SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

SCOTT GULBRANSON,

Claimant,

v.

A & B SERVICE GARAGE,

Employer,

and

WESTERN NATIONAL,

Insurer.

HF No. 223, 2002/03

DECISION

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. Scott Gulbranson (Claimant) appeared personally and through his attorney of record, Dennis W. Finch. Michael S. McKnight represented Employer and Insurer (Employer). The sole issue presented was whether Claimant is permanently and totally disabled pursuant to SDCL 62-4-53.

FACTS

Based upon the Department's record and live testimony at hearing, the following facts have been established by a preponderance of the evidence.

At the time of the hearing, Claimant was forty-five years old. Claimant graduated from Colman High School, but did not pursue any further education. During Claimant's senior year in high school, he worked at T & R Electric as a mechanic. After graduation, Claimant continued to work for T & R Electric for two years, and then worked for various employers honing his skills as a self-taught mechanic. Claimant also worked as a welder and as an equipment operator.

Claimant began working for Employer in 1991 and worked for approximately nine years as a mechanic repairing farm equipment, trucks and tractors. Claimant sustained two work-related injuries to his right shoulder while working for Employer. The first injury occurred on November 24, 1997, and the second injury occurred on May 20, 1998. Claimant's workers' compensation rate was $345.39 per week.

Claimant sought medical treatment after each injury from Dr. Tad Jacobs, his family physician. In December 1998, Dr. Jacobs referred Claimant to Dr. Robert Van Demark, an orthopedic surgeon, for an evaluation of his right shoulder. Dr. Van Demark recommended conservative care and continued to monitor Claimant through July 1999. On July 19, 1999, Dr. Van Demark gave Claimant a ten percent right upper extremity impairment rating because he thought Claimant had reached maximum medical improvement.

Despite the injury to his right shoulder, Claimant was able to continue working for Employer performing his full array of mechanical duties. Claimant quit his employment with Employer in February 2000. Claimant then went to work for UPS in Brookings as a maintenance mechanic on the delivery trucks. This was lighter maintenance work than what Claimant performed for Employer. Claimant worked for UPS for four months and then quit to have surgery performed on his right shoulder.

Claimant returned to see Dr. Van Demark in June 2000 due to continued pain in his right shoulder. Dr. Van Demark's diagnosis throughout this time was rotator cuff tendonitis and some arthritis between the AC joint, the tip of the acromion and the clavicle on the right side. Dr. Van Demark performed an AC joint resection arthroplasty on Claimant's right shoulder on July 18, 2000. Claimant remained off work for a period of time following his surgery and received workers' compensation benefits.

Claimant participated in a Functional Capacity Evaluation (FCE) on February 13, 2001. The FCE was valid and the results placed Claimant in the light-medium physical demand classification and indicated that he was able to work eight hours per day on a full-time basis. The FCE also showed that Claimant had the following lifting restrictions: thirty-five pounds torso lift; thirty pounds leg lift; forty pounds 12" lift; fifteen pounds shoulder lift; twenty-five pounds overhead lift; forty-five pounds carry; forty pounds pushing force; and thirty-five pounds pulling force.

On February 15, 2001, Dr. Richard Farnham conducted an independent medical examination (IME) on Claimant. Based upon his examination and review of Claimant's records, Dr. Farnham opined Claimant was capable of gainful employment performing light to moderate type work. Dr. Farnham actually released Claimant to return to work with slightly higher weight restrictions than the FCE. However, Dr. Farnham agreed with the findings of the FCE that Claimant was incapable of returning to work as a mechanic in a heavy truck commercial setting. Dr. Farnham also opined that Claimant had a four percent impairment to his right upper extremity. On February 19, 2001, Claimant returned to see Dr. Van Demark, who released Claimant to return to work in accordance with the FCE guidelines.

Despite being released to return to work, Claimant remained unemployed for over two years. During this time, Claimant was doing very little and applied only for one job. On January 6, 2003, Claimant met with Sherry Rudloff from the South Dakota Department of Vocational Rehabilitation (DVR) to see "what job [he] would fit into." After the meeting, Rudloff indicated that Claimant "chose not to apply for VR services based on the fact he was not interested in employment at this time."

In May 2003, Claimant started working for Mark and Diana Froning at Dakota Wholesale Bait on a regular basis. Prior to this time, Claimant performed odd jobs for Dakota Wholesale Bait on an as-needed basis. Mark hired Claimant as the "mechanic," but he performed more "fisheries" type activities, such as milking and hatching eggs. Claimant worked approximately fifteen to twenty-five hours per week. Both Mark and Diane credibly testified they had full-time work available for Claimant, but he chose to work only part-time because he wanted to keep his monthly income below $750 a month because of some "prior claim he had or a prior thing he had." Claimant initially testified at his deposition that he could physically perform his duties at Dakota Wholesale Bait without any difficulty. However, at hearing, Claimant changed his testimony and stated that the job was "not okay" for him physically. According to Mark,

Claimant was able to perform his work duties and that Claimant "just worked as he could." Claimant worked for the Fronings at Dakota Wholesale Bait until July 2005.

During the time Claimant worked at Dakota Wholesale Bait, he returned to DVR for another vocational evaluation. DVR referred Claimant to Career Advantage, an agency that assists people with disabilities to find and maintain jobs. Claimant initially worked with Karla Tawzer and met with her on August 6, 2003. Tawzer expressed concern to Claimant about his unkempt appearance and his body odor. Tawzer noted, "I stated that he would need to shower daily, wash and trim up his hair and pull it back into a ponytail if he wouldn't consider cutting it, trim up his beard, and wear different and clean clothes on a daily basis." Claimant informed Tawzer he had no interest in changing his appearance to get a job. Claimant admitted he really was not looking for any work during the 2003 timeframe. Claimant did not return for further vocational assistance until 2006.

Claimant returned to see Dr. Van Demark on June 24, 2003, complaining of continued pain in his right shoulder. Dr. Van Demark examined Claimant and noted that Claimant nearly had full range of motion in his shoulder. Dr. Van Demark did not find any objective findings to document Claimant's pain complaints regarding his right shoulder. Dr. Van Demark recommended that Claimant have a bone scan done to determine the cause of pain, but Claimant did not follow through with this recommendation. Claimant did not return to see Dr. Van Demark after this visit.

Dr. David Hoversten of Dakota Orthopedics, Ltd., performed an IME on Claimant on March 12, 2004. Dr. Hoversten reviewed Claimant's medical records, took a written history and conducted a physical examination. Claimant complained to Dr. Hoversten that his right shoulder continued to limit him and that "it is difficult to pull up his pants." Claimant describes his pain as a "generalized aching problem" with pain radiating over the back of the shoulder blade. Dr. Hoversten concluded that Dr. Farnham's IME of Claimant was extremely thorough and agreed completely "with all of [Dr. Farnham's] return-to-work restrictions and allowances." Dr. Hoversten opined:

> It is true that since the left arm is extremely weak, the right arm has to bear the majority of work that Mr. Gulbranson does. Because of that, keeping him at a lighter capacity is extremely important. Also, Mr. Gulbranson's size and muscle mass are very small and his muscles are quite weak throughout. For that reason keeping him in a lighter capacity work is extremely important. There is no question that there is some achiness in the shoulder, but it would be present whether he does any work or not, and it is entirely compatible with normal function in a medium-to light-capacity work.

Dr. Hoversten opined Claimant suffered from "pain of a nonmalignant nature which is unresponsive to normal treatment measures, and therefore should simply be observed and supported with mild pain medication and restrictions at work." Dr. Hoversten agreed that Claimant had a four percent impairment rating to his right upper extremity.

In November 2006, Claimant resumed his search for employment. Claimant met and worked with Loni Ching, an employment consultant with Career Advantage. Claimant informed Ching on the Career Advantage Intake form that he was able to work only weekday mornings and no more than twenty to twenty-five hours per week. These self-limitations were not due to Claimant's physical restrictions. Ching recommended

Claimant participate in some situational assessments to determine what type of employment he could perform.

Claimant first performed a situational assessment at Sturdevant's, an automotive parts store in Brookings. Claimant worked at Sturdevant's for two or three days for two hours each day. Ching observed Claimant's activities of putting away parts. Claimant was "kind of sore at the end of two hours." But, Ching reported that Claimant's functional abilities were based on his "self-limiting behavior." In addition, Ching noted Claimant's appearance was "unkempt" and wore clothes stained with oil and grease. Ching also recorded that the manager asked Claimant to take the garbage out, but Claimant responded that "he really didn't want to do it" and did not take the garbage out. Claimant complained that working at Sturdevant's was too hard for him because the cement floors were too hard on his back. Claimant suffered a previous non-work related injury to his low back that is not part of this claim. Claimant was not offered a job at Sturdevant's.

In March 2007, Claimant participated in another situational job assessment at ADVANCE in Brookings, a company that employs people with work restrictions or other special needs. Claimant worked for three days, each day performing different activities, including assembling pill bottles, putting together guards on fans, putting parts in plastic bags, and drilling some holes in bolts. Claimant complained of being sore at the end of each shift, but again, Ching noted that Claimant demonstrated self-limiting behavior. Claimant was not offered a job and has not attempted any further job assessments.

After Claimant left his employment with Employer in 2000, he applied for a total of seven jobs. Of these seven jobs, Claimant applied for four jobs based upon the recommendations from James Carroll, Employer's vocational expert. These jobs were at South Dakota State University, Daktronics, Royal Plastics, and Flandreau Indian School. Claimant did not obtain a job and continues to be unemployed. Claimant registered at the Career Center approximately two months prior to the hearing.

Even though Claimant has remained unemployed, he has been able to perform a variety of odd jobs for friends and other people. For example, Robert Fite, a friend in Brookings, has hired Claimant on multiple occasions to perform various tasks. Fite hired Claimant to sandblast some picnic tables and perform other odd jobs such as helping with a transmission and working on various vehicles to get them running. Fite stated, "one of our bigger projects where I was involved with Scott is we moved a garage from one location to another. He helped me do that." On occasion, Fite has had Claimant stop by and check on and feed his thirty head of cattle. Fite paid Claimant approximately $5000 per year for his services. Claimant has also checked engines and serviced cars out of his garage. Claimant has also performed some work for Moriarty Rentals, a large property rental outfit in Brookings.

Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED PURSUANT TO SDCL 62-4-53?

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 alleged that he is permanently and totally disabled under the odd-lot doctrine. SDCL 62-4-53 governs whether a person is permanently and totally disabled and provides in part:

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

Pursuant to SDCL 62-4-53, Claimant has two ways to make the required prima facie showing that he is entitled to benefits under 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.

Fair v. Nash Finch Co., 2007 SD 16, ¶ 19 (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 he is obviously unemployable due to his physical condition, coupled with his education, training and age. Rather, Claimant argued that

he is obviously unemployable due to his "chronic and unrelenting pain." However, under either avenue, Claimant cannot satisfy his burden of establishing a prima facie showing that he is obviously unemployable. "'The test to determine whether a prima facie case has been established is whether there "are facts in evidence which if unanswered would justify persons of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain."'" Eite v. Rapid City Area Sch. Dist. 51-4, 2007 SD 95, ¶ 23 (citations omitted). Even considering the evidence in a light most favorable to Claimant, Claimant cannot meet his burden of production to establish that he is obviously unemployable. The evidence demonstrated that Claimant is physically capable of returning to work on a full-time basis, is physically capable of looking for work, and is not suffering from continuous, severe and debilitating pain as he claimed.

The valid FCE demonstrated that Claimant is capable of performing light to medium duty work. The FCE also showed, and the physicians agreed, that Claimant should not return to his prior employment as a truck mechanic. But, this finding does not negate the fact that Claimant is capable of returning to full-time employment. In addition, no physician opined that Claimant cannot work and no physician ever restricted the number of hours that Claimant could work.

Dr. Van Demark, Claimant's treating physician, opined that there is no medical reason to prohibit Claimant from working within the guidelines of the FCE. Dr. Van Demark also opined there is no medical reason that would prevent Claimant from looking for work within the FCE guidelines. Dr. Jacobs, Claimant's family physician, also agreed with the FCE classification. Dr. Farnham and Dr. Hoversten also credibly opined that Claimant is capable of returning to work on a full-time basis with certain work restrictions. Dr. Hoversten recognized that Claimant experienced nonmalignant pain in his right shoulder, but opined that this pain would not prevent Claimant from returning to work. Dr. Hoversten concluded, "[the nonmalignant pain] means there's nothing serious going on, but it's just sort of an achy soreness that's there from the surgery residuals. Really your best treatment is to try to help him forget that it's there and just live with it." Dr. Hoversten explained that the best course was to explain to Claimant that he would experience some pain, but "that it's unlikely to worsen significantly, and that he won't hurt himself if he works with it and it aches a little, that it's okay." In fact, Dr. Hoversten opined "it would be extremely helpful, physically and mentally[,]" for Claimant to look for work and return to work.

Claimant demonstrated that he was physically able to work when he wanted to work. Claimant worked at Dakota Wholesale Bait for over two years and was physically able to perform his job duties. Claimant earned $10.50 per hour while working at Dakota Wholesale Bait. Claimant self-limited the number of hours he worked even though there was full-time work available for him. Claimant also performed a variety of odd jobs over the past few years. Again, Claimant demonstrated that he worked when he wanted to work and was not limited by his physical condition. Claimant's vocational expert, Rick Ostrander, opined that Claimant was obviously unemployable at or above his workers' compensation rate. Ostrander's opinions are rejected as lacking in foundation and inconsistent with the totality of the record showing that Claimant is able to work and that there are jobs open and available that pay at least his workers' compensation rate.

Claimant cannot meet his burden of production to establish that he suffers from continuous, severe and debilitating pain. Claimant described his right shoulder pain as pain and soreness "most of the time, but it gets more severe when I move the arm around more." Claimant usually rates his pain as a two or three, on a scale of one to ten, "and then if I overuse it, then it will go up to the ten scale, and then I'll use my TENS unit." Claimant does not use his TENS unit every day, only when his pain "gets real severe." Claimant does not take any prescribed pain medication and takes only aspirin for pain relief. Claimant drives to Sioux Falls every day from Brookings to take his disabled son to school at Southeast Behavioral Health. Claimant usually tries to drive with an armrest so he can lean on it and steer with his left hand. Claimant admitted that he can lift "a lot" with his right arm without it hurting, but "it hurts afterwards if I pick up heavy things." Claimant stated that on an average day, "if I feel like doing something, I go do it if I feel up to it."

Claimant's description of pain, even if accepted, is insufficient to rise to the level of continuous, severe and debilitating pain as required under the odd-lot test. However, Claimant's testimony concerning the severity of his pain was not credible. Claimant confirmed that he can lift from his waist to his chest, "and then above that is just about impossible." Employer presented surveillance video tapes that contradicted Claimant's testimony. The video tapes showed Claimant participating in a number of activities in which he used his right arm, including above chest level, at various times during seven different days in 2003 and 2004.

The surveillance video tapes also showed Claimant participating in various activities including, but not limited to:

Carrying a bucket with right arm;
Driving with right arm;
Lifting a full laundry basket with both arms and raising it to shoulder height;
Driving a tractor and alternating arm with steering;
Pulling himself onto tractor with right arm;
Picking up wire cages and lifting them above his head;
Loading and unloading wire cages;
Carrying two 5-gallon buckets;
Sandblasting with right arm;
Pushing hopper with right arm;
Picking up tubular frame with right arm;
Carrying tubular frame with both arms and carrying it into garage;
Picking up large wire screen over his head and carrying it into garage;
Changing tire on truck;
Sandblasting;
Picking up trailer hitch and dragging a trailer to move it; and
Picking up bag of silicone sand to head/shoulder level and shaking it into hopper.

Dr. Jacobs reviewed the surveillance video tapes and based on his observations, Dr. Jacobs did not see anything that led him to believe Claimant's strength was diminished in his right arm or that Claimant had reduced range of motion. Dr. Jacobs did not see anything to suggest that Claimant was in pain or that he exhibited any pain behaviors while performing the various tasks depicted in the video tapes.

The surveillance video tapes, along with Claimant's demonstrated ability to work at Dakota Wholesale Bait and the medical testimony, contradict Claimant's assertion that he suffers from "chronic and unrelenting pain." Claimant may experience some pain in his right shoulder, but the medical providers took this information into account when providing work restrictions. Again, the conclusive medical evidence showed that Claimant can work and there was no need to restrict his daily hours. Claimant placed unreasonable limitations on the work he would perform and these limitations were self-imposed and unwarranted.

Based on the evidence presented, Claimant failed to make a prima facie showing that he is entitled to benefits under the odd-lot doctrine because he is not obviously unemployable due to his physical condition. Therefore Claimant must introduce evidence of a reasonable, good faith work search effort.

Claimant did not conduct a reasonable, good faith work search. After Claimant quit working for Employer in 2000, Claimant applied for seven jobs in seven years. Claimant applied for four of these jobs only after Carroll identified them in his vocational report. Claimant registered at the Career Center, but this was done only two months prior to the hearing. Granted, Claimant contacted DVR and utilized some of their services. However, Claimant indicated at various times that he was not interested in employment or would not follow advice from the vocational professionals who were trying to assist Claimant to return to the labor market. Claimant placed undue limitations on when he would work, if at all. At Dakota Wholesale Bait, Claimant self-restricted the number of hours he worked, even though full-time work was available. Claimant informed Career Advantage that he could work only in the mornings and he could not work in excess of twenty to twenty-five hours per week. Again, there is no medical reason why Claimant cannot work on a full-time basis and these self-imposed restrictions were unreasonable. Claimant's minimal effort to seek employment was not reasonable and Claimant failed to establish that he conducted a good faith work search.

As Claimant failed to establish a prima facie showing that he is permanently and totally disabled under the odd-lot doctrine, the burden of production does not shift to Employer to show that some form of suitable employment was regularly and continuously available to Claimant within his community. Despite this, Employer demonstrated there were positions, which were not sporadic, actually open and available in the Brookings area that met all of Claimant's limitations.

Employer offered vocational testimony from James Carroll, a vocational rehabilitation consultant, with over twenty years of experience as a vocational expert. Carroll reviewed the entire record in preparation of his testimony. Carroll relied upon the medical evidence indicating that Claimant was able to perform work at the light to medium physical demand classification.

Carroll performed a labor market survey of the Brookings area after reviewing Claimant's extensive medical records, Claimant's educational and work background, and Claimant's physical limitations. Carroll utilized this information to determine the type of employment available for Claimant that would meet his FCE restrictions and pay at least $8.66 per hour. Carroll identified two employers in the Brookings area that had positions open and available that paid at least Claimant's workers' compensation rate. Carroll opined that 3M and Royal Plastics had positions open and available that met these specific requirements.

Carroll first contacted 3M, a manufacturer of medical supplies in Brookings. 3M had light duty positions open and available that paid between $9.75 and $10.20 per hour depending upon previous work experience. Carroll recognized that Claimant performed a situational assessment that involved drilling, a task that would be performed as part of this job with 3M. Carroll noted that Claimant worked at one hundred percent of the norm on drilling. Carroll next contact Royal Plastics in Brookings. This company had at least seven openings on the second and third shifts for full-time employment. The second shift started at $9.00 per hour and the third shift started at $9.25 per hour. The job involved standing, repetitive work, but no lifting over twenty-five pounds. Carroll opined that these positions were within Claimant's physical capabilities.

Carroll concluded suitable work is regularly and continuously available to Claimant in the Brookings labor market. Carroll opined Claimant "was capable not only of employment in the Brookings labor market but also capable of retraining at either Lake Area or Southeast Technical." After Carroll generated his initial report, he reviewed information from DVR and the depositions of Robert Fite and Mark and Diane Froning. This additional information bolstered Carroll's opinions and conclusions that Claimant is employable in the Brookings labor market. Ultimately, Carroll opined there are positions open and available Claimant's community that meet all of his physical limitations that paid at least his weekly workers' compensation rate. Carroll's opinions are well-founded, credible and are accepted as persuasive evidence that there are specific positions open and available for Claimant that meet his physical requirements and pay at least $8.66 per hour.

Employer satisfied its burden to identify specific positions that are regularly and continuously available and actually open in Claimant's community that would meet all of his limitations. "Although the law does not require an employer actually to place a claimant in an open job, an employer must show more than mere possibility of employment." Capital Motors LLC v. Schied, 2003 SD 33, ¶ 12 (citation omitted). Employer demonstrated by a preponderance of the evidence that there were specific positions open and available within Claimant's community that would meet all his limitations and pay him a suitable wage.

Claimant failed to satisfy his ultimate burden of persuasion to establish that he is permanently disabled pursuant to SDCL 62-4-53. The surveillance video tapes, Claimant's ability to perform odd jobs, and his employment at Dakota Wholesale Bait demonstrated that Claimant is capable of working. Further, Claimant's pain complaints are not credible given the overwhelming medical evidence, the surveillance video tapes, and again, his demonstrated ability to work. Unfortunately, Claimant has imposed self-limitations on his ability to work that have nothing to do with his physical restrictions. In addition, Claimant conducted a very minimal, limited and insufficient job search. Claimant's actions and inactions cannot justify a finding of permanent, total disability. Therefore, Claimant failed to satisfy his burden of persuasion that he is permanently and totally disabled. Based upon careful consideration of all the testimony and evidence, Claimant is not permanently and totally disabled pursuant to SDCL 62-4-53. Claimant's request for permanent total disability benefits is denied. Claimant's Petition for Hearing is dismissed with prejudice.

Employer 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. Claimant shall have ten days from the date of receipt of Employer's proposed 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, Employer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 30th day of September, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge