SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CLARA NAVRATIL, **HF No. 169, 2002/03**

Claimant, **DECISION**

vs.

STATE OF SOUTH DAKOTA,

Employer/Self-Insurer.

This is a workers' 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. A hearing was held before the Division of Labor and Management on October 12, 2004, in Sioux Falls, South Dakota. Clara Navratil (Claimant) appeared personally and through her attorney of record, Dennis W. Finch. Timothy M. Engel represented Employer/Self-Insurer (Employer). The issue presented was whether Claimant is permanently and totally disabled under the odd-lot doctrine.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence:

At the time of the hearing, Claimant was nearly fifty-eight years old and lived on a farm eight miles southwest of Tabor, South Dakota. Claimant's residence is twenty-five miles from Yankton, approximately sixty miles from Vermillion and eight to ten miles from Springfield. Claimant is currently unemployed and receives Social Security Disability.

Claimant graduated from high school in 1965 and then attended the CE School of Commerce in Omaha, Nebraska. Claimant took classes in accounting, bookkeeping and typing, but she did not graduate. Claimant then worked with her husband who owned and operated a Phillips 66 station in Yankton. Claimant worked part-time for her husband doing daily bookwork. Claimant also worked for five or six months at M-Tron Industries in Yankton. Thereafter, Claimant worked as a secretary in the financial aid office at USD Springfield. Claimant worked in that position for a little over nine years and her duties included helping students complete financial aid forms, typing letters and completing reports.

In December 1975, Claimant started working at the Human Services Center (HSC) in Yankton. Claimant was responsible for accounts payable for the entire HSC, a state institution with hundreds of employees and a budget of millions of dollars. Claimant also set up and prepared reports, attended and provided information at budget hearings and exercised her independent judgment concerning how best to accomplish a task.

Sometime in 2000, Claimant began to experience problems with her left hand caused by her work at HSC. Claimant had considerable pain in her hand and fingers

and her left arm would fall asleep and she experienced significant pain at night. Claimant's workers' compensation rate was $279.27.

Claimant sought treatment from her family physician, Dr. Herb Saloum, who referred her to Dr. Daniel Johnson, an orthopedic surgeon in Yankton. On April 27, 2000, Dr. Johnson diagnosed Claimant with probable left carpal tunnel syndrome with some mild de Quervain's tenosynovitis. Dr. Johnson performed carpal tunnel release surgery on Claimant's left hand on June 8, 2000. Claimant returned to work after being off for one week. However, Claimant had to return to see Dr. Johnson on June 22, 2000, as she "was doing quite a bit more than she should." Claimant had increased pain in her left hand. Dr. Johnson recommended that Claimant lift no more than two pounds with her left hand and avoid repetitive wrist motion. In addition, Claimant was restricted to working half-days for two weeks.

Claimant returned to work at HSC, but began performing most of her activities with her right hand. Sometime in late 2000 or early 2001, Claimant's right hand began to bother her with the same problems she had with her left hand, meaning that her fingers would fall asleep and would be numb. Claimant's increased pain also kept her from being able to fall asleep at night.

In March 2001, Claimant resigned from HSC. At that time, Claimant had assumed duties from other vacated positions and was extremely busy in her position. In addition, Claimant experienced increased pain in her right hand. Claimant stated:

> I would go home at night, and I would, you know, just - - there was so much that you couldn't get it done in a day, and you couldn't work overtime. And so I ended up just going home at night crying. And then I would end up at night not being able to sleep because my hands hurt.
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> . . . .
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> And then the state went to a zero tolerance, no errors. You couldn't have any errors of any sort. And the anxiety from that plus the pain in my hands and stuff just - - I ended up resigning.

Claimant admitted she experienced stress in her position, but stated, "[s]ome of it, yes, but some of it was that when you can't hold a pencil and causing discomfort off and on all day, I just couldn't do it anymore." When Claimant resigned, she intended to go home and work part-time. However, Claimant's pain complaints continued and she was unable to work.

On May 3, 2001, Claimant returned to see Dr. Johnson for an evaluation of her right hand. Dr. Johnson diagnosed Claimant with probable right carpal tunnel syndrome. Dr. Johnson prescribed a wrist splint for Claimant to wear on her right hand at night. On May 17, 2001, Dr. Johnson injected the carpal tunnel. After conservative treatment failed to alleviate Claimant's symptoms, Dr. Johnson performed carpal tunnel release surgery on Claimant's right hand on July 10, 2001. Following surgery, Claimant was encouraged to use her hand for light activities, but was to avoid any heavy lifting or carrying with her right hand. Claimant was also encouraged to continue using the wrist splint when she was active.

On October 4, 2001, Dr. Johnson examined Claimant and noted that she continued to have problems with her right hand. Dr. Johnson stated "the carpal tunnel was a bit worse on the right side." Dr. Johnson recognized that Claimant was not

currently working, but provided restrictions as if she were working. Dr. Johnson indicated that Claimant could return to work on a half-day basis as long as she avoided activities that aggravated her hand. Dr. Johnson also stated that he would release Claimant to full-time work after several weeks. Dr. Johnson encouraged Claimant to use her hands, but not to excess. Dr. Johnson noted that Claimant had no immediate plans to return to work at that time.

Claimant returned for a follow-up visit with Dr. Johnson on April 8, 2002. Dr. Johnson noted that Claimant continued to have problems with her right hand. Dr. Johnson stated:

> Clara is about 9 months status post right carpal tunnel release. She initially had some normal post-operative soreness in her hand, but gradually improved until about December 2001 when she started to have some increased numbness and discomfort in her right hand in the thumb, index and long, and part of the ring finger, especially as she was trying to do some fine needlework and other more meticulous work with her hand. It worsened even more after she began doing her taxes and using a computer keyboard. She never returned to work, but was thinking about doing so, but is having enough trouble with her right hand at this time that it is impractical for her to pursue that. She notices that she has permanent numbness in the thumb and index finger, but it is transient in the long and ring finger. She has always had some problems even since surgery with the thumb, but at one point the index [finger] was feeling pretty normal. It is causing her to drop objects at home. She notes that she has broken about 5 glasses.

Dr. Johnson injected the carpal tunnel and recommended that nerve conduction studies should be redone if Claimant continued having significant problems.

Dr. Johnson referred Claimant to Dr. Tommy Howey, an orthopedic surgeon in Sioux Falls, to address Claimant's continued problems with recurrent right carpal tunnel syndrome. Dr. Howey first saw Claimant on May 30, 2002. Following his examination, Dr. Howey ordered electrical studies, which confirmed that Claimant had recurrent right carpal tunnel syndrome. Dr. Howey saw Claimant again on June 4, 2002, and discussed treatment options with her. On June 12, 2002, Dr. Howey performed an open release of Claimant's carpal tunnel and rotated some fat from the skin in her hand over the nerve to protect the nerve.

Claimant returned to see Dr. Howey on June 25, 2002. Claimant did not notice any improvement of her carpal tunnel symptoms. Dr. Howey released Claimant to return to work as his "routine return to work is two weeks after carpal tunnel surgery with a restriction of no lifting more than five pounds." During Claimant's next visit on July 23, 2002, Dr. Howey noticed some improvement since Claimant's last visit. Dr. Howey recommended physical therapy to "work on the tenderness in her incision" and strengthening exercises. Dr. Howey also increased the work restriction to no lifting of more than ten pounds. Dr. Howey slowly increased Claimant's workload "so that she could gradually get back to full duty."

Dr. Howey next saw Claimant on September 3, 2002. Claimant still had pain in her incision area, but did not have any improvement in the numbness in her median nerve distribution. Dr. Howey increased Claimant's weight restriction to twenty pounds

because he "felt that she was getting stronger and having less pain so we allowed her to do more at work."

Claimant returned to see Dr. Howey on October 29, 2002. Dr. Howey noted Claimant "hadn't gotten any return of her sensation." Dr. Howey did not think Claimant would regenerate her median nerve sensation. Dr. Howey indicated that Claimant could return to work with lifting as tolerated on the right side.

On February 11, 2003, Dr. Howey opined that Claimant had a ten percent impairment rating to her right upper extremity and indicated Claimant may have some difficulty at times lifting heavy objects. Dr. Howey continued with the work restriction that Claimant could lift as tolerated on her right side. Later, Dr. Howey clarified Claimant's work restriction and advised her to work to tolerance.

In 2002, between the time Claimant had the two surgeries on her right hand, Claimant applied for three jobs. These positions were at St. Michael's Hospital in Tyndall, the John Deere Implement in Tyndall and First Dakota Bank in Yankton. Claimant was interviewed for two of the jobs, but was not hired. Claimant has applied for only one other job since that time. Claimant did not register at the local Career Center.

Claimant suffers from continuous pain in her right hand. She has pain in her wrist and palm of her hand. Claimant's thumb and first two fingers are always numb and hurt all the time. Claimant has a continuous ache in her right hand that fluctuates in intensity. Sometimes Claimant experiences shooting pains up her arm. Claimant described her pain on a typical day as a four or five on a scale of one to ten. Claimant's pain significantly increases if she performs repetitive activity or uses her hand too much. Claimant has difficulty doing any type of repetitive activity for any length of time. The right side is Claimant's dominant side.

Claimant is never without pain. If Claimant's pain is too intense, she will cease her activity and rest her arm and hand until the pain level decreases. Claimant takes 600 milligrams of Ibuprofen two times a day for her hand pain. Claimant does not take any prescription medication, but will take Tylenol with increased pain.

Claimant experiences problems with gripping and frequently drops objects, including jars and glasses. Claimant has difficulty opening jars and cans. Before her injury, Claimant was proficient at crocheting, but has stopped performing this activity because of her injury and pain. Claimant has also stopped gardening and does not use her home computer. Claimant is able to drive, but if she travels for too long, the pain in her fingers increases and her fingers go numb. Claimant also has trouble sleeping, especially when her hand is irritated. She stated, "it's just like a continual throbbing and ache in my hand, and it keeps me up most of the night." This happens most every night for Claimant. Claimant is able to care for herself and her home. Claimant can mow her lawn, but she uses a riding mower and operates it with her left hand. Claimant does not experience much difficulty with her left hand and wrist. She does have some problems with her left thumb and first finger as "they feel funny."

Claimant's son, Larry Navratil, credibly testified that Claimant was much more active prior to the problems with her right hand. Before her injury, Claimant was very active, especially outdoors. Now, Larry will ask his mother for assistance but she will not be able to complete the task. He stated, "I'll ask her to [help out] and then about halfway through she's gone. Come to the house and she's sitting there in her chair with

her arm up or on the deck[.]" In addition, Claimant constantly rubs the fingers on her right hand to try to get the feeling back in her fingers.

Claimant was a credible witness at the hearing. This is based on consistent testimony and on the ability to observe her demeanor at the hearing. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED UNDER THE ODD-LOT DOCTRINE?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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).

Claimant argued that she is permanently and totally disabled under the odd-lot doctrine. At the time of Claimant's injury, permanent total disability was statutorily defined by SDCL 62-4-53. This statute states:

> 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 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.

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). Even though the burden of production may shift to Employer, the ultimate burden of persuasion remains with Claimant. Shepard v. Moorman Mfg., 467 N.W.2d 916, 918 (S.D. 1991).

Claimant did not argue that she is obviously unemployable due to her physical condition, coupled with her education, training and age. To the contrary, Claimant argued, as a result of her work-related right carpal tunnel syndrome, she experiences severe, continuous and debilitating pain such that she is obviously unemployable. Due to her injury, Claimant has undergone two surgeries on the right carpal tunnel, physical therapy and exercises. Neither surgery provided Claimant with significant pain relief. In addition, Claimant had at least two injections in the right carpal tunnel and was prescribed a wrist splint. There are no further treatment options available for Claimant with respect to her right carpal tunnel. Dr. Howey stated, "[o]nce you have failed a redo [surgery], basically the only option would be to try nerve grafting, which has very limited success."

Claimant demonstrated that she is obviously unemployable due to her continuous, severe and debilitating pain. As previously stated, Claimant was a credible witness. Claimant suffers from continuous right hand pain on a daily basis. Claimant rated her daily pain as a four or five, but her pain significantly increases if she uses her right hand too much or performs repetitive activity. Claimant's activities have been significantly limited due to her work injury. Claimant's credible testimony concerning her pain was also supported by Larry's credible testimony. Claimant is never without pain and experiences so much pain on a daily basis that it affects her ability to sleep at night. Claimant has continuous throbbing and aching in her right hand, so much that the pain keeps her awake at night. Claimant does not take any prescription pain medication, but uses Ibuprofen every day and will take Tylenol when she experiences increased pain. Claimant must rest when her right hand pain becomes too intense.

Claimant's vocational expert, Rick Ostrander, opined that Claimant was unable to be employed in anything other than sporadic employment resulting in an insubstantial income. Ostrander also opined Claimant was not a candidate for vocational rehabilitation and that a job search by Claimant would be futile.

Based on Claimant's and Larry's credible testimony, Claimant has established that she suffers from severe, continuous and debilitating pain such that it would make her obviously unemployable. Therefore, Claimant does not have to demonstrate "the unavailability of suitable employment by showing that [she] has made 'reasonable efforts' to find work" and was unsuccessful. Peterson, 515 N.W.2d at 231.

Based on the foregoing, Claimant established a prima facie showing that she is permanently and totally disabled under the odd-lot doctrine. Therefore, the burden of production shifts to Employer to show that some form of suitable employment is regularly and continuously available to Claimant within her community. "Employer must have demonstrated the existence of 'specific' positions 'regularly and continuously available' and 'actually open' in 'the community where the claimant is already residing' for persons with *all* of claimant's limitations." Shepard, 467 N.W.2d at 920.

Employer presented testimony from Gayla Stewart, a medical and vocational case manager employed by CorVel Corporation for over sixteen years. In her position, Stewart assists with medical case management and return to work issues, including job analyses, job search and labor market surveys.

In April 2004, Stewart performed a labor market survey of Claimant's community including Yankton, Vermillion and Springfield. Stewart used AAA South Dakota to determine the distances from Tabor. Stewart stated the distance from Tabor to Yankton is eighteen miles, Tabor to Vermillion is fifty-six miles and Tabor to Springfield is nineteen miles. However, Stewart did not take into consideration that Claimant's residence is actually located eight miles southwest of Tabor.

Stewart reviewed Claimant's deposition, Ostrander's deposition, Dr. Howey's deposition and Claimant's medical records. Stewart relied upon Dr. Howey's final report to identify Claimant's work restrictions. The only restriction Stewart used in her labor market survey was Dr. Howey's statement that Claimant "may have difficulty at times with heavy objects." In addition, Stewart recognized that Claimant's workers' compensation rate was $279.27. Stewart tried to identify positions that paid at least $7.00 per hour, the amount necessary to meet Claimant's workers' compensation rate.

Based on her labor market survey, Stewart opined there is employment available in Claimant's community and within her restrictions that would pay a wage equal to or more than her workers' compensation rate. Stewart provided Claimant with forty-five jobs leads for positions that Stewart thought were suitable for Claimant. Of the forty-five job leads, thirty-eight of the positions fit a more restrictive limitation of limited repetitive use of the hands. Stewart opined "there were many jobs identified that would be suitable for [Claimant] based on her physical restrictions and her work experience."

Although Stewart identified forty-five positions, five positions paid less than $7.00 per hour. Stewart estimated that only half of the positions identified paid at least $9.00 per hour. In addition, twelve of the positions were in Vermillion, which is sixty miles from Claimant's residence. SDCL 62-4-52 defines community as:

> [T]he area within sixty road miles of the employee's residence unless:
> (a) The employee is physically limited to travel within a lesser distance;
> (b) Consideration of the wages available within sixty road miles and the cost of commuting to the job site makes it financially infeasible to work within such a distance[.]

Stewart admitted that taking into consideration the cost of commuting from Claimant's residence to Vermillion would more than likely reduce Claimant's wage to below $7.00 per hour. Further, Stewart identified some positions in Yankton with the City of Yankton or Yankton County. Stewart did not know whether Claimant would be required to move to Yankton and acquire residency in order to be eligible for those positions.

More importantly, Stewart did not discuss any of Claimant's limitations with any potential employers she identified. Stewart talked to some potential employers and inquired as to the lifting requirement. For example, Stewart asked about job duties and if there was any heavy lifting required of the position. But, Stewart did not inquire as to whether Claimant could work to tolerance or discuss the fact that Claimant has gripping problems with her right hand. Stewart did not have any contact with Claimant as she

developed the job leads. Finally, Stewart could not testify that any of the forty-five job leads were open and available as of the date of the hearing.

Ostrander credibly testified that the positions identified by Stewart were not appropriate for Claimant. For example, some positions were far outside Claimant's vocational background, or Claimant's age would be a barrier for some positions, such as the youth position, or some positions were highly repetitive in nature. Ostrander opined that Claimant has severe functional limitations that interfere with her capacity to return to employment. Therefore, Ostrander opined that Claimant was not employable in any capacity other than sporadic employment.

Based upon Stewart's testimony, Employer failed to demonstrate that there were specific positions open and available within Claimant's community that would meet all her limitations and pay her a suitable wage. Even though Employer failed to satisfy its burden of production, the ultimate burden of persuasion remains with Claimant.

Claimant credibly demonstrated that she is obviously unemployable due to continuous, severe and debilitating pain. It is true that Claimant has not looked for employment since she applied for three positions in 2002. However, Ostrander credibly opined that a job search by Claimant would be futile. In addition, Dr. Howey advised Claimant to work to tolerance and her right hand pain significantly limits her activities. Claimant has difficulty performing any type of repetitive activity for any length of time with her right hand. Claimant's activities have been significantly impacted and decreased due to the continuous, severe and debilitating pain caused by her work-related injury.

Therefore, Claimant has met her burden of persuasion to establish that she is permanently and totally disabled under the odd-lot doctrine. Claimant's request for permanent total disability benefits is granted.

Claimant shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Employer shall have ten days from the date of receipt of Claimant's Findings and Conclusions to submit objections 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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 7th day of June, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge