SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

BERNARD M. EITE,
Claimant,

HF No. 146, 2002/03

v.

DECISION

RAPID CITY AREA SCHOOL DISTRICT 51-4,
Employer,

and

ASSOCIATED SCHOOL BOARDS OF SOUTH DAKOTA WORKERS COMPENSATION TRUST FUND,
Provider.

This is a worker's compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. Claimant, Bernard M. Eite (hereafter Claimant), appeared personally and through his counsel, James Leach. Tieszen Law Office represented Employer Rapid City Area School District, and Insurer Associated School Boards of South Dakota Workers Compensation Trust Fund (hereafter Employer/Provider). The issue for determination is whether Claimant is permanently, totally disabled under the "odd-lot" doctrine, and if so, when permanent, total disability began.

Facts:

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

Employer/Provider stipulated that Claimant provided notice of his injuries pursuant to SDCL 62-7-10. The parties stipulated that Claimant suffered a work-related, compensable injury to his lower back on February 23, 2001, that combined with preexisting, work-related, compensable back injures of October 8, 1993, and August 23, 1996, to contribute independently to his disability, impairment, or need for treatment. The parties stipulated that Claimant's weekly worker's compensation rate is $308.28.

After his injury in 1996, Claimant returned to his regular work as a custodian, but his back continued to deteriorate. Claimant underwent fusion surgery on the L4-L5 segment on April 14, 1999. During his recovery from surgery, Claimant worked as an in-school suspension supervisor. Claimant alleged that this was a teacher's aid position and he could not do this work because of reading requirements. Claimant later admitted on cross-examination that Employer did not require him to do anything beyond making sure that the children did not fight or make a lot of noise. Claimant eventually

returned to his regular work as a custodian/night foreman. Claimant was given a ten percent permanent partial impairment rating.

On February 23, 2001, Claimant suffered a work-related injury to his lower back when he slipped and fell. Claimant did not return to work as a custodian after this injury. He underwent fusion surgery of the L4-S1 segments on October 31, 2001. He underwent a functional capacities evaluation (FCE) in August of 2002 with Myron Sorestad. Sorestad reported that Claimant was capable of working a full-time, light duty position. Based on Claimant's "substantial self-limiting," Sorestad concluded medium duty work could be possible if Claimant had participated fully in the FCE.

Claimant's treating physician, physiatrist Dr. Brett Lawlor, saw Claimant on September 26, 2002. Claimant reported to Dr. Lawlor that he had back pain and intermittent leg pain. Upon testing, Dr. Lawlor noted that Claimant demonstrated pain behaviors, could not perform a deep squat, and complained of pain upon range of motion testing. Dr. Lawlor's records reveal that he found Claimant's presentation of symptoms highly questionable and assigned a Waddell's score of 4 out of 5, meaning, "[t]here are potentially nonphysical components to [his] pain." Dr. Lawlor declined to increase Claimant's 10 percent permanent partial impairment rating because Claimant presented with give-way weakness, non-dermatomal sensory loss, and exaggerated pain behaviors on range of motion testing, making the measurements too subjective to assess impairment.

Dr. Lawlor saw Claimant again on December 31, 2002, to discuss his impairment rating. Dr. Lawlor explained to Claimant why he did not assess additional impairment. On January 27, 2003, Dr. Lawlor met with Claimant to discuss his work capabilities. Dr. Lawlor noted that Claimant still complained of back pain.

Claimant underwent an independent medical examination (IME) by Dr. Wayne Anderson on July 14, 2003. Dr. Anderson performed a physical examination of Claimant and had Claimant fill out a questionnaire regarding his physical capabilities and symptoms. Claimant reported to Dr. Anderson that he suffers from "hard back pains", rating them as 8 out of 10, ten being excruciating pain. He also told Dr. Anderson that he suffers leg symptoms including "tingling", "a jumping sensation", and "muscle pains". Claimant described his pain as stabbing, burning, and aching pains that cause him difficulty bending, sitting, and walking.

Dr. Anderson reported that Claimant said his symptoms improve with medication, lying flat, and relaxing, and worsen when he walks or sits for more than a half an hour. Dr. Anderson reviewed Claimant's voluminous medical records as well. Dr. Anderson found:

> On examination today, [Claimant is] pleasant and cooperative. He is accompanied at all times by his wife. Examination of his back reveals a well-healed scar. He has tenderness to palpation in the right paraspinous muscles at the L4-S1 areas. He also has tenderness bilaterally in the buttocks and the SI area. Straight leg raising causes discomfort in his back bilaterally at about 70°. Reflexes are 1+. Sensation is altered in a non-dermatomal manner. Thighs are

> measured and are 40 centimeters bilaterally. Lower extremity strength is non-equal. There is non-physiologic weakness in the left lower extremity. Back range of motion really cannot be tested. He flexes to less than 5°. He says he cannot go any further. Extension is 0° and right and left lateral flexion is about 5°.

Dr. Anderson reported that Claimant could return to work at a light work category as defined by the Department of Labor, with 20 pounds maximum lifting with 10 pounds frequent lifting.

Nano Johnson, a physical therapist, performed a functional capacity evaluation (FCE) of Claimant on August 4, 2003. Claimant's performance on the FCE was invalid. Claimant misrepresented his physical capabilities to Nano Johnson during the FCE. The Validity Profile showed "very poor effort or voluntary submaximal effort which is not necessarily related to pain, impairment, or disability." Johnson opined that Claimant misrepresented his physical capabilities during the test and intentionally self-limited his performance, most significantly in the straight-leg raising test, where Johnson found discrepancies of as much as 44°. Johnson opined that Claimant's range of motion was "out of the realm of anything" she had seen before. She observed that Claimant was "trying to demonstrate some weakness that wasn't there." Johnson further opined that, in her experience, most people with the level of pain reported by Claimant would not have been able to tolerate a test for two hours and fifteen minutes.

On October 8, 2003, Claimant presented for a follow-up with Dr. Lawlor, telling Dr. Lawlor that he continued to suffer the same amount of back pain and leg pain, and there was no improvement in his condition. Dr. Lawlor provided certain restrictions for Claimant, including maximum 20-pound lifting, position changes every half hour, and limited bending, twisting, lifting, walking, crawling, climbing a ladder and squatting.

Claimant's testimony and reports to his medical providers

At hearing, Claimant alleged an inability to bend, twist, and squat. Claimant also alleged an extremely limited range of motion, demonstrating for the Department an inability to bend forward more than a small amount.

Employer/Provider hired a private investigator to take surveillance video of Claimant on several occasions. Employer/Provider offered approximately five and-one-half hours of surveillance video[1]. The Department received the surveillance video and viewed all of it. Claimant's testimony of his physical capabilities is contrary to his obvious physical capabilities as displayed on the surveillance video. Claimant's reports of his physical capabilities to his medical providers and the psychological experts are contrary to his obvious physical capabilities as displayed on the surveillance video.

The surveillance video clearly showed Claimant bending forward freely, in contrast to his demonstration at hearing of his inability to bend forward more than a small amount.

[1] The five and one-half hours of surveillance video were presented on three videotapes but for ease of comprehension will be referred to in the singular instead of the plural.

Claimant's ability to bend forward did not appear extremely limited on the surveillance video, and in fact, appeared to be normal.

Claimant is seen on several occasions bending, twisting, and squatting on the surveillance video. He gets in and out of his boat easily at the dock and a rocky shoreline. Claimant is clearly seen twisting around to look behind him as he is backing his pickup and boat trailer down the boat ramp. Claimant is clearly seen squatting several times. Claimant is seen traversing along a rocky, steep shoreline, up and around a fallen tree trunk, to retrieve a fishing lure tangled in the exposed roots of the tree trunk.

Claimant reported to Dr. Anderson an alleged difficulty carrying on any sustained activity besides lying down for more than one-half hour at a time. The surveillance video clearly shows Claimant exceeding this alleged limitation repeatedly over the course of four days. Claimant is also seen lifting various objects, including a boat tarp, a tackle box, a trolling motor, and a picnic table without difficulty. Claimant twists and bends while lifting some of these objects. At hearing, Claimant presented himself as a disabled man, stiff and unable to tolerate much movement, even standing at times to testify, shifting his weight often, holding his back and complaining of back pain. The surveillance video showed a different picture of Claimant. Claimant did not display the behaviors on the video that he displayed during his testimony. Claimant's movements at hearing and his movements on the video are inconsistent, raising the question of Claimant's credibility before the Department and before his medical providers and experts. Claimant's capabilities are not as limited as he testified they are. Claimant's reports to the experts are clearly at odds with Claimant's actual capabilities.

The expert medical opinions about the significance of the surveillance video also reveal Claimant's lack of credibility.[2] The surveillance video was viewed in its entirety by Dr. Wayne Anderson. Dr. Brett Lawlor viewed selected portions of the surveillance video. Bruce Rogers, Employer/Provider's vocational expert, also viewed the surveillance video. Dr. Anderson, Dr. Lawlor, and Rogers all found Claimant's activities on the surveillance videos to be significantly different from Claimant's representations of his capabilities to each of them. Dr. Anderson and Dr. Lawlor each opined that Claimant showed relatively normal, fluid motion, including but not limited to normal flexion, the ability to side bend, to bend repeatedly, normal squatting, twisting, and lifting himself with his lower extremities. Dr. Anderson and Dr. Lawlor also opined that Claimant did not demonstrate pain behaviors on the surveillance, contrary to the pain behaviors he demonstrated to them upon examination.

Dr. Anderson opined that "[a]s you look at all of the videotapes together over a period of . . . four days, repeatedly day after day he's moving fluidly without pain behavior, he's flexing, bending, twisting, and exhibiting nothing I would call a pain behavior." Dr. Anderson opined that during his examination of Claimant, Claimant attempted to appear significantly more disabled than he actually was.

[2] Nano Johnson's opinions regarding the surveillance video were not admitted into the record because they were not disclosed in a timely manner.

Based on the expert medical opinions of Dr. Anderson and Dr. Lawlor, I find that Claimant misrepresented his symptoms of pain and disability to the medical experts during testing and treatment. In addition to the gross differences between the video and Claimant's representations at examinations, Dr. Anderson found "nondermatomal sensory loss, nonphysiologic weakness, and an extremely limited range of motion beyond what you see in almost anybody." Dr. Lawlor found the many nonphysiologic findings upon Claimant's examinations made it impossible to assess Claimant's permanent impairment after his second surgery.

Based on the surveillance video and the expert medical opinions of Dr. Anderson and Dr. Lawlor regarding the contrast between Claimant's reports and the surveillance, I find Claimant knowingly misrepresented his physical capabilities to the Department during his testimony at hearing, especially when he demonstrated an inability to bend forward more than a little bit. Dr. Anderson, Dr. Lawlor, and Nano Johnson each testified that Claimant misrepresented his physical capabilities to them. Other objective medical evidence, including the live testimony of Dr. Anderson and Nano Johnson and the deposition of Dr. Lawlor, establish that Claimant is capable of full flexion, repeated and sustained bends, side bending, squatting, twisting, and lifting his body weight with his left lower extremity, contrary to his assertions. Claimant lacks credibility. This determination is based upon the significant difference between Claimant's testimony about his physical capabilities and his obvious physical abilities on the surveillance videos. Claimant's credibility is also damaged by his inconsistent reports of his education and his inconsistent testimony, including but not limited to his false testimony that as an in-school suspension supervisor he was actually required by Employer to do paperwork and assist students with their schoolwork.

Claimant's physical limitations

Claimant is physically capable of working. Claimant's surgeon, Dr. Larry Teuber, has released Claimant to work within the limits of the FCE given by Sorestad. After viewing the surveillance video and acknowledging Claimant's misrepresentations, Dr. Lawlor changed Claimant's limitations and restrictions to increase his lifting, bending and twisting to no more than frequent and recommended Claimant change his position every forty-five minutes. Dr. Lawlor declined to increase the twenty-pound lifting limit, opining that, absent clear evidence to the contrary, the fusion surgeries alone require a limit of twenty pounds. Dr. Lawlor based his opinion on the increased risk of injury and pain a two-level fusion creates. Dr. Anderson, after viewing the surveillance video, opined that Claimant is capable of medium duty work, which would include a lifting limit of fifty pounds.

Vocational testimony

Claimant served more than fifteen years in the military as a Brigadier General's driver in England. Claimant worked in a ball-bearing factory as a production worker before he joined the military. Claimant also worked as a chauffeur for a limousine service in England. Claimant also drove a concrete truck in England. Claimant earned a commercial drivers license in England. After Claimant moved with his family to the United States, he worked first as a dump truck driver in Rapid City, then as a chauffeur

for a limousine service. Claimant began working for Employer in 1989 as a custodian, working his way up to night foreman.

Claimant has difficulty reading and writing. Claimant presumes that he is a high school graduate because he never dropped out of school in England. There was no evidence to determine what level of education Claimant actually has. The record reveals that Claimant reported different levels of education, ranging from completion of eighth grade to a high school diploma to a G.E.D. Nevertheless, intellectual testing places Claimant's skills at a "borderline" or low average. At hearing, Claimant demonstrated some ability to read and write, as evidenced by the job log that he kept.

Contrary to Claimant's testimony, and consistent with the vocational and medical testimony, Claimant does not have any obvious verbal communication barriers of vocational significance, because of his native accent or his intelligence. Claimant's testimony at hearing was observed by Rogers, Ostrander, psychologist Dr. Frank Dame, and the fact finder. The vocational experts and Dr. Dame did not note any difficulty understanding Claimant's accent or following his testimony. Claimant was also able to communicate adequately with his attorney, Employer/Provider's attorney, and with the Department.

Curt Hill, a psychologist who performed psychological testing on Claimant, recommended on May 7, 2003, that Claimant receive weekly psychotherapy with specific psychotherapeutic interventions. Notably, Hill recommended employment assistance as a treatment option to get Claimant back to work. Roberta Kramlich, a licensed psychologist, performed psychological testing and opined on March 19, 2003, that Claimant was a "fully functioning, capable individual" before his back injuries. Kramlich found that Claimant has "the knowledge to maintain his residence and also has the "intellectual capability to manage his benefits." While Kramlich and Hill both opined that Claimant suffers depression related to his complaints of back pain, neither opined that his depression is a major contributing cause of his current disability, impairment or need for treatment.

Claimant does not believe he is too limited to work. Claimant is willing to try to work an eight-hour day. Claimant believes he could work as a housekeeper. Claimant believes he could do a custodian position with some modifications. Claimant believes he could perform a driving job if it did not involve the operation of a clutch. Claimant believes he can do security work if given the opportunity. Since his injury, Claimant has obtained a private security license. At the time of the hearing, Claimant was on standby as a security guard at a Rapid City hotel, but had yet to be called in to work.

Rick Ostrander, Claimant's vocational expert, met with Claimant on April 3, 2003. He did not provide vocational assistance to Claimant. Ostrander sent Claimant to Curt Hill, who found that Claimant's intellectual functioning to be at a borderline level. Ostrander ultimately opined that no work is available for Claimant within his physical restrictions because of his limited intellectual functioning.

Despite Ostrander's opinions, Claimant, with the help of his attorney, engaged in a job search, which involved checking the newspapers for openings, registering at the South

Dakota Career Center, and visiting with South Dakota Vocational Rehabilitation. Claimant kept a written log of his efforts in his own handwriting.

Bruce Rogers, a certified vocational rehabilitation counselor, certified case manager, and Employer/Provider's vocational expert, met with Claimant three times and performed a vocational assessment of Claimant. Rogers' testimony was credible. He thoroughly explored the labor market and Claimant's work and medical history.

Rogers opined that Claimant could be retrained if the training were on-the-job training. He stated that Claimant has "worked all of his life, and he's learned the jobs that he had done, so why couldn't he learn these? They are not any more demanding, and they're not any more involved, than what he had done [before his injury]." Rogers opined that many employers he identified are willing to train new employees. Rogers also opined that Claimant possesses many transferable skills and is not as low functioning as Ostrander claimed. Rogers' opinions are supported by Roberta Kramlich's opinions that Claimant was a "fully functioning, capable individual" before his injuries and that he still possessed the ability to manage his benefits. Rogers' opinions are supported by Claimant's steady work history and Claimant's performance evaluations.

Other facts will be developed as necessary.

Issue

Is Claimant permanently and totally disabled under the "odd-lot" doctrine and if so, when did that permanent, totally disability begin?

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

"odd-lot" test:

Claimant asserts that he is entitled to permanent total disability benefits. At the time of Claimant's injury, SDCL 62-4-53 defined permanent total disability:

> 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 claimant in the community. 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.
>
> If an employee chooses to move to an area to obtain suitable employment that is not available within the employee's community, the employee shall pay moving expenses of household goods not to exceed four weeks of compensation at the rate provided by 62-4-3.

The South Dakota Supreme Court has recognized at least two avenues by which a claimant may make the required prima facie showing for inclusion in the "odd-lot" category. Peterson v. Hinky Dinky, 515 N.W.2d 226, 231 (S.D. 1994). The court stated:

> 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 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." The burden will only shift to the employer in this second situation when the claimant produces substantial evidence that he is not employable in the competitive market. Thus, if the claimant is "obviously unemployable," he does not have to prove that he made reasonable efforts to find employment in the competitive market.

Id. at 231-32 (citations omitted).

Obvious unemployability

Claimant has not met his prima facie burden to show he is "obviously unemployable". Claimant's physical condition is that he is restricted to modified light duty work. No medical provider has opined that Claimant is physically incapable of working. The psychological expert testimony reveals that working would benefit Claimant psychologically. Claimant failed to shown that his age is a barrier to modified light duty work. Claimant has maintained employment, maintained a marriage, raised three children and accumulated a house, a boat, a camper, and several hobbies. Claimant believes he can work. Claimant's work and personal history are contrary to Ostrander's opinion that Claimant's intellectual abilities, combined with Dr. Lawlor's restrictions, render him unemployable. Furthermore, Ostrander admitted that Claimant is employable if Dr. Anderson's medium duty restrictions are considered. Claimant conceded that medium duty work is regularly and continuously available to him. Claimant's physical condition, coupled with his education, training, and age do not make it "obvious" that he is unemployable.

Claimant has not met his burden to demonstrate that his pain is so severe, continuous and debilitating that he cannot work. The medical records and testing, along with the expert medical testimony, do not support such a finding. Dr. Teuber, Dr. Lawlor, and Dr. Anderson all agree that Claimant is capable of working. Nano Johnson did not believe Claimant's complaints of pain could possibly be as bad as he reported. Dr. Lawlor and Dr. Anderson both had concerns over the nonphysiologic nature of Claimant's pain, meaning the pain complained of by Claimant does not make anatomical sense. Dr. Anderson did not observe any pain behaviors on the surveillance videos, contrary to the pain behaviors Claimant displayed during his IME and contrary to the medical records. After viewing the surveillance videos, Dr. Anderson did not believe Claimant's complaints of pain and released Claimant to medium duty work. Dr. Lawlor opined that Claimant misrepresented his physical capabilities to him. Claimant's testimony regarding his pain and resulting disability was contrary to what was shown on the surveillance video. Based on the expert medical opinions, the surveillance videos, and Claimant's lack of credibility at hearing, Claimant's pain is not as severe, continuous and debilitating as he claims and does not leave him unable to work.

Claimant has failed to demonstrate "obvious unemployability." "[T]he 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. Peterson v. Hinky Dinky, 515 N.W.2d 226, 231 (S.D. 1994). SDCL 62-4-53 requires Claimant to "introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile."

Whether the medical or vocational findings show that a work search would be futile.

The medical findings do not support a finding that a work search would be futile. First, no medical provider opined that Claimant is physically or psychologically incapable of working. The medical evidence does not support a finding that Claimant is as disabled as he claims. The psychological testimony does not support a finding that Claimant is too disabled to work, let alone a finding that Claimant's injury is and remains a major contributing cause of his depression.

The vocational findings do not support a finding that a work search would be futile. First, Claimant concedes that if Dr. Anderson's limitations are considered, he could find work at a medium duty level. Second, when Ostrander's opinions are weighed against Rogers' opinions, Rogers' opinions are more persuasive and have better foundation.

Ostrander conducted a labor market survey, contacting only a few employers. Ostrander relied too much upon an analysis of the general requirements of broad categories of positions. Rogers investigated the actual availability and suitability of specific positions and specific employers and credibly opined a work search for Claimant in the Rapid City labor market would not be futile. Rogers contacted many employers personally, inquiring about accommodations for Claimant's specific

limitations, finding many possibilities[3]. Rogers balanced Claimant's low intelligence scores with his solid forty year work history, opining that Claimant has adapted well, as evidenced by his performance I.Q. of 86. Claimant received positive evaluations while working for Employer and was promoted to a supervisory position. Rogers found that Claimant possessed many transferable skills.

Because of his personal contacts with employers and his other efforts, Rogers opinions regarding the availability of jobs for Claimant in the Rapid City job market are more persuasive evidence than Ostrander's opinions. Ostrander's opinion that a work search would be futile is rejected as contrary to the medical and vocational findings that Claimant can return to work with assistance. His opinions do not adequately address the recommendations of David W. Jetson[4], Hill, Kramlich, and Rogers, who each opined that Claimant needs vocational assistance. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "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). The medical and vocational findings do not show that a reasonable, good faith work search effort would be futile.

Claimant's work search

Claimant has not met his burden to demonstrate that he made reasonable, but unsuccessful efforts to find work. Claimant conducted his own job search with the assistance of his attorney, keeping his own job logs. Claimant's job logs consist of 11 pages documenting that Claimant checked the job listing at the South Dakota Career Center fifty-two times and looked at the Rapid City Journal Classified Ads fifty times from March 12, 2003, to December 5, 2003. Claimant found one position to apply for, a janitor position paying $7.00 an hour. On November 14, 2003, Claimant contacted "Lisa" at the City of Rapid City Human Resources and found a "position filled." Claimant alleges that he went to the Career Center twice a week, looked at the listings, and read the Rapid City Journal on the weekends to look for work.

Claimant interviewed with Bonnie Lund at South Dakota Division of Rehabilitation Services (SDDRS) on September 12, 2003. On September 29, 2003, David W. Jetson, a counselor with SDDRS, found that Claimant qualifies for their services. On September 29, 2003, Jetson concluded:

> [Claimant] requires VR services to help determine employment options based on his abilities, since he currently sees himself as too limited to work. [Claimant] will require an assessment to determine his abilites [sic] and to see if a job could be carved to work within his limits. [Claimant] will require counseling and guidance, functional assessment, pre-employment, assistance in completing his resume,

[3] Employer/Provider's burden of demonstrating "some form of suitable work [] regularly and continuously available" will addressed separately.
[4] David W. Jetson is a counselor with the South Dakota Division of Rehabilitation Services. His findings will be more fully discussed in the analysis of Claimant's job search.

cover letters and applications, job placement, job coaching and follow along services.

Despite this information from Jetson and despite the psychological evidence that shows Claimant needs vocational assistance to find employment, Claimant did not attempt to utilize any such services. All Claimant did for his work search was look at the job listings at the Career Center and read the weekend papers. Claimant obtained a private security license and is on "stand-by" at a Rapid City hotel where his son works as a security guard, but has yet to be called in to work. While this is evidence of a work search, it does not meet the requirement of a reasonable, good faith work search.

By his own admission, Claimant acknowledges that he has limitations intellectually, yet he failed to seek help in finding work. Instead of seeking help, he misrepresented his condition to his medical providers, whose erroneous limitations were in effect during his work search. Dr. Anderson and Nano Johnson opined that Claimant attempted to appear more disabled than he actually was. His misrepresentations, regardless of their effect on his limitations, are sufficient to show his lack of good faith in conducting his work search.

Claimant showed a lack of good faith in his failure to cooperate fully with Rogers. Rogers provided Claimant with job leads, asking Claimant to follow-up on them. Rogers opined that Claimant's effort was one of the poorest he had ever seen. Rogers stressed the importance of filling out applications. Although Claimant's job logs indicate that he applied for many of the job leads Rogers sent him, the only position for which Rogers could verify Claimant applied in response to his leads was one for which Claimant applied during the week of the hearing. Claimant did not conduct a reasonable, good faith work search effort.

Claimant has failed in his burden of production. Even if Claimant had met his burden of production, Employer/Provider met its burden to show that some form of suitable work is regularly and continuously available to Claimant. Taking Dr. Lawlor's limitations and restrictions into account and Claimant's intellectual difficulties, Rogers identified employment regularly and continuously available in Claimant's community that would yield him a wage in excess of his worker's compensation rate. Rogers identified many suitable positions, including a sales position at Landstrom's jewelry, a sales position at Auto Depot, a housekeeping job at Westhills Village, and a driver position at Rapid Taxi, positions at Perdue Woodworks, a transportation driver at Black Hills Workshop, a bus driver for the Rapid Transit System, a shuttle bus driver for Retired Senior Volunteer Program, custodian at the Rapid City Regional Hospital, a custodian at the Black Hills Workshop, warehouse and production positions at Black Hills Sandwich Company, a "door-shaker" security position with Peacekeeper Security, a security position at the Rushmore Mall, a hotel housekeeper position, and a personal care attendant at Rapid City Regional Hospital.

Claimant's ultimate burden of persuasion and SDCL 62-7-40

Claimant presented himself at hearing as disabled, holding his back, grimacing, and complaining of pain. Claimant, during his hearing testimony, also offered for the

Department's consideration a demonstration of his alleged inability to bend forward at the waist. The difference between Claimant's presentation at hearing and his activities on the surveillance video was obvious, even without the benefit of medical expert analysis. His representations were a blatant attempt to mislead the Department, leaving the trier of fact with the conclusion that Claimant testified falsely about his physical capabilities. Claimant can be seen on the surveillance video bending at the waist, moving about much as a normal person could. A claimant's physical capability is a material fact in a workers' compensation claim for permanent total benefits.

Employer/Provider urge the Department to reject Claimant's testimony in its entirety because this false testimony. Rejection of all of his testimony results in the automatic failure of his claim under the "odd-lot" doctrine. Automatic failure of his case is the harshest result possible. In light of the fact that Claimant does have physical disability resulting from his work injuries, whether that physical disability qualifies him for permanent total disability benefits has been assessed using the "odd-lot" doctrine, not SDCL 62-7-40.

Claimant's argument that his credibility plays no role in the specific questions presented by this case is without merit. The issue as set forth in the Prehearing Order is whether Claimant is entitled to benefits under the "odd-lot" doctrine. Contrary to his post-hearing argument, Claimant's credibility is indeed at issue. The parties agreed that the issue was Claimant's eligibility for permanent total disability benefits under the "odd-lot" doctrine. The "odd-lot" doctrine specifically requires Claimant to carry a burden of persuasion.

Claimant has failed in his burden of persuasion under the "odd-lot" doctrine. He lacks credibility. Dr. Lawlor opined that Claimant misrepresented his physical capabilities to him. Dr. Anderson opined that Claimant misrepresented his physical capabilities to him. Nano Johnson opined that Claimant intentionally misrepresented his physical capabilities during the FCE she administered. Johnson further opined that Claimant's effort on the functional capabilities evaluation was invalid.

Dr. Anderson testified live at hearing and offered expert medical analysis of Claimant's physical actions shown on the surveillance video. Dr. Anderson's testimony was credible, thoroughly explained, and unrefuted by expert medical opinion regarding Claimant's demonstrated physical capabilities on the surveillance videos. Dr. Lawlor agreed with Dr. Anderson's written report of Claimant's activities on the surveillance videos. Dr. Anderson opined that Claimant displayed the ability to flex normally on the surveillance videos, contrary to what Claimant demonstrated to him. Claimant misrepresented his physical capabilities to his medical providers.

Whether Claimant is a malinger

Employer/Provider argued that Claimant is a malingerer, using Dr. Frank Dame as its expert. Dr. Dame conducted psychological testing, concluding that the results of his tests reveal that Claimant is a malingerer. However, Claimant, in rebuttal, offered the opinions of Dr. Scott Cherry. Dr. Cherry opined that Dr. Dame failed to analyze properly the raw psychological data and used the results of the MMPI in an inappropriate manner

given Claimant's alleged chronic pain syndrome. Dr. Cherry's opinions are accepted as sufficient to rebut Dr. Dame's opinion that Claimant is a malingerer. Dr. Dame's opinion that Claimant is a malingerer is rejected.

Conclusion

Claimant failed in his burden of production and in his burden of persuasion. Claimant lacks credibility. Claimant misrepresented his physical capabilities to his medical providers, Employer/Provider's experts, and to the Department. Claimant failed to conduct a reasonable, good faith work search. Furthermore, if Claimant had met his burden of production, Employer/Provider met its burden to demonstrate the regular and continuous availability of suitable work in Claimant's community. Employer/Provider showed that positions are available that are not sporadic employment resulting in an insubstantial income as defined by SDCL 62-4-52(2). Claimant is not permanently totally disabled under the "odd-lot" doctrine.

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

Dated this 25th day of February, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge