

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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Appeal No. 29900

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DESTINY SCHOON,

Appellee,

v.

NEWS AMERICA MARKETING, FARMINGTON CASUALTY COMPANY,

Appellants.

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Appeal from the Circuit Court  
Sixth Judicial Circuit  
Hughes County, South Dakota

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THE HONORABLE CHRISTINA KLINGER  
Circuit Court Judge

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**APPELLANTS' BRIEF**

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## **PRELIMINARY STATEMENT**

In this brief, the Appellant, News America Marketing and Farmington Casualty Company will be referred to collectively as “Employer and Insurer.” The Appellee, Destiny Schoon, will be referred to as “Claimant.” References to the Department of Labor will be made using “DLR.” The Hughes County Clerk of Courts’ record will be referred to by the initials “CR” and the corresponding page numbers. The Appendix to this brief will be referred to as “App.” followed by corresponding page number. References to the testimony during the September 23, 2020 hearing before the DLR will be made using (HT) followed by the page designation found in the hearing transcript. References to deposition testimony will be cited using the deponent’s name and the page number (i.e. “Nipper at \_\_\_\_”). References to medical records entered into evidence before the DLR will be cited using the Exhibit number or references directly to their location in the DLR record.

## **JURISDICTIONAL STATEMENT**

This is an appeal from the trial court’s Memorandum Decision and Order, which were filed on December 27, 2021. Notice of Entry was served on January 7, 2022. Employer and Insurer filed a Notice of Appeal on February 4, 2022. This Court may exercise jurisdiction pursuant to SDCL § 15-26A-3(1), because Employer and Insurer are appealing from a judgment.

## **STATEMENT OF THE ISSUES**

1. Whether the Circuit Court erred by affirming the DLR’s holding that Claimant’s work injury is and remains a major contributing cause of her impairment and need for treatment.

*Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425

- a. Whether the Circuit Court erred by finding Claimant suffered no symptoms between 2009 and 2015.

*Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425

*McQuay v. Fischer Furniture*, 2011 S.D. 91, 808 N.W.2d 107

- b. Whether the Circuit Court erred by failing to reverse the DLR's refusal to make a specific credibility determination as to Claimant.

*Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, 653 N.W.2d 247

*Kennedy v. Hubbard Milling Co.*, 465 N.W.2d 792 (S.D. 1991)

*Schneider v. S. Dakota Dep't of Transp.*, 2001 S.D. 70, 628 N.W.2d 725

2. Whether the Circuit Court erred by finding the opinions of Drs. Dietrich, Wilson, and Lawlor more persuasive than that of Dr. Nipper.

*Riccord v. John Burns Memorial Hospital*, 82 S.D. 68, 141 N.W. 2d 160

*Helms v. Lynn's, Inc.*, 1996 S.D. 8, 542 N.W.2d 769

*Jewett v. Real Tuff, Inc.*, 2011 S.D. 33, 800 N.W.2d 345

*McQuay v. Fischer Furniture*, 2011 S.D. 91, 808 N.W.2d 107

3. Whether the Circuit Court erred in affirming the DLR's failure to strike Dr. Dietrich's opinions for lack of foundation.

*Hughes v. Dakota Mill & Grain, Inc.*, 2021 S.D. 31, 959 N.W.2d 903

*State v. Guthrie*, 2001 S.D. 61, 627 N.W.2d 401

SDCL § 19-19-702

## **STATEMENT OF THE CASE**

Claimant filed a Petition for Hearing with the DLR on November 28, 2016. (CR 2-6.) Employer and Insurer filed a Joint Answer on January 20, 2017, denying that Claimant's May 2015 work injury is and remains a major contributing cause of her current neck injuries. (CR 14-25.) The DLR held a hearing on the merits on September

23, 2020, in Rapid City, South Dakota. Administrative Law Judge Michelle Faw issued a decision on January 26, 2021, (CR 1952-64), approving Claimant's request for benefits. Judge Faw issued Findings of Fact and Conclusions of Law along with an Order dated March 10, 2021. (CR 2029-50.) Notice of Entry of the same was filed by Claimant on March 18, 2021. (CR 2052-55.)

On March 22, 2021, Appellant filed a Notice of Appeal. (CR 2057-60.) On November 15, 2021, this matter came to hearing before the Honorable Christina Klinger. On December 27, 2021, Judge Klinger issued a Memorandum Opinion and Order, affirming ALJ Faw's decision, in full. (Appendices A and B.) On January 7, 2022, Claimant filed a Notice of Entry of the same. On February 4, 2022, Employer and Insurer filed a Notice of Appeal with this Court.

## **STATEMENT OF THE FACTS**

### **1. Claimant's Prior Injuries and Treatment History**

#### **a. November 2001 Motor Vehicle Accident**

Claimant was involved in a motor vehicle accident in November 2001. (HT 50:18-21.) On September 9, 2002, Claimant treated for the first time with Dr. Shannon DeBoer. (Ex. 20; CR 1237.) Claimant presented with "[c]onstant upper back pain into the neck and shoulders in in between shoulders." Claimant did not indicate "an exact date [of onset] but it has been for years now." (*Id.*)

Patient states that since a child she has had leg aches along with pain between her shoulder blades into the neck, traps progressively worsening since last week, happens on a daily basis...Complains of a stabbing and aching pain in the whole back depending on what she is doing worsens the pain...States that pain interferers with hobbies, sports and other similar leisure time activities. Social activity is hindered due to pain along with occupational responsibilities... Patient was involved in a motor vehicle accident November of 2001, rearended in McDonald's drive thru. Was not

hospitalized. Has had intermittent problems with neck, upper back, upper cervical pain since that time.

(*Id.*) “Treated with Dr. Runyan. He is the first chiropractor or physician to diagnosis [sic] her with whiplash.” (*Id.*) Following this first motor vehicle accident, Claimant continued to treat with Complete Chiropractic 86 times through April 2005. (CR 1229-1308.)

#### **b. August 2003 Motor Vehicle Accident**

Claimant was involved in another motor vehicle accident in August 2003. (Ex. 21; CR 1278.). On August 18, 2003, Claimant was treated by Dr. Shannon DeBoer where she noted:

Destiny presents today having been involved in another motor vehicle accident over the last week. Her chief complaint is going to be her neck, shoulders, pain primarily from bra line up across the shoulders into the middle base of the head. She states that the pain is currently rated at a 9 out of 10 into the neck and shoulders and also a 9 out of 10 in the mid back.

Diagnosis today is going to be aggravation of cervical complaint via motor vehicle accident. We've got a cervical segmental dysfunction with a mild to moderate cervical sprain aggravation from a previous injury that was becoming close to stabilized.

(Ex. 21; CR 1278) (emphasis added). In a follow-up appointment on August 21, 2003, Claimant complained that “[w]hen she would pick up plates and trays at work she could feel the muscles in her neck and upper back causing quite a bit of pain. She states that she is tight and stiff down the shoulders and arms but no numbness, tingling or burning sensation.” (*Id.*)

On February 10, 2004, Claimant treated with Break Through Health and filled out a patient form where she indicated she was presenting with complaints of constant neck

and shoulder pain resulting from her car accident in August of 2003. (CR 1316.)

Claimant also indicated that she has suffered from this before. (*Id.*)

**c. August 17, 2004 Slip and Fall**

On August 17, 2004, Claimant suffered a slip and fall at a concert in Sioux Falls, South Dakota. This slip and fall resulted in Claimant filing a lawsuit against the City of Sioux Falls, Clear Channel, and SMG in Minnehaha County, South Dakota (49CIV06-002628). (CR 674-78.) Claimant specifically alleged she “suffered serious and permanent personal injuries (as a result of Defendants’ actions) and other serious injuries, all of which caused her to experience great pain and suffering (past, present and future)....” (CR 676, at ¶ 10.) In support of her claims, Claimant submitted some of the same medical records that were made part of the record at the hearing in the present matter. In fact, the Court will notice Claimant’s personal injury lawsuit’s case caption is on several of her medical records. The jury found against Claimant. (CR 679.)

On March 25, 2005, Claimant treated with 2 Docs Chiropractic and complained of neck pain as a result of her prior motor vehicle accident and fall:

She stated she was under active care for injuries sustained in a motor vehicle accident and as a result of a fall. She states that the care accident caused her to have headaches, neck, upper and mid back pain, as well as low back pain and stiffness...The patient presents with a chief complaint if headaches, pain, spasm, soreness and of the upper mad, mid back and neck.

(CR 1513.) This treatment continued for some time as Claimant complained of “pain, spasm and soreness of the upper back, mid back and neck[]” and became increasingly worried that her prior injuries were not healing and would be permanent. (*See id.* at 1513-28.) In fact, Claimant treated with 2 Docs Chiropractic over 100 times between March 2005 and September 2007. (*Id.* at 1513-73.)

A letter from Dr. Michael Torsney, of 2 Docs Chiropractic, dated August 30, 2005, offered an expert opinion in Claimant's lawsuit regarding her slip and fall. (Ex. 22; CR 521-22.) Claimant was referred to 2 Docs Chiropractic on March 25, 2005 "for follow-up care of injuries sustained in an MVA (8-11-2003) and a fall (8-19-2004)." (*Id.*) Dr. Torsney diagnosed Claimant with, among other things, "[a]cute traumatic sprain/strain of the neck with associated pain and stiffness[]" and "[c]ervical, thoracic, lumbar, sacral and pelvic segmental dysfunction with associated muscle spasm, stiffness and pain." (*Id.*) Dr. Torsney opined:

These injuries were the combined result of both the MVA and the fall. It is my opinion that her spinal injuries were initially caused by the MVA. She sought chiropractic treatment and was progressing as expected. Her overall condition regressed markedly following the fall when she fractured her right wrist forearm. The fall caused an acute exacerbation of the preexisting accident injuries. An orthopedic surgeon in Sioux Falls, S.D, treated the fracture sustained to the right forearm.

(*Id.*) (emphasis added). In a follow up letter on December 11, 2008, Dr. Torsney, again offered an expert opinion in Claimant's personal injury lawsuit where he stated, in part, as follows:

1. The opinion stated in my 08-30-2005 letter has not changed.  
...
5. Ms. Schoon will have residuals from her accident injuries for the rest of her life or until some other treatment is discovered that will repair her injuries.
6. It is probable that Ms. Schoon's fibromyalgia was aggravated or worsened by the fall of August 7<sup>th</sup>, 2004. In my opinion, the fall resulted in the need for treatment is several ways....The fall also aggravated or exacerbated pre-existing dormant musculoskeletal conditions as well as sub-clinical accident injuries....

(CR 1574.)

On December 8, 2008, Claimant treated with Black Hills Orthopedic & Spine Center after “complaints of pain in her right shoulder.” (CR 1628.)

She states four years ago she fell down during a concert and broke her right wrist, and she was wondering if maybe this could be causing her shoulder pain because she fell on an outstretched arm. Patient states that the pain started in the shoulder approximately three years ago, but has been getting worse as time goes on.

Patient states that she does have neck problems because she was rear-ended two times within a year, and is wondering if this could be a problem.

She does state that her shoulder hurts very badly on one day and then the next day she will notice that she has tingling down into her arm.

(*Id.*) (emphasis added).

In a letter dated December 22, 2008, Claimant’s provider at Black Hills Health & Wellness Center, Dr. Shannon DeBoer, provided an expert opinion regarding her injuries relating to her slip and fall on August 17, 2004. (Ex. 23; CR 523-24.) This letter was offered in connection with Claimant’s lawsuit against the City of Sioux Falls and other third-parties in an attempt to establish not only damages, but the permanency of her medical conditions. Dr. DeBoer states:

My diagnosis at that time of her next visit (8/24/2004) with me was: Cervical Segmental Dysfunction with a moderate cervical sprain/strain, Thoracic segmental dysfunction with thoacalgia and continued with lumbar segmental dysfunction with lumbalgia. The fall did not change my diagnosis that she had been treating with me for but she was more acute and flared up at the time. Please note also on this date of service, the patients signature had been changed significantly due to her injuries.

As a result of her fall the condition of fibromyalgia was exacerbated. The fall would have been the precipitating factor. She had been working with the underlying fibromyalgia with some success prior to that incident. Fibromyalgia by nature makes it tougher for a patient to overcome a musculoskeletal injury in that there is a baseline of pain and tightness in the muscles and any significant increase in the forces that travel thru those



areas will increase the amount of pain experienced. This would be consistent with a force being transmitted from the distal extremity thru the arm and shoulder and up to the neck.

The extent of injury exacerbated with the fall would be confined to the cervical and thoracic sprain/strain injuries. She had progressed thru the prior couple of months with the main complaint becoming less and less about her neck and upper back areas. She had responded well to the care provided and we had worked down to the point of only one adjustment per every 1-2 weeks depending on how she had done. Post fall she really went back to primary complaint being neck and shoulder related.

Ms. Schoon has again sought my care for her injuries. Starting in March of 2008. She continues to have issues with relative areas. She continues to have troubles with the right shoulder/trapezius and cervical spine. She is also having some increase of radiating pain into the rest of her arm and wrist pain and numbness.

In my opinion the injuries that she has been dealing with will be permanent...although she was on a great course to resolution of her problems prior to the fall in question but since then she has never been the same.

(Ex. 23; CR 523-24) (emphasis added). As will be discussed more fully below,

Claimant's prior injuries did not heal and had lasting effects on her overall condition.

#### **d. Claimant's Treatment from 2010-2014.**

In 2010, Claimant lost her health insurance. (CR 1781). Thereafter, her ability to arrange treatment was significantly impacted. The record is replete with medical notes explaining Claimant's loss of insurance impacted her ability to seek and receive treatment between 2009 and 2015. Specifically, in October 2010, Claimant's treating physician at Rapid City Medical Center noted she had lost her job and "is going to lose her insurance...at the end of the month. She asked me to refill a lot of her prescriptions."

(CR 1781.) *See also* (CR 1805) (Rapid City Medical Center, February 22, 2011,

"Telephone call from the patient stating 'I was wondering if Dr. Stephens would refill my hydrocodone/APAP because I lost my insurance and I don't have a job.'"); (CR 534)

(Community Health Center of the Black Hills, March 26, 2012, “she lost her insurance coverage and was unable to pay for it on her own.”); (CR 530-31) (Community Health Center BH, March 22, 2013, “She did call Dr. Finley's office to schedule an apt to be seen for possible seizures, but was told she would have to pay \$400 up front as she no longer has insurance.”); (CR 1066) (Rapid City Medical Center, June 7, 2015, “She has health insurance again and would like to restart her nuvigil and tegretol.”).

With the lapse in her insurance coverage, Claimant was largely prevented from treating for her conditions. However, there medical records that show she did treat sporadically throughout 2010-2014. For example, there are several records from Black Hills Orthopedic & Spine Center where Claimant either treated for neck pain or refilled prescriptions for the same. *See, e.g.*, (CR 692) (January 9, 2009 – Assessed for neck stiffness, posterior shoulder discomfort, right arm pain and tingling into the hand.); (CR 1639) (January 16, 2009 – “The patient states she continues to have some achiness in her neck and into her arm.”); (CR 1642) (March 19, 2009 – “Patient calls requesting refill of Vicodin. She stated she is having increased neck pain due to physical therapy.”); (CR 1643) (April 17, 2009 – “Patient calls requesting refill of Vicodin.”); (1644) (May 14, 2009 – “Patient calls requesting a refill of her Norco.”); (CR 1649) (September 24, 2009 – Assessed for neck pain.); (CR 1651) (January 28, 2010 – “Patient calls in requesting a refill of her Norco.”); (CR 1697) (September 12, 2014 – “She states therapy has also flared up some neck pain and left radicular arm symptoms.”); (CR 1699) (September 12, 2014 – “Patient called in requesting a prescription for Flector patches....”).

## **2. Claimant's Prior Diagnoses**

### **a. Degenerative Disc Disease**

In addition to her prior injuries, Claimant was diagnosed with degenerative disc disease in 2001. (HT 50:10-13.) (*See also* Schoon Dep., at 15:2-17.) This disease has been noted in several of Claimant's medical records with The Rehab Doctors. (*See, e.g.*, CR 951-53 (Dr. Dietrich note from 8/5/16); CR 961-62 (Dr. Dietrich injection procedure note); CR 970 (Dr. Dietrich note from 12/30/16); CR 989-97 (Dr. Dietrich note from 7/16/19). Additionally, Claimant's expert witness, Dr. Dietrich, admitted her degenerative disc disease affected her susceptibility to injury:

- Q: Now, the fact that she had some degeneration at C5-6 prior to the 2015 injury, does that actually make her more susceptible to aggravating or injuring that area?
- A: Sure. Those disc bulges or protrusions are weak links. That area that was pushed out certainly is more susceptible to herniating out or pushing out with some of these lifting, straining, torqueing type activities.

(Dr. Dietrich Dep., at 27:9-17.) Dr. Dietrich also agrees this is a condition that is permanent and that "[a]s [Claimant] ages, there's going to be continued...progression of degeneration, absolutely. (*Id.* at 33:1-15.)

### **b. Fibromyalgia**

Claimant also suffers from fibromyalgia, which was described by Dr. DeBoer as:

Fibromyalgia by nature makes it tougher for a patient to overcome a musculoskeletal injury in that there is a baseline of pain and tightness in the muscles and any significant increase in the forces that travel thru those areas will increase the amount of pain experienced.

(Ex. 23; CR 523.) Consistent with Dr. DeBoer's conclusion that Claimant's prior fall exacerbated her fibromyalgia symptoms, Claimant testified at the hearing that "[w]hen the fibromyalgia is exacerbated, it makes your pain symptoms more severe than what

they would be for somebody without fibromyalgia.” (HT 60:2-4.) Claimant admitted that her “fibromyalgia never goes away.” (HT 59:13.)

### **3. May 7, 2015 Work Injury**

On May 18, 2015, Claimant treated with Black Hills Orthopedic & Spine Center. (Ex. 4; CR 466-67.)

Destiny Schoon comes in today with complaints of right shoulder pain. She has had problems on and off for many years since she had injured her right arm in 2006. She required ORIF of her wrist. She had issues with pain in the shoulder and neck at the same time. She states that on the 7th of this month she was working on putting a shelf up and was cranking on a screw and she felt like the screwdriver had gave and she had sharp pain into her right shoulder. She could hardly lift her arm for the next 24 hours. She tried using ice and anti-inflammatories, which has caused her to become more functional, but she continues to have pain in that shoulder.

(*Id.*) Claimant was assessed as suffering from a “[r]ight shoulder strain.” (*Id.*) Nowhere in this exam note is there a reference to a complaint of pain or pressure in Claimant’s neck.

Three months later, on August 20, 2015, Claimant treated with Dr. Brett Lawlor of The Rehab Doctors. (Ex. 6; CR 471-72.)

Ms. Schoon is a woman who I have treated in the past for similar problems. She was working on 05/15/15 doing some overhead type work in her second job that has to do with putting coupons up in store isles. She was using a screwdriver type device above shoulder height cranking on it and she felt a sudden pain in the front of her shoulder. She has had pain in this area ever since. She was evaluated at Black Hills Orthopedics and had x-rays taken. She was referred to physical therapy. She has been working with Myron Sorestad, PT, and Ian Kopriva, PT. She saw some significant benefit with Myron, but she has not seen benefit thus far with Ian who was treating her while Myron was gone. She has been having pain in the shoulder and pain in the interscapular region with intermittently some tingling down the left arm. She denies significant numbness down the right arm. She has had this in the past. I previously saw her in 2009. She had completely recovered from this and was having no difficulties until this most recent injury. Since that time, she has had fairly steady pain. She especially has pain with overhead activity with using the right arm. She

has less pain with rest. There is no specific thing she can do to make her pain go away

(Ex. 6; CR 471) (emphasis added). As the note indicates, the pain was in her shoulder and the “interscapular region,” not in her neck.

On August 20, 2015, Claimant filled out a medical report for The Rehab Doctors and indicated she was being seen for right shoulder pain which started May 7, 2015. (Ex. 24; CR 536-41.) Notably, she indicated that she had not had similar problems in the past, which contradicts her substantial prior medical history. Further, Claimant did not tell her doctors that she was or had been suffering from neck pain or pressure. (HT 64:20-65:7.)

### **STANDARD OF REVIEW**

The standard of review is well-settled. “Questions of law, of course, are fully reviewable.” *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, ¶ 6, 575 N.W.2d 225, 228. And “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. As to deposition testimony, this Court “will decide for [itself] the credibility of the deponents and the weight and value to be attached to their testimony.” *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 357 (S.D.1992).

### **ARGUMENT**

- 1. The Circuit Court erred by affirming the DLR’s holding that Claimant’s work injury is and remains a major contributing cause of her impairment and need for treatment.**

In affirming the DLR’s decision, the Circuit Court held that “Schoon proved by a preponderance of the evidence that her May 7, 2015, work-related injury was and remains a major contributing cause of her condition, need for treatment, and

impairment.” (App. A, at 14.) However, essential to the Circuit Court and DLR’s decisions was *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425, which each tribunal distinguished on the erroneous assumption that Claimant suffered no symptoms from 2009 to 2015. Furthermore, the Circuit Court failed to reverse the DLR on its refusal to make a credibility determination after Claimant materially altered her testimony at the hearing. These rulings constitute reversible error.

In a worker’s compensation proceeding, “the claimant has the burden of proving all facts essential to compensation and if [s]he fails to meet such burden of proof the [DLR] has the duty to deny compensation.” *Kraft v. Kolberg Mfg. Co.*, 215 N.W.2d 844, 846 (S.D. 1974); *see also Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶ 20, 653 N.W.2d 247, 252 (“[Claimant] has the burden of proving all facts essential to sustain an award of compensation.”). This “proof need not arise to a degree of absolute certainty, but the award may not be based upon mere possibility or speculative evidence.” *Schneider v. South Dakota Dept. of Transp.*, 2001 S.D. 70, ¶ 13, 628 N.W.2d 725, 729. The rule that workers’ compensation acts must be liberally construed “applies only to the law and not to the evidence offered to support a claim.” *Egemo v. Flores*, 470 N.W.2d 817, 824 (S.D. 1991).

The definition of “injury” under South Dakota workers’ compensation statutes is limited to an “injury arising out of and in the course of employment, and does not include a disease in any form except as it results from the injury.” SDCL § 62-1-1(7)(b). Furthermore, “[a]n injury is compensable only if it is established by medical evidence, subject to the following conditions: (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[.] *Id.*

This causation standard was recently analyzed by this Court in *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425. In *Armstrong*, the claimant injured his left knee while working for his employer. *Id.* ¶ 1, 938 N.W.2d at 426. Armstrong’s initial treatment was paid by his employer and its worker’s compensation insurer, but liability for claimant’s total knee replacement surgery and post-operative treatment was denied. *Id.* However, Armstrong also suffered two injuries to his left knee prior to his work-related injury with Longview. *Id.* ¶ 3, 938 N.W.2d at 426-27. During Armstrong’s arthroscopic surgery to repair his left knee following his second injury, severe osteoarthritis was discovered and the option for a total knee replacement was discussed; however, Armstrong wanted to forestall surgery. *Id.* ¶ 4, 938 N.W.2d at 427. Following Armstrong’s arthroscopic surgery and prior to the work-related injury at issue on appeal, several medical providers commented on his worsening left knee condition. *Id.* ¶ 5.

After Armstrong injured his left knee while employed at Longview, an MRI revealed “severe tricompartmental osteoarthritis, extensive degeneration and tearing of the lateral meniscus, chronic ACL tear and...degeneration of the medial meniscus” and no major acute injuries. *Id.* ¶ 7. With respect to available treatment, Armstrong was offered conservative treatment or total knee replacement and he chose total knee replacement. *Id.* Longview’s worker’s compensation insurer subsequently advised him that his work injury was not a “major contributing cause” of his left knee condition and

that it was, instead, caused to a chronic, pre-existing condition. *Id.* ¶ 8, 938 N.W.2d at 428. After a hearing before the DLR, it found:

[t]he weight of the evidence establishes that Claimant's pain and immobility were primarily due to years of severe and degenerative osteoarthritis.” The Department acknowledged that Armstrong's March 31 injury “did contribute to his disability” but determined it “was not a major contributing cause.” Therefore, the Department concluded that Armstrong had not established by a preponderance of the evidence that his work-related injury was either a major contributing cause or independently contributed to his need for knee replacement surgery.

*Id.* ¶ 13, 938 N.W.2d at 429.

On appeal, this Court focused on the causation requirements outlined under SDCL § 62-1-7(b). “Under the causation standard set out in SDCL 62-1-1(7)(b), ‘[t]he question is whether th[e] work-related injury remained a major contributing cause....’” *Armstrong*, 2020 S.D. 1, ¶ 23, 938 N.W.2d 425, 431 (quoting *Jewett*, 2011 S.D. 33, ¶ 22, 800 N.W.2d at 350). “[P]roof of causation ‘must be established to a reasonable degree of medical probability, not just possibility.’” *Id.* This Court has described the standard for Claimant to meet under SDCL § 62-1-1(7)(b) an “onerous task of showing her occupational duties were a major contributing cause to her impairment or need for treatment.” *Byrum v. Dakota Wellness Found.*, 2002 S.D. 141, ¶ 15, 654 N.W.2d 215, 219.

Ultimately, the *Armstrong* Court held “[t]he fact that the March 31 injury may have been the unfortunate tipping point of Armstrong's knee symptoms does not mean that it displaced the degenerative effects of his preexisting condition.” *Id.* ¶ 24, 938 N.W.2d at 431. “[W]e have previously rejected a similar argument that relegated the causation standard of SDCL 62-1-1(7)(b) to an elementary cause-in-fact determination.” *Id.* ¶ 26, 938 N.W.2d at 431 (citing *Jewett*, 2011 S.D. 33, ¶ 24, 800 N.W.2d at 351).



“Though the medical evidence could broadly establish that Armstrong's employment was a but-for cause of his knee replacement surgery, Dr. Adler's opinions do not attribute Armstrong's need for the surgery to anything other than his pre-existing osteoarthritis.” *Id.* ¶ 28, 938 N.W.2d at 432. *See also Grauel v. S.D. Sch. of Mines & Tech.*, 2000 S.D. 145, ¶ 21, 619 N.W.2d 260, 265-66 (holding claimant's medical evidence insufficient to establish causation amid contrary evidence that remaining symptoms after arthroscopic surgery were due to preexisting degenerative arthritis).

In this case, Claimant's treating providers and Claimant herself, like those in *Armstrong*, continually noted Claimant's degenerative condition and related her symptoms back to her prior motor vehicle accidents and slip and fall. *See, e.g.* Ex. 4; CR 466 (“She has had problems on and off for many years since she had injured her right arm in 2006.”); CR 1481 (“She is a 22-year-old woman who reports that she has had ‘pain ever since she was 4 years old.’”); Ex. 20; CR 1237 (“Patient states that since a child she has had leg aches along with pain between her shoulder blades into the neck, traps progressively worsening since last week, happens on a daily basis.”); CR 1636 (“Patient states that she does have a history of whiplash and has had problems with lack of curve in her neck for years.”); CR 1628 (“Patient states that she does have neck problems because she was rear-ended two times within a year, and is wondering if this could be a problem.”); Ex. 23; CR 524 (“In my opinion the injuries that she has been dealing with will be permanent...although she was on a great course to resolution of her problems prior to the fall in question but since then she has never been the same.”); CR 1574 (“Ms. Schoon will have residuals from her accident injuries for the rest of her life or until some other treatment is discovered that will repair her injuries.”).

A de novo review of the records shows that these pre-existing injuries, and not the May 7, 2015 shoulder strain, are the cause of Claimant's current cervical condition. Dr. Nipper specifically concluded "[t]he evolution of a C5-6 disc herniation has been ongoing and predates the event of May 7, 2015." (Ex. 14, at pg. 9; CR 505.) This conclusion is based, in part, on Claimant's diagnosis of degenerative disc disease and prior injuries. As in *Armstrong*, even if Claimant can show her employment was a but-for cause of her current condition, she failed to show that her need for neck surgery was due to her work injury and not a result of her significant prior medical complications.

However, the Circuit Court found Claimant's injury compensable and erred by making assumptions regarding Claimant's symptoms from 2009 to 2015 and failing to reverse the DLR's refusal to make a credibility determination as to Claimant's material change in testimony.

**a. The Circuit Court erred by finding Claimant suffered no symptoms between 2009 and 2015.**

Critical to the DLR and Circuit Court's decision to award benefits to Claimant was the period of 2009 to 2015. A de novo review of the record on appeal does not support either tribunal's finding that Claimant suffered no symptoms between 2009 and 2015.

In distinguishing *Armstrong*, the DLR held, "The records show that while Schoon does have a history of injury, degenerative disc disease, and pain in her neck and shoulder, she did not seek treatment for these issues from 2009 until the May 7, 2015 work injury." (CR at 1961; 2044, at ¶ 95.) (emphasis added). *See also* (CR at 1962 ("In contrast, there is no record of Schoon requiring treatment in the years leading up to her injury.")).

Dr. Nipper opined that it was not plausible for her to have no symptoms during that time period, and she must have merely refrained from seeking treatment. Employer/Insurer assert that Schoon did not seek treatment, because she did not have health care. However, the Department must look to the evidence before it, and there is no medical evidence or testimony that indicates that Schoon suffered symptoms between 2009 and 2015. The Department does not have evidence to support the conclusion that this was merely due to Schoon's lack of health insurance.

(CR at 1961; 2044 at ¶¶ 96-99.) (emphasis added). The DLR concluded that it cannot make assumptions based upon the facts, but then made assumptions. There is a vital distinction between not seeking treatment and not suffering from symptoms. Similarly, the Circuit Court concluded that “[t]here is no evidence that [Claimant] would not seek treatment for upper back, neck, and shoulder pain.” (App. A, at 11.) The DLR and Circuit Court’s conclusions are logically flawed and inconsistent with the evidence.

First, the DLR and Circuit Court have downplayed and completely disregarded the importance of Claimant’s admission that she suffered from “flare ups” within that time period and used medication:

- Q: So can you explain to Judge Faw how your pain and symptoms changed after those injections in 2009?
- A: I was very lucky, the injections worked very well for me. It really calmed everything down and the pain was pretty much nonexistent other than an occasional flare-up.
- Q: And if you -- when you finished treating with -- let me go back. Was that the last time you treated with Dr. Lawlor?
- A: With the -- those injections, I believe so, yeah.
- Q: Okay. Did you still have a prescription for those Flector patches when you completed your treatment and had those injections?
- A: Yes.
- Q: So if you did have a flare in the following, you know, five, six years, what would you do?
- A: I would chop up my pain patch, the Flector patch, and stick it on the areas that are irritating.

(HT 23:6-24.) The DLR acknowledged these flare ups in its Findings of Fact, (CR 2031, at ¶ 27), but did not factor it into the *Armstrong* analysis. Similarly, the Circuit Court held “[t]here was no evidence presented by Employer that Schoon experienced severe pain but failed to seek treatment.” (App. A., at 11.) However, these flare ups are evidence of continued upper back, neck, and shoulder pain. Since she lost health insurance in October 2010, Claimant cut up her available Flector patches. This is direct evidence that she had symptoms and required pain medication between 2009 and 2015. Furthermore, she actively sought refills on many medications and prescriptions, including pain medication, prior to losing healthcare. (See CR 534, 1805, 1781). Claimant essentially stocked up in anticipation of losing healthcare and the ability to treat as she had done for the past 9 years.

Second, Claimant’s medical records immediately following her injury reflect her admission to her treaters that she has a history of right shoulder pain since 2006, whether treated or not. On May 18, 2015, Claimant treated with Black Hills Orthopedic & Spine Center. (Ex. 4; CR 466) This record of treatment reflects “Destiny Schoon comes in today with complaints of right shoulder pain. She has had problems on and off for many years since she had injured her right arm in 2006.” (*Id.*) (emphasis added). This directly refutes Claimant’s allegation, as well as the DLR and Circuit Court’s presumption that Claimant suffered no symptoms between 2009 and 2015.

Finally, Dr. Nipper opined “[i]t’s simply not plausible. With the level of pathoanatomy that she had, demonstrated by MRI, she must have had symptoms during that period of time. She just didn’t seek treatment.” (Nipper Dep., at 72:6-12.) (*See also* 13:22-14:12 (“simply because there was no treatment doesn’t mean that the patient’s pain

and pathology went away. She just maybe didn't go in for treatment.") And Claimant expressed an intention to stop treating because she did not have health insurance. While treating with the Rapid City Medical Center in October 2010, Claimant expressed to her treating physician that "[s]he is going to lose her insurance...at the end of the month." (CR 1781.)

Although there is a lack of treatment records between 2009 and 2015, the inference should not be that all of Claimant's prior medical issues were miraculously healed. Rather, the medical evidence prior to this period, the exam notes right after her 2015 event, and Dr. Nipper's opinion demonstrate that the Circuit Court's finding that Claimant suffered no symptoms between 2009 and 2015 is unwarranted. Instead, a de novo review of the record demonstrates that Claimant was still suffering from right shoulder symptoms between 2009 and 2015, but simply chose not to treat for them with her doctors, or could not treat because she did not have insurance.

**b. The Circuit Court erred by failing reverse DLR's refusal to make a specific credibility determination as to Claimant.**

Claimant has the ultimate burden to establish "all facts essential to sustain an award of compensation." *Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶ 20, 653 N.W.2d 247, 252. Integral to that burden of proof is whether her testimony is credible or whether there are obvious inconsistencies in her testimony. *See, e.g., Kennedy v. Hubbard Milling Co.*, 465 N.W.2d 792, 796 (S.D. 1991) (The "Department is not required to accept the testimony of the claimant and is free to choose between conflicting testimony."). "[W]here the claimant's subjective experience of pain is central to the issue of whether recovery is warranted, the credibility of the claimant is always at issue."

*Schneider v. S. Dakota Dep't of Transp.*, 2001 S.D. 70, ¶ 14, 628 N.W.2d 725, 729.

When first deposed, Claimant was asked directly to describe the location of her pain immediately following her workplace injury:

- Q: Right. Okay. And you said you had an intense amount of pain. The pain was shoulder? Hand? Arm? Where was it?
- A: At that point in time it was a severe amount of pain coming from the shoulder.
- Q: Okay.
- A: My right shoulder.
- Q: Okay. And do you recall front or back of the shoulder? Top of the shoulder?
- A: I recall it being more to the front, but honestly, it was so severe it was hard to elaborate where it was coming from.

(Schoon Dep., at 22:18-23:4.) No mention is made of neck pain or neck pressure immediately following her injury at any point during her deposition. However, at the hearing while under oath, Claimant changed her testimony to include neck pressure.

- A: And the piece – to get the piece of equipment off of the shelving was frozen and would not move. I kept cranking on it. With the last crank, I had severe pain.
- Q: Severe pain where?
- A: It was in the shoulder area primarily.
- Q: Was it in the front? The top? The side?
- A: It was mostly coming from the front.
- Q: Okay. And where did that pain also refer to?
- A: I instantly got really tight on the top of the shoulder and hurt. And I felt pressure in my neck. I wouldn't call it necessarily pain. The best way to explain it is you have a sinus infection, you have sinus pressure. It just -- it felt like pressure in my neck.

(HT 27:18-28:7.) Claimant was impeached at the hearing because of this material alteration. (HT 47:9-48:19.) It is well settled that “a party cannot claim the benefit of a version of the facts more favorable than given in testimony.” *Guthmiller v. S. Dakota Dep't of Transp.*, 502 N.W.2d 586, 589 (S.D. 1993); *State v. Jacobson*, 491 N.W.2d 455 (S.D.1992); *Waddell v. Dewey County Bank*, 471 N.W.2d 591 (S.D.1991); *Lalley v. Safway Steel Scaffolds, Inc.*, 364 N.W.2d 139 (S.D. 1985); *Myers v. Lennox Co-op.*

*Ass'n*, 307 N.W.2d 863 (S.D.1981); *Swee v. Myrl & Roy's Paving, Inc.*, 283 N.W.2d 570 (S.D.1979); *Miller v. Stevens*, 63 S.D. 10, 256 N.W. 152 (1934).

These material alteration of material testimony is contradicted by Claimant's own complaints following her injury. On May 8, 2015, the day after her injury, Claimant was treated by Black Hills Health and Wellness Center. (Ex. 15.) Claimant did not complain of any pain or pressure in her neck. (*Id.*; HT 49:2-5.) Other records immediately following her injury confirm Claimant did not complain of neck pain or pressure. On May 18, 2015, Claimant was seen by Black Hills Orthopedic & Spine Center where she was complaining of and treated for a right shoulder strain following her work injury. (Ex. 4; CR 508-10.) No mention was made of neck pain or pressure. (*Id.*) Additionally, Claimant never communicated any pain in her neck to Dr. Nipper during her examination. "Furthermore, Ms. Schoon did not give me a verbal account of the event which included anything to do with the cervical spine or her neck." (Ex. 13, at pg. 4; CR 490.) Importantly, Claimant has agreed that the medical records immediately following her injury are likely more accurate than her recollection of events five years later. (HT 49:6-12.)

It cannot be overstated how significant of a departure this alteration is from her previous testimony as to whether or not she felt pain or pressure in her neck immediately following her injury. As Dr. Nipper testified:

[W]hether there's preexisting pathoanatomy or not, when somebody blows a disc in the cervical spine, I mean, I've been doing this for 27 years, they know it. They know it and they know it within a couple, three days, either from neck pain or if the disc blows and it's pushing on a nerve, they know. They feel something down their arm then and there and not weeks or months later.

(Nipper Dep., at 17:8-15.) Given Claimant's concession that the medical records are more accurate than her memory and the fact that medical records immediately following the workplace injury make no mention of complaints of neck pain or pressure, (Exs. 4 (CR466-67), 15 (CR508-10); HT 49:2-5), the DLR should have found Claimant's original deposition testimony more credible than her testimony at the hearing.

Ultimately, Claimant changed her prior sworn testimony in an effort to secure compensability for her neck surgery. But, the DLR and Circuit Court ignored this pivotal change in Claimant's testimony regarding her initial physical complaints after her injury.

Without addressing this, the DLR and Circuit Court left unanswered the question of whether SDCL 62-7-40 applies:

In proceedings for workers' compensation benefits brought under this title, if the finder of fact determines that any person testifying in the proceeding has knowingly sworn falsely to any material fact in the proceeding, then the finder of fact may reject all of the testimony of that witness.

The failure to provide analysis of this evidence is reversible error, especially where other similar issues exist. Notable in this context is the fact that Claimant filled out a medical report for The Rehab Doctors when she was first being seen for right shoulder pain which started May 7, 2015 (Ex. 24; CR 536-41). In this handwritten document, she indicated that she had not had similar problems in the past. (*Id.*) Of course, this contradicts her substantial prior medical history. In fact, Dr. Dietrich agreed that "she definitely checked that box in a fashion that we would disagree with." (Dr. Dietrich Dep., at 38.) The Circuit Court erred by refusing to reverse the DLR on this issue.



**2. The Circuit Court erred by finding the opinions of Drs. Dietrich, Wilson, and Lawlor more persuasive than that of Dr. Nipper.**

The Circuit Court erred by finding the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than Dr. Nipper's. (App. A., at 12.) Although Dr. Lawlor and Dr. Wilson treated Claimant following her May 7, 2015 injury, Dr. Nipper is the only medical expert who had a complete and exhaustive understanding of Claimant's entire medical history. The Circuit Court's finding is fully-reviewable by this Court.

*Armstrong*, 2020 S.D. 1, ¶ 16, 938 N.W.2d 425, 429; *McQuay*, 2011 S.D. 91, ¶10, 808 N.W.2d 107,110. This case presents an instance where a non-treating physician's testimony is more credible than that of Claimant's treating physicians.

This Court has found the testimony of a non-treating physician to be more persuasive than the testimony of a treating physician on causation issues. For example, in 1966, the This Court affirmed the acceptance of a medical opinion of a radiologist who did not see, treat or examine a claimant personally, while rejecting the opinion of the treating physician who had cared for the claimant for several years. *Riccord v. John Burns Memorial Hospital*, 141 N.W. 2d 160, 161 (S.D. 1966). More recently, in *Helms v. Lynn's, Inc.*, 1996 S.D. 8, 542 N.W. 2d 769, this Court examined a claim involving preexisting coronary disease and a myocardial infarction which occurred after exertion at work. Helms' treating cardiologist was of the opinion that the work was a contributing factor of his heart attack. *Id.* ¶17, 542 N.W.2d at 768. The cardiologist hired by employer, who reviewed the medical records, disagreed. *Id.* ¶¶ 18-19. This Court rejected the opinion of the treating cardiologist. Accordingly, based on the rulings of the this Court, for a physician's opinion to be persuasive, it is not necessary that he or she be the treating physician. See also *Jewett v. Real Tuff, Inc.*, 800 N.W.2d 345 (S.D. 2011);

*McQuay v. Fischer Furniture*, 808 N.W.2d 107 (S.D. 2011); and *Grauel v. S.D. Sch. Of Mines and Tech.*, 619 N.W.2d 260 (S.D. 2000). In all of these cases, the underlying issue was causation of a claimed injury, and in all three cases this Court found the testimony of non-treating physicians to be more persuasive than the testimony of the treating physician.

In this case, Dr. Nipper's opinions should have been found more persuasive than that of Dr. Lawlor, Dr. Wilson, and Dr. Dietrich. Dr. Nipper is a board certified orthopedic surgeon who has been practicing for over 27 years. (HT 3:11-17: Ex. 12.) Dr. Nipper issued an Independent Medical Evaluation on February 17, 2016 after conducting an in-person examination of Claimant on January 21, 2016. (Ex. 13; CR 487-96.) This IME outlines Dr. Nipper's preliminary opinion that Claimant "sustained a right shoulder strain in the workplace on May 7, 2015. No other injury was sustained during that event." (*Id.*, at pg. 8; CR 494.) More specifically, Dr. Nipper concluded:

Any ongoing symptoms referable to the neck, shoulder or radiating symptoms into either of the upper extremities is due to pre-existing pathoanatomy. The evolution of a C-6 disc herniation has been ongoing and predates the event of May 7, 2015. The activities in which Ms. Schoon was involved on or around May 7, 2015 were not capable of causing a disc herniation in the cervical spine. The other MRI finding of neuroforaminal stenosis is also the product of longstanding chronic degenerative process entirely unrelated to the event of May 7, 2015.

(*Id.*) Ultimately, Dr. Nipper concluded "the work injury of May 7, 2015 is not a major contributing cause to Ms. Schoon's current diagnosis" and that [n]o additional treatment, testing, medications, injections, surgery or any other forms of treatment would be reasonable or necessary or related to the event of May 7, 2015." (*Id.*, at pg. 9; CR 495.)

After receiving more of Claimant's medical records, Dr. Nipper subsequently issued an Independent Record Review on August 12, 2019. (Ex. 14; CR 497-507.) Attached as Appendix C, is a medical chronology based on the records in evidence, outlining Claimant's voluminous medical history. This Appendix is a summary of the medical records Dr. Nipper had at his disposal for his 2019 records review. Employer and Insurer submit that a review of this document will satisfy the Court that the foundation for Dr. Nipper's opinions is unassailable.

In his 2019 report, Dr. Nipper concluded his "diagnoses and impressions given in [his] initial narrative of February 17, 2016, remain unchanged." (*Id.*, at pg. 9; CR 505.) Dr. Nipper also noted Claimant "had a very profound and significant history of neck, spine, right shoulder, right upper extremity, and even left upper extremity problems and symptoms well prior the event of May 7, 2015." (*Id.*)

Claimant's prior injuries were critical to Dr. Nipper's opinions:

Q: And it seems like from your testimony a big factor that weighed in on your opinions was her prior treatment that she had back in the 2000s?

A: Yes. It's highly relevant history. If she never had any problems in the past, I don't think we would be sitting here. I wouldn't be saying what I'm saying.

(Nipper Dep., at 62:9-14.) Further, the effects of these injuries had a lasting and permanent impact on Claimant. Dr. Nipper testified that

the pathoanatomy, which was present in 2004, 2005, 2009, didn't go away. The pathoanatomy stays there and progresses. We know that from just about every study that's ever been published on this subject. People just don't get better. They get worse once these things happen. So it's my position that what we're observing in Ms. Schoon was simply that natural progression regarding her neck and her shoulder.

(Nipper Dep., at 66:7-16.) *See also id.* at 14:9-15:3 (“[M]y position is simply because there's no treatment doesn't mean that the patient's pain and pathology went away...And as we all know, you don't have to be a doctor to know that if you have a degenerated disc when you're 22, it's going to get worse by the time you're 32, and you're never going to have a disc like you had when you were 15.”). Dr. Dietrich agreed: “[a]s [Claimant] ages, there’s going to be continued...progression of degeneration, absolutely. (*Id.* at 33:1-15.)

With particular attention to Dr. Dietrich, his opinions have been found to be less credible in comparison to IME experts in the past because of his failure to exhaustively review medical records. In *McQuay*, the South this Court found the IME opinions more credible than Dr. Dietrich’s, in part, because he did not review all of Claimant’s relevant medical records. 2011 S.D. 91, ¶ 25, 808 N.W.2d at 113. The Court specifically held “Dr. Dietrich did not review the 2002 or 2005 MRI images. He also did not account for medical evidence indicating that prior to June 2005, McQuay's back pain was on the right side of his low back while McQuay's complaint at the time of the hearing was for low back pain on the left side.” *Id.* The Court ultimately affirmed the circuit court’s denial of worker’s compensation benefits. *Id.*

*McQuay* demonstrates the importance of having a complete understanding of Claimant’s medical history before forming an opinion as to causation. Dr. Nipper is the only expert in this case that demonstrated a complete knowledge of Claimant’s entire medical history. The importance of this fact cannot be overstated because the sole issue in this case was whether Claimant has satisfied her burden of persuasion that her work injury is compensable. As this Court’s de novo review has no doubt demonstrated,

Claimant's entire prior medical history is vital to this determination, especially in light of this Court's analysis in *Armstrong*. Because such an understanding was absent from the bases of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor's opinions, the Circuit Court erred in finding them more credible and should be reversed.

**3. The Circuit Court erred in affirming the DLR's failure to strike Dr. Dietrich's opinions for lack of foundation.**

The Circuit Court found that the DLR did not abuse its discretion in admitting Dr. Dietrich's opinions. (App. A., at 12-13.) Like the DLR, the Circuit Court erred because the foundation for Dr. Dietrich's opinions is missing a complete understanding of Claimant's prior medical history.

This Court recently reaffirmed its holding regarding the weight to be given to an expert who has questionable foundation for his or her opinions. "The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true. It may prove little if only partially true." *Hughes v. Dakota Mill & Grain, Inc.*, 2021 S.D. 31, ¶ 23 (quoting *Johnson v. Albertson's*, 2000 S.D. 47, ¶ 25, 610 N.W.2d 449, 455). *See also State v. Guthrie*, 2001 S.D. 61, ¶ 34, 627 N.W.2d 401, 416 ("In deciding whether to admit expert testimony, a court must ensure that the opinion abides on a reliable foundation...These standards must be satisfied whenever scientific, technical, or other specialized knowledge is offered."). Furthermore, "When presented with medical expert testimony, Department is 'free to accept all of, part of, or none of, an expert's opinion.'" *Wagaman*, 1998 S.D. 27, ¶ 18, 576 N.W.2d 237, 241. By statute, expert testimony must be "based on sufficient facts or data." SDCL § 19-19-702. Because of these fundamental foundational requirements, Employer and Insurer maintained an

objection to Dr. Dietrich's opinions at his deposition, (Dietrich Dep., at 6:12-7:11), and renewed those same objections at the hearing before the DLR. (HT 6:17-24.)

Claimant offered Dr. Dietrich's opinions in support of her claims that her shoulder injury is a major contributing cause to her need for neck surgery. Rather than supplying him with the actual medical records as a basis for analyzing Claimant's extensive history, Claimant's counsel provided Dr. Dietrich with a document his office prepared from Claimant's prior medical history. Before Dr. Dietrich offered an opinion as to whether Claimant's May 7, 2015 injury caused an aggravation of her pre-existing injuries, counsel for Employer and Insurer objected as to Dr. Dietrich's foundation:

MR. SHULTZ: Before you answer, I want to interpose an objection and voir dire the witness. Doctor, you've referred to Exhibit 2 as being a document that you have received and reviewed. Am I getting that right?

THE WITNESS: Correct.

MR. SHULTZ: And that is a document that purports to be a summary of medical records that predated your treatment of this patient, right?

THE WITNESS: Yes. There are several records that are prior to my treating of the patient.

MR. SHULTZ: And so we're clear, you were never treating her at the time of her alleged injury in 2015, right?

THE WITNESS: Correct.

MR. SHULTZ: You have not seen all of the records referred to in Exhibit 2, have you?

THE WITNESS: All of these records, no.

MR. SHULTZ: Okay. I'm going to object, lack of foundation insofar as the Doctor cannot state to a reasonable -- cannot state his opinion to a reasonable degree of medical probability without having seen each and every document, each and every record pertaining to this patient's pre-injury condition.

(Dietrich Dep., at 6:12-7:11.) Dr. Dietrich's primary source of information was a document prepared by Claimant's counsel, summarizing her extensive 15 years of prior medical treatment into 35 pages. It is impossible for Dr. Dietrich to have a sufficient understanding of Claimant's prior injuries, treatments, and diagnoses without reviewing

the actual and complete records. *McQuay*, 2011 S.D. 91, ¶ 25, 808 N.W.2d at 113.

Surely more is required of an expert than to simply rely on information from counsel in order to render a causation opinion, especially in a case where compensability hinges on Claimant's prior medical history combining with a work place injury. Dr. Dietrich's opinions lacked this essential foundation and should have been stricken. This Court should reverse the Circuit Court as to this issue.

### **CONCLUSION**

For these reasons, Appellant respectfully urges this Court to reverse the Circuit Court's decision.

Dated this \_\_\_ day of June, 2022.

WOODS, FULLER, SHULTZ & SMITH P.C.

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## **REQUEST FOR ORAL ARGUMENT**

Appellants respectfully requests the opportunity to present oral argument on these issues.

Dated this \_\_ day of June, 2022.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 31 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Times New Roman (12 pt.) and contains 9,199 words. The word processing software used to prepare this Brief is Microsoft Word.

Dated this \_\_ day of June, 2022.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_ day of June, 2022, I electronically served via e-mail transmission, a true and correct copy of the foregoing Appellants' Brief to the following:

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## **APPENDIX**

1. Appendix A – December 27, 2021 Memorandum Opinion by  
Judge Klinger .....APP 001-014
2. Appendix B - December 27, 2021 Order by Judge Klinger ..... APP 015
3. Appendix C – Medical Chronology for Claimant.....APP 016-063



## CIRCUIT COURT OF SOUTH DAKOTA SIXTH JUDICIAL CIRCUIT

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PIERRE, SOUTH DAKOTA 57501-1238

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RE: 32CIV21-48 – News America Marketing, Farmington Casualty Company v.  
Destiny Schoon

### MEMORANDUM OPINION

News America Marketing (Employer) and Farmington Casualty Company (Insurer) (collectively referred to as Employer) appeal from the South Dakota Department of Labor's (Department) decision in favor of Claimant Destiny Schoon (Schoon). The Department concluded that Schoon proved by a preponderance of the evidence that her May 7, 2015, work injury was and remains a major contributing cause of her condition, need for treatment, and whole person impairment. The Court heard oral argument on November 15, 2021. After reviewing the administrative record and considering the arguments raised by the parties, the Court now issues this Memorandum Opinion.

### FACTUAL BACKGROUND

Schoon is a 39-year-old female residing in Rapid City, South Dakota. She grew up in Spearfish, South Dakota, and graduated from high school in January 2000. After high school she enrolled at South Dakota State University in Brookings, South Dakota. Schoon soon transferred to the University of South Dakota in Vermillion, South Dakota, to pursue a degree in criminal justice. Schoon transferred once more to Kaplan University in the Quad Cities (Davenport, IA; Bettendorf, IA; Moline, IL; East Moline, IL), where she received her Bachelor's degree in

Paralegal Studies in 2007. Schoon subsequently moved back to western South Dakota, and has since resided in Rapid City.

### **A. Preexisting Condition**

In November 2001, Schoon was rear-ended in a motor vehicle accident. Schoon was treated at Runyan Chiropractic in Spearfish, South Dakota, from July to August 2002. Schoon's records indicate that she primarily complained of fibromyalgia and pain in the back of her neck, shoulder blades, and mid-back. On September 9, 2002, Dr. DeBoer of Complete Chiropractic in Sioux Falls, South Dakota, treated Schoon for upper back pain into the neck and shoulders. According to Dr. DeBoer's notes, Schoon stated she had pain in her shoulder blades and neck since childhood. Schoon had treatments with Complete Chiropractic 86 times from September 2002 to April 2005. During almost all these visits, upper back, neck, and/or shoulder pain were Schoon's primary concerns or chief complaints.

In August 2003, Schoon was again rear-ended in a motor vehicle accident. Schoon was treated by Breakthrough Health in Sioux Falls from February 2004 to August 2004. During this time, her chief complaints were for neck, back, hip, leg, and shoulder pain. She was diagnosed with whiplash from one of her prior car accidents, but it appears that as of May 4, 2004, she had experienced some progress in her conditions.

In 2004, Schoon fell at a concert in Sioux Falls. In 2008, in a lawsuit by Schoon against the City of Sioux Falls, Dr. DeBoer provided expert witness testimony via documental evidence that the fall had exacerbated Schoon's fibromyalgia. Dr. DeBoer testified that Schoon's main complaints after the fall, of neck and upper back pain, were improving.

Schoon sought treatment for pain to the neck, back, and shoulders from different healthcare providers from 2002 to 2007. In 2007, Schoon relocated to Rapid City and was referred to the Black Hills Orthopedic & Spine Center. After Black Hills Orthopedic & Spine Center conducted imaging, they ordered Schoon to participate in further physical therapy.

Schoon began treatment in March 2008 with Black Hills Health & Wellness Center. Schoon's initial main complaint was pain in the lower back, but as she continued treatment she began to have chief complaints of achiness in her neck, upper back, and shoulder.

On December 8, 2008, Schoon sought treatment with Black Hills Orthopedic & Spine Center for complaints of pain in her right shoulder. On January 9, 2009, an image was taken showing Schoon had decreased disc space at C6-7 and C7-T1. A subsequent magnetic resonance imaging (MRI) showed that there were some minimal disc displacements at C3-4, C4-5, and C5-6, but that there was no compressive arthropathy.<sup>1</sup> Schoon was subsequently treated for a period of time with medications and physical therapy. She was discharged as a patient of Black Hills Orthopedic & Spine Center physical therapy on October 14, 2009, after it was determined by Physical Therapist April McNaboe, that she had successfully "achieved all physical therapy and functional goals." Schoon was seen by Physician Assistant Michael Aanderud of the Black Hills Orthopedic & Spine Center on February 11, 2010, for complaints of pain in her wrists and hands and numbness and tingling in her fingers.

In early 2009, Schoon began seeing Dr. Lawlor at the Rehab Doctors for right arm pain and numbness. Schoon also had complaints of arm and neck pain. Dr. Lawlor conducted trigger point injections to help treat her symptoms. Schoon did not seek treatment specifically for issues related to her neck, back, and shoulder pain in late 2009 to early 2010. During this time and after,

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<sup>1</sup> "Arthropathy" is defined by Merriam-Webster as "a disease of a joint."

Schoon did periodically refill her medications related to her treatment for her neck, shoulder, and back pain.

Schoon sought medical treatment from late 2009 to early 2010 for other medical conditions including concerns about her cervix, leg pain, fibromyalgia, and abdominal pain. In 2014 she was also treated at Black Hills Orthopedic & Spine Center for a right knee injury and pain.

## **B. May 7, 2015, Work-Related Injury**

Since moving to Rapid City, Schoon has worked as a paralegal for a number of different law firms. In the summer of 2013, Schoon started working a second job with Employer. Schoon worked as an advertising representative for Employer, responsible for hanging advertising signs on shelves and ceilings of different retail stores, as well as for data entry. From 2013 to 2019, Schoon remained employed with Employer while she transitioned between firms as a paralegal. At the time of the work-related injury, Schoon continued to work as paralegal and for Employer.

On May 7, 2015, Schoon was hanging signage for Employer as part of her work-related duties. After hanging a piece of signage on one of the shelves and sending a photo to Employer, Schoon began to remove the universal clamp used to hang the signage but the clamp was “frozen” on the shelf and “would not move.” Schoon had to “[keep] cranking on it.” On the “last crank, [she] had severe pain.” Schoon testified at the hearing before the Department that the pain was primarily in the front of her shoulder and that she “instantly got really tight on the top of her shoulder [...] [and] felt pressure in [her] neck.”

On the night of May 7, 2015, Schoon treated her pain at home with over the counter pain medication and ice. On May 8, 2015, Schoon sought treatment at the Black Hills Health and Wellness Center in Rapid City. Medical records state she sought treatment for a neck sprain, muscle spasm, joint sprain, and additional treatment. On May 12, 2015, Schoon returned for treatment at the Black Hills Health and Wellness Center, and stated that she initially felt better after her last appointment, but she had “stiffness in her upper back and neck and her right shoulder again this morning.” She was referred to Black Hills Orthopedic & Spine Center, and on May 18, 2015, was prescribed physical therapy. Schoon began physical therapy at Promotion in Rapid City, on June 2, 2015. After multiple physical therapy sessions, Schoon was referred to Dr. Lawlor of The Rehab Doctors in Rapid City, for treatment of her neck and interscapular, and for shoulder pain.

On August 20, 2015, Schoon was treated by Dr. Lawlor. Dr. Lawlor ordered additional physical therapy. On October 14, 2015, Dr. Lawlor ordered a cervical MRI. Schoon’s MRI was completed on October 30, 2015, and showed a herniation of the C5-6 disc level.

The MRI results were sent to Employer for authorization of further physical therapy. Dr. Lawlor’s office received correspondence from Employer on November 3, 2015, requesting additional “medical records supporting the need for further PT to the right shoulder. Attached MRI results show cervical issues. However, claim is accepted for right shoulder only.” Dr. Lawlor provided a letter to Employer, stating that additional physical therapy was necessary to address Schoon’s shoulder pain, and that the results of the MRI (showing a C5-6 disc herniation) could be related to her pain. Dr. Lawlor stated that it is “not uncommon for people with a C5-6 disc herniation to report shoulder pain as a predominate pain complaint.” Dr. Lawlor opined that the findings of the MRI warranted ongoing physical therapy “to specifically address the neck as it relates to her shoulder pain.”

Schoon continued physical therapy at Promotion. On December 2, 2015, Dr. Lawlor referred Schoon for a surgical consult for a disc replacement. Dr. Lawlor opined that the surgical referral was “medically necessary, appropriate, and [sic] causely related to her work injury.” Dr. Jonathan Wilson of Black Hills Neurosurgery & Spine conducted a surgical consult with Schoon. After the surgical consultation, on December 30, 2015, Dr. Wilson recommended Schoon have an artificial disc replacement (central disc arthroplasty) of the C5-6 disc level due to the herniation of that disc. Dr. Wilson was concerned about Schoon’s new symptoms, decreased reflexes in the right brachioradialis and bicep and ongoing paresthesias of her hands. Dr. Lawlor opined on December 30, 2015, that the recommended surgery was “medically necessary and appropriate treatment [...] as a consequence of her work injury.”

A request for authorization of the central disc arthroplasty was sent to Employer. Employer denied the surgery pending an independent medical evaluation (IME). Dr. Jeffrey Nipper of ExamWorks conducted an IME of Schoon on January 21, 2016. Dr. Nipper reviewed Schoon’s medical records from after the May 7, 2015, injury and conducted a physical examination of Schoon. Dr. Nipper concluded that Schoon had suffered a right shoulder strain and that no additional treatment was reasonably related to the May 7, 2015, injury. Dr. Nipper stated that the cervical disc arthroplasty may be appropriate for Schoon, but would be unrelated to her injuries from May 7, 2015. Dr. Nipper stated that approximately six weeks after the May 7, 2015, injury Schoon had reached maximum medical improvement. Employer denied further worker’s compensation benefits related to the May 7, 2015, injury.<sup>2</sup>

On May 5, 2016, Dr. Wilson preformed the cervical disc arthroplasty on Schoon. Since that time, Schoon has continued to periodically receive physical therapy, medications, injections, and seek additional treatment related to her neck and shoulder pain. On June 16, 2019, Dr. Dietrich determined that Schoon has an 11% whole person impairment according to the *AMA Guides to Evaluation of Permanent Impairment*.

On November 28, 2016, Schoon submitted a Petition for Hearing to the Department of Labor & Regulation. A hearing was held on September 23, 2020, before Administrative Law Judge Michelle Faw. The Department received live testimony from Schoon, copies of Schoon’s medical records from 2000 to 2019, Dr. Dietrich and Dr. Nipper’s depositions, and Dr. Wilson and Dr. Lawlor’s affidavits. At the time of Dr. Dietrich’s deposition, Employer objected to his testimony based on lack of foundation, arguing that he did not have the proper foundation to offer his expert medical opinion, as he had not reviewed all of Schoon’s medical records.

Employer argued that Schoon failed to meet her burden of proving by a preponderance of the evidence that the May 7, 2015, injury was a major contributing cause of her continued pain and need for neck surgery, and therefore was not compensable. Employer further argued that Schoon’s claims for indemnity benefits were unsupported. Employer reasoned that Schoon’s preexisting conditions caused her prolonged impairment, disc herniation, and need for an artificial disc replacement. Employer also claimed that Schoon’s testimony at the hearing, that she experienced pressure in her neck immediately after her injury, was in direct contradiction of her deposition testimony, where she did not mention that she was experiencing neck pain.

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<sup>2</sup> Dr. Nipper released an additional report on August 12, 2019, after review of additional medical records, specifically Schoon’s medical records prior to the May 7, 2015 injury. Dr. Nipper stated that his opinion remained unchanged, and that he was even more confident that Schoon’s condition and need for disc replacement surgery was due to her preexisting condition, and that the May 7, 2015, injury was not a major contributing cause of her condition or need for treatment.

The Department concluded that Schoon had proven by a preponderance of the evidence that the May 7, 2015, injury was and remained a major contributing cause of her disc herniation and need for surgery. The Department concluded that the May 7, 2015, work injury combined with her preexisting diseases and conditions to cause or prolong her impairment and need for treatment. The Department concluded that Schoon was entitled to benefits related to her work injury based on an 11% whole person impairment rating, for \$492.84 per week or total permanent partial disability benefits of \$16,914, plus prejudgment interest, either possibility totaling \$19,333.30. The Department also awarded medical expenses to Schoon in the amount of \$59,282.73 plus prejudgment interest, totaling \$82,463.70.

Employer appealed the Department's decision, raising several issues. Employer argued that the Department erred by: 1) finding that Schoon's work injury remains a major contributing cause of her impairment, and that Schoon's underlying medical conditions are the sole remaining major contributing cause, 2) finding Schoon suffered no symptoms of her preexisting condition from 2009 to 2015, 3) not making a specific credibility finding of Schoon, due to her purported change in testimony, 4) finding that the testimony of Schoon's experts, Dr. Lawlor, Dr. Dietrich, and Dr. Wilson, were more persuasive than Employer's expert witness, Dr. Nipper, 5) failing to strike the testimony of Dr. Dietrich for lack of foundation.

### **QUESTION PRESENTED**

- I. WHETHER THE DEPARTMENT ERRED IN FINDING THAT SCHOON'S WORK INJURY WAS AND REMAINS A MAJOR CONTRIBUTING CAUSE OF HER IMPAIRMENT AND NEED FOR TREATMENT.**
- II. WHETHER THE DEPARTMENT ERRED BY FINDING THAT SCHOON SUFFERED NO SYMPTOMS FROM 2009-2015.**
- III. WHETHER THE DEPARTMENT ERRED BY FINDING THE OPINIONS OF DR. DIETRICH, DR. WILSON, AND DR. LAWLOR MORE PERSUASIVE THAN THAT OF DR. NIPPER.**
- IV. WHETHER THE DEPARTMENT ERRED BY NOT STRIKING DR. DIETRICH'S OPINIONS BASED ON LACK OF FOUNDATION.**

### **LEGAL STANDARD**

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

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings.



The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

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

## ANALYSIS

### *I. THE DEPARTMENT DID NOT ERR IN FINDING THAT SCHOON’S WORK INJURY WAS AND REMAINS A MAJOR CONTRIBUTING CAUSE OF HER IMPAIRMENT AND NEED FOR TREATMENT.*

Schoon must prove by a preponderance of the evidence that she is entitled to worker’s compensation benefits. *Darling v. West River Masonry, Inc.*, 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367. SDCL 62–1–1(7) sets forth the standard a claimant must meet to prevail in a worker’s compensation case. To be awarded benefits, an employee must first establish that she has suffered an “injury arising out of and in the course of the employment[.]” *Id.* *See also Horn v. Dakota Pork*, 2006 SD 5, ¶ 14, 709 N.W.2d 38, 41 (“Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained”). “This causation requirement does not mean that the employee must prove that

[his] employment was the proximate, direct, or sole cause of [his] injury; rather the employee must show that [his] employment was a ‘contributing factor’ to [his] injury.” *Orth v. Stoebner & Permann Const., Inc.*, 2006 S.D. 99, ¶ 32, 724 N.W.2d 586, 592-93 (quoting *Brown*, 2002 SD 92, ¶ 19, 650 N.W.2d at 270).

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

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

It is undisputed that Schoon’s injury was work-related and combined with her pre-existing condition. Employer argues that Schoon has failed to prove by a preponderance of the evidence that her work-related injury was and remains a major contributing cause for her need for surgery, continued treatment, and 11% whole person impairment. Employer argues that Schoon’s preexisting pathoanatomy and a natural progression of her disc degeneration disorder, and not the May 7, 2015, injury, are the major contributing causes of her continued impairment and need for treatment.

Schoon was not required to prove that the May 7, 2015, injury was at least 50% attributable to her condition and need for treatment in order to show that the injury was a major contributing cause of her condition. *Hughes v. Dakota Mill and Grain Inc.*, 2021 S.D. 31, ¶ 20, 959 N.W.2d 903, 909. Nor was Schoon required to prove that the May 7, 2015 injury was *the* major contributing cause of her condition and need for treatment, but instead she was required to prove that the May 7, 2015 injury was and remains *a* major contributing cause of her disability, impairment or need for treatment. *Orth*, 2006 S.D. 99, ¶ 41-42, 724 N.W.2d at 595-96 (citation omitted). Causation must be established by a reasonable degree of medical probability. *Id.* Because all of the expert witnesses’ testimony was presented by documentary evidence, the Court reviews that evidence de novo. *Id.* Schoon’s testimony, offered as live testimony, is reviewed under a clearly erroneous standard. *Gerlach v. State*, 2008 S.D. 25, ¶ 6, 747 N.W.2d 662, 665. (further citations omitted). Having reviewed the evidence accordingly, the Court finds that the Department did not err in finding that Schoon proved by a preponderance of evidence that the May 7, 2015, injury was and remains a major contributing cause of her impairment and need for treatment.

Schoon offered expert testimony from Dr. Dietrich, Dr. Lawlor, and Dr. Wilson via medical records and depositions. All three had treated Schoon at some point in time. Schoon also testified at the hearing before the Department. Employer offered the testimony of Dr. Nipper, who conducted an independent medical examination of Schoon.

### **A. Documentary Evidence**

This Court considers whether Schoon proved by a preponderance of the evidence that her May 7, 2015, injury was and remains a major contributing cause of her need for surgery, continued treatment, and 11% whole person impairment. Dr. Dietrich testified by deposition that he believed with a reasonable degree of medical probability that Schoon’s work-related injury was a major contributing cause of her condition. Dr. Dietrich reviewed some of Schoon’s medical records from

before the injury and physically examined and treated Schoon over a period of several years. Dr. Dietrich determined that the activities on May 7, 2015, exacerbated Schoon's cervical disc, resulting in the cervical disc herniation and need for subsequent surgery and treatment. Dr. Dietrich further testified that the "straining, the twisting, the torqueing, the looking up, movement of the head, somehow created pressure or a load at [the C5-C6] level" and resulted in the disc herniation.

Dr. Dietrich provided that when a disc protrudes or herniates, it can come into contact with a nerve root and cause pain into the shoulder, when in actuality the underlying injury may be to the neck. Dr. Dietrich testified that a vast majority of Schoon's medical records after the May 7, 2015, injury included chief complaints of, or recommendations for evaluation and treatment for, a neck strain or neck pain. Dr. Dietrich testified that Schoon's medical records from May 18, 2015, eleven days after her injury, indicate that Schoon should be evaluated and treated for a right shoulder and neck strain.

Dr. Nipper also testified by deposition. Prior to his testimony, he conducted an IME at the request of Employer. As part of the IME Dr. Nipper reviewed Schoon's medical records and examined Schoon one time. Dr. Nipper determined that Schoon's work activities were not a major contributing cause of her neck pain, shoulder pain, and herniated disc. Dr. Nipper determined that Schoon suffered a shoulder strain due to her work activities, and the ongoing and continued complaints were the result of her preexisting pathoanatomy and the natural progression of her disc condition, documented in 2009. Dr. Nipper opined that generally a shoulder strain should heal in approximately six (6) weeks. Dr. Nipper testified that at some point after Schoon's injury, the symptoms she was experiencing were no longer attributable to her work activities (and injury) but to her underlying preexisting conditions. Dr. Nipper determined that Schoon's preexisting conditions superseded her work injury as a major contributing cause of her current symptoms and condition. Dr. Nipper determined the disc herniation was a result of her underlying disease, and not the work injury. Dr. Nipper concluded that although Schoon did not seek treatment for her disease from 2009-2015, it was likely causing her pain and difficulty prior to May 7, 2015.

Dr. Lawlor provided testimony via affidavit and attached medical records. Dr. Lawlor treated Schoon in the years before her injury and after her injury. Before her injury, Dr. Lawlor last treated Schoon in 2009. Dr. Lawlor determined that Schoon had completely recovered from her pre-work injury symptoms and was having no difficulties until the May 7, 2015, injury. Dr. Lawlor determined that since her May 7, 2015, injury Schoon had fairly steady pain in the shoulder, neck, and interscapular on the right. In a November 4, 2015, letter Dr. Lawlor stated that Schoon's MRI showed a disc herniation of the C5-6 area which can cause referred pain in the shoulder area. Dr. Lawlor provided that a herniation of this disc can result in pain that is consistent with Schoon's complaint and that the MRI was consistent with Schoon's stated onset of pain. In treating Schoon, Dr. Lawlor recommended ongoing physical therapy to address her neck as it related to her shoulder pain. On December 2, 2015, Dr. Lawlor referred Schoon for a surgical consult. Dr. Lawlor determined the referral was medically necessary, appropriate, and related by cause to her work injury.

Dr. Wilson also provided testimony via an affidavit and attached medical records. Dr. Wilson performed Schoon's artificial disc replacement surgery on May 6, 2016. Dr. Wilson first saw Schoon on December 29, 2015. At that time, Schoon described her symptoms as "neck pain discomfort." Dr. Wilson determined that Schoon's symptoms were caused by a large disc

herniation at C5-6, resulting in right foraminal<sup>3</sup> stenosis<sup>4</sup> and severe central stenosis at that level. Dr. Wilson determined that Schoon's symptoms were caused secondary by a subtle progressive cervical myelopathy.<sup>5</sup> Dr. Wilson found that Schoon's symptoms were worsening as a result of her conditions. Due to Schoon's young age, Dr. Wilson recommended an artificial disc replacement surgery, because that treatment would decrease her risk of adjacent level disease and provide more durable treatment of her additional symptoms.

Schoon's medical records show that the pain she was suffering in her upper back, neck, and shoulders had improved by late 2009 to early 2010. On October 10, 2009, she was discharged from physical therapy at Black Hills Orthopedic & Spine Center. On February 22, 2010, she was seen by Black Hills Neurology, for complaints of upper extremity discomfort and concerns about carpal tunnel; she provided no indication she was suffering from neck, back, or shoulder pain. From 2010-2015, Schoon did seek medical treatment for other concerns. Schoon sought treatment for wrist pain, abdominal pain, uterine concerns, performance of a colonoscopy, knee swelling and pain, and other medical services not related to her neck, shoulder, and back.

Schoon first sought treatment for upper back, neck, and shoulder pain in September 2002. Schoon had problems with this pain since she suffered a car accident in November 2001. Schoon's medical records from 2002 to 2009 primarily concern neck, shoulder, and back pain. Schoon was treated by multiple medical institutions, seeking extensive treatment from 2008 to early 2010. In late 2009 and early 2010 Schoon stopped seeking treatment for pain in her neck, back, and shoulders. Documental evidence, as well as Schoon's testimony, proves by a preponderance of the evidence that the trigger point injections and other treatment Schoon received during this time were effective in minimizing Schoon's neck and shoulder pain. The flare-ups Schoon had from 2010-2015 did not affect her daily life and did not require treatment. It was not until Schoon's May 7, 2015, injury she again experienced debilitating neck and shoulder pain requiring treatment. The May 7, 2015, injury was a major contributing cause of Schoon's symptoms, extended need for treatment, need for surgery, and 11% whole person impairment.

## **B. Live Testimony**

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

Employer argued that Schoon's testimony regarding her neck and shoulder pain was inconsistent. The Department did not make a specific factual finding regarding Schoon's credibility. “Witness credibility is a question of fact.” *Baier v. Dean Kurtz Const., Inc.*, 2009 S.D. 7, ¶ 12, n. 1, 761 N.W.2d 601, 604-05. Employer questioned Schoon at the hearing before the Department about the supposed change. “Even where specific credibility findings are absent, we defer to the Department's overall assessment of the weight of the evidence when it is based upon

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<sup>3</sup> “Foramen” is defined by Merriam-Webster as “a small opening, perforation, orifice.”

<sup>4</sup> “Stenosis” is defined by Merriam-Webster as “a narrowing or constriction of the diameter of a bodily passage or orifice.”

<sup>5</sup> “Myelopathy” is defined by Merriam-Webster as “a disease or disorder of the spinal cord or bone marrow.”

live witness testimony.” *Billman v. Clarke Machine, Inc.*, 2021 S.D. 18, ¶ 28, 956 N.W.2d 812, 820.

Schoon testified at the hearing before the Department. From her testimony it is proven by a preponderance of the evidence that Schoon had a preexisting condition. Schoon began experiencing neck and back problems after she was involved in two motor vehicle accidents in November 2001 and August 2003. Schoon sought chiropractic treatments for her pain because of these accidents, and got temporary relief from treatment. In 2007 she began physical therapy after re-locating to Rapid City. Schoon testified “a lot of this pain back here just almost vanished” because of her utilizing the information she learned in physical therapy. She testified that the Flector patch helped her pain, and that epidural steroid injections, specifically the July 28, 2009, injection performed by Dr. Lawlor, worked very well, making the pain almost nonexistent outside of an occasional flare-up. Schoon began using the Flector patches whenever she would experience a flare up. Schoon’s flare-ups did not affect her ability to work, perform activities of daily living, or participate in recreational activities.

Schoon testified that she was hanging overhead signage for her employment with Employer when she had severe pain in her shoulder. She “got really tight on the top of the shoulder ... [and] felt pressure in [her] neck.” The pain she experienced after her work injury was different than what she had experienced previously; the current pain was coming from the front where as previously it was located in the back of her body. The pressure in her neck was higher than it had previously been. Schoon indicated on her August 20, 2015, intake form with The Rehab Doctors that she was being seen for a problem on the right shoulder, but provided on the drawing that she was also experiencing pain in her neck.

Based on Schoon’s testimony, the Department found that Schoon’s 2009 treatment with Dr. Lawlor alleviated Schoon’s symptoms. After treatment with Dr. Lawlor, Schoon was able to work 60 hours per week and play recreational softball without symptoms of neck and shoulder pain, other than the occasional flare up. The Department noted the alleged change in testimony, but did not make a specific finding regarding the alleged change. The Department, in relying on the documental and live testimony, found that Schoon had proven by a preponderance of evidence that her May 7, 2015, injury was and continued to be a major contributing cause of prolonged need for treatment, need for surgery, and 11% whole person impairment. Based on all of the evidence presented, the Department’s findings based on Schoon’s testimony were not clearly erroneous.

Schoon has proven by a preponderance of the evidence that her May 7, 2015, injury was and remains a major contributing cause of her need for surgery, continued treatment, and 11% whole person impairment entitling her to worker’s compensation benefits. Her deposition and testimony before the Department did not critically change. Her description of her symptoms has been consistent since her injury. Dr. Dietrich testified that he believed by a reasonable degree of medical probability that Schoon’s work-related injury was a major contributing cause of her condition. All three of her expert witnesses testified that in their opinion the continued treatment and surgery were medically necessary as a result of Schoon’s injury. Schoon’s October 14, 2015, MRI showed a disc herniation at the C5-6 level, to which Dr. Lawlor testified he believed was caused by the May 7, 2015, injury. The testimony of all three of Schoon’s expert witnesses is consistent with one another, with Schoon’s medical records, and with Schoon’s testimony. Schoon has proven by a preponderance of the evidence that her May 7, 2015, work-related injury was and remains a major contributing cause of her condition, prolonged need for treatment, need for surgery, and 11% whole person impairment. Schoon is entitled to worker’s compensation benefits.

II. THE DEPARTMENT DID NOT ERR BY FINDING THAT CLAIMAINT SUFFERED NO SYMPTOMS FROM 2009-2015.

Employer argued that the Department erred in finding that Schoon suffered no symptoms from 2009-2015. Employer misquotes the findings of the Department. The Department concluded that there was no evidence or testimony that Schoon suffered symptoms between 2009 and 2015, and that there was not sufficient evidence to support a conclusion that this was merely due to Schoon's lack of health insurance. The Department concluded that Schoon's medical records prove by a preponderance of the evidence that she did not seek treatment for pain in her neck and shoulder from 2009 until her May 7, 2015, work injury. Employer presented no evidence that Schoon suffered comparable neck and shoulder pain from 2009 to May 7, 2015. Schoon testified that if she had flare-ups, she would use the Flector patches. Schoon's flare-ups did not affect her ability to participate in daily and recreational activities. The Department noted the lack of evidence presented by Employer, and concluded that Schoon's work injury combined with her preexisting diseases and conditions to cause or prolong her impairment and need for treatment. The Department found that Schoon experienced occasional flare-ups while still being able to work 60 hours per week and play recreational softball. The Department's finding that Schoon experienced flare-ups, but that they were not severe enough to require treatment was not erroneous and was supported by the evidence presented. There was no evidence presented by Employer that Schoon experienced severe pain but failed to seek treatment. Schoon's evidence proves that she had flare-ups of pain but that they were minimal and not debilitating. Her medical records from 2009-2015 prove that she sought treatment for conditions and illnesses she was experiencing. There is no evidence that she would not seek treatment for upper back, neck, and shoulder pain.

Employer alternatively argues that the Department did acknowledge Schoon's flare-ups, but did not consider the flare-ups under the precedent provided in *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425. *Armstrong*, provides that a work injury may not be compensable if it is not a major contributing cause, but rather is the tipping event of the degenerative effects of a preexisting condition. *Id.* at ¶ 24, 938 N.W.2d at 431. The Department distinguished Schoon's condition from the claimant's in *Armstrong*, concluding that the Court in *Armstrong*, made note that the medical records of the claimant indicated a worsening of the preexisting condition in the time leading up to the work injury. The Court in *Armstrong*, noted that the record contained uncontroverted evidence that the claimant's preexisting degenerative condition had grown worse in the years before his work injury. *Id.*

This Court concludes that Schoon's case is distinguishable from *Armstrong*. There is no evidence in the record that Schoon's preexisting condition worsened over the years immediately leading up to her work injury. Schoon proved by a preponderance of the evidence that her work activities on May 7, 2015, were and remain a major contributing cause of her impairment and need for treatment. Dr. Lawlor's and Dr. Wilson's opinions were given the appropriate weight, and were well supported by the testimony of Dr. Dietrich, the medical records of Schoon, and her live testimony at the hearing. In light of this Court's comprehensive review of the medical records and entire administrative record, this Court concludes Schoon's injury on May 7, 2015, was and remains a major contributing cause of her impairment and need for treatment, including the artificial disc replacement.

III. THE DEPARTMENT DID NOT ERR BY FINDING THE OPINIONS OF DR. DIETRICH, DR. WILSON, AND DR. LAWLOR MORE PERSUASIVE THAN THAT OF DR. NIPPER.

Employer argued that the Department erred by finding the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than Dr. Nipper's. Employer argued that Dr. Nipper is the only physician who had a complete and exhaustive understanding of Schoon's entire medical history, therefore making his testimony more persuasive. Employer relies on *Helms v. Lynn's Inc.*, 1996 S.D. 8, 542 N.W.2d 764.

The South Dakota Supreme Court in *Helms*, held that a non-treating physician's opinion can be more persuasive than that of a treating physician regarding causation issues. The Department found the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than that of Dr. Nipper. The Department's factual determination based on documentary evidence, is reviewed de novo. *Hughes v. Dakota Mill and Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907 (citations omitted). All of the opinions and testimony of the four expert witnesses was provided by medical records and depositions. Reviewing the record de novo, this Court finds the testimony of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than Dr. Nipper. The opinions and testimony of Schoon's experts is supported by Schoon's medical records. Schoon sought treatment from 2009-2015 for other medical conditions, but did not seek treatment for neck and shoulder pain, because her preexisting condition was not severe enough to require treatment or affect her daily life. Without treatment for the years leading up to the injury, there is no evidence of continued symptoms that would supersede as a major contributing cause of Schoon's need for treatment after the May 7, 2015, injury. The Court finds the testimony of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than Dr. Nipper, as their opinions are substantially supported by the evidence.

IV. THE DEPARTMENT DID NOT ERR BY NOT STRIKING DR. DIETRICH'S OPINIONS BASED ON LACK OF FOUNDATION.

Employer asserted that the Department erred by failing to strike Dr. Dietrich's testimony based on lack of foundation. Employer objected to Dr. Dietrich's testimony at his deposition based on lack of foundation, arguing that without reviewing every medical record of Schoon's prior to her work-related injury, Dr. Dietrich could not state to a reasonable degree of medical probability whether Schoon's injury was and remained a major contributing cause of her need for additional treatment and her impairment.

The Court reviews evidentiary rulings under an abuse of discretion standard. *McDowell v. Citibank*, 2007 S.D. 52, ¶ 26, 734 N.W.2d 1, 10. "An abuse of discretion is not whether we would have made the same ruling, but whether we believe a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion." *Gerlach v. State*, 2008 S.D. 25, ¶ 8, 747 N.W.2d 662, 665 (internal citations omitted). "An error will not be overturned unless it in all probability ... produced some effect upon the final result." *Id.* (internal citations omitted).

In accepting Dr. Dietrich's expert witness testimony, the Department noted that "Expert testimony is entitled to no more weight than the facts upon which it is predicated." *Darling*, 2010 S.D. 4, ¶ 13, 777 N.W.2d 363, 367 (further citations omitted). The Department evaluated Dr.

Dietrich's expert testimony pursuant to *Burley v. Kytac Innovative Sports Equip. Inc.*, 2007 S.D. 82, 737 N.W.2d 397. *Burley*, provides that

Admissibility of expert testimony is governed by SDCL 19-15-2 (Rule 702). Under this rule, before a witness can testify as an expert, that witness must be "qualified." *Id.* Furthermore, under *Daubert*, the proponent offering expert testimony must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge as required under rule 702. *Guthrie*, 2001 SD 61, ¶ 34, 627 N.W.2d at 415-416; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d 469 (1993). Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415. The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. SDCL 19-9-7 (Rule 104(a)). The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence. *Daubert*, 509 U.S. at 592 n. 10, 113 S.Ct. at 2796 n. 10, 125 L.Ed.2d 469 n. 10. Relevance embraces evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415 (quoting SDCL 19-12-1).

*Burley*, 2007 S.D. 82, ¶ 13, 737 N.W.2d at 402.

The Department applied the *Burley* test, and found that Dr. Dietrich's testimony was relevant, reliable, and represented scientific, technical, or specialized knowledge. The Department found Dr. Dietrich reviewed the records of Dr. Lawlor, ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, the medical records summary, and also physically treated Schoon. The Department found that Dr. Dietrich's testimony was based on an appropriate foundation.

Dr. Dietrich's curriculum vitae was introduced into evidence at his deposition. Dr. Dietrich attended the University of South Dakota for his undergraduate, masters, and medical degrees. He completed a residency in Physical Medicine and Rehabilitation at the Mayo Clinic Graduate School of Medicine. He is licensed with the South Dakota Board of Medical & Osteopathic Examiners. Dr. Dietrich has been board certified in Physical Medicine & Rehabilitation and Pain Medicine. Dr. Dietrich has presented multiple times on shoulder and back pain. Including his residency, Dr. Dietrich has over twenty years of experience.

Dr. Dietrich's experience and education qualify him to testify as an expert witness. His testimony was reliable and relevant based on his review of Schoon's medical records, his examination of her, and his qualifications. Because of his qualifications, treatment, and review of the medical records, his testimony has a tendency to make the existence of facts that are of consequence to the determination of the action more or less probable than without his testimony. The Court finds that the Department did not err by admitting Dr. Dietrich's expert witness testimony or by giving the testimony its proper weight. Any objection would go to the weight and not admissibility of Dr. Dietrich's testimony. The Department did not err in its admission of this evidence.

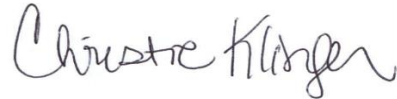


## CONCLUSION

Employer argued that the Department erred by determining Schoon had proved by a preponderance of the evidence that her May 7, 2015, injury was and remains a major contributing cause of her impairment, need for additional treatment, and need for surgery. Employer challenged the Department's finding regarding Schoon's symptoms from 2009-2015. Employer also challenged the credibility of Schoon and the admission of Dr. Dietrich's testimony. Employer finally asserted that the Department erred in finding Dr. Lawlor, Dr. Dietrich, and Dr. Wilson more persuasive than Dr. Nipper. Schoon proved by a preponderance of the evidence that her May 7, 2015, work-related injury was and remains a major contributing cause of her condition, need for treatment, and impairment. The Department found that Schoon experienced flare-ups from 2009 to 2015 but her underlying preexisting condition did not worsen during this time period. Dr. Lawlor, Dr. Dietrich, and Dr. Wilson's testimony was extensively supported by the evidence and was more persuasive than Dr. Nipper's. Dr. Dietrich's testimony was based on a proper foundation. He is qualified, treated Schoon, and reviewed additional records. Schoon did not critically change her testimony, as she consistently described experiencing symptoms in her shoulder and neck. The Department's decision is affirmed. A corresponding Order shall be entered accordingly.

Dated this 27th day of December 2021.

BY THE COURT



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Christina Klinger  
Circuit Court Judge

## Appendix B

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
<hr/>		
NEWS AMERICA MARKETING and	)	32CIV21-48
FARMINGTON CASUALTY COMPANY,	)	
	)	
Employer and	)	
Insurer/Appellants,	)	
v.	)	<b>ORDER</b>
	)	
DESTINY SCHOON,	)	
	)	
Claimant/Appellee.	)	
	)	
	)	
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WHEREAS, the Court having entered its Memorandum Decision on December 22, 2021, and having expressly incorporated the same herein, now, therefore, it shall be and hereby is

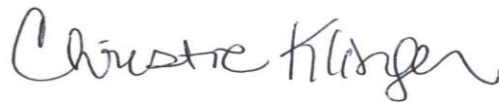
ORDERED, ADJUDGED, AND DECREED:

The Department's decision concluding that Claimant has met her burden of proving both elements of causation pursuant to SDCL 62-1-1(7) is AFFIRMED.

Pursuant to SDCL 1-26-32.1 and SDCL 15-6-52(a), the Court's Memorandum Decision shall act as the Court's findings of fact and conclusions of law as permitted by SDCL 1-26-36.

Dated this 27th day of December 2021.

BY THE COURT:



Attest:

Deuter-Cross, TaraJo  
Clerk/Deputy



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The Honorable Christina L. Klinger  
Circuit Court Judge  
Sixth Judicial Circuit

## DESTINY SCHOON Appeal No. 29900

DATE	PROVIDER	DESCRIPTION
12/21/81	Date of birth	
09/18/01	Central Plains Clinic	Allergy symptoms. She has smoked occasionally and should not continue. Indicates severe mono in the past and took good deal of time to get over it. Letter stating she has multiple allergies, including food, dust mites, molds, pets, and pollen. Dr. Thomas Wilson
11/05/01	Brookings Medical Clinic	Sore throat, chills and body aches. Recent bronchitis. Most likely viral and she is adamant that she gets some antibiotics today. Refused mono check. Script for amoxicillin. Delaina Rickwa, PA-C
01/09/02	Brookings Medical Clinic	History of head congestion, ears hurting off and on, sore throat, clear nasal discharge, feels glands are swollen. Some vomiting. Adamant it is not strep. Does not feel she needs an antibiotic just wants to stop vomiting. Dr. Delaina Rickwa
03/21/02	Sioux Valley Clinic	She is seeing Dr. Wake in Brookings and Dr. McVetty in Spearfish. Concerned about fatigue and treatment for chronic fatigue syndrome. Shots are once a week. Allergic rhinitis and problems with increased need for rest, which attributes to chronic fatigue from mono. Dr. Thomas Wilson
04/30/02	Brookings Medical Clinic	Fatigues and might be depressed. Some positive Epstein Barr factors but no current infection. She requested anti-depressants. Paxil prescribed and side effects discussed. Dr. Richard Wake
07/23/02	Runyan Chiro	Fibromyalgia. Rode jet ski last week and became really sore.
07/30/02	Runyan Chiro	She is numbed out from amitriptyline she received for pain and does not feel as much
07/31/02	Runyan Chiro	Not getting sore from treatment. Working aggressively to make the changes desired as quickly as possible.
08/02/02	Runyan Chiro	Moved well except for T6. Do more stretches for mid back.
08/05/02	Runyan Chiro	Much better.
08/06/02	Runyan Chiro	T2-3 moved best It will not only help the back but also the chest will feel better. Headache gone, upper back feels a little better.
08/07/02	Runyan Chiro	Do NMR next time to get rest moving.
08/12/02	Runyan Chiro	Moved better in upper back.
08/16/02	Runyan Chiro	About time for extended mm work session.
08/20/02	Runyan Chiro	Daily activities still flaring her up. Start Omega 3.
08/21/02	Runyan Chiro	Moved better.

DATE	PROVIDER	DESCRIPTION
08/23/02	Runyan Chiro	Do NMR soon before she goes back to school.
08/26/02	Runyan Chiro	Review x-rays before she goes back to school.
08/27/02	Runyan Chiro	Reverse curve found on original x-rays need revisiting. To determine where she is and where we need to go.
08/28/02	Runyan Chiro	Do the mm work necessary to achieve some stability.
08/29/02	Runyan Chiro	Last visit here. She needs to fill in Brookings. So the cleanse script to avoid unwanted chemicals.
09/09/02	Complete Care Chiro	Upper back into neck and shoulders. Dr. Runyan diagnosed curve in spine. MVA when rear-ended in 2001 at McDonald's drive through. Adjustment. Does not have exact date but says it has been years with constant upper back into neck and shoulder pain. Pain questionnaire results are 50% severe disability. Assessment: cervical and thoracic segmental dysfunction, associated cervicalgia, thoracalgia and multiple areas of myositis. Dr. Shannon DeBoer
09/11/02	Complete Care Chiro	Ache between her shoulder blades and in the neck. Pain rating 8/10. No headache. Felt better after her adjustment. She forgot to take her Neurontin and did not sleep well. Allergy shots yesterday so her sinuses are better. Mid back twitching. Adjustment. Shannon DeBoer, DC
09/13/02	Complete Care Chiro	Tension in shoulders. Still twitching. Low back is less sore. Slept okay. Adjustment. Shannon DeBoer, DC
09/17/02	Complete Care Chiro	Upper back, shoulder blade and neck pain. Pain rating 9/10. She did some lifting Saturday morning moving furniture. Headache started Sunday night. No new symptoms. Sleeping okay but really tired. Low back is seeing some improvement. Adjustment. Shannon DeBoer, DC
09/20/02	Complete Care Chiro	Shoulders, neck and mid-back have constant ache. Pain rating 8/10. A little better. No numbness or tingling. Twitching all over during the day. Taking Neurontin at night. Adjustment. Shannon DeBoer, DC
09/24/02	Complete Care Chiro	Sore through the neck and shoulders but improving. Twitching sensations continue. Low back does not hurt but is sore with pressure. Problems with left leg. Adjustment. Shannon DeBoer, DC
09/26/02	Complete Care Chiro	Shoulders and neck pain. Pain rating 8/10. Her legs were achy when she got off of work. Twitching is letting up from switching meds. Switched from Paxil to Wellbutrin and that makes her feel wired so helps with fatigue. Sleeping okay. Wakes a few time a night. Adjustment. Shannon DeBoer, DC
10/02/02	Complete Care Chiro	Patient follow up questionnaire. Shoulders are sore, neck is sore, upper back is sore more than 75% of the day but getting better. Pain rating 6-9/10.

DATE	PROVIDER	DESCRIPTION
		Reports getting worse after massage last week. Pain rating 8/10, spasms have decreased since last adjustment. No numbness or tingling. Dropped the Wellbutrin dose which made her feel weird. Feet insoles are doing very good. Her feet have been okay except left toe. Adjustment. Shannon DeBoer, DC
10/04/02	Complete Care Chiro	Dizziness for a week and believes it is from her meds. Recently lowered dosage of Wellbutrin. Shoulders have been improving. Second massage did not irritate them. No pain in mid and low back. No headache. Felt better after last adjustment. She used to be able to get her neck to pop and it is not popping any more. Shannon DeBoer, DC
10/08/02	Complete Care Chiro	No chief complaint. No Dizziness. Put on new med, Celexa instead of Wellbutrin. No pain. Sleeping well. Twitching is getting better. Headache after last adjustment but shoulder and neck pain was better. Shannon DeBoer, DC
10/15/02	Complete Care Chiro	Very fatigued. Sleeping ok if she takes Neurontin. Aches in legs, neck and shoulders. Feels better today. No headaches, no numbness or tingling. Mostly bothers her when sleeping. Shannon DeBoer, DC
10/23/02	Complete Care Chiro	Upper back and right shoulder pain. Pain rating 8/10. Flared up during normal activity. Shoulder pain radiated down the arm. No numbness and tingling. Legs are achy. Neck is tight but no headaches.
10/25/02	Complete Care Chiro	Upper back and neck, both shoulders have aches and pains. No headaches. Legs are achy morning and night but not during the day. Trigger point massage hurt but is improving. Pushing she is experiencing has not changed. Adjustment. Shannon DeBoer, DC
10/29/02	Complete Care Chiro	Upper back and neck pain. Pain rating 7/10. Headache after adjustment. Ice helped. Very dizzy and stretches make her more dizzy. No pain, numbness or tingling in lower extremity. Continues to have aches in legs. Overall symptoms are letting up. Adjustment. Shannon DeBoer, DC
10/30/02	Complete Care Chiro	Upper back, neck and shoulders are tight. Occasional headaches. Massage.
11/04/02	Complete Care Chiro	Dizziness and sore neck. Trouble sleeping. Overall same. Massage.
11/06/02	Complete Care Chiro	Complaints whole back is aching today. Constant pain. Massage on Monday seemed to flare up the mid back and up into the neck.
11/07/02	Complete Care Chiro	Right hip pain. Getting headaches and upper back is sore. Massage.
11/12/02	Complete Care Chiro	Very tight and sore. Feeling achy and legs are bothering her. Neck and upper back are right. Massage. Bilateral neck and shoulder pain. Flared up from driving over the

DATE	PROVIDER	DESCRIPTION
		weekend. Pain rating 3/10 but was 10/10 in the morning. No numbness or tingling. Improved after last adjustment and then drove 5-6 hours and it started to get worse. Headache would not go away last week. Low back was sore from driving. Some improvement with the twitching. Adjustment. Shannon DeBoer, DC
11/15/02	Complete Care Chiro	Feels a cold coming on. Achy all over. Legs have been bothering her at work. Especially sore when she stands for long periods of time.
11/18/02	Brookings Medical Clinic	Not feeling well, tired but nontoxic. Recommend Tylenol, fluids and rest. Recheck in a week if not better. Dr. Debra Johnston
11/19/02	Complete Care Chiro	Being sick. She went to doctor and states she is all clear except white blood cell count. Close to throwing up. Sore in neck and shoulder. Pain rating 7/10. Twitching continues to improve. Massages are helping. Shannon DeBoer, DC
11/25/02	Complete Care Chiro	Stayed in bed last week and weekend. Feels better but stomach is still upset. Neck and shoulder pain 7/10. Slight headache recently but currently none. Dull low back pain radiates into legs. Likes the cervical pillow and neck is not as sore in the morning. Shannon DeBoer, DC
12/02/12	Complete Care Chiro	Upper back pain rating 7/10. Bothered her all weekend from driving over the holiday 5-6 hours. Not much twitching. Legs are achy. Tired and has upset stomach. Some dizziness. Nights she sleeps right away and other nights tosses turns. Doctor in Spearfish put her on Prevacid for stomach and ear infection. White blood cells are low. Possible virus. Adjustment. Shannon DeBoer, DC
12/03/02	Complete Care Chiro	Has not been in for over a week due to the holiday. Legs and upper back are achy. Massage.
12/06/02	Complete Care Chiro	Cannot shake the virus. Feels very run down. Most irritation is in upper and mid back. Massage.
12/09/02	Complete Care Chiro	Constant pain in shoulders, neck and mid back. No headache. Symptoms are starting to get better. Pain rating 8/10. No numbness or tingling. Twitching coming back a little. Ears are bothering her, stomach is improving. Adjustment. Shannon DeBoer, DC Severe tenderness and tightness in upper back. In pain from adjustment.
12/11/02	Complete Care Chiro	Feeling much better regarding virus. Muscles are not achy. Tightness in back and shoulders. Massage.
12/16/02	Complete Care Chiro	Same as last visit. Pain rating 7/10. Symptoms seem better but work increases pain. No headaches. Stomach and ears improving. Allergy shots every 2 weeks instead of once. Shannon DeBoer, DC

DATE	PROVIDER	DESCRIPTION
12/20/02	Complete Care Chiro	Mid back pain. Right hip popped yesterday and hurts. Neck and shoulder are very good. Responding well to massages. Adjustment. Shannon DeBoer, DC
01/10/03	Complete Care Chiro	Shoulders are bothering here. Overall quite good. Headache but not bad. Neck has bothered her since Christmas break. Low back is acting up but doing better. Adjustment. Shannon DeBoer, DC
01/23/03	Complete Care Chiro	Shoulder pain. Pain rating 7/10. Slight headache. Doing well up until the weekend. Good for a few days after adjustment. Twitching is going away. Fatigue is worsening. Low back flare up. Adjustment. Shannon DeBoer, DC
02/03/03	Complete Care Chiro	Woke up congested and sore. Sore throat and a fever. Back pain is 8/10. It flared up. Denies headaches, numbness or tingling. Fatigue is worse. Adjustment. Shannon DeBoer, DC
02/12/03	Complete Care Chiro	Stopped in after massage which did not help mid back pain. Flared up over the weekend and is very intense. Adjustment. Shannon DeBoer, DC
02/13/03	Complete Care Chiro	Bilateral shoulder pain. Pain rating 7/10. Flared up last week Denies headaches. Some twitching. Shannon DeBoer, DC
02/21/03	Brookings Medical Clinic	Sore throat. Nausea. Back aches and neck stiffness. Amoxicillin for 10 days. Misty Rudebusch, PA-C
02/24/03	Complete Care Chiro	States she has strep throat. Starting to get better. Bilateral shoulder and upper neck pain. Low back has been on and off. Taking Neurontin and Ambien every other night. Adjustment. Shannon DeBoer, DC
02/25/03	Brookings Medical Clinic	Needs note excusing her from school week of 2/10/03 -2/14/03 and 2/17/03 – 2/21/03.
03/10/03	Complete Care Chiro	Shoulder pain radiating into the neck. Pain rating 8/10. Low back flaring up and makes legs hurt. Trouble sleeping. Quit taking Neurontin and needs to sleep without it. Adjustment. Shannon DeBoer, DC
03/13/03	Brookings Medical Clinic	Sore throat. Treat with Tamiflu. Misty Rudebusch, PA-C
03/24/03	Complete Care Chiro	Recently had the flu and is getting over that. Upper back and neck, shoulder are bothering her. She did golf for most of the two weeks. Low back is bothering her and making legs hurt. Twitching some. Adjustment. Shannon DeBoer, DC
03/31/03	Brookings Medical Clinic	Sore throat, neck and shoulders hurt, ears hurt, plugged nose.
04/07/03	Complete Care Chiro	Reports having a cold. Using a lot of Ben-Gay. It helped for a while. Legs are bothering her. Sleeping well since she has had cold.

DATE	PROVIDER	DESCRIPTION
		Adjustment. Shannon DeBoer, DC
04/14/03	Complete Care Chiro	Low back is “killing her”. She rode bike Friday and has been sore since. States mid back hurts from coughing. Feels she is doing better. Adjustment. Shannon DeBoer, DC
04/23/03	Complete Care Chiro	Neck and shoulders hurt really badly. She did a lot of driving to Spearfish. Was fine a few days after adjustment. Low back is sore. Legs are twitching. Sore around tailbone. Adjustment. Shannon DeBoer, DC
04/30/03	Complete Care Chiro	Legs are hurting. Low back hurts she believes because of her legs. Started new job waitresses in SF. Adjustment. Shannon DeBoer, DC
05/12/03	Complete Care Chiro	Legs are bothering her. She could barely walk last night. Feet and knees are bothering her from working. She is a waitress at Champs restaurant. States her shoulders cramp up but otherwise has been pretty good. Overall feels improved. Adjustment. Shannon DeBoer, DC
05/27/03	Complete Care Chiro	Shoulders were cramping from driving over the week to Spearfish. Low back is okay. Legs and feet do not like her job but states it is getting better. Adjustment. Shannon DeBoer, DC
06/10/03	Complete Care Chiro	Rode pedal bike last week. Neck and shoulders were sore after. It has gotten better. Legs and hips are irritated with work but doing better. Generally doing better. Adjustment. Shannon DeBoer, DC
06/26/03	Complete Care Chiro	Stiff and sore in upper back and shoulders. Low back is same. Legs are aching. Adjustment. Shannon DeBoer, DC
07/14/03	Complete Care Chiro	Mid back and neck are bothering her after holiday weekend. Slightly improved. Adjustment. Shannon DeBoer, DC
08/11/03	All About Potential	Neck, back and shoulder pain from whiplash on 8/1/03.
08/18/03	Complete Care Chiro	Involved in another MVA last week. Neck and shoulder pain. Pain rating 9/10. Treated in Spearfish since accident with Dr. Scott Korigan. No significant improvement. Stretches and adjustment. Adjust 2 times a week for 4-6 weeks. Shannon DeBoer, DC
08/21/03	Complete Care Chiro	Worked yesterday and felt uncomfortable. She would feel a lot of pain when she would pick up trays or plates. Arms are stiff but no numbness, tingling or burring. Using bio freeze. Adjustment. Shannon DeBoer, DC
08/27/03	Complete Care Chiro	Sore and taking a lot of ibuprofen. Worse than last visit. Headaches. Low back hurts. Did well after last adjustment but moving things over the weekend irritated her pain. Stretches and adjustment.



DATE	PROVIDER	DESCRIPTION
		Shannon DeBoer, DC
09/02/03	Complete Care Chiro	Went to Pierre and then North Dakota over the weekend and irritated her back. She was sore after the drive. Worse today than last visit. Headache. Neck, shoulders, low back and legs are sore. Adjustment. Shannon DeBoer, DC
09/09/03	Complete Care Chiro	Sore all over. Felt better for a few days and then sore again. Headache around the base of her head and makes her nauseous. She has been getting really tired lately. Adjustment Shannon DeBoer, DC
09/11/03	Complete Care Chiro	Shoulders are tight. Muscles are twitching. Adjustment. Shannon DeBoer, DC
09/16/03	Complete Care Chiro	Very tight and taking ibuprofen. Fatigued and not sleeping. States she had whip lash on 8/1/03. Neck is sore. Adjustment.
09/19/03	Complete Care Chiro	Slightly improved overall. Adjustment. Shannon DeBoer, DC
09/22/03	Complete Care Chiro	Overall a little better. Adjustment. She is having headaches. Shannon DeBoer, DC
09/24/03	Complete Care Chiro	Currently sick. States that she is doing a little better. No soreness from last appointments. Adjustment. Shannon DeBoer, DC
10/03/03	Complete Care Chiro	Improvement with neck and shoulders. Experiencing some muscular twitching. Adjustment. Shannon DeBoer, DC
10/08/03	Complete Care Chiro	Neck and shoulder pain getting worse. States that she is hurting. Headache. Shannon DeBoer, DC
10/15/03	Complete Care Chiro	Shoulders and twitching. Continues to have low back pain. States that she really has not had any headaches but her neck and upper back are tight and sore. Adjustment. Shannon DeBoer, DC
10/22/03	Complete Care Chiro	Soreness and tension. Had flu last three days. Overall feels worse. Had the flu this weekend. Feeling more like normal finally. Adjustment. Shannon DeBoer, DC
10/27/03	Complete Care Chiro	Improvement for a couple days. Extreme amount of stress at school lately. Shoulder and neck tension. Low back and legs are twitching. Adjustment. Shannon DeBoer, DC
10/30/03	Complete Care Chiro	Tightness in mid and low back and shoulders due to extra stress with school. Adjustment. Shannon DeBoer, DC
11/17/03	Complete Care Chiro	Slowly getting little worse. Neck and shoulders hurt. Unable to be seen last week due to doctor being detained. Adjustment. Shannon DeBoer, DC

DATE	PROVIDER	DESCRIPTION
11/24/03	Complete Care Chiro	Coughing a lot. Mid back is sore. Adjustment. Shannon DeBoer, DC
12/01/03	Complete Care Chiro	Shoulders are tense possibly from driving. Improvement since last visit. Feeling better. LB and legs are ok. Adjustment. Shannon DeBoer, DC
12/10/03	Complete Care Chiro	Doing okay until she worked all weekend. Shoulder is bad and Friday she had a lot of stress. Adjustment. Shannon DeBoer, DC
12/17/03	Complete Care Chiro	Neck and shoulders. Adjustment. Shannon DeBoer, DC
12/23/03	Sioux Valley Clinic	Left eyelid is puffy, tender, red and itchy. Sty. e.
01/07/04	Complete Care Chiro	Back, neck, land legs sore. Adjustment. Shannon DeBoer, DC
01/14/04	Complete Care Chiro	Some good days and some bad. Did quit waitressing. Sits at desk a lot more. Adjustment. Shannon DeBoer, DC
01/21/04	Complete Care Chiro	Shoulders are sore. Legs are bothering her every night. Took a long drive last weekend. Adjustment. Shannon DeBoer, DC
01/23/04	Sioux Valley Clinic	Evaluation of diffuse joint pain. Pain predominantly in her lower extremities. Diagnosed with Fibromyalgia by Dr. Hewitt in Spearfish. She is intolerant of most medications she has tried. Start Vioxx. Dr. Jeffrey Jenkins
01/28/04	Complete Care Chiro	Legs bother her for a few weeks. She had labs done. Adjustment. Shannon DeBoer, DC
01/29/04	Sioux Valley Clinic	Evaluation for 5 day history of nasal discharge, sore throat and fatigue. No cough. Recently seen for joint pain. She is concerned about her thyroid. Asked for a referral to neurologist. If results are normal may consider referral to Rheumatology or Neurology. Dr. Jeffrey Jenkins
01/30/04	Complete Care Chiro	Legs are better. Neck and shoulders are not too bad. Sinus infection. Adjustment. Shannon DeBoer, DC
02/06/04	Sioux Valley Clinic	Follow-up for joint pain and fatigue. She has had extensive lab work done. Continues to have pain in multiple joints and symptoms that she is convinced are related to hypothyroidism. She would like to see a rheumatologist. Dr. Jeffrey Jenkins
02/10/04	Breakthrough Health Center	Legs and bilateral hips ache. Pain rating 8-9/10. Pain came gradually. Constant 76-100% of the time. Prolonged sitting makes it worse. Reports having this before. Neck and shoulder pain from car accident in August. Pain rating 6-8/10. Constant pain 76-100%. Has had this before.  X-ray of cervical spine. Impression: excursion in flexion and

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		extension is adequate. There is no abnormality of alignment at either extreme with the amount of minor subluxation felt to be within normal physiological limits on the extended view. There is reversal of the curvature in neutral position which can be seen with muscular guarding.  X-ray of lumbar spine. Impression: Five normal lumbar bodies. Vertebral height, disc height and alignment are within normal limits. Dr. MJ Kihne
02/11/04	Sioux Valley Hospital	Lumbosacral spine images. Impression: negative lumbar spine; extensive colonic feces. Dr. Robert DeClark  ER. Chronic back pain. Depression.
02/11/04	Complete Care Chiro	States she feels like an old lady. Legs bothering her. Started working out Monday. Adjustment. Shannon DeBoer, DC
02/11/04	Breakthrough Health Center	Neck and low back pain. Adjustment. Lynne Ryan, DC
02/12/04	Breakthrough Health Center	Neck pain 6/10 and LBP 9/10. Adjustment. Lynne Ryan, DC
02/16/04	Breakthrough Health Center	Neck pain 7/10 and LBP 9/10. Adjustment. Lynne Ryan, DC
02/17/04	Breakthrough Health Center	Neck and LBP 9/10. Walking, weather, lifting, driving and sitting make the pain worse. Script for PT from Allied Pain Management. Adjustment. Lynne Ryan, DC
02/19/04	Breakthrough Health Center	Neck and LBP 7/10. Adjustment. Lynne Ryan, DC
02/23/04	Breakthrough Health Center	Neck pain 7/10 and LBP 9/10. Low back and neck disability questionnaire. Initial PT eval. Lynne Ryan, DC
02/25/04	Breakthrough Health Center	Neck pain 6/10 and LBP 7/10. Adjustment. Lynne Ryan, DC
02/26/04	Breakthrough Health Center	PT. Continue current treatment plan.
03/03/04	Breakthrough Health Center	Neck and LBP 7/10. Adjustment. Lynne Ryan, DC
03/04/04	Breakthrough Health Center	PT. Neck pain, mid back, low back.
03/04/04	Sioux Valley Clinic	Fatigue with a goiter. She first started having problems about 6 years ago. She had difficulty tolerating cold. She has had hair loss. There has been fatigue, muscle and joint pain. She has been told she has fibromyalgia. Metabolic panel done. She read a Readers Digest about misdiagnosis and hypothyroidism was listed. She thought she had these.

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		Past medical history: remarkable for depression, anxiety and fibromyalgia. She does not smoke and drinks 6 drinks twice a month. Tough situation. She has normal thyroid function tests. Talked about thyroid and what it does. I do not feel that her thyroid is enlarged. Talked about fluctuating processes such a thyroiditis, but the patient's history does not really go along with this. No clear endocrinopathy. Return care to Dr. Jenkins and psychiatrist. Letter to Dr. Jenkins regarding visit. Dr. Mark Oppenheimer
03/05/04	Breakthrough Health Center	PT. Neck, low back, leg.
03/09/04	Complete Care Chiro	Doing PT at Breakthrough in SF. Extra family stress. Adjustment. Shannon DeBoer, DC
03/10/04	Breakthrough Health Center	Neck and low back pain 7/10. Adjustment. Neck pain, low back pain. Chiro adjustment revealed a significant amount of motion at C2. Lynne Ryan, DC
03/11/04	Breakthrough Health Center	Chest pain and shortness of breath. Possible asthma.
03/17/04	Breakthrough Health Center	PT. Neck pain, shoulder.
03/18/04	Breakthrough Health Center	PT.
03/23/04	Breakthrough Health Center	PT. Neck pain, shoulder.
03/26/04	Breakthrough Health Center	PT.
03/30/04	Breakthrough Health Center	PT. Neck pain, shoulder.
03/31/04	Breakthrough Health Center	PT. Headache, shoulder, leg.
04/06/04	Breakthrough Health Center	PT. Neck pain, shoulder pain, leg.
04/09/04	Breakthrough Health Center	PT. Neck pain, shoulder pain, leg.
04/13/04	Breakthrough Health Center	Neck pain 8/10 and LBP 9/10. Adjustment. Now in subacute phase. Lynne Ryan, DC PT.
04/15/04	Breakthrough Health Center	Legs are flared up, started with moving her mom. 20% improved. PT. Neck pain, shoulder pain.
04/18/04	Orthopedic Institute	Medical history form by patient.
04/19/04	Orthopedic Institute	Rheumatology clinic. Reports "pain ever since she was 4 years old." Restless sleep. Sometimes has puffiness in the morning. Numb and tingling in hands. Occasional pleurisy. History of depressed mood. On exam, has "every single fibromyalgia tender point present." Fibromyalgia.

DATE	PROVIDER	DESCRIPTION
		Dr. Joseph Fanciullo
04/20/04	Breakthrough Health Center	PT. Neck pain, shoulder, leg.
04/23/04	Breakthrough Health Center	PT. Neck pain, shoulder, leg.
04/27/04	Breakthrough Health Center	PT. Neck pain, shoulder, leg.
04/29/04	Breakthrough Health Center	PT. Neck pain, shoulder, leg.
05/04/04	Breakthrough Health Center	PT. Neck pain, shoulder, leg.
05/04/04	Midwest Ear Nose and Throat	Seen in the past for problems with tonsils. Interested in proceeding with surgery. Dr. Bethany Helvig
05/06/04	Complete Care Chiro	Continues PT. It may be helping a little. Still have leg aches. Neck and shoulders are sore but overall better. Did new x-rays that showed reverence curve in lumbar spine. Adjustment. Shannon DeBoer, DC
05/11/04	Breakthrough Health Center	Neck pain 7/10 and LBP 10/10. Adjustment. Flare up of chronic condition. Good degree of vertebral movement at C1, C2, L2, L4, L5 and left ilium-sacrum was observed during adjustment. Lynne Ryan, DC X-ray of cervical spine. Impression: moderately increased motion at C4-5 and C5-6 levels indicating damage to the anterior and posterior longitudinal ligaments at this level. There is moderate intervertebral foraminal encroachment at C4/5 and C5/6 levels right sided with extension indicating possible nerve root impingement/compression. Mild to moderate lateral instability is noted at C4/5 indicating possible capsular ligament damage bilaterally at this level. Lynne Ryan, DC
05/13/04	Breakthrough Health Center	PT. Neck pain, shoulder, leg.
05/18/04	Breakthrough Health Center	PT. Neck pain, shoulder, leg.
05/20/04	Breakthrough Health Center	PT. Neck pain, shoulder, leg.
05/21/04	Breakthrough Health Center	Neck pain 8/10 and LBP 6/10. Reports for two days has started to tighten, reports dizziness today and believes it is associated with neck tightness. Adjustment. Lynne Ryan, DC
05/24/04	Midwest Ear Nose and Throat	Recheck before surgery. She was under the impression that she needed to have her physical exam redone. She wants her throat rechecked. She got a lot of debris out over the weekend. Doing well. Tonsillectomy. Dr. Bethany Helvig

DATE	PROVIDER	DESCRIPTION
05/25/04	Breakthrough Health Center	Hurts all the time. Tunes it out most of the time, worse when sedentary. Numb and tingly feeling in lumbar spine. Neck and low back disability questionnaire. Impression: shoulder pain, muscle dysfunction, continue PT, follow-up with MD in one month, start Bextre. MRI 5/27/04.
05/26/04	Complete Care Chiro	Neck and shoulders are overall the same. Some good and bad days. Has tonsils out Wed. Adjustment. Shannon DeBoer, DC
05/27/04	Breakthrough Health Center	Neck pain 4/10 and LBP 6/10. Adjustment. Stable at this time. Adjustment revealed substantial amount of movement at C1, C2, T2-4, L2, L4-5 and left ilium-sacrum. Lynne Ryan, DC MRI of lumbar spine. Impression: negative. Dr. Lawrence Leon
05/28/04	Midwest Ear Nose and Throat	Tonsillectomy. Post op visits on 6/4/04 and 6/14/04.
06/01/04	Midwest Ear Nose and Throat	Postop phone call. No answer.
06/02/04	Breakthrough Health Center	Reviewed MRI results. Healthy discs.
06/10/04	Breakthrough Health Center	Neck pain 5/10 and LBP 6/10. Adjustment. Lynne Ryan, DC
06/14/04	Midwest Ear Nose and Throat	Status post tonsillectomy. Little bleeding from right side but self-limited. Dr. Bethany Helvig
06/15/04	Complete Care Chiro	Legs are worse. Shoulders and neck were bad and getting worse again. Adjustment. Shannon DeBoer, DC
06/21/04	Breakthrough Health Center	Reports for two days the neck has started to tighten – reports today she began to feel dizziness that she believes is associated with the neck tightness.
06/25/04	Complete Care Chiro	Legs are bad. Not much change but feels like it is helping Shoulders and neck are flared up. Adjustment. Shannon DeBoer, DC
06/28/04	Breakthrough Health Center	PT.
07/02/04	Complete Care Chiro	Legs still bad. Neck and shoulders are off and on. Adjustment. Shannon DeBoer, DC
07/14/04	Complete Care Chiro	Same symptoms. Leg discomfort has decreased but starting to come back. Adjustment. Shannon DeBoer, DC
07/21/04	Complete Care Chiro	Headaches on and off. Right shoulder is bothering her. Legs were better until this morning. Adjustment. Shannon DeBoer, DC
08/02/04	Complete Care	Has cold. Still trouble with nose and throat. Neck sore off and on.

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	Chiro	Mid back is more irritated from coughing. LP and legs are ok. Adjustment. Shannon DeBoer, DC
08/17/04	Sioux Valley Hospital	ER. Right wrist pain after fall.  Right wrist images. Impression: there are no prior studies for comparison; four views of the right wrist are performed; there is comminuted fracture of the distal right radius present with some dorsal angulation evidence on the lateral radiograph; a nondisplaced or minimally displaced ulnar styloid fracture is also present. Dr. Terry Yaeger
08/18/04	Van Demark Orthopedic Specialists	Right wrist pain. She fell down a few stairs and landed on her outstretched right hand. Sioux Valley ER fracture and splint was applied. Dr. Nicholas Yokan
08/18/04	Orthopedic Institute	Works for Jim Abourezk and fell at the Kid Rock Concert last night injuring her right wrist. Shows up in a well molded splint. X-rays show comminuted extra articular transverse metaphyseal fracture of the right distal radius with ulnar styloid avulsion and comminution of the dorsal cortex. Consulted with Dr. Curd. Dr. Peter Looby  Dr. VanDemark's office requested an evaluation. She is neurovascularly intact at the fingertips. Her elbow is nontender. No pain in shoulder or neck. She opted to proceed with open reduction and internal fixation with dorsal bone grafting utilizing a synthetic substance. Dr. Blake Curd
08/19/04	Van Demark Orthopedic Specialists	Fracture right wrist. Steps were slippery at the SF Arena, Kid Rock concert. She slipped and fell.
08/19/04	Orthopedic Institute	Reduction and internal fixation with dorsal bone grafting, right distal radius as outpatient as SFSC. Dr. Blake Curd
08/19/04	Sioux Falls Surgical Center	Operative report: open reduction and internal fixation with dorsal bone grafting. Dr. R Blake Curd
08/19/04	Avera McKennan	Right wrist radiology report. Post-op fracture distal radius with ventral plate and screw fixation. Near anatomic fracture alignment. Dr. J. Baka
08/24/04	Complete Care Chiro	Saw Dr. Dawn in Spearfish last week for broken wrist. Fell down wet stairs at arena in Sioux Falls. Had surgery on the 19 <sup>th</sup> . Adjustment. Shannon DeBoer, DC
08/26/04	Avera McKennan	May start PT ROM right wrist in 7 days. OT hand clinic notes. This

DATE	PROVIDER	DESCRIPTION
	Hospital	patient would benefit from continued therapy to upgrade functional use of her right dominant hand for work tasks and functional tasks.
09/01/04	Orthopedic Institute	Post-op check. Sustained right distal radius fracture. Saw occupational therapy. She is in a short arm orthoplast splint and doing ROM exercises which are going well. ROM is improving nicely. Minimal pain. No pain medications. She works as a legal assistant. She has gone back to work and is trying to do the best she can. Incision healing well. No infection. Continue with therapy with ROM and no strengthening at this point. Continue to work. Chad Scott, PA-C
09/07/04	Complete Care Chiro	Better for a bit. Right shoulder and neck have been fine. Legs starting to bother again. Doing okay considering recent fall. Adjustment. Shannon DeBoer, DC
09/21/04	Complete Care Chiro	Wrist is starting to improve. Allergies are bothering her. Shoulders are sore, drove to Davenport, IA recently. Legs are off and on, bother her when working out. Adjustment. Shannon DeBoer, DC
09/28/04	Avera McKennan	Occupational therapy hand clinic. She has had 9 sessions thus far since 8/26/04. She is tolerating therapy well. She has made good gains in her ROM. Pain is decreasing. She is gradually waning out of her splint. Continue to meet 3 times a week. Rhonda Siemonsma, OTR
09/29/04	Orthopedic Institute	Follow-up. Motion is about 60-70% where we would like it. Continue motion exercises and add strengthening program. Discussed wearing splint in-between exercises. Dr. R. Blake Curd
10/04/04	Avera McKennan	OT.
10/05/04	Complete Care Chiro	A week after adjustment she begins to get tight. Neck and shoulders are tight. Adjustment. Shannon DeBoer, DC
10/07/04	Avera McKennan	OT. Seen in therapy 8/26/04 to 10/04/01. 2-4 times per week.
10/27/04	Orthopedic Institute	Follow-up. Doing terrific. No further complaint or concerns. Denies any problems with the wrist. Not having numbness or tingling in any fingers. She probably lacks about 10 degrees of full extension. Color of scar is starting to fade. X-rays show good fracture healing Chad Scott, Pa-C
11/03/04	Avera McKennan	OT. ROM and strengthening.
12/14/04	Avera McKennan	Occupational therapy hand clinic discharge note. No longer wearing her splint. She is currently working full-time regular duty at JC Penny's. Rhonda Siemonsma, OTR
03/25/05	2 Docs Chiropractic	Consultation, examination and treatment for injuries sustained in 2 accidents. Referred by Dr. Shannon Deboer. MVA caused her to have headaches, neck, upper and mid back pain, as well as low back pain



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		and stiffness. The fall caused her to fracture her right distal radius and ulna. Repaired surgically. Continued to have pain, stiffness and noticeable weakness. ADLs were regularly made difficult or impossible.  Complaint: headaches, pain, spasm, soreness and of the upper back, mid back and neck. Low back pain radiating into left hip. Pain rating 7/10. Adjustment performed.  Michael Torsney, DC
03/28/05	2 Docs Chiropractic	Follow-up. Pain rating 5/10. Describes pain as severe and frequent. Adjustment performed.  Michael Torsney, DC
04/06/05	2 Docs Chiropractic	Follow-up. She felt better throughout treatment. Severity and intensity of back conditions have decreased. Right wrist and arm felt temporarily more flexible following her last treatment. Pain rating 5/10. Adjustment performed.  Michael Torsney, DC
04/14/05	Complete Care Chiro	Upper back feels sore. Adjustment.  Shannon DeBoer, DC
04/22/05	2 Docs Chiropractic	Follow-up. States she had been busy and that she had a difficult time making appointment during business hours. She felt mild improvements overall since initiating care. Pain moderate and frequent. Pain rating 5/10. Adjustment performed.  Michael Torsney, DC
04/26/05	2 Docs Chiropractic	Follow-up. Presents with complaints of pain, spasm and soreness of the upper back, mid back and neck. Problem is moderate and frequent. Pain rating 5/10. Adjustment performed.  Michael Torsney, DC
05/04/05	2 Docs Chiropractic	Routine visit. Symptoms are moderate and frequent. Pain rating 5/10. She also complains of pain, spasm, soreness of the left shoulder, right shoulder, right arm, right elbow, right hand and right wrist. Condition is as expected and slowly improving with treatment. Functional limitations are improving with treatment, and her abilities to perform ADLs are getting better. Adjustment performed.  Michael Torsney, DC
05/09/05	2 Docs Chiropractic	Routine visit. States she made significant progress in her neck, upper, mid and low back. She stated further concerns about her wrist and shoulder. Her right arm is regularly irritated by normal ADLs. Pain is moderate and frequent. Pain rating 5/10. Adjustment performed.  Michael Torsney, DC
05/16/05	2 Docs Chiropractic	Follow-up. Soreness of the upper back, mid back and neck. Symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed.  Michael Torsney, DC
05/25/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10.

DATE	PROVIDER	DESCRIPTION
		Adjustment performed. Michael Torsney, DC
05/27/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Adjustment performed. Michael Torsney, DC
05/31/05	2 Docs Chiropractic	Follow-up. Stated that her car accident injuries were getting close to what she would consider pre-injury. Discussed the possibility of release from active care for her accident injuries and continued care for her right arm, shoulder and wrist. Symptoms are moderate and occasional. Pain rating 4/10. Condition is as expected and slowly improving with treatment. Functional limitations are improving with treatment, and it is clear her abilities to perform ADLs are getting better. Adjustment performed. Michael Torsney, DC
06/08/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 3/10. Condition is as expected and slowly improving with treatment. Functional limitations are improving with treatment, and it is clear her abilities to perform ADLs are getting better. Adjustment performed. Michael Torsney, DC
06/16/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 3/10. Condition is as expected and slowly improving with treatment. Functional limitations are improving with treatment, and it is clear her abilities to perform ADLs are getting better. Adjustment performed. Michael Torsney, DC
06/23/05	2 Docs Chiropractic	Follow-up. Stated she reached what she considered pre-injury status of her car accident injuries. She stated that although she had felt minor improvements to her right wrist, arm, and shoulder, she was not at what she would consider pre-injury stats for that injury. Raised concerns about the long-term residuals from her injuries related to the fall. Symptoms are moderate and frequent. Pain rating 5/10. Condition is as expected and slowly improving with treatment. Functional limitations are improving with treatment, and it is clear her abilities to perform ADLs are getting better. Adjustment performed.  She is release from active care for her car accident injuries effective 5/31/15. Recommend continue treatment on as needed basis for 1-2 times per month for 8-12 months to minimize the possibility of long-term residuals. Remains under active care for her right arm, wrist and shoulder injuries. Michael Torsney, DC
06/29/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and frequent. Pain rating 5/10. Adjustment performed.

DATE	PROVIDER	DESCRIPTION
		Michael Torsney, DC
07/13/05	2 Docs Chiropractic	Follow-up. Stated that she has had regular irritation to her right wrist as a result of ADLs. Primary complaint of pain, spasm and soreness of the right shoulder, right arm, right elbow and right wrist. Symptoms are moderate and frequent. Pain rating 4/10. Adjustment performed.
		Michael Torsney, DC
07/20/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and frequent. Pain rating 4/10. Adjustment performed.
		Michael Torsney, DC
08/02/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and frequent. Pain rating 4/10. Adjustment performed.
		Michael Torsney, DC
08/10/05	Orthopedic Institute	Phone call that her thumb and index finger are numb from riding motorcycle. She needs to give it time per Dr. Curd about 2 weeks.
08/15/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and frequent. Pain rating 6/10. Adjustment performed.
		Michael Torsney, DC
08/18/05	2 Docs Chiropractic	Right shoulder, right elbow, and right wrist. Additional complaints of pain and soreness of the upper back and neck.
08/29/05	2 Docs Chiropractic	Follow-up. Symptoms moderate and occasional. Pain rating 6/10. Condition is unchanged somewhat worse, due to an acute flare-up of a chronic condition. Functional limitations are not improving with treatment, and it is clear that she still cannot perform ADLs at an acceptable level. She will likely have periods of exacerbation and remission. Adjustment performed.
		Michael Torsney, DC
08/30/05	2 Docs Chiropractic	Letter that she was seen at the office for follow-up care regarding a MVA on 8/11/03 and a fall on 8/19/04. Initial examination diagnosis: acute traumatic sprain/strain of the neck with associated pain and stiffness; acute traumatic sprain of the thoracic spine with associated pain and stiffness; acute traumatic sprain/strain of the lumbar spine with associated pain and stiffness; acute traumatic sprain/strain injury of the knee with associated local swelling and point tenderness; joint dysfunction of the right wrist with associated decreased active and passive range of motion, local soft tissue swelling, and point tenderness; cervical, thoracic, lumbar, sacral and pelvic segmental dysfunction with associated muscle spasm, stiffness and pain. These injuries were combined results in the MVA and fall. She was progressing as expected and her condition regressed following the fall when she fractured her right wrist/forearm. The fall caused an acute exacerbation of the preexisting accident injuries. Her spinal diagnoses have progressed as expected. She had not reached what I would consider pre-injury status at the time of release. At that time she improved approximately 85%.

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		The fracture of the right wrist, radius and ulna healed as expected but the wrist has not improved to pre-injury status. She will have lifelong residuals from the injury including pain, active and passive ROM abnormality, and joint dysfunction of the proximal wrist, as well as possible neuralgia. I suspect the wrist will develop osteoarthritis prematurely due to biomechanical changes that resulted from the fracture. Treatment should be continued until MMI is reached. Michael Torsney, DC
09/01/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Condition is unchanged somewhat worse, due to an acute flare-up of a chronic condition. Functional limitations are not improving with treatment, and it is clear that she still cannot perform ADLs at an acceptable level. She will likely have periods of exacerbation and remission. Adjustment performed. Michael Torsney, DC
09/06/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Condition is unchanged somewhat worse, due to an acute flare-up of a chronic condition. Adjustment performed. Michael Torsney, DC
09/12/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Condition is as expected and slowly improving with treatment. Functional limitations are improving with treatment, and it is clear her abilities to perform ADLs are getting better. Adjustment performed. Michael Torsney, DC
09/26/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed. Michael Torsney, DC
10/06/05	2 Doc Chiropractic	Follow-up. Right shoulder, elbow and wrist pain 4/10. Exacerbated by normal activities. Soreness in upper back and neck, pain rating 2/10.
10/13/05	2 Doc Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Adjustment performed. Michael Torsney, DC
10/24/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed. Michael Torsney, DC
11/03/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Adjustment performed. Michael Torsney, DC
11/07/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 6/10. Condition is unchanged somewhat worse, due to an acute flare-up of a chronic condition. Functional limitations are not improving with treatment, and it is clear that she still cannot perform ADLs. Adjustment performed.

DATE	PROVIDER	DESCRIPTION
		Michael Torsney, DC
11/14/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Condition is unchanged somewhat worse, due to an acute flare-up of a chronic condition. Adjustment performed. Michael Torsney, DC
11/21/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Condition is unchanged somewhat worse, due to an acute flare-up of a chronic condition. Adjustment performed. Michael Torsney, DC
11/28/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Condition is as expected and slowly improving with treatment. Functional limitations are improving with treatment and it is clear her abilities to perform ADLs are getting better. Adjustment performed. Michael Torsney, DC
12/12/05	2 Docs Chiropractic	Follow-up symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed. Michael Torsney, DC
12/22/05	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Adjustment performed. Michael Torsney, DC
01/02/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and frequent. Pain rating 6/10. Condition is as expected and slowly improving with treatment. Functional limitations are improving with treatment and it is clear her abilities to perform ADLs are getting better. Adjustment performed. Michael Torsney, DC
01/04/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Adjustment performed. Michael Torsney, DC
01/06/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Condition is as expected and slowly improving with treatment. Functional limitations are improving with treatment, and it is clear her abilities to perform ADLs are getting better. Adjustment performed. Michael Torsney, DC
01/09/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed. Michael Torsney, DC
01/17/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed. Michael Torsney, DC
01/23/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Adjustment performed. Michael Torsney, DC
01/30/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasion. Pain rating 4/10. Adjustment performed.

DATE	PROVIDER	DESCRIPTION
		Michael Torsney, DC
02/03/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Adjustment performed.
		Michael Torsney, DC
02/06/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed.
		Michael Torsney, DC
02/13/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed.
		Michael Torsney, DC
02/22/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 5/10. Adjustment performed.
		Michael Torsney, DC
02/23/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 6/10. Adjustment performed.
		Michael Torsney, DC
02/27/06	2 Docs Chiropractic	Follow-up. Symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed.
		Michael Torsney, DC
03/20/06	2 Docs Chiropractic	Follow-up. Complaints of pain and soreness of the right elbow and wrist. Symptoms are moderate and occasional. Pain rating 3/10. Adjustment performed.
		Michael Torsney, DC
03/29/06	2 Docs Chiropractic	Right elbow and wrist pain. Symptoms are moderate and occasional. Pain rating 4/10. Adjustment performed.
		Michael Torsney, DC
04/03/06	2 Docs Chiropractic	Follow-up. Right elbow and wrist pain and upper back and neck pain. Symptoms are moderate and intermittent. Pain rating 4/10. Condition is as expected and slowly improving. Adjustment performed.
		Michael Torsney, DC
04/10/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3/10. Conditions is as expected and slowly improving. Adjustment performed.
		Michael Torsney, DC
04/24/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3-4/10. Adjustment performed.
		Michael Torsney, DC
05/08/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3/10. Condition is as expected and slowly improving. Adjustment performed.
		Michael Torsney, DC
05/11/06	Genesis Health Group	Establishing care. New to area. Right shoulder and bilateral leg pain. Extensive work up in 2000 for leg pain. Mother has same affliction. Unable to find anything. Right shoulder pain from accident. No

DATE	PROVIDER	DESCRIPTION
		numbness or tingling. Lyrica. Dr. Karl Treiber
05/22/06	2 Docs Chiropractic	Follow-up. Conditions were regularly irritated by ADLs. Primary compliant is right elbow and right wrist pain and soreness. Upper back and neck pain, spasm and soreness. Symptoms are moderate and occasional. Pain rating 3-4/10. Adjustment performed. Michael Torsney, DC
05/31/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3-4/10. Adjustment performed. Michael Torsney, DC
06/05/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3/10. Conditions is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
06/15/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3-4/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
06/19/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 2-4/10. Adjustment performed. Michael Torsney, DC
06/20/06	Genesis Health Group	Spider bite on left shoulder. Big blister. Photos on phone. She also got a tick bite in the BH 3 weeks ago and there is still a scab. Tick was on her for less than 24 hours.
06/26/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate, intermittent, and occasional. Pain rating 4/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
07/05/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
07/24/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3-4/10. Adjustment performed. Michael Torsney, DC
08/01/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate, occasional and frequent. Pain rating 3-5/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC

<b>DATE</b>	<b>PROVIDER</b>	<b>DESCRIPTION</b>
08/04/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 4-5/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
08/10/06	2 Docs Chiropractic	Follow-up. Right arm, right elbow, right wrist, upper back and neck pain radiating into the right shoulder. Symptoms are moderate and occasional. Pain rating 3-4/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
08/15/06	Genesis Health Group	Female physical.
08/17/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3-4/10. Conditions is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
08/25/06	2 Docs Chiropractic	Follow-p. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3-5/10. Condition is unchanged somewhat worse, due to an acute flare-up of a chronic conditions. Adjustment performed. Michael Torsney, DC
09/13/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck. Symptoms are moderate and occasional. Pain rating 5/10. Condition is unchanged somewhat worse, due to an acute flare-up of a chronic condition. Adjustment performed. Michael Torsney, DC
09/27/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 2-4/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
10/02/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
10/18/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 2-4/10. Adjustment performed. Michael Torsney, DC
11/03/06	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate, occasional and intermittent. Pain rating 4/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC



DATE	PROVIDER	DESCRIPTION
11/07/06	Genesis Health Group	Upset stomach. Around more smoke and stayed out late. Refill of Flonase.
01/03/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
01/22/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck. Symptoms are moderate and occasional. Pain rating 3-4/10. Adjustment performed. Michael Torsney, DC
02/01/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck. Symptoms are moderate and occasional. Pain rating 3/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
02/01/07	Genesis Health Group	Stomach infection. Did scope and biopsy.
02/15/07	Genesis Health Group	Recheck. History of fibromyalgia and chronic leg pain. Grieving the death of her two grandmothers and struggling. Fluoxetine/Prozac has not been as helpful. Requests to restart counseling. Problems sleeping at night. Nausea every morning. Her mother has H-Pylori and would like to be tested. Jennifer George, FNP
02/19/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck. Symptoms are moderate and occasional. Pain rating 3/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
02/19/07	Metropolitan Medical Laboratory	Pylori Breath Test – negative.
02/26/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3/10. Adjustment performed. Michael Torsney, DC
03/04/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3-4/10. Condition is as expected and slowly improving. Adjustment performed. Michael Torsney, DC
03/12/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate, occasional, and frequent. Pain rating 3-5/10. Condition is as expected and irritated by ADLs. Adjustment performed. Michael Torsney, DC
03/14/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3/10. Condition is as expected and slowly improving. Adjustment performed.

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		Michael Torsney, DC
03/15/07	Genesis Health Group	Phoned complaining of leg pain. Eye pain and vision changes so stopped meds.
03/17/17	2 Docs Chiropractic	Follow-up. Soreness in right elbow and wrist. Pain rating 3/10. Spasms in upper back and neck.
		Michael Torsney, DC
03/20/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3-4/10. Condition is as expected and slowly improving. Adjustment performed.
		Michael Torsney, DC
03/26/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 3-4/10. Condition as expected and slowly improving. Adjustment performed
		Michael Torsney, DC
03/30/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 2-3/10. Condition is as expected and slowly improving. Adjustment performed.
		Michael Torsney, DC
04/03/07	2 Docs Chiropractic	Follow-up. Right elbow, right wrist, upper back and neck pain. Symptoms are moderate and occasional. Pain rating 2-3/10. Condition is as expected and slowly improving. Adjustment performed.
		Michael Torsney, DC
04/05/07	Genesis Health Group	Bilateral leg pain. Extensive work up in the past has been negative, Requip helped 25-50% of the time. Difficult to describe. No upper extremity symptoms. No headaches or vision changes. Lyrica is only med that has worked for her but it causes bilateral eye pain. Three months' worth of samples of Lyrica given.
		Karl Teiber, DO
04/11/07	2 Docs Chiropractic	Reports no significant change in their level of symptoms or their capacity for noted daily, recreational and/or occupational activities. Adjustment performed.
		Michael Torsney, DC
04/16/07	2 Docs Chiropractic	Reports no significant changes in reported functional complaints or symptoms except as noted. Adjustment performed.
		Michael Torsney, DC
04/19/07	Genesis Health Group	Sinus pressure.
04/20/07	2 Docs Chiropractic	Reports no significant change in their level of symptoms or their capacity for noted daily, recreational and/or occupational activities. Adjustment performed.
		Michael Torsney, DC

DATE	PROVIDER	DESCRIPTION
04/24/07	2 Docs Chiropractic	Reports no significant change in their level of symptoms or their capacity for noted daily, recreational and/or occupational activities. Adjustment performed. Michael Torsney, DC
04/30/07	2 Docs Chiropractic	Reports no significant change in reported functional complaints or symptoms except as noted. Adjustment performed. Michael Torsney, DC
05/07/07	2 Docs Chiropractic	Revised complaint: mechanism of flare-up: patient entered the office with worsening of previous complaints which were not caused by work or automobile accident. Instead, the mechanism for the current condition is attributed to overexertion, and the current symptoms are described as: pain and stiffness. Duration: the symptoms worsened today in the early morning. Reports no significant change in the reported functional complaints or symptoms except as noted. Adjustment performed. Michael Torsney, DC
05/08/07	Genesis Health Group	Restless legs. Recently switched off Requip and start Lyrica. She had only one day where she had leg pain, which was last night. Karl Treiber, DO
05/09/07	2 Docs Chiropractic	Reports no significant change in the reported functional complaints or symptoms except as noted. Adjustment performed. Michael Torsney, DC
05/10/07	Genesis Health Group	Needs letter stating condition that she may miss work at times.
05/14/07	2 Docs Chiropractic	Reports no significant change in the reported functional complaints or symptoms except as noted. Adjustment performed. Michael Torsney, DC
05/29/07	2 Docs Chiropractic	Reports no significant change in the reported functional complaints or symptoms except as noted. Adjustment performed. Michael Torsney, DC
05/29/07	Genesis Health Group	She wants MRI of the brain.
06/02/07	2 Docs Chiropractic	Reports no significant change in the reported functional complaints or symptoms except as noted. Adjustment performed. Michael Torsney, DC
06/04/07	Genesis Health Group	Pre-authorization for brain MRI. Physician needs to speak to medical director for peer to peer evaluation. MRI of brain. Bilateral hand and leg numbness. Impression: no intracranial abnormality. Dr. Robert Hartung

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06/06/07	2 Docs Chiropractic	Reports no significant change in their level of symptoms or their capacity for noted daily, recreational, and/or occupational activities. Adjustment performed. Michael Torsney, DC
07/05/07	2 Docs Chiropractic	Revised complaint: mechanism of flare-up: patient entered the office with worsening of previous complaints which were not caused by work or automobile accident. Instead, the mechanism for the current condition is attributed to overexertion, and the current symptoms are described as: pain and stiffness. Duration: the symptoms worsened today in the early morning. Reports no significant change in the reported functional complaints or symptoms except as noted. Adjustment performed. Michael Torsney, DC
07/16/07	2 Docs Chiropractic	Reports no significant change in her reported functional complaints or symptoms except as noted. Adjustment performed. Michael Torsney, DC
07/31/07	2 Docs Chiropractic	Reported no significant change in their level of symptoms or their capacity for noted daily, recreational and/or occupational activities. Adjustment performed. Michael Torsney, DC
08/13/07	2 Docs Chiropractic	Reports no significant change in her reported functional complaints or symptoms except as noted. Adjustment performed. Michael Torsney, DC
08/20/07	2 Docs Chiropractic	Reports no significant change in their level of symptoms or their capacity for noted daily, recreational and/or occupational activities. Adjustment performed. Michael Torsney, DC
09/05/07	2 Docs Chiropractic	Reports no significant change in her reported functional complaints or symptoms except as noted. Adjustment performed. Troy Newmyer, DC
03/13/08	Black Hills Health and Wellness Center	Personal history. Mid and low back pain. Slip and fall 3-4 years ago and broke wrist. Thoracic and lumbar spine pain. Adjustment. Shannon DeBoer, DC
03/26/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. Adjustment. Shannon DeBoer, DC
04/10/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. Adjustment. Shannon DeBoer, DC
04/21/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. States that she bent over today and felt her lower back pop. Not good. Has been in a lot of pain. Hard to move and bend in any direction. Adjustment. Shannon DeBoer, DC

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04/28/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. Has been about the same since her last visit. Adjustment. Shannon DeBoer, DC
05/22/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. Has been the same since last visit. Adjustment. Shannon DeBoer, DC
06/10/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. She is getting pain in the upper back and shoulder on the right side. This is an aggravation from a previous issue that has been for a year or so and now is getting bad again. Adjustment. Shannon DeBoer, DC
06/24/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. Same since last visit. Adjustment. Shannon DeBoer, DC
07/07/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. Did well last visit and now spent the weekend helping shoe horses. She is pretty flared up all over and her low back and shoulders are getting worse. Adjustment. Shannon DeBoer, DC
07/21/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. Did well last visit and now spent the weekend helping shoe horses. She is pretty flared up all over and her low back and shoulders are getting worse. Adjustment. Shannon DeBoer, DC
07/30/08	Black Hills Health and Wellness Center	Thoracic and lumbar pain 75% improved. Did well last visit and now spent the weekend tubing behind a boat. Lots of stress at work and her shoulders and upper back are even worse. Adjustment. Shannon DeBoer, DC
08/21/08	Black Hills Health and Wellness Center	Pain in thoracic and lumbar spine. Pain with movement in thoracic and lumbar spine. Stiffness in cervical, thoracic and lumbar spine. Tenderness in the thoracic and lumbar spine.
09/09/08	Black Hills Health and Wellness Center	Dull moderate pain in neck and back. Adjustment. Shannon DeBoer, DC
09/23/08	Black Hills Health and Wellness Center	Presents with pain that is characterized as dull moderate, the muscle of the posterior neck, the trapezius muscles and the muscles of the upper back.
10/09/08	Black Hills Health and Wellness Center	Upper back and neck pain worsening. Adjustment. Shannon DeBoer, DC
10/16/08	Black Hills Health and Wellness Center	Upper back and neck pain worsening. Adjustment. Shannon DeBoer, DC
11/11/08	Black Hills Health and Wellness Center	Upper back and neck pain worsening. Adjustment. Shannon DeBoer, DC
12/04/08	Black Hills Health and Wellness Center	Upper back and neck pain worsening. Adjustment. Shannon DeBoer, DC
12/08/08	BH Ortho & Spine	Right shoulder pain from falling at a concert. She states it is difficult to pull off her shirt, do things overhead, and lift any objects. She does not recall any other injury. She has a plate and screws in her right

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		wrist. She reports neck problems from being rear-ended two times within a year. Shoulder will hurt badly and the next day she will have tingling down her arm. Recommend PT for 4-6 weeks. X-rays of shoulder do not show any acute bony abnormality or degenerative changes. Candy Collabollotta, PA-C
12/09/08	Black Hills Health and Wellness Center	Upper back and neck pain worsening. Related last visit helped release her upper back and shoulder. Saw Ortho MD today and states they recommend that she have some PT done. 10-20% improved. Adjustment. Shannon DeBoer, DC
12/11/08	2 Docs Chiropractic	Letter responding to her condition and resulting treatment. The opinion stated in my 08/30/05 letter has not changed....  5. Ms. Schoon will have residuals from her accident injuries for the rest of her life or until some other treatment is discovered that will repair her injuries. 6. It is probable that Ms. Schoon's fibromyalgia was aggravated or worsened by the fall of 8/17/04. In my opinion, the fall resulted in the need for treatment in several ways. It likely produced its own joint, connective tissue, and muscular injuries that required treatment. The fall also aggravated or exacerbated pre-existing dormant musculoskeletal conditions as well as sub-clinical accident injuries. The fibromyalgia diagnosis could also contribute to the rate of recovery and level of pain experienced. It has been my experience that fibromyalgia's sufferers, respond more slowly to treatment, are more sensitive to the actual treatments, and flare up at a lower threshold of irritation. Further their levels of exacerbation are significantly greater than would be expected for similar stimulus in a normal person. The fibromyalgia seems to magnify the subjective level of pain reported and is equivalent to the measurable level of irritation present. Michael Torsney, DC
12/12/08	BH Ortho & Spine	PT. Initial evaluation. Right shoulder pain started hurting three years ago and has progressively gotten worse. Notes tingling in her pinky finger when overhead. Types and sits at workstation 75% of the workday. April McNaboe, PT
12/15/08	BH Ortho & Spine	Patient cancelled appointment.
12/19/08	BH Ortho & Spine	PT. Right shoulder pain is better. Noted she checked her workstation and employer has approved a new desk and workstation. This should help with overall ergonomics. April McNaboe, PT

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12/22/08	BH Ortho & Spine	Patient cancelled appointment.
12/22/08	BH Health & Wellness Center	<p>Letter responding to 12/12/08 letter regarding status of Ms. Schoon.</p> <ol style="list-style-type: none"> <li>1. Within a reasonable amount of medical certainty, Ms. Schoon was injured in the fall dated 8/17/04.</li> <li>2. My diagnosis at that time of her next visit (8/24/04) with me was: cervical segmental dysfunction with a moderate cervical sprain/strain, thoracic segmental dysfunction with thoracalgia and continued with lumbar segmental dysfunction with lumbalgia. The fall did not change my diagnosis that she had been treating with me for but she was more acute and flared up at that time. Please note also on this date of service, the patient's signature had been changed significantly due to her injuries.</li> <li>3. As a result of her fall the condition of fibromyalgia was exacerbated. The fall would have been the precipitating factor. She had been working with the underlying fibromyalgia with some success prior to that incident. Fibromyalgia by nature makes it tougher for a patient to overcome a musculoskeletal injury in that there is a baseline of pain and tightness in the muscles and any significant increase in the forces that travel thru those areas will increase the amount of pain experienced. This would be consistent with a force being transmitted from the distal extremity thru the arm and shoulder and up to the neck.</li> <li>4. The extent of injury exacerbated with the fall would be confined to the cervical and thoracic sprain/strain injuries. She had progressed thru the prior couple of months with the main complaint becoming less and less about her neck and upper back areas. She had responded well to the care provided and we had worked down to the point of only one adjustment per every 1-2 weeks depending on how she had done. Post fall she really went back to primary complaint being neck and shoulder related. Due to the nature of her fall and the history she had with my office I gave her a little latitude with her treatment schedule and kept her at 1 time per one or two weeks. She still responded relatively well to her adjustments but they were less effective and did not palliate as long.</li> <li>5. Ms. Schoon has again sought my care for her injuries. Starting in March of 2008. She continues to have issues with relative areas. She continues to have troubles with the right shoulder/trapezius and cervical spine. She is also having some increase of radiating pain into the rest of her arm and wrist pain and numbness. For these reasons we had decided recently that it would be appropriate for her to have another orthopedic consult which the patient has done.</li> </ol>

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		<p>6. The care and treatment that Ms. Schoon had undergone since the accident have been very appropriate for the symptoms that she has been experiencing. She has been very consistent with her care schedules and continues to try and find resolution to her situation.</p> <p>7. In my opinion, Ms. Schoon has not reached MMI for the injuries sustained in this fall. As with ligamentous injury there is scar tissue to deal with and stretching of the ligament. It is a medical fact that once a ligament has been injured it will never be 100 percent again.</p> <p>8. In my opinion, the injuries that she has been dealing with will be permanent. I have not prepared nor performed a permanent impairment rating on Ms. School although she was on a great course to resolution of her problems prior to the fall in question but since then she has never been the same.</p> <p>9. In my opinion, Ms. School will require ongoing palliative care for the injuries described. She has responded well to chiropractic adjustments, myofascial release, trigger point therapy and active care instruction including stretching, strengthening and proprioceptive work. I expect that her consistency will dictate the extent that she will need to use these services. Currently she is on an as needed basis as she states that financial concerns had factored into her ability to participate. She has been getting adjusted one time per every 2-4 weeks. This has been palliative at best and patient consistently reports being about the same as the previous visit and maybe worsening slightly over the past month or so. She is getting relief but being consistent and a little proactive with her care schedule would make a pronounced difference in her ability to improve. In my opinion she needs to be receiving treatment once a week and as she improves and stabilizes again she may progress out to the one time per 2-4 weeks and be able to maintain this. So in my best estimation she is going to need the previously noted care to the extent of 24 visits per year at an average cost of \$150.00 per session. This would come out to approximately \$3,600.00 per year.</p> <p style="text-align: right;">Dr. Shannon DeBoer</p>
12/23/08	Black Hills Health and Wellness Center	<p>She did a little better for a few days again and now she is fighting a cold and getting really sore in the upper back and shoulder on the right side and into the neck. Adjustment.</p> <p style="text-align: right;">Shannon DeBoer, DC</p>
01/06/09	Black Hills Health and Wellness Center	<p>She did a little better for a few days again and now she is fighting a cold and getting really sore in the upper back and shoulder on the right side and into the neck. Adjustment.</p> <p style="text-align: right;">Shannon DeBoer, DC</p>



DATE	PROVIDER	DESCRIPTION
01/09/09	BH Ortho & Spine	Follow-up right shoulder pain. Appeared to be doing better with PT and last week noticed a lot of excruciating pain down the back of her arm and into her hand. History of whiplash and lack of curve in her neck. X-rays show no acute bony abnormalities. Order MRI of cervical spine. Candace Collabолletta, PA-C
01/12/09	BH Surgery Center	MRI of cervical spine. Impression: minimal disc displacements at the C3-4, C4-5, and C5-6 levels without dominant compressive arthropathy. Dr. Andrew Finkbeiner
01/16/09	BH Ortho & Spine	Patients call for MRI results of cervical spine It shows minimal disc displacement at C3-4, C4-5, and C5-6 but there is no compressive arthropathy. Continues to have achiness in neck into arm. Recommend PT. Consider MRI of shoulder. Candy Collabолletta, PA-C
01/20/09	Black Hills Health and Wellness Center	She did better for a few days again and now she is not really sick anymore but still pretty sore in the upper back and shoulder on the right and neck. Adjustment. Shannon DeBoer, DC
02/05/09	Rehab Doctors	EMG. The nerve conduction studies and needle examination are normal. There is not electrophysiological evidence of a right median or ulnar neuropathy, brachial plexopathy or cervical radiculopathy. This is a normal study. Dr. Brett Lawlor
02/09/09	BH Ortho & Spine	Received patient's EMG results and there were no signs of neuropathy. Recommend PT towards neck with radiculopathy. Refill Flexeril. Candy Collabолletta, PA-C
02/10/09	BH Ortho & Spine	Requests refill Flexeril. Received EMG results. No signs of neuropathy. She should get PT. Candy Collabолletta, PA-C
02/17/09	Black Hills Health and Wellness Center	She did better for a few days again and now she is not really sick anymore but still pretty sore in the upper back and shoulder on the right and neck. Adjustment. Shannon DeBoer, DC
02/20/09	ProMotion PT	Patient questionnaire. Neck into right shoulder and arm pain. Reports she initially broke her wrist and had surgery with plating to treat that. Has had onset of shoulder pain about 6 months after injury and had progressively gotten worse. Tends to get headaches and neck pain especially is she does not go to the chiropractor. Currently going to chiro every 2-3 weeks. Has an increase of aggravation with weather changes, vacuuming or any pushing motion and punching exercises. Significant myofascial pain through the cervical and thoracic area radiating tightness into the right arm. May benefit from axial distractions and aggressive stabilization exercises. 2 times a week for

DATE	PROVIDER	DESCRIPTION
		8-12 weeks. Exercises. Sonya Maas, PT
02/24/09	Black Hills Health and Wellness Center	States she started PT this week for her shoulder and thinks that it is aggravating things a little right now. Did feel better with adjustment last time. Adjustment. Shannon DeBoer, DC
02/25/09	ProMotion PT	Neck is more sore.
02/27/09	ProMotion PT	Reports shoulder pain after last session. Slight headache.
03/03/09	Black Hills Health and Wellness Center	States PT sessions are making things more sore. She did okay with her last visit and that she had to do a lot of traveling over the weekend. She is sore in the same areas and intensity is about the same. Shannon DeBoer, DC
03/06/09	ProMotion PT	Did well last session. Pain rating 2/10.
03/10/09	Black Hills Health and Wellness Center	No change from last visit. Adjustment. Shannon DeBoer, DC
03/13/09	ProMotion PT	Neck disability index moderate. Went to chiro Tuesday and started to have pain in low back and treated with meds. Pain rating 0/10.
03/17/09	Black Hills Health and Wellness Center	PT sessions are starting to give her some benefit. She is sore all over and under a lot of stress as one of her horses was killed in a freak accident on the farm. She has been very sad about this and thinks this is contributing to her tensions. Adjustment. Shannon DeBoer, DC
03/18/09	ProMotion PT	Right side of neck seemed to tight up after last session. Mid back is hurting.
03/19/09	BH Ortho & Spine	Requests Vicodin refill.
03/20/09	ProMotion PT	Did not do well after last session. Had to get more pain meds. Pain rating 7/10. Left shoulder pain.
03/25/09	ProMotion PT	Has appointment with Dr. Lawler on 4/9/09. Pain rating 3/10.
03/27/09	ProMotion PT	Much improved. Pain rating 3/10.
03/30/09	ProMotion PT	Cancelled.
04/02/09	ProMotion PT	Script for home traction.
04/08/09	Rehab Doctors	Questionnaire. Problems: headaches, neck pain, left arm pain, right arm pain, mid-back pain, lower back pain, left leg pain, and right leg pain. Injury from MVA, recreational accident and no known cause. Prior treatment from chiro for MVAs and slip and fall at concert. Currently getting massage therapy, chiro adjustments, and physical therapy and taking hydrocodone.
04/09/09	Black Hills Health and Wellness Center	PT sessions were doing pretty good but now that started to get worse as they had done mechanical tractions and things are flared up and worsening. Adjustment. Shannon DeBoer, DC
04/09/09	Rehab Doctors	Self-referred. Neck pain and right upper extremity paresthesias. Paralegal who states she has had adjustment by chiro since 2001. She was told she has fibromyalgia and adjustments were helpful. Two

DATE	PROVIDER	DESCRIPTION
		<p>minor MVA, resulting in whiplash. In 2004, she fell fracturing her right wrist and needed surgery. 6-8 months following that surgery, she began having right shoulder and neck pain. She then moved to Rapid City and continued chiro care which were initially helpful. November 2008, having difficulty sleeping due to right shoulder pain and x-ray shows no acute bony abnormality, some decreased disc space at C6-7 and C7-T1 and quite a bit of posterior spurring at C6-7.</p> <p>MRI obtained and indicated displacements at C3-4, C4-5 and C5-6 without dominant compressive arthropathy. Referred for PT. Therapist reported she could perform exercises at times, but then had significant upper extremity weakness, so was referred to Dr. Lawlor for EMG, which was normal. She tried Lyrica, Amitriptyline, and Gabapentin for leg symptoms and found them not beneficial. Pain in the CT junction region. Pain radiates to occipital region and interscapular region. Right shoulder pain with numbness and tingling in 4<sup>th</sup> and 5<sup>th</sup> digits of right and occasionally the left hand. 100% back pain, 50% neck pain and 50% arm pain. Current pain rating 2/00, at best 1/10 and at worst 10/10.</p> <p>Diagnoses: thoracic outlet syndrome and neck pain with radicular pain. Recommend: Lyrica, NMES unit, thoracodorsal vest, PT. Dr. Brett Lawlor</p>
04/09/09	ProMotion PT	Traction felt good initially but had significant pain by end of day.
04/10/09	Rehab Doctors	Remembers she was on Lyrica before on 2 different occasions. She did not continue with this due to visual difficulties. She does not want to try it again from past complications. Requests something similar. Will call in Cymbalta.
04/13/09	ProMotion PT	Cancelled.
04/14/09	Black Hills Health and Wellness Center	Same as last week. Taking some new meds and they are making her feel weird and messing with her head. Adjustment. Shannon DeBoer, DC
04/16/09	ProMotion PT	Pain rating 4/10.
04/17/09	BH Ortho & Spine	Patient calls requesting a refill of Vicodin. Refilled per Mike Aanderud, PA-C.
04/29/09	ProMotion PT	Pain rating 9/10.
05/01/09	ProMotion PT	Pain rating 9/10.
05/06/09	ProMotion PT	Neck disability index moderate. Pain rating 3/10.
05/08/09	ProMotion PT	Flare up.
05/13/09	ProMotion PT	Pain rating 6/10.
05/14/09	BH Ortho & Spine	Patient calls requesting refill on Norco. Refilled per Candy Collabолletta, PA-C.
05/15/09	ProMotion PT	Pain rating 5/10.
05/20/09	ProMotion PT	Neck disability index severe. Pain rating 8/10. Neck, right shoulder and arm. Transferred care from Sonya to Myron.

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		Pain rating 4-8/10. Neck disability index score has steadily worsening the past 2 months. Myron Sorestad, PT
05/22/09	ProMotion PT	Pain rating 7/10.
05/26/09	Rehab Doctors	Follow-up. She is not seeing significant improvement and it worsening lately. She is having predominantly interscapular pain, made worse with activity. Diagnosis: Thoracic outlet; neck pain with radicular pain; interscapular myofascial pain. She wants to take a more aggressive treatment. Discussed trigger point injections. She asked about Botox and told her we should start with trigger point injections. If they are helpful, only for short-term, then can consider Botox. Trigger point injections. Dr. Brett Lawlor
06/03/09	Rehab Doctors	Needs Flexeril.
06/26/09	ProMotion PT	Last session on 5/20. Last seen for treatment 5/22/09. She has been since been to her referring physician and no orders have been received. Over a month has elapses. Discharge from care. Myron Sorestad, PT
07/20/09	Rehab Doctors	Follow-up. Continues to have problems with pain in cervicothoracic junction and intermittent tingling and numbness down the hands. Symptoms are made worse with activity. Wondering what she can do for this. Specifically wondering about shots today. Pain with neck motion on exam. Diagnoses: thoracic outlet syndrome; neck pain with radicular pain; and interscapular myofascial pain. Reasonable to do fluoroscopically guides injections at C6-7 and C7-T1. She inquired about Vicodin and told her I would not like her to start on that right now and see how the shots do. Dr. Brett Lawlor
07/23/09	Rehab Doctors	Called stating hurting really back and she wants something called in.
07/28/09	Black Hills Surgery Center	Injection. Cervical mechanical and myofascial pain and probable cervical facet pain. Right and left C6-7, C7-T1 facet area injection. Dr. Brett Lawlor
08/02/09	Rapid City Medical Center	Health maintenance examination. OB. STD testing. Grace Scholl, PA-C
08/03/09	Rehab Doctors	Called patient and she states that she is using energy drinks in the morning and this keeps her up at night. She may have to decrease Darvocet because when she has the energy drinks she cannot sleep. She does not want to take any afternoon and if she doesn't take energy drink she just wants to sleep.
09/24/09	BH Ortho & Spine	Patient Health history form updated: right arm arthritis, numbness/tingling.
09/24/09	BH Ortho & Spine	Been seeing her for about a year with complaints of posterior right shoulder pain, right neck pain, tingling and numbness in her left

DATE	PROVIDER	DESCRIPTION
		hand. History of MVA with neck injury and wrist fracture. Refer to PT. There is nothing surgical for orthopedics to do so she can have a referral to a neurologist. Refill Vicodin but will not again. Candace Collabолletta, PA-C
10/02/09	Rapid City Medical Center	Family medicine. Establish care. Worsening cough and congestion. Feverish and cold sweats. Sore throat. Main concern is chronic pain from fibromyalgia. Neck pain with some bone spurs. She has been seen by ortho and referred to PT. She reports PT and injections make pain worse. Numbness and paresthesia of bilateral fingers. Family history of peripheral neuropathy. Referred to chronic pain clinic. She tried Cymbalta but that gave her suicidal ideations. She has tried Ultram, Neurontin, Provigil, amitriptyline, Lyrica, Celexa, Lexapro, Paxil, Wellbutrin, Prozac and Darvocet which did not help much. She has been on and off Vicodin, which she feels worked the best for pain control. She feels she is able to work while taking Vicodin as well. She also notes having trouble with her anxiety daily. Requesting refill of Ativan. Notes struggling with pain since she was 8 years old when she started having leg pain. She was diagnosed with fibromyalgia by Dr. Lawlor. Exam reveals tenderness over C7 with paresthesias into right arm. Diagnosis: fibromyalgia, anxiety. Dr. Karen Tjaden
10/14/09	BH Ortho & Spine	PT. She was seen for 2 PT visits. She achieved all PT and functional goals. Discharged from PT. April McNaboe, PT
11/04/09	Rapid City Medical Center	Family medicine. Comes in complaining go gradually worsening symptoms of sore throat, cough, congestion, headache, postnasal drip and just not feeling well and tired for three days. No history of asthma or pneumonia. Tried Savella for fibromyalgia, but notes a low dose gives her nausea. Dr. Karen Tjaden
11/06/09	Rapid City Medical Center	Family medicine. Comes in complaining that she was feeling better yesterday and thought she was getting over her cold but this morning her chest felt tight and worse. Worried she may have pneumonia. Denies wheezing. History of environmental allergies and family history of asthma. Has an albuterol inhaler that she used once. Initially prescribed to her when she had pneumonia before. Prescribed Zithromax. Dr. Karen Tyaden
11/10/09	RMC Neurology & Rehabilitation	Adult neurologic evaluation. Presents for a variety of neurologic symptomology; primary complaint is upper extremity numbness which moved up into the shoulder region and then ultimately into the neck area. MRI of cervical spine: minimal disc displacements at the C3-4, C4-5, and C5-6 levels without dominant compressive arthropathy. Apparently bone spurs on x-rays. Turning her neck

DATE	PROVIDER	DESCRIPTION
		causes discomfort. Numbness in last 2 digit on the right and some similar symptoms on the left. Neck injections did not help substantially. Prior diagnosis of fibromyalgia. Assessment: lingering upper extremity discomfort; some symptoms may be related to fibromyalgia. Chronic pain symptoms. Difficulty sleeping; intermittent difficulty with leg twitching and aching for restless leg syndrome. Referred for sleep study and prescribe Tegretol. Dr. Robert Finley
11/15/09	RMC Neurology & Rehabilitation	Polysomnograph. Dr. Brian Tschida
01/04/10	Black Hills Neurology	Follow-up on sleep study. Undergo EMG/nerve conduction studies of both upper extremities. Stay active. Continue presents meds. Dr. Robert Finley
01/28/10	BH Ortho & Spine	Call requesting Norco refill. She was advised to ask Dr. Finley.
02/02/10	Black Hills Neuology	EMG – study overall unremarkable.
02/11/10	BH Ortho & Spine	Patient health history form updated. Evaluation for bilateral wrist pain. Occasional numbness and tingling in her fingers. Wearing splint. EMG scheduled. Wrist x-ray shows no bony deformities other than her right wrist does have a distal radial plate from a previous fracture that fixed a few years back. Michael Aanderud, PA-C
02/15/10	BH Ortho & Spine	Initial evaluation. Questionable bilateral carpal tunnel syndrome. Right-hand dominant and works as a paralegal. Has had ongoing bilateral hand problems for two months. EMG studies on 2/20/10. Broke her wrist 5 years ago. Complains of nocturnal awakening and is wearing a nighttime splint on left hand. Patrick Person, PT
02/22/10	RMC Neurology & Rehabilitation	EMG/NVC Examination. Impression: above electrical study is overall unremarkable. There is no evidence to suggest any significant abnormality on nerve conduction study involving the median and ulnar nerves bilaterally. Also no denervation is noted on needle testing of median or ulnar innervated musculature in the left upper extremity. Depending on clinic status, further evaluation or repeat study at a later date could be considered. Dr. Robert Finley
03/03/10	Rapid City Medical Center	Refill Ativan.
08/05/10	Rapid City Medical Center	Urgent care. Pain in both wrists. She has a lot of numbness distally. Seeing Dr. Lang and Finley from Neurology. No evidence of carpal tunnel or nerve impingements. Some trauma to hand and had surgery two years ago. History of fibromyalgia which she believes is flaring up. Takes Darvocet PRN. Nuvigil for excessive sleepiness secondary to sleep apnea. Did not tolerate CPAP.

DATE	PROVIDER	DESCRIPTION
		Dr. Michael Rafferty
08/10/10	Rapid City Medical Center	Urgent care. Complaining of stomach cramps, diarrhea and nausea. Thought she had flu. Started on Nucynta, wonders if it is a side effect. Devon Graham, PA-C
08/17/10	Rapid City Medical Center	Urgent care. Complaining of continued problems with lower abdominal pain. Took some Phenergan she had at home. Feels she is to the point where she cannot eat. Cipro prescribed. Refill Ativan. Discontinue Clindamycin. Devon Graham, PA-C CT of abdomen and pelvis with contrast. Impression: mild bowel thickening in the sigmoid colon with some diverticula, could represent changes of mild acute diverticulitis. Dr. Thomas Habbe
08/27/10	Rapid City Medical Center	Urgent care. Follow-up colitis. CT shows wall inflammation. She has had lots of problems with arthritis. Prior diagnosis of fibromyalgia. She has lost about 5 pounds. Missed work and not performing well because of her myalgias. Mild left-sided abdominal pain today. Suggest colonoscopy. Dr. Michael Rafferty Gastroenterology Department. Referral from Dr. Rafferty to be seen related to Colitis. Started her on Prednisone and wanting to know how quickly she can be seen.
09/02/10	Rapid City Medical Center	Patient history form. Arthritis, fibromyalgia. Current complaints include muscle soreness, joint swelling and pain. Gastroenterology consult. History of GI upset, intermittent diarrhea and abdominal pain. Dr. Michael Rafferty
09/03/10	Rapid City Medical Center	Right upper quadrant ultrasound. Impression: normal. Dr. Gregory Saffell
09/08/10	Endoscopy Center and Lab	Generalized abdominal pain and distress established gastroesophageal reflux disease, failure to respond to medical treatment, nausea and weight loss. Dr. James Frost Upper GI Endoscopy. Dr. Valerie Stephens
09/09/10	Rapid City Medical Center	Gastroenterology consultation. Abdominal pain, diarrhea, history of abnormal CT scan. Longstanding history of GI upset. 8 months ago symptoms became worse. Seen at urgent care on 8/17/10. CT revealed a mild bowel wall thickening in the sigmoid colon with some diverticula. 8/27/10 saw Dr. Rafferty and was started on Prednisone for possible IBD. Lisa Atnip, CNP
09/13/10	Endoscopy Center	Abdominal pain, abdominal distress, chronic diarrhea and weight

DATE	PROVIDER	DESCRIPTION
	and Lab	lost.  Colonoscopy. Normal.  Dr. James Frost  Dr. Valerie Stephens
09/14/10	Rapid City Medical Center	Patient history form. History of arthritis, fibromyalgia. Symptoms in last 3 months of weakness in arms and legs and arthritis. OB. Proceed with yearly.  Dr. Marcia Beshara
09/17/10	Rapid City Medical Center	Urgent care. Generally not feeling well. Lots of problems last month or two. Increase in nausea and vomiting. Sore, scratchy throat. Productive cough. Dehydrations.  Jennifer Johnson, PA-C
09/18/10	Rapid City Medical Center	Urgent care notes. Called requesting refill of Vicodin.
09/24/10	Rapid City Medical Center	Urgent care. Called requesting script for Ceftin for sinus infection.
10/04/10	Rapid City Medical Center	Gastroenterology visit. Follow-up EGD. Not been doing well. Studies are negative. Most likely IBS. States she is under considerable stress. She is about to file bankruptcy, had court dates in SF that did not go well. She recently lost her pet of 17 years. Sleeping a lot lately, very depressed and teary. Requesting an antidepressant. She has been on them in the past and used several with success. Try Lomotil and Hyoscyamine. Start Zoloft.  Dr. Valerie Stephens
10/18/10	Rapid City Medical Center	Gastroenterology visit. Follow-up. Diagnosed with fibromyalgia and IBS. She has had considerable losses lately, including now having lost her job. She will be losing insurance at the end of the month. Asked me to refill her prescriptions. States doing well with IBS, but fibromyalgia has been troublesome. Meds refilled and she was advised to follow up with Community Health Clinic and to call if she feels desperate or suicidal which she does not today, but she has a fair amount of painkillers at her disposal.  Dr. Valerie Stephens
10/27/10	Rapid City Medical Center	Gastroenterology notes. Paperwork received for "medical statement of ability to work" Filled out for IBS and will need PCP to fill out for fibromyalgia.
02/22/11	Rapid City Medical Center	Gastroenterology notes. Call requesting hydro refill because she lost her insurance and job. Advised to go through PCP.
03/26/12	Community Health Center BH	New patient for All Women Count exam and refills. Abnormal PAP in 2009. States she tested positive for HPV. Does not recall having a LEEP procedure or biopsy. She was told to have repeat PAP in 6-12 months but did not. She lost her insurance and was unable to pay. Fibromyalgia and depression history.  Kristie Sontag-Waddell, FNP
08/21/12	Community Health	Medications.



DATE	PROVIDER	DESCRIPTION
	Center BH	Kristie Waddell, CNP
11/16/12	Community Health Center BH	Medications. Kristie Waddell, CNP
03/05/13	Community Health Center BH	Breast lump on right side. It was been there for a months swollen and tender. No redness or warmth. Swelling went down, but painful and now a lump. Lump has not enlarged since she first noticed it. She has Fibromyalgia and is having a flare up right now, so unsure where the pain is coming from. Mammogram ordered. Kristie Waddell, CNP
03/06/13	Dakota Radiology	Mammogram. Impression: No mammographic evidence of malignancy. Dr. William Zavitz
03/22/13	Community Health Center BH	Med refills. Possible seizure activity. She hit the top of her head on a shelf on 3/2/13 while she was moving some things. Says she did developed a headache later and that the headache got worse by that evening. She says when she got home she was standing at the foot of her bed and she felt "a lightening type shock go through my brain". Says she laid down on bed a while and felt better later. Says a few days later she was concerned she might have had a seizure so she resumes taking Tegretol which she had been given by Dr. Finley for peripheral neuropathy. Since starting the medication she has had no more episodes. She has never had anything similar to that in the past. She did call Dr. Finley's office to schedule appointment, but was told she would have to \$400 up front as she no longer has insurance. She did not make an appointment but would like to now. Krisite Waddell, CNP
08/13/13	Community Health Center BH	Medications. Kristie Waddell, CNP
09/16/13	Community Health Center BH	Medications. Kristie Waddell, CNP
09/30/13	Community Health Center BH	Medications. Kristie Waddell, CNP
10/29/13	Community Health Center BH	Medications. Kristie Waddell, CNP
10/31/13	Community Health Center BH	Medications.
06/13/14	BH Ortho & Spine	Health intake form. Referred by self. History includes fibromyalgia and peripheral neuropathy.
06/16/14	BH Ortho & Spine	Right knee evaluation. She works for an advertising company and has to put labels and stickers on certain products and covers multiple stores. She was working when she twisted her knee and had immediate pain. Her knee swelled up and turned blue. Continues to give her pain and it has not improved over the last two weeks. Denies ever injuring the knee. Possible MCL tear, possible meniscus injury. Recommend MRI.

DATE	PROVIDER	DESCRIPTION
		Michael Aanderud, PA-C
06/20/14	BH Ortho & Spine	MRI for right knee ordered.
06/20/14	BH Imaging Center	Right lower extremity MRI. Impression: no evidence of internal derangement; incidental note is made of small subcentimeter nonaggressive appearing intraosseous lesions within the posterior aspect of the distal femoral metaphysis and the proximal tibial metaphysis most compatible with small enchondromas or bone cysts. Dr. James Joseph
06/23/14	BH Ortho & Spine	Called with MRI results. No signs of internal derangement. Incidental findings of nonaggressive appearing lesion. States knee is still bothering her. PT referral. Michael Aanderud, PA-C
07/02/14	BH Ortho & Spine	PT note. Initial evaluation. Getting up from squatting position and went to pivot and had severe right knee strain. She works in marketing. Notes it popped, was swollen, bruised and she had a picture that she showed me that looked like ecchymosis. MRI indicated strain. 3 cysts on her tibia and femur. She is having some pain walking but mostly with sitting, getting up from sitting position, trying to raise her leg to transfer sit to supine, or getting in and out of a car. Notes some limping. 1-3 visits per week for 4-10 weeks. April McNaboe, PT
07/11/14	BH Ortho & Spine	PT note. Feeling better and therefore is becoming more active. April McNaboe, PT
07/16/14	BH Ortho & Spine	PT note. Knee is feeling better since initiating therapy. April McNaboe, PT
07/18/14	BH Ortho & Spine	PT note. Knee has been progressively feeling better as far as pain but felt very weak in the thigh muscle even with walking. April McNaboe, PT
07/30/14	BH Ortho & Spine	PT note. Feeling better with less knee pain. April McNaboe, PT
07/31/14	Community Health Center BH	Med refills. Wondering if her birth control is contributing to her depression. Notes she has been on antidepressants before but worked hard to get off the meds and would like avoid use again if able. Mainly just feels down and sad and at times has difficulty doing daily activities. It is not severe or disabling. Requested EpiPen for reactions to bug/spider/mosquito bites. Finances are tight as she just bought a house. Ashley Rook, PA-C
08/01/14	BH Ortho & Spine	PT note. Feeling better with less knee pain but her thigh and anterior hip are sorer. April McNaboe, PT
08/04/14	Community Health Center BH	Medications.
08/07/14	BH Ortho & Spine	PT note. Progressing with knee program. Complains of achiness and mild pain with walking and getting up from sitting position.

DATE	PROVIDER	DESCRIPTION
		April McNaboe, PT
08/13/14	BH Ortho & Spine	Right knee pain. Recheck. Continues to have pain and currently has a flare-up of her fibromyalgia causing increased pain. Describes aching pain. States the ecchymosis has not yet resolved. Cortisone injections have helped and would like one if possible. Injection. Michael Aanderud, PA-C  PT note. Reports achiness. April McNaboe, PT
08/20/14	BH Ortho & Spine	PT note. Reports achiness and pain in right knee. Overall pain is better. April McNaboe, PT
09/02/14	BH Ortho & Spine	PT note. Feeling achiness and pain in right knee. She has been doing exercises but not every day. April McNaboe, PT
09/04/14	BH Ortho & Spine	PT note. Feeling pain in right knee. April McNaboe, PT
09/08/14	BH Ortho & Spine	PT note. States her knee was throbbing this past weekend and states she is 80% better. April McNaboe, PT
09/11/14	BH Ortho & Spine	PT note. Reports being back to two jobs currently. Notes aching in knee off and on. April McNaboe, PT
09/12/14	BH Ortho & Spine	Patient called requesting Flexor patches and wanting to continue PT. Authorized. Michael Aanderud, PA-C
		Recheck right knee. States the last two weeks her knee has improved, but still has discomfort and throbbing, achy pain, especially with weather changes. Therapy also flared up some neck and left arm pain. Cortisone injection. Michael Aanderud, PA-C
10/10/14	BH Ortho & Spine	Right knee pain. She had PT, x-ray, and an MRI. Pain is improving but still a problem. Full ROM without discomfort. No instability. Reviewed her MRI. She had some interosseous high signal consistent with a benign bony abnormality. No arthritis or other significant changes. Close to being at MMI. She is a little nervous this thing may blow up on her. One of her therapists told her it could take 2 years and she is reluctant to close the work comp case. She can continue without any restrictions. She is not getting any PT. 6 weeks for final eval. Dr. Rand Schleusener
12/05/14	BH Ortho & Spine	Recheck right knee. States there is still a little discomfort over the medial epicondyle when she has to lift certain things. She had a contusion that was last May. Other than that she is doing okay. Full ROM. Nontender. No instability. She has reached MMI. No

DATE	PROVIDER	DESCRIPTION
		restrictions. No impairment. Dr. Rand Schleusener
02/02/15	Community Health Center BH	Medications.
05/07/15		DATE OF INJURY.
05/08/15	Black Hills Health and Wellness Center	States that last night she was using a screwdriver overhead and her right shoulder locked up on her. Notes that she was in severe pain and took a lot of OTC meds to be able to sleep. She related that it is slightly better since she woke up, but it is still very sore. Currently experiencing a flare-up and worse. Return in two weeks. I have advised her to stay home from work today with her headaches and to ice for 20 minutes every 2-3 hours. Adjustment. Kari Quashnick
05/12/15	Black Hills Health and Wellness Center	Notes she did feel a little bit better after last appointment but that she was having a return of the pain and stiffness in her upper back, neck and right shoulder again. Return in 2 weeks. Advised to stay home from work today with her headaches and to ice 20 minutes every 2-3 hours. Adjustment. Stephen Gullickson, DC
05/15/15	BH Ortho & Spine	Fax correspondence approval for Candace Winters appointment.
05/18/15	BH Ortho & Spine	Right shoulder pain. She has had problems on and off for many years since she injured her arm in 2006. She required ORIF of wrist. She had issues with her shoulder neck at the same time. States on the 7 <sup>th</sup> she was working on putting a shelf up and cranking on a screw and she had a sharp pain in her right shoulder. She could hardly lift her arm for the next 24 hours. X-rays of shoulder show no acute bony abnormalities. If pain continues may need an MRI. Candace Winters, PA
05/27/15	BH Ortho & Spine	Patient calls stating her shoulder is very painful at the end of the day after she has been working. She requests prescription of Norco and Flexor patches. Patches authorized but not Norco. Michael Aanderud PA-C
6/2/15	ProMotion PT	PT new evaluation referral from Candace Winters. Sudden sharp pain in the right shoulder while adjusting a sign on display. Pain rating 7/10. Intermittent numbness into the hand. Sleep is not regularly disturbed from pain. Worse when waking up and at the end of the day. She has been to chiro and feels that aggravated her pain. Home exercise program. Myron Sorestad, PT
06/03/15	ProMotion PT	Fax correspondence approving 12 PT visits.
06/07/15	Rapid City Medical Center	Fell last night going down the stairs. States she was trying to dodge a cat and not sure how she landed. Now as pain with walking on the ball of the right foot. Denies previous injuries to the right foot. She would like to discuss her general health and needs PCP and referral for neurology. Diagnosed with sleep apnea. Tried CPAP at night and

DATE	PROVIDER	DESCRIPTION
		<p>would wake with the mask on the floor. She has health insurance now and would like to restart nuvigil. She has been taking Tegretol secondary to chronic pain/fibromyalgia which she describes as a burning feeling in her hands and feet. Suffers from chronic fatigue syndrome.</p> <p>Jennifer Johnson, PA-C</p> <p>Foot x-ray. Impression: no fracture, no dislocation, versus deformity of the first digit.</p> <p>Dr. Michael Rafferty</p>
06/10/15	Black Hills Health and Wellness Center	<p>Comes in on crutches and states that her neck, back and hips have been hurting from using them. Return in two weeks. Advised to stay home from work today with her headaches and to ice 20 minutes every 2-3 hours. Adjustment.</p> <p>Jayne Scherr, DC</p>
06/15/15	Black Hills Health and Wellness Center	<p>Comes in using crutches stating her neck, back and hips hurt from using them. Return in 2 weeks. Advised to stay home from work today with her headaches to ice 20 minutes every 2-3 hours. Adjustment.</p> <p>Jayne Scherr, DC</p>
06/16/15	ProMotion PT	<p>Right shoulder and neck pain. Pain rating 7/10. Continue manual therapy.</p> <p>Myron Sorestad, PT</p>
06/18/15	ProMotion PT	<p>Right shoulder and neck pain. Pain rating 7/10. Resume manual therapy.</p> <p>Myron Sorestad, PT</p>
06/19/15	Black Hills Health and Wellness Center	<p>Comes in using crutches stating her neck, back and hips hurt from using them. Return in 2 weeks. Advised to stay home from work today with her headaches to ice 20 minutes every 2-3 hours. Adjustment.</p> <p>Stephen Gullickson, DC</p>
06/19/15	RMC Neurology & Rehabilitation	<p>Sleep consult. Positive for sleep related problems including leg jerks, breathing problems, snoring etc in the family. Notes no trouble getting to sleep. She awakens frequently. She may awaken gasping for air. She does snore. She is not rested in the morning. Excessive daytime somnolence. Clinical symptomatology strongly suggestive of restless leg syndrome. She has a known history of neuralgic symptomatology. She has had some history of seizure events in the past.</p> <p>Dr. Robert Finley</p>
06/23/15	ProMotion PT	<p>Right shoulder and neck pain. Pain rating 5/10. Consider resumption of manual therapy progress therapeutic exercise.</p> <p>Myron Sorestad, PT</p>
06/30/15	ProMotion PT	<p>Right shoulder and neck pain. Pain rating 6/10. Progress therapeutic exercise addressing rotator cuff strengthening.</p>

DATE	PROVIDER	DESCRIPTION
		Myron Sorestad, PT
07/01/15	Black Hills Health and Wellness Center	Comes in using crutches stating her neck, back and hips hurt from using them. Return in 2 weeks. Advised to stay home from work today with her headaches to ice 20 minutes every 2-3 hours. Adjustment.
		Stephen Gullickson, DC
07/02/15	ProMotion PT	Right shoulder and neck pain. Pain rating 8/10. Reports a flare-up in her fibromyalgia. Burning pain throughout the body however, right shoulder and neck have an “ice pick” sensation. Progress therapeutic exercise addressing rotator cuff strengthening.
		Myron Sorestad, PT
07/07/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. Pain in right arm and neck after sleeping wrong on a hideaway bed this weekend. Stiff neck. Believes right shoulder exercises are going well, shoulder is getting stronger and not increasing pain. Progress therapeutic exercise addressing rotator cuff strengthening.
		Ian Kopriva, PT
07/09/15	BH Ortho & Spine	Right shoulder pain is improving significantly with PT. PT was delayed for about 6 weeks since she hurt her ankle and had to use crutches.
		Candace Winters, PA
7/10/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. Pain in neck with increased headache. Stiffness with decreased mobility in neck. Progress therapeutic exercise addressing rotator cuff strengthening.
		Ian Kopriva, PT
7/15/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. No pain in neck today, just shoulder. Progress therapeutic exercise addressing rotator cuff strengthening.
		Ian Kopriva, PT
7/17/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. Decreased pain after last PT. States reduced pain and neck felt more mobile lasting for one day. Feels soreness in right shoulder. Progress with ROM. Progress therapeutic exercise addressing rotator cuff strengthening.
		Ian Kopriva, PT
07/21/15	Rapid City Medical Center	Sinus congestion, pressure, teeth pain and cough. She notes she has allergies. Tylenol provides some relief.
		Christopher Seime, PA
7/23/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. Decreased pain after last PT. States exercises reduced pain and neck felt more mobile. Less shoulder pain. Muscle aches due to sinus pressure and headache. Progress therapeutic exercise addressing rotator cuff strengthening.
		Ian Kopriva, PT
07/24/15	Black Hills Health and Wellness Center	Comes in using crutches stating her neck, back and hips hurt from using them. Return in 2 weeks. Advised to stay home from work today with her headaches to ice 20 minutes every 2-3 hours.

DATE	PROVIDER	DESCRIPTION
		Adjustment. Stephen Gullickson, DC
7/28/15	ProMotion PT	Fax correspondence approving PT. Pain rating 9/10. Increased pain in shoulder. She attributes the increased pain to prolonged typing of a deposition over the weekend. Progress therapeutic exercise addressing rotator cuff strengthening. Myron Sorestad, PT
7/30/15	ProMotion PT	Right shoulder and neck pain. Pain rating 8/10. Reports continued pain involving right shoulder. Progress therapeutic exercise addressing rotator cuff strengthening. Myron Sorestad, PT
8/4/15	ProMotion PT	Right shoulder and neck pain. Pain rating 8/10. Reports continued pain involving right shoulder. Progress therapeutic exercise addressing rotator cuff strengthening. Myron Sorestad, PT
8/6/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. Reports continued pain involving the right shoulder. Progress therapeutic exercise addressing rotator cuff strengthening. Myron Sorestad, PT
8/11/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. She reports having stress in personal life that is increasing pain in right neck and shoulder. Reports that she is having trouble with keeping her posture. Progress therapeutic exercise rotator cuff strengthening. Ian Kopriva, PT
8/13/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. States her lats are sore from pull-ups last PT. Feels like they are getting stronger, less pain today. Progress therapeutic exercise addressing rotator cuff strengthening. Ian Kopriva, PT
8/18/15	BH Ortho & Spine	Fax correspondence regarding office appointment approved. States her shoulder is significantly improving with PT but she had to be scheduled with a different therapist and now her pain is worsening. Requests trigger injections referral with Dr. Lawlor as she has had them in the past. Requests refill. Pain clinic referral placed. Candace Winters, PA
08/18/15	Black Hills Health and Wellness Center	Noted that she has been having a terrible flare up of stiffness and pain in her mid-back and her ribs with pain running down her back and hips. Return in two weeks. Advised to stay home from work today with her headaches and to ice 20 minutes on every 2-3 hours. Stephen Gullickson, DC
8/19/15	BH Ortho & Spine	Referral for evaluation and treatment with injections approved.
8/20/15	Rehab Doctors	Patient Questionnaire: pain began 5/7/15 attempting to remove equipment from shelf. No current work restrictions. Right arm and shoulder pain. Felt about like dislocated but no MRI. Notes cannot take NSAIDS but can do Flexor patches. She has tried narcotic

DATE	PROVIDER	DESCRIPTION
		<p>medications and muscle relaxers. Lists Heart, diabetes, fibromyalgia and cancer in family history. Quit smoking July 2008. Drinks two alcoholic beverages a week. Participates in regular exercise program. Lifts 10-20 pounds as paralegal and second job with News AmericaMarketing. Have tried heat, ice, PT and chiropractor. Confirms fibromyalgia and IBS history. Previous right wrist surgery. Pain rating 8/10. Pain radiating down right arm and elbow. Numbness and tingling in left arm and hand. Muscle spasms in mid back-thoracic. Weakness in arms. 75% back and 25% leg. 75% neck and 25% arm.</p> <p>Consultation requested by BH Ortho. Neck, interscapular and shoulder pain. Have treated her the past for similar problems. She was working on 5/15/155 doing some overhead type work in her second job that has to do with putting coupon yup in stores isles. She was suing a screwdriver type device about shoulder height cranking on it and felt a sudden pull in the front of her shoulder. She has had pain since. She was evaluated by BH Ortho and x-rays sent over. Referred to PY. She has been working with Myron Sorestad and Ian Kopriva. Saw significant benefit with Myron, but has not seen benefit with Ian. She has been having pain in her shoulder and interscapular region with some intermittent tingling down left arm. Denies significant numbness down right arm. She has had this in the past. Previously saw her in 20009. She had completely recovered from this and was having no difficulties until most recent injury. Fairly steady pain especially with overhead activity.</p> <p>Diagnoses: cervicothoracic facet and rib dysfunction and impingement of the right shoulder.</p> <p>Cervical mechanical and myofascial pain; probable cervical degenerative disc and joint disease.</p> <p>Consultation. Requested by Black Hills Ortho. She has treated in the past for similar problems. She was working on 5/15/15 doing some overhead work in her second job that has to with putting coupon up in store isles. She was using a screw driver type device when she felt sudden pain in the front of her shoulder. Evaluated at BH Ortho and referred to PT. She has seen improvement with Myron (PT) but not Ian (PT). Intermittent tingling down left arm. Denies numbness. She had this in the past (2009). She has completely recovered until recent injury. Cervicothoracic facet and rib dysfunction and impingement of the right shoulder. Hold off on injections and work with Myron (PT). Dr. Brett Lawlor</p>
8/20/15	ProMotion PT	Fax correspondence approving 10 PT visits.



DATE	PROVIDER	DESCRIPTION
		Right shoulder and neck pain. Pain rating 9/10. She experienced muscle spasms since performing exercises in the clinic last week. Secondary pain continues to be experienced in the right shoulder. Progress therapeutic exercise addressing rotator cuff strengthening. Myron Sorestad, PT
8/25/15	ProMotion PT	Right shoulder and neck pain. Pain rating 6/10. Progress therapeutic exercise addressing rotator cuff strengthening Myron Sorestad, PT
8/27/15	ProMotion PT	Right shoulder and neck pain. Pain rating 6/10. Progress therapeutic exercise addressing rotator cuff strengthening. Myron Sorestad, PT
08/28/15	Black Hills Health and Wellness Center	Comes in this afternoon and noted that she has been doing PT for her upper back and ribs but that it has not been helping. She noted that she was still having a lot of tension and pain in her back and neck and lower back and her ribs. Adjustment. Stephen Gullickson, DC
08/31/15	Black Hills Health and Wellness Center	Comes in this afternoon noted that she has been doing PT for her upper back and ribs but that it has not been helping. Noted she was stilling a lot of tension and pain her back and neck and lower back and ribs. Adjustment. Jayme Scherr, DC
08/31/15	Rapid City Medical Center	Yearly OB exam. Birth control pill was worsening her depression. Dr. Marcia Beshara
9/1/15	ProMotion PT	Right shoulder and neck pain. Pain rating 10/10. Reports a spontaneous onset of severe muscle spasms in neck after waking up Sunday. He has had some relief following massage and chiro adjustments yesterday. Assess response to treatment on Thursday and possible follow-up with Dr. Lawlor for alternative treatments if no improvement. Myron Sorestad, PT
9/2/15	Black Hills Surgery Hospital	MRI ordered.
9/3/15	ProMotion PT	Right shoulder and neck pain. Pain rating 8/10. Reports muscle spasms in the neck decreasing. Progress home exercise program if symptoms have diminished. Continue manual therapy. Myron Sorestad, PT
09/03/15	Rehab Doctors	Called due to increased pain. PT told her to call. Sunday she was unable to get out of bed and unable to go to work Monday. Pain meds, muscles relaxers, ice, massage, chiro and PT has been attempted. Recommend MRI.
9/9/15	ProMotion PT	Right shoulder and neck pain. Pain rating 8/10. Reports increased pain with hanging store signs over the past weekend which required prolonged use of arms above her head while maintaining the head and neck in extension. Recommend consult with physician.

DATE	PROVIDER	DESCRIPTION
		Myron Sorestad, PT
09/09/15	Rehab Doctors	Patient called regarding work restrictions. She has to hang ceiling signs and it really irritates her neck and right shoulder. Request order for no heavy lifting.
9/10/15	Rehab Doctors	No overhead lifting or work. Maximum lift is 15 pounds below waist. Dr. Brett Lawlor
9/11/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. Resume stabilization and rotator cuff strengthening. Myron Sorestad, PT
9/16/15	ProMotion PT	Right shoulder and neck pain. Pain rating 6/10. Myron Sorestad, PT
9/24/15	ProMotion PT	Right shoulder and neck pain. Pain rating 4/10. Myron Sorestad, PT
9/30/15	ProMotion PT	Right shoulder and neck pain. Pain rating 7/10. Reports air-conditioning in her office causing increased pain due to the cold draft. Myron Sorestad, PT
10/2/15	ProMotion PT	Right shoulder and neck pain. Pain rating 6.5/10. Reports some irritability of the shoulder and neck. Myron Sorestad, PT
10/12/15	Black Hills Health and Wellness Center	Comes in this afternoon and noted that she has been doing PT for her upper back and ribs but that it has not been helping. Noted that she was still having a lot of tension and pain in her back and neck and lower back and her ribs. Adjustment. Jayme Scherr, DC
10/14/15	Rehab Doctors	Follow-up. She has not had the MRI that was ordered. We are trying to get ahold of insurance adjuster and not getting any return calls. She tells me today there is a new adjuster and provided her contact information. Symptomatic and had a flare up. She has not been to PT as it has not been authorized. Continue PT. Dr. Brett Lawlor
10/23/15	Rehab Doctors	Fax correspondence requesting authorization for C-Spine MRI.
10/26/15	Rehab Doctors	Fax correspondence authorizing the MRI.
10/30/15	Black Hill Imaging Center	MRI cervical spine. Impression: C5-6; interval development of a broad-based rightward subligamentous disc herniation which impinges upon the right ventricle hemicord and reduces the midline sagittal AP central canal dimension to 6.5 cm; interval development of moderate left and mild right neural foraminal stenosis due to uncovertebral and facet hypertrophy; no cord signal abnormality. Dr. Matthew Chanin
10/31/15	Black Hills Surgical Hospital	MRI cervical. Conclusion same as 10/30/15.

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 29900

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DESTINY SCHOON, *Claimant/Appellee*,

vs.

NEWS AMERICA MARKETING, *Employer/Appellant*, and  
FARMINGTON CASUALTY COMPANY, *Insurer/Appellant*.

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Appeal from the Sixth Judicial Circuit  
Hughes County, South Dakota  
The Honorable Christina Klinger  
Circuit Court Judge

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**APPELLEE'S BRIEF**

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## **I. PRELIMINARY STATEMENT**

As used in the following brief, Destiny Schoon will be referred to as Claimant or Destiny and News America Marketing and Farmington Casualty Company will be referred to collectively as Employer and Insurer or Appellants. References to the Department of Labor will be made using Department. For purposes of this brief, references to the Hughes County Clerk of Courts will be made using “CR” followed by the page designation from the Index. References to Claimant’s Appendix will be referred to as “Schoon.APPX” followed by the page designation from the Appendix.

## **II. JURISDICTIONAL STATEMENT**

Claimant filed a Petition for Hearing with the Department on November 28, 2016. (CR 27-29.) Employer and Insurer filed a Joint Answer on January 20, 2017, denying that Claimant’s May 2015 work injury is and remains a major contributing cause of her current neck injuries. (CR 39-40.) The Department held a hearing on the merits on September 23, 2020, in Rapid City, South Dakota. Administrative Law Judge Michelle Faw issued a Decision on January 26, 2021, approving Claimant’s request for benefits. (Schoon.APPX.003.) Judge Faw issued Findings of Fact and Conclusions of Law along with an Order dated March 10, 2021. (Schoon.APPX.016.) Notice of Entry of the same was filed by Claimant on March 18, 2021. (CR 2077-2078.) Employer and Insurer filed a Notice of Appeal on March 22, 2021, to the Sixth Judicial

Circuit Court. (CR 2082.) On December 27, 2021, the Honorable Christina Klinger issued her opinion affirming the Department's decision. (Schoon.APPX.037.) Notice of entry of the same was filed by Claimant on January 7, 2022. (CR 2254.) Employer and Insurer filed a Notice of Appeal on February 4, 2022. (CR 2257.)

### **III. STATEMENT OF LEGAL ISSUES**

- A. Whether the Department erred by finding Claimant's work injury is and remains a major contributing cause of her impairment and need for treatment.
  - 1. Whether the Department erred by finding Claimant suffered no symptoms between 2009 and 2015.
  - 2. Whether the Department erred by failing to make a specific credibility determination as to Claimant.
- B. Whether the Department erred by finding the opinions of Dr. Dietrich, Dr. Wilson and Dr. Lawlor more persuasive than that of Dr. Nipper.
- C. Whether the Department erred by failing to strike Dr. Dietrich's opinions for lack of foundation.

### **IV. STATEMENT OF THE CASE**

Claimant was working at her second job at News America Marketing when she was injured on the job. Claimant suffered an injury to her neck, that caused symptoms that forced her to seek treatment for her neck and shoulder pain the next day and following weeks. Insurer Farmington Casualty Company accepted the claim as compensable and paid for Claimant's reasonable and necessary medical treatment for seven months. After seven months of conservative treatment garnering insignificant relief, Claimant's treating doctors recommended neck

surgery. At this point, Insurer immediately scheduled Claimant to see Dr. Jeffrey Nipper for an independent medical examination (“IME”). In his IME report, Dr. Nipper stated that Claimant had only suffered a shoulder strain and that her symptoms should have gone away in six weeks. Further, Dr. Nipper believed that all of Claimant’s other symptoms and conditions were the result of “pre-existing pathoanatomy.” As a result, Employer and Insurer denied further compensation for Claimant’s work injury.

Claimant respectfully submits to this Court that she has met her burden of proving that her injury and condition arose out of and in the course of her employment with News America Marketing, and the injury was a major contributing cause of her disability and need for treatment. Claimant’s treating doctors, as discussed herein, all agree that Claimant suffered a work injury at News America Marketing that was and remains a major contributing cause of her need for treatment. All of Claimant’s treating doctors also agree that her treatment to date has been reasonable and necessary. Moreover, Dr. Nipper’s opinions pointedly lacked credibility, because he did not have all of Claimant’s records when he performed his IME and he misinterpreted medical records. As such, Claimant asks this Court to uphold the Circuit Court’s affirmance of the Department’s decision in favor of Claimant.

## **V. STATEMENT OF FACTS**

### **A. Destiny's Background**

Destiny grew up in Spearfish, South Dakota, and graduated from high school early in 2000. (CR 348.) Following her graduation from high school she attended South Dakota State University in Brookings, South Dakota, before transferring to the University of South Dakota in Vermillion, South Dakota. (*Id.*) While at the University of South Dakota, Destiny began to pursue a degree in criminal justice. (*Id.*) Destiny finally transferred to Kaplan University in Davenport, Iowa, and finished her college education graduating with a degree in paralegal studies in 2007. (348-349.) Following graduation, Destiny moved to Rapid City, South Dakota. (*Id.*)

After working different jobs throughout college, she worked as a legal secretary at Califf and Harper Law Firm. (*Id.*) Following her stint at Califf and Harper Law Firm, Destiny worked as a paralegal in various law firms in Rapid City. (CR 348-350.) She worked at Bettmann, Maks, & Hogue, Costello Porter Law Firm, Porter Law Office, Gunderson Palmer Law Firm, Barker Wilson, and Bangs McCullen Law Firm. (*Id.*)

While working at the Porter Law Office, she picked up a second job with News America Marketing. (CR 349.) She worked as an advertising representative for News America Marketing, which entailed hanging advertising signs on shelves and ceilings as well as data entry. (*Id.*)

In August of 2019, while working at Bangs McCullen Law Firm, Destiny had to stop working for News America Marketing. (CR 350.) Destiny stopped working for News America Marketing, because of the caseload at Bangs McCullen Law Firm, and because the neck and shoulder pain emanating from the work injury that is the subject of this litigation prevented her from working her usual amount of hours. (*Id.*)

## **B. Injuries and Treatment**

### ***i. Prior Injuries and Treatment***

Prior to the injury that is the subject of this appeal, Destiny had minor incidents that involved injuries to her neck, shoulder, and back. (*Id.*) The incidents were two car accidents in November 2001 and August 2003 and a trip-and-fall where she broke her wrist in 2003. (*Id.*) Her treatment for her neck and back injuries primarily involved routine chiropractic adjustments. (CR 350.)

In 2007, following graduation from Kaplan University, Destiny continued to receive routine chiropractic care. (CR 350-351.) However, the conservative treatment only gave Destiny temporary relief. (*Id.*) As a result, Destiny was referred to Black Hills Orthopedic & Spine Center (“BHO”). (CR 351; Schoon.APPX.018.) After conducting imaging, BHO recommended Destiny go through physical therapy. (CR 350-351; Schoon.APPX.018.) Destiny went through physical therapy off and on for about a year. (*Id.*) On February 5, 2009, Dr. Brett Lawlor of The Rehab Doctors performed an electromyography (“EMG”) test and the result of

the EMG test was normal. (CR 1732-1733; Schoon.APPX.018.) As such, Destiny began treating with Dr. Lawlor.

At the beginning of her treatment with Dr. Lawlor, around April 9, 2009, Dr. Lawlor prescribed medications and physical therapy to see if that might help Destiny's ongoing symptoms. (CR 351 and 1744-1746; Schoon.APPX.018.) Next, Dr. Lawlor performed bilateral C6-7, C7-T1 facet area injections to see if that would help alleviate Destiny's symptoms. (CR 1749-1750; Schoon.APPX.018.) According to Destiny, the injections were very helpful: "I was very lucky, the injections worked very well for me. It really calmed everything down and the pain was pretty much nonexistent other than an occasional flare-up." (CR 351-352; Schoon.APPX.018.) In fact, Destiny did not need any medical treatment for her neck or shoulder after those injections until the work injury that is the subject of this worker's compensation claim. (CR 352.) After the injections, Destiny was able to work up to 60 hours per week and play recreational softball from 2010 through 2013 without any symptoms other than the occasional flare up. (*Id.*; Schoon.APPX.018.)

#### ***ii. May 7, 2015, Worker's Compensation Injury***

On May 7, 2015, Destiny was hanging advertising for her News America Marketing job when she injured herself. (CR 352-353; Schoon.APPX.019 and Schoon.APPX.021-022.) She explained specifically at the Department of Labor Hearing:

A     The job that day that I was -- had to do was -- the company wanted to see if they were working with

Walmart on advertising, they wanted to see if they could start hanging advertising in the makeup aisle. So what I was ordered to do was to go and, with the variety pieces of equipment that we have, and see if any of them work in the makeup aisle. The shelving is very awkward. It sticks out in different places, so it was really hard to hang something that would work. Ultimately I had to -- we have a -- what's called a universal clamp that's always kind of our fail-proof. And I had finally pulled that out, last but not least, and had got that up there on the shelf. I had stepped back and taken a picture of it. Part of what the job requirement is, is pictures. They want to see. I had taken a picture, stepped back, and I had gone up there with a screwdriver and was cranking on it (indicating). It was frozen at that point.

Q And let me just stop you. You have your hands kind of positioned at maybe forehead level?

A Yeah. Kind of eye-forehead level is where I was working.

Q Okay.

A And the piece -- to get the piece of equipment off of the shelving was frozen and would not move. I kept cranking on it. With the last crank, I had severe pain.

Q Severe pain where?

A It was in the shoulder area primarily.

Q Was it in the front? The top? The side?

A It was mostly coming from the front.

Q Okay. And where did that pain also refer to?

A I instantly got really tight on the top of the shoulder and hurt. And I felt pressure in my neck. I wouldn't call it necessarily pain. The best way to explain it is you have a sinus infection, you have sinus pressure. It just -- it felt like pressure in my neck.

(CR 352-353; Schoon.APPX.019 and Schoon.APPX.021-022.) Destiny went home that night and iced her shoulder and neck and took some over the counter pain relief medicine. (CR 353; Schoon.APPX.019 and Schoon.APPX.022.)

The very next morning Destiny reported to Black Hills Health and Wellness for a chiropractic adjustment, in an attempt to relieve the symptoms of her neck and shoulder. (CR 353 and 745-746; Schoon.APPX.019.) She again received an adjustment four days later on May 12, but Destiny decided she was not receiving any relief. (CR 353; Schoon.APPX.019.) Black Hills Health and Wellness referred Destiny to Black Hills Orthopedic to see if she required more serious treatment. (CR 353; Schoon.APPX.019.)

On May 18, Destiny reported to BHO continuing to complain of right shoulder and neck pain. (CR 491-492; Schoon.APPX.019.) A physician's assistant prescribed physical therapy at ProMotion to see if the therapy might resolve some of Destiny's symptoms. (CR 493-495 and 789; Schoon.APPX.019.) Destiny began physical therapy at Promotion on June 2. *Id.* After multiple physical therapy appointments, BHO referred Destiny to Dr. Lawlor for treatment of her neck, interscapular, and shoulder pain:

Dr. Lawlor had the benefit of treating Destiny before and after, this worker's compensation injury which occurred on May 7, 2015: I previously saw her in 2009. She had completely recovered from this and was having no difficulties until this most recent injury. Since that time, she has had fairly steady pain. She especially has pain with overhead activity with



using the right arm. She has less pain with rest. There is no specific thing she can do to make her pain go away.

(CR 496-497; Schoon.APPX.019.) Destiny complained to Dr. Lawlor how she was injured and the symptoms she was experiencing. (*Id.*) Dr. Lawlor chose to order a cervical MRI and prescribed more physical therapy with Promotion. (CR 500-501; Schoon.APPX.019.) The MRI results showed a broad-based disc herniation at C5-6 which impinged on the right ventral hemicord. (*Id.*; Schoon.APPX.020.)

Around this time, the Employer indicated that Destiny's work injury claim was accepted for her right shoulder only and asked Dr. Lawlor to send records supporting the need for more physical therapy for her shoulder as well as treatment for her neck:

---

10/3/15  
-please send medical records supporting the need for further PT to the right shoulder. Attached MRI results show cervical issues, however, claim is accepted for right shoulder only. Thank you. Jurna Chapple 763-416-8909

(CR 965; Schoon.APPX.020.) The next day, Dr. Lawlor sent a fax to Ms.

Chapel stating:

The MRI was ordered which showed C5-6 herniation. The area of her pain drawing is consistent with pain referred from a C5-6 area. It is not uncommon for people with a C5-6 disc herniation to report shoulder pain as a predominate pain complaint. In my opinion, these findings are consistent with her stated onset of pain and consistent with her need for ongoing physical therapy to specifically address the neck as it relates to her shoulder pain.

(CR 502; Schoon.APPX.020.)

The physical therapy and conservative treatment did not provide Destiny with any long-term relief from her pain and symptoms. As a result, Dr. Lawlor referred her to Dr. Jonathan L. Wilson at Black Hills Neurosurgery and Spine, who examined Destiny on December 30, 2015. (CR 1054-1058; Schoon.APPX.020.) Dr. Wilson recommended a C5-6 cervical disc arthroplasty. (CR 1050-1051; Schoon.APPX.020.)

Upon receiving Dr. Wilson's recommendation Insurer refused to authorize surgery until Destiny attended an IME:

*\* Request for cervical disc arthroplasty denied - pending  
IME opinion. IME scheduled for 1/21/16 \**  
(CR 1061; Schoon.APPX.020.) The IME took place on January 21, 2016 and Dr. Nipper issued his report on February 17, 2016. (CR 512-521; Schoon.APPX.020.)

Dr. Nipper opined in his IME report that Destiny suffered a shoulder strain that "resolved by approximately six weeks following the event." (CR 520-521; Schoon.APPX.020.) Dr. Nipper also stated she was at MMI, entitled to no impairment, and needed no further treatment. (CR 520-521; Schoon.APPX.021.) On February 24, 2016, relying on Dr. Nipper's IME opinion, Insurer denied further worker's compensation benefits. (See CR 27-29 and 30; Schoon.APPX.021.)

On May 5, 2016, Destiny underwent surgery with Dr. Wilson. (CR 503-505; Schoon.APPX.021.) After the surgery she continued to have conservative treatment including physical therapy, medications, and

injections. (CR 356; Schoon.APPX.021.) The surgery was successful in eliminating the paresthesia and numbness Destiny was having in her arms; however, she continues to have some pain. (CR 356; Schoon.APPX.021.)

## **VI. ARGUMENT**

### **A. Standard of Review**

A Court's review of a decision from the Department is controlled by SDCL § 1-26-36, which states:

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.

“The test is whether after reviewing the evidence we are left with a definite and firm conviction that a mistake has been made.” *Hughes v. Dakota Mill & Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907 (quoting *Schneider v. S.D. Dep’t of Transp.*, 2001 S.D. 70, ¶ 10, 628 N.W.2d 725, 728). “The Department’s factual findings and credibility determinations are reviewed under a clearly erroneous stand.” *Sauder v.*

*Parkview Care Center*, 2007 S.D. 103, ¶ 11, 740 N.W.2d 878, 883 (*Kuhle v. Lecy Chiropractic*, 2006 S.D. 16, ¶ 15, 711 N.W.2d 244, 247). Further, “when findings of fact are made based on live testimony, the clearly erroneous standard applies” and “[d]eference and great weight are given to the hearing examiner on fact questions.” *Tucek v. South Dakota Dept. of Social Services*, 2007 S.D. 106, ¶ 13, 740 N.W.2d 867, 871 (citing *VanSteenwyk v. Baumgartner Trees & Landscaping*, 2007 S.D. 36, ¶ 10, 731 N.W.2d 214, 218)

In reviewing factual findings of an administrative decision, “[t]he question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them.” *Abild v. Gateway 2000, Inc.*, 1996 S.D. 50, ¶ 6, 547 N.W.2d 556, 558. 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, 111 (citing *Darling v. W. River Masonry, Inc.*, 2010 S.D. 4, ¶ 10, 777 N.W.2d 363, 366-67).

Finally, review of the Department’s evidentiary ruling requires an abuse of discretion standard. *McDowell v. Citibank*, 2007 S.D. 52, ¶ 26, 734 N.W.2d 1, 10 (citing *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 63, 698 N.W.2d 555, 579). “An evidentiary ruling will not be overturned unless error is ‘demonstrated . . . [and] shown to be prejudicial error.’” *Novak*

*v. McEldowney*, 2002 S.D. 162, ¶ 7, 655 N.W.2d 909, 912 (quoting *State v. Smith*, 1999 S.D. 83, ¶ 39, 599 N.W.2d 344, 353).

## **B. Burden Of Proof**

A claimant “must prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of the employment” in order to recover under South Dakota’s workers’ compensation law.”

*Fair v. Nash Finch Co.*, 2007 S.D. 16, ¶ 728 N.W.2d 623, 628. An injury arises out of employment, if:

- (1) The employment contributes to causing the injury;
- (2) The activity is one in which the employee might reasonably engage; or,
- (3) The activity brings about the disability upon which compensation is based.

*Id.* at ¶ 10. “An employee is acting in the course of employment when an employee is doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment.” *Id.* at ¶ 11.

This Court has explained that “an employee does not have to have an accident or experience any trauma to his person before a medical condition will qualify as a compensable injury.” *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 358 (S.D. 1992). An employee is only required to show “that the disability ‘was brought on by strain or overexertion incident to the employment, though the exertion or strain need not be

unusual or other than that occurring in the normal course of employment.’ ” *Id.* (citing *Sudrla v. Commercial Asphalt and Materials*, 465 N.W.2d 620, 621 (S.D. 1991)). A claimant is only required to show that the work injury “was ‘a’ major contributing cause, pursuant to SDCL 62-1-1(7).” *Orth v. Stoebner & Permann Const., Inc.*, 2006 S.D. 99, ¶ 42, 724 N.W.2d 586, 596. Further, “[t]here are no ‘magic words’ needed to express an expert’s degree of medical certainty, and the test is only whether the expert’s words demonstrate that he or she was expressing an expert medical opinion.” *Id.* at ¶ 44.

Within the context of South Dakota workers’ compensation laws, where a “claimant’s pre-existing condition is concerned, we must take the employee as we find him.” *Orth*, 2006 S.D. 99, ¶ 42, 724 N.W.2d at 596. “If a compensable event contributed to final disability, recovery may not be denied because of the pre-existing condition, even though such condition was the immediate cause of the disability.” *Id.* “[I]f the employment aggravated, accelerated, or combined with the [pre-existing] condition or infirmity to produce the disability for which compensation is sought” the pre-existing condition or infirmity does not disqualify the claimant from receiving benefits. *St. Luke’s Midland Regional v. Kennedy*, 2002 S.D. 137, ¶ 13, 653 N.W.2d 880, 884-85.

This Court recently visited causation and pre-existing conditions in the workers’ compensation context in *Armstrong v. Longview Farms, LLP*. 2020 S.D. 1, 938 N.W.2d 425. The claimant in *Armstrong* was injured

while scraping the floor of his employer's hog confinement building with a curved push blade that caused him to fall to his left knee. *Id.* at ¶ 6. The claimant had suffered two work-related injuries to the same knee over a decade prior to the injury in the hog confinement building. *Id.* at ¶¶ 3, 4. Within the decade between injuries, claimant sought out treatment and appointments relating to his left knee problems. *Id.* at ¶ 5. Claimant's medical notes stated throughout this period of time that his left knee remained a "chronic problem," was progressively getting worse, and needed to be replaced. *Id.* Following claimant's left knee injury in the hog confinement building, his employer's workers' compensation insurer denied compensation on the basis that his work injury was not a major contributing cause to the condition of his left knee. *Id.* at ¶ 8.

This Court upheld the workers' compensation insurer's denial of benefits because "uncontroverted evidence of Armstrong's preexisting [knee condition] as it grew worse in the years leading up to the" hog confinement building injury. *Id.* at ¶ 24. It further discussed that claimant's knee problems were "ongoing, [and] worsening" for the 11 years in between injuries. *Id.* The ongoing knee problems were shown through "medical providers comment[ing] on [claimant's] worsening condition" in the years after his work injury in the hog confinement building. *Id.* at ¶ 5.

**C. The Circuit Court Did Not Err by Affirming the Department's Holding that Claimant's Work Injury is and Remains a Major Contributing Cause of Her Impairment and Need for Treatment.**

The Circuit Court upheld the Department's finding on Claimant's work injury causation, because there was substantial evidence on record to support the finding that her work injury is and remains a major contributing cause of her impairment and need for treatment.

Appellants assert to this Court that the Circuit Court erred when it affirmed the Department's finding. (Appellants' Brief at 12-24.) Central to Appellants' argument are the Circuit Court's findings regarding two central issues:

- (1) That substantial record evidence existed to support the finding that Claimant did not suffer symptoms between 2009 and 2015 (CR 2248); and,
- (2) That the Department's overall assessment of the weight of the evidence based upon Claimant's testimony and medical records was not clearly erroneous. (CR 2248.)

***i. Medical Records and Expert Testimony Support the Department's Finding that Claimant Suffered No Symptoms Between 2009 and 2015.***

Appellants first argue that "the Circuit Court erred by making assumptions regarding Claimant's symptoms from 2009 to 2015." (Appellants' Brief at 17.) Appellants assert that a "de novo review of the record on appeal does not support either tribunal's finding that Claimant suffered no symptoms between 2009 and 2015." (*Id.*) Appellants not only misstate the record and applicable standard of review, but ask this Court to make assumptions in support of their own argument.



Appellants misgivings with the Department's findings and Circuit Court's review are based on the findings of fact, live testimony, and medical records made at the Department level. (Appellants' Brief at 17-20.) At the Department hearing, Claimant gave live testimony, Dr. Nipper's and Dr. Dietrich's depositions were offered into evidence, and medical records were received. (CR 181-182.) As such, Claimant's live testimony should be reviewed under a clearly erroneous standard, *Tucek*, 2007 S.D. 106, ¶ 13, 740 N.W.2d at 871 (citing *VanSteenwyk*, 2007 S.D. 36, ¶ 10, 731 N.W.2d at 218), and Dr. Nipper's and Dr. Dietrich's depositions, as well as the medical records, should be reviewed under the de novo standard of review. *McQuay*, 2011 S.D. 91, ¶ 10, 808 N.W.2d at 111 (citing *Darling*, 2010 S.D. 4, ¶ 10, 777 N.W.2d at 366-67).

There was substantial evidence on record to support the Department's finding that Claimant did not suffer any symptoms from 2009 to 2015. While Claimant admitted both that she "had problems on and off for many years since she had injured her right arm in 2006" and that she would have occasional "flare ups" from time to time, none of these "problems" or "flare ups" were significant enough to have required treatment or attention. (CR 351-352.) Appellants cannot point to any record evidence that Claimant required treatment during the six-year period in question. In fact, the only attempt Appellants levy is that Claimant "sought refills on many medications and prescriptions" prior to this six-year period, to show motive that she intended not to treat any

symptoms she might have.<sup>1</sup> (Appellants' Brief at 19.) However, if this Court looks at the citations Appellants provide, none of the prescriptions had to do with her shoulder, neck, or radicular pain.<sup>2</sup>

There is no dispute that Claimant's minor flare-ups did not require treatment. The Department and Circuit Court both recognized that Claimant experienced flare ups between 2009 and 2015, but the flare ups did not arise to a level that required treatment. (Schoon.APPX.011 and Schoon.APPX.045.) Again, Appellants misgivings with the Department's credibility determinations and Circuit Courts affirmation of the same does not mean there was a lack of substantial evidence to support their determinations. (Appellants Brief at 19.) Rather, there was substantial evidence on record to support the Department's finding, because no medical record showing treatment exists for the period of time Appellants point to, unlike in *Armstrong*. *Armstrong*, 2020 S.D. 1, ¶ 5, 938 N.W.2d at 427. Additionally, all experts in Claimant's case agree that Claimant's injury was a major contributing cause to her condition and need for treatment. *But see Id.* at ¶ 25 (where experts did not agree that claimant's work-related injury was a major contributing cause of his need for a knee replacement surgery, because of the history of symptoms and treatment related to his knee).

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<sup>1</sup> As briefed below, it is understood by all parties that Claimant lost her healthcare coverage for a period of time during this six-years.

<sup>2</sup> The majority of the prescriptions Appellants point to deal with allergies, birth control, irritable bowel syndrome, depression, and fibromyalgia. (See CR 534, 1781, and 1805.)

Appellants ask this Court to rely on Dr. Nipper's assumption that "it was not plausible for [Claimant] to have no symptoms" during the time period in question. (Appellants Brief at 18.) Not only did Dr. Nipper make a baseless assumption regarding Claimant's condition from 2009-2015, he agreed there was no evidence of treatment during the same time period:

- Q. There's no evidence Destiny had any treatment for neck pain for approximately six years prior to this date of injury, is that correct?
- A. Not that I've seen.
- Q. If she did have neck pain it was not severe enough for her to seek medical treatment?
- A. That's her choice, yes.
- Q. If she did have neck pain it was not severe enough to affect her ability to work?
- A. That's her choice, yes.
- Q. If she did have neck pain it was not severe enough to affect her ability to work?
- A. It appears to be so.
- Q. And same with the radicular pain, are you aware of any medical records that indicate Destiny had radicular pain into her arms in the days, months, or six years leading up to the May 7<sup>th</sup>, 2015, date of injury?
- A. No records were presented as such.
- Q. And if she did have these pain complaints, it wasn't severe enough to seek medical treatment or affect her ability to work?
- A. Yes.

(CR 436-438; Schoon.APPX.023.)

There are no medical records that support Appellants' argument that Claimant suffered no symptoms between 2009 and 2015.

Claimant's symptoms were not severe enough to cause her to seek treatment, as Appellants' own expert has agreed. (*Id.*) As such, Appellants cannot meet its burden in proving the Circuit Court erred in finding that Claimant did not suffer any symptoms between 2009 and 2015.

***ii. The Circuit Court Did Not Err by Failing to Reverse the Department's Refusal to Make a Specific Credibility Determination as to Claimant.***

Again, the testimony and medical records involved in this case clearly show that Claimant was experiencing, and complaining about, neck pain in the days, weeks, and months following her work injury. Appellants' argument that the Department's failure to make a specific "credibility determination" not only fails as a matter of law, but ignores the record in this case.

***a. No Authority Exists to Support Employer and Insurer's Specific Credibility Argument.***

This Court has clearly stated that "[d]ue regard shall be given to the opportunity of the agency to judge the credibility of the witness." *Kurtz v. SCI*, 1998 S.D. 37, ¶12, 576 N.W.2d 878, 883 (quoting *Bonnett v. Custer Lumber Corp.*, 528 N.W.2d 393, 396 (S.D. 1995)). In addition, it is clear that a reviewing court does not "substitute [its] judgement for the Department's on the weight of the evidence or the credibility of the

witness.” *Mettler v. Sibco, Inc.*, 2001 S.D. 64, ¶ 7, 628 N.W.2d 722, 724 (citing *Lends His Horse v. Myrl & Roy’s Paving, Inc.*, 2000 S.D. 146, ¶¶ 9, 15, 619 N.W.2d 516, 519). Further:

Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous. Determining the credibility of the witnesses is the role of the factfinder. Where the Department has resolved conflicts in evidence, we cannot change its findings.

*Schneider v. South Dakota Department of Transportation*, 2001 S.D. 70, ¶ 14, 628 N.W.2d 725, 729-30. Appellants’ argument that the Department should have made specific credibility determination as to Claimant should fail as a matter of law. No authority exists to support Appellants’ argument and in essence Appellants are requesting this Court change the Department’s findings. As such, Appellants’ specific credibility argument fails as a matter of law.

*b. There is Substantial Evidence on Record to Support the Findings that Claimant Complained of and was Treated for Neck Pain in the Days Following Her Injury, All the Way Up to the Date of Her Deposition.*

Claimant’s testimony throughout this case has been consistent and clear. Appellants argue Claimant changed her testimony at the hearing versus what she said in her deposition when she explained where she felt pain immediately after her injury. However, when the Court looks at the question asked in the deposition, along with her explanation at the hearing, it is clear her testimony was consistent. Moreover, this argument ignores the fact that from the date of the injury, up until her deposition three years later, Claimant had complained of,

and repeatedly treated for, neck pain. That fact is undisputed by Appellants.

In her deposition, which was taken on July 12, 2018, Claimant was asked where she was feeling *pain* right after the injury, and she explained the *pain* was in her shoulder:

Q Right. Okay. And you said you had an intense amount of pain. The pain was shoulder? Hand? Arm? Where was it?

A At that point in time it was a severe amount of pain coming from the shoulder.

Q Okay.

A My right shoulder.

Q Okay. And do you recall front or back of the shoulder? Top of the shoulder?

A I recall it being more to the front, but, honestly, it was so severe it was hard to elaborate where it was coming from.

(Schoon.APPX.055-56.) Counsel for Appellants chose not to further question her on that topic or inquire if she was feeling any other symptoms in any other part of her body—the question only pertained to pain as it related to her shoulder. At hearing, Claimant more fully explained that she was also feeling pressure in her neck at the time, but it was not painful at that point:

Q Severe pain where?

A It was in the shoulder area primarily.

Q Was it in the front? The top? The side?

A It was mostly coming from the front.

Q Okay. And where did that pain also refer to?

A I instantly got really tight on the top of the shoulder and hurt. *And I felt pressure in my neck. I wouldn't call it necessarily pain.* The best way to explain it is you have a sinus infection, you have sinus pressure. It just -- it felt like pressure in my neck.

(CR 352-353 (emphasis added).) Claimant's testimony at her deposition and hearing is not contradictory and certainly not a basis to call into question her credibility.

Further, Appellants ignore Claimant's visit to Black Hills Health and Wellness Center on May 8, 2015, one day after her work injury and other relevant medical records. (Appellants' Brief at 22 (where Appellants state "Claimant did not complain of any pain or pressure in her neck").) In fact, Claimant *did complain* of articular fixations and spasms in her neck and was diagnosed with a neck strain. (CR 533-535.) On May 12, Claimant again presented to Black Hills Health and Wellness Center: "Destiny noted that she did feel a little bit better after her last appt but that she was having a return of the pain and stiffness in her *upper back and neck* and her right shoulder again this morning." (CR 534 (emphasis added).) Throughout the days and weeks that followed her work injury, Claimant sought treatment and medical attention.

Not only are Appellants' arguments contrary to the medical records, it is also contrary to the testimony of their own expert, Dr. Nipper, who agreed Claimant was complaining about upper back and

neck pain on May 12:

Q And then would you agree, at least according to this chiropractor, she felt as though the neck may have been a source of pain complaints for Destiny Schoon?

A I think it was an area of concern based on the chiropractor's perceived findings which the chiropractor then treated. And I can only assume that the treatment was designed to make this better.

Q And you don't dispute then on May 12th that Destiny Schoon was complaining about upper back and neck pain?

A I don't dispute what's in the record.

(CR 405-407.) Additionally, Dr. Nipper agreed that Claimant's muscle spasming was an objective finding. (CR 404-405.)

On May 18, Destiny treated at BHO with Candace Winters, PA, who ordered physical therapy to evaluate and treat Destiny's right shoulder and *neck strain*. (CR 884 (emphasis added).) On June 2, Destiny had her initial evaluation with Myron Sorestad, PT, at ProMotion Physical Therapy. That record also reveals Destiny had multiple complaints relating to her neck and objective signs of injury to her neck:

Primary Problem/Complaint: Right shoulder girdle and neck pain.

tabbles

EXHIBIT

5

worst. Current numeric pain rating is 7/10. Pain is described as involving the right dorsal and lateral neck region as well as right shoulder. Intermittent numbness has also been experienced involving the right 4th and 5th digits of hand. Aggravation

Pain Diagram: Aching and burning are indicated over the right dorsal and lateral neck, right shoulder, and right posterior elbow.

#### ASSESSMENT

Clinical findings are consistent with right rotator cuff tendonitis and cervicothoracic mechanical/myofascial dysfunction. Based upon patient presentation, physical therapy treatment is appropriate. Rehabilitative potential is encouraging.



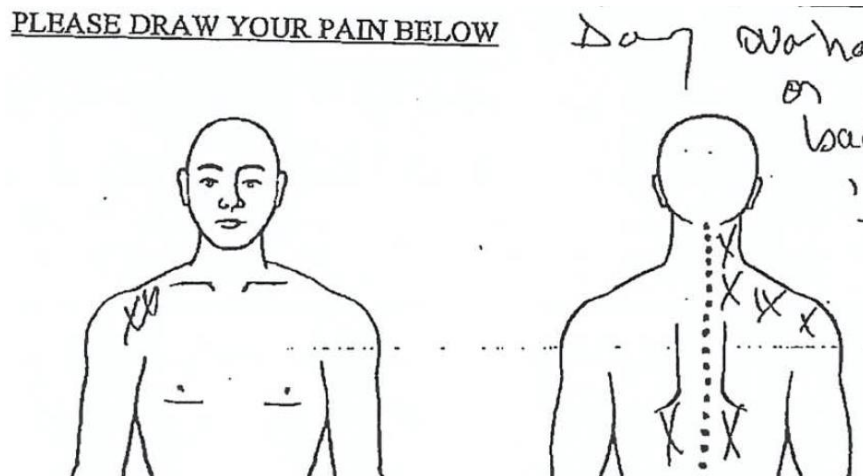
(CR 493-495.) Again, Dr. Nipper continued to agree that Claimant was complaining about neck pain on June 2, when Claimant saw physical therapist Myron Sorestad:

Q And at least based on Exhibit Number 5, I know you didn't have the chiropractic records, but based on the physical therapy records, she was complaining about neck pain as well as numbness, tingling, aching, burning down into her right arm?

A As stated in that record, yes.

(CR 422.)

On August 20, 2015, Claimant's patient intake form from a visit with The Rehab Doctors objectively shows that Claimant identified her neck as being painful and that she was having referred symptoms in her arm:



(CR 561.) The objective record shows that Claimant was having pain on the right side of her neck down to her shoulder. On the same form, Claimant further indicating she was experiencing radiating pain, numbness, tingling, and weakness into her arms:

---

- ☒ Pain radiating down arm or leg (Where: R-arm elbow)
- ☐ Numbness (Where: l arm/hand)
- ☐ Tingling (Where: l arm/hand)
- ☒ Muscle spasms (Where: mid back-thoracic)
- ☒ Weakness (Where: arms)
- ☐ Bowel Accidents    ☐ Bladder Accidents

(CR 566.) Finally, Claimant indicated that she felt 75% of her pain was in her neck, while 25% was in her arm:

If you have neck and/or arm pain, what percentage of your pain is in your neck versus your arm?

- ☐ 100% neck  
☐ 50% each  
☐ 100% arm  
☒ 75% neck/25% arm  
☐ Not sure  
☐ 75% arm/25% neck

(CR 566.)

Lastly, Claimant indicated on the form that she “had not had similar problems in the past” because the pain was different this time.

Claimant clearly explained this at the hearing:

Q Okay. And then if we go down two lines, it says, Have you had similar problems in the past? There's a Yes or a No and Explain. And it likes the box No is checked. Did you fill out that portion of the --

A     I did, for a reason.

Q Okay. And by this indication are you saying that you've never had similar problems with right shoulder pain in the past?

A When I was handed this form to fill it out, they wanted to know about the specific injury that I was there for and whether or not I had had pain in that specific area. When I meant no, what I was saying is that similar -- in the past the pain was behind the shoulder to the back side of it. This was to the front. That was new.

Q Okay.

A That's where -- what I meant by no and that's how they directed me to fill out this form was specific to the injury.

(CR 361.)

Appellants' specific credibility argument is contrary to Claimant's consistent testimony, the medical records, and even the opinions of their own hired expert. Moreover, even Dr. Nipper testified that he is not questioning Claimant's credibility:

Q Now, when you spoke with Destiny, she answered all your questions?

A Yes.

Q Honestly, as far as could you tell?

A As far as I recall, yes.

Q And you have not seen any doctors in the records question her credibility?

A I have not.

Q And you're not questioning her credibility here today?

A I'm not.

(CR 396.) As such, given the substantial evidence to support the Department's credibility determination, Appellants' arguments that Claimant's neck complaints are somehow not credible fails.

**D. The Department did not err by finding the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than that of Dr. Nipper.**

All of Claimant's treating medical providers, Drs. Lawlor, Wilson, and Dietrich, each opined that the injuries Claimant suffered to her neck and shoulder were caused by her May 7, 2015 work injury at News America Marketing. On the contrary, one doctor, Dr. Jeffrey Nipper, hired by the Appellants to perform Claimant's IME, disagrees. Not only is Dr. Nipper's testimony less credible than Claimant's treating physicians, Appellants' assertion that "Dr. Nipper is the only medical expert who had a complete and exhaustive understanding of Claimant's entire medical history" is completely false. (Appellants' Brief at 24.)

***i. Dr. Brett D. Lawlor***

Dr. Lawlor is a medical doctor board certified in Physical Medicine and Rehabilitation and Pain Medicine, educated at the Mayo Graduate School of Medicine, and practices at The Rehab Doctors in Rapid City, South Dakota. (CR 187; Schoon.APPX.022.) Dr. Lawlor explained how Claimant's injuries changed after the work injury on May 15, 2015:

I previously saw her in 2009. She had completely recovered from this and was having no difficulties until this most recent injury. Since that time, she has had fairly steady pain. She especially has pain with overhead activity with using the right arm. She has less pain with rest. There is no specific thing she can do to make her pain go away.

(*Id.*; Schoon.APPX.022.) Dr. Lawlor further showed that Claimant's symptoms were related to her work injury in a fax he sent to Ms. Chapel, stating:

The MRI was ordered with showed C5-6 herniation. The area of her pain drawing is consistent with pain referred from a C5-6 area. It is not uncommon for people with a C5-6 disc herniation to report shoulder pain as a predominate pain complaint. In my opinion, these findings are consistent with her stated onset of pain and consistent with her need for ongoing physical therapy to specifically address the neck as it relates to her shoulder pain.

(CR 502; Schoon.APPX.023.) In addition, Dr. Lawlor explained that he considered the “referral to Dr. Schleusener to be medically necessary, appropriate, and causally related to her work injury.” (CR 973-974 (stating physical therapy and medications are “medically necessary and appropriate treatment [and] necessary as a consequence of her work injury”). There is no evidence that Dr. Lawlor did not have a “complete and exhaustive understanding of Claimant’s entire medical history.” (Appellants’ Brief at 24.)

***ii. Dr. Jonathon L. Wilson***

Dr. Wilson is a medical doctor board certified in neurosurgery, was trained at Wake Forest University, and practiced at Black Hills Neurosurgery & Spine in Rapid City, South Dakota. (CR 227-228; Schoon.APPX.023.) Dr. Wilson examined Claimant on December 30, 2015, and also personally reviewed her October 30, 2015 MRI. (CR 1050; Schoon.APPX.023.) Based on that information Dr. Wilson stated: “I feel that the event at work while shifting a sign over her head is directly related to her C5-6-disc herniation and ongoing neurologic symptoms.” (*Id.*; Schoon.APPX.023.) There is no evidence that Dr. Wilson did not have a “complete and exhaustive understanding of

Claimant's entire medical history. (Appellants' Brief at 24.)

***iii. Dr. Christopher Dietrich***

Dr. Dietrich is a medical doctor board certified in Physical Medicine and Rehabilitation, Pain Medicine, and Sports Medicine, performed his residency at the Mayo Graduate School of Medicine, and practices at The Rehab Doctors in Rapid City, South Dakota. (CR 486-490; Schoon.APPX.023.) Dr. Dietrich has treated thousands of patients with herniated or bulging discs and estimates 70-80% of his practice is dedicated to treating patients with neck/back pain. (CR 186; Schoon.APPX.023.)

In reaching his opinions in this case, Dr. Dietrich reviewed the records from Dr. Lawlor, ProMotion, BHO, Black Hills Neurosurgery & Spine, the medical records summary, (CR 451-485), and also physically examined and treated Destiny over a period of several years. (CR 1843-1844; Schoon.APPX.023.) Based on that information, Dr. Dietrich stated it was his opinion "that the 2015 work injury caused an exacerbation of her cervical disc and cervical disc herniation that led to the subsequent surgery and treatment." (CR 1846; Schoon.APPX.024.) Dr. Dietrich further detailed this opinion on cross examination:

Q Do we know when, with certainty, Destiny Schoon herniated her disc?

MR. LEE: I'm going to object to the standard of being certainty, but with that, go ahead.

A Sure. Well, from '09 until fall of 2015, there was no symptoms that interfered with her ability to work two

jobs and there was nothing that led her to pursue additional care or treatment. And there's this mechanism of a strain and a pop that led to symptoms severe enough that took her in to seek care. So from a clinical perspective, it sure looks like, acts like, sounds like nothing really necessitating care until this date of injury and now we're necessitating care. I mean, the picture that was painted by PA Winters and by Dr. Lawlor and by Physical Therapist Soresstad all consistently describe this incident leading to symptoms necessitating care. My interpretation of that is that's when this happened.

(CR 1898-1899; Schoon.APPX.024.)

In support of that opinion, Dr. Dietrich explained Claimant's mechanism of injury, which included "the straining, the twisting, the torquing, the looking up, movement of the head, somehow created pressure or a load at this level that resulted in this disc herniation." (CR 1873-1874; Schoon.APPX.024.) He further testified that he has treated other patients who suffered similar injuries to their neck doing similar injurious events. (CR 1873; Schoon.APPX.024.) Dr. Dietrich then explained that based on physical therapist Myron Soresstad's examination a few weeks after the injury, it was evident there was a cervical component to her symptoms based on Destiny's radiating pain and the numbness in her 4<sup>th</sup> and 5<sup>th</sup> digits. (CR 1876; referencing CR 493-495.) Dr. Dietrich concluded by stating Claimant's surgery was necessary:

Q And based on your treatment of Destiny and her recovery, is it your opinion that the surgery was necessary?

A From what I can tell by looking at the records and looking at the notes, she had failed all attempts at conservative care, had continuing ongoing pain and

symptoms, was referred for surgery, deemed appropriate by the neurosurgeon, and then, ultimately, recovered and did better after that surgery.

(CR 1884-1885.) Again, there is no evidence that Dr. Dietrich did not have a “complete and exhaustive understanding of Claimant’s entire medical history.” (Appellants’ Brief at 24.)

***iv. Dr. Jeffrey Nipper***

After Insurer found out that Claimant was a surgical candidate it hired Dr. Nipper to examine Claimant. Dr. Nipper met with Claimant on January 21, 2016, and issued his report on February 17, 2016. (CR 512-521; Schoon.APPX.025.) Dr. Nipper reported it was his opinion Claimant merely suffered a “shoulder strain [that] resolved by approximately six weeks following the event.” (CR 519; Schoon.APPX.025.) When asked what he meant by “six weeks,” Dr. Nipper explained “there’s a gradual process during which the symptoms will resolve and go back to baseline.” (CR 399-400.)

***a. Dr. Nipper Lacks Credibility.***

Dr. Nipper routinely works for ExamWorks conducting medical examinations on behalf of insurance companies. Dr. Nipper affirmatively admitted his bias during his deposition:

Q And I think you testified previously that the *vast majority of your medical examination work* is done on behalf of insurance companies, adjusters, or attorneys that represent insurance companies?

A Yes.

Q And it's also true that the *vast majority of the time* you



issue reports that are favorable to the insurance company and against the injured worker, is that true?

A Yes.

(CR 397-398 (emphasis added); see Schoon.APPX.025.)

Contrary to Appellants' argument, it was Dr. Nipper who did not have all of Claimant's medical records. (Appellants' Brief at 24.) Dr. Nipper was missing the chiropractic records from days following the injury. (CR 512-521 and 403; Schoon.APPX.025.) This is critical, because Dr. Nipper himself testified that Claimant's injury and complaints were not related to the work injury on May 7, 2015, because Claimant did not complain about neck pain in the days and weeks following the work injury event:

Q And when you say the surgery was not related, I assume, would you also say all of the treatment for her neck was not related to the date of injury because, again, she did not complain about neck pain following the date of injury?

A I would say that, yes.

(CR 400-401.) Importantly, Dr. Nipper testified that it would be significant if Claimant had complained about the neck pain in the days following the injury:

Q Why would it be significant to you if Destiny were to have complaints about neck pain and receive treatment for her neck in the days, weeks, and months following the date of injury?

A It would be significant to me in knowing that she had another problem. I mean, if I was her treating physician, that's something I would want to know to put a complete treatment package together. So in that

respect it would be valuable to me.

(CR 400-401; Schoon.APPX.027.)

Specifically, Claimant presented to the Black Hills Health and Wellness with fixations, spasms, and hypertonicity, and rigidity in her neck, only one day after the work injury. (CR 533-535; Schoon.APPX.027.) The chiropractor adjusted Claimant's neck and back and diagnosed her as having, among other things, a neck sprain. (CR 533-535; Schoon.APPX.027.) Dr. Nipper testified these findings "blend together" and represent muscle spasms, which is objective evidence:

Q     Would muscle spasming be more of an objective finding versus the patient saying, my neck is tight, when the doctor can actually go through and feel that those muscles are locked up and tense?

A     Yes.

(CR 404-405.)

Just four days later, Claimant returned to the chiropractor with complaints "that she was having a return of the pain and stiffness in her upper back and neck and her right shoulder again this morning."

(Schoon.APPX.027.)

Dr. Nipper did not dispute that Claimant was complaining about upper back and neck pain on May 12. (CR 407.) He also conceded that Claimant's pain at that time could have been coming from her shoulder or neck: "So can I tell you for sure whether that's what was happening here? Was it from the neck? Was it from the shoulder? I can't say with 100 percent certainty, but it could be either." (CR 408;

Schoon.APPX.027.) Given Dr. Nipper's bias and non-exhaustive review of Claimant's medical history, his credibility is clearly spoiled.

*b. Dr. Nipper Misconstrued Critical Medical Records.*

Dr. Nipper misconstrued critical medical records, which led him to make opinions regarding Claimant's initial symptoms and the locality of her symptoms. Again, these failings show Dr. Nipper's lack of credibility.

In his initial report, Dr. Nipper summarized the ProMotion Physical Therapy records beginning on June 2, 2015. Dr. Nipper stated: "The therapy according to the records was directed toward the right shoulder." (CR 512-521; Schoon.APPX.028.) A simple review of that physical therapy record, however, reveals that there were multiple references to the fact that therapy would be directed to Claimant's shoulder and neck:

Primary Problem/Complaint: Right shoulder girdle and neck pain.

worst. Current numeric pain rating is 7/10. Pain is described as involving the right dorsal and lateral neck region as well as right shoulder. Intermittent numbness has also been experienced involving the right 4th and 5th digits of hand. Aggravation

Pain Diagram: Aching and burning are indicated over the right dorsal and lateral neck, right shoulder, and right posterior elbow.

**ASSESSMENT**

Clinical findings are consistent with right rotator cuff tendonitis and cervicothoracic mechanical/myofascial dysfunction. Based upon patient presentation, physical therapy treatment is appropriate. Rehabilitative potential is encouraging.

(CR 493-494.) In his deposition, Dr. Nipper conceded that Claimant was, in fact, complaining about neck pain when she saw physical therapist Sorestad on June 2:

Q And at least based on Exhibit Number 5, I know you didn't have the chiropractic records, but based on the

**EXHIBIT**  
5

physical therapy records, she was complaining about neck pain as well as numbness, tingling, aching, burning down into her right arm?

A As stated in that record, yes.

(CR 422.)

Further, Dr. Nipper reported it was his opinion Claimant's symptoms "resolved by approximately six weeks following the event" without any sort of documentary evidence. (CR 519; Schoon.APPX.028.) His only barometer for the opinion was that "there's a gradual process during which the symptoms will resolve and go back to baseline." (CR 399-400.)

However, Dr. Nipper was confronted with Claimant's physical therapy records from June 23, 2015, just over six weeks after her injury, wherein she was still reporting pain from 3/10 at its best and 10/10 at its worst, along with other symptoms:

**Presenting Symptoms:** Initially, after applying ice to the shoulder in the first 24-hours, the condition improved. It has remained unchanged since, however. Pain is described as being continuous in nature ranging from 3/10 at best to 10/10 at worst. Current numeric pain rating is 7/10. Pain is described as involving the right dorsal and lateral neck region as well as right shoulder. Intermittent numbness has also been experienced involving the right 4th and 5th digits of hand. Aggravation

(CR 539.) Dr. Nipper agreed, that based on that record, Claimant was not doing as well six weeks after her injury as she was before the date of injury. (CR 429-430; Schoon.APPX.028.)

*C. Dr. Nipper Agrees That Neck Injuries Can Cause Pain to a Shoulder, Which Defies the Credibility of His Opinions Relevant to this Case.*

Upon first examination following the May 7, 2015, work injury Claimant reported that she was having symptoms in her right shoulder.

Dr. Dietrich explained that it is not unusual for a neck injury to cause pain into the shoulder. (CR 1873-1874; Schoon.APPX.027.) Critically, Dr. Nipper also testified that he has treated patients who had neck injuries that resulted in pain into the shoulders. (CR 401-402; Schoon.APPX.027.) Dr. Nipper's admission defies his credibility relevant to this case.

***iv. Documentary Evidence Supports Evidence of Claimants Injury and Pain Complaints and Reasonable Necessity of Treatment.***

All of Claimant's treating doctors and Dr. Nipper all agree her treatment was reasonable and necessary. SDCL 62-1-15 states: "In any proceeding or hearing pursuant to this title, evidence concerning any injury shall be given greater weight if supported by objective medical findings." Dr. Dietrich compared the MRIs from 2009 and 2015 and noted that there was definitely a change—specifically at the C5-6 level. (CR 1879-1880; Schoon.APPX.024.) He explained the 2015 MRI is objective evidence that Claimant's condition was different now versus what it was in 2009. (CR 1881-1882; Schoon.APPX.024.) Dr. Nipper also agreed that "MRIs are one of the most objective ways to define pathoanatomy" and that the 2015 MRI is worse than the 2009 MRI. (CR 391 and 420.)

Dr. Dietrich testified that the treatment Claimant had for her injury was reasonable and necessary, her condition was likely permanent, and she would need treatments such as Flector Patches to

help with flares in her pain. (CR 398-400; Schoon.APPX.025.) Drs. Lawlor and Wilson agreed that Destiny's treatment, while they were seeing her, was also reasonable. (CR 477 and 1050.) Moreover, even Dr. Nipper agrees Claimant's treatment was reasonable:

Q So would you agree with me that the treatment that Destiny had to try and treat her injuries and symptoms that she was complaining about were reasonable and appropriate based on the symptoms she was complaining of?

A Yes.

(CR 427.) As such, it cannot be argued that Claimant's treatment was not reasonable.

**E. The Department Did Not Abuse Its Discretion by Not Striking Dr. Dietrich's Opinions Based on Lack of Foundation**

Appellants' request to overturn the Circuit Court's affirmance of the Department's decision on the foundation of Dr. Dietrich's opinions fails for two reasons: (1) Appellants' objection was untimely; and, (2) the Department's finding that Dr. Dietrich had adequate foundation to offer opinions regarding the causation of Claimant's injuries was not a fundamental error of judgement. *See In re Jarman*, 2015 S.D. 8, ¶ 19, 860 N.W.2d 1, 9. As such, Appellants' request should be denied.

***i. Appellants' Request to Strike Dr. Dietrich's Opinions is Untimely.***

On April 16, 2019, the Department entered its Order and Notice of Telephonic Prehearing Conference. The Department scheduled the telephonic prehearing conference for December 16, 2019, commencing at

9 a.m. CT. The Department further ordered that at the conference the parties shall be fully prepared to: “d. Identify all affidavits and depositions intended to be offered at hearing or objections thereto.” On November 21, 2019, the parties took Dr. Dietrich’s deposition for use at hearing.

The prehearing conference was held on December 16 and Appellants did not make any objections to Dr. Dietrich’s deposition or opinions. Thereafter, on December 17, 2019, the Department issued its Prehearing Order receiving into evidence Dr. Dietrich’s deposition. At no point thereafter did the Appellants file a motion to strike Dr. Dietrich’s opinions or raise that as an issue even at the Hearing on September 23, 2020.

The very first time Appellants sought to strike Dr. Dietrich’s opinion was in their post-hearing brief. Notably, Appellants cite to no authority that would justify striking or limiting Dr. Dietrich’s opinion in any fashion. As a result, Appellants request is untimely, procedurally and substantively flawed, and should be dismissed. *See Dennis Pottebaum v. City of Sioux Falls*, No. 290, 1997/98, 2001 WL 356251, at \*1 (S.D. Dept. Lab. Mar. 8, 2001) (“The time for objecting to experts [is] at the Prehearing Conference.”).

***ii. Dr. Dietrich's Foundation is More than Adequate to Offer Opinions Regarding the Causation of Claimant's Injuries.***

Appellants argue that Dr. Dietrich lacks the foundation to give opinions in this case because “Dr. Dietrich’s opinions is missing a complete understanding of Claimant’s prior medical history.” (Appellants’ Brief at 28.) Appellant’s representation of the information Dr. Dietrich considered is, like its representation of Claimant’s medical records, incorrect. Moreover, Appellants cannot cite to any authority stating a treating provider is *required* to read *every* medical record ever generated for a patient in order to offer causation opinions. The reason for this omission is obvious—it is not required.

Specifically, this Court has discussed what a party must show when offering expert testimony:

Admissibility of expert testimony is governed by SDCL 19–15–2 (Rule 702). Under this rule, before a witness can testify as an expert, that witness must be “qualified.” *Id.* Furthermore, under *Daubert*, the proponent offering expert testimony must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge as required under Rule 702. *Guthrie*, 2001 SD 61, ¶ 34, 627 N.W.2d at 415–16; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 2799, 125 L. Ed. 2d 469 (1993). Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415.

*Burley v. Kytect Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402. This court went on to explain that: “We interpret our rules of evidence liberally with the general approach of relaxing the



traditional barriers to ‘opinion’ testimony.” *Burley*, 2007 S.D. 82, ¶ 24, 737 N.W.2d 397, 405. “A party who offers expert testimony is not required to prove to a judge in a *Daubert* hearing that the expert's opinion is correct: all that must be shown is that expert's testimony rests upon ‘good grounds, based on what is known.’” *Id.* “Any other deficiencies in an expert's opinion or qualifications can be tested through the adversary process at trial.” *Id.* Where expert testimony does not rest upon “good grounds,” but is allowed into trial, the court’s evidentiary ruling is reviewed under an abuse of discretion standard. *See In re Jarman*, 2015 S.D. 8, ¶ 19, 860 N.W.2d at 9.

Dr. Dietrich’s opinions rest upon “good grounds, based on what is known.” *See Burley*, 2007 S.D. 82, ¶ 24, 737 N.W.2d at 405. First, Dr. Dietrich’s opinions were based on his review of the contemporaneous medical records, his examinations and discussions with Claimant, as well as a summary of all Claimant’s prior medical treatment:

Q Now, in reaching your opinions in this case, you were provided and received some records, I believe, from your facility including Dr. Lawlor, is that right?

A Correct.<sup>3</sup>

Q ProMotion?

A Correct.

Q Black Hills Orthopedic?

---

<sup>3</sup> Dr. Lawlor’s records, which began in 2009 and detailed Claimant’s prior injuries from motor vehicle accidents, the slip and fall, and the treatment she underwent for those injuries and pain complaints, were certainly part of Dr. Dietrich’s review. (CR 1732-1750.)

A Correct.

Q Black Hills Neurosurgery & Spine?

A Correct.

Q And I've also provided you with a copy of what I've marked as Exhibit 2, which is a summary of all of Destiny's past treatment to present, as near as we can tell. Have you had an opportunity also to review that document?

A I have.<sup>4</sup>

(CR 1868-1869.)

Second, Dr. Dietrich was acutely aware that Claimant had been in prior motor vehicle accidents and suffered neck pain that she underwent chiropractic treatment for over the years:

Q Now, Doctor, I'd like to talk to you a little bit about her prior injuries and treatment. I think you know from your history and your review of the records and summary that she's had a long history of neck pain and chiropractic adjustments dating back as far as 2002 all the way through 2010 relating to two rear-end accidents she had in 2000 and 2003. Were you aware that she was routinely undergoing chiropractic care during that time frame of 2002 to 2010?

A I'm aware that she received treatment during that time. The frequency, I think, I'm not sure that -- what routine means. I think my definition is probably different than some of the chiropractors.

Q Does that change your opinion, though, that she had these prior treatments and symptoms that the May 2015 injury caused an aggravation to her neck

---

<sup>4</sup> The Medical Summary (Ex. 2; DI 426-460) is a thorough 52-page Summary of all of Claimant's medical treatment from the year 2000 through 2019. (see Appellants' Brief at 29.) Any conjecture regarding the adequacy of this Summary fails upon simple review document itself.

causing it to become more painful and need treatment?

MR. SHULTZ: I'm going to object to form of the question on the basis of foundation and lack of complete understanding of all previous records. Go ahead.

A It does not. I mean, I think we clearly have talked about and described previous midline disc bulges or protrusions at C3-4, C4-5 and C5-6. From '09 until '15, there really wasn't much in the way of treatment. And then in '15, there was this documented injury that led to a significant objective measurable difference on the MRI that explains her symptoms and ultimately led to her surgery with Dr. Wilson and treatment.

(CR 1890-1891.)

Third, Dr. Dietrich further explained why it is not necessary for him to review every single medical record ever generated for a patient in order to formulate opinions about injuries or their causation:

Q And, Doctor, in forming the opinions that you have in this case and all of the cases that you've testified on, do you have to review every single record in your opinion in order to give an informed and accurate opinion regarding your patient's treatment, diagnoses, things like that?

A I think we obtained a detailed history. That can be a summary of previous treatments, previous experiences, previous records. We lay out a timeline. You have an examination. I'm also basing this off of my partner's assessment and his interpretation at the time of injury. He left work for a period of time and I assumed care, I believe, in August of 2016. And so I sort of assumed the responsibility for him for managing her case and providing care.

(CR 1871-1872.)

Lastly, Dr. Dietrich testified that he was willing and able to look at any prior records that defense counsel thought may impact his opinions:

Q And as we sit here today, are you willing and capable of looking at any prior records that counsel may think might have an impact on your opinions?

A Yes.

(CR 1872.) However, defense counsel chose not to provide any other prior records or cross examine Dr. Dietrich regarding some of Destiny's treatment notes or any prior medical records, of which they argue are so important.

This case is not one where a patient had prior injuries and treatment that the treating doctor was completely unaware of or ignored. On the contrary, Dr. Dietrich was well aware of Destiny's prior injuries, diagnosis, and treatment, and all that information was considered in conjunction with his examination and treatment of Destiny. As such, the Department's admission of his expert opinion was not a fundamental error of judgement.

## **VII. CONCLUSION**

Based upon the forgoing, Claimant Schoon respectfully requests that this Court enter an Opinion affirming the Circuit Court opinion, which affirmed the Department's decision.

## **VIII. REQUEST FOR ORAL ARGUMENT**

Appellee respectfully requests oral argument in this matter.

## **IX. CERTIFICATE OF COMPLIANCE**

Pursuant to S.D.C.L. §15-26A-66(b)(4), I certify that Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 9,810 words and 49,987 characters. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellee's brief and all copies are in compliance with this rule.

Dated this 16<sup>th</sup> day of August, 2022.

BEARDSLEY, JENSEN & LEE,  
PROF. L.L.C.

By: /s/ Brad J Lee  
Brad J. Lee  
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*Attorney for Claimant/Appellee*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 30, 2019, he electronically filed a copy of this legal document with the South Dakota Supreme Court and that the original and two copies of the same were filed by serving them upon:

Ms. Shirley A. Jameson-Fergel  
South Dakota Supreme Court  
500 East Capitol Avenue  
Pierre, SD 57501-5070

A true and correct copy of *Appellee's Brief with Appendix* was also provided by electronic means to:

Jeff Shultz and Seth Lopour  
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which address is the last address of the addressees known to the subscriber.

/s/ Brad J. Lee

Brad J. Lee

## **APPENDIX**

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SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT  
WORKERS' COMPENSATION

**DESTINY SCHOON,**

Claimant,

vs.

**NEWS AMERICA MARKETING,**

Employer, and

**FARMINGTON CASUALTY COMPANY,**

Insurer.

HF No. 76, 2016/17

**ORDER**

**RECEIVED**  
MAR 15 2021

The above-entitled matter coming on for decision and the Department having considered the agreed upon record and received arguments on briefs of counsel, the Department of Labor having entered its Findings of Fact and Conclusions of Law; it is hereby

ORDERED that Claimant's work injury combined with her preexisting diseases and conditions caused or prolonged her impairment and need for treatment; it is further

ORDERED that the work injury is and remains a major contributing cause of her impairment and need for treatment; it is further

ORDERED that Dr. Dietrich's testimony is based on the appropriate foundation, and Employer/Insurer's objection is overruled; it is further

ORDERED that Claimant is entitled to benefits related to her work injury; it is further

ORDERED that Claimant shall receive permanent partial disability benefits in the amount of \$16,914.00 (312 weeks x 11% x \$492.84), including prejudgment interest on those payments totaling \$2,419.30, for a total of \$19,333.30; it is further

ORDERED that Employer/Insurer shall reimburse to Claimant the amount of \$59,282.73 for medical bills paid by health insurance, amounts paid by the Claimant, and outstanding medical bills, including pre-judgment interest on the medical expenses totaling \$23,180.97, for a total of \$82,463.70; it is further

ORDERED that payments be made through Claimant's counsel, consistent with *Lagge v. Corsica Co-op*, 677 N.W.2d 569 (SD 2004) and *Wise v. Brooks Construction*, 721 N.W.2d 466 (SD 2006); it is further

ORDERED that Employer/Insurer shall remain responsible for payment of Claimant's future medical treatment consistent with the Findings of Fact and Conclusion of Law and South Dakota law.

Dated this 10<sup>th</sup> day of March, 2021.

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

By: Michelle Faw  
Michelle M. Faw  
Administrative Law Judge

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

**DESTINY SCHOON,**

**HF No. 76, 2016/17**

**Claimant,**

**v.**

**DECISION**

**NEWS AMERICA MARKETING,**

**Employer,**

**RECEIVED**

**and**

**JAN 29 2021**

**FARMINGTON CASUALTY COMPANY,**

**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 23, 2020, in Rapid City, South Dakota. Claimant, Destiny Schoon, was present and represented by Brad J. Lee of Beardsley Jensen & Lee Prof. L.L.C. The Employer, New America Marketing and Insurer, Farmington Casualty Company, were represented by J.G. Shultz and Seth Lopour of Woods, Fuller, Shultz, & Smith P.C.

***Facts:***

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

1. In November 2001, Destiny Schoon (Schoon or Claimant) was involved in a motor vehicle accident.
2. On September 9, 2002, Schoon treated with Dr. Shannon DeBoer at Complete Chiropractic. Schoon presented with upper back pain into the neck and shoulders. Dr. DeBoer's notes indicate that Schoon complained of pain in her shoulder blades and neck since childhood. Dr. DeBoer further noted that Schoon had intermittent problems with neck, upper back, and upper cervical spine since the car accident. Schoon continued to treat with Complete Chiropractic 86 times through April 2005.

3. On April 18, 2003, Schoon was treated by Dr. DeBoer who noted, Schoon presented with neck and shoulder pain. Dr. DeBoer diagnosed Schoon with aggravation of cervical complaint via motor vehicle accident.
4. In August 2003, Schoon was involved in another motor vehicle accident.
5. On February 10, 2004, Schoon treated with Break Through Health. On her patient form, Schoon indicated that she was presenting with constant neck and shoulder pain resulting from her car accident in August of 2003.
6. On August 17, 2004, Schoon suffered a slip and fall at a concert in Sioux Falls, South Dakota. In her personal injury suit against the City of Sioux Falls, Schoon alleged she suffered serious and permanent injuries.
7. On March 25, 2005, Schoon was treated at 2 Docs Chiropractic where she complained of neck pain as a result of her car accident and fall. Dr. Michael Torsney of 2 Docs Chiropractic diagnosed Schoon with acute traumatic sprain/strain of the neck with associated pain and stiffness as well as cervical, thoracic, lumbar, sacral and pelvic segmental dysfunction with associated muscle spasm, stiffness, and pain. He opined that the injuries were the combined result of the motor vehicle accident and the fall.
8. In 2007, Schoon moved to Rapid City. She continued chiropractic care, but it was only offering temporary relief. The chiropractor referred her to Black Hills Orthopedic & Spine Center (Black Hills Orthopedic). Black Hills Orthopedic conducted imaging and ordered physical therapy. Schoon took part in the physical therapy off and on for about a year. Black Hills Orthopedic then sent her for an EMG.
9. On December 8, 2008, Schoon treated with Black Hills Orthopedic for complaints of pain in her right shoulder.
10. On December 22, 2008, Dr. DeBoer offered an expert medical opinion in Schoon's lawsuit. DeBoer opined that as a result of Schoon's fall, her fibromyalgia was exacerbated which would be consistent with a force transmitted from the distal extremity through the arm and shoulder and up to the neck. Dr. DeBoer also noted that Schoon had responded well to treatment and had



progressed through the prior couple of months with the main complaint becoming less and less about her neck and upper back areas.

11. On February 5, 2009, the EMG was performed by Dr. Brett Lawlor of The Rehab Doctors. The EMG was normal. Schoon was referred to Dr. Lawlor for treatment.
12. On April 9, 2009, Schoon began her treatment with Dr. Lawlor who prescribed medication and physical therapy with a new therapist. He then performed bilateral C6-7, C7-T1 facet area injections to see if that would alleviate Schoon's symptoms. Schoon found the injections very helpful. Following the injections, School was able to work 60 hours per week and play recreational softball from 2010 through 2013 without symptoms other than the occasional flare up.
13. On and before May 7, 2015, Schoon worked for a law firm and a second job at News America Marketing which was at all times pertinent insured by Farmington Casualty Company (jointly Employer/Insurer) for workers' compensation purposes.
14. On May 7, 2015, Schoon was hanging advertising for News America Marketing when she felt severe pain in her shoulder. That night she took over the counter medication and iced the area to try to alleviate the pain. Employer/Insurer accepted the claim as compensable.
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18. On June 2, 2015, Schoon began physical therapy at Promotion with Myron Sorestad. After multiple physical therapy appointments, Black Hills Orthopedic referred Schoon to Dr. Lawlor

19. On August 20, 2015, Schoon visited Dr. Lawlor. He prescribed physical therapy with Myron at Promotion and ordered a cervical MRI. The MRI showed broad-based disc herniation at C5-6 which impinged on the right ventral hemicord.
20. On November 3, 2015, Jorna Chapple, on behalf of Employer, indicated the claim was accepted for right shoulder only and asked Dr. Lawlor to send records supporting the need for more physical therapy for the shoulder as well as treatment for the neck.
21. On November 4, 2015, Dr. Lawlor responded to Ms. Chapple by fax. He explained that it was not uncommon for people with similar injuries to Schoon's to report shoulder pain as the predominant complaint. He opined that the findings were consistent with Schoon's stated onset of pain and consistent with her need for physical therapy to specifically address the neck as it related to her shoulder pain.
22. On December 30, 2015, following a referral from Dr. Lawlor, Schoon visited Dr. Jonathan L. Wilson at Black Hills Neurosurgery and Spine. Dr. Wilson recommended a C5-6 cervical disc arthroplasty. Employer/Insurer required an independent medical examination (IME) before the surgery would be authorized.
23. On January 21, 2016, Dr. Jeffrey Nipper performed an IME of Schoon.
24. On February 17, 2016, Dr. Nipper issued his report in which he opined that Schoon had suffered a shoulder strain and her symptoms should have gone away in six weeks. He further opined that her other symptoms were the result of pre-existing pathoanatomy. He opined she was at maximum medical improvement (MMI), entitled to no impairment, and needed no further treatment.
25. On February 24, 2016, Employer/Insurer denied the claim.
26. On May 5, 2016, Schoon underwent surgery with Dr. Wilson. After surgery she continued to have conservative treatment including physical therapy, medications, and injections. The surgery was successful in eliminating the paresthesia and numbness Schoon was having in her arms. However, she continued to have some pain.
27. On November 28, 2016, Schoon submitted this Petition for Hearing to the Department of Labor & Regulation (Department).

28. In August 2019, Schoon stopped working for Employer due to the caseload at her law firm job and the neck and shoulder pain which prevented her from working so many hours.

Additional facts may be developed in the issue analysis below.

### **Causation**

Schoon's work injury occurred while she was hanging advertising for Employer. Her job that day involved hanging advertising and applying a clamp to a shelf. She was attempting to remove a piece of equipment with a screwdriver, but the equipment was frozen and would not move. She was trying to turn the screwdriver at roughly eye level when with the last crank, she felt severe pain in her shoulder. She also claims she felt a tightness in her shoulder and pressure in her neck. She treated that evening with over the counter medications.

The Department's first inquiry is whether Schoon's work injury on May 7, 2015, is a major contributing cause of her current condition. Schoon, as the claimant, has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry Inc.*, 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367. "The employee's burden of persuasion is by a preponderance of the evidence." *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 358 (SD 1992).

Schoon has provided Dr. Lawlor as an expert witness. Dr. Lawlor is a medical doctor board certified in physical medicine and rehabilitation, as well as pain medicine. He was educated at the Mayo Graduate School of Medicine and practices at The Rehab Doctors in Rapid City, South Dakota. Dr. Lawlor treated Schoon in 2009, prior to the work injury. He opined that Schoon completely recovered from her complaints in 2009 and was having no difficulties prior to the work injury. Dr. Lawlor further opined that the pain Schoon was experiencing in her shoulder was consistent with the results of the MRI which showed C5-6 herniation. He further opined that physical therapy and medications were medically necessary and appropriate treatment and a necessary consequence of her work injury. Schoon has also provided the expert opinion of Dr. Wilson who is board certified in neurosurgery, was trained at Wake Forest University, and used to practice at Black Hills Neurosurgery & Spine in Rapid City, South Dakota.

Dr. Wilson examined Schoon on December 30, 2015 and reviewed her MRI. Dr. Wilson opined that the work injury was directly related to C5-6 disc herniation and ongoing neurologic symptoms.

Schoon has also provided the expert opinion of Dr. Christopher Dietrich, a medical doctor, who is board certified in physical medicine and rehabilitation, pain medicine, and sports medicine. He performed his residency at the Mayo Graduate School of Medicine and practices at The Rehab Doctors in Rapid City, South Dakota. Dr. Dietrich has treated thousands of patients with herniated or bulging discs. He estimates that 70-80% of his practice is dedicated to treating patients with neck or back pain. Dr. Dietrich reviewed Schoon's records from Dr. Lawlor, ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, the medical records summary, and also physically examined and treated Schoon over a period of several years. Dr. Dietrich opined that the work injury caused an exacerbation of Schoon's cervical disc and cervical disc herniation that led to the subsequent surgery and treatment.

Dr. Dietrich observed that between 2009 and 2015, there were no symptoms that interfered with Schoon's ability to work two jobs and there was nothing that led her to pursue additional care or treatment. Dr. Dietrich opined that the straining, twisting, torqueing, looking up, movement of the head while trying to remove the ad equipment, somehow created pressure or load that resulted in disc herniation and led to symptoms severe enough for her to seek care following the work injury. From this, he concluded that the work injury was what resulted in her need for care. Dr. Dietrich further opined that he has seen similar injuries in other patients from similar injurious events. Dr. Dietrich compared the MRIs from 2009 and 2015 and noted that there was a change specifically to the C5-6 level. He opined that the 2015 MRI is objective evidence that Schoon's condition had changed. He further testified that Schoon's treatment was reasonable and necessary, her condition was likely permanent, and she would need treatments to help with flares in pain.

Employer/Insurer has offered the expert opinion of Dr. Nipper. Dr. Nipper is a board certified orthopedic surgeon who has been practicing for over 27 years. The majority of his medical examination work is done on behalf of insurance companies, adjusters, or attorneys that represent insurance companies. He conducted an in-person



evaluation of Schoon on January 21, 2016. Then he issued his IME report on February 17, 2016. Dr. Nipper opined that Schoon sustained a right shoulder strain in the workplace on May 7, 2015, and no other injury was sustained during that event. He further opined that any ongoing symptoms referable to the neck, shoulder, or radiating symptoms into either of the upper extremities was due to pre-existing pathoanatomy. He concluded that the evolution of a C-6 disc herniation was ongoing and predated the work injury. Dr. Nipper opined that the activities Schoon was involved in during the work injury were not capable of causing a disc herniation in the cervical spine, and the other MRI findings were the product of a longstanding chronic degenerative process unrelated to the work injury. He further opined that Schoon had suffered a shoulder strain that resolved by approximately six weeks following the work injury, and over that time, there was a resolution of symptoms and a return to baseline. He concluded that the work injury is not a major contributing cause of Schoon's current diagnosis, and no additional treatment would be reasonable or necessary related to the work injury.

At the time of the IME, Dr. Nipper did not have Schoon's chiropractic records from the days following the injury. After receiving more of Schoon's records, Dr. Nipper issued an Independent Records Review on August 12, 2019. In this report, he opined that his diagnosis and impressions were unchanged from those provided in the IME report. He also noted that Schoon had a significant history of neck, spine, right shoulder, right extremity, and left extremity problems and symptoms prior to the work injury. He further opined that Schoon's current condition was the result of pathoanatomy that was present in 2004, 2005, and 2009 that had progressed. Dr. Nipper did not find it plausible that Schoon did not have symptoms between 2009 and 2015 due to the level of pathoanatomy.

Schoon argues that Dr. Nipper did not have all the records when he formed his initial opinion and that he misinterpreted the records he reviewed. He opined that, according to the records, the therapy was directed towards Schoon's right shoulder. However, medical records show that Schoon complained of neck pain as well. Dr. Nipper also testified that it would be significant if Schoon had complained about neck pain in the days following her injury, because it would tell him she had another problem. Schoon presented to Black Hills Health and Wellness with neck issues following the

injury. The chiropractor adjusted Schoon's neck and back then diagnosed her as having, among other things, a neck sprain. Four days later, Schoon returned to the chiropractor complaining of pain and stiffness in her upper back, neck, and right shoulder. Dr. Nipper testified that he could not be certain exactly where the pain was coming from, and it could be the shoulder or neck. Dr. Dietrich opined that it is not unusual for a neck injury to cause referred pain into the shoulder. Dr. Nipper also opined that he has seen and treated patients who had neck injuries that resulted in referred pain into the shoulders. Schoon argues that she reported pain in the shoulder on the date of the injury, and then shoulder and neck pain the next day. Both Dr. Dietrich and Dr. Nipper agreed that Schoon's previous injuries could make her more susceptible to injury.

Dr. Nipper also testified that Schoon's injury resolved by six weeks. However, he acknowledged that Schoon was still reporting pain more than six weeks after the injury. He further agreed that there are not any records indicating Schoon had any shoulder pain, neck pain, or radicular pain in the six years leading up to the injury, and that she did not have any pain complaints that were severe enough to require her to get medical treatment or that affected her ability to work. Employer/Insurer argue that Schoon may not have sought care due to not having health insurance.

Employer/Insurer assert that Schoon's testimony regarding her neck and shoulder pain has been inconsistent. Schoon responds that the form of the questions during the hearing and the deposition were different regarding what she felt after the injury. During her first deposition, Schoon was asked where she felt pain. She said she felt pain in her right shoulder, and she did not mention pain or pressure in her neck. At hearing, Schoon was asked where she felt pain and where the pain referred. She said she felt pain in her shoulder and pressure, not necessarily pain, in her neck. Employer/Insurer argue the change in testimony contradicts Schoon's complaint following her injury, and she did not complain of pain or pressure in her neck on May 8, 2015 when she visited Black Hills Health and Wellness Center. She also did not complain of neck pain or pressure on May 18, 2015 at her visit to Black Hills Orthopedic. Schoon argues that the records from Black Hills Health and Wellness center on May 8 and May 12, 2015 reflect that she presented with neck pain.

Employer/Insurer further assert that Schoon did not communicate any pain in her neck to Dr. Nipper during her IME. However, during his deposition testimony, Dr. Nipper acknowledged that the medical records show she was complaining of upper back and neck pain.

The Department must look to the medical expert testimony to decide if Schoon's May 7, 2015 work injury remains a major contributing cause as defined by SDCL 62-1-1(7) (b) which provides,

(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

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

"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). Additionally, "[t]here are no 'magic words' needed to express an expert's degree of medical certainty, and the test is only whether the expert's words demonstrate that he or she is expressing an expert medical opinion." *Orth v. Stoeber & Permann Const., Inc.*, 2006 SD 99, ¶ 44, 724 N.W.2d 586, 596 (Citation omitted). The Department finds that both Dr. Dietrich and Dr. Nipper's testimony rests on the necessary foundation. Dr. Dietrich's opinion is based on his review of medical records from ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, and the summary provided by Schoon's counsel. He has also treated Schoon for several years. Dr. Nipper conducted a records review and an IME of Schoon. Both doctors were aware of Schoon's previous injuries and treatment history.

In addition to Dr. Dietrich's opinion that the work injury caused an exacerbation of Schoon's cervical disc and cervical disc herniation, Dr. Wilson and Dr. Lawlor agree that the work injury was the cause of injury and need for treatment. Dr. Nipper concluded that Schoon's work injury was merely a right shoulder strain which would have resolved after six weeks, and, therefore, is not a major contributing cause of her current condition. The South Dakota Supreme Court (Court) has held that a non-treating physician's opinion can be more persuasive than the opinion of a treating physician on

causation issues. *Helms v. Lynn's Inc.*, 1996 S.D. 8, 542 N.W. 2d 764. However, in Schoon's case, the Department finds the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than that of Dr. Nipper. The records show that while Schoon does have a history of injury, degenerative disc disease, and pain in her neck and shoulder, she did not seek treatment for these issues from 2009 until the May 7, 2015 work injury. Dr. Nipper opined that it was not plausible for her to have no symptoms during that time period, and she must have merely refrained from seeking treatment. Employer/Insurer assert that Schoon did not seek treatment, because she did not have health care. However, the Department must look to the evidence before it, and there is no medical evidence or testimony that indicates that Schoon suffered symptoms between 2009 and 2015. The Department does not have evidence to support the conclusion that this was merely due to Schoon's lack of health insurance.

The Court has recently clarified the causation standard under SDCL 62-1-1(7)(b) in *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425. In *Armstrong*, Armstrong sustained multiple injuries to his left knee while working for Longview Farms. The injuries were initially found to be compensable. During the treatment for these injuries, osteoarthritis and other chronic issues were discovered. Armstrong was offered the choice of conservative treatment or a knee replacement. He opted for replacement. The insurer concluded that the work injury was not a major contributing cause of his left knee condition and it was, instead, the result of chronic, preexisting conditions. The Department held that Armstrong had not proven that his injury was the major contributing cause of his need for knee replacement surgery. On appeal, the Court stated, "[t]he fact that the March 31 injury may have been the unfortunate tipping point of Armstrong's knee symptoms does not mean that it displaced the degenerative effects of his preexisting condition." *Id.* ¶ 24, 938 N.W.2d at 431. "[W]e have previously rejected a similar argument that relegated causation standard of SDCL 62-1-(7)(b) to an elementary cause-in-fact determination." *Id.* ¶ 26, 938 N.W.2d at 431 (citations omitted).

The Department finds Schoon's case distinguishable from that of *Armstrong*. While they both have preexisting conditions, the Court in *Armstrong* made note of the

record indicating that Armstrong's condition was worsening in the time up to the work injury.

Here, the record contains uncontroverted evidence of Armstrong's preexisting degenerative osteoarthritis as it grew worse in the years leading up to the March 31 injury. Further, there is no evidence to support the view that Armstrong's osteoarthritis was related to his employment, either at Longview Farm or any previous employer. Armstrong was a candidate for total knee replacement for 11 years prior to his injury and during that time his medical providers noted he was experiencing ongoing, worsening pain in *both knees*.

*Id.* ¶ 24, 938 N.W.2d at 431.

In contrast, there is no record of Schoon requiring treatment in the years leading up to her injury. The Court in *Armstrong* also did not find Armstrong's expert testimony persuasive. "The testimony from both Dr. Adler and Dr. Bissell supports the conclusion that Armstrong's work-related injury was not a major contributing cause of his need for knee replacement surgery." *Id.* ¶ 25, 938 N.W.2d at 431. Schoon's experts all agree that the injury was a contributor to her condition and need for treatment.

Therefore, the Department is persuaded that in accordance with SDCL 62-1-1(7)(b) Schoon's work injury combined with her preexisting diseases and conditions to cause or prolong her impairment and need for treatment. The Department further concludes that the work injury is and remains a major contributing cause of her impairment and need for treatment.

***Employer/Insurer's Objection Regarding Dr. Dietrich's Expert Opinion:***

Employer/Insurer have objected to Dr. Dietrich's opinions based on lack of foundation. Schoon has argued Employer/Insurer's objection is untimely. For the sake of expedience, the Department will address the objection that was made during deposition. Employer/Insurer argues that unlike Dr. Nipper who conducted an examination of Claimant in person and reviewed the entirety of her medical records, Dr. Dietrich did not review all of Claimant's medical records or medical history. Dr. Dietrich, instead, reviewed a summary provided by Schoon's counsel.

"Expert testimony is entitled to no more weight than the facts upon which it is predicated." *Darling*, 2010 S.D. 4, ¶ 13, 777 N.W.2d 363, 367 (citations omitted). The Court has offered guidance regarding expert testimony:

Admissibility of expert testimony is governed by SDCL 19-15-2 (Rule 702). Under this rule, before a witness can testify as an expert, that witness must be "qualified." *Id.* Furthermore, under *Daubert*, the proponent offering expert testimony must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge as required under rule 702. *Guthrie*, 2001 SD 61, ¶ 34, 627 N.W.2d at 415-16; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d. 469 (1993). Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415. The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. SDCL 19-9-7 (Rule 104(a)). The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence. *Daubert*, 509 U.S. at 592 n. 10, 113 S. Ct. at 2796 n. 10, 125 L.Ed.2d 469 n. 10. Relevance embraces evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415 (quoting SDCL 19-12-1).

*Burley v. Kytect Innovative Sports Equip. Inc.*, 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402

Applying the guidance offered by the Court in *Burley*, the Department finds that Dr. Dietrich's expert testimony is relevant, reliable, and represents scientific, technical, or specialized knowledge. Dr. Dietrich reviewed Schoon's records from Dr. Lawlor, ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, the medical records summary, and also physically treated Schoon. The Department finds that Dr. Dietrich's testimony is based on the appropriate foundation. Employer/Insurer's objection is overruled.

***Benefits:***

For the above stated reasons, the Department has found that Schoon's injury is a major contributing cause of her current condition and need for treatment. The Department further finds that Schoon is entitled to benefits related to her work injury. These benefits are based on the 11% whole person impairment rating assessed by Dr. Dietrich and a weekly compensation rate of \$492.84. Therefore, these benefits include permanent partial disability benefits in the amount of \$16, 914 (312 weeks x 11% x \$492.84) and medical expenses in the amount of \$59, 282.73.

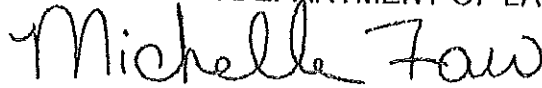
***Conclusion:***

Schoon has proven by a preponderance of the evidence that the injury she suffered on May 7, 2015 is and remains a major contributing cause of her current condition. She is therefore entitled to benefits as reflected above.

Counsel for Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer/Insurer shall have an additional twenty (20) days from the date of receipt of Claimant'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, Claimant shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 25<sup>th</sup> day of January, 2021.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION



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Michelle M. Faw  
Administrative Law Judge

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT  
WORKERS' COMPENSATION

<b>DESTINY SCHOON,</b>	)	HF No. 76, 2016/17
	)	
Claimant,	)	
	)	
vs.	)	<b>FINDINGS OF FACT AND</b>
	)	<b>CONCLUSIONS OF LAW</b>
<b>NEWS AMERICA MARKETING,</b>	)	
	)	
Employer, and	)	
	)	
<b>FARMINGTON CASUALTY COMPANY,</b>	)	
	)	
Insurer.	)	

**RECEIVED**  
MAR 15 2021

The above-entitled matter came on for hearing before the Honorable Michelle Faw, South Dakota Department of Labor and Regulation, Division of Labor & Management, on September 9, 2020. The parties having submitted documents constituting an agreed upon record, having submitted briefs, and the Department entering a Decision on January 25, 2021, the Department enters its Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. In November 2001, Destiny Schoon (Schoon or Claimant) was involved in a motor vehicle accident.
2. On September 9, 2002, Schoon treated with Dr. Shannon DeBoer at Complete Chiropractic. Schoon presented with upper back pain into the neck and shoulders. Dr. DeBoer's notes indicate that Schoon complained of pain in her shoulder blades and neck since childhood.
3. Dr. DeBoer further noted that Schoon had intermittent problems with neck, upper back, and upper cervical spine since the car accident.



4. Schoon continued to treat with Complete Chiropractic 86 times through April 2005.

5. On April 18, 2003, Schoon was treated by Dr. DeBoer who noted, Schoon presented with neck and shoulder pain. Dr. DeBoer diagnosed Schoon with aggravation of cervical complaint via motor vehicle accident.

6. In August 2003, Schoon was involved in another motor vehicle accident.

7. On February 10, 2004, Schoon treated with Break Through Health.

8. On her patient form, Schoon indicated that she was presenting with constant neck and shoulder pain resulting from her car accident in August of 2003.

9. On August 17, 2004, Schoon suffered a slip and fall at a concert in Sioux Falls, South Dakota.

10. In her personal injury suit against the City of Sioux Falls, Schoon alleged she suffered serious and permanent injuries.

11. On March 25, 2005, Schoon was treated at 2 Docs Chiropractic where she complained of neck pain as a result of her car accident and fall.

12. Dr. Michael Torsney of 2 Docs Chiropractic diagnosed Schoon with acute traumatic sprain/strain of the neck with associated pain and stiffness as well as cervical, thoracic, lumbar, sacral and pelvic segmental dysfunction with associated muscle spasm, stiffness, and pain.

13. He opined that the injuries were the combined result of the motor vehicle accident and the fall.

14. In 2007, Schoon moved to Rapid City.

15. She continued chiropractic care, but it was only offering temporary relief.

16. The chiropractor referred her to Black Hills Orthopedic & Spine Center (Black Hills Orthopedic).

17. Black Hills Orthopedic conducted imaging and ordered physical therapy.

18. Schoon took part in the physical therapy off and on for about a year.

19. Black Hills Orthopedic then sent her for an EMG.

20. On December 8, 2008, Schoon treated with Black Hills Orthopedic for complaints of pain in her right shoulder.

21. On December 22, 2008, Dr. DeBoer offered an expert medical opinion in Schoon's lawsuit. DeBoer opined that as a result of Schoon's fall, her fibromyalgia was exacerbated which would be consistent with a force transmitted from the distal extremity through the arm and shoulder and up to the neck. Dr. DeBoer also noted that Schoon had responded well to treatment and had progressed through the prior couple of months with the main complaint becoming less and less about her neck and upper back areas.

22. On February 5, 2009, the EMG was performed by Dr. Brett Lawlor of The Rehab Doctors. The EMG was normal.

23. Schoon was referred to Dr. Lawlor for treatment.

24. On April 9, 2009, Schoon began her treatment with Dr. Lawlor who prescribed medication and physical therapy with a new therapist.

25. He then performed bilateral C6-7, C7-T1 facet area injections to see if that would alleviate Schoon's symptoms.

26. Schoon found the injections very helpful.

27. Following the injections, School was able to work 60 hours per week and play recreational softball from 2010 through 2013 without symptoms other than the occasional flare up.

28. On and before May 7, 2015, Schoon worked for a law firm and a second job at News America Marketing which was at all times pertinent insured by Farmington Casualty Company (jointly Employer/Insurer) for workers' compensation purposes.

29. On May 7, 2015, Schoon was hanging advertising for News America Marketing when she felt severe pain in her shoulder.

30. That night she took over the counter medication and iced the area to try to alleviate the pain.

31. Employer/Insurer accepted the claim as compensable.

32. On May 8, 2015, Schoon went to Black Hills Health and Wellness for chiropractic adjustments to relieve her symptoms.

33. Schoon experienced temporary relief.

34. On May 12, 2015, Schoon returned to Black Hills Wellness for another adjustment, but the relief was not long lasting.

35. The chiropractor referred her to Black Hills Orthopedic.

36. On May 18, 2015, Schoon presented to Black Hills Orthopedic with complaints of right shoulder and neck pain.

37. PA Candace M. Winters prescribed physical therapy.

38. On June 2, 2015, Schoon began physical therapy at Promotion with Myron Sorestad.

39. After multiple physical therapy appointments, Black Hills Orthopedic referred Schoon to Dr. Lawlor

40. On August 20, 2015, Schoon visited Dr. Lawlor.

41. He prescribed physical therapy with Myron at Promotion and ordered a cervical MRI.

42. The MRI showed broad-based disc herniation at C5-6 which impinged on the right ventral hemicord.

43. On November 3, 2015, Joma Chapple, on behalf of Employer, indicated the claim was accepted for right shoulder only and asked Dr. Lawlor to send records supporting the need for more physical therapy for the shoulder as well as treatment for the neck.

44. On November 4, 2015, Dr. Lawlor responded to Ms. Chapple by fax.

45. He explained that it was not uncommon for people with similar injuries to Schoon's to report shoulder pain as the predominant complaint.

46. He opined that the findings were consistent with Schoon's stated onset of pain and consistent with her need for physical therapy to specifically address the neck as it related to her shoulder pain.

47. On December 30, 2015, following a referral from Dr. Lawlor, Schoon visited Dr. Jonathan L. Wilson at Black Hills Neurosurgery and Spine.

48. Dr. Wilson recommended a C5-6 cervical disc arthroplasty.

49. Employer/Insurer required an independent medical examination (IME) before the surgery would be authorized.

50. On January 21, 2016, Dr. Jeffrey Nipper performed an IME of Schoon.

51. On February 17, 2016, Dr. Nipper issued his report in which he opined that Schoon had suffered a shoulder strain and her symptoms should have gone away in six weeks.

52. He further opined that her other symptoms were the result of pre-existing pathoanatomy.

53. He opined she was at maximum medical improvement (MMI), entitled to no impairment, and needed no further treatment.

54. On February 24, 2016, Employer/Insurer denied the claim.

55. On May 5, 2016, Schoon underwent surgery with Dr. Wilson.

56. After surgery she continued to have conservative treatment including physical therapy, medications, and injections.

57. The surgery was successful in eliminating the paresthesia and numbness Schoon was having in her arms. However, she continued to have some pain.

58. On November 28, 2016, Schoon submitted this Petition for Hearing to the Department of Labor & Regulation (Department).

59. In August 2019, Schoon stopped working for Employer due to the caseload at her law firm job and the neck and shoulder pain which prevented her from working so many hours.

Additional facts may be developed in the issue analysis below.

### **CONCLUSIONS OF LAW**

1. The Department has jurisdiction over the parties and the subject matter of this litigation.

2. To the extent that any Findings of Fact herein are improperly designated as such, then they should be considered Conclusions of Law.

3. Likewise, to the extent that any Conclusion of Law contained herein are improperly designated as such, then they should be considered as Findings of Fact.

4. Schoon's work injury occurred while she was hanging advertising for Employer.

5. Her job that day involved hanging advertising and applying a clamp to a shelf.

6. She was attempting to remove a piece of equipment with a screwdriver, but the equipment was frozen and would not move.

7. She was trying to turn the screwdriver at roughly eye level when with the last crank, she felt severe pain in her shoulder.

8. She also claims she felt a tightness in her shoulder and pressure in her neck.

9. She treated that evening with over-the-counter medications.

10. The Department's first inquiry is whether Schoon's work injury on May 7, 2015, is a major contributing cause of her current condition.

11. Schoon, as the claimant, has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry Inc.*, 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367.

12. "The employee's burden of persuasion is by a preponderance of the evidence." *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353,358 (SD 1992).

13. Schoon has provided Dr. Lawlor as an expert witness.

14. Dr. Lawlor is a medical doctor board certified in physical medicine and rehabilitation, as well as pain medicine.

15. He was educated at the Mayo Graduate School of Medicine and practices at The Rehab Doctors in Rapid City, South Dakota.

16. Dr. Lawlor treated Schoon in 2009, prior to the work injury.

17. He opined that Schoon completely recovered from her complaints in 2009 and was having no difficulties prior to the work injury.

18. Dr. Lawlor further opined that the pain Schoon was experiencing in her shoulder was consistent with the results of the MRI which showed C5-6 herniation.

19. He further opined that physical therapy and medications were medically necessary and appropriate treatment and a necessary consequence of her work injury.

20. Schoon has also provided the expert opinion of Dr. Wilson who is board certified in neurosurgery, was trained at Wake Forest University, and used to practice at Black Hills Neurosurgery & Spine in Rapid City, South Dakota.

21. Dr. Wilson examined Schoon on December 30, 2015 and reviewed her MRI. Dr. Wilson opined that the work injury was directly related to C5-6 disc herniation and ongoing neurologic symptoms.

22. Schoon has also provided the expert opinion of Dr. Christopher Dietrich, a medical doctor, who is board certified in physical medicine and rehabilitation, pain medicine, and sports medicine.

23. He performed his residency at the Mayo Graduate School of Medicine and practices at The Rehab Doctors in Rapid City, South Dakota.

24. Dr. Dietrich has treated thousands of patients with herniated or bulging discs.

25. He estimates that 70-80% of his practice is dedicated to treating patients with neck or back pain.

26. Dr. Dietrich reviewed Schoon's records from Dr. Lawlor, ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, the medical records summary, and also physically examined and treated Schoon over a period of several years.

27. Dr. Dietrich opined that the work injury caused an exacerbation of Schoon's cervical disc and cervical disc herniation that led to the subsequent surgery and treatment.

28. Dr. Dietrich observed that between 2009 and 2015, there were no symptoms that interfered with Schoon's ability to work two jobs and there was nothing that led her to pursue additional care or treatment.

29. Dr. Dietrich opined that the straining, twisting, torqueing, looking up, movement of the head while trying to remove the ad equipment, somehow created pressure or load that resulted in disc herniation and led to symptoms severe enough for her to seek care following the work injury.

30. From this, he concluded that the work injury was what resulted in her need for care.

31. Dr. Dietrich further opined that he has seen similar injuries in other patients from similar injurious events.

32. Dr. Dietrich compared the MRIs from 2009 and 2015 and noted that there was a change specifically to the C5-6 level.

33. He opined that the 2015 MRI is objective evidence that Schoon's condition had changed.

34. He further testified that Schoon's treatment was reasonable and necessary, her condition was likely permanent, and she would need treatments to help with flares in pain.

35. Employer/Insurer has offered the expert opinion of Dr. Nipper. Dr. Nipper is a board-certified orthopedic surgeon who has been practicing for over 27 years.



36. The majority of his medical examination work is done on behalf of insurance companies, adjusters, or attorneys that represent insurance companies.

37. He conducted an in-person evaluation of Schoon on January 21, 2016.

38. Then he issued his IME report on February 17, 2016. Dr. Nipper opined that Schoon sustained a right shoulder strain in the workplace on May 7, 2015, and no other injury was sustained during that event.

39. He further opined that any ongoing symptoms referable to the neck, shoulder, or radiating symptoms into either of the upper extremities was due to pre-existing pathoanatomy.

40. He concluded that the evolution of a C-6 disc herniation was ongoing and predated the work injury.

41. Dr. Nipper opined that the activities Schoon was involved in during the work injury were not capable of causing a disc herniation in the cervical spine, and the other MRI findings were the product of a longstanding chronic degenerative process unrelated to the work injury.

42. He further opined that Schoon had suffered a shoulder strain that resolved by approximately six weeks following the work injury, and over that time, there was a resolution of symptoms and a return to baseline.

43. He concluded that the work injury is not a major contributing cause of Schoon's current diagnosis, and no additional treatment would be reasonable or necessary related to the work injury.

44. At the time of the IME, Dr. Nipper did not have Schoon's chiropractic records from the days following the injury.

45. After receiving more of Schoon's records, Dr. Nipper issued an Independent Records Review on August 12, 2019.

46. In this report, he opined that his diagnosis and impressions were unchanged from those provided in the IME report.

47. He also noted that Schoon had a significant history of neck, spine, right shoulder, right extremity, and left extremity problems and symptoms prior to the work injury.

48. He further opined that Schoon's current condition was the result of pathoanatomy that was present in 2004, 2005, and 2009 that had progressed.

49. Dr. Nipper did not find it plausible that Schoon did not have symptoms between 2009 and 2015 due to the level of pathoanatomy.

50. At the time of the IME, Dr. Nipper did not have Schoon's chiropractic records from the days following the injury.

51. After receiving more of Schoon's records, Dr. Nipper issued an Independent Records Review on August 12, 2019.

52. In this report, he opined that his diagnosis and impressions were unchanged from those provided in the IME report.

53. He also noted that Schoon had a significant history of neck, spine, right shoulder, right extremity, and left extremity problems and symptoms prior to the work injury.

54. He further opined that Schoon's current condition was the result of pathoanatomy that was present in 2004, 2005, and 2009 that had progressed.

55. Dr. Nipper did not find it plausible that Schoon did not have symptoms between 2009 and 2015 due to the level of pathoanatomy.

56. Schoon argues that Dr. Nipper did not have all the records when he formed his initial opinion and that he misinterpreted the records he reviewed.

57. He opined that, according to the records, the therapy was directed towards Schoon's right shoulder.

58. However, medical records show that Schoon complained of neck pain as well.

59. Dr. Nipper also testified that it would be significant if Schoon had complained about neck pain in the days following her injury, because it would tell him she had another problem.

60. Schoon presented to Black Hills Health and Wellness with neck issues following the injury.

61. The chiropractor adjusted Schoon's neck and back then diagnosed her as having, among other things, a neck sprain.

62. Four days later, Schoon returned to the chiropractor complaining of pain and stiffness in her upper back, neck, and right shoulder.

63. Dr. Nipper testified that he could not be certain exactly where the pain was coming from, and it could be the shoulder or neck.

64. Dr. Dietrich opined that it is not unusual for a neck injury to cause referred pain into the shoulder.

65. Dr. Nipper also opined that he has seen and treated patients who had neck injuries that resulted in referred pain into the shoulders.

66. Schoon argues that she reported pain in the shoulder on the date of the injury, and then shoulder and neck pain the next day.

67. Both Dr. Dietrich and Dr. Nipper agreed that Schoon's previous injuries could make her more susceptible to injury.

68. Dr. Nipper also testified that Schoon's injury resolved by six weeks.

69. However, he acknowledged that Schoon was still reporting pain more than six weeks after the injury.

70. He further agreed that there are not any records indicating Schoon had any shoulder pain, neck pain, or radicular pain in the six years leading up to the injury, and that she did not have any pain complaints that were severe enough to require her to get medical treatment or that affected her ability to work.

71. Employer/Insurer argue that Schoon may not have sought care due to not having health insurance.

72. Employer/Insurer assert that Schoon's testimony regarding her neck and shoulder pain has been inconsistent.

73. Schoon responds that the form of the questions during the hearing and the deposition were different regarding what she felt after the injury.

74. During her first deposition, Schoon was asked where she felt pain.

75. She said she felt pain in her right shoulder, and she did not mention pain or pressure in her neck.

76. At hearing, Schoon was asked where she felt pain and where the pain referred.

77. She said she felt pain in her shoulder and pressure, not necessarily pain, in her neck.

78. Employer/Insurer argue the change in testimony contradicts Schoon's complaint following her injury, and she did not complain of pain or pressure in her neck on May 8, 2015 when she visited Black Hills Health and Wellness Center.

79. She also did not complain of neck pain or pressure on May 18, 2015 at her visit to Black Hills Orthopedic.

80. Schoon argues that the records from Black Hills Health and Wellness center on May 8 and May 12, 2015 reflect that she presented with neck pain.

81. Employer/Insurer further assert that Schoon did not communicate any pain in her neck to Dr. Nipper during her IME.

82. However, during his deposition testimony, Dr. Nipper acknowledged that the medical records show she was complaining of upper back and neck pain.

83. The Department must look to the medical expert testimony to decide if Schoon's May 7, 2015 work injury remains a major contributing cause as defined by SDCL 62-1-1 (7) (b) which provides,

(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

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

84. "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).

85. Additionally, "[t]here are no 'magic words' needed to express an expert's degree of medical certainty, and the test is only whether the expert's words demonstrate

that he or she is expressing an expert medical opinion." *Orth v. Stoebner & Permann Const., Inc.*, 2006 SD 99, ¶ 44, 724 N.W.2d 586, 596 (Citation omitted).

86. The Department finds that both Dr. Dietrich and Dr. Nipper's testimony rests on the necessary foundation.

87. Dr. Dietrich's opinion is based on his review of medical records from ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, and the summary provided by Schoon's counsel.

88. He has also treated Schoon for several years.

89. Dr. Nipper conducted a records review and an IME of Schoon.

90. Both doctors were aware of Schoon's previous injuries and treatment history.

91. In addition to Dr. Dietrich's opinion that the work injury caused an exacerbation of Schoon's cervical disc and cervical disc herniation, Dr. Wilson and Dr. Lawlor agree that the work injury was the cause of injury and need for treatment.

92. Dr. Nipper concluded that Schoon's work injury was merely a right shoulder strain which would have resolved after six weeks, and, therefore, is not a major contributing cause of her current condition.

93. The South Dakota Supreme Court (Court) has held that a non-treating physician's opinion can be more persuasive than the opinion of a treating physician on causation issues. *Helms v. Lynn's Inc.*, 1996 S.D. 8, 542 N.W. 2d 764.

94. However, in Schoon's case, the Department finds the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than that of Dr. Nipper.

95. The records show that while Schoon does have a history of injury, degenerative disc disease, and pain in her neck and shoulder, she did not seek treatment for these issues from 2009 until the May 7, 2015 work injury.

96. Dr. Nipper opined that it was not plausible for her to have no symptoms during that time period, and she must have merely refrained from seeking treatment.

97. Employer/Insurer assert that Schoon did not seek treatment, because she did not have health care.

98. However, the Department must look to the evidence before it, and there is no medical evidence or testimony that indicates that Schoon suffered symptoms between 2009 and 2015.

99. The Department does not have evidence to support the conclusion that this was merely due to Schoon's lack of health insurance.

100. The Court has recently clarified the causation standard under SDCL 62-1-1(7)(b) in *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425.

101. In *Armstrong*, Armstrong sustained multiple injuries to his left knee while working for Longview Farms. The injuries were initially found to be compensable. During the treatment for these injuries, osteoarthritis and other chronic issues were discovered. Armstrong was offered the choice of conservative treatment or a knee replacement. He opted for replacement. The insurer concluded that the work injury was not a major contributing cause of his left knee condition and it was, instead, the result of chronic, preexisting conditions. The Department held that Armstrong had not proven that his injury was the major contributing cause of his need for knee replacement surgery.

102. On appeal, the Court stated, "[t]he fact that the March 31 injury may have been the unfortunate tipping point of Armstrong's knee symptoms does not mean that it

displaced the degenerative effects of his preexisting condition." *Id.* ¶ 24, 938 N.W.2d at 431. "[W]e have previously rejected a similar argument that relegated causation standard of SDCL 62-1-(7)(b) to an elementary cause-in-fact determination." *Id.* ¶ 26, 938 N.W.2d at 431 (citations omitted).

103. The Department finds Schoon's case distinguishable from that of *Armstrong*.

104. While they both have preexisting conditions, the Court in *Armstrong* made note of the record indicating that Armstrong's condition was worsening in the time up to the work injury.

Here, the record contains uncontroverted evidence of Armstrong's preexisting degenerative osteoarthritis as it grew worse in the years leading up to the March 31 injury. Further, there is no evidence to support the view that Armstrong's osteoarthritis was related to his employment, either at Longview Farm or any previous employer. Armstrong was a candidate for total knee replacement for 11 years prior to his injury and during that time his medical providers noted he was experiencing ongoing, worsening pain in *both knees*.

*Id.* ¶ 24, 938 N.W.2d at 431.

105. In contrast, there is no record of Schoon requiring treatment in the years leading up to her injury.

106. The Court in *Armstrong* also did not find Armstrong's expert testimony persuasive. 'The testimony from both Dr. Adler and Dr. Bissell supports the conclusion that Armstrong's work-related injury was not a major contributing cause of his need for knee replacement surgery." *Id.* ¶ 25, 938 N.W.2d at 431.

107. Schoon's experts all agree that the injury was a contributor to her condition and need for treatment.



108. Therefore, the Department is persuaded that in accordance with SDCL 62-1-1 (7)(b) Schoon's work injury combined with her preexisting diseases and conditions to cause or prolong her impairment and need for treatment.

109. The Department further concludes that the work injury is and remains a major contributing cause of her impairment and need for treatment.

110. Employer/Insurer have objected to Dr. Dietrich's opinions based on lack of foundation.

111. Schoon has argued Employer/Insurer's objection is untimely.

112. For the sake of expedience, the Department will address the objection that was made during deposition.

113. Employer/Insurer argues that unlike Dr. Nipper who conducted an examination of Claimant in person and reviewed the entirety of her medical records, Dr. Dietrich did not review all of Claimant's medical records or medical history.

114. Dr. Dietrich, instead, reviewed a summary provided by Schoon's counsel.

115. "Expert testimony is entitled to no more weight than the facts upon which it is predicated." *Darling*, 2010 S.D. 4, ¶13, 777 N.W.2d 363,367 (citations omitted).

116. The Court has offered guidance regarding expert testimony:

Admissibility of expert testimony is governed by SDCL 19-15-2 (Rule 702). Under this rule, before a witness can testify as an expert, that witness must be "qualified." *Id.* Furthermore, under *Daubert*, the proponent offering expert testimony must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge as required under rule 702. *Guthrie*, 2001 SD 61, ¶34, 627 N.W.2d at 415-16; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 2799, 125 L.Ed.2d. 469 (1993). Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. *Guthrie*, 2001 SD 61, ¶32, 627 N.W.2d at 415. The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. SDCL 19-9-7 (Rule 104(a)). The proponent of the expert

testimony must prove its admissibility by a preponderance of the evidence. *Daubert*, 509 U.S. at 592 n. 10, 113 S. Ct. at 2796 n. 10, 125 L.Ed.2d 469 n. 10. Relevance embraces evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415 (quoting SDCL 19-12-1).

*Burley v. Kytac Innovative Sports Equip. Inc.*, 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402.

117. Applying the guidance offered by the Court in *Burley*, the Department finds that Dr. Dietrich's expert testimony is relevant, reliable, and represents scientific, technical, or specialized knowledge.

118. Dr. Dietrich reviewed Schoon's records from Dr. Lawlor, ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, the medical records summary, and also physically treated Schoon.

119. The Department finds that Dr. Dietrich's testimony is based on the appropriate foundation.

120. Employer/Insurer's objection is overruled.

121. For the above stated reasons, the Department has found that Schoon's injury is a major contributing cause of her current condition and need for treatment.

122. The Department further finds that Schoon is entitled to benefits related to her work injury.

123. These benefits are based on the 11% whole person impairment rating assessed by Dr. Dietrich and a weekly compensation rate of \$492.84.

124. Therefore, these benefits include permanent partial disability benefits in the amount of \$16, 914 (312 weeks x 11 % x \$492.84) and medical expenses in the amount of \$59, 282.73.

125. Schoon has proven by a preponderance of the evidence that the injury she suffered on May 7, 2015 is and remains a major contributing cause of her current condition.

126. She is therefore entitled to benefits as reflected *above*.

127. The South Dakota Supreme Court has authorized the Department of Labor to order payments of medical bills through Claimant's counsel. The Court has held "payment through a claimant's attorney is commonly done and is contemplated by statute." *Lagge v. Corsica Coop.*, 677 N.W.2d 569, 578 (SD 2004). *See also Wise v. Brooks Construction*, 721 N.W.2d 466 (SD 2006).

Dated this 10<sup>th</sup> day of March, 2021.

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

By: Michelle Faw  
Michelle M. Faw  
Administrative Law Judge





## CIRCUIT COURT OF SOUTH DAKOTA SIXTH JUDICIAL CIRCUIT

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RE: 32CIV21-48 – News America Marketing, Farmington Casualty Company v.  
Destiny Schoon

### MEMORANDUM OPINION

News America Marketing (Employer) and Farmington Casualty Company (Insurer) (collectively referred to as Employer) appeal from the South Dakota Department of Labor's (Department) decision in favor of Claimant Destiny Schoon (Schoon). The Department concluded that Schoon proved by a preponderance of the evidence that her May 7, 2015, work injury was and remains a major contributing cause of her condition, need for treatment, and whole person impairment. The Court heard oral argument on November 15, 2021. After reviewing the administrative record and considering the arguments raised by the parties, the Court now issues this Memorandum Opinion.

### FACTUAL BACKGROUND

Schoon is a 39-year-old female residing in Rapid City, South Dakota. She grew up in Spearfish, South Dakota, and graduated from high school in January 2000. After high school she enrolled at South Dakota State University in Brookings, South Dakota. Schoon soon transferred to the University of South Dakota in Vermillion, South Dakota, to pursue a degree in criminal justice. Schoon transferred once more to Kaplan University in the Quad Cities (Davenport, IA; Bettendorf, IA; Moline, IL; East Moline, IL), where she received her Bachelor's degree in

Paralegal Studies in 2007. Schoon subsequently moved back to western South Dakota, and has since resided in Rapid City.

#### **A. Preexisting Condition**

In November 2001, Schoon was rear-ended in a motor vehicle accident. Schoon was treated at Runyan Chiropractic in Spearfish, South Dakota, from July to August 2002. Schoon's records indicate that she primarily complained of fibromyalgia and pain in the back of her neck, shoulder blades, and mid-back. On September 9, 2002, Dr. DeBoer of Complete Chiropractic in Sioux Falls, South Dakota, treated Schoon for upper back pain into the neck and shoulders. According to Dr. DeBoer's notes, Schoon stated she had pain in her shoulder blades and neck since childhood. Schoon had treatments with Complete Chiropractic 86 times from September 2002 to April 2005. During almost all these visits, upper back, neck, and/or shoulder pain were Schoon's primary concerns or chief complaints.

In August 2003, Schoon was again rear-ended in a motor vehicle accident. Schoon was treated by Breakthrough Health in Sioux Falls from February 2004 to August 2004. During this time, her chief complaints were for neck, back, hip, leg, and shoulder pain. She was diagnosed with whiplash from one of her prior car accidents, but it appears that as of May 4, 2004, she had experienced some progress in her conditions.

In 2004, Schoon fell at a concert in Sioux Falls. In 2008, in a lawsuit by Schoon against the City of Sioux Falls, Dr. DeBoer provided expert witness testimony via documental evidence that the fall had exacerbated Schoon's fibromyalgia. Dr. DeBoer testified that Schoon's main complaints after the fall, of neck and upper back pain, were improving.

Schoon sought treatment for pain to the neck, back, and shoulders from different healthcare providers from 2002 to 2007. In 2007, Schoon relocated to Rapid City and was referred to the Black Hills Orthopedic & Spine Center. After Black Hills Orthopedic & Spine Center conducted imaging, they ordered Schoon to participate in further physical therapy.

Schoon began treatment in March 2008 with Black Hills Health & Wellness Center. Schoon's initial main complaint was pain in the lower back, but as she continued treatment she began to have chief complaints of achiness in her neck, upper back, and shoulder.

On December 8, 2008, Schoon sought treatment with Black Hills Orthopedic & Spine Center for complaints of pain in her right shoulder. On January 9, 2009, an image was taken showing Schoon had decreased disc space at C6-7 and C7-T1. A subsequent magnetic resonance imaging (MRI) showed that there were some minimal disc displacements at C3-4, C4-5, and C5-6, but that there was no compressive arthropathy.<sup>1</sup> Schoon was subsequently treated for a period of time with medications and physical therapy. She was discharged as a patient of Black Hills Orthopedic & Spine Center physical therapy on October 14, 2009, after it was determined by Physical Therapist April McNaboe, that she had successfully "achieved all physical therapy and functional goals." Schoon was seen by Physician Assistant Michael Aanderud of the Black Hills Orthopedic & Spine Center on February 11, 2010, for complaints of pain in her wrists and hands and numbness and tingling in her fingers.

In early 2009, Schoon began seeing Dr. Lawlor at the Rehab Doctors for right arm pain and numbness. Schoon also had complaints of arm and neck pain. Dr. Lawlor conducted trigger point injections to help treat her symptoms. Schoon did not seek treatment specifically for issues related to her neck, back, and shoulder pain in late 2009 to early 2010. During this time and after,

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<sup>1</sup> "Arthropathy" is defined by Merriam-Webster as "a disease of a joint."

Schoon did periodically refill her medications related to her treatment for her neck, shoulder, and back pain.

Schoon sought medical treatment from late 2009 to early 2010 for other medical conditions including concerns about her cervix, leg pain, fibromyalgia, and abdominal pain. In 2014 she was also treated at Black Hills Orthopedic & Spine Center for a right knee injury and pain.

### **B. May 7, 2015, Work-Related Injury**

Since moving to Rapid City, Schoon has worked as a paralegal for a number of different law firms. In the summer of 2013, Schoon started working a second job with Employer. Schoon worked as an advertising representative for Employer, responsible for hanging advertising signs on shelves and ceilings of different retail stores, as well as for data entry. From 2013 to 2019, Schoon remained employed with Employer while she transitioned between firms as a paralegal. At the time of the work-related injury, Schoon continued to work as paralegal and for Employer.

On May 7, 2015, Schoon was hanging signage for Employer as part of her work-related duties. After hanging a piece of signage on one of the shelves and sending a photo to Employer, Schoon began to remove the universal clamp used to hang the signage but the clamp was “frozen” on the shelf and “would not move.” Schoon had to “[keep] cranking on it.” On the “last crank, [she] had severe pain.” Schoon testified at the hearing before the Department that the pain was primarily in the front of her shoulder and that she “instantly got really tight on the top of her shoulder [...] [and] felt pressure in [her] neck.”

On the night of May 7, 2015, Schoon treated her pain at home with over the counter pain medication and ice. On May 8, 2015, Schoon sought treatment at the Black Hills Health and Wellness Center in Rapid City. Medical records state she sought treatment for a neck sprain, muscle spasm, joint sprain, and additional treatment. On May 12, 2015, Schoon returned for treatment at the Black Hills Health and Wellness Center, and stated that she initially felt better after her last appointment, but she had “stiffness in her upper back and neck and her right shoulder again this morning.” She was referred to Black Hills Orthopedic & Spine Center, and on May 18, 2015, was prescribed physical therapy. Schoon began physical therapy at Promotion in Rapid City, on June 2, 2015. After multiple physical therapy sessions, Schoon was referred to Dr. Lawlor of The Rehab Doctors in Rapid City, for treatment of her neck and interscapular, and for shoulder pain.

On August 20, 2015, Schoon was treated by Dr. Lawlor. Dr. Lawlor ordered additional physical therapy. On October 14, 2015, Dr. Lawlor ordered a cervical MRI. Schoon’s MRI was completed on October 30, 2015, and showed a herniation of the C5-6 disc level.

The MRI results were sent to Employer for authorization of further physical therapy. Dr. Lawlor’s office received correspondence from Employer on November 3, 2015, requesting additional “medical records supporting the need for further PT to the right shoulder. Attached MRI results show cervical issues. However, claim is accepted for right shoulder only.” Dr. Lawlor provided a letter to Employer, stating that additional physical therapy was necessary to address Schoon’s shoulder pain, and that the results of the MRI (showing a C5-6 disc herniation) could be related to her pain. Dr. Lawlor stated that it is “not uncommon for people with a C5-6 disc herniation to report shoulder pain as a predominate pain complaint.” Dr. Lawlor opined that the findings of the MRI warranted ongoing physical therapy “to specifically address the neck as it relates to her shoulder pain.”

Schoon continued physical therapy at Promotion. On December 2, 2015, Dr. Lawlor referred Schoon for a surgical consult for a disc replacement. Dr. Lawlor opined that the surgical referral was “medically necessary, appropriate, and [sic] causely related to her work injury.” Dr. Jonathan Wilson of Black Hills Neurosurgery & Spine conducted a surgical consult with Schoon. After the surgical consultation, on December 30, 2015, Dr. Wilson recommended Schoon have an artificial disc replacement (central disc arthroplasty) of the C5-6 disc level due to the herniation of that disc. Dr. Wilson was concerned about Schoon’s new symptoms, decreased reflexes in the right brachioradialis and bicep and ongoing paresthesias of her hands. Dr. Lawlor opined on December 30, 2015, that the recommended surgery was “medically necessary and appropriate treatment [...] as a consequence of her work injury.”

A request for authorization of the central disc arthroplasty was sent to Employer. Employer denied the surgery pending an independent medical evaluation (IME). Dr. Jeffrey Nipper of ExamWorks conducted an IME of Schoon on January 21, 2016. Dr. Nipper reviewed Schoon’s medical records from after the May 7, 2015, injury and conducted a physical examination of Schoon. Dr. Nipper concluded that Schoon had suffered a right shoulder strain and that no additional treatment was reasonably related to the May 7, 2015, injury. Dr. Nipper stated that the cervical disc arthroplasty may be appropriate for Schoon, but would be unrelated to her injuries from May 7, 2015. Dr. Nipper stated that approximately six weeks after the May 7, 2015, injury Schoon had reached maximum medical improvement. Employer denied further worker’s compensation benefits related to the May 7, 2015, injury.<sup>2</sup>

On May 5, 2016, Dr. Wilson preformed the cervical disc arthroplasty on Schoon. Since that time, Schoon has continued to periodically receive physical therapy, medications, injections, and seek additional treatment related to her neck and shoulder pain. On June 16, 2019, Dr. Dietrich determined that Schoon has an 11% whole person impairment according to the *AMA Guides to Evaluation of Permanent Impairment*.

On November 28, 2016, Schoon submitted a Petition for Hearing to the Department of Labor & Regulation. A hearing was held on September 23, 2020, before Administrative Law Judge Michelle Faw. The Department received live testimony from Schoon, copies of Schoon’s medical records from 2000 to 2019, Dr. Dietrich and Dr. Nipper’s depositions, and Dr. Wilson and Dr. Lawlor’s affidavits. At the time of Dr. Dietrich’s deposition, Employer objected to his testimony based on lack of foundation, arguing that he did not have the proper foundation to offer his expert medical opinion, as he had not reviewed all of Schoon’s medical records.

Employer argued that Schoon failed to meet her burden of proving by a preponderance of the evidence that the May 7, 2015, injury was a major contributing cause of her continued pain and need for neck surgery, and therefore was not compensable. Employer further argued that Schoon’s claims for indemnity benefits were unsupported. Employer reasoned that Schoon’s preexisting conditions caused her prolonged impairment, disc herniation, and need for an artificial disc replacement. Employer also claimed that Schoon’s testimony at the hearing, that she experienced pressure in her neck immediately after her injury, was in direct contradiction of her deposition testimony, where she did not mention that she was experiencing neck pain.

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<sup>2</sup> Dr. Nipper released an additional report on August 12, 2019, after review of additional medical records, specifically Schoon’s medical records prior to the May 7, 2015 injury. Dr. Nipper stated that his opinion remained unchanged, and that he was even more confident that Schoon’s condition and need for disc replacement surgery was due to her preexisting condition, and that the May 7, 2015, injury was not a major contributing cause of her condition or need for treatment.



The Department concluded that Schoon had proven by a preponderance of the evidence that the May 7, 2015, injury was and remained a major contributing cause of her disc herniation and need for surgery. The Department concluded that the May 7, 2015, work injury combined with her preexisting diseases and conditions to cause or prolong her impairment and need for treatment. The Department concluded that Schoon was entitled to benefits related to her work injury based on an 11% whole person impairment rating, for \$492.84 per week or total permanent partial disability benefits of \$16,914, plus prejudgment interest, either possibility totaling \$19,333.30. The Department also awarded medical expenses to Schoon in the amount of \$59,282.73 plus prejudgment interest, totaling \$82,463.70.

Employer appealed the Department's decision, raising several issues. Employer argued that the Department erred by: 1) finding that Schoon's work injury remains a major contributing cause of her impairment, and that Schoon's underlying medical conditions are the sole remaining major contributing cause, 2) finding Schoon suffered no symptoms of her preexisting condition from 2009 to 2015, 3) not making a specific credibility finding of Schoon, due to her purported change in testimony, 4) finding that the testimony of Schoon's experts, Dr. Lawlor, Dr. Dietrich, and Dr. Wilson, were more persuasive than Employer's expert witness, Dr. Nipper, 5) failing to strike the testimony of Dr. Dietrich for lack of foundation.

#### **QUESTION PRESENTED**

- I. WHETHER THE DEPARTMENT ERRED IN FINDING THAT SCHOON'S WORK INJURY WAS AND REMAINS A MAJOR CONTRIBUTING CAUSE OF HER IMPAIRMENT AND NEED FOR TREATMENT.**
- II. WHETHER THE DEPARTMENT ERRED BY FINDING THAT SCHOON SUFFERED NO SYMPTOMS FROM 2009-2015.**
- III. WHETHER THE DEPARTMENT ERRED BY FINDING THE OPINIONS OF DR. DIETRICH, DR. WILSON, AND DR. LAWLOR MORE PERSUASIVE THAN THAT OF DR. NIPPER.**
- IV. WHETHER THE DEPARTMENT ERRED BY NOT STRIKING DR. DIETRICH'S OPINIONS BASED ON LACK OF FOUNDATION.**

#### **LEGAL STANDARD**

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

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings.

The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

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

## ANALYSIS

### *I. THE DEPARTMENT DID NOT ERR IN FINDING THAT SCHOON’S WORK INJURY WAS AND REMAINS A MAJOR CONTRIBUTING CAUSE OF HER IMPAIRMENT AND NEED FOR TREATMENT.*

Schoon must prove by a preponderance of the evidence that she is entitled to worker’s compensation benefits. *Darling v. West River Masonry, Inc.*, 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367. SDCL 62–1–1(7) sets forth the standard a claimant must meet to prevail in a worker’s compensation case. To be awarded benefits, an employee must first establish that she has suffered an “injury arising out of and in the course of the employment[.]” *Id.* *See also Horn v. Dakota Pork*, 2006 SD 5, ¶ 14, 709 N.W.2d 38, 41 (“Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained”). “This causation requirement does not mean that the employee must prove that

[his] employment was the proximate, direct, or sole cause of [his] injury; rather the employee must show that [his] employment was a ‘contributing factor’ to [his] injury.” *Orth v. Stoeber & Permann Const., Inc.*, 2006 S.D. 99, ¶ 32, 724 N.W.2d 586, 592-93 (quoting *Brown*, 2002 SD 92, ¶ 19, 650 N.W.2d at 270).

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

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

It is undisputed that Schoon’s injury was work-related and combined with her pre-existing condition. Employer argues that Schoon has failed to prove by a preponderance of the evidence that her work-related injury was and remains a major contributing cause for her need for surgery, continued treatment, and 11% whole person impairment. Employer argues that Schoon’s preexisting pathoanatomy and a natural progression of her disc degeneration disorder, and not the May 7, 2015, injury, are the major contributing causes of her continued impairment and need for treatment.

Schoon was not required to prove that the May 7, 2015, injury was at least 50% attributable to her condition and need for treatment in order to show that the injury was a major contributing cause of her condition. *Hughes v. Dakota Mill and Grain Inc.*, 2021 S.D. 31, ¶ 20, 959 N.W.2d 903, 909. Nor was Schoon required to prove that the May 7, 2015 injury was *the* major contributing cause of her condition and need for treatment, but instead she was required to prove that the May 7, 2015 injury was and remains *a* major contributing cause of her disability, impairment or need for treatment. *Orth*, 2006 S.D. 99, ¶ 41-42, 724 N.W.2d at 595-96 (citation omitted). Causation must be established by a reasonable degree of medical probability. *Id.* Because all of the expert witnesses’ testimony was presented by documentary evidence, the Court reviews that evidence *de novo*. *Id.* Schoon’s testimony, offered as live testimony, is reviewed under a clearly erroneous standard. *Gerlach v. State*, 2008 S.D. 25, ¶ 6, 747 N.W.2d 662, 665. (further citations omitted). Having reviewed the evidence accordingly, the Court finds that the Department did not err in finding that Schoon proved by a preponderance of evidence that the May 7, 2015, injury was and remains a major contributing cause of her impairment and need for treatment.

Schoon offered expert testimony from Dr. Dietrich, Dr. Lawlor, and Dr. Wilson via medical records and depositions. All three had treated Schoon at some point in time. Schoon also testified at the hearing before the Department. Employer offered the testimony of Dr. Nipper, who conducted an independent medical examination of Schoon.

#### **A. Documentary Evidence**

This Court considers whether Schoon proved by a preponderance of the evidence that her May 7, 2015, injury was and remains a major contributing cause of her need for surgery, continued treatment, and 11% whole person impairment. Dr. Dietrich testified by deposition that he believed with a reasonable degree of medical probability that Schoon’s work-related injury was a major contributing cause of her condition. Dr. Dietrich reviewed some of Schoon’s medical records from

before the injury and physically examined and treated Schoon over a period of several years. Dr. Dietrich determined that the activities on May 7, 2015, exacerbated Schoon's cervical disc, resulting in the cervical disc herniation and need for subsequent surgery and treatment. Dr. Dietrich further testified that the "straining, the twisting, the torquing, the looking up, movement of the head, somehow created pressure or a load at [the C5-C6] level" and resulted in the disc herniation.

Dr. Dietrich provided that when a disc protrudes or herniates, it can come into contact with a nerve root and cause pain into the shoulder, when in actuality the underlying injury may be to the neck. Dr. Dietrich testified that a vast majority of Schoon's medical records after the May 7, 2015, injury included chief complaints of, or recommendations for evaluation and treatment for, a neck strain or neck pain. Dr. Dietrich testified that Schoon's medical records from May 18, 2015, eleven days after her injury, indicate that Schoon should be evaluated and treated for a right shoulder and neck strain.

Dr. Nipper also testified by deposition. Prior to his testimony, he conducted an IME at the request of Employer. As part of the IME Dr. Nipper reviewed Schoon's medical records and examined Schoon one time. Dr. Nipper determined that Schoon's work activities were not a major contributing cause of her neck pain, shoulder pain, and herniated disc. Dr. Nipper determined that Schoon suffered a shoulder strain due to her work activities, and the ongoing and continued complaints were the result of her preexisting pathoanatomy and the natural progression of her disc condition, documented in 2009. Dr. Nipper opined that generally a shoulder strain should heal in approximately six (6) weeks. Dr. Nipper testified that at some point after Schoon's injury, the symptoms she was experiencing were no longer attributable to her work activities (and injury) but to her underlying preexisting conditions. Dr. Nipper determined that Schoon's preexisting conditions superseded her work injury as a major contributing cause of her current symptoms and condition. Dr. Nipper determined the disc herniation was a result of her underlying disease, and not the work injury. Dr. Nipper concluded that although Schoon did not seek treatment for her disease from 2009-2015, it was likely causing her pain and difficulty prior to May 7, 2015.

Dr. Lawlor provided testimony via affidavit and attached medical records. Dr. Lawlor treated Schoon in the years before her injury and after her injury. Before her injury, Dr. Lawlor last treated Schoon in 2009. Dr. Lawlor determined that Schoon had completely recovered from her pre-work injury symptoms and was having no difficulties until the May 7, 2015, injury. Dr. Lawlor determined that since her May 7, 2015, injury Schoon had fairly steady pain in the shoulder, neck, and interscapular on the right. In a November 4, 2015, letter Dr. Lawlor stated that Schoon's MRI showed a disc herniation of the C5-6 area which can cause referred pain in the shoulder area. Dr. Lawlor provided that a herniation of this disc can result in pain that is consistent with Schoon's complaint and that the MRI was consistent with Schoon's stated onset of pain. In treating Schoon, Dr. Lawlor recommended ongoing physical therapy to address her neck as it related to her shoulder pain. On December 2, 2015, Dr. Lawlor referred Schoon for a surgical consult. Dr. Lawlor determined the referral was medically necessary, appropriate, and related by cause to her work injury.

Dr. Wilson also provided testimony via an affidavit and attached medical records. Dr. Wilson performed Schoon's artificial disc replacement surgery on May 6, 2016. Dr. Wilson first saw Schoon on December 29, 2015. At that time, Schoon described her symptoms as "neck pain discomfort." Dr. Wilson determined that Schoon's symptoms were caused by a large disc

herniation at C5-6, resulting in right foraminal<sup>3</sup> stenosis<sup>4</sup> and severe central stenosis at that level. Dr. Wilson determined that Schoon's symptoms were caused secondary by a subtle progressive cervical myelopathy.<sup>5</sup> Dr. Wilson found that Schoon's symptoms were worsening as a result of her conditions. Due to Schoon's young age, Dr. Wilson recommended an artificial disc replacement surgery, because that treatment would decrease her risk of adjacent level disease and provide more durable treatment of her additional symptoms.

Schoon's medical records show that the pain she was suffering in her upper back, neck, and shoulders had improved by late 2009 to early 2010. On October 10, 2009, she was discharged from physical therapy at Black Hills Orthopedic & Spine Center. On February 22, 2010, she was seen by Black Hills Neurology, for complaints of upper extremity discomfort and concerns about carpal tunnel; she provided no indication she was suffering from neck, back, or shoulder pain. From 2010-2015, Schoon did seek medical treatment for other concerns. Schoon sought treatment for wrist pain, abdominal pain, uterine concerns, performance of a colonoscopy, knee swelling and pain, and other medical services not related to her neck, shoulder, and back.

Schoon first sought treatment for upper back, neck, and shoulder pain in September 2002. Schoon had problems with this pain since she suffered a car accident in November 2001. Schoon's medical records from 2002 to 2009 primarily concern neck, shoulder, and back pain. Schoon was treated by multiple medical institutions, seeking extensive treatment from 2008 to early 2010. In late 2009 and early 2010 Schoon stopped seeking treatment for pain in her neck, back, and shoulders. Documental evidence, as well as Schoon's testimony, proves by a preponderance of the evidence that the trigger point injections and other treatment Schoon received during this time were effective in minimizing Schoon's neck and shoulder pain. The flare-ups Schoon had from 2010-2015 did not affect her daily life and did not require treatment. It was not until Schoon's May 7, 2015, injury she again experienced debilitating neck and shoulder pain requiring treatment. The May 7, 2015, injury was a major contributing cause of Schoon's symptoms, extended need for treatment, need for surgery, and 11% whole person impairment.

## **B. Live Testimony**

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

Employer argued that Schoon's testimony regarding her neck and shoulder pain was inconsistent. The Department did not make a specific factual finding regarding Schoon's credibility. “Witness credibility is a question of fact.” *Baier v. Dean Kurtz Const., Inc.*, 2009 S.D. 7, ¶ 12, n. 1, 761 N.W.2d 601, 604-05. Employer questioned Schoon at the hearing before the Department about the supposed change. “Even where specific credibility findings are absent, we defer to the Department's overall assessment of the weight of the evidence when it is based upon

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<sup>3</sup> “Foramen” is defined by Merriam-Webster as “a small opening, perforation, orifice.”

<sup>4</sup> “Stenosis” is defined by Merriam-Webster as “a narrowing or constriction of the diameter of a bodily passage or orifice.”

<sup>5</sup> “Myelopathy” is defined by Merriam-Webster as “a disease or disorder of the spinal cord or bone marrow.”

live witness testimony.” *Billman v. Clarke Machine, Inc.*, 2021 S.D. 18, ¶ 28, 956 N.W.2d 812, 820.

Schoon testified at the hearing before the Department. From her testimony it is proven by a preponderance of the evidence that Schoon had a preexisting condition. Schoon began experiencing neck and back problems after she was involved in two motor vehicle accidents in November 2001 and August 2003. Schoon sought chiropractic treatments for her pain because of these accidents, and got temporary relief from treatment. In 2007 she began physical therapy after re-locating to Rapid City. Schoon testified “a lot of this pain back here just almost vanished” because of her utilizing the information she learned in physical therapy. She testified that the Flector patch helped her pain, and that epidural steroid injections, specifically the July 28, 2009, injection performed by Dr. Lawlor, worked very well, making the pain almost nonexistent outside of an occasional flare-up. Schoon began using the Flector patches whenever she would experience a flare up. Schoon’s flare-ups did not affect her ability to work, perform activities of daily living, or participate in recreational activities.

Schoon testified that she was hanging overhead signage for her employment with Employer when she had severe pain in her shoulder. She “got really tight on the top of the shoulder ... [and] felt pressure in [her] neck.” The pain she experienced after her work injury was different than what she had experienced previously; the current pain was coming from the front where as previously it was located in the back of her body. The pressure in her neck was higher than it had previously been. Schoon indicated on her August 20, 2015, intake form with The Rehab Doctors that she was being seen for a problem on the right shoulder, but provided on the drawing that she was also experiencing pain in her neck.

Based on Schoon’s testimony, the Department found that Schoon’s 2009 treatment with Dr. Lawlor alleviated Schoon’s symptoms. After treatment with Dr. Lawlor, Schoon was able to work 60 hours per week and play recreational softball without symptoms of neck and shoulder pain, other than the occasional flare up. The Department noted the alleged change in testimony, but did not make a specific finding regarding the alleged change. The Department, in relying on the documental and live testimony, found that Schoon had proven by a preponderance of evidence that her May 7, 2015, injury was and continued to be a major contributing cause of prolonged need for treatment, need for surgery, and 11% whole person impairment. Based on all of the evidence presented, the Department’s findings based on Schoon’s testimony were not clearly erroneous.

Schoon has proven by a preponderance of the evidence that her May 7, 2015, injury was and remains a major contributing cause of her need for surgery, continued treatment, and 11% whole person impairment entitling her to worker’s compensation benefits. Her deposition and testimony before the Department did not critically change. Her description of her symptoms has been consistent since her injury. Dr. Dietrich testified that he believed by a reasonable degree of medical probability that Schoon’s work-related injury was a major contributing cause of her condition. All three of her expert witnesses testified that in their opinion the continued treatment and surgery were medically necessary as a result of Schoon’s injury. Schoon’s October 14, 2015, MRI showed a disc herniation at the C5-6 level, to which Dr. Lawlor testified he believed was caused by the May 7, 2015, injury. The testimony of all three of Schoon’s expert witnesses is consistent with one another, with Schoon’s medical records, and with Schoon’s testimony. Schoon has proven by a preponderance of the evidence that her May 7, 2015, work-related injury was and remains a major contributing cause of her condition, prolonged need for treatment, need for surgery, and 11% whole person impairment. Schoon is entitled to worker’s compensation benefits.

II. THE DEPARTMENT DID NOT ERR BY FINDING THAT CLAIMANT SUFFERED NO SYMPTOMS FROM 2009-2015.

Employer argued that the Department erred in finding that Schoon suffered no symptoms from 2009-2015. Employer misquotes the findings of the Department. The Department concluded that there was no evidence or testimony that Schoon suffered symptoms between 2009 and 2015, and that there was not sufficient evidence to support a conclusion that this was merely due to Schoon's lack of health insurance. The Department concluded that Schoon's medical records prove by a preponderance of the evidence that she did not seek treatment for pain in her neck and shoulder from 2009 until her May 7, 2015, work injury. Employer presented no evidence that Schoon suffered comparable neck and shoulder pain from 2009 to May 7, 2015. Schoon testified that if she had flare-ups, she would use the Flector patches. Schoon's flare-ups did not affect her ability to participate in daily and recreational activities. The Department noted the lack of evidence presented by Employer, and concluded that Schoon's work injury combined with her preexisting diseases and conditions to cause or prolong her impairment and need for treatment. The Department found that Schoon experienced occasional flare-ups while still being able to work 60 hours per week and play recreational softball. The Department's finding that Schoon experienced flare-ups, but that they were not severe enough to require treatment was not erroneous and was supported by the evidence presented. There was no evidence presented by Employer that Schoon experienced severe pain but failed to seek treatment. Schoon's evidence proves that she had flare-ups of pain but that they were minimal and not debilitating. Her medical records from 2009-2015 prove that she sought treatment for conditions and illnesses she was experiencing. There is no evidence that she would not seek treatment for upper back, neck, and shoulder pain.

Employer alternatively argues that the Department did acknowledge Schoon's flare-ups, but did not consider the flare-ups under the precedent provided in *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, 938 N.W.2d 425. *Armstrong*, provides that a work injury may not be compensable if it is not a major contributing cause, but rather is the tipping event of the degenerative effects of a preexisting condition. *Id.* at ¶ 24, 938 N.W.2d at 431. The Department distinguished Schoon's condition from the claimant's in *Armstrong*, concluding that the Court in *Armstrong*, made note that the medical records of the claimant indicated a worsening of the preexisting condition in the time leading up to the work injury. The Court in *Armstrong*, noted that the record contained uncontroverted evidence that the claimant's preexisting degenerative condition had grew worse in the years before his work injury. *Id.*

This Court concludes that Schoon's case is distinguishable from *Armstrong*. There is no evidence in the record that Schoon's preexisting condition worsened over the years immediately leading up to her work injury. Schoon proved by a preponderance of the evidence that her work activities on May 7, 2015, were and remain a major contributing cause of her impairment and need for treatment. Dr. Lawlor's and Dr. Wilson's opinions were given the appropriate weight, and were well supported by the testimony of Dr. Dietrich, the medical records of Schoon, and her live testimony at the hearing. In light of this Court's comprehensive review of the medical records and entire administrative record, this Court concludes Schoon's injury on May 7, 2015, was and remains a major contributing cause of her impairment and need for treatment, including the artificial disc replacement .

III. *THE DEPARTMENT DID NOT ERR BY FINDING THE OPINIONS OF DR. DIETRICH, DR. WILSON, AND DR. LAWLOR MORE PERSUASIVE THAN THAT OF DR. NIPPER.*

Employer argued that the Department erred by finding the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than Dr. Nipper's. Employer argued that Dr. Nipper is the only physician who had a complete and exhaustive understanding of Schoon's entire medical history, therefore making his testimony more persuasive. Employer relies on *Helms v. Lynn's Inc.*, 1996 S.D. 8, 542 N.W.2d 764.

The South Dakota Supreme Court in *Helms*, held that a non-treating physician's opinion can be more persuasive than that of a treating physician regarding causation issues. The Department found the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than that of Dr. Nipper. The Department's factual determination based on documentary evidence, is reviewed de novo. *Hughes v. Dakota Mill and Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907 (citations omitted). All of the opinions and testimony of the four expert witnesses was provided by medical records and depositions. Reviewing the record de novo, this Court finds the testimony of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than Dr. Nipper. The opinions and testimony of Schoon's experts is supported by Schoon's medical records. Schoon sought treatment from 2009-2015 for other medical conditions, but did not seek treatment for neck and shoulder pain, because her preexisting condition was not severe enough to require treatment or affect her daily life. Without treatment for the years leading up to the injury, there is no evidence of continued symptoms that would supersede as a major contributing cause of Schoon's need for treatment after the May 7, 2015, injury. The Court finds the testimony of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than Dr. Nipper, as their opinions are substantially supported by the evidence.

IV. *THE DEPARTMENT DID NOT ERR BY NOT STRIKING DR. DIETRICH'S OPINIONS BASED ON LACK OF FOUNDATION.*

Employer asserted that the Department erred by failing to strike Dr. Dietrich's testimony based on lack of foundation. Employer objected to Dr. Dietrich's testimony at his deposition based on lack of foundation, arguing that without reviewing every medical record of Schoon's prior to her work-related injury, Dr. Dietrich could not state to a reasonable degree of medical probability whether Schoon's injury was and remained a major contributing cause of her need for additional treatment and her impairment.

The Court reviews evidentiary rulings under an abuse of discretion standard. *McDowell v. Citibank*, 2007 S.D. 52, ¶ 26, 734 N.W.2d 1, 10. "An abuse of discretion is not whether we would have made the same ruling, but whether we believe a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion." *Gerlach v. State*, 2008 S.D. 25, ¶ 8, 747 N.W.2d 662, 665 (internal citations omitted). "An error will not be overturned unless it in all probability ... produced some effect upon the final result." *Id.* (internal citations omitted).

In accepting Dr. Dietrich's expert witness testimony, the Department noted that "Expert testimony is entitled to no more weight than the facts upon which it is predicated." *Darling*, 2010 S.D. 4, ¶ 13, 777 N.W.2d 363, 367 (further citations omitted). The Department evaluated Dr.



Dietrich's expert testimony pursuant to *Burley v. Kytect Innovative Sports Equip. Inc.*, 2007 S.D. 82, 737 N.W.2d 397. *Burley*, provides that

Admissibility of expert testimony is governed by SDCL 19-15-2 (Rule 702). Under this rule, before a witness can testify as an expert, that witness must be "qualified." *Id.* Furthermore, under *Daubert*, the proponent offering expert testimony must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge as required under rule 702. *Guthrie*, 2001 SD 61, ¶ 34, 627 N.W.2d at 415-416; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d 469 (1993). Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415. The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. SDCL 19-9-7 (Rule 104(a)). The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence. *Daubert*, 509 U.S. at 592 n. 10, 113 S.Ct. at 2796 n. 10, 125 L.Ed.2d 469 n. 10. Relevance embraces evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d at 415 (quoting SDCL 19-12-1).

*Burley*, 2007 S.D. 82, ¶ 13, 737 N.W.2d at 402.

The Department applied the *Burley* test, and found that Dr. Dietrich's testimony was relevant, reliable, and represented scientific, technical, or specialized knowledge. The Department found Dr. Dietrich reviewed the records of Dr. Lawlor, ProMotion, Black Hills Orthopedic, Black Hills Neurosurgery & Spine, the medical records summary, and also physically treated Schoon. The Department found that Dr. Dietrich's testimony was based on an appropriate foundation.

Dr. Dietrich's curriculum vitae was introduced into evidence at his deposition. Dr. Dietrich attended the University of South Dakota for his undergraduate, masters, and medical degrees. He completed a residency in Physical Medicine and Rehabilitation at the Mayo Clinic Graduate School of Medicine. He is licensed with the South Dakota Board of Medical & Osteopathic Examiners. Dr. Dietrich has been board certified in Physical Medicine & Rehabilitation and Pain Medicine. Dr. Dietrich has presented multiple times on shoulder and back pain. Including his residency, Dr. Dietrich has over twenty years of experience.

Dr. Dietrich's experience and education qualify him to testify as an expert witness. His testimony was reliable and relevant based on his review of Schoon's medical records, his examination of her, and his qualifications. Because of his qualifications, treatment, and review of the medical records, his testimony has a tendency to make the existence of facts that are of consequence to the determination of the action more or less probable than without his testimony. The Court finds that the Department did not err by admitting Dr. Dietrich's expert witness testimony or by giving the testimony its proper weight. Any objection would go to the weight and not admissibility of Dr. Dietrich's testimony. The Department did not err in its admission of this evidence.

## CONCLUSION

Employer argued that the Department erred by determining Schoon had proved by a preponderance of the evidence that her May 7, 2015, injury was and remains a major contributing cause of her impairment, need for additional treatment, and need for surgery. Employer challenged the Department's finding regarding Schoon's symptoms from 2009-2015. Employer also challenged the credibility of Schoon and the admission of Dr. Dietrich's testimony. Employer finally asserted that the Department erred in finding Dr. Lawlor, Dr. Dietrich, and Dr. Wilson more persuasive than Dr. Nipper. Schoon proved by a preponderance of the evidence that her May 7, 2015, work-related injury was and remains a major contributing cause of her condition, need for treatment, and impairment. The Department found that Schoon experienced flare-ups from 2009 to 2015 but her underlying preexisting condition did not worsen during this time period. Dr. Lawlor, Dr. Dietrich, and Dr. Wilson's testimony was extensively supported by the evidence and was more persuasive than Dr. Nipper's. Dr. Dietrich's testimony was based on a proper foundation. He is qualified, treated Schoon, and reviewed additional records. Schoon did not critically change her testimony, as she consistently described experiencing symptoms in her shoulder and neck. The Department's decision is affirmed. A corresponding Order shall be entered accordingly.

Dated this 27th day of December 2021.

BY THE COURT



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Christina Klinger  
Circuit Court Judge

South Dakota Codified Laws

Title 1. State Affairs and Government (Refs & Annos)

Chapter 1-26. Administrative Procedure and Rules (Refs & Annos)

SDCL § 1-26-36

1-26-36. Weight given to agency findings--Disposition of case--  
Grounds for reversal or modification--Findings and conclusions--Costs

Currentness

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.

**Credits**

**Source:** SL 1966, ch 159, § 15 (7); SL 1972, ch 8, § 29; SL 1977, ch 13, § 16; SL 1978, ch 13, § 10; SL 1978, ch 17; SL 1983, ch 6, § 2.

Notes of Decisions (298)

SDCL § 1-26-36, SD ST § 1-26-36

Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

South Dakota Codified Laws

Title 62. Workers' Compensation (Refs & Annos)

Chapter 62-1. Definitions and General Provisions (Refs & Annos)

SDCL § 62-1-1

62-1-1. Definition of terms

Currentness

Terms used in this title, unless the context otherwise plainly requires, shall mean:

- (1) "Annual earnings," the average weekly wages, computed as provided in §§ 62-4-24 to 62-4-28, inclusive, multiplied by fifty-two;
- (2) "Ascertainable loss," a loss becomes ascertainable when it becomes apparent that permanent disability and the extent thereof has resulted from an injury and that the injured area will get no better or no worse because of the injury;
- (3) "Average weekly wages," the earnings of the injured employee, computed as provided in §§ 62-4-24 to 62-4-28, inclusive;
- (4) "Department," the Department of Labor and Regulation created by chapter 1-37;
- (5) "Domestic servant," an employee who performs services in or around a home, which pertain to a house, home, household, lawn, garden, or family. The term includes baby sitters but does not include an independent contractor;
- (6) "Earnings," the amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was working at the time of the employee's injury. It includes payment for all hours worked, including overtime hours at straight-time pay, and does not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed by the employee by the nature of the employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, the allowances shall be deemed a part of the employee's earnings;
- (7) "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;

(c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought;

(8) “Temporary disability, total or partial,” the time beginning on the date of injury, subject to the limitations set forth in § 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first.

#### Credits

**Source:** SDC 1939, § 64.0102 (3) to (7); SL 1943, ch 313; SL 1974, ch 333, § 1; SL 1975, ch 322, § 1; SL 1978, ch 370, § 20; SL 1992, ch 364, § 4; SL 1993, ch 379, § 1; SL 1994, ch 395; SL 1994, ch 396, § 5; SL 1995, ch 296, § 6; SL 1995, ch 297, § 6; SL 1999, ch 261, § 2; SL 2011, ch 1 (Ex. Ord. 11-1), § 33, eff. Apr. 12, 2011; SL 2016, ch 236, § 4.

#### Notes of Decisions (321)

S D C L § 62-1-1, SD ST § 62-1-1

Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

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[South Dakota Codified Laws](#)

[Title 62. Workers' Compensation \(Refs & Annos\)](#)

[Chapter 62-1. Definitions and General Provisions \(Refs & Annos\)](#)

SDCL § 62-1-15

62-1-15. Evidence of injury supported by medical findings

[Currentness](#)

In any proceeding or hearing pursuant to this title, evidence concerning any injury shall be given greater weight if supported by objective medical findings.

**Credits**

**Source:** [SL 1995, ch 296, § 5A.](#)

S D C L § 62-1-15, SD ST § 62-1-15

Current through laws of the 2022 Regular Session and Supreme Court Rule 22-10

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SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION  
DIVISION OF LABOR AND MANAGEMENT  
Worker's Compensation

DESTINY SCHOON,	)	HF NO. 76, 2016/17
	)	
Claimant,	)	DEPOSITION OF:
	)	
vs.	)	DESTINY SCHOON
	)	
NEWS AMERICA,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
FARMINGTON CASUALTY COMPANY,	)	
	)	
Insurer.	)	
	)	

COPY

BEFORE: Tina Rae Pruss  
Court Reporter and Notary Public  
Rapid City, South Dakota

DATE: JULY 12, 2018 @ 9:00 A.M.

PLACE: BEARDSLEY JENSEN & LEE  
4200 Beach Drive, #3  
Rapid City, South Dakota 57702

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1 A I would say, if I remember right, it was maybe  
2 forehead, if I remember right.

3 Q You were looking up at it it sounds like?

4 A Yeah.

5 Q But you weren't like stretching overhead?

6 A Right. It wasn't like up here (indicating). It  
7 was just right above eye level is what I remember.

8 Q And you were using something to try to get it off  
9 of the shelving. What were you using?

10 A We have a screwdriver that they had given us.  
11 It's a part of our equipment, our hardware, for  
12 the company.

13 Q Okay. Was anybody around when this happened?

14 A I would assume there were customers in the aisle.  
15 I -- not that I remember.

16 Q Okay.

17 A It's Wal-Mart. It's a busy place.

18 Q Right. Okay. And you said you had an intense  
19 amount of pain. The pain was shoulder? Hand?  
20 Arm? Where was it?

21 A At that point in time it was a severe amount of  
22 pain coming from the shoulder.

23 Q Okay.

24 A My right shoulder.

25 Q Okay. And do you recall front or back of the



1           shoulder? Top of the shoulder?

2    A    I recall it being more to the front, but,  
3           honestly, it was so severe it was hard to  
4           elaborate where it was coming from.

5    Q    Okay. All right. You did treat directly after  
6           that as I recall?

7    A    Yes.

8    Q    And I -- I thought I saw it was a PAC; is that  
9           right? You went to a physician's assistant?

10   A    I believe I went up to the -- to the  
11          Medical Center to the Urgent Care.

12   Q    Okay. All right. Did you go right from work to  
13          the Medical Center or did you complete your job?  
14          How did that go?

15   A    Nope. That -- finished the job. I went home and  
16          emptied every icepack that I had out of my freezer  
17          and my ice bin and I put ice under it. I put ice  
18          all around it. And that was how I fell asleep.  
19          The next day it was still sore, it hurt, it did  
20          not get better, which led to the report of injury  
21          and treatment.

22   Q    Okay. All right. Okay. As I recall, following  
23          that injury you were able to continue working for  
24          both the paralegal job and the News America job  
25          until surgery. Am I getting that right?

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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Appeal No. 29900

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DESTINY SCHOON,

Appellee,

v.

NEWS AMERICA MARKETING, FARMINGTON CASUALTY COMPANY,

Appellants.

---

Appeal from the Circuit Court  
Sixth Judicial Circuit  
Hughes County, South Dakota

---

THE HONORABLE CHRISTINA KLINGER  
Circuit Court Judge

---

**APPELLANTS' REPLY BRIEF**

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Notice of Appeal Filed on February 4, 2022

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## ARGUMENT

### **1. Claimant ignores 14 years of medical treatment and significant prior, permanent injuries.**

Before responding to the arguments presented to the Court by Claimant, the absence of any real discussion of Claimant's medical history in the Statement of Facts in her Brief deserves specific mention. Under *Armstrong v. Longview Farms, LLP*, Claimant's prior medical history is crucial to resolution of this case. 2020 S.D. 1, 938 N.W.2d 425. However, Claimant essentially ignores the fact that she had substantial medical treatment addressing her neck and shoulders since 2001. Appendix C to Appellants' Opening Brief provides a detailed explanation of the records that make up Claimant's treatment history. Claimant's Brief glosses over this history in less than two pages, a strategy which speaks volumes.

Claimant also ignores the medical opinions regarding permanency that she obtained in connection with her lawsuit against the City of Sioux Falls following her August 2004 slip and fall. Specifically, Dr. Torsney opined "Ms. Schoon will have residuals from her accident injuries for the rest of her life or until some other treatment is discovered that will repair her injuries." (CR 1574.) Dr. DeBoer also opined that her injuries, which she described as "right shoulder/trapezius and cervical spine...some increase of radiating pain into the rest of her arm and wrist pain and numbness" were permanent: "In my opinion the injuries that she has been dealing with will be permanent...although she was on a great course to resolution of her problems prior to the fall in question but since then she has never been the same." (Ex. 23; CR 523-24). Since

her current lawsuit seeks recovery from Employer and Insurer, her silence on the question of whether she once offered expert medical evidence asserting that she had the same symptoms and that they were permanent also speaks volumes.

Although Claimant chooses to ignore them, these opinions are consistent with her extensive treatment history for neck and shoulder problems. For example, following her first motor vehicle accident, Claimant treated with Complete Chiropractic 86 times through April 2005. (DI 1229-1308.) Claimant also treated with 2 Docs Chiropractic over 100 times between March 2005 and September 2007. (DI 1511-75.) Claimant's refusal to accept, much less explain, her prior medical history is telling and confirms for this Court just how important it is to have a full understanding of her prior medical history.

**2. The Circuit Court erred in refusing to reverse DLR's finding that Claimant suffered no symptoms between 2009 and 2015.**

The DLR clearly erred<sup>1</sup> in distinguishing this case from [Armstrong v. Longview Farms, LLP](#), 2020 S.D. 1, 938 N.W.2d 425 and that conclusion is fully reviewable by this Court. This erroneous holding is as follows:

The records show that while Schoon does have a history of injury, degenerative disc disease, and pain in her neck and shoulder, she did not seek treatment for these issues from 2009 until the May 7, 2015 work injury. Dr. Nipper opined that it was not plausible for her to have no symptoms during that time period, and she must have merely refrained

---

<sup>1</sup> Lest Claimant's recitation of the standard of review creates any confusion, the correct standard is the clearly erroneous standard. At page 12 of her Brief, Claimant cites [Abild v. Gateway 2000, Inc.](#), 1996 S.D. 50, ¶ 6, 547 N.W.2d 556, 558, for the proposition that substantial evidence in the record is all that is required to support a DLR finding. This standard is repeated in the argument about the flare ups and elsewhere, e.g., "There was substantial evidence on record to support the Department's finding that Claimant did not suffer any symptoms from 2009 to 2015." (Appellee's Br., at 17.) In [Sopko v. C & R Transfer Co., Inc.](#), 1998 S.D. 8, 575 N.W.2d 225, this Court explained that the clearly erroneous standard should be used on appellate review. *Id.* at ¶ 7, 575 N.W.2d 225, 228–29.

from seeking treatment. Employer/Insurer assert that Schoon did not seek treatment, because she did not have health care. However, the Department must look to the evidence before it, and there is no medical evidence or testimony that indicates that Schoon suffered symptoms between 2009 and 2015. The Department does not have evidence to support the conclusion that this was merely due to Schoon's lack of health insurance.

The Department finds Schoon's case distinguishable from that of *Armstrong*. While they both have preexisting conditions, the Court in *Armstrong* made note of the record indicating that Armstrong's condition was worsening in the time up to the work injury.

...

In contrast, there is no record of Schoon requiring treatment in the years leading up to her injury.

(DI at 1961-62; 2044 at ¶¶ 95-99.) (emphasis added). The DLR's holding is contradicted by the record on several levels and must be reversed. The DLR ignored the evidence before it and erroneously distinguished *Armstrong* based upon the assumption that because there are no treatment records, Claimant did not have symptoms between 2009 and 2015.

The record clearly shows Claimant did suffer symptoms between 2009 and 2015. Claimant testified at the hearing that she experienced "flare ups" during this period. (HT 23:6-24.) The DLR made a specific finding that Claimant suffered from "flare-ups." (DI 2031, at ¶ 27.) It goes without saying that "flare-ups" are symptoms. And, although downplayed, this testimony about "flare ups" constitutes admissions by Claimant that she suffered symptoms between 2009 and 2015, which undermines the DLR's holding regarding the applicability of *Armstrong*.

In response, Claimant argues that the flare ups did not require treatment and, therefore, cannot constitute a symptom. (Appellee's Br., at 17.) The Circuit Court



similarly found the flare ups unimportant because of the lack of treatment. (Appx. A, at 9.) Specifically, the Circuit Court held:

There was no evidence presented by Employer that Schoon experienced severe pain but failed to seek treatment. Schoon's evidence proves that she had flare-ups of pain but that they were minimal and not debilitating. Her medical records from 2009-2015 prove that she sought treatment for conditions and illnesses she was experiencing. There is no evidence that she would not seek treatment for upper back, neck, and shoulder pain.

(*Id.* at 11.) This holding is flatly contradicted by the record.

First, the record contains several records from Black Hills Orthopedic & Spine Center where Claimant either treated for neck pain or refilled prescriptions for the same between 2009 and 2015. *See, e.g.*, DI 692, 1639, 1642-44, 1649, 1651, 1697, 1699. Second, Claimant now openly admits she lost her health insurance during these six years. (Appellee's Br., at 18, n.1) Considering her loss of health insurance, Claimant reached out to providers to refill several prescriptions in order to treat her symptoms between 2009 and 2015. *See, e.g.*, DI 530-31, 534, 1066, 1781, 1805. This evidence directly contradicts the Circuit Court's holding and demonstrates Claimant, in fact, did have symptoms between 2009 and 2015 and treated to the extent she could without health insurance.

Because these findings were crucial to the DLR's and Circuit Court's holding that *Armstrong* was inapplicable, this Court should reverse: "[t]he fact that the...injury may have been the unfortunate tipping point of [Schoon's neck] symptoms does not mean that it displaced the degenerative effects of [her] preexisting condition." *Armstrong*, ¶ 24, 938 N.W.2d at 431.

**a) The DLR erred by failing to make a credibility determination as to Claimant's material change in testimony.**

Claimant argues Employer and Insurer have offered no authority that the DLR must make a specific credibility determination. This is not true. As Claimant, she has the inherent burden to establish “all facts essential to sustain an award of compensation.” *Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶ 20, 653 N.W.2d 247, 252. Integral to that burden of proof is whether her testimony is credible or whether there are obvious inconsistencies in her testimony. *See, e.g., Kennedy v. Hubbard Mining Co.*, 465 N.W.2d 792, 796 (S.D. 1991) (The “Department is not required to accept the testimony of the claimant and is free to choose between conflicting testimony.”).

Claimant testified at her deposition to experiencing an “immense amount of pain” in her right shoulder and that it “was so severe it was hard to elaborate where it was coming from.” (Schoon Dep., at 22:18-23:4.) Claimant also testified that she was working on the piece of equipment “when [she] suddenly had [her] injury. Just a severe amount of pain.” (*Id.* at 21:16-20.) Not once did Claimant describe any “pressure” or radiation of pain into her neck, she only testified regarding pain in her shoulder.

At the hearing, however, Claimant's story changed. In addition to pain in her shoulder, Claimant now, for the first time, testified that she had pressure in her neck. (HT 28:3.) This is not a simple or insignificant inconsistency. Claimant was impeached at the hearing because of this material alteration and her attempt to claim a better version of the facts than her prior testimony. (HT 47:9-48:19; 65:10-66:8.) Interestingly, despite extensive argument in her Brief, Claimant points to no medical record that reflects she suffered from “pressure” in her neck. The DLR erred by not making a specific finding on

this point, especially given how critical Claimant's description of her pain immediately following the injury is to the DLR's decision regarding medical causation. "[W]here the claimant's subjective experience of pain is central to the issue of whether recovery is warranted, the credibility of the claimant is always at issue." *Schneider*, 2001 S.D. 70, ¶ 14, 628 N.W.2d 725, 729. This Court should reverse the Circuit Court because of its failure to assign error to the DLR's refusal to address credibility.

**3. The Circuit Court erred by finding the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor more persuasive than those of Dr. Nipper.**

The Circuit Court's finding that the opinions of Dr. Dietrich, Dr. Wilson, and Dr. Lawlor were more persuasive than those of Dr. Nipper is fully reviewable by this Court. "[F]indings based on documentary evidence, such as depositions or medical records, are reviewed de novo." *Armstrong*, 2020 S.D. 1, ¶ 16, 938 N.W.2d 425, 429. Dr. Nipper issued two IME's in this case and conducted a complete records review by exhaustively analyzing every available medical record. (Ex. 13; DI 487-96; Ex. 14; DI 497-507; Appendix B to Appellants' Opening Brief.) In contrast, Claimant has offered no proof that her experts had this comprehensive knowledge of Claimant's prior condition before opining as to its effect on her current condition. Indeed, Dr. Dietrich specifically conceded he did not have access to Claimant's prior medical records and unabashedly supplied expert medical opinions based on the contents of Claimant's counsel's summary of those records. Acceptance of such an opinion is inconsistent with a venerable axiom of South Dakota workers' compensation law:

"The value of the opinion of an expert witness is no better than the facts upon which they are based. It cannot rise above its foundation and proves nothing if its

factual basis is not true.” *Johnson*, 2000 SD 47, ¶ 25, 610 N.W.2d at 455 (citing *Podio v. American Colloid Co.*, 83 S.D. 528, 532, 162 N.W.2d 385, 387 (1968)).

*Schneider v. S. Dakota Dep't of Transp.*, 2001 S.D. 70, ¶ 16, 628 N.W.2d 725, 730

Dr. Dietrich’s opinions have been rejected in the past because of his failure to exhaustively review medical records. In *McQuay*, this Court found the IME opinions more credible than Dr. Dietrich’s, in part, because he did not review all of Claimant’s relevant medical records. 2011 S.D. 91, ¶ 25, 808 N.W.2d at 113. The Court specifically held “Dr. Dietrich did not review the 2002 or 2005 MRI images. He also did not account for medical evidence indicating that prior to June 2005, McQuay’s back pain was on the right side of his low back while McQuay’s complaint at the time of the hearing was for low back pain on the left side.” *Id.* The Court ultimately affirmed the circuit court’s denial of worker’s compensation benefits. *Id.*

This case presents yet another instance where a non-treating physician’s testimony is more credible than that of Claimant’s treating physicians. See, e.g., *Riccord v. John Burns Memorial Hospital*, 141 N.W. 2d 160 (S.D. 1966). *Helms v. Lynn’s, Inc.*, 1996 S.D. 8, 542 N.W. 2d 769; *Jewett v. Real Tuff, Inc.*, 2011 S.D. 33, 800 N.W.2d 345 (S.D. 2011); *McQuay v. Fischer Furniture*, 808 N.W.2d 107 (S.D. 2011); *Grael v. S.D. Sch. Of Mines and Tech.*, 2000 S.D. 145, 619 N.W.2d 260 (S.D. 2000). Dr. Nipper is the only expert in this case that considered all of Claimant’s medical records. And Claimant’s entire prior medical history is vital to the determination of compensability under SDCL § 62-1-1(7) (b) which requires analysis of whether

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 glaring weakness of the foundation of Claimant's medical opinions cannot withstand de novo review. And the fact that Claimant has studiously avoided dealing in this case with her medical experts' representations to a jury in her prior personal injury case further undermines the present medical opinions. Because Claimant failed to demonstrate that Dr. Dietrich, Dr. Wilson, and Dr. Lawlor had access to and understood all of her medical history, the Circuit Court erred in finding them more credible and should be reversed.

**4. The Circuit Court erred in affirming the DLR's failure to strike Dr. Dietrich's opinions for lack of foundation.**

As mentioned previously, it is an axiom of South Dakota workers' compensation law that

"The value of the opinion of an expert witness is no better than the facts upon which they are based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Johnson*, 2000 SD 47, ¶ 25, 610 N.W.2d at 455 (citing *Podio v. American Colloid Co.*, 83 S.D. 528, 532, 162 N.W.2d 385, 387 (1968)).

*Schneider v. S. Dakota Dep't of Transp.*, 2001 S.D. 70, ¶ 16, 628 N.W.2d 725, 730. See also *State v. Guthrie*, 2001 S.D. 61, ¶ 34, 627 N.W.2d 401, 416 ("In deciding whether to admit expert testimony, a court must ensure that the opinion abides on a reliable foundation...These standards must be satisfied whenever scientific, technical, or other specialized knowledge is offered."). By statute, expert testimony must be "based on sufficient facts or data." [SDCL § 19-19-702](#). Because of these fundamental foundational requirements, Employer and Insurer maintained an objection to Dr.

Dietrich's opinions at his deposition, (Dietrich Dep., at 6:12-7:11), and at those same objections at the hearing. (HT 6:17-24.)

Employer and Insurer are not suggesting Dr. Dietrich relied on false records in coming to his opinions, but rather that the best evidence for him to use to formulate this critical opinion was not used. Dr. Dietrich's primary source of information was a document prepared by Claimant's counsel, summarizing her extensive 15 years of prior medical treatment into 35 pages. One can only wonder whether the DLR would have stricken Dr. Nipper's opinion if he had used a medical record summary prepared by defense counsel. Surely more is required of an expert than to simply rely on information from counsel in order to render a causation opinion, especially in a case where compensability hinges on analysis of Claimant's prior medical history and its relationship to a work place injury. The DLR clearly erred by accepting Dr. Dietrich's opinions because its foundation was incomplete. This Court should reverse.

### **CONCLUSION**

For these reasons, Appellant respectfully urges this Court to reverse the Circuit Court's decision.

Dated this 15<sup>th</sup> day of September, 2022.

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### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Brief complies with [SDCL 15-26A-66\(4\)](#). This Brief is 9 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Times New Roman (12 pt.) and contains 2,790 words. The word processing software used to prepare this Brief is Microsoft Word.

Dated this 15<sup>th</sup> day of September, 2022.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of September, 2022, I electronically served via e-mail transmission, a true and correct copy of the foregoing Appellants' Reply Brief to the following:

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