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

LYUDMILA BAGDASAROV, **HF No. 12, 2007/08**

Claimant,

v. **DECISION**

TRADE SECRET,

Employer,

and

SPECIALTY RISK SERVICES,

Insurer.

The above-entitled matter came on for hearing before Catherine Duenwald, Administrative Law Judge, Division of Labor and Management. Attorneys Dean Nasser and Jolene Nasser represented Claimant, Lyudmila Bagdasarov, who was present at the hearing. Attorney Justin Smith represented Employer and Insurer, Trade Secret and Specialty Risk Services.

Appearing as witnesses at the hearing were: Lyudmila Bagdasarov, Lynn Lofswold, Lolita Heinis, George Bagdasarov, Ana Galvan, Joan Hanson, Rick Ostrander, Lafae Amdahl, Marta Fink, Nicholas Stevens, William Chad Jordan, and James Carroll. A Russian translator was present for witnesses who required or requested translation services. Depositions admitted into evidence via the Prehearing Order are from Dr. Judith Peterson, Dr. Gary Wyard, Dr. Evan Hermanson, and Ms. Joan Hanson, PT.

A. Whether Claimant's work-related injury is a major contributing cause of Claimant's condition and need for past and future treatment of her neck, back, arm, and right shoulder?

B. Whether Claimant is entitled to reimbursement of medical bills related to the work-related injury incurred after the date of denial?

D. Whether Claimant is permanently and totally disabled?

FACTS:

1. Claimant, Lyudmila (Lucy) Bagdasarov, a 62-year-old female, was living with her husband, George, in Sioux Falls, South Dakota.

2. Claimant immigrated to the United States from Baku, Azerbaijan in about 1981.

3. Claimant started working for Employer in November 2001. Claimant attended beauty school in her home country and had worked as a hairdresser for about 15 years.

4. Claimant obtained her cosmetology license for South Dakota in 1994.

5. Claimant worked about 8-10 hours per day for Employer.

6. On March 27, 2004, prior to leaving work for the day, Claimant sat down on a stylist chair to add up receipts for the day. The back of the chair Claimant was sitting on broke. Claimant fell backwards off the chair.

7. Claimant reports that she reached for the sink with her right hand and was unable to stop the momentum of the fall. She fell off the chair onto a metal plate which caused the abrasions and lacerations.

8. The fall was witnessed by a co-worker who in turn helped Claimant into a regular chair.

9. Claimant telephoned her manager reporting the injury immediately. The manager, Lynn Lofswold came back to the worksite to meet Claimant. Ms. Lofswold took photographs of the broken chair and of part of Claimant's back. There was a large abrasion that was covered by Claimant's shirt in the photographs.

10. Claimant's husband escorted her to the emergency room. The emergency room reports indicate that Claimant sustained abrasions to her back and right shoulder.

11. The initial x-rays did not indicate that Claimant had broken any bones in her back or right shoulder, or suffered from a pneumothorax.

12. An x-ray was taken of Claimant's right shoulder area due to Claimant's complaints of pain in her shoulder. The radiologist did not report any "acute findings."

13. Claimant continued to work for Employer for at least 32 hours per week. Ms. Lofswold testified that Claimant had to work at least 32 hours per week in order to keep her benefits.

14. Claimant left her job with Employer on January 8, 2011.

15. Claimant had a large and loyal clientele, according to a former manager for Employer. Employer wanted Claimant to continue to work there because her clients would continue to see Claimant on a regular basis, and if they could not be seen by Claimant, other stylists for Employer would take over. Employer accepted Claimant's limitations in order to keep Claimant's client base.

16. The former manager for Employer presented testimony regarding Claimant. After Claimant left Employer, her clients did not continue to come to the other stylists with Employer. Claimant's client base was a large percentage of Employer's customers. The former manager testified that Claimant's client cards had disappeared after Claimant left her job. The manager worked for Employer for only 8 months after Claimant left.

17. Claimant made more money than the other stylists while employed with Employer. Claimant earned an hourly wage plus 55% commission. Most of the other stylists were only paid hourly.

18. Towards the end of Claimant's employment with Employer, Claimant was unable to perform the amount of work she typically had performed. According to the manager of Employer, Claimant was working at about 50%of normal productivity. Many of Claimant's clients had to be seen by other stylists. Claimant's co-workers had to assist Claimant with normal everyday tasks with her job.

19. The former manager presented conflicting testimony. She was adamant that Claimant continued to curl her own hair; however, when cross-examined, she admitted that Claimant had to bend her head far over to the right in order to curl her hair with her right hand. Claimant did not reach above her head while her head was upright.

20. The former manager's testimony is not entirely credible, given the bias she had against Claimant. The former manager exhibited some animus towards Claimant during the testimony.

21. Claimant initially underwent medical treatment for her upper back and neck including physical therapy. Claimant's initial treatments were accepted as compensable by Employer and Insurer.

22. Claimant's initial treating physician was Dr. Billion with McGreevy Clinic.

23. In June 2004, Claimant was still experiencing pain on her right side. An MRI was performed of Claimant's upper back. Dr. Puumala, a neurologist recommended by Dr. Billion, was of the opinion that nothing on the MRI could explain Claimant's pain.

24. Claimant started seeing Dr. Thomas Ripperda at Avera Rehabilitation Associates on July 8, 2004. He noted, among other pain complaints, that Claimant had "some constant pain of her right shoulder and the right aspect of her neck". Dr. Ripperda prescribed physical therapy and conservative treatment for Claimant.

25. Claimant continued to see Dr. Ripperda. Her condition improved slightly, but she experienced quite a bit of pain after only a few hours of work. She could not work with her hands over her head without becoming dizzy and light-headed. As of April 28, 2005, Claimant was reporting to Dr. Ripperda that the pain in her right

upper extremity was near constant with occasional burning around the scapula. Dr. Ripperda noted trigger points within the right upper trapezius muscle.

26. As noted by the doctors, Claimant's pain was primarily located in the upper right trapezius and right medial border of the scapular. The medical records note a small scar at that location from when Claimant fell. Claimant continued conservative treatments to her upper back.

27. On May 12, 2005, Dr. Ripperda found Claimant to be at Maximum Medical Improvement or MMI, and was given a 5% impairment rating. Claimant was given permanent work restrictions of no reaching overhead.

28. In April 2005, Dr. Jeff Luther performed a records review IME for Employer and Insurer. Dr. Luther was of the opinion that Dr. Ripperda's assessment was correct. That Claimant was experiencing "myofascial pain that did not require any further interventional treatment other than independent home exercise program."

29. In February 2006, Claimant started chiropractic treatments with Dr. Jon Bruce Hagen at Back Specialist of the Midwest. Dr. Hagen noted that Claimant's pain complaints were the entire right side of her body. Claimant had been treating at home with over-the-counter pain medication and heat treatments.

30. In September 2006, Dr. Hagen recommended Claimant have physical therapy treatments with Dr. Justin Wittmayer, a physical therapist who worked with Dr. Hagen. Claimant engaged in active home care and physical therapy as directed by Dr. Wittmeyer. She also continued to see Dr. Hagen for chiropractic treatments.

31. In November 2006, Dr. Hagen advised Claimant that he was going to consult with Dr. Judith Peterson regarding her case. Claimant treated with Dr. Hagen until February 2007. Claimant was referred to Dr. Peterson.

32. Dr. Judith Peterson diagnosed right median neuropathy at the wrist and probably lumbosacral radiculopathy. She recommended continuation of chiropractic treatments and ordered an EMG/NCS of the lumbar spine and right lower extremity.

33. In February 2007, the physical therapist reported that Claimant was having a lot of problems in her right upper extremity, and the right side of her neck. Claimant's range of motion in her right arm and shoulder was decreased.

34. On June 14, 2007, Claimant returned to Dr. Billion at the McGreevy Clinic. Dr. Billion wanted an updated MRI of Claimant's lumbar spine.

35. On June 18, 2007, Claimant underwent a CT scan of the head and MRI scans of the cervical, thoracic, and lumbar spine. The results had unremarkable changes from the earlier scan and results of the CT scan were negative.

36. On July 28, 2007, Claimant was experiencing severe right shoulder and back pain and went to the Avera McKennan Hospital Emergency Room. She was instructed to follow-up with Dr. Billion.

37. On August 1, 2007, Claimant saw Dr. Billion's colleague at the McGreevy Clinic, Dr. Burchett. He diagnosed chronic back pain, right sided thoracic paraspinal muscle spasm and pain, and cervical somatic dysfunction. Dr. Burchett prescribed medications and physical therapy.

38. On March 18, 2008, Dr. Judith Peterson gave Claimant an 18% whole person impairment rating, based upon the 5th Edition of the AMA Guides. It was Dr. Peterson's opinion, at that time, that Claimant had sustained a permanent impairment was limited to 30 hours per week.

39. On May 7, 2008, Claimant saw Dr. Luther for an IME. The IME was in-person and based upon reports from Claimant as well as the objective medical reports, test reports, and objective findings from the exam.

40. Dr. Luther determined that Claimant had "diffuse and multiple pain generators" and symptoms consistent with fibromyalgia "which may be her underlying diagnosis." He did not have a definitive diagnosis or opinion on where her pain was coming from, because the tests did not show anything. Although Claimant was in pain, which is subjective, Dr. Luther did believe that any treatment after Dr. Ripperda released her was not related to the March 27, 2004 incident.

41. On August 25, 2008, Claimant was seen again by Dr. Billion for chronic back pain, right leg weakness, degenerative arthritis, occasional complaints of pain in the right back and shoulder, dizziness, recent lightheadedness and a fall at work. Claimant was having a hard time working for longer than a couple of hours.

42. On September 8, 2008, Dr. Judith Peterson completed another impairment rating. This time she used the 4th Edition of the AMA Guides. The impairment rating was 15% whole person.

43. Claimant continued to see different doctors because of her pain in her right shoulder, neck, and back. Claimant underwent MRI's, scans, and injections with her neck and back.

44. On June 1, 2009, Claimant returned to Dr. Judith Peterson for a follow-up. Claimant presented with severe, right-sided back pain in the mid-back, swelling in the right axilla, neck pain and low back pain. On exam, Dr. Peterson noted Claimant had pain on active range of motion of the right shoulder, but that the shoulder range of motion is functional. She suggested Claimant return to Dr. Billion to see if there are other illnesses.

45. On June 4, 2009, Claimant saw Dr. Aarti Kapoor at Avera McGreevy Clinic, a colleague of Dr. Billion. Dr. Kapoor notes that Claimant had some swelling on her right shoulder that accompanied the pain. Like other previous doctors, Dr.

Kapoor ordered an MRI of the cervical spine, but she also ordered an MRI of the right shoulder because of the swelling.

46. On August 17, 2009, Claimant had the first MRI performed on her right shoulder. Although Claimant told her physicians about her right shoulder pain continually since her accident in March 2004, none of her doctors ordered an MRI of her shoulder until August 2009.

47. The MRI showed a full thickness tear of Claimant's rotator cuff. Dr. Billion referred her to an orthopedic surgeon to repair her rotator cuff.

48. On August 26, 2009, Claimant was seen by Dr. Hermanson at the Orthopedic Institute. Dr. Hermanson, following a physical examination, recommended a right shoulder surgery which would include arthroscopy, debridement, decompression, a distal clavicle excision, and a rotator cuff repair.

49. This surgery took place on January 5, 2010, at the Sioux Falls Surgical Hospital. The surgery was generally successful and Claimant was instructed to participate in physical therapy post-surgery.

50. Claimant continued to see doctors regarding her back pain. She was diagnosed with bulging discs in her cervical spine with no nerve root impingement. She had degenerative disc disease through her cervical and thoracic spine.

51. Claimant continued to report weakness in her right arm and side. In June 2010, Dr. Johnson at the Orthopedic Institute recommended physiatry and referred Claimant to Dr. Drymalski.

52. On July 12, 2010, Claimant returned to Dr. Hermanson who diagnosed a radiculopathy in her right shoulder. Dr. Johnson had offered cervical surgery for the condition. Dr. Hermanson released Claimant to work with no restrictions.

53. Dr. Judith Peterson at SoDak Rehab noted that Claimant had severely decreased range of motion of the right shoulder. She felt Claimant may need manipulation of the shoulder under anesthesia. Claimant was referred to Dr. Eric Peterson at Orthopaedic Consultants.

54. A postoperative MRI on July 26, 2010 indicated an intact rotator cuff.

55. On August 30, 2010, Dr. Peterson gave Claimant work restrictions of no overhead lifting, no lifting with the right arm over 5 pounds, and no repetitive use of the right arm.

56. In September 2010, Claimant had complaints of significant right upper extremity pain, neck pain, and numbness in the toes of her right foot and weakness in the right leg. Claimant was undergoing acupuncture from Dr. Eric Peterson for those symptoms. He referred her back to Dr. Judith Peterson for examination under anesthesia.

57. Claimant did not undergo the examination under anesthesia but continued with physical therapy and acupuncture.

58. In November 2010, physical therapy and acupuncture were discontinued as no improvement was being made.

59. In December 2010, Claimant quit her job with Employer. Dr. Peterson gave the opinion that Claimant was disabled from her employment. Claimant had severe restrictions on her right shoulder, neck and low back: no overhead lifting, no lifting with right arm greater than 5 pounds, and no repetitive use of the right arm.

60. On February 11, 2011, Dr. Richard Farnham performed an IME on Claimant on behalf of Employer and Insurer.

61. Dr. Farnham is of the opinion that Claimant did not sustain an injury to her right shoulder joint. He notes that there are multiple other reasons why Claimant could have a right shoulder joint injury: "firing shotgun right handed shooting at clay pigeons while living in Russia, sleeping on her right side, past history of playing tennis for multiple years, bowling for multiple years, working in her flower garden, being right hand dominant, and holding scissors and other cosmetology instruments in her right hand while perform the art of hairstyling, and recreational painting."

62. Claimant testified at hearing that she shot a shotgun probably twice in her life while in school in Russia; Claimant also played tennis about once a week around the age of 16 or 17, while in Russia. Claimant testified that she sleeps on her right side, but she also sleeps on her back, her tummy, and on her left side.

63. Dr. Farnham gave the opinion that Claimant is able to work as a hairstylist if she was motivated to do so. He wrote that the only time Claimant should not have been working was for her shoulder surgery.

64. The diagnosis of "cervicothoracic spine contusion with myofascial inflammation, now resolved" is the diagnosis Dr. Farnham would give Claimant as the injury that was caused by the workplace injury on March 27, 2004. He is not of the opinion that she injured her right shoulder during the fall from the work chair.

65. At the request of Claimant, Dr. Gary Wyard, a board-certified orthopedic surgeon, performed an IME of Claimant on November 22, 2011. He reviewed all of Claimant's medical records and provided updates.

66. Dr. Wyard, like other doctors including the IME doctors, indicated in his report that Claimant guards or has apprehension when touched on her right arm and shoulder. There is less pain in her hand than on her upper arm.

67. Dr. Wyard is of the opinion that Claimant's torn rotator cuff was caused by the workplace injury that occurred on March 27, 2004. He bases his opinion on the

fact that there were no previous issues with her shoulder and that she complained of her right shoulder pain at the time of the accident.

68. During his deposition, Dr. Wyard testified that x-rays and EMG's of the shoulder and neck would not reveal a tear in the rotator cuff. His testimony, as an expert in this area, was that only an MRI of the shoulder will show a rotator cuff tear.

69. It is Dr. Wyard's opinion that the care and treatment has been reasonable and necessary to address Claimant's injuries and complaints. During his deposition taken prior to the hearing, Dr. Wyard said that he agreed with Dr. Erik Peterson's analysis that Claimant suffers from postoperative adhesive capsulitis. He also agreed with Dr. Peterson's impression and plan for treatment of Claimant.

70. According to Dr. Wyard, some of Claimant's pain complaints caused by the work-related injury are permanent in nature. He gave the opinion that Claimant is permanently and totally disabled. Dr. Wyard gave the opinion that Claimant will never be returned to her pre-injury condition, but that surgery and manipulation of the shoulder could make her current condition better.

71. In October and November of 2011, Employer and Insurer employed Sedgwick CMS and their videographer and investigator, William Chad Jordan, to perform video surveillance of Claimant. The video surveillance was presented at hearing. In three days, Mr. Jordan shot four hours, 9 minutes, and 5 seconds of digital footage. This footage was condensed to a short video of just over four minutes containing the most pertinent footage.

72. During the condensed version, Claimant is seen wearing a purse on her left arm and shoulder. The lifting of heavier items is primarily with her left hand. On one occasion, Claimant is lifting to her waist a small half-bushel basket of produce, using a bilateral lift. On another part of the video, Claimant is seen lifting a connected package of two bottles of mouthwash from a cart into the back of her SUV. Claimant also is seen drinking from a small beverage (water) bottle, holding the bottle in her right hand. The video shows Claimant standing behind her husband, watching him play a video lottery machine. Claimant has her right forearm bent at the elbow and resting on her husband's chair; she is putting some of her weight on her right arm and the chair back.

73. On the surveillance video, Claimant uses both hands when performing many of the lifts. The video does not show Claimant lifting anything overhead with her right hand and arm. It shows Claimant reaching forward with her right hand/arm and holding small items with her right arm.

74. On August 27, 2012, Claimant underwent an upper extremity functional capacity exam (FCE). The results of the test were conditionally valid meaning that it is likely Claimant is capable of doing more or lifting more. Claimant was perceived as terminating the test earlier than her capabilities as the activities can likely cause pain.

75. Based upon the FCE, Claimant is limited from working more than 5-6 hours per day; sitting up to 60 minutes at a time; standing 1-2 hours per day, up to 25 minutes at a time; walking only 2-3 hours per day for occasional moderate distances; and using her upper extremity 1-2 hours per day for only 20 minutes at a time.

76. On December 7, 2011, Mr. Rick Ostrander, a vocational rehabilitation expert met with Claimant. She indicated to him that she could not lift much with her right hand without also using her left hand. She spoke with Mr. Ostrander about her restrictions. He also had a copy of the restrictions from Dr. Judith Peterson.

77. Using the OASYS software, a computerized transferable skills analysis with a local labor market database, Mr. Ostrander could not identify any work that was available for Claimant. The work would have to be consistent with Claimant's medical restrictions and based upon her education, past work history, and transferable skills. It is Mr. Ostrander's opinion that Claimant is obviously unemployable.

78. Mr. Ostrander also reviewed whether Claimant could be rehabilitated into another occupation. She is over 60 years old and has significant limitations in the use of her upper dominant arm, which limits her to one-handed work. She also takes prescription and over the counter pain medication. It is his opinion that there is no formal vocation retraining that could restore Claimant to 85% of her pre-injury earning capacity.

79. James Carroll, a vocational rehabilitation consultant and expert, upon request of Employer and Insurer, completed a vocational assessment on Claimant on May 16, 2012, with updates to the report issued on March 4, 2013 and August 8, 2013.

80. Mr. Carroll identified Claimant as being able to work in the "Light" range of work, based upon Dr. Wyard's only initial restriction of 25 pounds to chest level on occasion. Mr. Carroll believes Claimant would be capable of working as a restaurant host/hostess as an appropriate job for Claimant, as well as hotel/motel desk clerks, fast food worker.

81. Mr. Carroll is of the opinion that jobs are available for Claimant with wages at or above her workers' compensation benefit rate of $310.99 per week; which is equivalent to $7.55 per hour, based upon a 40 hour week.

82. Dr. Wyard, on December 10, 2012, expanded his restrictions to include no use of her arms above chest level, overhead or on a repetitive or prolonged basis and only an occasional lift of up to 25 pounds to chest level.

83. On July 13, 2012, Mr. Ostrander updated his report to Claimant's attorney. He indicated that Claimant had applied for 38 of the possible 44 employers Mr. Carroll had indicated had work suitable for Claimant. He wrote, "in most cases

the employers have indicated to her that the work would involve physical demands clearly in excess of her capabilities as identified by Dr. Peterson. In other situations they have simply indicated they have no openings although a number of the employers have accepted applications."

84. As of November, 2012, Claimant had contacted 64 employers without success. Taking into account the restrictions given to Claimant by Dr. Wyard, Mr. Ostrander is still of the opinion that there are no jobs that Claimant could perform that would restore Claimant to 85% of her pre-injury earning capacity.

85. Just prior to the hearing, Mr. Ostrander and Mr. Carroll were made aware that Claimant provides translator services for A to Z World Languages. Claimant is fluent in Russian, Armenian, and Ukrainian languages. She is able to translate them to English. Claimant averages about 10 hours per month and earns about $230 a month. It is not possible for Claimant to work full-time for A to Z as a translator.

86. Claimant's workers' compensation benefit rate is stipulated by the parties to be $310.99 per week.

87. There are three organizations within Sioux Falls which provide translators for hire, A to Z, Lutheran Social Services (LSS), and the Multi-Cultural Center. Mr. Ostrander testified that LSS will not hire a translator who contracts with either of the other two agencies. A to Z pays more than the Multi-Cultural Center or LSS. The testimony is that none of these agencies hires Russian, Armenian, or Ukrainian translators on a full-time basis.

Further facts may be established in the Analysis set out below.

ANALYSIS

A. Whether Claimant's work-related injury is a major contributing cause of Claimant's condition and need for past and future treatment of her neck, back, arm, and right shoulder?

The Supreme Court is clear on the burden of proof for causation of a workers' compensation injury. They have stated, "the claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability." *Wise v. Brooks Const. Ser*., 2006 SD 80, ¶17, 721 NW2d 461, 466 (internal citations omitted). In a more recent case, the Court has written:

> In a workers' compensation dispute, a claimant must prove all elements necessary to qualify for compensation by a preponderance of the evidence. … A claimant need not prove his work-related injury is a major contributing cause of his condition to a degree of absolute certainty.

> Causation must be established to a reasonable degree of medical probability, not just possibility. The evidence must not be speculative, but must be precise and well supported.
>
> The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition because the field is one in which laypersons ordinarily are unqualified to express an opinion. No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition. SDCL 62-1-1(7). Expert testimony is entitled to no more weight than the facts upon which it is predicated.

Darling v. West River Masonry, Inc., 2010 SD 4, ¶11-13, 777 NW2d 363,367 (citations and quotes omitted). Furthermore, the Court has opined on the "level of proof" that must be shown by a claimant.

> "The burden of proof is on [Claimant] to show by a preponderance of the evidence that some incident or activity arising out of [his] employment caused the disability on which the worker's compensation claim is based." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. This level of proof "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." Id. To meet his degree of proof "a possibility is insufficient and a probability is necessary." *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

In this case, the surgeon, Dr. Hermanson has not given an opinion as to the causation of Claimant's torn rotator cuff. He did not feel like he knew the case well enough to give an opinion on causation. Dr. Wyard, a board certified orthopedic surgeon, has thoroughly reviewed all the medical records and the opinions of the other IME doctors and is of the opinion that the fall in March 2004 caused the torn rotator cuff. The condition Claimant is currently suffering from, stems directly from the workplace injury when Claimant fell off the back of the chair, according to Dr. Wyard. Dr. Wyard states his opinion with a reasonable degree of medical probability. He testified that it was possible that something else caused the tear, but it is medically probable that workplace injury was a major contributing cause of Claimant's torn rotator cuff and need for treatment. There are no other orthopedic specialists who have given an opinion as to causation in this case, to a medical degree of probability. For that reason, Dr. Wyard's opinion is given a greater weight than the other IME doctors who are not board certified in orthopedics.

Claimant continued to tell her doctors and chiropractor that her right shoulder was in pain. After being placed at MMI by Dr. Ripperda and being denied further

treatment, Claimant sought treatment on her own, going to a chiropractor, Dr. Bruce Jon Hagen. After a number of months of treatment, he sent Claimant to Dr. Judith Peterson. Dr. Peterson, a board certified physiatrist, treated Claimant's symptoms conservatively, but did not discover the cause of the pain or that she was still suffering from an untreated injury.

Claimant went back to Dr. Stephen Billion, an internal medicine doctor, who by chance had Dr. Kapoor filling in for him. Dr. Kapoor recognized some swelling in Claimant's shoulder and felt that an MRI would be appropriate. Dr. Billion ordered the shoulder MRI for Claimant. Five years after the fall at work, a full-thickness tear in the rotator cuff is found. According to Dr. Wyard, neither X-rays nor EMGs will indicate that a rotator cuff is torn; it can only be diagnosed from an MRI or by actually looking at the injury. This is the first time an MRI was performed on Claimant's shoulder. Dr. Hermanson was called in for the surgical consult. He fixed Claimant's rotator cuff, but the pain continued. Dr. Erik Peterson believes that Claimant suffers from postoperative adhesions or adhesive capsulitis in her shoulder and would like to treat her under anesthesia for this condition. Dr. Wyard, the orthopedic surgeon IME, and Dr. Judith Peterson agree with Dr. Peterson's assessment of the problem and the proposed treatment of Claimant.

Employer and Insurer secured the opinions of Dr. Luther and Dr. Farnham; both doctors specialize in IME's. Both doctors gave the opinion that Claimant suffers from Myofascial pain[1]; which is basically another term for muscle pain. This conclusion is also seen in the diagnosis from Claimant's other doctors. However, Claimant's most recent treating physicians, Dr. Judith Peterson and Dr. Erik Peterson are and were looking for the cause of the muscle pain and trying to alleviate the pain or reduce it. The diagnoses from Dr. Judith Peterson include adhesive capsulitis, potential complex regional pain syndrome, right carpal tunnel syndrome, and scapular dysfunction.

By a preponderance of the evidence, it is shown that Claimant's rotator cuff was torn on March 27, 2004 when she was injured at work. The evidence shown by Claimant indicates that her shoulder was fine prior to the incident at work and has not been fine since. The evidence also indicates that she told her doctors about her shoulder from the time of her initial medical examination. Both sides have paid experts that gave opinions in this case. Claimant's expert indicates that Claimant's symptoms in her shoulder did not change during the years post-injury. Claimant's evidence also indicates that Claimant's neck and back problems are at MMI and Claimant may have long-term pain symptoms that will never be resolved. Employer and Insurer's evidence concludes that Claimant has muscle pain, but that it is not caused by her work injury. Employer's witness is of the opinion that the normal use of the right shoulder will more likely cause a torn rotator cuff than the reported fall off the chair. Employer's experts do not acknowledge that Claimant has complained about her right shoulder from the time of the accident forward. Claimant's evidence and experts are more convincing and are given more weight.

[1] According to the on-line medical dictionary, "myofascial" is defined as "of or relating to the fasciae of muscles." http://www.merriam-webster.com/medical/myofascial ; as of October 28, 2014.

Claimant has shown by a preponderance of the evidence that a work-related injury is a major contributing cause of the past and future need for treatment of Claimant's condition found in her right upper arm, right shoulder, neck, and upper back. Claimant's medical evidence is given by a reasonable degree of medical probability by an expert in the field of orthopedics. Employer and Insurer are responsible for treatment of Claimant's right shoulder, neck, and upper back that was sought after the denial of benefits in 2005.

Employer and Insurer are not responsible for the payment of medical treatment unrelated to the injury, specifically treatment for Claimant's lower back and leg pain. There is no medical evidence supporting that these conditions are causally related.

B. Whether Claimant is entitled to reimbursement of medical bills related to the work-related injury incurred after the date of denial?

Claimant makes the argument that Claimant is entitled to be reimbursed for the full original charge of expenses made by the medical providers. Most of these charges were then discounted by the provider and paid for by medical insurance. The discount is due to an agreement between the provider and the medical insurer. According to the recent South Dakota Supreme Court case of *Whitesell v. Rapid Soft Water & Spas Inc.,* 2014 S.D.41, (July 2, 2014), the party that paid the medical bill is entitled to be reimbursed for the amount paid, not the amount originally billed, pursuant to S.D.C.L. § 62-1-1.3. This opinion reverses the circuit court opinion cited by Claimant in furtherance of her argument.

The statute, in pertinent part: "If it is later determined that the injury is compensable under this title, the employer shall immediately reimburse the parties not liable for all payments made, including interest at the category B rate specified in § 54-3-16." S.D.C.L. § 62-1-1.3.

As in *Whitesell*, the Employer and Insurer in this case are responsible for reimbursing Claimant's medical insurer or the party that paid the medical bill. This reimbursement may be made directly to the party to whom the money is owed. There is no requirement in law that the reimbursement be made through Claimant's attorney. In the *Whitesell* case, the Court agreed with the ALJ who found that Insurer had met their statutory obligation when reimbursing the Health Insurer and the claimant, Whitesell. Reimbursement to the Whitesell health insurer was not made through the claimant's attorney, but directly to the party who paid the bill. The Supreme Court reinstated this Order by the ALJ was reinstated in full.

The total medical benefits, paid by various health insurers, as of September 30, 2013, are $7,687.17. The total unpaid charges that Claimant has either paid or are outstanding, is $11,723.27.

If any of the bills were paid by Claimant or are still outstanding to health care providers, it is appropriate for the reimbursement to be made through Claimant's attorney and Employer and Insurer are ordered to do so. Employer and Insurer are also responsible for the payment of interest to all parties at the category B level, 10% per year. S.D.C.L. §54-3-16(2). Employer and Insurer are responsible for reimbursing the amounts paid by the health insurers, directly to the health insurers.

C. Whether Claimant is permanently and totally disabled?

The final issue is whether Claimant is permanently and totally disabled. It is Claimant's initial burden to establish a prima facie case that she is obviously unemployable. The Supreme Court has clarified and interpreted the permanent total disability law in a number of cases.

> "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." SDCL 62-4-53. The burden is on the employee "to make a prima facie showing of permanent total disability." Id.
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> > First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment is actually available in claimant's community for persons with claimant's limitations. Obvious unemployability may be shown 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 fact 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 relegated to the odd-lot category then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work.

Baier v. Dean Kurtz Construction, Inc., 2009 S.D. 7, ¶25, 761 N.W.2d 601, 608 (Fair v. Nash Finch Co., 2007 S.D. 16, ¶19, 728 N.W.2d 623, 632-33 (quoting Kassube v. Dakota Logging, 2005 S.D. 102, ¶34, 705 N.W.2d 461, 467 (internal citations omitted))).

As the South Dakota Supreme Court has written, "A claimant can show obvious unemployability by showing either that [her] physical condition along with [her] education and training make it obvious that [she] is in the odd-lot total disability

category, or by convincing the trier of fact that [she] suffers … continuous, severe, and debilitating pain …". *Wagaman v. Sioux Falls Construction*, 576 NW2d 237, 242 (S.D. 1998).

To establish that she is in the odd-lot disability category, Claimant must prove that "[her] physical condition, in combination with [her] age, training, and experience, and the type of work available in [her] community, causes [her] to be unable to secure anything more than sporadic employment resulting in insubstantial income." *Id*. at 241. Claimant's is currently 63 years old. Claimant is educated in the field of hairstyling, a field in which she can no longer work, given her medical restrictions. She is also experienced as a language translator in three Eastern European languages; however, translating for those languages will only result in sporadic employment.

Claimant has proven by a preponderance of the evidence that she is obviously unemployable. To that end, Claimant's evidence of obvious unemployability includes testimony from her medical experts, the vocational expert, her clients, and former co-workers. Dr. Judith Peterson took Claimant off work permanently because of her pain and restrictions. Claimant has permanent lifting restrictions and use restrictions with her hands and arms. She can perform a bilateral lift up to 25 pounds to her waist on an infrequent basis. She cannot work overhead and she cannot work with her hands forward for an extended period of time. The vocational assessment indicates Claimant has very little grip strength in her dominant right arm. During the hearing, she sat at the hearing table with a pillow to prop her arm in a comfortable position. Even with that aid, she had visible signs of continuous, severe, and debilitating pain during the hearing.

Claimant is currently 63 years old, close to the typical age of retirement. Claimant's Average weekly wage is $452.99 which has a workers' compensation indemnity rate of $310.99 per week or $7.55 per hour based upon a 40 hour work week. The medical experts agree that Claimant could work up to 6 hours per day in a job that met her other restrictions. If Claimant worked for 30 hours per week, her hourly wage would have to be $10.37 per hour.

Claimant also is fluent in the languages of Russian, Ukrainian, and Armenian. She currently works as a part-time translator for A-Z languages and has done this for a number of years; she works about 10 hours per month. She earns from $30 to $36 per hour when interpreting. She would have to work at least 10 hours per week interpreting to meet her workers' compensation indemnity rate. Testimony indicates that there is no longer a great need for translators or interpreters in Sioux Falls for these languages. The need for Russian, Ukrainian, and Armenian interpreters in Claimant's work region is not increasing, but decreasing.

Employer and Insurer's expert, Mr. Carroll argues that Claimant can work in the public service industry performing jobs such as desk clerks, host/hostess, or fast food worker. These positions have job lifting requirements which may not meet Claimant's restrictions. Mr. Carroll also has indicated that Claimant could take a more lucrative job

translating. He identified job openings with the local Career Center for translator positions; however, there is no indication as to which language the position requires.

Mr. Ostrander is of the opinion that because of Claimant's severe restrictions with the use of her dominant hand and arm, and the fact that she is currently on pain medications, that Claimant is obviously unemployable. He does not believe there are any occupations with open and continuous employment that Claimant can perform that will earn her 85% of her past wages. As an expert in the field of vocations, Mr. Ostrander studies the job market and the requirements of ongoing and available positions. He testified that positions such as fast food worker have lifting requirements that Claimant's restrictions do not meet. The jobs are typically part-time, and with the added restriction of only 6 hours per day, do not pay more than $10 per hour. Mr. Ostrander confirmed with a local language service provider, Lutheran Social Services, that they are seeking translators. However, he discovered that LSS will not employ anyone who is also employed with A to Z Languages or the Multi-Cultural Center. The work for any of the language providers is on-call with no guarantee of the number of hours. The testimony from the hearing indicated that translating in these languages in Sioux Falls would not be full-time work, but only part-time.

Claimant has proven obvious unemployability. Claimant's physical condition and chronic continuous pain, combined with her mature age and lack of available work with restrictions, establishes that Claimant is unable to secure meaningful employment or at least nothing more than sporadic employment resulting in an insubstantial income. Claimant is also in continuous, severe, and debilitating pain. Claimant has shown that she is permanently and totally disabled.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Claimant may also prepare Proposed Findings of Fact and Conclusions of Law that are not consistent with this Decision. The initial proposals shall be submitted to the Department within twenty (20) days from the date of receipt of this Decision. Employer/Insurer shall have twenty (20) days from the date of receipt of Claimant's Proposed Findings and Conclusions to submit objections thereto or to submit their own proposed Findings and Conclusions. 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.

DONE at Pierre, Hughes County, South Dakota, this 29th day of October, 2014.

SOUTH DAKOTA DEPARTMENT OF LABOR and REGULATION

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Catherine Duenwald
Administrative Law Judge