory exception to the finality rule. *See e.g. Sopko*, 1998 S.D. 8, ¶ 11, 575 N.W.2d at 230. Appellant's citations do not contradict the plain language of SDCL § 62-7-33 contemplates the broader category of "any payment," including "medical" payments, as stated in the statute. Moreover, "[w]orker's compensation statutes are liberally construed in favor of injured employees." *Welch v. Auto. Co.*, 528 N.W.2d 406, 409 (S.D. 1995) (citing *Mills v. Spink Elec. Co-op.*, 442 N.W.2d 243, 246 (S.D. 1989)).

ii. The Circuit Court interpretation of SDCL § 62-7-33 can be read consistently with other statutes.

Appellant claims this interpretation of SDCL § 62-7-33 cannot be read in conformity with other statutes under the workers' compensation title. Appellant specifically identifies SDCL §§ 62-7-35.1, 62-7-35, and 62-7-12 as potential statutes that would not be in conformity with said interpretation.

SDCL § 62-7-35 requires claimants to bring a petition for hearing within two years of an employer's written denial of benefits. However, in this case, Smithfield denied benefits without providing any notice, much less in writing. Regardless, this

statute can be read in conformity with SDCL § 62-7-33. If an employer believes its injured employee was not injured at work, did not give timely notice, was injured as a result of willful misconduct, etc., then it can issue a written denial requiring a petition to be filed in two years. If an employer makes payments to an injured worker and obtains medical evidence or opinion of a change in condition, then the employer files a petition under SDCL § 62-7-33. If an employer makes payments to an injured worker and obtains medical evidence or opinion that the work injury was not the major contributing factor to the claimant's symptoms and need for treatment, then the employer can similarly issue a written denial, requiring the injured worker to file a petition within two years. In this case, however, Smithfield did not have any basis to stop paying benefits on a previously accepted claim until 2022, *i.e.* four years after it stopped medical benefits. Smithfield's current problem would have been resolved if it simply had Dr. Jensen's opinion and sent a written denial at the time it wanted to stop payments. It, however, did not do so.

SDCL § 62-7-35.1 provides a three-year statute of limitations from the date of the last payment of benefits for injured workers to bring a petition for a hearing for additional benefits with the Department. Again, this statute can be read in conformity with SDCL § 62-7-33. If an employer pays out everything it believes it owes an injured worker, and the injured worker believes they are entitled to additional payment—*e.g.* rehabilitation, additional PPD, PTD, or future medical benefits—then the injured worker would have to bring a petition within three years of the last payment. This is consistent with the facts in *Thurman*, 2010 S.D. 46, as cited by Appellant. Alternatively, and as occurred in this case, if an employer, like Smithfield, improperly stops paying medical benefits, then the injured worker still has three years to file a petition for their owed benefits.

SDCL § 62-7-12 simply states if an agreement between the employer and injured employee cannot be reached, then it is set for hearing. Again, this statute can be read in conformity with SDCL § 62-7-33, as that is what occurred in this case. All three statutes can be read in conformity with SDCL § 62-7-33 requiring employers to petition the Department on an accepted claim if they believe there is a change in condition.

iii. *The Circuit Court interpretation is consistent with public policy.*

Appellant's case citations do not support its position that the Circuit Court's decision goes against public policy. In *Tiensvold v. Universal Transp.*, the Department found an injured worker was permanently and totally disabled. 464 N.W.2d 820, 822 (S.D. 1991). This Court affirmed the circuit court's reversal as they found the Department's findings of fact clearly erroneous. *Id.*, at 825. On notice of review, this Court held that there must be repayment of the overpayment of TTD benefits made in good faith if the claimant was issued an award of additional benefits. *Id. Tiensvold* does not stand the broad proposition as Appellant claims. *Tiensvold* would be more applicable if the Department found Pham was owed medical benefits but was overpaid TTD, causing an award for medical benefits offset by the overpayment.

In *Martz v. Hills Materials*, the claimant suffered a work injury in 2000 from one employer and another work injury in 2002 with a second employer in the same area of his body. 2014 S.D. 83, ¶¶ 2-3, 857 N.W.2d 413, 415. The second employer paid benefits but obtained an IME in 2005 opining the major contributing cause of the claimant's pain and need for treatment was the 2000 injury. *Id*, ¶ 5. Based on that opinion, the second employer denied further benefits. *Id.* These facts are the inverse of this present case as Smithfield denied benefits *four years before* it obtained a medical opinion claiming

Pham's working conditions were not a major contributing cause to her injuries and need for treatment. Unlike in *Martz*, Smithfield failed to obtain "sufficient medical evidence . . . to justify a denial." *See id.*, ¶ 21. Consistent with *Martz*, Smithfield would not be estopped from a later denial of a previously accepted claim. In such case, however, Smithfield would need to have a basis to issue denial at the time the decision was made—not retroactively four years later as it claimed in prior briefing. SR2 101.

Employers would still have a right to challenge claims when new medical evidence becomes available and petition the Department for a change in condition pursuant to SDCL § 62-7-33, based on evidence. The problem for Smithfield is it did not have medical evidence saying that there was a change in condition for Pham's neck, right shoulder, and right arm pain when it shifted medical bills from workers' compensation to health insurance. Rather, the medical records from her treating providers—*i.e.* Dr. Ripperda—opined they were a major contributing cause. Had Smithfield obtained contrary medical evidence, then the medical evidence would have been referenced in a written denial and/or referenced in a petition for a change in condition. However, it did not. Had Smithfield obtained Dr. Jensen's opinion in March 2018, then Smithfield would not be in this present situation.

III. The Circuit Court properly determined that the Department's findings on causation were clearly erroneous.

"A claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty." *Darling*, 2010 S.D. 4, ¶ 12, 777 N.W.2d at 367 (citing *Brady Mem'l Home v. Hantke*, 1999 SD 77, ¶ 16, 597 NW2d 677, 681). "Causation must be established to a reasonable degree of medical probability, not just possibility." *Id.* (citing *Truck Ins. Exch. v. CNA*, 2001 SD 46, ¶ 19, 624 NW2d 705,

709. "The evidence must not be speculative, but must be 'precise and well supported.'" *Id.* (citing *Vollmer*, 2007 SD 25, ¶ 14, 729 NW2d at 382. "The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition "because the field is one in which laypersons ordinarily are unqualified to express an opinion.'" *Id.* (quoting *Vollmer*, 2007 SD 25, ¶ 14, 729 NW2d at 382.

The Department made only two general findings on causation: (1) Dr. Jensen reviewed Pham's pre-October 2015 medical records so Dr. Ripperda's opinion was not well-supported (SR 2075, ¶¶ 12-15); and, (2) Dr. Jensen's analysis on the 2016 MRIs was significant. SR 2075, ¶ 16. That ended the Department's analysis on causation. SR 2075, ¶ 17. On review, the Circuit Court held the Department's "decision to accept the opinion of the independent medical examiner following a post-denial paper review over that of the treating physician who has overseen all of the patient's care and treatment at issue in the particular case is clearly erroneous." SR2 664. The Department's failure to recognize South Dakota law as cited by Pham (SR 2000), and failure to give Dr. Ripperda's opinion substantially more weight, was further compounded by the Department providing two clearly erroneous reasons.

A. The Department's adoption of Smithfield's record-reviewing physician over Pham's treating physician was clearly erroneous.

Dr. Ripperda testified Pham's cumulative work injury was a major contributing cause of her condition and need for treatment. Smithfield retained Dr. Jensen to perform a review of Pham's medical records four years after it stopped paying medical benefits. The Department's findings regarding both doctors' testimony are reviewed for clear error. *See Maroney v. Aman*, 1997 S.D. 73, ¶ 6, 565 N.W.2d 70, 72. Dr. Ripperda's

written opinions and Pham's medical records from her other providers are reviewed de novo. The Circuit Court held the Department's finding that Dr. Jensen's opinion was more persuasive is clearly erroneous.

As noted by the Circuit Court, the Department failed to follow South Dakota law and to give substantially more weight to the opinion of Dr. Ripperda. SR2 662. South Dakota law is clear, "[t]he opinion of an examining physician should be given *substantial weight* when compared to the opinion of a doctor who only conducts a review of medical records." *Peterson v. Evangelical Lutheran Good Samaritan Soc'y*, 2012 S.D. 52, ¶ 23, 816 N.W.2d 843, 850 (emphasis added) (citing *Darling*, 2010 S.D. 4, ¶ 19, 777 N.W.2d at 369). The Circuit Court agreed Dr. Ripperda's opinion was supported by, and consistent with, the medical evidence and Pham's years of repetitive push and pull motions at work. SR2 662. Importantly, Dr. Ripperda did not merely treat Pham once or twice. Dr. Ripperda's treatment of Pham was extensively interwoven in all of Pham's treatment for her work injury. *Id.* Dr. Ripperda diagnosed Pham's injury as work-related *while* treating her symptoms. *Id.* Pham summarized Dr. Ripperda's involvement in her treatment history in an earlier brief and is incorporating it by reference. SR2 146-47. By contrast, Dr. Jensen never personally examined Pham and conducted his review four years after Smithfield stopped paying benefits. *Id.* The Department's failure to recognize and apply this legal principle was clearly erroneous.

In reviewing the Department's specific findings, the Circuit Court properly determined placing more reliance on Dr. Jensen's opinion was clearly erroneous. SR2 661. Dr. Jensen testified Pham's work did not expose her to any neck stressors. The Circuit Court noted this opinion conflicts with the medical records documenting a history

of repetitive push-pull motions and common sense. SR2 662. Both Drs. Ripperda and Asfahani—treating physicians—agreed Pham's work duties provided neck and shoulder stressors after either reading the job description (SR 818) or watching the same DVD as Dr. Jensen. SR 677. The Circuit Court noted Dr. Jensen never examined Pham, compared with Dr. Ripperda who had been treating her the entire time. SR2 652, 662.

B. The prior medical records in question support Dr. Ripperda's opinion that Pham sustained a cumulative work injury.

The primary reason the Department found Dr. Jensen persuasive was because he looked at Pham's prior medical records. SR 2075, ¶¶ 12-14. This reasoning was clearly erroneous when looking at those prior records. This is especially important because Dr. Jensen's opinion ignores Smithfield's own assessment of a cumulative injury from repetitive use over time. SR 1603, 1832; SR2 662.

Dr. Jensen opined Pham's conditions pre-existed her date of injury so her working conditions were not a major contributing cause of her injuries. Dr. Jensen can cite to only one record (a March 4, 2014, appointment with Dr. Michael Stotz) in support of his conclusion that Pham "has a history of Neck and R shoulder pain that predates her claimed DOI on October 14, 2015." SR 177. Relying on this opinion was clearly erroneous. First, this was a record from an "annual exam," not specifically for her neck and shoulder. SR 1871. Second, the record reflects "tightness" and "discomfort"—not pain. Third, the record supports the conclusion that Pham's symptoms were related to her repetitive work activities as part of a cumulative injury.

> HISTORY OF PRESENT ILLNESS: Jody is a 42-year-old female who comes in with a few concerns today. . . . The second concern is that she has some right neck and shoulder *discomfort*. She *works at John Morrell and repetitively uses her right upper extremity*. Occasionally, she gets some *tightness*, which seems to be more in the trapezius muscle.

SR 456) (emphasis added). As noted by the Circuit Court during the hearing:

> It just doesn't support that it was work related exclusively on October 14th of 2015, but to me if you, you're talking about a *repetitive injury case*, and she went to the doctor a year or two before complaining of the same problems. *To me, that supports work-relatedness*, and Dr. Jensen and Judge Faw said that that opposes work-relatedness, and that it basically undermined the credibility of Dr. Ripperda to when he didn't specifically address that.

SR2 204) (emphasis added). Furthermore, the Circuit Court reasoned although the symptoms occurred before October 14, 2015, they still occurred "while she was employed by Smithfield in the same job that she has had ... for the past 14 years" and do "not contra-indicate causation in this cumulative trauma case." SR2 663. Dr. Ripperda testified reviewing prior medical records would be unnecessary in his evaluation of Pham as she developed worsening discs between MRI while doing work activities, confirming her work activities were the major contributing cause of her injury and need for treatment. SR 1790. Based on the opinion of a treating physician, the Circuit Court held:

> The [Department's] claim that Dr. Jensen had a more complete knowledge of Pham's prior medical history regarding the treatment of her shoulder or headaches than Dr. Ripperda is weak and clearly insufficient to overcome the deference the trier of fact must afford him as the examining physician.

SR2 663. Thus, the Department's first reasoning is clearly erroneous.

C. The Department failed to give substantial weight to Dr. Ripperda's opinion on the 2016 MRIs.

The Department's second and last justification was finding Dr. Jensen's analysis between the two MRIs as "significant," claiming the injury occurred after October 2015. SR 2075, ¶¶ 15-16. Dr. Jensen opined Pham's disc herniation happened after the work-related injury of October 14, 2015. He described the C5/C6 injury from the January 2016 MRI as "basically a disc bulge, without any nerve impingement." SR 1884. He then described the injury from the December 2016 MRI as the "disc had herniated, and was

now causing compression of the C6 nerve." *Id.* Again, Dr. Jensen ignores Pham's injury was cumulative, meaning it would worsen over time as she continued to work. SR2 662. By contrast, Dr. Ripperda explained why the December 2016 MRI *confirmed* a work-related injury. Pham "developed a worsening disk protrusion that, from the initial MRI to the follow-up MRI while she was still doing some work activities". SR 1790. Pham's "symptoms were classic for that type of a problem." *Id.* "The MRIs were confirmatory for our suspected location or source of symptoms." *Id.*

> [I]t was confirmatory that that disk was slowly getting bigger and it probably *didn't matter* whether she was performing a lot of repetitive work activity *at that point in time, the mechanism had been initiated and would likely get a little bit worse over time*, whether she was doing a lot of repetitive activity at that point.

SR 1792 (emphasis added). Dr. Ripperda explained how Pham did not sustain a new, non-work injury, rather the difference between a bulge (January 2016 MRI) and a herniation (December 2016 MRI) is a matter of degree of how much disc is seen. SR 1790.

D. Dr. Jensen failed to provide a medically justified alternative mechanism of injury.

The Circuit Court concluded Dr. Jensen does not have any plausible alternative hypothesis for Pham's condition and he ignores her work wear and tear. SR2 662. Dr. Jensen's explanations of injury are not based on medical evidence. For instance, Dr. Jensen believed one potential origin of Pham's neck pain was muscular. However, as Dr. Ripperda testified, this opinion "doesn't explain the – abnormal EMG. . . . [Pham had] two findings that you see from prior nerve trauma or irritation. . . . [S]he has a very objective reproducible finding on her EMG postsurgery that suggests there was nerve root involvement." SR 1797-98. *See also* SR 844. "[E]vidence concerning any injury

shall be given greater weight if supported by objective medical findings." SDCL 62-1-15. Dr. Ripperda explained how, "Once you injure that nerve root, it may or may not completely recover and can give you persistent radicular symptoms." SR 1798; SR2 661.

Dr. Jensen also presented an "explanation" that Pham's symptoms were psychosomatic. SR 1885. Although he proffered this opinion, Dr. Jensen is not a psychiatrist and cannot diagnose Pham as having psychosomatic issues. SR 253. More importantly, Dr. Ripperda saw no "evidence of that throughout [his] treatment of her" over the course of several years. SR 1796.

Dr. Jensen's opinion was made with important information withheld by Smithfield. Dr. Jensen was unaware Drs. Elkins and Noonan were paid by Smithfield under workers' compensation. SR 251. Dr. Jensen was never given Pham's employee file establishing she had not missed time as a result of a shoulder injury or headaches prior to October 14, 2015. SR 254. Dr. Jensen did not consult with Dr. Asfahani regarding Pham's conditions or need for treatment before reaching his opinion. SR 252.

E. Dr. Ripperda's testimony establishes Pham's cumulative work injury was a major contributing cause to her condition and need for treatment.

Dr. Ripperda is board certified in both physical medicine and rehabilitation and pain medicine. SR 1780. Dr. Ripperda's expertise as a physiatrist is more persuasive than an orthopedic surgeon, such as Dr. Jensen. Dr. Ripperda explained how an orthopedic surgeon's "focus is primarily on correcting the underlying problem, but not necessarily looking at … [the] causation [of] injury where part of [his] training in physical medicine and rehabilitation [is] looking at occupational activities as well as mechanisms of . . . injury and their subsequent causes." SR 1792, *see also* 1796. The Circuit Court agreed. SR2 663-64.

Dr. Ripperda's opinion was based on his experience and his actual examination and treatment of Pham for years. SR 1781; SR2 662-63. He formed his opinion during his treatment of Pham, not after the fact. SR 819; SR2 662. Not only did Dr. Ripperda review Pham's job description while coming up with his opinions, but he also has extensive experience specifically treating Smithfield workers. SR 1791. Dr. Ripperda opined the December MRI confirmed her repetitive work activity was a major contributing cause for her neck, shoulder, and arm pain. SR 1790 SR2 660-61. Dr. Ripperda explained how the mechanism of injury from repetitive activity creates compressive force to cause herniations. *Id.*; SR2 660. Dr. Ripperda opined her injury is permanent. SR 1789; SR2 660. Dr. Ripperda opined the first surgery was not successful because "follow-up nerve conductions showed that [Pham] still had residual effects of the C-6 nerve root" and her pain complaints were the same before and after the surgery. SR 1792.

Dr. Ripperda opined Pham's headaches stemmed from her cervical radiculopathy, caused by her work injury. SR 1788. He opined "nerve irritation and surgery, persistent muscular pain and muscular spasms were the causative factor[s]" for Pham's headaches. SR 1789. Dr. Ripperda rejected that his causation opinion would change based on prior headaches. SR 1793. Dr. Ripperda explained how his opinion would only change "depending on how frequently she's getting treatment . . . and what types of interventions she had had up to the point of her work-related injury." SR 1793. "If she had a visit and her headaches were very well controlled and was not on any medications for migraine headaches, then it would not change my opinion." *Id.*; SR2 661.

The only prior records that Dr. Jensen and Appellant can identify as to pre-injury headaches are records in January 2011 (SR 511-13) and August 2014 (SR 446). This is far from a "lengthy history" of preinjury headaches as Appellant argues. Appellant Brief, 10. In the January 6, 2011, appointment, Pham rated her parietal headaches as 2-3 out of 10 and had not taken any over the counter pain relievers. SR 511. The headaches only lasted one month. *Id.* Pham was only prescribed Naprosyn for 14 days and Prednisone for four days; however, she did not tolerate the Prednisone and did not take the Naprosyn. SR 512. On August 18, 2014, *i.e.* over three-and-a-half years later, Pham reported frontal—not parietal—headaches for only three weeks. SR 446. Pham was prescribed Imitrex. SR 449. Moreover, considering this latter appointment was less than two months from her date of injury, the Circuit Court's reasoning that this kind of record supports a cumulative injury also applies. SR2 204; 663.

Analysis of pre- vs post- date of injury treatment confirms Dr. Ripperda's causation opinion on Pham's headaches. Pham sought treatment for headaches twice pre-injury. Comparing this to her post-injury visits, Pham complained of headaches and/or sought treatment at least 17 times on October 14, 2015 (SR 730), December 8, 2015 (SR 736), December 10, 2015 (SR 73), December 30, 2015 (SR 742), January 4, 2016 (SR 425), January 27, 2016 (SR 1707-09), March 13, 2016 (SR 623), March 20, 2016 (SR 1200), July 12, 2016 (SR 628), August 15. 2016 (SR 636), October 3, 2018, (SR 641), October 5, 2018 (SR 570), October 29, 2018 (SR 647), December 31, 2020 (SR 653-55), January 26, 2021 (SR 848-52), March 25, 2021 (SR 656-58), and April 30, 2021 (SR 659). Pre-injury, Pham took over the counter pain medication and was prescribed Prednisone, Norsyn, and Imitrix, most of which she did not take. Comparing

this to her post-injury treatment, Pham was prescribed Amitriptyline (SR 1709) which was increased in dosage (SR 623), Gabapentin (SR 628), Carisoprodol (SR 429), had two brain MRIs (SR 1200, 1878), recommended to neurology (SR 428, 574), given trigger point injections and occipital nerve block (SR 651), and given two sets of Botox injections. SR 653, 656.

As for ulnar neuropathy, Dr. Ripperda defined the ulnar nerve as going around the inside of the elbow and into the fingers. SR 1785. Dr. Ripperda explained how the C5-C6 area impacts nerve distribution into the elbow and into the thumb. SR 1790. He explained how Pham's work activity put her at risk for developing ulnar nerve issues. SR 1789; SR2 660. Dr. Ripperda ultimately opined Pham's right elbow issues would be "ulnar nerve entrapment, which was related to her work injury." SR 1788.

As for thoracic outlet syndrome, Dr. Ripperda described this syndrome as persistent muscular spasms and pain, causing entrapment of the nerve bundle between different muscles in the neck and chest, creating numbness and tingling. SR 1783. Dr. Ripperda noted Pham's symptoms were consistent with this diagnosis. SR 1787. These symptoms mimic those of ulnar nerve symptoms as well. SR 1795. Dr. Ripperda noted Roos maneuvers are a diagnostic tool in evaluating this syndrome. *Id.* Pham had positive Roos tests on October 2 and November 14, 2018. SR 174, 1784, 1878. Despite positive tests, Dr. Jensen did not believe Pham had this injury.

As for right shoulder adhesive capsulitis, Dr. Ripperda opined this injury was "secondary to the radiculopathy that was related to the work injury." SR 1789. He explained how shoulder trauma, surgery, and limited shoulder movement are causative factors. SR 1795. It is also more common in women and those older than 40, like Pham.

Id. Dr. Ripperda explained how Pham's guarded arm movement with her cervical radicular symptoms, particularly after surgery from her work injury, caused Pham to develop adhesive capsulitis. *Id.*

The Circuit Court was correct in concluding the Department's claim that Dr. Jensen had a more complete knowledge of Pham's medical history than Dr. Ripperda "is weak and clearly insufficient to overcome the deference the trier of fact must afford him as the examining physician." SR2 663. *See Peterson*, 2012 S.D. 52, ¶ 23 (citing *Darling* 2010 S.D. 4, ¶ 19). The Department's unsupported disregard for Dr. Ripperda's opinion is contrary to South Dakota law and constitutes clear error.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Pham respectfully requests the Circuit Court's decision be affirmed in full. The Department's decision was clearly erroneous by adopting the testimony of a record reviewing expert over a treating physician for ill-supported reasons. The Circuit Court was correct when it held that Smithfield had the burden of proof in asserting a change in condition when Pham's claim was accepted, paid out for years, and Smithfield had no medical evidence or opinion supporting a denial.

Pham respectfully requests oral argument in this matter.

Dated this 31st day of January 2025.

/s/ David J. King
David J. King
Brendan (Bo) F. Pons
King Law Firm, PC
101 N. Phillips Ave, Ste. 602
Sioux Falls, SD 57104
david@davidkinglawfirm.com
bo@davidkinglawfirm.com
Attorneys for Claimant/Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2). said brief containing 9,659 words, Times New Roman Font, 12 point, and 49,741 characters (no spaces).

Dated this 31st day of January 2025.

/s/ David J. King
David J. King

CERTIFICATE OF SERVICE

I, David J. King, do hereby certify that I am a member of King Law Firm, P.C., and that on the 31st day of January 2025, the foregoing on:

Laura K. Hensley
Kristin N. Derenge
BOYCE LAW FIRM, L.L.P.
300 S. Main Avenue/P.O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424
lkhensley@boycelaw.com
knderenge@boycelaw.com
Attorneys for Employer and Insurer/Appellant

via Odyssey File & Serve.

/s/ David J. King
David J. King

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30859

SMITHFIELD FOODS, SIOUX FALLS, Employer/Self-Insurer and Appellant,
v.
JODY PHAM, Claimant and Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Douglas Hoffman

BOYCE LAW FIRM, LLP
Laura K. Hensley
Kristin N. Derenge
300 South Main Avenue, Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424
lkhensley@boycelaw.com
knderenge@boycelaw.com
Attorneys for Appellant

KING LAW FIRM, P.C.
David J. King
101 N. Phillips Ave. Ste 602
Sioux Falls, SD 57104
(605) 332-4000
David@davidkinglaw.com
Attorneys for Appellee

NOTICE OF APPEAL FILED October 2, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

ARGUMENT AND ANALYSIS

I. Claimant did not raise the issue of whether SDCL § 62-7-33 put the burden of proof on Smithfield before the Department or the Circuit Court, and the Circuit Court addressed this issue *sua sponte*.[1]

In light of the Circuit Court's opinion that SDCL § 62-7-33 placed the burden on Smithfield to prove Claimant was not entitled to benefits, Claimant argues she raised this issue to the Department and the Circuit Court. (Appellee Brief ("*AB*") at 14–15). Not so. Claimant never argued SDCL § 62-7-33 shifted the burden to Smithfield nor otherwise relieved Claimant of her burden of proof. Claimant made a different argument before the Department and Circuit Court based on another statute and legal theory, arguing Smithfield failed to "meet [its] burden to show treatment for [Claimant's] work-related injury was either unreasonable, unsuitable, or improper pursuant to SDCL § 62-4-1. (AB 14–25 (citing *Hanson v. Penrod Const. Co.*, 425 N.W.2d 396 (SD 1988)). This argument did not implicate or reference SDCL § 62-7-33 in any way. (*See* SR2 24–31, 165, SR 1943–46). The Circuit Court, nonetheless, held SDCL § 62-7-33 shifted the burden to Smithfield. (SR2 654–56).

Before the Department and Circuit Court, Claimant argued Smithfield had the burden of showing her course of treatment was improper based on SDCL § 62-4-1 and *Hanson*. (SR2 24–31, 165; SR 1943–46). However, Smithfield has no burden to show Claimant's recommended treatment is improper because (1) Smithfield does not argue

[1] For the Court's convenience, this Brief use the same defined terms and abbreviations as Appellant's Brief. Further, this Brief shall cite to the Administrative Record File 30859.01 as "SR" followed by the corresponding page number and Administrative Record File 30859.R02 as "SR2" followed by the corresponding page number.

Claimant's treatment is improper and (2) Claimant did not establish a compensable injury.

In *Hanson*, a claimant suffered an injury to his back after a fall at work. *Hanson v. Penrod Const. Co.*, 425 N.W.2d 396, 397 (SD 1988). The Department found the injury was compensable and ordered employer pay for chiropractic treatments and a nuclear magnetic resonance test for treatment of the compensable injury. *Id.* On appeal, the circuit court affirmed. *Id.* The employer then appealed to the South Dakota Supreme Court, challenging the Department's finding claimant had established entitlement to benefits. *Id.* The employer also challenged the Department's order that employer pay for chiropractic treatment and nuclear magnetic resonance testing, arguing the ordered treatment "were not necessary or suitable and proper medical services." *Id.*

The Supreme Court affirmed the claimant had shown entitlement to benefits under SDCL § 62-1-1. *Id.* at 398. It further held, under SDCL § 62-4-1, once a claimant has established a compensable injury, an 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." *Id.* at 399. If an employer disagrees with the treatment rendered or recommended for a compensable claim, then "it is for the employer to show that the treatment was not necessary or suitable and proper." *Id.*; *see also Engel v. Prostrollo Motors*, 2003 S.D. 2, ¶¶ 31–35, 656 N.W.2d 299, 304 (applying the same burden to employers opposing treatment as "not necessary or suitable or proper" for a compensable injury); *Streeter v. Canton Sch. Dist.*, 2004 S.D. 30, ¶¶ 25–28, 677 N.W.2d 221, 226–27 (same).

Relying on *Hansen*, Claimant argued to the Department and Circuit Court that Smithfield could not refuse to pay for Claimant's treatment. (*See* SR2 24–31, 165; SR 1943–46). The are two errors in this argument. First, Smithfield does not argue Claimant's recommended treatment is unnecessary or improper, so it has no burden to disprove anything.[2] Secondly and more crucially, *Hansen* is inapplicable because Claimant has not established a compensable injury. Smithfield stopped paying benefits years after Claimant reported her Work Injury on October 14, 2015. (SR 1755–58). Claimant then filed her petition, prompting the parties to engage in discovery and obtain expert opinions. (SR2 49). Dr. Jensen then provided a report dated January 15, 2022, confirming Claimant's various conditions were not work related. (SR 246–49, 1883–87). Dr. Ripperda did not issue a causation report in this matter until February 2, 2022 – after the report from Dr. Jensen and after Claimant's deposition was taken. (SR 860-64). After a hearing before the Department and examination of witnesses, the Department agreed Claimant had not met her burden to establish Work Injury was a major contributing cause of her current condition. (SR 2012–18). Until a compensable condition is established, and Smithfield raises objections to Claimant's recommended course of treatment, *Hansen* is not applicable. Moreover, Claimant cannot bootstrap her argument concerning *Hansen* to claim she raised the issue of whether SDCL § 62-7-33 required Smithfield to continue to pay Claimant's workers' compensation benefits in perpetuity until Smithfield proved a change in condition. The Circuit Court *sua sponte* raised this issue and in doing so

[2] Smithfield has been paying for all of Claimant's medical treatment under its self-insured health insurance program. Smithfield's argument is about causation, not reasonableness and necessity of treatment.

violated its role as a neutral decision-maker. *See State v. Mulligan*, 2007 S.D. 67, ¶ 25, 736 N.W.2d 808, 818.

Further, Claimant's argument is inconsistent in its application, highlighting Claimant did not make the argument asserted by the Circuit Court *sua sponte*. Claimant argues if Smithfield "had Dr. Jensen's opinion and sent a written denial at the time it wanted to stop payments" Smithfield's current problem would be resolved. (AB 20). This argument is not consistent with the argument asserted by the Circuit Court, and establishes Claimant *agrees* Smithfield did not need to file a petition pursuant to SDCL § 62-7-33 in order to stop paying benefits, as it appears Claimant only takes issue with the timing of the opinion from Dr. Jensen, which Claimant wrongly assumes was the first time Smithfield could deny responsibility for payment of benefits. This argument ignores the lack of medical support sufficient to establish the work activities were a major contributing cause of Claimant's condition(s) and need for treatment at the time the treatment was being received.

II. Claimant did not unilaterally establish entitlement to benefits because she suffered a work injury or because Smithfield initially accepted compensability of her claim.

Claimant criticizes Smithfield for allegedly unilaterally determining Claimant was not entitled to benefits and ceasing its voluntary payments of benefits to her. (*See* AB 16–17). Claimant then argues she unilaterally established entitlement to benefits because she suffered a work injury and Smithfield initially accepted compensability for that injury. (*Id.*). Claimant states that "[e]mployers should be required to have medical evidence or opinion a claimant's current condition and need for medical treatment was not related to the work injury after accepting a claim." (*Id.* at 17). Claimant argues her working

conditions caused "cumulative trauma" that caused her medical conditions and selectively cites some of her medical records in support. (*Id.* at 16–18).

However, South Dakota workers' compensation statutes simply do not allow claimants to unilaterally prove a compensable injury. "Sustaining a work-related injury does not automatically establish entitlement to benefits for the claimed condition; instead, the claimant must prove that the work-related injury is *a* major contributing cause of his claimed condition and need for treatment." *Arneson v. GR Mgmt., LLC*, 2024 S.D. 61, ¶ 16, 13 N.W.3d 206, 213. Rather, whether a claimant's working conditions or work injury is a major contributing cause is that claimant's condition is determined by an order of the Department, either entered pursuant to a settlement or petition for hearing. *See* SDCL § 62-7-5, SDCL § 62-7-12; *Hammonds v. Hartford Fire Ins. Co.*, 501 F.3d 991, 993 n.2 (8th Cir. 2007) (citing *Sopko v. C & R Transfer Co., Inc.*, 575 N.W.2d 225, 229 (SD 1998) (stating settlement agreements accepted by the Department "have the same force and effect as if the award was actually adjudicated")).

While South Dakota workers' compensation statutes put the burden on claimants to show entitlement to benefits, it permits employers to unilaterally accept compensability of a claims and voluntarily pay workers' compensation benefits without an order of the Department. *See Tiensvold v. Universal Transp., Inc.*, 464 N.W.2d 820, 825 (SD 1991); *see* SDCL § 62-7-35.1. There is good reason to do so. This Court has recognized that permitting employers to voluntarily pay claims facilitates cost effective and efficient resolution of claims and therefore is in the interest of injured employees. *Tiensvold*, 464 N.W.2d at 825; *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 21, 857 N.W.2d 413, 418–19. If this Court were to accept Claimant's argument and hold Claimant could

unilaterally establish her conditions were compensable, South Dakota's entire workers' compensation statutory scheme would be upended.

A. SDCL § 62-7-33 only applies to final awards of benefits – either entered pursuant to a settlement accepted by the Department or findings of the Department.

Next, Claimant argues that SDCL § 62-7-33 applies to voluntary payments of workers' compensation benefits because SDCL § 62-7-33 states "[a]ny payment. . . made under this title may be reviewed by the Department." (AB 18–19 (quoting SDCL § 62-7-33)). Claimant argues "any payments" as stated in the statute includes "voluntary" payments of an employer. (*Id.*). In Claimant's view, if an employer makes ***any*** voluntary payments of benefits for a work injury, SDCL § 62-7-33 requires the employer then assume liability for payment of all benefits in perpetuity and assumes the burden of proving a change in condition before denying further payments. (*See* AB 18–19). Claimant then argues this expansive interpretation of SDCL § 62-7-33 can be read in conformity with South Dakota workers' compensation statutes. (*Id.* at 19–21).

This is not possible. As explained in Appellant's initial brief, Claimant's interpretation of SDCL § 62-7-33 is in direct contravention of SDCL § 62-7-35.1 and cannot be reconciled with it. SDCL § 62-7-35.1 states:

> *In any case in which any benefits have been tendered pursuant to this title* on account of an injury, *any claim for additional compensation shall be barred, unless the claimant files a written petition for hearing* pursuant to § 62-7-12 with the department within three years from the date of the last payment of benefits. *The provisions of this section do not apply to review and revision of payments or other benefits under § 62-7-33.*

(Emphasis added).

The above statute makes it clear that when an employer pays *any* benefits to claimant, a claimant is *not* entitled to additional compensation *unless* upon timely bringing a petition for hearing before the Department. This statute is unambiguous and puts the burden on claimants to show entitlement to benefits even when an employer makes a voluntary payment. This is in direct contravention of Claimant's argument that "any payment" of benefits in SDCL § 62-7-33 includes "voluntary payments" and thus SDCL § 62-7-33 eliminates the burden on claimants to prove a compensable condition whenever an employer initially makes payment for a condition. Further, SDCL § 62-7-35.1 makes clear a claimant's burden to show compensability—even in cases in which an employer has voluntary paid workers' compensation benefits—is separate from and does not invoke the "review and revision of payments or other benefits under § 62-7-33." SDCL § 62-7-35.1. In short, SDCL § 62-7-35.1 cannot be reconciled with Claimant's interpretation of SDCL § 62-7-33.

Likewise, SDCL § 62-7-35 places the burden on claimants to bring a petition for hearing to protect their "right to compensation" within two years of a written denial of benefits or their claim "shall be forever barred." SDCL § 62-7-35. Again, Claimant's expansive interpretation of SDCL § 62-7-33 contravenes this statute requiring claimants to preserve and enforce their right to benefits. Claimant's expansive reading of SDCL § 62-7-33 is also in direct contravention of decades of precedent in which this Court has affirmed South Dakota law places the burden on claimants to show a compensable injury. *Kuhle v. Lecy Chiropractic*, 2006 S.D. 16, ¶ 16, 711 N.W.2d 244, 247 ("Ultimately, the claimant retains the burden of proving all facts essential to compensation."); *Wise v.*

Brooks Const. Servs., 2006 S.D. 80, ¶ 16, 721 N.W.2d 461, 466 (same). Claimant's interpretation of SDCL § 62-7-33 must be rejected.

B. Claimant's interpretation of SDCL § 62-7-33 is inconsistent with public policy.

Claimant attempts to distinguish this Court's established precedent that, as a principle, it will not construe workers' compensation statutes to punish employers who voluntarily pay workers' compensation benefits. (AB 21–22). But that established principle is applicable here. This Court has repeatedly refused requests, such as Claimant's request, to interpret workers' compensation statutes to penalize employers who voluntarily pay benefits because it would disserve injured South Dakotans and hinder employers from paying claims promptly. *See Tiensvold*, 464 N.W.2d at 825; *Martz*, 2014 S.D. 83, ¶ 21, 857 N.W.2d at 418–19.

First, Claimant argues *Tiensvold* is not applicable because it involved a question of overpaid TTD benefits, not medical benefits. (AB 21). The type of benefits *Tiensvold* concerned is of no consequence to the principles expressed in that case. Here, Claimant asks the Court to do exactly what *Tiensvold* warned against and interpret SDCL § 62-7-33 to impose liability on Smithfield, and other employers, who voluntarily pay workers' compensation benefits. This Court has already stated that such an interpretation of any statute would be inconsistent with South Dakota public policy. *See Tiensvold*, 464 N.W.2d at 825.

Next, Claimant argues *Martz* is distinguishable because the employer in *Martz* obtained an IME supporting its denial of benefits before denying a claimant additional workers' compensation benefits. (AB 21). The Court in *Martz* never stated an employer needs a medical opinion that an injury is not compensable before denying a claim, so it

cannot be cited for this proposition. *See Martz*, 2014 S.D. 83, 857 N.W.2d 413. The *Martz* Court also expressly held voluntary payments of workers' compensation benefits do not bind an employer to continue to make such payments in perpetuity and holding as such would "adversely affect[]" employers obligations to pay claims promptly. *Martz*, 2014 SD 83, ¶ 21, 857 N.W.2d at 418–19. Therefore, this Court would need to abrogate *Martz* to agree with Claimant that Smithfield's voluntary payment to Claimant invoked SDCL § 62-7-33.

III. The Department's Decision was not clearly erroneous.

A. There was sufficient medical evidence to support the Department's Decision, so the Department's Decision should be affirmed.

Claimant argues the Department's finding that her working conditions were not a major contributing cause of her current conditions was clearly erroneous. (AB 22–23). In support, Claimant argues that two of the Department's stated reasons for its findings were clearly erroneous. (*Id.* at 22–27). Claimant also argues the Department erred by accepting Dr. Jensen's opinion over Dr. Ripperda's opinion because Dr. Ripperda was a treating physician and because Dr. Jensen's opinion was implausible. (*Id.* at 23–25, 27–28). Claimant further argues that the Department's decision was clearly erroneous because Claimant's medical records showed "cumulative trauma" from working caused her current conditions. (*Id.* at 25–32). After considering each argument in turn, the Department's Decision must be affirmed.

i. The Department's factual findings were not clearly erroneous.

First, the Department found both Dr. Ripperda and Dr. Jensen "are experts in their fields, but without knowing [Claimant's] history of treatment in these relevant areas, Dr. Ripperda's opinion is not well-supported." (SR 2075). Claimant states this was error. (AB

22–23). Second, the Department found that "Dr. Jensen's analysis of the herniation [in Claimant's cervical spine] forming between the January 2016 MRI and the December 2016 MRI particularly significant regarding whether the herniation is the result of work activity." (SR 2075). Claimant argues this was error because this testimony "ignores that [Claimant's] injury was cumulative, meaning it worsened over time as she continued to work." (AB 27).

Neither of the Department's findings here were unfounded or lacks a reasonable basis. This Court has stated that "[t]he value of the opinion of an expert witness is no better than the facts upon which they are based." *Schneider v. S. Dakota Dep't of Transp.*, 2001 S.D. 70, ¶ 16, 628 N.W.2d 725, 730. Here, Dr. Ripperda's opinions were not based on a complete review of Claimant's medical history. (SR 2017). Further, Dr. Ripperda did not issue any opinion on the matter until February 2, 2022 – after the opinion from Dr. Jensen and after Claimant's deposition was taken. (SR 860–64). Although Dr. Ripperda saw Claimant for treatment, Claimant had no medical opinion to support her claims of the causal connection between her reported conditions and the work activities until Dr. Ripperda issued his opinion. Dr. Asfahani placed Claimant at MMI on September 21, 2017, for the cervical fusion (SR 1683), and Dr. Liddell released her from care for her right shoulder on April 5, 2018. (SR 1581–83). She was given a rating by Dr. Noonan on August 30, 2018, and Dr. Noonan said he did not feel the right-sided finger weakness was related to the C-spine. (SR 284–90). Smithfield denied responsibility for the ongoing treatment thereafter because no treating doctor was causally connecting the need for the treatment to the work activities as required by law. Therefore, the Department soundly exercised its discretion in finding Dr. Ripperda's opinion wanting.

Secondly, the Department's acceptance of Dr. Jensen's testimony was appropriate because Dr. Jensen was well-qualified to provide an opinion on causality and his opinion was supported by the medical record. Dr. Jensen is an orthopedic surgeon who performs hundreds of surgeries a year to treat cervical issues, and his opinion that Claimant's cervical issues were a result of degenerative disease was based on his experience, was consistent with Claimant's MRIs, and was consistent with Claimant's medical history of cervical complaints over the years. (SR 244–49, 1867, 1883–87). There was no error in either of the Department's factual findings concerning causation.

ii. The Department did not "clearly err" by adopting Dr. Jensen's opinion over Dr. Ripperda's opinion.

Next, Claimant argues that South Dakota law required the Department to give more weight to Dr. Ripperda's opinion than Dr. Jensen's opinion. (AB 23–25). Claimant cites *Peterson v. Evangelical Lutheran Good Samaritan Society* in support, in which this Court stated that "[t]he opinion of an examining physician should be given substantial weight when compared to the opinion of a doctor who only conducts a review of medical records." (AB 24 (citing *Peterson*, 2012 S.D. 52, ¶ 23, 816 N.W.2d 843, 850)). But this is not so.

While the Court has cautioned that the opinions of treating doctors should be given "substantial weight,"[3] it has repeatedly affirmed that the Department, as a trier of fact, "is

[3] This Court has not defined what according "substantial weight" to a treating provider's testimony entails in *Peterson* or since *Peterson*. However, to the extent "substantial weight" requires the Department to carefully consider the testimony of the treating provider as it would for other evidence in a case, there is no evidence the Department failed to do so. The Department reviewed and considered all the testimony presented before it and made factual findings that it found Dr. Jensen's opinion persuasive. (*See* SR 2006–2018). The law does not require the Department to do more or bind the Department to accept Dr. Ripperda's testimony over Dr. Jensen's testimony merely because Dr.

free to accept all, part, or none of an expert's opinion." *Tischler v. United Parcel Serv.*, 1996 S.D. 98, ¶ 46, 552 N.W.2d 597, 605; *Wagaman v. Sioux Falls Const.*, 1998 S.D. 27, ¶ 18, 576 N.W.2d 237, 241 (same). In the face of contradictory testimony from experts, there is no requirement that the Department accept one expert's testimony over another merely because one expert is a treating provider. *See Tischler*, 1996 S.D. 98, ¶ 46, 552 N.W.2d at 605; *Wagaman*, 1998 S.D. 27, ¶ 18, 576 N.W.2d at 241. The Department did not err by accepting Dr. Jensen's opinion and rejecting Dr. Ripperda's opinion.

Claimant also argues that the Department erred by not giving "substantial weight" to Dr. Ripperda's testimony that the progression of Claimant's cervical disc bulge in her January 2016 MRI to a disc herniation in her December 2016 MRI showed that Claimant's cervical issues were a result of "cumulative" injury from repetitive movements at work. (*See* AB 26–27). However, Dr. Ripperda testified Claimant's disc herniation was the result of the Work Injury on October 14, 2015, and not "cumulative injury" from repetitive movements over time as Claimant now argues for the first time. (SR 1788, 1792). Secondly, as addressed above, the Department was free to accept Dr. Jensen's testimony over Dr. Ripperda's testimony in whole or part. Dr. Jensen's opinion that degenerative disc disease likely caused Claimant's cervical herniation in her December 2016 MRI was supported by the MRI imaging and Claimant's medical history of cervical complaints. (SR 245, 1884–85). There was no error.

iii. Dr. Jensen's opinions were plausible and supported by the medical record.

Next, Claimant argues Dr. Jensen's testimony is insufficient because his opinion

---

Ripperda was one of Claimant's treating providers. *See Tischler v. United Parcel Serv.*, 1996 S.D. 98, ¶ 46, 552 N.W.2d 597, 605.

on the cause of Claimant's conditions—particularly his opinion on the cause of Claimant's neck pain—were implausible. (AB 27–28). In support, Claimant cites Dr. Ripperda's testimony that Claimant had an abnormal EMG in January 2021 showing "chronic changes" in her C6 vertebra. (*See id.* (citing SR 1797–98); SR 848). Claimant states the "objective" findings of injury this January 2021 EMG were inconsistent with Dr. Jensen's opinion. (AB 27–28).

Not so. Claimant, as well as Dr. Ripperda, ignores evidence showing Claimant had years of normal EMGs until she had one abnormal EMG in 2021 as referenced by Dr. Ripperda, over six years after the Work Injury. (SR 470, 617, 635, 653, 754, 1577). This medical evidence is more consistent with Dr. Jensen's opinion that Claimant's neck pain was likely of a combination of a "progressive degeneration" in her cervical spine and myofascial or psychosomatic pain than Dr. Ripperda's opinion that the Work Injury caused Claimant's neck pain. (SR 245, 1883–85). Dr. Jensen's opinion that Claimant's neck pain was myofascial in origin was also consistent with three of her other treating providers, including Dr. Asfahani, who recorded for years that Claimant's neck pain was likely myofascial in origin as her EMG results were normal. (SR 285, 290, 294, 669, 870).

iv. The record does not show that Claimant's current conditions are a result of a "cumulative work injury."

Claimant next alleges that her medical records and Dr. Ripperda's opinion show her current conditions were caused by cumulative work trauma from repetitive arm movement. (AB 24–26, 28–32). In support, Claimant points to a note in her medical records documenting Claimant's self-reported symptoms and the Circuit Court's opinion that her conditions were a result of cumulative injury from repetitive arm movement. (*See id.*). There are two critical problems with this argument.

First, the question before this Court is not whether there is sufficient evidence to support Claimant's position, but whether there is sufficient evidence to support the Department's Decision. "[T]he question is not whether there is substantial evidence contrary to the [Department's] finding, but whether there is substantial evidence to support the [Department's] finding." *Tischler*, 1996 S.D. 98, ¶ 46, 552 N.W.2d at 605; *Bankston v. New Angus, LLC*, 2023 S.D. 27, ¶ 16, 992 N.W.2d 801, 806 (same). The Court only overturns the Department's factual findings if it is "left with a definite and firm conviction that a mistake has been made." *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 18, 984 N.W.2d 127, 133.

Under this analysis, the Department's findings should be sustained. As discussed at length in Appellant's initial brief, the Department's findings were all supported by the expert testimony of Dr. Jensen. (Appellant Brief 10–16). Dr. Jensen is a well-respected orthopedic surgeon with specialization in cervical injuries such as Claimant's cervical injury. (SR 224, 1780). Dr. Jensen's opinions were also consistent with her medical records. (Appellant Brief 10–16). In fact, Dr. Jensen agreed with many of Claimant's treating providers. (*Id.*). Smithfield relies on the medical record and its previous briefing to show there is substantial evidence to support the Department's findings and the Department did not clearly err. Claimant's disagreement with Dr. Jensen's opinions and the Department's factual findings do not demonstrate clear error.

Secondly, Claimant cannot meet her burden of showing that her current conditions are the result of cumulative work trauma because she did not present expert testimony in support of this theory. This Court is clear that "medical expert testimony is required to establish the causal connection" in workers' compensation proceedings

"where the relationship between the work and the injury is not clear" and is outside the knowledge of a layperson. *Hanten v. Palace Builders, Inc.*, 1997 S.D. 3, ¶ 18, 558 N.W.2d 76, 80. Claimant's current medical conditions and the cause of those conditions is in dispute and certainly outside the knowledge of a lay person. Therefore, Claimant requires expert testimony to show her working conditions are a major contributing cause of her current conditions. *See id.*

Claimant attempts to argue Dr. Ripperda's testimony provide support for her claim that "cumulative trauma" from repetitive arm movement caused her current conditions, but this argument misstates Dr. Ripperda's opinion. (AB 28–32). Dr. Ripperda first began treating Claimant in March 2016, approximately six months after the Work Injury on October 14, 2015. (SR 1790). Dr. Ripperda opined that the Work Injury on October 14, 2015, caused Claimant's cervical radiculopathy or irritation of her cervical nerve root. (SR 1788–89). He also stated Claimant's Work Injury on October 14, 2015, caused Claimant's ulnar nerve entrapment, for which she had surgery in 2017. (SR 1788–89). Then he opined, with minimal explanation, Claimant's right shoulder adhesive capsulitis and migraine headaches were secondary or developed "sequela" to Claimant cervical radiculopathy, which was caused by the Work Injury. (SR 1788–89).

In short, Dr. Ripperda did not opine that Claimant's current conditions were caused by cumulative trauma or injury from repetitive arm movement overtime as Claimant now argues. (SR 1788–89). Rather, he opined the Work Injury on October 14, 2015, was the mechanism of Claimant's cervical radiculopathy and elbow problems, which later caused her to develop her right shoulder adhesive capsulitis and neck issues. (SR 1788–89). Thus, Claimant cannot rely on Dr. Ripperda to argue she has presented the

necessary expert testimony to show her current conditions were the result of cumulative trauma from repetitive movements at work.

In sum, Dr. Ripperda did not review all Claimant's medical records. (SR 2094). Dr. Ripperda then testified by deposition and with minimal detail that all of Claimant's current conditions were connected to her initial Work Injury on October 14, 2015. (SR 1788–89). Dr. Jensen, after reviewing thousands of pages of Claimant's medical records, came to a different conclusions and conclusions consistent with many of Claimant's other treating providers. (SR 243). He then testified live before the Department to explain the basis for his opinions, while Dr. Ripperda did not. (SR 242). On this record, the Department did not err in accepting Dr. Jensen's testimony and finding Claimant had not met her burden to show her working conditions were a major contributing cause of her current need for treatment.

CONCLUSION

For the foregoing reasons, Smithfield respectfully requests that the Department's Decision be affirmed in full.

Dated this 3rd day of March 2025.

/s/ Laura K. Hensley
Laura K. Hensley
Kristin N. Derenge
BOYCE LAW FIRM, L.L.P.
300 S. Main Avenue/P.O. Box 5015
Sioux Falls, SD 57117-5015
lkhensley@boycelaw.com
knderenge@boycelaw.com
Attorneys for Employer/Appellee and Insurer/Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL § 15-26A-66(b)(2), said brief containing 4,626 words, Times New Roman Font, 12 point, and 24,825 characters (no spaces).

Dated this 3rd day of March 2025.

/s/ Laura K. Hensley
Laura K. Hensley

CERTIFICATE OF SERVICE

I, Laura K. Hensley, do hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 3rd day of March 2025, the foregoing on:

David King
King Law Firm, PC
101 N. Phillips Ave, Ste. 602
Sioux Falls, SD 57104
david@davidkinglawfirm.com

via Odyssey File & Serve.

/s/ Laura K. Hensley
Laura K Hensley