IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

DAVID WETCH,

Claimant/Appellant,

-vs-

MIDCONTINENT MEDIA, INC., and CRUM & FORSTER COMMERCIAL INS.,

Defendants/Appellees.

Appeal Nos. 31059, 31060
Notice of Appeal Filed: April 17, 2025

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL DISTRICT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGOT NORTHRUP,
CIRCUIT COURT JUDGE

APPELLANT'S OPENING BRIEF

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Filed: 7/22/2025 5:23 PM CST Supreme Court, State of South Dakota #31059

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JURISDICTIONAL STATEMENT

Appellant brings this appeal from the Memorandum Decision and Order, of the Sixth Judicial Circuit Court, which affirmed the Decision and Order of the South Dakota Department of Labor & Regulation, Division of Labor and Management ("DOL" or the "Department"), dated March 18, 2025. Appellant appealed that decision to the Circuit Court on May 1, 2024. The Circuit Court entered its Memorandum Opinion and Order on March 18, 2025. Appellant filed his Notice of Appeal on April 17, 2025. This Court has jurisdiction to hear this appeal pursuant to SDCL 1-26-37.

STATEMENT OF THE ISSUES

Appellant's Issues:

1. Whether the Circuit Court erred in declining to apply the doctrines of res judicata, judicial estoppel, and "mend the hold" to preclude consideration of a change in condition?

   Yes. The Circuit Court erred in declining to apply the doctrines of judicial estoppel, res judicata, and "mend the hold" to preclude consideration a change in condition.

   - *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.*, 2014 S.D. 64, 853 N.W.2d 878
   - *Kermmoade v. Quality Inn*, 2000 S.D. 81, 612 N.W.2d 583
   - *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, 922 N.W.2d 784
   - *Pfeifer v. Sheehan*, 51 S.D. 611, 216 N.W. 349, 350 (1927)

2. Alternatively, whether the Circuit Court and the DOL erred in finding a change of condition under SDCL 62-7-33?

   Yes. The Circuit Court and the DOL erred in finding a change of condition under SDCL 62-7-33.

   - *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353 (S.D. 1992)
   - *Sopko v. C & R Transfer Co.*, 1998 S.D. 8, 575 N.W.2d 225
   - *Sudrla v. Commercial Asphalt and Materials*, 465 N.W.2d 620 (S.D.1991)

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

3. Whether the Circuit Court erred in concluding it was harmless error by the DOL to allow the Employer/Insurer's biomechanical engineer to testify on medical causation?

Yes. The Circuit Court erred in concluding it was harmless error by the DOL to allow the Employer/Insurer's biomechanical engineer to testify on medical causation.

- *Maroney v. Aman*, 1997 S.D. 73, 565 N.W.2d 70

STATEMENT OF THE CASE

David Wetch ("Wetch" or "Claimant") suffered a work injury in 1991. The parties signed a stipulated settlement which required Crum & Forster Commercial Insurance ("Insurer") to pay Wetch's future injury related medical expenses. (R.168-169).[1] In 2014, Wetch filed a Petition for Hearing with the South Dakota Department of Labor ("Department" or "DOL") to order Insurer to make payments for medical benefits owed pursuant to SDCL 62-4-1. (A.247-250). Claimant filed multiple motions for summary judgment on the compensability of Wetch's medical bills. The DOL granted Wetch's motions and ordered Insurer to pay the medical benefits identified in Claimant's Petition. Wetch's entitlement to benefits was also enforced through two contempt proceedings in the Seventh Judicial Circuit Court.

Then, in March of 2020, Insurer filed the instant proceedings as a Request for Review under SDCL §§ 62-7-33, 62-4-47 and 48 ("Request"), asserting a change in condition and fraudulent conduct by Wetch. (R.91-94). A four-day hearing was convened before the DOL. On January 30, 2024, the DOL issued its decision finding that Claimant had not fraudulently concealed a 2010 injury from Insurer, but that he had suffered a change in his condition. (A.53-88). The DOL concluded that Claimant's benefits should be terminated or reduced. (A.87). Claimant appealed to the Circuit Court. (R.13701-13702).[2] The Circuit Court

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[1] "R._" refers to the first volume of the settled record in File No. 31059. "R.II.__" refers to the second volume of the settled record. "A.__" refers to the Appendix.
[2] Insurer separately appealed the denial of its Motion for Vacatur, which was consolidated with Wetch's appeal by the Circuit Court.

affirmed the Department's decision, and entered an order terminating and/or reducing Wetch's worker's compensation benefits. (A.1-20). Wetch appeals.

STATEMENT OF FACTS

A. The 1991 Work Injury

On July 30, 1991, Wetch suffered a fall at work resulting in an injury to his cervical spinal cord that caused permanent damage. (R.168-169). Approximately four months later, on December 3, 1991, Wetch had an MRI at Rapid City Regional Hospital, which revealed spinal stenosis at the C3-5 levels of his spine. (R.12559). The next day Dr. Larry Teuber performed a surgical fusion of the C3 to C5 sections of Claimant's cervical spine. (A.22 at ¶ 4). As a result of the work injury/fusion, Claimant suffered from spastic quadriparesis, characterized by weakness and spastic muscle activities in both arms and both legs. (A.22 at ¶ 2).

B. The Stipulated Agreement and Order.

Wetch commenced a worker's compensation proceeding, and on November 8, 1994, a Stipulated Agreement as to Compensation for Permanent and Total Disability was approved by the Department. (R.168-169). In the agreement, Insurer agreed to provide benefits for Wetch's future medical care and treatment under SDCL 62-4-1. (R.168-169, at ¶ 9).

C. Wetch's Medical Condition.

Before the work injury, despite being born with cerebral palsy, David Wetch led an active lifestyle. (R.5722-5723). He lived independently, studied, and earned a degree in broadcasting. (R.5722-5723). He exercised; he played racquetball and had a typical social life with friends, family, and loved ones. (R.5722-5723).

1. Assisted Care.

After the work injury, Claimant moved in with his parents for help with daily living. (R.5730 at 38:2-7). Claimant's medical providers documented: "this patient needs assistance in attaining his highest level of functioning in regard to the injury... [h]e lives with his parents and all of his needs are met by them in regard to where he lives, cooking, cleaning, laundry and transportation." (R.9302). Wetch was eventually prescribed long-term assisted care by his physician in 2015. (R.12192-12193). Since 2020, Wetch has resided in a full-time care facility in Texas.

2. Instability, Immobility, and Falling

Since the work injury, Claimant has required various mobility devices, such as canes, walkers, or wheelchairs to assist him with balance, ambulation, and mobility. (R.9617). Wetch's difficulty with balance and ambulation are repeatedly referenced in Wetch's medical records. (R.5725; H.Ex.[3] 147 at R. 9211, R. 9217). For example, in November of 2001, Claimant's provider at Black Hills Neurology documented that Mr. Wetch continued to struggle with "Stiffness in legs balance problems a feeling of falling back." (H.Ex. 147 at R. 9452).

For his quadriparesis, Wetch was prescribed Soma. (H.Ex. 147 at R. 9450). While Soma helps with Wetch's muscular discharges, but it is not for pain management. (R.5515). Claimant also used pain medication regularly. (R.5526-5527). Wetch also suffered from depression. (R.5526-5527). In 1995, Claimant

[3] H.Ex. refers to Hearing Exhibit.

attempted suicide with an intentional overdose of pain medication. (R.5526-5527).

Claimant suffered multiple falls after the work injury. After these falls, Claimant's treating doctors explained that the falls were due to instability caused by the work injury in 1991. (*See e.g.* R. 11186) (stating, "It is my opinion that cervical myelopathy will result in unsteadiness of gait and unsteadiness of gait will result in falls and falls do result in ankle injuries. I do believe that his cervical myelopathy which was likely aggravated by his falling from a chair did contribute to the fall in which he sustained an ankle injury.").

3. Shoulder and Neck Pain.

Wetch also suffered from chronic neck and shoulder pain as a result of the 1991 work injury. (R.11889). In 1993, Wetch's doctor expressed concern that Claimant's shoulder pain was a symptom of deterioration due to overuse. (R.9613) Years later, in 2006, Claimant saw Dr. Steven Waltman, who performed an injection in Wetch's left shoulder. (R.11228). In 2009, Claimant followed up with Dr. Waltman and received a second injection in his left shoulder. (R.11240). In April of 2011, Claimant began seeing Dr. Michael Goodhope, who had replaced Dr. Waltman as Claimant's primary doctor. (R.11243-11244).

D. Insurer Begins to Deny Wetch's Medical Treatment.

In July of 2011, Wetch's friend contacted Insurer on Wetch's behalf to get reimbursement for Wetch's prescriptions for Soma, a walker, a lift chair and pull bars. (A.32 at ¶ 78). In response, Insurer requested that Claimant's treating physician provide a letter detailing Wetch's medical needs and their cause.

(R.11237). On August 1, 2011, Dr. Goodhope, sent the requested letter confirming that Wetch's prescriptions work injury related. (R.11237).

Shortly thereafter, Insurer began to look for a doctor to challenge the opinions of Dr. Goodhope. At the time, Insurer was aware that the Wetch's primary care was provided by Rapid City Medical Center. (R.9197). There is no evidence that Insurer ever requested medical records from Wetch or asked him to sign a medical records release; or that he refused to sign one. (A.51-52 ¶¶ 38-39).

In late 2011, Insurer obtained a medical examination ("IME") from Dr. Randal Wojciehoski. (H.Ex. 116 at R.6893-6899). Before the IME, Insurer sent all of the medical records to Dr. Wojciehoski's office through a third-party vender. (R.5610). Neither Dr. Wojciehoski nor Insurer kept a record of which of Claimant's medical records were sent to Dr. Wojciehoski. (R.5439; R.5617). Ultimately, Dr. Wojciehoski's IME report confirmed the compensability of Wetch's medical bills. (R.6893-6899). Despite this, Insurer denied fifty percent (50%) of Claimant's care and treatment. (R.9196).

E. Summary Judgment and Contempt Orders

In 2014, Wetch filed a Petition for Hearing pursuant to SDCL 62-4-1, seeking reimbursement for his work-related medical care and treatment. (A.247-250). For the next several years of litigation, multiple tribunals entered orders relative to Wetch's claim.

1. First Summary Judgment Order

In September of 2015, Wetch filed a Motion for Partial Summary Judgment. (R.208-232). On January 28, 2016, the DOL ordered Insurer to

provide 100% of the care and treatment approved by Wetch's physicians. (R.234-240). Insurer did not appeal this decision.

2. Second Summary Judgment Order

Months later, Wetch filed a Second Motion for Partial Summary Judgment in May 2016. (R.252-258). In response, Insurer claimed that the issues were moot because Insurer had already approved care and treatment as a compensable. (R.260-263). The DOL accepted Insurer's "mootness" argument, denying Wetch's Motion, but retaining "continuing jurisdiction over Claimant's medical claim to ensure treatment consistent with its previous orders in this matter is provided." (R.264-268). Insurer did not appeal this decision.

3. Third Summary Judgment Order

In August 2016, Wetch filed a Third Motion for Partial Summary Judgment and Request for Expedited Hearing/Resolution. (R.269-278). Insurer did not substantively respond. (R.280-283). On November 16, 2016, the DOL entered its Third Motion for Partial Summary Judgment Letter Decision and Order, which accepted the stipulation/representation that the Insurer would pay for Wetch's medical care. (R.284-285 at ¶ 3). Insurer did not appeal this decision.

4. First Contempt Proceeding

Meanwhile, also in August 2016, the Seventh Judicial Circuit Court of the State of South Dakota ("Seventh Circuit") had entered judgment pursuant to SDCL 62-7-31. (R.288). An Order to Show Cause for Contempt was issued in October 2016. (R.286-287). After a hearing in late 2016, Seventh Circuit Judge, Jeff Davis, held Insurer in contempt for non-compliance with the Department's order to pay Wetch's medical benefits. (R.289-292). Insurer did not appeal.

5. Fourth Summary Judgment Order

In April 2017, Wetch filed a Complaint in the United States District Court of South Dakota ("Federal Court"), alleging multiple torts, including insurance bad faith. (R.293-308). During discovery in that case, Wetch provided medical documents to Insurer in October of 2017, in the "initial" round of discovery. (R.310-311).

Four months later, Wetch filed a Fourth Motion for Partial Summary Judgment and Motion for Sanctions with the Department. (R.312-316). Insurer filed its response on March 1, 2018. (R.318-321). On May 7, 2018, the DOL entered an order; incorrectly dated May 7, 2015. (R.322-328). In it, the Department explained that at the hearing, Employer/Insurer provided no explanation as to why it delayed payments for necessary treatments. (R.322-328). The Department found that Wetch was entitled to partial summary judgment on the issue of compensability. (R.322-328). However, the Department also cautioned that "summary judgment in this case seems a hollow victory." (R.322-328). The Department lamented that it was "without authority to force Employer/Insurer to abide by its word." *Id.*, at pgs. 4-5.

6. Second Contempt Proceeding

In May of 2018, the Seventh Circuit issued a Second Order to Show Cause for Contempt. (R.335-336). In response, Insurer requested and received additional time to conduct discovery in the second contempt action. (R.329-334). Insurer took the depositions of various witnesses, including Mr. Wetch and his treating doctor, Dr. Goodhope.

On September 14, 2018, Insurer filed Insurer's Motion for Factual Determination as to Whether Two Items Constitute Other Suitable and Proper Care with the DOL. (R.338-353). Insurer also requested an extension to submit the new depositions to the DOL. (R.375-377). On October 31, 2018, Insurer filed Insurer's Motion for Leave to Supplement Record in Support of Motion for Factual Determination as to Whether Two Items Constitute Other Suitable and Proper Care, seeking again to submit the depositions and other materials to the DOL. (R.378-385). The DOL denied Insurer's Motion for Factual Determination and deemed moot the Motion for Leave to Supplement the Record. (R.386-392).

On November 9, 2018, Insurer filed a Motion for Reconsideration or, in the Alternative, for Relief under SDCL 15-6-60(b), with the Department alleging that "Wetch failed to disclose he suffered a major fall and injury in April 2010, which would have been probative of important issues before the Department." (R.394). Insurer also alleged that "Wetch has violated his duty of candor to the Department." (R.395). On January 8, 2019, Insurer filed Insurer's Motion for Leave to Supplement Record in Support of Motion for Reconsideration, or in the Alternative, for Relief Under SDCL 15-6-60(b) with the DOL. Insurer's motion included arguments regarding the April 2010 fall and included the expert opinion report of John Sabow, M.D. (R.424-434; R.435-436).

Three days later, Insurer filed a Motion to Dismiss Plaintiff's Second Motion to Show Cause for Contempt with the Seventh Circuit. (R.440-446). In its Motion, Insurer argued that it had complied with the lawful orders and could no longer be held in contempt, relying on the Department's November 27, 2018, Letter Decision, finding that the issues were "moot." (R.444-445).

On February 26, 2019, a hearing on Insurer's Motion for Reconsideration was held before the Department. The Department denied both the Motion for Reconsideration and the Motion to Supplement Record. (R.463-467). It concluded that the issues were moot and that it lacked jurisdiction to hear Insurer's arguments, and denied relief under SDCL 15-6-60 (b). (R.467).

Three weeks later, in the Second Contempt Proceeding, Insurer once again admitted the compensability of Wetch's claim. (A263-269 at 2:10-13; at 8:11-13 (stating, "Mr. Wetch needs assistance and Crum & Forster has indicated it plans to provide that assistance."); at 8:20-22 ("The department has come to an end and there doesn't seem to be any reason that a contempt action should remain at this point."), at 9:15-22 (stating, "So the issue is, my understanding, Crum & Forster has committed to doing what's been recommended. ... Crum & Forster is committed to doing the work."). Based on Insurer's representations, the Circuit Court granted the Insurer's Motion to Dismiss the Contempt. (A263-269 at 9:23–11:4; 9:24-10:6). On April 4, 2019, at Insurer's urging, Judge Davis signed Insurer's proposed order dismissing the contempt proceeding *with prejudice.* (R.981-982; R.481). Insurer did not appeal.

The day *after* arguing to the Seventh Circuit that Wetch's benefits *were* compensable, and would be paid, Insurer argued to the federal court that Wetch's care was not compensable. (R.482-497). The federal district court entered its Order of February 25, 2020, rejecting most Insurer's arguments. (*See generally* R. 499-565).

F. Insurer's Request for Review Pursuant to SDCL §§ 62-7-33, 62-4-47 and 48

In March of 2020, Insurer filed the instant proceedings pursuant to SDCL §§ 62-7-33, 62-4-47 and -48. (R.91-94). In its Request, Insurer "re-alleged" that payments were made under fraudulent conditions arising out of an undisclosed "change of condition" arising out of a fall at Wetch's apartment in 2010. (R.91-94). Insurer had received the medical records referencing this fall in the federal action more than two years before the second contempt proceeding before Judge Davis, and its Reconsideration Motion before the DOL. (R.310-311). As a result, Wetch filed a Motion for Summary Judgment on September 16, 2020, once again arguing that these were precluded by res judicata, estoppel, and "mend the hold." (R.121-156). Despite robust briefing, on January 19, 2022, the Department entered a one-page Letter Decision denying Claimant's Motion for Summary Judgment, stating that unspecified issues of fact remained to be decided. (R.3434).

Claimant appealed the Department's decision on January 19, 2022. (R.3436-3437). On June 21, 2022, the Sixth Judicial Circuit dismissed Wetch's appeal. (A.91-103; A.104). Claimant petitioned for interlocutory appeal on July 19, 2022. (R.II. 43-59). This Court denied Claimant's Petition for Interlocutory Appeal without commenting on the merits of the Circuit Court's decision. (R.II. 60).

G. The DOL Hearing

In May of 2023, a four-day-long hearing was held. During the hearing, the Department received substantial evidence and testimony on the case history and the 2010 fall. Below are the facts known about the incident:

In April of 2010, Wetch suffered a fall at his apartment complex when the handle to his fire door came apart, he lost his balance, and he fell into drywall and dented it with his back and head. (R.11242). On that day, Mr. Wetch was using a cane to help him with instability caused by his work injury. (R.5401). After his fall, Wetch was *immediately* found by a neighbor who was leaving her second-story apartment just as Wetch fell. (R.6708-6719). Wetch's neighbor, Tina Caffey, told Insurer's investigator, Bryan Schnell, that she discovered Wetch on *his steps* immediately after this fall occurred. (R.6712). Ms. Caffey told Mr. Schnell: "[Wetch] wasn't on my stairs, he was on his, I think. He must have been coming up. I think he was on the *bottom floor*." (R.6712) (emphasis added). Wetch's apartment was on the basement level of the apartment. (R.5398).

After finding Wetch, Ms. Caffey called 911. (R.6708-6719). Wetch was taken by ambulance to the Emergency Room at Rapid City Regional Hospital, where he was released on his own recognizance by the doctors less than an hour later. (R.6288-6290; R.6291-6296). Wetch was diagnosed with a (1) mild concussion, and (2) a cervical neck sprain. *Id*. Wetch's doctors also ordered a CT of his cervical spine and of his head which did not show any acute abnormalities. (R.11242).

Six days later, Wetch followed up with his family doctor, Dr. Waltman. (R.11242). Dr. Waltman examined Wetch and conducted a neurological

evaluation. (R.11242). Dr. Waltman discharged Wetch, and did not prescribe any additional treatment for this fall. (R.11242). There is no evidence that Wetch received any medical treatment for more than a year after his follow-up appointment with Dr. Waltman. (*See generally* H.Ex. 147). The only imaging done at the ER after the 2010 fall was a CT of Claimant's head and cervical spine, which was unremarkable. (R.6291-6296). No MRI of Claimant's cervical spine was done for more than five years after the 2010 incident. (R.5514).

1. Insurer's Theory About the 2010 Fall.

At the hearing, Insurer presented a more violent version of the fall than what was reflected in Wetch's medical records. To present its theory, Insurer retained biomechanical expert, Michael Liebschner, who opined that Wetch fell from the top of Ms. Caffey's second-story stairwell, and struck the top of his head on the drywall at the bottom of the stairs. (R.5412). Mr. Liebschner testified that this fall resulted in nine times the load forces than what occurred in the 1991 work injury. (R.5414). Mr. Liebschner did not construct any model where Wetch fell on his own stairwell, as Ms. Caffey stated to the Investigator. (R.5425-5426 at 176:24 to 177:1).

The Department discounted Ms. Caffey's account of where Wetch fell, stating that her account was "inconsistent." (A.53-88 at 64). However, neither the Department nor the Circuit Court identified any contrary statement from Ms. Caffey regarding where she found Mr. Wetch. (*See generally* A.1-20 and A.21-52). Ms. Caffey did not testify live at the hearing.

In addition to his opinions on the circumstances of the fall, Mr. Liebschner also testified on the cause of the injuries suffered by Wetch in this fall. (R.5770-

5774). Mr. Liebschner was called as a rebuttal witness to Wetch's medical expert, Dr. Larry Teuber, to opine on whether Wetch suffered an acute injury in the 2010 fall. Mr. Liebschner testified that Wetch likely suffered an acute injury due to an absence of annular tearing referenced in Wetch's medical records. (R.5770-5774). Wetch objected to this testimony as well beyond the expertise of Mr. Liebschner. (R.5772). The DOL overruled Wetch's objection, and allowed Mr. Liebschner to testify on medical causation. (R.5772).

On appeal, the Circuit Court found that the DOL had abused its discretion in "overruling Wetch's objection and allowing this testimony." (A.1-20 at pg. 19). However, the Circuit Court concluded that Wetch was not prejudiced by the DOL's error because "it does not appear the Department relied on Dr. Liebschner's causation opinion." (A.1-20 at pg. 19.) Therefore, according to the Circuit Court, Wetch could not demonstrate that he was prejudiced by the improper testimony of Mr. Liebschner. (A.1-20 at pg. 19.)

2. Wetch's Medical Condition After the 2010 Fall.

Over a year after the fall, Wetch was seen by Dr. Goodhope at Rapid City Medical Center. (A.67). At that time, Wetch wanted a wheeled walker with a seat, and was prescribed physical therapy and a TENS unit for his neck and shoulder pain. (A.67-68). A month later, Claimant returned to Dr. Goodhope requesting a new lift chair because his current chair was more than ten years old. (A.68).

Additionally, as he had since his injury in 1991, Wetch worked hard at maintaining his mobility. For example, in May of 2012, Claimant's physical therapist noted that Wetch had been "walking more miles at the track, which has

helped his legs, but his neck gets stiff with the use of the cane." (R.11012). In 2013, Wetch was noted to still be walking laps around a half-mile track. (R.11286).

Over time, however, Wetch's physical condition deteriorated. In 2015, Dr. Goodhope ordered a formal "life care plan" for Claimant as well as a wheelchair, supervised living services with live-in aide, a modified dwelling, van with modifications, specialty bed, and other medical equipment. (R.12192-12193). Eventually, Wetch would undergo surgery to his cervical spinal sections above and below the fusion performed by Dr. Teuber in 1991. (R.9679-9681).

3. Medical Causation Testimony.

At the DOL hearing, Insurer offered the testimony of Dr. John Sabow, who opined that the fall caused acute injuries to the vertebral sections above (C2-3) and below (C5-6) the fusion performed by Dr. Teuber in 1991. (R.6121-6125). According to Dr. Sabow, the fusion performed (C3-5) by Dr. Teuber in 1991 magnified the sheering forces at the adjacent vertebral levels that were later fused in 2016. (R.6124). Dr. Sabow also testified that the 1991 work injury contributed to Wetch's falls and instability. (R.5504). And he admitted that the 2010 fall was an aggravation of the original 1991 work injury. (R.5530).

Wetch's medical expert, Dr. Teuber, opined Claimant's progressive deterioration was a product of "adjacent segment disease," which is a condition that always develops at the vertebral sections above and below a block fusion. (R.5657). According to Dr. Teuber, the 1991 surgery "set the stage" for the 2016 surgery. (R.5675). Dr. Teuber explained that if surgery is performed on a young

person, like Wetch, he is "absolutely going to develop adjacent segment disease and probably more likely than not will need another surgery, and they are told that." (R.5657). He testified that the 1991 surgery he performed after the work injury was a "profound contributor" to the eventual degeneration of Wetch's cervical spine in 2015 and 2016. (R.5677).

In addition to Dr. Teuber, Wetch also offered the opinions of Dr. Michael Goodhope. Dr. Goodhope's testimony was offered through two deposition transcripts.[4] During his first deposition, Dr. Goodhope testified at length that the *past, present,* and *ongoing* care prescribed by him *is causally related to Wetch's 1991 work injury.* (H.Ex. 118 RII.1303, RII.1309). Dr. Goodhope also attributed Wetch's falls to the 1991 work injury. (H.Ex. 118 RII. 1308).

During his second deposition, Dr. Goodhope qualified his opinion, but he still testified that he believed that the 1991 work injury contributed to the medical care and treatment he provided for Wetch even when confronted with additional information about the 2010 fall. (H.Ex. 118 RII. 1344-1345 at 67:23-25; 68:1-25; 69:1-2). The Department rejected this testimony and instead found: "As a result of the new information [about the 2010 fall], [Dr. Goodhope] was not able to opine whether the 1991 injury is still contributing to the need for Wetch's treatment." (A.53-88 at A.73).

[4] Dr. Goodhope was subpoenaed by Insurer to have his deposition taken twice in this matter. Both transcripts were admitted into evidence by the DOL at hearing. (H.Ex.118).

H. The DOL Decision and Order

On January 30, 2024, the DOL issued a Decision finding that Wetch had not fraudulently concealed his 2010 injury from Insurer. (A.88). However, the Department also concluded that the 2010 fall caused a change in condition such that Claimant's benefits should be terminated or reduced. (A.87). The Department determined that the 2010 fall was an independent intervening cause that had both aggravated Wetch's work injury and caused new and distinct injuries. (A.87). On April 10, 2024, the DOL issued findings of fact and conclusions of law with an order terminating or reducing Wetch's benefits. (A.21-52). Wetch timely appealed this Decision to the Circuit Court. (R.47-48).

Because the Insurer had admitted that Claimant's work injury was compensable and paid Wetch's medical benefits *after* it learned of the 2010 fall, Wetch argued that Insurer was estopped from arguing a "change in condition" under SDCL 62-7-33 without first establishing that Claimant had fraudulently concealed the 2010 fall. (R.13394-13452). Further, because the medical evidence clearly established the causal connection between the 1991 work injury and Wetch's present condition, Wetch argued the Department erred in finding an independent intervening cause to Claimant's change in condition pursuant to SDCL 62-7-33.

While the Circuit Court identified multiple errors committed by the Department, it affirmed the DOL's conclusion that the 2010 fall aggravated Claimant's work injury, and that the work injury did not contribute to Claimant's need for medical care under SDCL 62-4-1. (A.1-20). As a consequence, the Circuit

Court ordered that Claimant's medical benefits be terminated or reduced. (A.20). Claimant now appeals from the Circuit Court's decision. (RII.1719-1720).

SUMMARY OF THE ARGUMENT

The Circuit Court and the Department erred in allowing Insurer to "pervert the judicial machinery" by taking contrary positions on the same issues before multiple judicial bodies. Insurer's admissions of compensability in earlier proceedings narrowed the window for Insurer to assert a change in Wetch's condition. The Insurer was aware of the 2010 fall in 2018 and 2019, and *still* chose to admit the compensability of the claim before the Department and Seventh Judicial Circuit. Insurer cannot "rewind the clock" to challenge those adjudications collaterally without exceptional circumstances. Res judicata, judicial estoppel, and the "mend the hold" doctrine bar such collateral attacks.

While fraudulent conditions might permit a party to collaterally contest a judgment, SDCL 15-6-60(b)(3), mere neglect by Insurer in investigating the claim is not sufficient. *See Kermmoade v. Quality Inn*, 2000 S.D. 81, 612 N.W.2d 583. Both the Department and the Circuit Court correctly rejected Insurer's fraud theories under SDCL §§ 62-4-47 and 62-4-48, and Insurer has not appealed that decision to this Court. As a result, there was no jurisdiction for the Department or the Circuit Court to reach the "change in condition" question.

Alternatively, both the Department and the Circuit Court erred in misapplying the substantial evidence tying Wetch work injury to his condition. The evidence clearly establishes that the 1991 work injury contributed to both Wetch's propensity to fall and to the location and severity of injury suffered in the fall. Wetch's 2010 fall was a foreseeable and natural consequence of his work

injury. Therefore, the Circuit Court and the Department erred in finding that the work injury did not contribute to Wetch's need for medical care.

ARGUMENT

I. Standard of Review.

The standard of review in administrative appeals is established by SDCL 1-26-36. The standard of review under SDCL 1-26-37 is the same as the standard of review in the circuit courts.

> "Questions of law are reviewed de novo. Matters of reviewable discretion are reviewed for abuse. The agency's factual findings are reviewed under the clearly erroneous standard. The agency's decision may be affirmed or remanded but cannot be reversed or modified absent a showing of prejudice."

Skjonsberg v. Menard, Inc., 2019 S.D. 6, ¶ 10, 922 N.W.2d 784, 787 (citations omitted). The court may reverse or modify the decision if the 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.

SDCL 1-26-36. "The findings will not be disturbed unless [the Court is] left with a definite and firm conviction a mistake has been made." *Bankston v. New Angus, LLC*, 2023 S.D. 27, ¶ 16, 992 N.W.2d 801, 806–07 (citations omitted). However, "findings must be entered 'with sufficient specificity to permit meaningful review.'" *Luze v. New FB Co.*, 2020 S.D. 70, ¶ 26, 952 N.W.2d 264, 272 (quotation omitted).

For an agency's findings of fact admitted only as documentary evidence submitted at hearing, no deference is given to the agency on appeal. "In administrative appeals, we review de novo an agency's findings of fact that are based upon documentary evidence submitted at the hearing, but we review its findings based on live testimony presented at the hearing for clear error." *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 26, 984 N.W.2d 127, 135. This applies to the affidavits and depositions of Dr. Goodhope. This would also apply to the statements and affidavit of Ms. Caffey.

Further, worker's compensation statutes are liberally construed in favor of injured employees. *Anderson v. Tri State Constr., LLC*, 2021 S.D. 50, ¶ 28, 964 N.W.2d 532, 541. This Court has long recognized that worker's compensation statutes are "remedial and should be liberally construed to effectuate [their] purpose." *Moody v. L.W. Tyler, Custom Combiners*, 297 N.W.2d 179, 18. All ambiguities or uncertainties with respect interpretations of statutes shall be construed in favor of Claimant.

II. The DOL Lacked Jurisdiction to Hear Insurer's Request.

For years, Wetch has repeatedly argued that the DOL lacked jurisdiction to hear Insurer's challenges to a settled record. (R.121-156). "'Jurisdiction' in regard

to administrative agencies generally may be defined as power given by law to hear and decide controversies." *Martin v. Am. Colloid Co.*, 2011 S.D. 57, ¶ 10, 804 N.W.2d 65, 67–68 (quoting 2 Am. Jur.2d, Administrative Law § 274 (1994)). This Court has described the jurisdiction of administrative agencies as follows:

> In administrative law the term jurisdiction has three aspects: (1) personal jurisdiction, referring to the agency's authority over the parties and intervenors involved in the proceedings; (2) subject matter jurisdiction, referring to the agency's power to hear and determine the causes of a general class of cases to which a particular case belongs; and (3) the agency's scope of authority under statute.

Id. (quoting *O'Toole v. Bd. Of Trustees of S. Dakota Ret. Sys.*, 2002 S.D. 77, ¶ 10, 648 N.W.2d 342). Here, the Department had personal and subject matter jurisdiction over the parties and the "general class of cases" of workers' compensation fraud under SDCL 62-4-47 and issues under SDCL 62-7-33. However, neither the DOL nor the Circuit Court had jurisdiction to "determine" that which has already been previously decided. *See Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, 922 N.W.2d 784 (discussing the DOL's jurisdiction to enter partial summary judgment, but losing jurisdiction to enter a second order after payment of the benefits had been made.).

While the Department would have had authority to consider the Insurer's arguments regarding "change of condition" had they been timely litigated by Insurer, the Department no longer had jurisdiction once the compensability of the claim was established by Insurer's admission and payment. *See Hayes*, 2014 S.D. 64, ¶ 10, 853 N.W.2d 878, 882; *Skjonsberg*, 2019 S.D. 6, at ¶¶13-16, 922

N.W.2d at 787-88. An admission of compensability necessarily includes an admission of causation. *Westergren v. Baptist Hosp. of Winner*, 1996 S.D. 69, ¶ 11, 549 N.W.2d 390, 394. As a result, the DOL had no *jurisdiction* to re-hear or resurrect "moot" issues. Similarly, the Circuit Court erred in exercising jurisdiction over the "change in condition" issue once there was no equitable basis to collaterally reopen the claim.

A. Res Judicata

The DOL has never attempted to address Wetch's arguments regarding res judicata or estoppel. Although both arguments were made by Wetch in his arguments before and after the hearing, the DOL completely ignored them. The Circuit Court affirmed the Department's decision on these issues even in the absence of any meaningful analysis by the DOL.[5] The Circuit Court erred.

The rule of *res judicata* and estoppel are similar but distinct.

> Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion. Issue preclusion, also known as collateral estoppel, "bars 'a point [that] *was actually and directly in issue* in a former action and was judicially passed upon and determined by a domestic court of competent jurisdiction.'" Claim preclusion bars not only relitigation of issues previously heard and resolved, but *also claims that could have been raised in the earlier proceeding, even though not actually raised.*

[5] In 2022, Judge Klinger dismissed Wetch's Motion for Summary Judgment on procedural grounds. (A.91-104). Judge Klinger's decision included analysis on Wetch's equitable/jurisdictional arguments. The Circuit Court expressly adopted Judge Klinger's decision in its Memorandum Opinion. (A.7).

Hayes, 2014 S.D. 64, ¶ 10, 853 N.W.2d 878, 882. (citations omitted) (emphasis added). Both Issue preclusion and claim preclusion promote fundamental fairness.

> One of the purposes of res judicata is to *protect parties from being subjected twice to the same cause of action*, since public policy is best served *when litigation has a finality*. ... [I]f the prior final judgment or order had been rendered by a court of competent jurisdiction, it "is conclusive as to *all rights, questions, or facts directly involved and actually, or by necessary implication, determined therein*," *whether the court was correct at the time or not*.
>
> We apply four factors to determine whether the doctrine of res judicata bars this appeal: (1) whether the issue decided in the former adjudication is identical with the present issue; (2) whether there was a final judgment on the merits; (3) whether the parties are identical; and (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication.

Moe v. Moe, 496 N.W.2d 593, 595 (S.D. 1993) (emphasis added).

In *Lawrence Cnty. v. Miller*, 2010 S.D. 60, ¶ 24, 786 N.W.2d 360, 369, the South Dakota Supreme Court explained that it had "adopted the broad test in *Hanson v. Hunt Oil Co.*, 505 F.2d 1237 (8th Cir. 1974), for determining if both causes of action are the same." *Id.*, at 0369 - 70. Put simply, "if the wrong sought to be redressed is the same in both actions, then res judicata applies." *Dakota Plains AG Center, LLC v. Smithey*, 2009 S.D. 78, ¶20, 772 N.W.2d 170, 179-80. However, "[w]hen a party to litigation *fails to develop all of the issues* and evidence available in a case, *the party is not justified in later trying the omitted issues or facts in a second action based on the same claim*." *Lee v. Rapid City*

Area Sch. Dist., No. 51-4, 526 N.W.2d 738, 740 (S.D. 1995) (emphasis added) (citation omitted).

Here, all four factors weigh in favor of res judicata. The issue of compensability was decided either directly or indirectly by both the Department and the Seventh Circuit on multiple occasions. There was a final judgment on the issues before the Seventh Court and the Department, and with respect to the Second Contempt Proceeding, the final judgment was dismissed *with prejudice*. *Cf. Hayes*, 2014 S.D. 64, ¶ 10 (discussing how res judicata would not apply to a judgment that is dismissed without prejudice). The parties were the same, and Insurer had multiple opportunities to raise the issues now raised in its Request. As such, both the Department and the Circuit Court erred in declining to apply res judicate to bar Insurer's Request in this case.

B. Judicial Estoppel.

Next, Judicial estoppel is an evidentiary bar that applies in South Dakota workers' compensation cases to protect the fact-finding process by preventing parties from "changing course." *Hayes* explains:

> The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the *intentional assertion of an inconsistent position that perverts the judicial machinery*

2014 SD 64, ¶¶13-14, 853 N.W.2d at 882-83 (emphasis added) (citations omitted). The question the Court looks to answer in deciding whether to apply judicial estoppel is whether the litigant's later position is clearly inconsistent with the earlier one, such that if it were judicially accepted it would create the risk of inconsistent legal determinations that would derive an unfair advantage to the litigant or impose an unfair detriment to the opponent if not estopped. *Id.* at ¶ 15.

In this case, Insurer has "perverted the judicial machinery" by taking contradictory positions on the issue of compensability before the Department, the Circuit Court, and the federal court by admitting the compensability of the claim before one body and denying before another.

Recently, this Court broadly discussed a similar legal concept, "quasi-estoppel" as "an equitable remedy, applicable when a party maintains a position inconsistent with a position previously acquiesced in, or of which the party accepted a benefit, and these inconsistent positions are to another's disadvantage." *Pres. French Creek, Inc. v. Cnty. of Custer*, 2024 S.D. 45, ¶ 16, 10 N.W.3d 233, 240 (citing *Bailey v. Duling*, 2013 S.D. 15, ¶ 31, 827 N.W.2d 351, 362). That is precisely what Insurer has done in this case. Estoppel is "[i]ntended to prevent parties from benefiting by taking two clearly inconsistent positions to avoid certain obligations or effects, the doctrine is sometimes used interchangeably with judicial and equitable estoppel, but it is more closely akin to judicial estoppel." *Id.* The Department and the Circuit Court erred in declining to apply judicial estoppel to bar Insurer's Request.

C. "Mend the Hold" Doctrine

Additionally, Insurer's shifting litigation strategy also violates the long established "mend the hold" doctrine, which prohibits a "perpetual litigation" strategy by a litigant.

> "If the right to shift grounds and adopt inconsistent positions were permissible, there would be *no end of litigation*, for with every defeat a party might change his ground, *mend his hold*, and *proceed indefinitely*."

Pfeifer v. Sheehan, 51 S.D. 611, 216 N.W. 349, 350 (1927) (citations omitted) (emphasis added). Insurer does not get a second, third, fourth, or fifth chance to *change* its reasons for not providing care under the Settlement Agreement. Insurer has "proceed[ed] indefinitely," by admitting defeat before the Department and the Circuit Court and then challenging anew on new defenses and arguments that could have been timely made. *Id. See also Shawver v. Ewing*, 1 F.2d 423, 426 (8th Cir. 1924); *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 362-365 (7th Cir. 1990) (Posner, J. discussing the doctrine in detail and its relation to judicial estoppel). That is exactly what Insurer has done in this case.

Insurer is not permitted to represent to the tribunals of this state that a worker's compensation claim is compensable with its "fingers crossed behind its back."

> [W]e do not feel that it is the intent of workers' compensation statutes to allow employers to *retain new experts to derive new positions based on the same facts contrary to what was previously admitted and judicially accepted, and have the employee again, and continually, bear the burden of proving what was previously settled by agreement or action under SDCL 62–7–12*. Yet, that is what Employer seeks here. Judicial estoppel, however, prevents Employer from intentionally asserting an inconsistent position that would *pervert the judicial machinery*.

Hayes, 2014 S.D. 64, ¶ 20, 853 N.W.2d at 883–84 (emphasis added).

The Circuit Court handwaved Wetch's arguments by noting that Insurer's Request "is the first time the issue of the 2010 fall was presented to the Department in an effort to reduce or terminate benefits." (A.6-7). While it may be true that this is the first time the 2010 fall *was* presented to the Department, it

was not the first time that the issue *could* have been presented. "Claim preclusion bars not only relitigation of issues previously heard and resolved, but also claims that *could* have been raised in the earlier proceeding, *even though not actually raised.*" *Id.* at ¶ 10 (citing *Nemec v. Goeman*, 2012 S.D. 14, ¶ 16, 810 N.W.2d 443, 447 (additional citation omitted) (emphasis added).

The "change of condition" issue could have and should have been raised in earlier proceedings. During the summary judgment proceedings in 2015 and 2016, the Insurer could have, with reasonable diligence, raised the issue in its defense. For example, Insurer could have reviewed Wetch's medical records; discovered the medical records from Dr. Waltman's office in 2010 referencing the fall; and given those records to Dr. Wojciehoski to consider for his IME. Then, Insurer could have then presented its "change of condition" theory in response to Wetch's 2014 Petition. Instead, Insurer chose a different course of action and paid the claim. An inadequate investigation by an insurer does not provide an equitable basis for reopening a worker's compensation award. *See Kermmoade, supra.*

In *Kermmoade v. Quality Inn*, this Court applied res judicata/estoppel to deny an insurer's request to reopen a worker's compensation settlement. *Id.* There, the insurance company for a hotel accepted, processed, paid, and settled a worker's compensation claim made by an employee who worked at the bar/restaurant located inside a different hotel owned by the same company. *Id.*, at ¶¶ 2-3. After the settlement was reached with the injured worker, the hotel's insurance company learned that the claim should have been made to the worker's compensation carrier for the bar/restaurant in the other hotel. *Id.* This Court

rejected the hotel's argument that the carrier "mistake" justified reopening the settlement agreement. *Id.*, at ¶ 20 (stating "Even the most scant of investigations by St. Paul could have determined that their insured, Quality Inn, did not have a Club Vallotte on its premises."). "[A]n innocent injured employee should not be forced to pay for an insurer's unilateral mistake." *Id.*

Insurer had years of opportunities to investigate Wetch's medical history before admitting to the compensability of his condition. It had the right to compel Wetch to sign a medical release. SDCL 62-4-1.3. It chose not to investigate. Instead, it elected to pay Wetch's medical benefits, which rendered the question of compensability moot. *See Skjonsberg*, 2019 S.D. 6, 922 N.W.2d 784. Resolution of compensability necessarily includes resolution of causation. *Westergren*, 1996 S.D. 69, ¶ 11, 549 N.W.2d 390, 394. The Circuit Court's decision to allow reopen these issues undermines the lesson of *Hayes*. The Circuit Court and the Department erred in allowing Insurer to successfully "pervert the judicial machinery." Insurer's Request should be dismissed for lack of jurisdiction.

III. The Circuit Court's Analysis of SDCL §§ 62-7-33 and 62-4-47 Was Clearly Erroneous.

Alternatively, even if the Department had jurisdiction to hear the question of compensability, it still erred in finding that Wetch's 2010 fall was a totally independent, intervening cause of Wetch's need for medical care. Similarly, the Circuit Court misunderstood the significance of Wetch's "aggravation" in the context of SDCL 62-7-33. These two errors are closely related, but distinct.

Under South Dakota law, when dealing with an aggravation of a work injury, the question is "whether the aggravation flowed from the original injury or whether it was caused by an unrelated incident." *Hanson v. Penrod Const. Co.*, 425 N.W.2d 396, 398 (S.D. 1988).

SDCL 62-7-33 provides in pertinent part:

> Any payment, including medical payments under § 62-4-1, ... made or to be made under this title may be reviewed by the Department of Labor and Regulation pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased, or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action...

This statute ostensibly gives the Department authority to modify an injured workers benefits if it finds that the worker's medical condition has changed *since the time of the last award.* However, in *Sopko v. C & R Transfer Co.*, 1998 S.D. 8, this Court explained that it was the intent of the legislature to "disallow agreements foreclosing statutory rights to reopen in the event of changes in condition resulting from undiscovered or *unforeseen* consequences." 1998 S.D. 8, ¶ 13, 575 N.W.2d 225, 231 (emphasis added). In other words, SDCL 62-7-33 only provides an avenue for review of prospective changes in the condition of the injured worker if the change in condition is unforeseeable. However, if an aggravation of a compensable work injury is foreseeable at the time of the settlement agreement, then the claim may not be revisited by the Department.

Neither the Department nor the Circuit Court ever addressed the issue of foreseeability in the context of SDCL 62-7-33.[6]

The Circuit Court's error is likely because Insurer's causation argument is incorrectly framed, which also caused the Department to erroneously apply the "last injurious exposure" rule. As a matter of statutory interpretation, the term "injury," as used in SDCL 62-4-47, refers to the *work* injury, as defined in SDCL 62-1-1.

> In 1992, "injury" under our workers' compensation statutes was defined in SDCL 62–1–1(2) as "only injury arising out of and in the course of the employment, and shall not include a disease in any form except as it shall result from the injury[.]"

Helms v. Lynn's, Inc., 1996 S.D. 8, ¶ 11, 542 N.W.2d 764, 766.[7] Here, Claimant's injury occurred on July 30, 1991. "[T]he law in effect at the time the employee is injured is what controls the rights and duties of the parties in workers' compensation cases." *Sopko*, 2003 S.D. 69, ¶ 12 (citations omitted). In 1991, SDCL 62-1-1's definition of "injury" only required that Wetch's injury arose out of and in the course of the employment.

In this case, Insurer has made no allegation that Claimant's 1991 injury was not related to his work. Whereas Wetch has repeatedly argued that his work

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[6] There is no finding of fact or conclusion of law from the Department on the issue of whether the "injury" arise out of Wetch's employment. (A.21-52). The only reference to this is in the Department's Order, which does not reference SDCL 62-4-47. As the Circuit Court noted, this is likely because the Department was correctly analyzing the Insurer's causation question only through the prism of SDCL 62-7-33.

[7] SDCL 62-1-1 was modified in 1992 by SL 1992, ch. 364, § 4. That change to the definition of "permanent partial disability" is irrelevant to the issues here.

injury contributed to the 2010 fall. In post-hearing briefs, Wetch specifically argued that the 2010 fall had "its origin in the hazard to which the employment exposed the employee while doing his work." (R.13394-13452). The Circuit Court clearly erred in finding that "[n]either party has alleged that the 2010 Fall, arose from, or was in the course of performance of [employment]." (A.1-20).

While the 2010 fall did not occur at work, all medical evidence is that the injuries sustained in 2010 were causally connected to the original work injury. In 1991, the rule for causal connection was minimal. "Before an employee can collect benefits under our worker's compensation statutes, he must establish, among other things, that there is *a causal connection* between his injury and his employment." *Sudrla v. Commercial Asphalt and Materials*, 465 N.W.2d 620, 621 (S.D.1991) (emphasis added). To be compensable, the injury must have "its origin in the hazard to which the employment exposed the employee..." *Id.* (citation omitted). In this case, there is substantial evidence to support that Wetch's fall "had its origin" in his work injury.

Both Dr. Sabow and Dr. Teuber admit that Claimant's 1991 work injury contributes to his falls and fall-related injuries. Falling was a foreseeable consequence of Wetch work injury. At the hearing, both medical experts agreed that Claimant's work-injury-related spastic quadriparesis contributed to Claimant's falls.(R.5504; R.5659). Specifically, Dr. Teuber testified:

> Q Can you say to a reasonable medical certainty that the prone to fall in David Wetch's case arises out of an remains and is related to the original injury and surgery you performed?

> **A Yes, his falls are – yes, his myelopathy contributes to his falls. *In whatever setting he fell*, they absolutely contribute to his falling.**

(R.5659) (emphasis added). Similarly, Dr. Sabow testified:

> **A ... I would say if he didn't have any, quote, prior injuries or cerebral palsy he was more prone to fall down the steps. And if he fell he would be more prone to have a greater likelihood of – he wouldn't be able to stop himself.**

(R.5504). Dr. Goodhope also attributed Wetch's falls to the 1991 work injury.

> Q Would you attribute his falls to his work injury?
> ...
> **A Yes.**

(RII. 1308 at 127:5-8). The substantial weight of this medical evidence underscores the Department's error in concluding that the work injury did not make it more likely for Wetch to fall.

The Circuit Court agreed with Wetch's argument on this point. (A.16) (concluding, "The Court is convinced the Department erred when it determined the 1991 injury and the spastic quadriparesis did not make it more likely for Wetch to fall."). However, later in its Memorandum Decision, Circuit Court contradicts itself by concluding that "the Department did not err in determining his condition caused Wetch to fall..." (A.17). These two conclusions are irreconcilable.

The Circuit Court's contradiction is then compounded by its conclusion that while the Department clearly erred in concluding that Wetch's condition did not make it more likely for Wetch to fall, it was correct in determining that Wetch's work injury did not contribute *at all* to the 2010 fall. (A.17). In so doing,

the Circuit Court effectively preserved a separate but similarly erroneous finding by the Department. In Finding of Fact 136, the Department found: "Besides a generalized assertion that individuals with his conditions are more unstable on their feet, there is no specific evidence that shows that Wetch tried and failed to protect himself from injury due to his condition." (A.40). According to the Department and the Circuit Court, in order to conclude that the 2010 fall was related to the work injury, it was apparently Wetch's burden to show "specific evidence that shows that Wetch tried and failed to protect himself from the injury due to his condition." (A.17).

Setting aside the fact that there is no rule in South Dakota law which would require the extremely specific showing, it is not Wetch's burden of proof to make any showing.[8] More importantly, it is immaterial whether Wetch's condition "prevented him from protecting himself from injury," even though the testimony of the experts established that it does. That issue is a "red herring." The only question on this issue is whether Wetch's condition *contributed* to his falling in the first place. South Dakota's 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. *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 357–58 (S.D. 1992) (citations omitted) (emphasis in original). If the work injury provides *any* source of contribution to the condition complained of, then it is compensable.

[8] The Circuit Court appears to have erroneously shifted the burden of proof to Wetch on the issue of causation. (A.17).

All medical evidence in this case establishes that Wetch's work injury contributed to his falls in whatever setting. Again, during the hearing, Dr. Teuber testified: "Yes, his falls are – yes, his myelopathy contributes to his falls. *In whatever setting he fell*, they absolutely contribute to his falling." (R.5659 at 222:22-25 to 223:1-17) (emphasis added). Dr. Sabow testified similarly. (R.5503 at 50:1-8.). He also opined that the 1991 spinal fusion contributed to the injuries in 2010 by magnifying the sheering forces at the adjacent segments he believes were injured in 2010. (R.6121-6125). *That* is a source of contribution under the 1991 standard.

The Circuit Court's requirement that Wetch must show that he "tried and failed to protect himself due to his injury" is unsupported. The conclusion of the Circuit Court and the Department that Wetch's injury "did not arise out of his employment" is erroneous. Similarly, the Circuit Court's conclusion that "the Department properly found Wetch's injury from the April 2010 fall was not a natural consequence or direct and natural result of his 1991 work injury, but was an intervening cause" is also in error.

The analysis of both the Department and the Circuit Court drifted far from the well-established rules of causation in order to conclude that there is no causal tie between the work injury and Wetch's condition. The general rule as stated in 1 Arthur Larson, Larson's Workmen's Compensation Law, § 13.00:

> When the primary injury is shown to have arisen out of and in the course of employment every natural consequence that flows from the injury likewise arises out of the employment unless it is the result of an independent intervening cause attributable to Claimant's own intentional conduct.

Hamerdierks v. Jensen Gran Co., No. HF No. 4, 1985/86, 1986 WL 218134, at *3. Here, there is no "intervening cause attributable to Claimant's own intentional conduct." There is no finding of negligence by either the Department or the Circuit Court. As a result, there was no basis for the DOL or the Circuit Court to even reach the question of intervening cause.

While the Circuit Court corrected the Department's clearly erroneous application of the "last injurious exposure" rule, (A.13), the Circuit Court misunderstood the reason why the Insurer was urging the DOL to apply the rule in the first place. Insurer's expert had testified that the 2010 fall was an *aggravation* of the original work injury. (R.5530). Once he did, the causal connection between the 1991 work injury and Wetch's condition was all but established because there was no evidence that Wetch had negligently caused his subsequent injuries, and falling was a foreseeable consequence of his work injury.

This rule is best articulated in *City of Sioux Falls v. Michael Dean Barrett*, CIV. No. 94-476, "Memorandum Decision," (S.D. 6th Cir. Ct., Sept. 15, 1995) (Zinter, J., Judge). (A.258-271[9]). There, then-Circuit Court Judge Steven L. Zinter provides a thorough, cogent, and persuasive analysis of these unique cases.

> Considering *Hanson, Detling, Bearshield* and *Larson*, this Court concludes that when a claimant is injured in purely personal activities outside the work place, the claimant must satisfy a two part test similar to that set forth in *Klosterman*. First, a claimant must show that he or she suffered an aggravation of the original work injury which naturally flowed from the original work injury ... There must be a causal connection between the original injury and the new injury or aggravation.

[9] This Memorandum Decision is within the Administrative Record, R.3074-3087; however, Claimant attaches this decision as an appendix for the Court's convenience. (A.258-271).

> Second, when engaged in a purely personal activity, the claimant' subsequent aggravation must not be caused by an independent intervening event attributable to claimant's own lack of due care ... The claimant's conduct must be reasonable in light of his or her condition.

Barrett, at 7-8 (citations omitted). *See also Wilson v. Worker's Compensation Comm'r*, 328 S.E.2d 485 (W.Va. 1984), and *Klosterman v. Industrial Comm'n of Arizona*, 747 P.2d 596 (Ariz. App. 1987). Both prongs of the *Barrett* test are satisfied in Wetch's case.

First, Dr. Sabow's opinion supports both an "aggravation" and the very low "contribution" standard of causation. *See Barrett*, at 8-11. Dr. Sabow testified, "The injury to C2-3 aggravated his previous injury. *Aggravated it.*" (R.5530) (emphasis added). Dr. Sabow also confirmed that the 1991 injury and spinal fusion contributed to the location of the injury and the severity of the 2010 fall by opining that Wetch's 1991 spinal fusion from C3 to C6 magnified the force at the C2-3 and C5-6 vertebral levels (A.34, at ¶ 96), which are the same levels Dr. Sabow believes were injured in the 2010 fall.

That Wetch was a classic "eggshell" Claimant is immaterial. "In South Dakota, 'insofar as a workers' compensation claimant's pre-existing condition is concerned[,] we must take the employee as we find him." *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 22, 984 N.W.2d 127, 134 (citing *Orth v. Stoebner & Permann Const. Inc.*, 2006 S.D. 99, ¶ 48, 724 N.W.2d at 597 (alteration in original). The DOL also accepted Dr. Sabow's opinion that the 1991 fusion "magnified the shearing forces" at the spinal sections above and below the fusion in its findings of fact. (A.34, FOF ¶96). This finding was affirmed by the Circuit

Court. As a result, the fusion also contributed to the injuries in 2010. The causal connection between the work injury and the fall injuries is also established as a matter of law. The Circuit Court conclusion that Wetch's condition was not a natural result of the 1991 work injury is clearly erroneous. (A.19).

Moving to the second prong of *Barrett/Klosterman*, Wetch's activity of opening a door was not negligent. There has been no contrary finding by the Department or the Circuit Court. It was a routine event, "ordinary and customary in light of his condition." *Barrett*, at 11. There was no evidence presented that Claimant failed to exercise due care conducting this "routine activity." *Id.* Wetch had limited mobility, balance, and dexterity due to his work injury, and he had no way of knowing the door handle might give way. Insurer has provided no evidence showing a lack of "due care" when Wetch opened a door, or that he was in any way violating his medical restrictions and guidance. Under *Barrett's* persuasive legal analysis, Insurer's claims fail. The Circuit Court clearly erred in concluding that the fall was an independent, intervening cause of Wetch's medical condition that had no causal connection to his work injury. Relatedly, the Circuit Court erred by affirming the Department's determination that Wetch's medical benefits should be modified or terminated pursuant to SDCL 62-7-33.

VI. The Circuit Court Erred in Finding Mr. Liebschner's Unqualified Opinion Testimony Did Not Prejudice Wetch.

Finally, while the Circuit Court was correct that the "Department erred by overruling Wetch's objection and allowing" Mr. Liebschner's medical causation testimony, it erred in concluding that the Department's error was harmless. *See Maroney v. Aman*, 565 N.W.2d 70, 79 (S.D. 1997). The Department found:

> Dr. Sabow explained that Wetch's history is consistent with a sudden traumatic injury and not merely normal wear and tear with degeneration. He opined that had Wetch's injuries been the result of normal wear and tear with degeneration as opposed to traumatic force, he would expect to see other associated wear and tear, *such as an annular tear which was not present.*

(A.34, at ¶ 94 (emphasis added)). However, Dr. Sabow did not opine as to the presence, or absence, of annular tearing in his October 30, 2020, sworn affidavit. (R.6115-6117). Similarly, Dr. Sabow did not expound upon annular tearing in any capacity during his deposition. Rather, Dr. Sabow merely noted the presence of Myelomalacia in Wetch's 2016 MRI. (R.5848 at 210:9-11). In fact, Dr. Sabow does not directly state that the 2010 fall gave rise to the myelomalacia in his deposition, but rather suggests it in the form of a question.

> **A Yeah, six years later, but there had to be a cause of it. The fact that they didn't identify ceph—the encphalomalacia was seen there afterwards. And we know from the time of this injury to when we see an MRI that shows another area of encephalomalacia, then we have to say, what happened? What caused that other area of encephalomalacia? Well, we have to—we like to get an answer.**

(R.5848 at 210:12-19).

During the hearing before the Department, Mr. Liebschner, and not Dr. Sabow, testified that the absence of annular tearing established a traumatic injury rather than normal wear and tear or degeneration. Dr. Sabow's testimony regarding annular tearing is far more limited than that of Mr. Liebschner. While Dr. Sabow did state that the absence of annular tearing was a "very good sign that this was not normal wear and tear with degeneration[,]" (R.5546, 222:5-6), he

did not attribute the absence of annular tearing to a traumatic injury, nor did the absence of annular tearing definitively substantiate Dr. Sabow's opinion. That testimony came from Mr. Liebschner, who was unqualified to provide it.

While the Circuit Court agreed that Claimant's objection to Mr. Liebschner's testimony was well-founded, the Circuit Court erroneously concluded that Mr. Liebschner's opinion as to medical causation did not prejudice Wetch. Both the Department *and* the Circuit Court relied on Mr. Liebschner's opinion, given that both erroneously attribute the absence of annular tearing to a traumatic fall to Dr. Sabow. The Circuit Court's erred in concluding the Department's error on this issue was harmless.

CONCLUSION

Wetch respectfully requests the Court grant the Appellant's motion for judgment as a matter of law on Insurer's Request. Alternatively, a new hearing is required. The Appellant requests oral argument.

BY: */s/ Nathan R. Oviatt*

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with SDCL 15-26A-66(b)(2). The brief is 41 pages long (exclusive of the table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Certificate of Compliance and Certificate of Service), is typeset in 12-point Georgia font (a proportional font), and contains 9981 words. The Appellant used Microsoft Word to prepare the brief.

Dated this 22nd day of July, 2025.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for appellant, hereby certifies that on July 22, 2025, a true and accurate copy of **APPELLANT'S OPENING BRIEF** was electronically transmitted via Odyssey File & Serve to:

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The original **APPELLANT'S OPENING BRIEF** was mailed by first-class mail, postage prepaid to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. A copy was electronically transmitted via Odyssey File & Serve.

Dated at Rapid City, South Dakota, this 22nd day of July, 2025.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 31059 & 31060

DAVID V. WETCH,
Claimant/Appellant,

v.

MIDCONTINENT MEDIA, INC., Employer/Appellee
and CRUM & FORSTER COMMERICAL INSURANCE, Insurer/Appellee.

APPELLEES' BRIEF

Appeal from the Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable Margo Northrup

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NOTICE OF APPEAL FILED April 17, 2025

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal pursuant to SDCL § 1-26-37, since claimant-insured, David V. Wetch ("Wetch"), is an "aggrieved party" and seeks review of a final judgment of the circuit court finding in favor of Midcontinent Media, Inc. and Crum & Forster Commercial Insurance (collectively, "Insurer"). This Court has jurisdiction to hear this appeal pursuant to SDCL §1-26-37.

II. STATEMENT OF THE ISSUES

(1) Whether this Court should affirm the circuit court's judgment affirming the Department decision on the ground Wetch failed to appeal the legal conclusion that Wetch's April 2010 fall and resulting injuries did not arise out of or in the course of his employment under SDCL § 62-4-47.

Yes.

- *Black Hills Truck & Trailer, Inc. v. S.D. Dep't of Revenue*, 2016 S.D. 47, ¶ 10 n.3, 881 N.W.2d 669
- *People in interest of M.S.*, 2014 S.D. 17, ¶ 17, 845 N.W.2d 366, 370-71

(2) Whether the circuit court, consistent with three other tribunals, properly rejected Wetch's legal argument that the equitable defenses of res judicata, judicial estoppel and mend the hold did not bar Insurer's request made under SDCL § 62-4-47, 62-4-48 and SDCL § 62-7-33, based on a separate circuit court dismissal of Wetch's contempt motion in a matter for which relief was not afforded to Wetch.

Yes.

- *Pham v. Smithfield Foods*, 2025 S.D. 41, ¶¶ 33-34

- *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, ¶ 1, 922 N.W.2d 784, 785

(3) Whether the circuit court correctly affirmed the Department's finding of fact that the April 2010 fall caused a change of condition under SDCL § 62-7-33 and that such a finding does not constitute clear error and further that a review of the evidence does not leave the court with the definite and firm conviction a mistake has been made.

Yes.

- *Zacher v. Homestake Mining Co. of Cal.*, 514 N.W.2d 394, 395 (S.D. 1994)
- *Hanson v. Penrod Constr. Co.*, 425 N.W.2d 396, 398 (S.D. 1988)
- *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 357-58 (S.D. 1992)

(4) Whether the circuit court correctly affirmed the Department in addressing Wetch's belated objection to Insurer's biomechanical engineer's testimony for publishing information from an exhibit in evidence which was cumulative of his earlier received testimony without objection and otherwise consistent with a medical doctor's opinion.

Yes.

- *Andreson v. Black Hills Power & Light Co.*, 1997 S.D. 12, ¶ 19, 559 N.W.2d 886, 890
- *Est. of Lynch v. Lynch*, 2023 S.D. 23, ¶ 22, 991 N.W.2d 95, 104, *reh'g denied* (June 27, 2023)

III. STATEMENT OF THE CASE

This case began more than three decades ago after Wetch suffered an injury at work in which he tipped backward in his chair resulting in "pressure on his neck" after coming into contact with a wall.[1] Wetch did not seek medical assistance at the time; instead, he finished his workday and even continued to work over the next several months before feeling "numbness and weakness" that later was addressed in surgery. Wetch and Insurer entered into a settlement agreement in 1994 in which an indemnity claim was fully settled but medical benefits were left open. By the following year, in 1995, Wetch was doing "very well" and walking "miles a day," living a mostly active lifestyle which continued over the next 15 years in which Wetch sought very little medical care beyond annual checkups. Wetch fully stopped submitting medical bills and made no requests for medical treatment to Insurer for several years, beginning in 2006.

On April 6, 2010, Wetch suffered a traumatic fall (April 2010 fall) in which he was hurled backward down a flight of stairs at his apartment building after a fire door handle suddenly broke. Wetch crashed his head into sheetrock at the bottom of the stairs, creating a hole nearly the size of a soccer ball. The April 2010 fall rendered Wetch unconscious and necessitated him to be rushed to the hospital by ambulance. A CT scan on the same day revealed entirely new injuries to his cervical spine compared to his 1991 work injury. Over the next year, Wetch's condition rapidly deteriorated, causing him to seek and use powerful opioids and rendering him wheelchair-bound, ultimately requiring

[1]Defendants/Appellees will adopt Claimant's/Appellant's citation form. "R." refers to the first volume and "R. II." the second volume of the settled record in File No. 31059. "RR" refers to the first volume and "RR. II" refers to the second volume of the settled record in File No. 31060. "H. Ex." refers to Hearing Exhibits. "A" refers to the Appendix. "HT" refers to the hearing transcript from the Department May 9-12 hearing.

him to have extensive physical therapy and additional surgery and leaving him in need of supervised living conditions and a life care plan.

Not long after the April 2010 fall, Wetch again began seeking workers' compensation benefits from Insurer, but now in unprecedented amounts. Wetch did not disclose the April 2010 fall to Insurer. Wetch instead filed a petition in the Department of Labor ("Department") and secured interlocutory letter decisions granting partial summary judgment on discrete medical care items. Throughout this process, Wetch did not disclose the April 2010 fall to Insurer nor to an independent medical examination ("IME") doctor who evaluated him, the Department that heard his complaints, or even his own treating physician, Dr. Goodhope. Wetch claimed to Insurer that all post-April 2010 fall medical treatments were needed because of the 1991 work injury, even though the costs after the April 2010 fall increased by a staggering 56,655%.

In April 2017, Wetch filed a bad faith action against Insurer in the South Dakota federal court during the course of which Insurer discovered the April 2010 fall for the first time. The South Dakota federal court found the Department letter decisions were not final orders and, in any event, it found significant facts had come to light such that judicial estoppel should not apply. The South Dakota federal court entered an order directing Insurer to "return [] to the [Department] and seek[] to reopen [Wetch's] earlier claims either as fraudulent (for failing to disclose the 2010 fall) or as neither reasonable nor necessary medical care (because of the intervening 2010 fall) under § 62-7-33." (R. 563). Insurer complied.

Insurer filed a request to review medical care pursuant to SDCL § 62-7-33 and for a hearing following an investigation pursuant to SDCL §§ 62-4-47 and 62-4-48 ("Insurer's request") in the Department (R. 91-94). Insurer's request came before the

Department for a full hearing with multiple fact and expert witnesses testifying in the trial held May 9-12, 2023 (R. 12-36 ¶¶ 1-177).

On January 30, 2024, the Department issued its decision and, on April 10, 2024, the Department issued its findings of fact and conclusions of law and order (the "April 2024 Order") in which it found and concluded: (a) "[Wetch's] injury from [the] April 2010 fall was not a natural consequence or direct and natural result of his 1991 work injury, but was an independent intervening cause of his condition"; (b) "Insurer has shown in respect to [Wetch's] April 2010 fall that [Wetch's] injury did not arise out of or in the course of his employment"; and (c) "[a] change in condition of [Wetch] has occurred." (R. 57-58).

On May 1, 2024, Wetch filed a notice of appeal of the April 2024 Order to the circuit court. On March 18, 2025, the circuit court entered a Memorandum Opinion and Order ("March 2025 Order") affirming the Department's April 2024 Order. Wetch appealed the March 2025 Order to this Court identifying three issues for appeal.

Wetch argues the circuit court erred in affirming the Department's April 2024 Order: (1) by declining to apply the doctrines of res judicata, judicial estoppel and mend the hold to preclude the Department from considering a change in condition; (2) by finding a change of condition in Wetch had occurred "under SDCL § 62-7-33"; and (3) by concluding it was harmless error for the Department to allow Insurer's biomechanical engineer to (allegedly) testify on "medical causation."

Wetch's issues on appeal are without merit. The record will show: (1) three different tribunals—the Department, circuit court and South Dakota federal court—each properly rejected Wetch's legal argument that equitable defenses of res judicata, judicial estoppel and mend the hold barred Insurer's statutory claims in this case; (2) the

Department's finding of fact that Wetch had a change of condition, which was affirmed by the circuit court, was not clear error or a decision leaving the definite and firm conviction that a mistake has been made; and (3) testimony of Insurer's biomechanical engineer was cumulative of testimony he had given before without objection and involved him essentially publishing content from an admitted exhibit consistent with the testimony of a medical doctor.

The March 2025 Order affirming the April 2024 Order of the Department should be affirmed.

IV. STATEMENT OF THE FACTS

A. 1991 Work-Related Injury and Aftercare

"On July 30, 1991, Claimant suffered a work-related injury" in Rapid City, South Dakota when "the chair he was sitting on" tipped back and "put [] pressure on his neck from the cement wall behind him." (R. 13 ¶ 1). Wetch "stayed and finished his workday." (R. 13 ¶ 1). Wetch continued working for several months and "did not seek medical care until December 1991." (R. 13 ¶ 1). Wetch was also "born with cerebral palsy." (R. 13 ¶ 1).[2]

"On December 4, 1991, Claimant had an MRI at Rapid City Medical Center, which revealed spinal stenosis at the **C3-5 level** of his spine." (R. 13 ¶ 3) (emphasis added).

"On December 5, 1991, Dr. Larry Teuber performed a surgical fusion of Claimant's C3-C5 sections of his cervical spine." (R. 13 ¶ 4). At the time of the cervical

[2] Wetch is a current resident of Sugarland, Texas (R. 5722 at 5:24-25).

fusion, Wetch's **C2-C3** level was "**normal**" and **C5-C6** level had "**no** cord compression or **narrowing**." (R. 14 ¶ 7) (emphasis added).

"In February 1992, Claimant informed Dr. Teuber that he had improved considerably and that his strength and gait had improved." (R. 13 ¶ 5). Wetch told Dr. Teuber that he (Wetch) "had no neck pain." (R. 13 ¶ 5). "Dr. Teuber concluded that the fusion had gone well and opined that Wetch could go back to light duty work." (R. 13 ¶ 5).

"As of May 1992, Dr. Teuber opined that Wetch had essentially stabilized. He found no loss of function following the fusion and did not detect progressive weakness of Claimant's upper extremities." (R. 13 ¶ 6).

"On September 10, 1992, Dr. Teuber opined that MRI reports showed Claimant's spine at C2-3 was **normal** with no indication of myelomalacia." (R. 14 ¶ 7) (emphasis added). "The MRI also showed no evidence of cord compression or myelomalacia at C5-6 level." (R. 14 ¶ 7).

"As of February 1993, Dr. Teuber noted that a myelogram revealed that Claimant was doing well after his fusion surgery and there were no negative changes of spinal stenosis." (R. 14 ¶ 10). "[Dr. Teuber] noted **no indication** of myelomalacia at C2-3 or C5-6." (R. 14 ¶ 10). "He opined that based on imaging, [Wetch] was stable, and the cervical spinal canal had been decompressed successfully." (R. 14 ¶ 10).

B. The 1994 Stipulated Agreement

"On November 8, 1994, the Department approved the Stipulated Agreement as to Compensation and Total Disability" ("Stipulated Agreement") regarding Wetch's claim (R. 14-15 ¶ 13). *See also* R. 168-169. Under the Stipulated Agreement, Wetch was not affirmatively granted "benefits allowable pursuant SDCL 62-4-1," but Insurer agreed that

nothing in the Stipulated Agreement affirmatively "impairs" Wetch from receiving benefits in the future under SDCL § 62-4-1 (R. 14-15 ¶ 13). *See also* R. 168-169 ¶¶ 9, 10(f).

C. Wetch's Condition Stabilizes After the 1991 Work-Related Injury

After Wetch's workers' compensation case was settled in November 1994, Wetch's condition improved dramatically (R. 15 ¶ 14).

By May 25, 1995, Wetch's neurologist, Dr. Brian Tschida, noted Wetch "had informed him that he had completed a 5k walk down in Texas." (R. 15 ¶ 14). *See also* R. 9460 (Wetch "reported walking two miles, six days a week.").[3] On September 26, 1995, Wetch "completed physical therapy related to his work injury," for which he only sporadically had treatment prior to that point (R. 15 ¶ 15). *See also* R. 5538-5539 at 192:20-195:11; R. 6494-6666 (H. Ex. 65).

On July 31, 1996, Dr. Tschida observed Wetch "was doing well, walking a couple of miles a day, and using Nautilus equipment maybe 2 days per week." (R. 15 ¶ 16). Wetch "reported he felt he was doing well." (R. 15 ¶ 16). On August 1, 2005, Dr. Tschida saw Wetch and again noted he reported he was doing "pretty well," was on "no medications," and had "his own apartment and was planning on accompanying his friend hunting in the fall where he would be able to sit as needed." (R. 16 ¶ 21); *see also* R. 6414 ("[Wetch] notes that he is doing pretty well. He is currently on no medications . . . goal of . . . go[ing] out with a friend to hunt this fall[.]").

[3] Insurer includes certain record citations to show the Department's finding of facts relating to a change in condition are supported in the record.

D. Wetch's Absence of Contact With Insurer

"After October of 2006 . . . Insurer was not contacted by Wetch or anyone on his behalf for assistance and no further medical bills were submitted for any treatments for Wetch" until after the April 6, 2010 fall (R. 16 ¶ 23). "On February 18, 2010, Insurer's Claim Specialist Linda Hanke ('Hanke') sent a letter" to Wetch "advising him she would be taking over his file, asking him to contact her with any questions, and expressing thanks in advance" for his "anticipated cooperation." (R. 17 ¶ 27). Wetch did not respond (R. 17 ¶ 27). At that time, Insurer had no record of Wetch "receiving any treatment since 2006 and before that he had been going in for a physical or something every other year." (R. 32 ¶¶ 149-150). As of the time immediately before the April 2010 fall, Wetch had not required physical therapy for almost 15 years—since September 26, 1995 (R. 15 ¶ 15); *see also* R. 5605 at 7:15-8:3; 8:12-21; R. 6697 (H. Ex. 147a), R. 6494-6505 (H. Ex. 65).

Before the April 2010 fall, Wetch was living independently, caring for himself, and driving without hand controls (R. 5730 at 37:15-17) ("I had my own apartment"); (R. 6412) ("[Wetch] is now driving again. He does not have hand controls."); (R. 5605 at 7:15-8:3) ("[T]here hadn't been any treatment since 2006"). Wetch further admits he did not need a wheelchair or walker at that time (R. 5736 at 62:8-17); (R. 3777 at 15:14-17) (Wetch "not . . . required to be in a wheelchair at that point"); (R. 6413) (Wetch "able to ambulate without the cane[.]").

E. The April 2010 Fall

On April 6, 2010, Wetch suffered a fall "when the door handle broke off the metal fire door he was attempting to open" in "the stairwell of his apartment complex." (R. 17 ¶ 28). *See also* R. 3777-3778 at 28:7-13; 29:4-7, 13-16. The Department found Wetch's "recounting of the mechanics and the severity" of the fall and "where he was at the time

of the injury" to be "inconsistent." (R. 20 ¶ 55). At the hearing, Wetch testified he was "at the bottom-right" door when the incident occurred (R. 20 ¶ 52). However, at his deposition on March 2, 2021, Wetch testified he was trying to open the door at "the top-left of the [stairwell]." (R. 20 ¶ 52); *see also* R. 3778 at 29:13-19.

After he fell, Wetch was "found by a neighbor," Tina Marie Caffey, who was "leaving her second-story apartment." (R. 17 ¶ 30). Caffey observed Wetch "laying at the bottom of the stairs and that she saw a hole in the sheetrock where he had hit his head." (R. 17 ¶ 33). "The hole was between the size of a softball and a soccer ball." (R. 17 ¶ 33). The Department made these finding of fact:

> The Emergency Medical Service (EMS) report noted, in pertinent part, "called on 911 for an emergent response . . . for a fall downstairs. neck pain from fall. 45[-year old] male trying to get into door when handle broke causing [patient] to fall backward striking back and head on wall breaking sheetrock." Patient was immobilized, given oxygen, and transported to the emergency room (er) by the rescue squad on a stretcher to Rapid City Regional Hospital.

(R. 17-18 ¶ 35); *see also* R. 6289 (capitalization in original omitted).

At the emergency room ("ER"), Wetch "was diagnosed with a closed head injury and cervical strain." (R. 18 ¶ 37). "A CT scan taken at the ER showed the fusion at C3-5 was solid, but that there was marked narrowing at the **C2-3** and a further narrowing at **C5-6** and below." (R. 18 ¶ 38) (emphasis added). *See also* R. 6405-6406 ("Marked narrowing" C2-3; "Mild disk narrowing" C-5). "The ER prescribed [Wetch] Flexeril and Tylenol with codeine" for his injuries (R. 21-22 ¶ 65).

Additionally, "both EMS and Rapid City Regional Hospital noted alcohol on [Wetch]." (R. 18 ¶ 40); *see also* R. 6288-6290 ("Alcohol, yes"); (R. 6291-6296) ("alcohol"); (R. 5747 at 105:5-13; 108:5-9). Wetch admitted "he had [] driven his stepfather to a local bar and stayed with him for several hours." (R. 18 ¶ 41);

(R. 5746-5747 at 104:15-105:22; 107:13-108:4). The Department reported Wetch had "**theorized** that he may have put his arm on the bar and alcohol may have been on his coat." (R. 18 ¶ 41) (emphasis added). *See also* R. 5747 at 105:5-13; 108:5-9.

F. Changes in Wetch's Condition and Medical Needs Following the April 2010 Fall

1. Wetch Filed Property Insurance Claim

On April 15, 2010, only days after the April 2010 fall, "Wetch … did report the April 2010 fall to the apartment's property insurance" carrier. (R. 36 ¶175) (H. Ex. 10). Wetch admits the April 2010 fall "did not arise out of [his] employment" at Midcontinent Media Inc (R. II 382 at 21:2-17).

2. Wetch Is Prescribed Powerful Opioids After April 2010 Fall

On April 12, 2010, Wetch "visit[ed] Dr. Waltman," an earlier treating physician, who commented Wetch told him about the April 2010 fall from the previous week, that "he hit his head, and may have been briefly unconscious." (R. 20 ¶53). Wetch testified at hearing that "following the April 2010 incident," he "had a year of not doing well, but he made his way by using substances and other things until he could not take it anymore." (R. 22 ¶66). *See also* R. 5730 at 38:8-39:17 ("A. [Wetch:] I was trying to self-medicate . . . .").

Between the April 6, 2010 fall and his first visit to a new treating physician, Dr. Goodhope, on April 25, 2011, Wetch was on "hydrocodone four to five days a week," which he had been receiving from Dr. Waltman over that year (R. 22 ¶68).

After a long period of regularly walking many miles per day (including a 5K) before the April 2010 fall, Wetch appeared to Dr. Goodhope in April 2011 in very poor and weak condition and he did not report the April 2010 fall and observed his new "main

goal[] in life" at that time was "to be able to walk a block." (R. 32 ¶143). *See also* R. 6277-6284; R. 33 ¶156.

3. Wetch Began Again To Seek Benefits From Insurer

On July 12, 2011, Insurer's representative (Hanke) "received a call from Alanna Turnbaugh (Turnbaugh), a long-time family friend" of Wetch, who falsely "represented herself as Claimant's sister." (R. 23, 33 ¶¶ 78, 151). Wetch, through Turnbaugh, reported "the pain in his neck . . . is really bad." (R. 33 ¶ 153); *see also* R. 5606 at 11:15-12:11. Turnbaugh "did not" disclose "the April 2010 fall." (R. 23, 33 ¶¶ 80, 155); *see also* R. 5607 at 16:16-19.

4. Wetch IME Physician Finds April 2010 Fall To Be Significant Trauma

After receiving a letter dated August 1, 2011 from Wetch's treating physician, Dr. Goodhope, Insurer scheduled an IME for Wetch (R. 23-24, 33 ¶¶ 81, 158). "The IME took place on January 20, 2012, with Dr. Randall Wojciehoski," a Board-Certified Internal Medicine and Emergency Medicine physician (R. 34 ¶ 161). "Dr. Wojciehoski specifically wanted to know if there were any other traumatic events before or after the work incident." (R. 34 ¶ 163). Wetch "did not mention the April 2010 fall." (R. 34 ¶ 164); R. 3839 at 38:6-9. Once informed about the April 2010 fall, Dr. Wojciehoski "opined that the April 2010 event was a significant trauma event that led to the deterioration of Claimant's condition." (R. 34-35 ¶ 166).

5. Wetch's Condition Continues To Deteriorate

"In 2013, Dr. Goodhope ordered a formal 'life care plan' for Claimant as well as a wheelchair, supervised living services with live-in aide, a modified dwelling, van with modifications, specialty bed, and other medical equipment." (R. 24 ¶ 85). Eventually,

"Claimant was referred to a neurosurgeon, and in July of 2016, he underwent surgery" of the cervical spine at C2-3 and C5-6 (R. 24 ¶ 88); *see also* R. 6106-6108 (H. Ex. 6).

G. Wetch's Petition for Review and Nonfinal Partial Summary Judgment Orders

On or about March 25, 2014, Wetch filed a petition for hearing with the Department seeking medical benefits (R. 24 ¶ 86). At the time Wetch filed his petition, he had possession of records disclosing the April 2010 fall (via his legal counsel) but they were not provided to Insurer and Insurer did not have this information (R. 6667-6694; R. 5553-5554 at 251:23-252:9; 254:1-16).

Before the Department, Wetch represented in partial summary judgment filings his need for treatment was "all related to the 1991 work injury," that his physical condition had "not changed" since his 1991 injury and there is "no basis in law or fact" for challenging his claims (RR. 113, 128 and 133). Insurer repeatedly rejected these blanket assertions, including noting Insurer's right to "investigate compensability," conduct a "further investigation" and deny claims not "related to … compensable injury" (R. 246, 262, 282). Insurer also argued from the outset that "discovery is necessary," certain treatments "remain[ed] subject to dispute" and that Wetch did not have "carte blanche" to anything he wanted (R. 237, 242).

The Department entered four letter decisions approving partial summary judgment regarding certain discrete matters related to Wetch's care but, despite invitation from the Department, Wetch did not at any time seek or obtain a final order (R. 322-328).

H. Civil Contempt Matters and Mootness

On May 11, 2018, Wetch filed a motion to show cause in the South Dakota circuit court (Judge Davis) seeking civil contempt (R. 440-447 p. 1). Months before the

scheduled hearing on Wetch's motion, Wetch stated there were only "two" issues to be decided in the contempt action (he vaguely described them as "transportation" and "dwelling unit") (R. 2164 Ex. 41¶1). Wetch admitted both issues were the subject of a "pending motion" before the Department (R. 2164 Ex. 41¶1).[4]

Significantly for these purposes, six months **before** the motion to show cause came on for hearing, Insurer gave notice to Wetch and the Department it had recently learned about the April 2010 fall, stating specifically Insurer planned to seek discovery "regarding a serious injury to Wetch occurring in April 2010, which was not revealed to [Insurer] or the Department at the time the Department entered important partial summary judgment orders in this matter." (R. 338-354 p. 15, n.7).

On September 17, 2018, Wetch and Insurer appeared in the circuit court to discuss limited discovery to be taken before the motion to show cause was to be heard (R. 5066, 5072). Wetch advanced his "perversion" of judicial machinery contention, stating: "It's a nice fiction that they are telling the [circuit] [c]ourt here . . . They're res judicata. They're barred by judicial estoppel. It's perversion of the judicial process." (R. 5066-5111 at 23:5-6; 32:14-25). But the circuit court strongly disagreed, pointedly responding "[e]verything they present . . . is not an absolute fiction" (R. 5108 at 43:13-20). The circuit court observed, for example, it had a "problem" with Wetch "morphing" his "prescription" for transportation in the contempt proceeding into a "24/7 chauffer" and that this type of issue "need[ed] to be fleshed out" by the Department (R. 5108 at 43:13-20).

[4] Insurer also argued Wetch's motion should be perfunctorily dismissed since the claim was not "clear, specific, and unambiguous" as required to allow for purging of contempt (R. 448-456 at 3).

Repeating comments made earlier, the circuit court noted its jurisdiction is limited to "enforcement" and the Department "is in charge of compensability" (R. 5107-5108 at 42:23-43:5; see also (R. 5104 at 39:8-17 and 44:18-23). Because it was a "contempt action," Insurer indicated it "would continue to make payments **until** there is clarification **or a change of that**" (R. 5080 at 15: 7-9) (emphasis added).

On November 27, 2018, four months before the hearing, the "two" issues identified by Wetch for contempt were declared by the Department to be "moot" based on Wetch's admissions (R. 445 at 5 ¶17; R. 2164 Ex. 41¶1; R. 3931 at 54:13-18).

On March 25, 2019, the parties appeared before the circuit court (Judge Davis) on the motion to show cause, mostly as a formality to bring the matter to an end since the only two issues identified by Wetch no longer existed (R. 472-478; R. 481). The parties and Judge Davis engaged in an informal discussion about a few unrelated small repair recommendations ("flooring," a "[door] peep hole and the handles in the kitchen") not addressed by the Department for which Wetch also needed approval from the "building owner allowing [them] to be done" (R. 472-478).

Wetch had asked for sanctions relief ancillary to the "two issues" rendered moot by the Department so Insurer "ask[ed] that the motion to dismiss" Wetch's action "be granted" because "Wetch cannot prove a prima facie case of contempt" (R. 2164 Ex. 41¶1; R. 440-456; R. 474 at 8:23-9:2; R. 481). The circuit court (Judge Davis) agreed and dismissed Wetch's action (R. 481).

I. Wetch's Federal Lawsuit and Insurer's Request Under SDCL § 62-4-47 and 48

1. South Dakota Federal Court Order

On or about February 25, 2020, the South Dakota federal court (Judge Viken) entered the federal order in the federal bad faith action brought by Wetch denying Wetch's motion for summary judgment (R. 499-565 at 14-15). The federal order and the Department letter decisions were not final orders and judicial estoppel did not apply to the April 2010 fall:

> There are significant facts which came to light after defendants' admission of liability for the four items [in the first motion to show cause] such that judicial estoppel should not apply . . . . The same logic applies to the court's analysis of Mr. Wetch's fourth motion for partial summary judgment before the DOL. Defendants' response to plaintiff[']s fourth motion for partial summary judgment may well have been the **result of mistake or inadvertence** . . . [and] the language of the DOL's last order in Mr. Wetch's case makes clear that it is not a final order and that his petition remains pending . . . . [T]he **DOL's order** upon which Mr. Wetch wishes to base his claim of res judicata is **not a final order**.

(R. 551, 553 at 53, 55) (emphasis added).

Based on these findings and conclusions, the South Dakota federal court sua sponte stayed Wetch's action and directed Insurer to "return[] to the DOL [Department] and seek[] to reopen Mr. Wetch's earlier claims, which are the basis of his bad faith cause of action, either as fraudulent (for failing to disclose the 2010 fall) under § 62-4-47 or as neither reasonable nor necessary medical care (because of the intervening 2010 fall) under § 62-7-33" (R. 563, 565 at 65, 67).

2. Insurer Requests Under SDCL § 62-7-33 and SDCL § 62-4-47/62-4-48

On March 27, 2020, Insurer timely filed Insurer's request seeking permission from the Department to investigate and have a "hearing pursuant to SDCL § 62-4-47 and

62-4-48," and to "grant [Insurer's] request to review medical care/payments pursuant to SDCL § 62-7-33." (R. 90-94).

3. Wetch's New Motion for Summary Judgment and Appeal

On September 16, 2020, Wetch filed a new motion for summary judgment in the Department in response to Insurer's request (R. 121-157). On August 5, 2021, Insurer filed an opposition to Wetch's motion showing the South Dakota federal court had directed Insurer to file Insurer's request or lose the opportunity (R. 1776-1883). On January 19, 2022, the Department denied Wetch's new motion for summary judgment and Wetch filed a notice of appeal to the circuit court (R. 3434-3435). On June 21, 2022, the circuit court denied Wetch's appeal (R. 5137). On July 19, 2022, Wetch filed a petition in this Court seeking an interlocutory appeal (R. II. 43-59). On August 19, 2022, Wetch's petition was denied (R. II. 60).

J. Hearing Before Department on Insurer's Request

1. Location and Mechanics of the April 2010 Fall Are Without Doubt

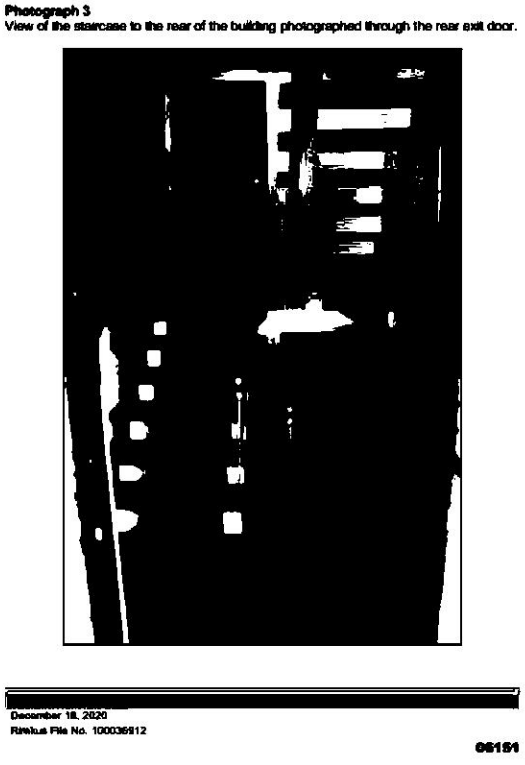
a. Dr. Liebschner's Biomechanical Study

On May 9, 2023, Insurer's Request came on for hearing before the Department (R. 12, 13654 ¶ 1). During the hearing Wetch testified ***for the first time*** (directly contrary to his prior deposition testimony and the EMS report) that the April 2010 fall had occurred in the "basement" of his apartment building (R. 5737 at 66:17-20) (Wetch's new testimony at the hearing was "I was downstairs in the basement[.]"); (R. 19 ¶ 46).

Insurer presented substantial testimony and physical evidential support through Dr. Michael Liebschner, who appeared as a live witness at the hearing to offer his expert opinion on the biomechanics of Wetch's fall in April 2010 (R. 18 ¶ 42). "Dr. Liebschner is a biomechanical engineer and forensic investigator . . . and a professor in the

department of neurosurgery at Baylor College of Medicine." (R. 18 ¶ 43). The Department observed "[Dr. Liebschner] has over 30 years of experience in analyzing and teaching biomechanics of the spine and evaluating the forces and dynamics of injury." (R. 18 ¶ 43).

The Department found "Dr. Liebschner performed a biomechanical analysis and reconstruction of the April 2010 incident." (R. 18-19 ¶ 44; R. 5409 at 112:20-25). Dr. Liebschner "produced an animated reconstruction of the April 2010 fall." (R. 18-19 ¶ 44); *see also* R. 6209-6270.



(R. 06151).

The Department found "Dr. Liebschner opined that the fall resulted in significant biomechanical loading of Claimant's head and neck that was about nine times more

severe than the 1991 incident." (R. 19 ¶ 45); *see also* R. 5414 at 132:6-17. "[Dr. Liebschner] testified that he tested all different combinations then determined which combinations are most consistent with the incident and the reported damage to the sheetrock." (R. 19 ¶ 45); *see also* R. 5414 at 131:10-22. "[Dr. Liebschner] tested the force that would be required to break sheetrock and determined the amount of force consistent with Claimant sustaining a head impact that resulted in a loss of consciousness." (R. 19 ¶ 45); *see also* R. 5414 at 131:10-22. "[Dr. Liebschner] concluded an acceleration between 68 and 100 G and a rotational acceleration between 3,700 and 5,500 would be required." (R. 19 ¶ 45).

"Dr. Liebschner concluded that the April 2010 fall could not have occurred in the basement as Claimant claimed at hearing based on the geometry of the staircase and the area where Claimant claimed his back hit the wall ledge." (R. 19 ¶ 46).

b. Record Review for Acute Injury or Degenerative Process

"[Dr. Liebschner] reviewed medical records" and biomechanical authorities as background for his biomechanical evaluation whether the April 2010 fall is "consistent with . . . a single overload event meaning a **traumatic injury** [i.e., acute event,] **not** a degenerative process." (R. 18-19, 29 ¶¶ 44, 120) (emphasis added).[5]

Dr. Liebschner initially testified, without objection, the "annulus" is identified in medical records and that no annular tearing was shown, consistent with an acute event (R. 5417-5418). Dr. Liebschner was called in rebuttal and repeated his prior testimony, essentially that "annulus" is stated in a medical record in evidence, but this time Wetch

[5] Biomechanical peer-reviewed research was received in evidence (R. 6321-6346) (referring to "annular tears").

made a belated objection which the Department overruled (R. 5770-5772 at 197:5-207:9; 199:11-18).[6]

c. Private Investigator's Site Visit and Review

Bryan Schnell ("Schnell"), a veteran private investigator in Rapid City and prior contract claims investigator for the State of South Dakota, also "conducted a visit of the incident site, took measurements and photographs, and spoke with potential witnesses" (R. 17, 19 ¶¶ 31, 48); (R. 5390-5391 at 34:7-36:8; 38:4-6). Schnell testified live at the hearing that "the upstairs door handle looked to be newer as if it had been replaced." (R. 20 ¶ 49; R. 5399 at 71:5-16). "The door on the bottom floor looked to be original equipment." *Id.* "[Schnell] also explained that he thought the only downstairs wall on which Claimant could have hit his head was not made of sheetrock." (R. 20 ¶ 49; R. 5399 at 69:15-22).

2. Live Medical Expert Testimony Regarding Wetch After April 2010 Fall

a. Dr. Sabow

Insurer offered the expert medical testimony of Dr. John Sabow, who appeared live at the hearing (R. 24 ¶ 89). Dr. Sabow was "a forensic neurologist based in Rapid City" and "a licensed physician and practicing neurologist since 1972." (R. 24 ¶ 89); *see also* R. 5446 at 258:3-259:3). *See also* R. 6115-6136.

Dr. Sabow "opined that prior to the April 2010 fall, Claimant's condition was in a steady, stable state that was not deteriorating." (R. 24 ¶ 89); *see also* R. 5448 at 266:5-19.

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[6] Without reviewing H. Ex. 6 (2016 operative report), Dr. Teuber speculated "there is **probably** no annulus left" (R. 5673 at 280:18-24) (emphasis added). Dr. Sabow was present when Dr. Liebschner testified and confirmed his own review that the annulus did not have any annular tearing (R. 5546 at 222:2-9; R. 5417-5418 at 142:17-25, 144:12-147:22; R. 5770 at 197:24-198:12).

He further "opined that the April 2010 fall was a new and distinct injury that is separate and distinct from the 1991 injury." (R. 24 ¶ 90); *see also* R. 5450-5451 at 273:2-274:19; 275:2-276:8; 277:17-25). Dr. Sabow "further opined that the April 2010 fall was the cause of Claimant's subsequent neurological deterioration." (R. 25 ¶ 91); *see also* R. 5450 at 276:13-22. "Imagery after the April 2010 fall showed that Claimant had suffered injuries in two new areas of the spine at C2-3 and C4*[sic]*-6." (R. 25 ¶ 91). *See also* R. 5448-5449 at 268:25-269:19; 270:4; 271:6-9; R. 6405-6406.

Dr. Sabow explained Wetch's "2016 MRI," unlike prior reports, "revealed cord myelomalacia at C2-3 and C4-5, and broad-based disc protrusion with severe right and moderate left foraminal narrowing compressing the exiting C6 nerve roots at C5-6." (R. 25 ¶ 93). Dr. Sabow also found that "Wetch's history is consistent with a sudden traumatic injury and not merely normal wear and tear with degeneration." (R. 25 ¶ 94).

b. Dr. Teuber

Wetch's treating physician back in 1991-92 and hearing expert, Dr. Teuber, also testified live at the hearing (R. 13, 26-27 ¶¶ 4, 105). Dr. Teuber attempted to advance the view "Claimant had developed adjacent segment disease as a result of the block fusion which eventually degenerated to the point of causing stenosis." (R. 26 ¶ 102). Dr. Teuber stated "the alleged adjacent segment disease ultimately resulted in the need for a second surgery which was performed in 2016." (R. 26 ¶ 103).

The Department found, in comparing Dr. Teuber's analysis with Dr. Sabow, that "Dr. Sabow's conclusions are better supported and more consistent with the medical record, specifically regarding whether Wetch's condition was related to deterioration caused by adjacent segment disease." (R. 29 ¶ 125). Dr. Teuber also was repeatedly impeached during the hearing with his video deposition, making multiple misstatements

(*see, e.g.*, R. 27 ¶ 107; R. II. 442 at 101:14-17, 19-25; R. 27 ¶ 111; R. 5672 at 274:2-14; 275:5-14; R. II. 432-433 at 64:21-65:5; 65:9-66:1; R. II. 427 at 42:22-43:2; R. 5664 at 243:2-19; R. II. 422, 441 at 22:15-22; 99:2-7).

In any event, even "Dr. Teuber confirmed that prior to the April 2010 fall, Claimant was in a strong stable position." (R. 26 ¶ 104; R. II. 436 at 77:19-78:2). "[Dr. Teuber] concluded at hearing that Claimant's April 2010 injuries were new and distinct injuries from the 1991 work injury." (R. 26 ¶ 104; *see also* R. II. 437 at 82:2-8). "Dr. Teuber was asked at hearing if he agreed that the April 2010 fall was not a direct and natural consequence of the 1991 injury. He responded that he thought that he would agree and that it was a fair statement." (R. 26-27 ¶ 105).[7]

"Dr. Teuber also testified that the April 2010 fall was an aggravation of the injury, and he did not indicate it was a recurrence." (R. 26-27 ¶ 105; R. 5664 at 241:14-21). The Department specifically noted Dr. Teuber "was asked whether he identified a specific recurrence on Claimant's spine or if he recognized there was an outside event, the fall down the stairs, that would be called an aggravation. He stated that he would call it an aggravation." (R. 28 ¶ 113; R. 5664 241:14-21).

Further, "Dr. Teuber agreed with Dr. Sabow that the April 2010 fall was a new injury and an aggravation of the original work injury." (R. 28 ¶ 114; R. 5664 at 242:18-243:1). Dr. Teuber "opined that the April 2010 fall contributed substantially to Claimant's current condition." (R. 28 ¶ 114; R. 5665 246:7-247:9).

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[7] Dr. Teuber and Dr. Sabow agreed Wetch's periodic neck or shoulder pain is attributable to general life ailments, not from the original injury (R. 5540 at 197:19-198:1). Dr. Sabow offered particularly credible testimony since he was a quadriplegic permanently confined to a wheelchair after a water-skiing accident when he was 20 years old (R. 5451 at 278:8-24). Dr. Sabow passed away during the earlier appeal to the circuit court.

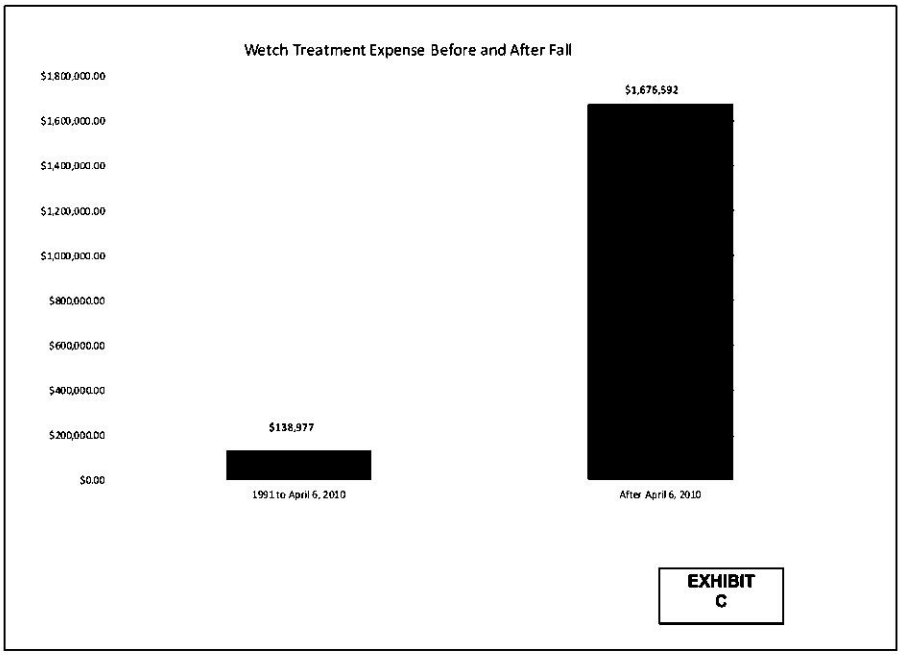
c. Dr. Goodhope

Wetch's family practice physician Dr. Goodhope "determined that the CT and MRI scans soon after the 1991 injury showed the C2-3 level of Claimant's spine was normal" but "he observed that the CT taken on April 6, 2010, showed marked narrowing at C2-3." (R. 28 ¶ 116); *see also* R. II. 1338-1339 at 44:12-17; 46:6-11. "At deposition, Dr. Goodhope testified that the injury to C2-3 shown in the April 6, 2010, CT was a serious injury and if he had known about it, it would have impacted the treatment he provided Claimant." (R. 28 ¶ 117); *see also* R. II. 1339 at 47:22-48:1). At his deposition on March 3, 2021, Dr. Goodhope testified he "was not able to opine whether the 1991 injury is still contributing to the need for Claimant's treatment." (R. 28-29 ¶ 119); *see also* R. II. 1343 at 61:18-23).

d. Forensic Economist Frankenfeld

In addition to medical expert testimony, "Insurer also offered the expert opinion of Don Frankenfeld" ("Frankenfeld"), "a forensic economist from Rapid City." (R. 29 ¶ 122). Frankenfeld was retained to evaluate from a financial perspective the relative impact of the 1991 work injury and the April 2010 fall on Wetch's treatment needs (R. 29 ¶¶ 123-24). "Frankenfeld evaluated thousands of records and summarized the results in a series of tables and charts." (R. 29 ¶ 123); *see also* R. 5623 at 79:4-16; R. 6177-6182; R. 6430-6465. "He found that when comparing the 13-year period prior to April 6, 2010, to the 13-year period after the incident the cost of Claimant's treatment needs had increased from $4,191 to over $2.4 million, an increase of about 56,655%." (R. 29 ¶ 123). *See also* R. 5625 at 87:12-21. Frankenfeld "opined that the patterns of financial activity he analyzed in this matter are consistent with the medical opinion that the April 2010 fall was a new and distinct injury and caused a change of condition in Claimant." (R. 29

¶ 124); *see also* R. 5626 at 90:5-13. One of Frankenfeld's charts displayed the great disparity between medical costs prior to the April 2010 fall and those incurred after:



(R. 2334).

e. Department Decision and April 2024 Order

On January 30, 2024, Administrative Law Judge Faw entered her decision ("Decision"), finding and concluding among other things:

(a) Wetch's injury from April 2010 fall was not a natural consequence or direct and natural result of his 1991 work injury, but was an independent intervening cause of his condition;

(b) Insurer has shown in respect to Wetch's April 2010 fall that Wetch's injury did not arise out of or in the course of his employment at Midcontinent Media, Inc.;

(c) A change in condition of Wetch has occurred . . . pursuant to SDCL § 62-7-33.

On April 10, 2024, the Department entered the April 2024 Order containing the Findings of Fact and Conclusions of Law.

f. Circuit Court Affirms the Department's April 2024 Order

On March 18, 2025, after appeal filed by Wetch, the circuit court entered the March 2025 Order affirming the April 2024 Order (R. II 1667-1686).

V. SUMMARY OF ARGUMENT

The Department entered detailed findings of fact and conclusions of law in the April 2024 Order after a nearly weeklong hearing in which the Department heard from multiple live fact and expert witnesses in addressing Insurer's request. The circuit court properly affirmed the March 2025 Order. This Court also should affirm.

The April 2024 Order concerns the highly consequential and debilitating April 2010 fall that occurred in Wetch's apartment building more than three decades after a relatively modest work injury from which Wetch had greatly improved and had for years no longer needed medical care benefits from Insurer. The Department found and concluded: (a) "[Wetch's] injury from [the] April 2010 fall was not a natural consequence or direct and natural result of his 1991 work injury, but was an independent intervening cause of his condition"; (b) "Insurer has shown in respect to [Wetch's] April 2010 fall that [Wetch's] injury did not arise out of or in the course of his employment. . . ."; and (c) "[a] change in condition of [Wetch] has occurred." (R. 44-45).

On appeal here, Wetch waives the second argument above and raises three other issues instead. As described herein, Wetch failed to appeal the circuit court's ruling the injury did not arise out of or in the course of the employment, **specific to** SDCL

§ 62-4-47 and 48. Wetch's first listed issue also should be rejected because the circuit court properly rejected Wetch's legal argument that res judicata, judicial estoppel and mend the hold barred Insurer's Request after Insurer was directed by the federal court and received permission from the Department to investigate the April 2010 fall. The circuit also should be affirmed on Wetch's second issue because the Department's finding of fact that Wetch had a change of condition as a result of the April 2010 fall was not clear error or a decision leaving the definite and firm conviction a mistake has been made. Finally, on the third issue, the circuit court's affirmance of the Department's ruling on Wetch's waived objection to Insurer's biomechanical engineer's testimony about the content of an admitted exhibit, consistent with a medical doctor's testimony, also should be affirmed.

The March 2025 Order affirming the April 2024 Order of the Department should be affirmed in all respects.

VI. ARGUMENT

A. Standard of Review

A reviewing court "shall give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL § 1-26-36. The Department's "findings of fact [are reviewed] for clear error" and should be overturned "only if 'after reviewing the evidence we are left with a definite and firm conviction that a mistake has been made.'" *News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶ 18, 984 N.W.2d 127, 133 (quotation omitted). A reviewing court "defer[s] to the agency on the credibility of a witness who testified live . . . ." *McKibben v. Horton Vehicle Components, Inc.*, 2009 S.D. 47, ¶ 11, 767 N.W.2d 890, 894 (quotation omitted).

This Court may "affirm" the circuit court, even if it does not "rely upon the circuit court's rationale." *Clay v. Weber*, 2007 S.D. 45, ¶ 7, 733 N.W.2d 278, 282. Indeed, this

Court "will affirm . . . if it is correct for any reason." *Westfield Ins. Co. v. Rowe ex rel. Est. of Gallant*, 2001 S.D. 87, ¶ 4, 631 N.W.2d 175, 176.

"Trial courts have broad discretion in determining whether to admit expert testimony" and it will be reversed only "where a court abuses its discretion." *Moeller v. Weber*, 2004 S.D. 110, ¶ 36, 689 N.W.2d 1, 12 (citing *State v. Weaver*, 2002 S.D. 76, ¶ 24, 648 N.W.2d 355, 364). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." *Hanson v. Penrod Constr. Co.*, 425 N.W.2d 396, 398 (S.D. 1988).

B. Wetch Failed To Appeal the Circuit Court's Conclusive Determination the Injury "Did Not Arise Out of or in the Course of Employment" Under SDCL §§ 62-4-47 and 48

This Court has made clear an appellate court may "consider only those issues that the parties actually brief[]" or the "issues are waived." *Black Hills Truck & Trailer, Inc. v. S.D. Dep't of Revenue*, 2016 S.D. 47, ¶ 10 n.3, 881 N.W.2d 669, 672 n.3 (internal quotation and citation omitted). This Court has declared waiver will be found against appellant even when an argument is mistakenly presented under the wrong statute. *People in interest of M.S.*, 2014 S.D. 17, ¶ 17, 845 N.W.2d 366, 370-71 ("The parties . . . overlooked the court's . . . citations to SDCL 26-8A-26.1. . . . That, in turn, means [appellants] do not directly refute the court's alternative basis for [ruling]. Accordingly, [appellants] waive that argument[.]").

Wetch did not appeal the circuit court's ruling "the injury did not arise out of or in the course of the employment, specific to SDCL § 62-4-47 and 48." R. II 1721-1724. Nor does Wetch address this issue in his briefing to this Court.

Insurer's request raised this issue in the Department and it ruled on the matter (R. 13329-13390) (Insurer's Post Hearing Brief at 40-62); R. 13686-13687 ("This is a workers' compensation case brought . . . pursuant to . . . the Department's order to

investigate . . . pursuant to SDCL §§ 62-4-47 and 62-4-48[.]") (R. 13597-13599 p. 2) ("It is further ORDERED AND ADJUDGED Insurer has shown in respect to Wetch's April 2010 fall that Wetch's injury did not arise out of or in the course of his employment at Midcontinent Media, Inc"). The circuit court later ruled "the injury did not arise out of or in the course of the employment, **specific to** SDCL § 62-4-47 and 48" (emphasis added).[8]

Wetch's waiver is dispositive of this appeal.

C. The Department Had Jurisdiction To Hear Insurer's Request

1. Wetch Has Been Fully Heard

Wetch argues the circuit court affirmed the Department "regarding res judicata and estoppel" without "any meaningful analysis." Appellant's Br. at 24. Wetch is not being forthright. Before this appeal, Wetch's res judicata and estoppel arguments were thoroughly considered—not only by the Department, but by three different tribunals. Each time Wetch's contentions were rejected.

When addressing this issue, the circuit court relied on a prior decision affirming denial of summary judgment made in its court (Judge Klinger). That decision is notable. To give Wetch every benefit of the doubt, Judge Klinger conducted an exhaustive and "thorough review of the administrative record" on a de novo basis (R. II. 1667-1686) ("Memorandum Opinion") at 13. Judge Klinger ruled "the Department applied the law correctly" and rejected Wetch's assertion that res judicata applies merely because Insurer had provided certain "medical benefits . . . at issue in the civil contempt proceedings" before the hearing (R. II. 1667-1686) (Memorandum Opinion at 11). Judge Klinger observed the highly limited proceeding before Judge Davis "did not" give the circuit

[8] The circuit court's statement in dicta that the Department did not rule on this issue is mistaken but inconsequential (R. II 1667-1686). *Clay v. Weber, supra.*

court "jurisdiction to entertain" more issues than those presented (R. II. 1667-1686) (Memorandum Opinion at 11).

Judge Klinger found Wetch's assertion of collateral estoppel also "fails on its face" because "the parties have **never** litigated the issue of change of condition or fraud" and likewise stated "[t]his court is in **agreement** with the federal court that Insurer's issues have not previously been addressed and until the Department does so, the parties have an adequate remedy available to them through the legal process statutorily provided." (R. II. 1667-1686) (Memorandum Opinion at 12 (emphasis added)).[9]

2. The April 2024 Order Was Not Barred by Admissions or Dismissal

Wetch separately argues "Insurer admitted the compensability of the claim" when it sought "dismiss[al] [of] the contempt proceeding *with prejudice*." Appellant's Br. at 12 (emphasis in original) (relying on *Hayes v. Rosenbaum Signs & Outdoor Advert., Inc.*, 2014 S.D. 64, ¶¶ 12-23, 853 N.W.2d 878, 882-84). Wetch is wrong on the facts and law.

Long before the hearing on Wetch's motion to show cause, Insurer had conclusively shown the only two items of care involved (vaguely described as "transportation" and "dwelling unit") were admitted by Wetch to have been satisfied and the Department thus ruled the issues were "moot." (R. 440-447 p. 5; R. 4768-4686 at 6-7). Before the hearing on the show cause motion, Insurer also gave "notice" it planned to initiate "discovery regarding a serious injury to Wetch occurring in April 2010, which was not revealed to [Insurer] or the Department at the time the Department entered important partial summary judgment orders in this matter." (R. 338-354 p. 15 n.7).

[9] Judge Klinger also rejected Wetch's "mend the hold" claim (R. II 1667-1686 p. 12).

On March 25, 2019, the parties appeared before the circuit court to formalize a conclusion to the proceeding since the two issues in the matter had been previously found by the Department to be moot (R. 981-982; R. 481). Since Wetch had asked for other relief in his motion, Insurer also "respectfully ask[ed] that the motion to dismiss be granted" and an order granting same was entered but not with prejudice (R. 2094-2102; R. 440-456; R. 474 at 8:23-9:2) (R. 481) (order).[10]

Wetch relies on *Hayes* under these facts but it is inapposite. In *Hayes*, the employer judicially admitted causation in its answer and this Court found "Employer's admission played a substantial role in the case's disposition." *Hayes* at ¶ 21. Here, Insurer did not admit to causation of the April 2010 fall at any time, much less in any answer (R. 9193-9195 (H. Ex. 135); R. 246, 262, 282); see also R. 512-513 at 14-15(the federal order reaffirmed "[t]he 1994 stipulation is final but does not affirmatively dispose of the issue of post stipulation medical benefits . . .").

The April 2010 fall was not at issue in the limited contempt proceeding before the circuit court (R. 4967-68). Indeed, Insurer had given notice to Wetch and the Department before the circuit court ruling in March 2019 that Insurer intended to seek discovery on the April 2010 fall (R. 338-354 p. 15, n.7). The April 2010 fall had not been addressed by the Department as of that time and the circuit court had previously recognized it had no jurisdiction over such matters (R. 5107-5108).

This same legal point is reinforced by this Court's recent decision in *Pham v. Smithfield Foods*, 2025 S.D. 41, ¶¶ 33-34, in which this Court distinguished *Hayes*, stating: "unlike the employer in *Hayes*, [employer] contested causation in its answer to

[10] See *Rotenberger v. Burghduff,* 2007 SD 7, 727 N.W.2d 291 ("dismissal … was silent …; therefore, the dismissal was without prejudice").

[claimant's] petition and successfully litigated the question before the ALJ." *Id.* at ¶ 34. *See also Martz v. Hills Materials*, 2014 S.D. 83, ¶¶ 1-35, 857 N.W.2d 413, 415-22 n.2 ("Judicial estoppel applied in *Hayes* because the Department . . . accepted an employer's answer that admitted causation"). Here, Insurer did not make a judicial admission in an answer on the issue under and, as in *Pham*, Insurer "successfully litigated the question before the ALJ." *Id.*

3. The Department Was Not Deprived of Jurisdiction

Wetch argues Insurer "elected to pay Wetch's medical benefits, which rendered the question of compensability moot." Appellant's Br. at 30 (citing *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, 922 N.W.2d 784). Wetch's argument is without merit. *Skjonsberg* supports Insurer under these facts.

In *Skjonsberg*, the Department "awarded partial summary judgment" in favor of Skjonsberg for certain medical expenses and later entered a second order despite the fact employer/insurer indicated the bills had been resolved by agreement with health care providers. *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, ¶ 1, 922 N.W.2d 784, 785. The circuit court affirmed the Department's order and, on appeal, this Court held the issue in the second motion was "moot before the Department and remains moot before this Court." *Id.* at ¶ 14, 922 N.W.2d at 788.

Here, long before the hearing on the show cause motion before Judge Davis, the two issues on which the action was based had been conceded by Wetch and the Department ruled they were "moot" (R. 448-456 p. 4-6; R. 4768-4686 at 6-7). Applying *Skjonsberg*, at best for Wetch, the matter before Judge Davis was moot and any subsequent order of dismissal would be without legal effect. As such, the equitable

defenses of res judicata, collateral estoppel or mend the hold doctrine were not available in this case.

D. Department Correctly Found a Change in Condition Based on April 2010 Fall

Wetch argues "there was no jurisdiction for the Department or the circuit court to reach" the "change in condition" question. Appellant's Br. at 20. Wetch's argument is in error.

"[B]y virtue of SDCL 62–7–33, [the] Department has continuing jurisdiction to adjust any payment from the original injury based upon a change of condition occurring since the last award." *Whitney v. AGSCO Dakota*, 453 N.W.2d 847, 850 (S.D. 1990). "A change in condition refers to a condition different from that which existed when the award was made. It must be a material and substantial change." *Id.* at 852 (quotation omitted).

The Department correctly concluded it had jurisdiction to adjudicate Insurer's claim under SDCL § 62-7-33 (R. 32 ¶¶ 146-148). The Department properly found Wetch's physical condition had severely changed because of the April 2010 fall, accepting Dr. Sabow's testimony "that prior to the April 2010 fall, Claimant's condition was in a steady, stable state" and "was not deteriorating," and that "the April 2010 fall was a new and distinct injury that is separate and distinct from the 1991 injury" and "was the cause of Claimant's subsequent neurological deterioration" (R. 25 ¶¶ 90-91). The Department also found, among other things, "[b]efore the April 2010 fall, [Wetch] had not sought any treatment from Insurer since October of 2006" (R. 32 ¶ 144). The Department was rightly unconvinced by Wetch's argument that his condition was merely a natural progression of his 1991 work injury.

E. The Circuit Court's Analysis of SDCL §§ 62-7-33 and 62-4-47 Was Not Clearly Erroneous

Wetch argues that, "even if" the Department had jurisdiction, it "misunderstood" the "significance" of Wetch's "aggravation" and "erred" in finding the April 2010 fall was an "independent, intervening cause" because "[f]alling was a foreseeable consequence" of Wetch's 1991 work injury. Appellant's Br. at 30, 34 and 35 n.8. Wetch's arguments are erroneous.

A causal connection is not presumed under case authority applied in 1991. *Zacher v. Homestake Mining Co. of Cal.*, 514 N.W.2d 394, 395 (S.D. 1994) ("[Claimant] requested . . . benefits in . . . 1988 . . . [Claimant] presumes that if an injury occurs while one is at work, the injury 'arose out of and in the course of employment.' However, . . . the phrase . . . expresses . . . did the work contribute to causing the injury?") (citations omitted). The doctrine of intervening cause also existed in 1991. *Hanson v. Penrod Constr. Co.*, 425 N.W.2d 396, 398 (S.D. 1988) (discussing "independent intervening cause"). In determining whether an injury arises out of and in the course of employment, "the employee must show that his employment was 'a contributing factor' to his injury." *See Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 358 (S.D. 1992). *See also Harmdierks v. Jensen Grain Co.*, HF No. 4, 1985/86, 1986 WL 218134, at *3 (S.D. Dep't Lab. Nov. 3, 1986) ("Claimant's subsequent injury on the basketball court, whether labeled an aggravation of the original injury or a new distinct injury, was not a 'natural consequence' nor a direct and natural result of the on-the-job injury, but . . . an independent intervening cause"); *Gnadt v. Warren Supply Co.*, HF No. 130, 1986/87, 1990 WL 506862, at *3 (S.D. Dep't Lab. Oct. 5, 1990) ("Claimant suffered an

aggravation as a result of the 1985 car accident which broke the chain of causation through an unrelated incident").

On this question, the circuit court properly cited this Court's decision in *Mills v. Spink Elec. Co-op*, 442 N.W. 2d 243 (S.D. 1989), which provides in pertinent part: "The 'change in condition' which justifies reopening and modification . . . may take such forms as . . . **aggravation** of the compensable condition . . . ." *Id.* at 246 (emphasis added) (quoting 3 Larson, § 81.31(a) (1988)).

"[O]nce the work-connected character of any injury such as a back injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced **by an independent non-industrial cause**[.]" *Scheurenbrand v. Martin & Assocs.*, HF No. 110, 1985/86, 1987 WL 268526, at *4 (S.D. Dep't Lab. June 30, 1987) (quoting *Larson's Worker's Compensation Law*, Sec. 16.11 at 3-354, 356, and 357) (emphasis added).

The Department made findings of fact, noting "[t]here are instances in the medical record where" Wetch did fall, "and the doctors related those incidents to the 1991 injury"; however, "[Wetch] testified that he did not fall very often" and "Wetch himself has asserted that he fell because the handle on the door broke" (R. 31 ¶ 135). The Department and circuit court correctly rejected Wetch's argument that his condition was simply a natural progression of his 1991 work injury. As the Department noted, "Dr. Sabow explained that [Wetch]'s history is consistent with a sudden traumatic injury and not merely normal wear and tear with degeneration" (R. 25 ¶ 94). In short, the worsening in Wetch's condition is shown to have been produced by an independent non-industrial cause. *Id.*

F. The Department Did Not Err, or It Was Harmless, in Allowing Information in Hearing Exhibit 6 To Be Published by Dr. Liebschner

Wetch argues Dr. Liebschner gave "medical causation" opinions and the circuit court "erred in concluding that the Department's error was harmless." Appellant's Br. at 39. Wetch's argument is mistaken.

Dr. Liebschner neither claimed to be nor testified as a medical doctor (R. 2335-2336; 2392-2396; 5407-5431). Hearing Exhibit 6 is a 2016 operative report in evidence in which the phrase "The anterior annulus" is printed twice and Dr. Liebschner reviewed and published the content of the record during his testimony (R. 5770, 5771 at 199:11-18, 202:1-13; R. 5772 at 206:13-207:9). Wetch did not object the first time Dr. Liebschner so testified (R. 5417-5418 at 142:17-147:4). There can be no error in this circumstance. *Andreson v. Black Hills Power & Light Co.*, 1997 S.D. 12, ¶ 19, 559 N.W.2d 886, 890 ("[E]vidence, received without objection, is available to the trier of fact . . .").

Also, Dr. Sabow was present during Dr. Liebschner's initial testimony in which the annulus was addressed (R. 5546 at 221:13-222:9). Dr. Sabow was later asked whether the annulus presented with an "annular tear" and he testified "I don't see that at all" (R. 5546 at 222:2-9). Dr. Teuber was not presented with Hearing Exhibit 6, but instead read from a radiology report from which he merely speculated "there is **probably** no annulus left" (R. 5673 at 280:18-24; R. 27, 28 ¶¶ 110, 115) (emphasis added).

The Department itself read the documentary evidence and made the finding it "references the . . . annuli." (R. 28 ¶ 115). Any error is harmless. *Est. of Lynch v. Lynch*, 2023 S.D. 23, ¶ 22, 991 N.W.2d 95, 104, *reh'g denied* (June 27, 2023) (citations omitted) ("An evidentiary ruling will not be overturned unless error is . . . prejudicial error").

VII. CONCLUSION

For the reasons stated herein, the circuit court's March 2025 Order affirming the Department's April 2024 Order should be affirmed.

VIII. REQUEST FOR ORAL ARGUMENT

Appellees request oral argument in this matter.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with SDCL § 15-26A-66(b)(2). The brief is 34 pages long (exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Certificate of Compliance and Certificate of Service), is typeset in 12-point Times New Roman (a proportional font), and contains 9,744 words. The Appellee used Microsoft Word to prepare the brief.

Dated this 22nd day of September, 2025.

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CERTIFICATE OF SERVICE

I, Thomas J. Von Wald, do hereby certify that I am a member of BOYCE LAW FIRM, L.L.P., attorneys for Employer/Appellee, Midcontinent Media, Inc., and Insurer/Appellee, Crum & Forster Commercial Insurance, and that on the 22nd day of September, 2025, I served a true and correct copy of the foregoing Brief of Employer/Insurer Appellees upon the following:

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/s/ *Thomas J. Von Wald*
Thomas J. Von Wald

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

DAVID WETCH,

Claimant/Appellant,

-vs-

MIDCONTINENT MEDIA, INC., and CRUM & FORSTER COMMERCIAL INS.,

Defendants/Appellees.

Appeal Nos. 31059, 31060
Notice of Appeal Filed: April 17, 2025

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL DISTRICT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGOT NORTHRUP,
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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REPLY

Appellee ("Insurer") paints a picture that this case is "business as usual" for worker's compensation cases in South Dakota. However, this case's long and uncommonly complicated procedural history illustrates that this case is the exception rather than the rule for worker's compensation claims in South Dakota. However, if Insurer's gambit is successful, it would open the floodgates of insurance companies relitigating lost or settled worker's compensation claims. After all, it was not until after Insurer was sued in federal court for bad faith claims handling that it launched its attack on Wetch by wrongfully accusing him of insurance fraud. If Insurer's "perversion the judicial machinery" is not reversed, the finality that the worker's compensation statutes are designed to provide will be upended.

Nothing in Insurer's brief distracts from the fact that Insurer was aware of the 2010 fall by at least 2018. Despite this, Insurer *still* chose to *repeatedly* admit the compensability of the claim before the South Dakota Department of Labor ("Department") and Seventh Judicial Circuit. Insurer's neglect in investigating Wetch's claim is not sufficient to reopen issues of compensability that could have been investigated during the pendency of Wetch's multiple motions for summary judgment and the enforcement actions before the Seventh Circuit. Such collateral attacks are barred by res judicata, estoppel, and the "mend the hold" doctrine. Both the Department and the circuit court correctly rejected Insurer's fraud theories under SDCL §§ 62-4-47 and 62-4-48, and Insurer has not appealed those decisions to this Court. As a result, there is no jurisdiction to set aside the

prior orders, and the error by the Department and the circuit court on these jurisdictional issues is manifest.

Moreover, the circuit court erred in affirming the Department's finding of a "change in condition" under SDCL § 62-3-77. Indeed, the circuit court recognized in its Memorandum Opinion that the Department repeatedly erred in its causation analysis. All of the medical evidence was that Wetch's work injury caused quadriparesis. Not a "relatively modest work injury" as Insurer describes. Insurer's argument that Wetch failed to appeal the circuit court's conclusion that the 2010 fall "did not arise out of work" is incorrect and a distraction from the circuit court's misapplication of the causation analysis. The circuit court's error was invited by Insurer's persistent mischaracterization of the causation standard at issue in this case. The substantial weight of evidence is that the 1991 work injury contributed to the 2010 fall, and the injuries sustained thereafter.

The order dated June 21, 2022, Order of the Circuit Court (J. Klinger, presiding), the order dated April 10, 2024, of the Department of Labor, and the order March 18, 2025, Order of the Circuit Court (J. Northrup, presiding) should be reversed, and Insurer's Request for Review should be dismissed as moot.

I. Wetch Did Not Fail To Appeal SDCL §§ 62-4-47 and 48.

Like it did before the circuit court, Insurer opens its argument by asserting that Wetch has waived his appeal of the circuit court's determination that the "injury did not arise out of or in the course of employment." Appellee's Brief, pg. 27. Insurer's argument is wrong for multiple reasons.

A. Jurisdiction cannot be waived.

First, Wetch's arguments with respect to res judicata, estoppel, and "mend the hold" are jurisdictional arguments. "Subject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void. " *Wells v. Wells*, 2005 S.D. 67, 698 N.W.2d 504, 508, citing *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 10, 675 N.W.2d 739, 742, other citations omitted. Parties cannot confer subject matter jurisdiction by agreement, consent, or waiver. *O'Neill v. O'Neill*, 2016 S.D. 15, 876 N.W.2d 486. Subject matter jurisdiction cannot be waived. *Application of Koch Exploration Co.*, 387 N.W.2d 530, 536 (S.D. 1986). On appeal, this Court reviews challenges to subject matter jurisdiction de novo. *Alone v. C. Brunsch, Inc*, 711 2019 S.D. 41, 931 N.W.2d 707, 711, (citing *City of Sioux Falls v. Missouri Basin Mun. Power Agency*, 2004 S.D. 14, ¶ 9, 675 N.W.2d 739, 742.) These arguments cannot be waived, and the Court is free to raise and resolve issues of jurisdiction *sua sponte*.

B. Insurer's "waiver" argument is incorrect.

Even setting aside Wetch's jurisdictional arguments, there is no finding of fact or conclusion of law from the Department on the issue of the "injury" arising out of the employment. Appellee's Brief, pg. 27. The circuit court did not enter separate findings of fact on this issue because it was not the fact finder. Not surprisingly, the Insurer does not cite to any finding of fact on this issue. *Id.* At best, this is an error of law by the Department and the circuit court, which is reviewed *de novo* by the Court. "The Department's conclusions of law are fully reviewable." *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 127, 133.

Second, Wetch did argue that the Department and the circuit court erred in concluding that Wetch's injury did not arise out of or in the course of his employment. In fact, Wetch spent substantial time in his brief arguing that the Department committed clear error by failing to connect the work injury with the 2010 fall. Appellant's Br., pp. 30-39. For example, Wetch argued: "The Circuit Court clearly erred in finding that '[n]either party has alleged that the 2010 Fall, arose from, or was in the course of performance of [employment]." Appellant's Br. pg. 33. Wetch also argued, "there is substantial evidence to support that Wetch's fall 'had its origins' in his work injury." *Id.* Then, Wetch spent considerable time discussing the medical and forensic evidence supporting this argument. All of these arguments relate to the question of whether the 2010 fall "arose out of" the work injury.

This is also how the Department and the circuit court framed them; i.e. as a question of causation rather than as a question of statutory interpretation. However, even as a matter of statutory interpretation, Insurer is wrong. The term "injury," as used in the statutory language of SDCL §§ 62-4-47 and 48, refers to the *work* injury, as defined in SDCL § 62-1-1. Insurer has consistently and incorrectly argued, under its *fraud* claim, that the "injury" did not arise out of or in the course of Claimant's employment with the Employer. However, there is no doubt that Wetch suffered a work injury in 1991.

Insurer's argument is that Wetch's condition changed as a result of the 2010 fall, and therefore, some of his care is not compensable under SDCL § 62-4-1. *That is a SDCL § 62-7-33 argument.* That is why the argument was framed as

such in briefing throughout this case. That is also how the Department and the circuit court analyzed the issue. The statutes can be read harmoniously.

The "injury" referred to in SDCL § 62-4-47 is the injury from which the injured worker claims compensability – the 1991 injury. Insurer has made no allegation that Claimant's 1991 injury was not related to his work. Insurer is confusing "injury" and "condition." Having suffered a workplace injury that left him *permanently* and totally disabled from work, Wetch is entitled to medical benefits under SDCL § 62-4-1 for his lifetime. Those facts have not changed and are *res judicata*. The issue of causation must be analyzed through the lens of SDCL § 62-7-33, not through SDCL § 62-4-47. Insurer's argument that this determination was waived by Wetch is meritless.

C. Insurer ignores substantial evidence of the causal connection between Wetch's work injury and the 2010 fall.

The most glaring omission from Insurer's Brief is the complete lack of discussion regarding the contribution of Wetch's spastic quadriparesis to the fall in 2010. This is a key factor. Per *Sopko v. C & R Transfer Co.*, it was the intent of the drafters of SDCL § 62-7-33 to only allow litigants to reopen a settled case in the event of changes in condition resulting from "undiscovered or unforeseen consequences." 1998 S.D. 8, ¶ 13, 575 N.W.2d 225, 231. In other words, for an aggravation to be subject to a "change in condition challenge," the "change" must be unforeseeable. Here, all the medical evidence establishes conclusively that Wetch's instability and falls are a natural and foreseeable consequence of his work injury and quadriparesis.

Both Dr. Sabow and Dr. Teuber admit that Claimant's 1991 work injury contributes to his falls and fall related injuries. (R.5504 at 53:8-13; R.5659). Dr. Teuber attributes Wetch's falls "in whatever setting" to his work injury. (R.5659 at 222:22-25 to 223:1-17). Dr. Sabow agrees with this assessment. (R.5503 at 50:1-8). Dr. Sabow also opined that the 1991 spinal fusion contributed to the injuries in 2010 by magnifying the sheering forces at the adjacent segments he contends were injured in 2010. (R.6121-6125). Insurer does not dispute these clear causal connections between the 1991 injury and the 2010 fall.

Rather than addressing these arguments, facts, or evidence, Insurer argues the unremarkable proposition that a "causal connection [between a work injury and a subsequent aggravation] is not presumed under case authority applied in 1991." Appellee's Brief, pg. 33. However, Wetch has never argued that such a presumption exists. Instead, Wetch has repeatedly argued that "[w]hile the 2010 fall did not occur at work, all medical evidence is that the injuries sustained in 2010 were causally connected to the original work injury." Appellant's Br., at 33.

Insurer also glosses over the circuit court's clearly erroneous finding that "neither party has alleged that the 2010 Fall, arose from, or was in the course of performance of [employment]." (A.1-20).[1] Clearly, this is not the case. Wetch has consistently argued that the work injury and the aggravation in 2010 are causally related.

In the tort context, this Court has analyzed the issue of determining when an intervening cause becomes a superseding cause based on a number of factors,

[1] (A.___) refers to Appellant's Appendix submitted with Appellant's Brief.

but commonly it is based on the relationship of the parties and foreseeability. *See e.g., Braun v. New Hope Twp.*, 2002 S.D. 67, ¶¶ 15-16, 646 N.W.2d 737, 741.

> In order to determine whether an actor's liability is shifted to a third person, one must look to see if the intervening cause was foreseeable. The risk created by the original actor may include the intervention of the foreseeable negligence of others. If such intervening negligence was foreseeable, the original actor remains liable because "[f]oreseeable intervening forces are within the scope of the original risk ...."

Id., 2002 S.D. 67, ¶¶ 15-16, 646 N.W.2d 737, 741 (citations omitted). This analysis follows a similar analytical framework of then- Circuit Court Judge Steven L. Zinter in *City of Sioux Falls v. Michael Dean Barrett*, CIV. No. 94-476, (A.258-271).

For the reasons set forth in Appellant's Opening Brief, the *Barrett* test is satisfied in Wetch's case. Appellant's Br. at 38. Both doctors agreed that the 2010 aggravation was a foreseeable consequence of Wetch's work-injury related quadriparesis. And Dr. Sabow opined in his report that Wetch's 1991 spinal fusion from C3 to C6 magnified the force at the C2-3 and C5-6 vertebral levels (A.21-52, at A.34, ¶ 96) – the same levels Dr. Sabow believes were injured in the 2010 fall. Moreover, there has been no finding by either the Department or the circuit court that Wetch was negligent in opening his apartment door. (A.1-20; A21-52). By any measure, opening a door to an apartment is a routine event, ordinary and "customary in light of his condition." *Barrett*, at 11. The substantial weight of evidence overwhelms the circuit court's finding that the 2010 fall was an independent, superseding cause of Wetch's condition. The circuit court's clear error warrants reversal.

II. Insurer Continues To "Pervert The Judicial Machinery" With Its Arguments.

Next, with respect to Wetch's contention that there is a dearth of legal analysis by the circuit court on the subjects of res judicata, estoppel, and "mend the hold," Insurer recklessly alleges that "Wetch is not being forthright." Appellee's Br., at 28. Wetch takes exception to this accusation. In fact, Wetch specifically noted that the circuit court had incorporated Judge Klinger's 2022 Memorandum Opinion on these subjects, and advised the Court of the federal court's decision in his Opening Brief. Appellant Br., at 24 and 12.

A. The Circuit Court erred in relying on Judge Klinger's "analysis" of *res judicata*, estoppel, and "mend the hold."

Insurer argues that "Wetch's res judicata and estoppel arguments have been thoroughly considered – not only by the Department but by three different tribunals...[e]ach time, Wetch's contentions have been thoroughly and resoundingly rejected." Appellee's Br., at 28. Insurer's argument is overstated.

Even charitably speaking, it would be difficult to find any evidence that the Department "thoroughly considered" Claimant's arguments regarding res judicata or estoppel. In nearly a decade of litigation, and over one hundred pages of legal analysis on the issues presented, not one sentence has been written by the Department on these issues. There is no discussion whatsoever by the Department in any of its Decisions, Orders, or Findings of Fact and Conclusions of Law. *See generally* (R.3434); (A.53-88); (A.89-90); (A.21-52). Instead of a thorough rejection of Wetch's theories, as argued by Insurer, there is a stark absence of any consideration of these issues by the Department.

While the circuit court did incorporate the decision of Judge Klinger in 2022 in its Memorandum Decision of 2025, there is no legal analysis in the

circuit court's decision about how a lack of fraud or mistake by Wetch impacts the Department's jurisdiction to consider a "change in condition" under SDCL § 26-7-33. In other words, the circuit court never considered whether the Department's finding that Wetch had not committed fraud impacted the jurisdiction of the "change in condition" question. This is error.

As previously briefed, *Hayes* bars an Insurer from subjecting Wetch to "perpetual litigation." 2014 S.D. 64, 853 N.W.2d at ¶ 20. The fact that the Department retained jurisdiction to determine future benefits does not dull the binding effect of the Department's prior orders. *Call v. Benevolent & Protective Order of Elks*, 307 N.W.2d 138, 140 (S.D. 1981). ("The retention of continuing jurisdiction should not be used to provide a secondary means of reviewing an otherwise final order."). Furthermore, in South Dakota, a workers' compensation insurer who conducts a shoddy investigation and accepts a claim will be bound by its admission/acceptance. *See Kermmoade v. Quality Inn*, 2000 S.D. 81, 612 N.W.2d 583, at ¶ 20. ("[A]n innocent injured employee should not be forced to pay for an insurer's unilateral mistake.").

Here, Insurer had years to investigate Wetch's medical history before admitting to the compensability of his condition. It also had the right to compel Wetch to sign a medical release. SDCL § 62-4-1.3. It chose not to investigate. Instead, it elected to pay Wetch's medical benefits, which rendered the question of compensability moot. *See Skjonsberg*, 2019 S.D. 6, 922 N.W.2d 784. Resolution of compensability necessarily includes resolution of causation. *Westergren v. Baptist Hosp. of Winner*, 1996 S.D. 69, ¶ 11, 549 N.W.2d 390, 394. The circuit court's decision to allow Insurer to "reopen" the issue of

compensability after its admission/acceptance of the claim undermines the lesson of *Hayes*.

B. The Department's Rulings on Summary Judgment Were Final and on the Merits of Compensability.

To overcome *Hayes*, Insurer argues that res judicata and estoppel do not bar its Request for Review because the decisions of the Department and the circuit court were not final or on the merits. Once again, Insurer glosses over the fact that the jurisdiction of the Department to hear the "change in condition" question ended once it decided that Wetch had not committed fraud in procuring worker's compensation benefits. This Court has made clear that the intent of SDCL § 62-7-33 is not to subject Wetch to perpetual litigation. *See Hayes, supra*. The determinations of compensability were made by the summary judgment decisions of the Department on January 28, 2016, (R.234-240), August 2, 2016, (R.264-268), November 16, 2016, (R.284-285), and May 7, 2018, (R.322-328). Insurer did not appeal those decisions. Only a finding of fraud or mistake, would have justified reconsideration of those final determinations of compensability.

That the Department has asserted "ongoing jurisdiction" over Wetch's entitlement to future benefits is immaterial. In *Call v. Benevolent & Protective Order of Elks*, this Court held that the Department's orders were final even if it retained continuing jurisdiction. 307 N.W.2d 138, 140 (S.D. 1981). "There may be numerous final orders in a workers' compensation case." *Call*, 307 N.W.2d at 140. "The retention of continuing jurisdiction should *not be used to provide a secondary means of reviewing an otherwise final order*." *Id.* (emphasis added). So too, in this case, the Department's assertion of ongoing jurisdiction was not a

"secondary means of reviewing" the previously entered and *otherwise* final orders. Yet, that is precisely what Insurer did.

Insurer has used the Department's assertion of ongoing jurisdiction over the 2020 claims for an improper purpose – to perpetually litigate the issue of compensability when such issues were previously waived, admitted, or otherwise resolved in earlier proceedings. This is a direct violation of *Hayes*. 2014 S.D. 64, 853 N.W.2d 878 at ¶29. That Insurer did not admit the compensability of the claim in its answer to Wetch's 2014 petition is completely irrelevant. The compensability of Wetch's care was repeatedly determined by the Department on summary judgment, and such determinations were never appealed by Insurer.

Insurer's argument that the Court's recent decision in *Pham v. Smithfield Foods*, 2025 S.D. 41, 24 N.W.3d 735, supports its conduct in this case is, respectfully, absurd. In *Pham*, "the parties never previously litigated causation under SDCL 62-1-1(7); Pham had not petitioned for a hearing; and there was no settlement agreement approved by the Department or other final order obligating Smithfield to pay ongoing benefits." 2025 S.D. 41, 24 N.W.3d 735 at ¶ 34. *Pham* is inapposite to this case. In fact, this Court expressly states in *Pham*, that *Pham* is *not a SDCL § 62-7-33 case. Id.* (emphasis added). Insurer's reliance on *Pham* is misplaced.

By 2018, Insurer was indisputably aware of the 2010 fall, and it *still* chose to admit the compensability of the claim before the DOL and Seventh Judicial Circuit. Insurer cannot "rewind the clock." *See Hayes*, 2014 S.D. 64, 853 N.W.2d 878 at ¶ 10. ("When a party to litigation fails to develop all of the issues and evidence available in a case, the party is not justified in later trying the omitted

issues or facts in a second action based on the same claim."); *Kermmoade v.*, 2000 S.D. 81, 612 N.W.2d 583 at ¶ 20. ("[A]n innocent injured employee should not be forced to pay for an insurer's unilateral mistake."). *Pham* does not provide Insurer shelter for its litigation decisions. Nor does it permit perversion of the judicial machinery. The Department and the circuit court have erred in failing to apply the lessons of *Hayes* and *Kermmoade* to bar Insurer's Request in this case.

C. The contempt proceedings triggered res judicata and estoppel.

Next, Insurer argues that it did not, "in appearing before the Circuit Court (Judge Davis), 'admit the compensability of the claim' as Wetch asserts." Appellee's Br., p. 31. Once again, the record contradicts Insurer's argument. At the hearing before Judge Davis to dismiss the contempt action brought against it, the Insurer stated to the court:

> So we are now here before Your Honor simply to say that based upon Your Honor's guidance and direction and instruction to the parties the issues that were the subject of the original motion here for contempt *have now been fully satisfied.* Your Honor is well aware of the standard for civil contempt, that it's to be coercive in nature and that it seeks to compel the person to act in accordance with the Court's prior orders or requirements. That *has now been satisfied. All of the care that has been requested has been provided.*

(R.946-957 at 4:20-5:5) (emphasis added)). When Insurer told Judge Davis "All of the care that has been requested has been provided," it invoked *Skjonsberg, and then*, it induced a final order by asking Judge Davis to dismiss the contempt action with prejudice.

Insurer effectively "exhausted" its administrative remedies by *admitting* the compensability of the claim to the Seventh Circuit Court, rather than timely pursuing their claims under SDCL §§ 62-7-33 or 62-4-47. (A.251-257, at 2:10-13; 8:11-13, 8:20-22, 9:15-22). The Seventh Circuit had to consider the issue of compensability when determining the question of enforcement, including the representation of fact that the Insurer was going to finalize items of care that remain *outstanding*. *Id.*, at 10:24–11:4. Based on Insurer's representations of compensability of the underlying injury regardless of the specific care ordered by Wetch's doctor, Judge Davis granted the Insurer's Motion to Dismiss with Prejudice. *Id.*, at 9:23–11:4.

The finality of the dismissal of the contempt action was the "exhaustion" of Appellees' administrative remedy. The Department lacked *jurisdiction* to consider these issues a second time. *See Martin v. Am. Colloid Co.*, 2011 S.D. 57, ¶ 10, 804 N.W.2d 65, 67–68; *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, 922 N.W.2d 784. (Discussing the DOL's jurisdiction to enter partial summary judgment as to compensability of a claim, but losing jurisdiction to enter a second order after payment of the benefits had been made and the dispute resolved). Insurer "had its day in court" regarding compensability and chose to "exhaust" its administrative remedies by *admitting* the claim and purging the contempt. Then, Insurer paid benefits and sought reimbursement from the Subsequent Injury Fund. The issue of compensability, at least by 2018 and 2019, was "mooted" by Insurer's admission/acceptance. *Skjonsberg*, 2019 S.D. 6, 922 N.W.2d 784 at ¶¶ 11-16. The parties' administrative remedies were exhausted. As a result, Insurer was barred from retroactively contesting the compensability of Wetch's care.

Insurer also argues that its payment of benefits "in compliance with prior orders of the Department" does not render the issues in this appeal moot. Appellee's Br., p. 31. However, the Court's decision in *Skjonsberg*, contradicts Insurer's argument. In *Skjonsberg*, this Court said that the payment of benefits, like those paid by Insurer to purge itself of contempt before Judge Davis, deprives the DOL of jurisdiction because payment of benefits renders the issue of compensability moot. *Id.*, 2019 S.D. 6, 922 N.W. 2d 784 at ¶¶ 12-14. In other words, there is no controversy for the Department to resolve. Payment also resolves the question of causation because an admission of compensability necessarily includes an admission of causation. *Westergren v. Baptists Hosp. of Winner*, 1996 S.D. 69, ¶ 11, 549 N.W.2d 390, 394.

Insurer, in its brief, seems to agree that *Skjonsberg* provides that the payment of benefits deprives the DOL of jurisdiction by rendering the compensability question moot. Appellee's Br., p. 33-34. Similarly, Insurer also acknowledges that it paid benefits to Wetch before, during, and after the Second Contempt Hearing. *Id.* at 33. Despite this, Insurer has attempted to argue that *Skjonsberg* actually supports its position on appeal. Appellee's Br. at 31 (arguing "long before the hearing on the show cause motion before Judge Davis, the two issues on which the action was based had been conceded by Wetch and the Department ruled they were "moot.").

What Insurer omits is that the issues were moot because the Department determined that Insurer had paid the benefits owed. (R.465) (stating, "Employer/Insurer conceded that it had paid all outstanding debts regarding Claimant's care. Therefore, any argument Employer/Insurer had regarding

previous medical care was therefore rendered moot, and the Department is without jurisdiction to consider this motion."). The rule announced in *Skjonsberg* applies. The question of compensability, and therefore causation, was moot upon payment of benefits by Insurer.[2]

In the absence of fraud, the Department's decision to hear Insurer's argument on "change of condition" going back to 2010 opened the door to contradictory legal conclusions that would impose an unfair detriment to Wetch if not estopped. As a result, all elements of judicial estoppel are met in this case. *Hayes*, 2014 S.D. 64, 853 N.W.2d 882 at ¶¶13-14. Insurer's Request for Review should be dismissed for lack of jurisdiction.

D. Insurer misreads the federal court's order.

As an aside, Insurer's assessment of the federal court's opinion on summary judgment is also overstated. First, Judge Viken's opinion is littered with comments that clearly suggest that Judge Viken recognized the impropriety of Insurer's actions. (R.499-565, pp. 52 and 65) (stating, "[Defendants] did not retain the ability to attack the impact of the order of contempt by taking a position in federal court inconsistent with the prior judicial decision . . . [t]his is a classic example of issue preclusion."; "Defendants are barred from 'perverting the judicial machinery,' by arguing positions inconsistent with the DOL, the state court and this court."). The crux of Judge Viken's opinion is comity. "The court intends to respect the decisions of the DOL but until the questions raised by

[2] Arguably, the Department would have had jurisdiction to hear a challenge by Insurer regarding a "change in condition" occurring *after* April of 2019; however, there is no evidence that an intervening cause occurred after April of 2019.

defendants are resolved by the DOL, the court does not intend to invoke res judicata to bind defendants to those prior administrative admissions and decisions. It will be for the DOL to determine whether defendants are attempting to 'mend their hold.'" *Id.*, at 62.

Unfortunately, the Department wrongly continued to exercise jurisdiction over the "change of condition" question after the "fraud" question was resolved. That was the threshold issue in Insurer's Request, and Insurer failed to meet it. *See Kermmoade*, 2000 S.D. 81, 612 N.W.2d 583 at ¶¶ 16-17. The issues raised by Appellee's Request are a clear attempt to relitigate matters previously considered and brought to conclusion before the Department and the Seventh Judicial Circuit Court in 2018 and 2019. As such, Wetch respectfully requests the decisions of the circuit court and the Department be reversed, and Insurer's Request for Review be dismissed for lack of jurisdiction.

III. Insurer's Characterization of Don Frankenfeldt's Testimony Is Misleading and Overstated.

Additionally, it is worth noting that as it did before the circuit court and the Department, Insurer argues that the costs associated with Wetch's medical care and treatment increased substantially after the 2010 fall. To make this argument, Insurer employed Don Frankenfeld who opined that "when comparing the 13-year period prior to April 6, 2010, to the 13-year period after the incident the cost of Claimant's treatment needs had increased from $4,191 to over $2.4 million, an increase of about 56,655%." Appellee's Brief, p. 23. However, Mr. Frankenfeld also admitted that from 2010 to 2015, Insurer paid less than $1,000 in medical care and treatment for Wetch's work injury. (R.5627, 94:25; 95:1-25.)

In other words, for *five years* after this "consequential and traumatic" fall in 2010, Insurer paid less than $1,000 total in medical care. In other words, the vast majority of expenses associated with 56,655% increase identified by Insurer were not incurred until more than five years after the 2010 fall. *Id.*

IV. Mr. Liebschner's Medical Testimony Was Prejudicial.

Lastly, Insurer makes several misstatements regarding Wetch's arguments vis-à-vis Liebschner's medical testimony. First, Insurer states that "Wetch argues Mr. Liebschner gave 'medical causation' opinions and the circuit court 'erred in concluding that the Department's error was harmless." Appellee Br., at 35. To be clear, it was the circuit court that found Mr. Liebschner's testimony was medical testimony regarding annular tears which went to the heart of medical causation.

> [Dr. Liebschner] further opined that because there was no annular tear shown in the reports, the findings were consistent with an acute injury . . . This final opinion goes directly to the heart of medical causation and the Department abused its discretion when it allowed Dr. Liebschner to testify as to medical causation.

(A.1-20). This finding is consistent with *Maroney v. Aman*, 565 N.W.2d 70, 79 (S.D. 1997). Furthermore, this finding was also not appealed by Insurer. Therefore, any argument as to whether Mr. Liebschner's testimony went to the heart of medical causation is waived.

Next, Insurer argues that because Wetch did not object to the 2016 operative report, he somehow acquiesced to the entirety of Mr. Liebschner's testimony. Appellees Br., at 35. This is also incorrect. In fact, the circuit court specifically noted Wetch's proper objection after admonishing the Department for its error in allowing Mr. Liebschner to testify about medical causation. (A.19)

(stating, "[t]he Department erred by overruling Wech's objection and allowing this testimony."). That Insurer would suggest that Wetch did not timely object to this testimony is obviously inaccurate.

Insurer seems to be blurring several sets of testimony and separate exhibits in order to make it seem as though Mr. Liebschner's clearly unqualified medical testimony was adopted by Dr. Sabow. However, as Insurer acknowledges, Dr. Sabow was only asked to opine on his recollection of Mr. Liebschner's medical testimony given the day prior. Appellee's Br., at 35. Insurer's effort to launder the unqualified testimony of Mr. Liebschner through Dr. Sabow is availing. The testimony of Mr. Liebschner, and its reliance by the Department was not harmless error. The circuit court abused its discretion in concluding this testimony was harmless. If Insurer's Request is not dismissed, at a minimum, Wetch requests this decision is reversed and a new hearing ordered.

CONCLUSION

For the foregoing reasons and for those set forth in Appellant's Brief, Wetch respectfully requests the Court grant the Appellant's motion for judgment as a matter of law on Insurer's Request for Review. Alternatively, a new hearing is required. Appellant requests oral argument.

Dated this 22nd day of October, 2025.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with SDCL 15-26A-66(b)(2). The brief is 18 pages long (exclusive of the table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Certificate of Compliance and Certificate of Service), is typeset in 12-point Georgia font (a proportional font), and contains 4975 words. The Appellant used Microsoft Word to prepare the brief.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for appellant, hereby certifies that on October 22, 2025, a true and accurate copy of **APPELLANT'S REPLY BRIEF** was electronically transmitted via Odyssey File & Serve to:

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Dated at Rapid City, South Dakota, this 22nd day of October, 2025.

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