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

ERDENE UECKER
Claimant,

HF No. 150, 2009/10

v.

DECISION

AVERA EDUCATION AND STAFFING SOLUTIONS
Employer,

and

AVERA WORKERS' COMPENSATION TRUST
Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. The above-entitled matter came on for hearing before Catherine Duenwald, Administrative Law Judge, Division of Labor and Management on January 19, 2011, in Yankton, South Dakota. Attorney Kerri Cook Huber represented Claimant, Erdene Uecker (Claimant). Attorney Michael McKnight represented Employer and Insurer, Hy-Vee, Inc. and EMC Risk Services, LLC (Employer and Insurer). The witnesses presenting testimony at hearing were: Claimant, Cari Uecker, and James Carroll. The deposition of Dr. Matthew McKenzie was admitted prior to hearing, as were the vocational assessments by Mr. James Carroll and Mr. Rick Ostrander.

ISSUE

Two issues were presented for the Department's determination at the hearing. The first is whether Claimant's right knee injury and condition arose out of and in the course of her employment with Employer; whether Claimant's compensable left knee injury and her continued employment was a major contributing cause of the right knee injury or condition?

The second issue is whether Claimant is permanently and totally disabled?

FACTS

At the date of hearing, Claimant was 62 years old and living in Wagner, South Dakota. Claimant is a high school graduate and a Certified Nursing Assistant (CNA). Claimant worked for Employer as a traveling CNA. Claimant's weekly workers' compensation benefit rate is $286 per week. Claimant earned $11.50 per hour and received mileage reimbursement. Claimant worked an average of 32 hours per week prior to injuring her left knee.

On or about August 15, 2007, Claimant injured her left knee during the course of her employment with Employer. Claimant's physician treated the left knee and eventually the orthopedic specialist ordered a left knee replacement. Claimant underwent a total left knee replacement on September 27, 2007 in Sioux Falls. The injury was accepted by Employer and Insurer as being compensable and medical treatment was provided by Employer and Insurer. The parties have stipulated and entered into an agreement that the left knee injury is compensable and that Claimant has not yet reached maximum medical improvement (MMI) on her left knee.

About one month after her left knee replacement, Claimant was released to light duty work with Employer. The light duty work consisted of walking to residents' rooms and delivering or picking up whatever was necessary at that time. Claimant was not lifting anything heavy, but she was continuously walking. Claimant experienced swelling and pain in both knees. In December 2007, Dr. Bubak took Claimant off work until her appointment with Dr. McKenzie in January 2008. In February 2008, Dr. Bubak returned Claimant to work on a part-time basis, 4 hours per day, with no lifting, pushing or pulling over 40 pounds over four hours per day. In April 2008, Dr. Bubak recommended that Claimant work full 8 hour days, three days per week. At some point in time, Claimant's right knee started to swell and hurt on a regular basis. Claimant returned to Dr. Bubak regarding her right knee in June 2009.

Claimant had treated with Dr. Bubak for her right knee in June 2007, about two months prior to the left knee being injured. At that time, Dr. Bubak noted that Claimant had "some swelling and also some discomfort in the right knee." The diagnosis was "epicondylitis". Claimant was given a trial of Celebrex (an anti-inflammatory) for two weeks. Claimant was to have "plain films" or x-rays done on her right knee. Dr. Bubak also recommended an MRI of the right knee if there was no improvement. No films or images were taken of Claimant's right knee at that time. On July 12, 2007, Claimant returned to Dr. Bubak regarding her right knee. The Celebrex was working and Dr. Bubak recommended some over the counter anti-inflammatories. At that time, Claimant could still tolerate activity and continued employment. About one month later, in August 2007, Claimant injured her left knee on the job.

Claimant went back to her primary care provider, Dr. Bubak, regarding her right knee in December 2007. Dr. Bubak was of the opinion that Claimant returned to work too soon after her knee replacement. Dr. Bubak wrote a note to excuse Claimant from work from December 21, 2007 to January 2008 when Claimant was scheduled to see Dr. MacKenzie, the knee surgeon. When Claimant saw Dr. MacKenzie in January 2008, Claimant was released from work for one month for additional therapy. After the therapy concluded, Claimant returned to working a 32-hour work week. After returning to work, Claimant continued to suffer pain and swelling in both knees.

Dr. MacKenzie referred Claimant to Dr. Pagnano at the Mayo Clinic in Minnesota. Dr. Pagnano was of the opinion that the left knee replacement needed to be redone as there was laxity in the left knee replacement. Dr. Pagnano also opined that Claimant's right knee would likely heal once the left knee was fixed. Claimant has decided not to redo the left knee replacement at this time partially due to personal family issues. Dr. MacKenzie saw Claimant specifically for the pain in her right knee. His opinion is that Claimant was hyperextending the right knee and overcompensating for the pain in the left knee. Dr. MacKenzie was of the opinion that the right knee should be fixed or scoped before the left knee replacement could be redone.

An MRI of the right knee indicates a very large tear of the posterior horn of the medial meniscus. Prior to incurring the initial injury to the left knee, Dr. Bubak told Claimant that she suffered from mild to moderate arthritic changes in the right knee. Dr. MacKenzie, in February 2009, gave the opinion that Claimant's right knee pain was caused by a degeneration of the knee and not a traumatic event. Dr. MacKenzie is also of the opinion that Claimant's work was not a major contributing cause of Claimant's right knee condition, although her work may have exacerbated the existing condition of her knee. Claimant's right knee was in a degenerating state prior to the left knee replacement and when her left knee was replaced, Claimant's right knee condition was "unmasked" according to Dr. MacKenzie's deposition testimony. Dr. Bubak is of the opinion that Claimant's right knee issues are multi-factorial; that Claimant's overuse of her right knee while recovering from her left knee replacement could be a factor in the current condition of her right knee.

When treating the left knee in January 2009, Dr. Pagnano gave his opinion regarding Claimant's right knee. He stated that Claimant "does have some early to moderate degenerative arthritis. I have suggested considering a cortisone injection for that right now, and I suspect that the right knee would settle down after dealing with the left knee; and she could likely put off the need for right knee surgery for quite some time."

In late February, 2009, Claimant's supervisors did not want Claimant working with the patients as it was unsafe for the patients. Claimant was less steady on her feet than her patients. On or about February 20, 2009, Claimant's doctors restricted Claimant's work. Claimant was only to be required to stand or walk as tolerated, and must be able to change positions or sit down as needed. Claimant is able to perform sedentary work.

Prior to working for Employer, Claimant's work history included working at Fort Randall Casino and Hotel as a front desk clerk and reservation manager; owning and operating a convenience store; working as a youth supervisor at the State Training

School in Plankinton; working as a correctional officer/guard at the Mike Durfee State Prison in Springfield; and training and working as a CNA for a nursing home.

Other pertinent facts may be developed in the analysis below.

ANALYSIS

Right knee Condition

To recover under workers' compensation law, 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). It is well settled that, "in order for the injury to arise out of the employment, the employee must show that there is a causal connection between the injury and the employment." *Fair v. Nash Finch Co.*, 2007 SD 16, ¶10, 728 NW2d 623, 629 (internal quotations omitted). The type of evidence necessary for a finding of the causation of a work-related injury is settled in South Dakota:

> A medical expert's finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.*, 443 NW2d 5, 6 (SD 1989). *See also Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, ¶21, 653 NW2d 247, 252-53 (quoting *Day*, 490 NW2d at 724) (Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers] compensation statutes.). Instead, [c]ausation must be established to a reasonable medical probability[.] *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶19, 624 NW2d 705, 709.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶34. Furthermore, the Supreme 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. Dr. Bubak's opinion that the left knee injury is a factor in the right knee condition is based upon a possibility and not a probability. Dr. Bubak clearly stated that the "continued over use of the right knee when she was recovering from the left knee surgery …certainly could be a factor in regards to injury of her right knee." The factor of overuse seems to be a possible cause rather than a probable cause. Dr. MacKenzie, an orthopedic surgeon who specializes in knees, is of the opinion that the left knee injury unmasked the condition of the right knee. The medical records state that Claimant suffered from a degenerative condition in her right knee prior to the left knee injury. Claimant's right knee was still degenerating while her left knee was healing from surgery. Taking into considerations the medical opinions, Claimant's right knee condition or injury is not work-related and is not compensable under the workers' compensation law.

Permanent Total Disability

Claimant makes the argument that she is permanently and totally disabled and is eligible to receive benefits under the "odd-lot" doctrine. Claimant makes this argument based upon the injury of her left knee independent of the claim of injury on her right knee. The criterion for finding a status of permanent total disability is described in SDCL §62-4-53:

> 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 Supreme Court has set out that the Claimant has two avenues to make the required prima facie showing for inclusion in the odd-lot category:

> 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. Under this test, if the claimant is obviously unemployable, he will not bear the burden of proving that he made reasonable efforts to find employment in the competitive market. Likewise, it is only when the claimant produces substantial evidence that he is not employable in the competitive market that the burden shifts to the employer.

Kassube v. Dakota Logging, 2005 SD 102, ¶34, 705 NW2d 461, 468 (internal citations and quotations omitted). See also *Fair v. Nash Finch Company*, 728 NW2d 623, 623-633 (SD 2007).

The facts of each case determine whether there is sufficient evidence to support the Department's findings that the claimant was permanently and totally disabled under the odd-lot doctrine. *Kassube* at ¶35.

> South Dakota has generally applied a reasonableness standard when analyzing the job search of an odd-lot claimant. When determining if a claimant qualifies for odd-lot classification, courts have considered the age, training, and experience of the person seeking classification. South Dakota courts have also considered the intent of the claimant, to the extent that he or she must show some motivation to become re-employed.

Johnson v. Powder River Transportation, 2002 SD 23, ¶15, 640 NW2d 739 (SD 2002) (internal citations omitted).

Claimant has proven that she is obviously unemployable, based upon her physical condition coupled with her age, training, and education. SDCL 62-4-53. Claimant suffers pain on a regular basis from both knees. The injury to Claimant's left knee is work-related and compensable; however, Claimant's daily activities are limited due to

the laxity of the left knee-replacement. Claimant also has a torn meniscus in her right knee. When Claimant stands or walks for a short time, both knees swell and are in pain.

Claimant conducted a job search in her home labor market of Wagner, SD. She contacted 23 different employers. Claimant's work restrictions, combined with her high school education, training as a CNA (currently unlicensed), and age of 62, makes her obviously unemployable. Claimant made a reasonable job search within the 60-mile radius and was not able to find open and continuous employment that met her restrictions. Claimant does not have any computer training and has no computer skills.

Claimant did not search for jobs in the Yankton area, where she most recently worked. Claimant's employment with Employer was based out of Yankton, but Claimant's hourly wage was much higher and she received mileage for travel to other communities. At a rate of $.37 per mile, the sedentary to light job opportunities in Yankton area would not pay her enough to make at least her workers' compensation rate of $520 every two weeks.

"The burden will only shift to the employer in this second alternative when the claimant produces substantial evidence that he is not employable in the competitive market. Then the employer must show that some form of suitable work is regularly and continuously available to the claimant." *Shepard v. Moorman Mfg*., 467 N.W.2d 916, 918 (SD 1991). "Once [Claimant] proves that [s]he is obviously unemployable, the burden shifts to the employer to show that suitable employment is available within the community that will accommodate the claimant's limitations." *Wagaman v. Sioux Falls Constr*., 1998 S.D. 27, ¶22, 576 N.W.2d 237, 241.

Mr. James Carroll, a vocational consultant for Employer and Insurer, reviewed Claimant's records and gave an opinion regarding the jobs that may be available for Claimant, based upon her restrictions. "While it is not required that an employer actually place a claimant in an open job position, more than mere possibility of employment

must be shown; the employer must establish that there are positions actually open and available. *Spitzack* at 76. (citing *Rank v. Lindblom*, 459 N.W.2d 247, 249 (S.D. 1990).

Mr. Carroll noted in his assessment that Claimant's work restrictions are due to a non-work related physical condition, her right knee. He wrote, "Vocationally, Ms. Uecker's Left knee was not a major contributing cause for her inability to maintain employment. Ms. Uecker's inability to maintain employment was be[sic] the result of Ms. Uecker's Right knee condition, which Dr. McKenzie has stated was not work related." (emphasis in original). At the time the right knee was reported to Employer/Insurer, Claimant's left knee had swollen to "half the size of a volleyball … the pain was beyond description." Claimant was taken off work due to her left knee, as well as her right knee.

Claimant has shown that the work-related injury to her left knee is a major contributing cause of her current physical condition and disability. Dr. McKenzie restricted Claimant to light to sedentary work with the ability to stand/walk as tolerated and sit as needed, due to her left knee. Claimant has been off work since February, 2009, as ordered by Dr. McKenzie, due to the condition of both her knees. Based upon just her left knee, Claimant is limited to sedentary to light work only.

The Supreme Court set out the parties' burdens of proof in the *Spitzack* case. They wrote:

> We held that under the odd-lot test for determining total disability, once an employee has made a prima facie showing that suitable employment is unavailable, the employer then has the burden of establishing that the employee would be capable of finding such employment without rehabilitation. Once a claimant establishes inability to find suitable employment, the employer is left to show that job opportunities exist in the competitive market.

Spitzack at 77 (internal citations omitted). See also *Baier v. Dean Kurtz Construction, Inc.*, 2009 SD 7, 761 NW2d 601; and *Capital Motors, LLC v. Schied*, 2003 SD 33, 660 NW2d 242.

Mr. Carroll listed a few jobs in Yankton that are sedentary to light duty, but that would not pay enough due to the commute from Wagner. Mr. Carroll also listed two jobs in the Wagner area, however one required proficiency in computers and knowledge of Meditech software. Claimant does not have any experience in specific computer software applications. The other position was that of a counter attendant at an agricultural type business, Country Pride Co-op. The position required occasionally lifting up to 50 pounds, which is beyond Claimant's restrictions.

Employer has not met their burden to show that suitable positions are continuously open and available in Claimant's labor market and that are more than insubstantial employment. Claimant is permanently and totally disabled due to the work-related injury of her left knee.

Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision on Issues 2. Employer and Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision on Issue 1. The initial proposals shall be submitted to the Department within twenty (20) days from the date of receipt of this Decision. The opposing parties shall have twenty (20) days from the date of receipt of the initial 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 and Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 1st day of July, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

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Catherine Duenwald
Administrative Law Judge