

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**DEBRA PERCY,**  
Claimant,

**HF NO. 252, 2001/02**

v.

**DECISION**

**AUTOMATED MAINTENANCE SYSTEMS,**  
Employer,

and

**MEDICAL ASSURANCE CO. INC.,**  
Insurer.

This is a workers' compensation proceeding brought before the 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 April 3, 2003, in Rapid City, South Dakota. Michael J. Simpson represents Claimant Debra Percy. Terri Lee Williams represents Employer/Insurer Automated Maintenance Systems and Medical Assurance Co., Inc.

Issues

1. Whether Claimant's work injury on October 28, 1999, is a major contributing cause of her current condition.
2. Whether Claimant is permanently and totally disabled under the "odd-lot" doctrine.
3. Whether Claimant is entitled compensation for unpaid medical and psychological treatment expenses.

Facts

The parties stipulated that Claimant's injury arose out of and in the course of employment as stated in the Department's Prehearing Order dated December 10, 2002. The parties also stipulated to Claimant's compensation rate and to the foundation of the medical records. The following facts have been found by a preponderance of the evidence.

1. At time of hearing, Claimant was 45 years old.
2. Claimant has worked as a bartender, a lunchroom supervisor, carpenter, weather station foreman, and at Hasting's Pork. She also ran her own day care center out of her home for three years and ran her own cleaning business for five years before she went to work for Employer as a cleaner.
3. In January of 1998, Claimant became "quality control supervisor" and "accounts supervisor" for Employer. In that position, she would inspect all the accounts that Employer cleaned and did monthly inspections on them. If the accounts were not cleaned properly, Claimant would clean them.

4. In 1999, Claimant spent two months in prison for drug possession. Claimant testified that the charges stemmed from her ex-husband Rick Percy being caught with drugs in her home.
5. Although her sentence was for two years, Claimant was released to a halfway house after two months. While in the halfway house, she worked at Empire Towers cleaning rooms and was promoted to head housekeeper during the four months she worked there.
6. Claimant returned to her accounts supervisor position, which Employer held for her, when she completed her prison term.
7. Employer's assistant general manager, Don Moore, and Employer's vice-president of operations, Kevin Silver, each wrote letters to the Board of Pardons and Paroles on behalf of Claimant. Each extolled Claimant's qualities as a valuable employee.
8. On October 28, 1999, Claimant injured her neck and right shoulder when she was lifting a vacuum cleaner up some stairs. She "lifted just wrong and something, like, tore or ripped in my neck and shoulder."
9. Claimant was treated by Dr. Waltman, who was Employer's occupational medicine doctor, the day after the injury. She testified that Employer asked her to go see him and set up the appointment.
10. Dr. Waltman, a Rapid City physician board certified in family practice medicine, examined Claimant on October 29, 1999, and diagnosed a dorsal and cervical spine strain.
11. Dr. Waltman prescribed medications and put Claimant on light duty for a period of time.
12. When her symptoms failed to improve, Dr. Waltman referred Claimant to Dr. Mark J. Simonson, a Rapid City physician board certified in physical medicine and rehabilitation and pain medicine.
13. Dr. Simonson diagnosed "[c]ervical/scapular sprain/strain with residual myofascial pain." Dr. Simonson treated Claimant with a series of trigger point injections, Botox injections, medications, and massage and physical therapy. The injections helped her pain and relieved her headache pain for a while.
14. While Dr. Simonson treated her, Claimant continued to perform light duty for Employer. Instead of her usual cleaning duties, Claimant started ordering supplies, going over bids, firing, hiring, training, and preparing schedules. She was promoted to assistant manager. As an assistant manager, she was responsible for supervising approximately 85 employees.
15. Claimant continued to work on a light-duty basis until April 30, 2001. During that time, Claimant apparently missed too much work for Employer and was forced to resign. She signed an agreement on which she wrote, "I agree to resign because I am no longer able to work the hours or perform the duties of my job because of my injuries." Employer did not give Claimant any option other than resignation.
16. After she had to resign, Claimant contacted approximately 47 employers over the course of several months in an effort to find work.
17. Claimant contacted the state Department of Vocational Rehabilitation (DVR) asking for their assistance in helping her return to work. DVR initially refused to qualify Claimant for benefits.

18. Claimant wrote the DVR in December of 2001, asking that it reconsider its decision and she was eventually accepted by DVR and worked with a counselor named Linda Lockner in a program called Lifeworks.
19. Claimant studied for and passed her G.E.D. in January of 2002.
20. Claimant also took basic computer and keyboarding classes through the Career Learning Center and completed those classes in January of 2002.
21. Lifeworks provided job leads to Claimant to help her return to work.
22. In March of 2002, Claimant began working as a cashier at Wal-Mart. She was hired to do a full time job, but was only able to do the job for approximately one month because "it was too much lifting, too much – I couldn't deal with the pain, the headaches; just couldn't do it."
23. Claimant then tried a job with Colonial Motel as a front desk clerk. She began working 20 to 30 hours a week, answering phones and making reservations. She left the position after about a month because the owners wanted the front desk clerk to start cleaning rooms, and she could not physically handle cleaning.
24. In the last week of June or the first week of July 2002, Claimant found a job at Ace Hardware working as a cashier. She began working 30 to 38 hours per week. However, Claimant had to cut back on her hours because "I'd just get hurting so bad or I'd take so many pain pills I couldn't concentrate. I couldn't perform my job and trying to learn a new job is hard anyway, and just not being able to concentrate and like putting it all into it."
25. Dr. Waltman agreed with Claimant's assessment that 40 hours a week was too much for her to work because of her pain. He cut her hours to 28 to 32 per week. Dr. Waltman also prescribed depression medications Paxil and Trazodone. He also recommended that Claimant seek counseling for depression.
26. Employer/Insurer stopped compensating Claimant for the depression medication and her Trazodone in October of 2002.
27. Despite the fact that Employer/Insurer denied compensation for treatment, Claimant sought counseling services five or six times after Dr. Waltman recommended it.
28. Claimant does not have the financial resources to continue with Dr. Waltman's recommendations and prescriptions. She has an outstanding bill for counseling services from Behavior Management in the amount of \$583.75.
29. Claimant gets nauseated on a daily basis because of her pain pills, but her prescriptions for Aciphex, an anti-nausea drug, have been denied by Employer/Insurer.
30. On October 18, 2002, Dr. Waltman noted that Claimant was having difficulty maintaining her current work schedule of 28 to 32 hours per week. He changed her restriction to no more than 20 to 22 hours per week.
31. Claimant has worked 20 to 22 hours per week since October of 2002.
32. Dr. Waltman's permanent restrictions for Claimant included no more than 20-22 hours per week, a fifteen minute break every one to two hours due to her problems with sitting, and no lifting greater than eight to ten pounds.
33. Claimant experiences pain in her neck and her shoulder all of the time.
34. Claimant felt that working five four-hour days was "going pretty good" despite her pain.

35. After her four-hour shift, Claimant returns home, takes a bath or a shower and lies down for a while.
36. Charles Bower, Claimant's boss at Ace, testified at the hearing. Bower has managed the store since 1991. He testified that Claimant is limited to 20 to 22 hours per week because of Dr. Waltman's recommendation.
37. Bower stated that Claimant is a good employee when she is there and that she is trying to work as many hours as she can.
38. Bower had contemplated reducing Claimant's hours significantly if her work attendance did not improve. Bower stated that Claimant has not missed as much work as she did when she was working more than 20 to 22 hours a week.
39. Claimant can sit for about an hour to an hour-and-a-half before she needs to move around to alleviate her worsening pain.
40. Claimant is able to stand for two hours at the most before her pain gets so bad that she needs to change her position.
41. Claimant is able to walk for about half an hour to 45 minutes before she needs to stop.
42. Working over her head with her right arm causes Claimant discomfort and pain.
43. Claimant has trouble washing and curling her hair.
44. Claimant has difficulty lifting or doing things with her right arm. For example, lifting a gallon of milk causes her pain.
45. Claimant takes between 8 and 15 Darvocet pills per day. She takes six muscle relaxers called Skelaxin per day. She also takes one Celebrex per day. All of these medications are prescribed by Dr. Waltman.
46. Claimant has gone to the EmergiClinic, Dr. Waltman's office, or to the Rapid City Regional Hospital emergency room eight times to get shots of Toradol or Morphine when her pain gets so bad she can no longer stand it. The Toradol shots provide a week's relief; the Morphine lasts a little longer.
47. Claimant also uses a TENS unit at home.
48. Dr. Wayne Anderson performed an independent medical examination on October 15, 2002. He diagnosed a trapezius strain and concurred with Claimant's medical treatment. Dr. Anderson found that Claimant was not malingering, but was perhaps "somatasizing" her pain. He defined "somatasizing" as unconsciously taking psychological distress and turning it into physical distress.
49. Dr. Anderson stated that Claimant was restricted to full-time, light duty because of her physical limitations, but deferred an opinion on Claimant's permanent restrictions to Dr. Waltman because Dr. Waltman had treated Claimant most recently.
50. Claimant testified credibly at hearing. Her testimony is supported and corroborated by the Daily Activities Questionnaires completed by Jody Trobee (Claimant's past boyfriend and coworker), Donald K. Moore, (Claimant's former boss at Employer), and Rick Percy, (her ex-husband).
51. Moore stated that Claimant is "completely different than [she] used to be – she could handle anything you put in front of her."
52. Dr. Lynn Meiners testified credibly as a vocational expert for Claimant. Dr. Meiners conducted a labor market survey, administered some vocational assessments, and opined that further retraining for Claimant would not be feasible.

53. Based upon her review of the records and Dr. Waltman's work restrictions, Dr. Meiners opined that vocational rehabilitation was not feasible for Claimant.
54. Dr. Meiners also opined that Claimant's physical condition in combination with her age, training, and experience and the type of work available in her community cause her to be unable to secure anything more than sporadic employment resulting in an insubstantial income. She explained that there is no suitable employment that would allow Claimant to earn as great an amount per week as \$215 per week, her worker's compensation rate.
55. Dr. Meiners opined that Claimant's attainment of her G.E.D., her additional training at the Career Learning Center, and her job search, along with her actual attempts to work at Wal-Mart and the Colonial Motel and her current employment, demonstrate that Claimant has conducted a reasonable, but unsuccessful job search.
56. Dr. Leslie Fiferman, a clinical psychologist, performed a psychological evaluation of Claimant at the request of the Department of Disability Determination on August 28, 2001. He diagnosed Claimant as suffering from major depression and posttraumatic stress disorder.
57. Dr. Mindy Hedlund, a clinical psychologist, performed a psychological evaluation of Claimant on October 25, 2002. She conducted some additional psychological testing and interviewed Claimant. She offered the opinion that Claimant presented with psychological dysfunction that entirely predated her work-related injury.
58. Claimant is permanently limited to working no more than 20-22 hours per week due to her chronic pain, in combination with her psychological condition.
59. Claimant is not malingering or exaggerating her pain or psychological complaints.

Other facts will be developed as necessary.

### **Issue One**

#### **Whether Claimant's work injury on October 28, 1999, is a major contributing cause of her current condition.**

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). A 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 "must establish a causal connection between her injury and her employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express and opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

[O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

- (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
- (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment.
- (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought.

Claimant's current condition consists of a physical injury and a mental injury. Employer/Insurer have stipulated that Claimant suffered an injury arising out of and in the course of employment.

Dr. Waltman testified on behalf of Claimant. He has been a physician since 1980. He has practiced occupational medicine since 1985 in Rapid City. He has treated a large number of people who have injured their backs or their necks while working. Dr. Waltman treated Claimant approximately 29 times from October 29, 1999, until the date of his deposition on March 27, 2003, over a period of three and one-half years. He opined that Claimant's injury of October 28, 1999, is a major contributing cause of her current physical condition and disability. Dr. Waltman also opined that based on his 18 years of treating people with chronic pain as an occupational medicine doctor, that Claimant was not malingering.

Employer/Insurer's own expert, Dr. Anderson, and Claimant's treating physician, Dr. Waltman, agreed that Claimant's work with Employer was a major contributing cause of her physical injury for which permanent partial impairment benefits were paid. Dr. Waltman found that Claimant's injury was a major contributing factor to her headaches. Employer/Insurer accepted Claimant's physical injury as compensable, although some

medical expenses appear to be in controversy and will be addressed in the analysis of Issue Three. Claimant has met her burden to demonstrate that her physical injury is compensable.

The compensability of Claimant's mental injury is another question. Dr. Waltman opined that Claimant's injury causes her legitimate pain and limits her to part-time work. Dr. Waltman further opined that Claimant's injury is a major cause of her depression. Dr. Waltman also opined that Claimant's work restrictions are "due to a combination of her physical findings and her psychological condition." Dr. Anderson deferred to the psychological experts about whether Claimant's depression is causally related to her chronic pain. Dr. Anderson did not "go into [Claimant]'s background . . . well enough to have an opinion" about the work-relatedness of Claimant's psychiatric disorders.

Dr. Leslie Fiferman, a clinical psychologist, performed a psychological evaluation of Claimant at the request of the Department of Disability Determination. His opinions are unbiased and credible. He diagnosed Claimant as follows:

Based upon all of the available information; that is, the testing that I performed, the history that was available, clinical observation at the time I initially evaluated [Claimant], my diagnosis reflects that she had major depression, posttraumatic stress disorder.

I also noted the source of some of the posttraumatic stress that she experienced as physical, sexual - - physical and sexual abuse and neglect as a child and that she had been, at some point, abusing alcohol and amphetamines and that at the time I was evaluating her that was in remission.

Regarding the causation of her psychological condition, Dr. Fiferman opined that Claimant's October 28, 1999, injury was "a major contributing cause of her current psychological condition" and that Claimant's "psychological condition has been dramatically worsened by her experience of injury." Dr. Fiferman found "no evidence that [Claimant] was malingering or exaggerating in any intentional way any of her problems." Regarding Claimant's veracity, Dr. Fiferman found that "[t]here was just no reason to doubt the veracity of what Claimant was talking about." He opined that Claimant "put in her best effort" during the psychological testing and was "in a great deal of discomfort and genuinely trying her best."

Dr. Waltman, Dr. Anderson, and Dr. Fiferman each opined that Claimant is not malingering. Dr. Mindy Hedlund, Employer/Insurer's psychological expert, agreed that Claimant is not malingering. Dr. Hedlund offered no opinion on the causation of Claimant's physical injuries or the effect those injuries have on Claimant's ability to work. Instead, Dr. Hedlund found, based on psychological tests that she performed on Claimant, that Claimant is "exaggerating her psychological complaints." In addition to her interpretations of the psychological testing, Dr. Hedlund found four "inconsistencies" in Claimant's medical records that cause her to question Claimant's veracity in reporting her symptoms. These four "inconsistencies" included:

1. The fact that Claimant's boyfriend went into an examining room with her and was mistakenly referred to in the medical record as her husband;
2. The fact that the records were "confusing" as to how many children Claimant has;
3. The fact that Claimant had not had more than five or six counseling sessions over a several month period; and
4. The fact that Claimant did not know the exact dates of her thirty-year work history and of her relationship with Jody Trobee.

These "inconsistencies" in the record do not support a finding that Claimant is not credible. The first and second "inconsistencies" have not been demonstrated to be anything but mistakes in the medical records. Employer/Insurer also failed to explain why Claimant's choice to have her boyfriend accompany her on one of her many, many medical appointments renders her unbelievable. The third "inconsistency" is explained by the fact that Claimant lives on approximately \$140 per week. Employer/Insurer have failed to demonstrate with sufficient evidence that Claimant could have afforded counseling sessions on this budget. The fourth "inconsistency" is not evidence that Claimant is "overstating her psychological symptoms."

Dr. Hedlund also seemed to suggest that because Claimant suffered from significant psychological problems prior to her work-related compensable physical injury, her current psychological problems are not compensable. Dr. Hedlund testified that Claimant's personal history was "full of chaos and problems and, you know, abuse, and that, again, suggests poor functioning, poor psychological functioning." The fact is that Claimant never had any extended periods of unemployment and was a productive employee prior to her injury. Even after her injury, Claimant worked, despite pain, managing 85 employees as an assistant manager. Dr. Hedlund's assumption that Claimant was "not very functional" is contrary to Claimant's work history, the medical records and the written statements of Employer's president, Charles Glood, assistant general manager, Don Moore and vice president of operations, Kevin Silver. Claimant's personal life is not the issue; her work history is the issue. The record reflects a solid work history before Claimant was injured.

Dr. Hedlund's testimony is further undermined by Claimant's extensive efforts to gain employment after her tenure with Employer ended. She earned her G.E.D. and she took computer and keyboarding classes. She sought assistance from various government entities. She conducted a reasonable job search. She attempted to work two different jobs, but her pain eventually forced her to stop. Claimant is currently working 20 to 22 hours a week per Dr. Waltman's restrictions.

Dr. Hedlund's written report references exaggeration "apparent in the difference between the objective findings and the physical and psychological complaints that she reports." Dr. Hedlund is not qualified to opine on Claimant's physical condition. She is not a medical doctor.



Dr. Hedlund's testimony is rejected because it is clearly contrary to the facts of this case. 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 testimony of Dr. Anderson, Dr. Waltman, Dr. Simonson, and Dr. Fiferman is accepted.

Based upon the observation of her live testimony and demeanor at hearing, Claimant is a credible witness. Her testimony was candid, genuine and believable. Furthermore, Dr. Anderson, Dr. Waltman, and Dr. Fiferman each considered the relevant record in this matter and did not find sufficient evidence to conclude that Claimant's psychological symptoms were faked, exaggerated, or were not believable.

Claimant has met her burden under SDCL 62-1-1(7) to demonstrate by clear and convincing evidence that her work-related, compensable physical injury is and remains a major contributing cause of the mental injury for which she seeks compensation. Both Claimant's physical and mental injuries are compensable under the South Dakota Workers' Compensation Act.

## **Issue Two**

### **Whether Claimant is permanently and totally disabled under the "odd-lot" doctrine.**

Claimant asserts that she is entitled to permanent total disability benefits. At the time of Claimant's injury, SDCL 62-4-53 (1994) 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.

A recent Supreme Court opinion further defined the burdens of proof:

To qualify for odd-lot worker's compensation benefits, a claimant must show that he or she suffers a temporary or permanent "total disability." Our definition of "total disability" has been stated thusly:

A person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in insubstantial income.

Under the odd-lot doctrine, the ultimate burden of persuasion remains with the claimant to make a prima facie showing that his physical impairment, mental capacity, education, training and age place him in the odd-lot category. If the claimant can make this showing, the burden shifts to the employer to show that some suitable work is regularly and continuously available to the claimant.

We have recognized two avenues in which a claimant may pursue in making out the prima facie showing necessary to fall 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 within claimant’s limitations is actually available in the community. 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 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 regulated to the odd-lot category,” then the 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. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that “some form of suitable work is regularly and continuously available to the claimant.” Even though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

McClaflin v. John Morrell & Co., 2001 SD 86, ¶ 7 (citations omitted).

A recognized test of a prima facie case is this: “Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?” 9 Wigmore, Evidence, (3rd { \*506 } Ed.) § 2494; see Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585, 72 A.L.R. 7.

Northwest Realty Co. v. Perez, 81 S.D. 500, 505, 137 N.W.2d 345, 348 (S.D. 1965).

Claimant made her prima facie case of permanent total disability by presenting her credible testimony at hearing, her expert medical testimony, and the credible testimony of Dr. Meiners at hearing, along with the medical records. Dr. Waltman opined that Claimant cannot work more than 20 to 22 hours per week. Dr. Fiferman opined that

Claimant's psychological problems limit her ability to be employed. Dr. Fiferman also opined that Claimant is not malingering and that "[t]here is no evidence for any of the standardized testing, reports or other sources which would be consistent with [Claimant] malingering." Dr. Meiners opined that Claimant conducted a reasonable, but unsuccessful job search. She also opined that Claimant would be unable to benefit from further retraining. Dr. Meiners also opined that Claimant was not employable at or above her workers' compensation rate. Claimant's current employer testified credibly that Claimant is a good worker and works as much as she can. There is no dispute that her job at Ace Hardware is not suitable, substantial and gainful employment. With her experts' opinions, along with the medical records and the live testimony at hearing, Claimant has met her prima facie burden to demonstrate that her physical condition, coupled with her education, training and age and the type of work available in her community make it obvious that she is in the odd-lot total disability category.

In addition, Claimant has made a prima facie case that she is in fact "in the kind of continuous, severe and debilitating pain which [s]he claims." Id. She testified credibly regarding her pain. The medical evidence and testimony supports her testimony. Dr. Waltman and Dr. Anderson both agreed that Claimant is indeed in real pain. Claimant has met her burden to show "obvious unemployability."

Claimant has also demonstrated that she conducted a good faith, reasonable job search. She tried three different jobs and is currently working 20 to 22 hours. She earned her G.E.D. and completed retraining courses to make herself more employable. Dr. Meiners testified that further retraining is not feasible because of Claimant's restrictions.

Because Claimant has met her prima facie burden, the burden shifts to Employer/Insurer to demonstrate that some form of suitable work is regularly and continuously available to Claimant. Rank v. Lindblom, 459 N.W.2d 247, 249 (S.D. 1990). Employer/Insurer must demonstrate 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. Id. Employer/Insurer have failed in this burden. Employer/Insurer's expert, Jerry Gravatt, testified that he could not identify any jobs within Claimant's restrictions, as given by Dr. Waltman or Dr. Anderson, that would pay her at least her weekly worker's compensation rate. He further testified that he had not researched with employers whether accommodations could be made for Claimant's restrictions. Even if Claimant's mental injury were not compensable, Gravatt did not identify any specific jobs available given only Claimant's restrictions due to her compensable physical injury. Employer/Insurer have failed in their burden to demonstrate that some form of suitable work is regularly and continuously available to Claimant.

Despite the fact that Claimant made her prima facie burden and Employer/Insurer have failed in its burden, Claimant must meet the overall burden of persuasion. Claimant has done so. She has been found credible. The medical testimony supports her claims. Her efforts at reemployment were and continue to be reasonable. Her efforts have been and are in good faith. She is currently trying to work despite obvious and medically

documented pain. Employer/Insurer failed to present adequate evidence to demonstrate that Claimant is a malingerer or is not credible. Claimant's physical condition, in combination with her age, training, and experience and the type of work available in her community, cause her to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Claimant is in continuous, severe and debilitating pain. Claimant has met her burden under the odd-lot doctrine and she is permanently and totally disabled.

### **Issue Three**

#### **Whether Claimant is entitled compensation for unpaid medical and psychological treatment expenses.**

Hanson v. Penrod Construction Co., 424 N.W.2d 396, 399 (S.D. 1988) provides that with regard to medical treatment "it is in the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper." Employer/Insurer have not met their burden to prove by medical evidence that Claimant's medical treatment is not necessary or suitable and proper. Dr. Anderson testified after reviewing the medical records in this case that he did not see any medical treatment that Claimant had been given that was not reasonable and necessary medical treatment.

Claimant is entitled to compensation for unpaid medical and psychological expenses, including but not limited to an October 9, 2002, CT scan of the head/brain, ER treatment at Rapid City Regional Hospital on May 24, 2002, October 9, 2002, and February 4, 2003, and her prescriptions for stomach problems, sleep disturbance, and depression.

Claimant 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. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant'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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 12<sup>th</sup> day of March 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

---

Heather E. Covey  
Administrative Law Judge