SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MELISSA ROWE,
Claimant,

HF No. 124, 2005/06

v.

DECISION

RAPID CITY REGIONAL HOSPITAL,
Employer,

and

FARM BUREAU MUTUAL INSURANCE COMPNAY,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-15 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Rapid City, South Dakota. Claimant appeared personally and through her attorney of record, Jason Groves. Comet H. Haraldson represented Employer Rapid City Regional Hospital and Insurer Farm Bureau Mutual Insurance Company.

Issues

1. Whether Claimant sustained a compensable injury arising out and in the course of her employment pursuant to SDCL 62-1-1(7).
2. Whether Claimant is permanently and totally disabled under the Odd-Lot Doctrine and/or SDCL 62-4-53.
3. Whether Claimant is entitled to reasonable and necessary medical expenses pursuant to SDCL 62-4-1.
4. Whether notice was proper pursuant to SDCL 62-7-10. [1]

Facts

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

At the time of hearing Claimant, Melissa Rowe (Rowe) was 47 years old. Rowe is a registered nurse and holds an associate's degree in nursing from the University of

[1] Notice was listed as an issue in the prehearing order dated December 12, 2007. By letter dated January 2, 2008, Employer/Insurer withdrew the issue of notice.

South Dakota. Rowe began working for Employer, Rapid City Regional Hospital (RCRH) in 1993. Rowe made two previous reports of injury while working for RCRH. On January 5, 1997 and May 25, 2000, Rowe reported low back pain as a result of lifting and/or transferring patients as part of her nursing duties at RCRH. Neither of these previous injuries resulted in continued disability and Rowe was able to resume her regular nursing duties without any restrictions.

At the time in question, Rowe was working as a sedation nurse in the endoscopy department of RCRH. As a sedation nurse, Rowe's duties included setting up IV's, colonoscopies, bronchoscopies, patient charting, computer data entry, positioning the patients correctly during procedures, and sedating the patients. She was also a charge nurse, helping to coordinate with nurse anesthetists, anesthesiologists, and radiologists. On February 22, 2005, Rowe reported for work and began her shift without any back pain. During her shift, Rowe noticed the onset of low back pain, which became progressively worse during the day.

Rowe sought treatment for her back pain from chiropractor, Max Winkler. She reported to him that her low back pain began after she started her work shift, but she was unable to identify a specific incident with a patient or accident which caused the pain. Following the chiropractic adjustment, Rowe's back pain failed to subside. Rowe was unable to return to work for the remainder of her shift. She then reported her back pain to Patty Sutton, her work supervisor, and a South Dakota First Report of Injury was filed.

The insurance case manager referred Rowe to Dr. Mark Simonson, a physiatrist. Dr. Simonson diagnosed Rowe with a cervical back strain/sprain and mechanical low back pain. Dr. Simonson gave Rowe work restrictions of no lifting over 20 pounds. Dr. Simonson's report concluded that although Rowe's symptoms did come on at work, absent any clear injury or event, Rowe's symptoms could not be attributed to work. Rowe was informed by the insurance company that based on Dr. Simonson's conclusion that work was not a major cause of her symptoms, further benefits were denied. Claimant's workers' compensation rate is $500.49 per week.

Dr. Simonson referred Rowe to Dr. James Nabwangu, a neurosurgeon. Dr. Nabwangu saw Rowe on May 4, 2005, Rowe reported to Dr. Nabwangu that on February 22, 2005 she had an extremely busy day at work and had a gradual onset of discomfort and pain. Rowe had an MRI which revealed mainly left-sided paracentral disc protrusions at L4-5 and L5-S1. Dr. Nabwangu felt that it was likely L5-S1 was the symptomatic one. He felt conservative measures should be continued and recommended epidural injections and prescription medications. He assigned work restrictions of no repetitive twisting of the lumbar spine and no lifting over 20 pounds. Rowe saw Dr. Nabwangu again on June 2, 2005, Rowe reported that she felt 100% better after the epidural injections and physical therapy, but still had problems lifting. Dr. Nabwangu allowed her to return to exercise, increased her lifting to 35 pounds. He had her continue with physical therapy and return to her regular duties. By June 6, 2005 Rowe was experiencing a return of her sciatic pain following a long car trip. She also reported that she was having difficulty at work because she was unable to respect the lifting restrictions because she was the only

nurse in the area and had no choice but to do what was necessary. As a result, Nabwangu took Rowe off work as she was unable to respect the physical limits due to her job. On August 24, 2005 Rowe saw Dr. Nabwangu again. At this time he felt that she had had adequate conservative measures and that decompression with diskectomy at L5-S1 was the only thing he had left to offer her. Nabwangu gave Rowe the option to decide whether surgery was something she wished to pursue.

Rowe also consulted neurosurgeon, Dr. Edward Seljeskog for a second opinion to determine if surgery would be beneficial. Dr. Seljeskog diagnosed lumbar degenerative disc disease with related back and left buttock pain. He advised that the potential benefit of surgery was difficult to predict. He felt that he could make an argument for surgery, but if she chose not to pursue surgery all he could do is try to treat her symptomatically.

While continuing with conservative treatment, Rowe returned to work at RCRH with restrictions from Dr. Nabwangu. She was unable to find a position in the hospital that accommodated the restrictions. As a result, Rowe was terminated from RCRH on August 24, 2005.

Rowe continued treatment with Dr. Nabwangu. On October 5, 2005, Rowe reported daily pain lasting up to 30 minutes a day. She expressed a desire to return to work and was put in a work hardening program. Rowe continued with physical therapy and work hardening with restrictions of no frequent bending of the lumbar spine, no lifting over 10 pounds floor to waist, no twisting frequently of the spine, and no carrying over 20 pounds. Rowe returned to Dr. Nabwangu on March 30, 2006 reporting that while working at her part-time job she reached for a door without standing up straight which caused intense low back pain. Since that time, her low back pain has been persistent. At this point Dr. Nabwangu told Rowe she needed to make up her mind whether or not she wanted surgery.

On July 12, 2006 Rowe began treatment with Dr. Brett Lawlor, a physiatrist. Dr. Lawlor diagnosed Rowe with degenerative disc disease, a herniated nucleus pulposus at L4-5, L5-S1, and possible lumbar facetogenic pain. Dr. Lawlor prescribed lumbar facet injections and prescription medications. Dr. Lawlor gave her restrictions of maximum lift of 23 pounds, single hand carry at 15 pounds, push/pull 12 and 10 pounds respectively. He limited her sitting and walking to a frequent basis and no squatting, changing positions from sitting to standing every hour as necessary. Dr. Lawlor, in his medical assessment of ability to do work related activities, concluded that Rowe's permanent medical condition could reasonably be expected to result in an unknown number of unscheduled absences from work.

Dr. Lawlor referred Rowe to Dr. Rand Schleusener, an orthopedic spine surgeon. Dr. Schleusener recommended that she attempt to live with the pain as there was only a 50/50 probability that surgery would relieve her symptoms. At the time of hearing, Rowe had not elected to have surgery.

In 2006, following her termination from RCRH, Rowe conducted a job search and was able to find two different part-time positions within her restrictions with Western Dakota VoTech. Despite the positions being within her limitations, she was unable to perform either job when her symptoms flared resulting in extended absences from work.

On March 28, 2007, Rowe underwent a physical Work Performance Evaluation with physical therapist, Geoff Bonar at ProMotion Rehabilitation. The results of the evaluation indicated that Rowe self-limited participation in 7 out of 20 tasks. Bonar concluded that Rowe was capable of performing physical work at the light duty level.

On February 12, 2008, Dr. Lawlor conducted an impairment rating. He thought she had reached maximum medical improvement. He concluded that she was qualified for a lumbar spine impairment of 5% to the whole person.

She has continuously been on work restrictions since February 22, 2005. The treating physicians determined Rowe's condition is permanent and they are in agreement that Rowe can work in some form with restrictions and limitations.

Vocational rehabilitation counselors, Mr. Rick Ostrander and Mr. James Carroll evaluated Rowe. Both experts reviewed Rowe's medical records and conducted a personal interview with Rowe. Ostrander and Carroll each conducted a labor market study and made a report.

Based on the totality of the evidence presented, including her testimony, the medical evidence, and on the opportunity to observe her demeanor at the hearing, Claimant was a credible witness. Other facts will be developed as necessary.

Analysis

Issue 1 Causation and Compensability

The first question briefed by the parties is whether Claimant sustained a compensable injury arising out and in the course of her employment pursuant to SDCL 62-1-1(7).

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that she sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520. The claimant must prove that "the employment or employment-related activities are a major contributing cause of the condition complained of." SDCL 62-1-1(7)(a). We construe the phrase "arising out of and in the course of employment" liberally. Norton, 2004 SD 6, ¶10, 674 NW2d at 521.

Did Rowe's injury arise out of her employment?

In order for an injury to "arise out of" the employment, the employee must show that there is a causal connection between the injury and the employment. The injury "arose out of" the employment if: 1) the employment contributes to causing the injury; 2) the activity is one in which the employee might reasonably engage; or 3) the activity brings about the disability upon which compensation is based. *Mudlin v. Hills Materials Co.,* 2005 SD 64, ¶11, 698 NW2d 67 (citations omitted).

Rowe was engaged in her usual duties as an endoscopy nurse when she experienced the gradual onset of low back pain. Her duties included lifting patients, transferring patients, positioning and sedating patients for procedures, and a variety of other tasks involved in patient care. Rowe's employment activities as a nurse contributed to the causation of her injury. Rowe was performing an activity in which she would reasonably engage as a nurse and those activities gave rise to her back pain. Rowe's injury arose out of her employment.

Did Rowe suffer an injury in the course of her employment?

"[T]he words 'in the course of' employment 'refer to the time, place and circumstances of the injury.'" *Id*. at ¶ 15 (citations omitted). "An employee is considered within his course of employment if he is doing something that is either naturally or incidentally related to employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment." *Id*.

Rowe had been pain free prior to the beginning of her shift. Rowe was at work performing her regular nursing duties when she experienced the onset of low back pain. Rowe did suffer an injury in the course of her employment.

Was Rowe's employment a major contributing cause of her injury?

Rowe established by a preponderance of the evidence that her injury arose out of and in the course of her employment with Employer. SDCL 62-1-1(7) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]"

> In applying the statute, we have held a worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [her] employment. We have further said South Dakota law requires [Rowe] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

Rowe presented a report by Dr. Edward Seljeskog, a neurosurgeon. He opined that the major cause of Rowe's painful low back was her employment on February 22, 2005. He

reasoned that the activities a nurse does during the day can and often do cause low back injuries. This reasoning is also supported by the absence of symptoms and clinical history prior to her work shift on February 22, 2005.

Dr. Brett Lawlor, one of Rowe's treating physicians, stated in his deposition and his assessment of ability to do work related activities that Rowe's work on February 22, 2005 was considered to be the major contributing cause of her symptoms. Rowe was also evaluated by Dr. Myung Cho, a physiatrist, who stated that Rowe's symptoms are most likely related to her work duties on February 22, 2005. Dr. Cho noted that although Rowe had a history of previous back injuries, these conditions had completely resolved. Dr. Cho concluded "[t]herefore the work she performed on 02/22/05 at Rapid City Regional Hospital is the major contributing factor in the onset of her lower back problem."

Employer/Insurer contend that there was no specific, identifiable injury or accident reported by Rowe, and therefore no compensable injury. This argument is based on the report of Dr. Simonson, who concluded in his report that in the absence of such an accident or injury that her employment was not a major contributing cause of her injury and therefore there was no compensable injury. Employer/Insurer also point out that Dr. Nabwangu was not able to articulate whether the injury was caused by her employment, but rather he could only state that it appeared she had a "significant event".

South Dakota has a history of awarding workers' compensation benefits to claimants even though they cannot prove any specific trauma, but only if they prove a history of injury to the body that occurs in the normal course of employment. *St. Luke's Midland Reg. Med. Center v. Kennedy*, 2002 SD 137, ¶11, 653 NW2d 880, 884; *See e.g. Caldwell v. John Morrell & Co*., 489 NW2d 353 (SD 1992)

> This Court has previously recognized that an employee does not have to have an accident or experience any trauma to his person before a medical condition will qualify as a compensable injury. It is sufficient that the disability "was brought on by strain or overexertion incident to the employment, though the exertion or strain need not be unusual or other than that occurring in the normal course of employment." *Caldwell,* 489 NW2d 353 at 358 (quoting *Sudrla v. Commercial Asphalt & Materials*, 465 NW2d 620, 621 (SD 1991)).

Dr. Simonson based his opinions on the lack of specific incident, however in his report he stated that her pain came on during work. Dr. Simonson's opinion is not persuasive because South Dakota law does not require a specific accident in order to recover workers' compensation benefits. Claimant was unable to identify what actions during her work shift caused the pain, however she performed a variety of tasks including lifting and turning patients, reaching, etc. during her shift which are in the normal course of employment as a nurse, and such activities have a history of causing this type of injury to Claimant.

Although Dr. Nabwangu did not articulate whether her employment was a major contributing cause of her injury, he did state that Rowe experienced a significant event on February 22, 2005 that was worse than her previous back injuries. He also testified that he disagreed with Dr. Simonson's opinion that Rowe's employment activities were not a major contributing case of her back pain.

When asked to elaborate on what he referred to as a "significant event" experienced by Rowe on February 22, 2005, that differed from her previous injuries, Dr. Nabwangu testified,

> A: What I mean by significant is a little bit different. What I mean by significant is that whereas in '97 she had gotten better, 2005 she had gotten better, since- or I mean 2000 I think it is five years- ten years and five years. Ten years before she had gotten better, five years before that before she came to see me she had gotten better. The significance of the onset of symptoms in 2005 when she came to see me is based on the fact that she has never gotten better. That is what I mean by significance.

Dr. Nabwangu does not use so-called magic words such as "a major contributing cause", however the South Dakota Supreme Court has stated that the statutory standard may be met without pronouncement of magic language. "No special verbal formula is necessary when, as here a doctor's testimony plainly and unequivocally conveys his conviction that events are causally related." *Wise v. Brooks Const*. *Ser*., 2006 SD 80, ¶25, 721 NW2d 461, 470. Dr. Nabwangu's testimony shows that the February 22, 2005 onset of symptoms at work as described by Rowe was a major contributing cause under *Wise*.

Based upon the medical evidence presented, Claimant has met her burden to demonstrate that she sustained a compensable injury arising out and in the course of her employment and that Rowe's employment was a major contributing cause of her injury.

Issue 2 Extent and degree of disability

The second question briefed by the parties is whether Claimant is permanently and totally disabled under the odd-lot doctrine and/or SDCL 62-4-53.

Claimant alleged that she is permanently and totally disabled under the odd-lot doctrine. The standard for determining whether a claimant qualifies for odd-lot benefits is set forth in SDCL 62-4-53, which provides in part:

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

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

SDCL 62-4-52(2) defines "sporadic employment resulting in an insubstantial income" as,

> employment that does not offer an employee the opportunity to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury.

There are two recognized ways that Claimant can make a prima facie showing that she is entitled to benefits under the odd lot doctrine. *Eite v. Rapid City Area Sch. Dist., 2007 SD 95, ¶21, 739 NW2d 264*, 270.

> First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment within claimant's limitations is actually available in the community. A claimant may show obvious unemployability by: 1) showing that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category, or 2) persuading the trier of fact that he is in the kind of continuous severe and debilitating pain which he claims.
>
> Second, if the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or regulated to the odd-lot category, then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has made reasonable efforts to find work and was unsuccessful. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant. Even though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

Id. (quoting *Wise*, 2006 SD 80, ¶28, 721 NW2d at 471 (citations omitted)).

At the time of hearing, Rowe was 47 years old. She holds a nursing degree and has approximately 13 years of experience working the field of nursing. Her condition is

permanent. The doctors as well as the vocational experts are in agreement that Rowe is capable of doing some work within her physical restrictions. Therefore, her physical condition, coupled with her education, training, and age do not make it obvious that she is in the odd-lot disability category.

Claimant has testified that she is in severe pain that at times can be debilitating. However, her severe and debilitating pain is not continuous. Claimant testified and medical experts agreed that although she is never completely without pain, there are going to be good days where she would be able to work within her restrictions and that there would be bad days where she would not be able to work at all. Dr. Lawlor stated that she would experience unpredictable, unscheduled absences from work due to unpredictable pain. It is undeterminable when and how often these types of absences would occur. Therefore, Claimant has not shown that she is in the type of continuous, severe, and debilitating pain that make it obvious that she is in the odd-lot disability category. Since Rowe is not obviously unemployable or regulated to the odd-lot category, then the burden remains with Rowe to demonstrate the unavailability of suitable employment by showing that she has made reasonable efforts to find work and was unsuccessful.

Rowe presented expert vocational testimony from Rick Ostrander, a vocational rehabilitation counselor with over twenty years of experience. Ostrander reviewed all of Rowe's medical records, Employer's vocational expert's reports, and interviewed Rowe. Ostrander recognized that Claimant's main debilitating condition is her pain. Ostrander opined a job search would be futile for Rowe because no work exists that would all meet all of her restrictions. Ostrander believed that Rowe's pain would interfere with her ability to maintain a productive schedule.

Ostrander concluded that although skilled nursing jobs exist within Rowe's limitations, Rowe was still unemployable. He testified,

> The real concern is her ability to maintain employment without an ability to regularly attend, be at work for a consistent amount of time relative to customary tolerances of employers. She was unable to do that in '06. Her condition has been described by the doctors as permanent.

Ostrander believed Claimant was not employable in any capacity, even part-time work, because she would have to be able to attend on a regular basis and he testified "she's unable to maintain…I don't think any work exists for her tolerance." Ostrander's opinions are credible.

Even though Ostrander concluded a job search would be futile, Rowe had a strong desire to return to work and she conducted a job search on her own. Rowe presented evidence of her job search including a list of websites which she regularly checked and a list of the employers to whom she sent resumes. Rowe attended interviews, but ultimately was unable to find a job.

Since February 22, 2005, Rowe was able to find employment on two different occasions. Rowe testified about the two positions at Western Dakota Vo-Tech

A: The first one I think it was six hours a day, five days a week. And that causes me horrible pain. I took ice packs with me and I took handfuls of Ibuprofen before I left. Then I would take Tylenol to take at lunchtime.

Then I would have Vicoden when I was ready to walk out the door. Then I came home and laid on the floor. It was- thank God it was a school setting do there was a spring break, Easter break. And then I had a major flare up in the middle of it and I was unable to finish that job.

Then the second one was a lot less demanding. It was twice a week, four hours at a time teaching certified nursing assistants.

Again, that hurt me. It hurt me just to work on a part-time limited basis. I was wiping a window sill in my house that wasn't even very low and one of those same episodes or flares where I was unable to walk and I had to lay down and it was back to – if you can't go to work, if you can't get yourself in the car, you lose the job.

Q: So you could have kept the job. As I understand, you could have kept working. Did they want you to keep working?

A: Most jobs need a person to be doing the job and so if I'm not able to be the person doing the job, I lose the job.

When asked why she continued to search for work following her experience at Western Dakota Vo-Tech, Rowe testified that she was "hopeful…I thought if I kept looking, I'd find the perfect job." She described her desire to continue her job search as delusional and that she was still trying to deal emotionally with the concept that she could no longer work. Rowe testified that her pain and the frequency and intensity of her flares are the same now as they were at the time she worked for Western Dakota Vo-Tech.

Rowe made reasonable efforts to find work, however she was unsuccessful in finding a job within her restrictions and that would accommodate her unscheduled absences due to unpredictable flare-ups of her low back pain. Based on the evidence presented, Rowe established a prima facie case that she is permanently disabled and the burden shifted to the Hospital to show that some form of suitable work was regularly and continuously available to Claimant..

Employer "may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2)." SDCL 62-4-53. Employer must demonstrate the specific position is "'regularly and continuously available' and 'actually open' in 'the community where the claimant is

already residing' for persons with *all* of claimant's limitations." *Shepard v. Moorman Mfg*., 467 N.W.2d 916, 920 (S.D. 1991).

In support of its burden, Employer/Insurer presented the testimony of James Carroll, a vocational rehabilitation counselor with over twenty years experience. Carroll testified that he identified several different job positions that were available which fell within Rowe's return to work guidelines and the FCE result, that paid at or above her workers' compensation weekly benefit rate either on a full or part-time basis.

Carroll placed particular emphasis on the objective limitations set forth in the FCE, rather than subjective complaints of pain, when determining which jobs would be appropriate for Rowe. Carroll failed to inform the potential employers that according to her doctors, she would have unpredictable absences. Carroll also did not discuss with potential employers that they may need to accommodate Rowe's need to lay down during the day, or alternate her sitting and standing. Carroll did not explain to potential employers that according to her doctors, she would have good days and bad days. Carroll mentioned that she may have absences, but did not discuss accommodating absences if Rowe were to experience a flare of her symptoms, because the nature and frequency of those absences are unknown.

> An expert's listing of jobs that focuses on a claimant's capabilities to the exclusion of his limitations is insufficient as a matter of law. When prospective employers were not informed of the nature of the limitations they needed to accommodate, there was no basis for the expert's opinion in concluding that the employers were willing to make modifications to meet those limitations.

Eite, *2007 SD 95 at ¶28, 739 NW2d* at 273. In *Eite*, the Supreme Court discussed the significance of excluding information regarding a claimant's limitations.

> [O]mitting such significant pieces of information regarding a claimant's abilities has led this Court to discount a vocational rehabilitation counselor's testimony in prior cases. *See Kurtz v. SCI*, 1998 SD 37, ¶21 n6, 576 NW2d 878, 885 n6 (stating that it was significant that counselor failed to inform prospective employers about claimant's physical limitations when he inquired into available jobs); *Rank v. Lindblom*, 459 NW2d 247, 250 n1 (SD 1990) (noting that counselor left out significant pieces of information regarding claimant's abilities).

Id. at ¶28.

Carroll also suggested that Rowe would be a candidate for retraining. He determined that with her level of knowledge and experience she could go back to school to receive her certification to teach nursing. Ostrander pointed out that the same problems Rowe would have with her pain tolerance and attendance would apply to an academic setting. If she was unable to attend classes during flare-up of her pain symptoms, she would be unable to complete the program or retain any job that she may qualify for with her additional education.

"The trier of fact ... is free to accept all, part, or none of an expert's opinion." *Rank*, 459 N.W.2d 247, 250 (S.D.1990) (citation omitted). The Department rejects the opinion of Carroll that some form of suitable work was regularly and continuously available to Claimant because the vocational expert failed to inform the potential employers about all of Rowe's limitations.

Employer/Insurer also presented the testimony of Judy Warnke, an occupational health nurse at RCRH. Her duties include screening all new employees, posting job offers, and working in safety to help prevent work-related injuries. Warnke identified several positions that were available at RCRH at the time of the hearing consistent with Rowe's current return to work restrictions. When questioned whether unscheduled absences could be accommodated in these, Warnke was unable to say whether she would hire someone that would be gone that much. She testified,

> Q: For example if an employee has a back injury and the back injury required them from time to time to miss work, that's something you may or may not be able to live with, true?
>
> A: That's difficult to predict.
>
> Q: That's difficult to predict. In other words, you can't tell us as you sit here today that someone that needs to miss work due to ongoing back injury can be accommodated, can you?
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> A: I could accommodate according to what the physician—from what the physician says their capabilities are we can accommodate. But from a subjective complaint of back pain, it could be very difficult to accommodate.

Warnke's testimony fails to demonstrate that there is suitable work within all of Rowe's restrictions and limitations. Employer/Insurer failed to meet their burden of production that some form of suitable work was regularly and continuously available to Claimant. The Department accepts the testimony of Ostrander and finds that Claimant was a credible witness. Claimant demonstrated the unavailability of suitable employment by showing that she made reasonable efforts to find work and was unsuccessful. Claimant has met her burden of persuasion that she is totally and permanently disabled under SDCL 62-4-53 and the odd-lot doctrine.

Issue 3 Medical Expenses

The last question briefed by the parties is whether Claimant is entitled to reasonable and necessary medical expenses pursuant to SDCL 62-4-1.

Pursuant to SDCL 62-4-1, the employer must provide reasonable and necessary medical expenses. It is well established by the South Dakota Supreme Court that the

Employer/Insurer has the burden of showing reasonable and necessary medical expenses.

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

Hanson v. Penrod Construction Co., 425 NW2d 396,399 (SD 1988).

Employer/Insurer presented no evidence that the medical expenses incurred by Rowe were not necessary or suitable and proper. Employer/Insurer has failed to meet its burden under SDCL 62-4-1. Rowe has been seen by several physicians. Dr. Lawlor reviewed the treatments rendered by those physicians and testified that all treatments have been reasonable. Medical expenses incurred by Rowe from and after February 22, 2005 are reasonable and necessary.

Conclusion

In summary, Rowe's injury on February 22, 2005, arose out of and in the course of her employment with Employer and Rowe's employment was a major contributing cause of her injury. Rowe is permanently and totally disabled under the odd-lot doctrine and SDCL 62-4-53. Finally, Rowe's medical expenses are reasonable and necessary and pursuant to SDCL 62-1-1.3 and SDCL 62-4-1, Employer/Insurer is responsible for payment of those medical expenses.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 25th day of September, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M. Dockter
Administrative Law Judge