

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MATTHEW LEETCH,

HF No. 286, 2000/01

Claimant,

DECISION

vs.

MERILLAT INDUSTRIES,

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 August 1, 2002, in Rapid City, South Dakota. Claimant appeared personally and through his attorney of record, Dennis W. Finch. Frank Driscoll represented Employer/Self-Insurer.

The parties stipulated that Claimant sustained a fall arising out of and in the course of his employment with Employer on March 8, 1999. As a result of that fall, Claimant sustained a compensable injury to his left shoulder, which resulted in two surgeries for a rotator cuff tear. The parties also stipulated that Claimant's weekly workers' compensation benefit is \$430 per week. Finally, the parties stipulated that as a result of Claimant's injury on March 8, 1999, Claimant cannot return to his boiler operator job from a physical capacity standpoint.

ISSUES:

1. Causation as to Claimant's hip condition.
2. Extent and degree of Claimant's disability.

FACTS

1. At the time of the hearing, Claimant was sixty-one years old.
2. Claimant quit high school in the tenth grade. Claimant received no formal educational, vocational or technical training after dropping out of high school.
3. Claimant worked in a variety of jobs before he started working for Employer, including as a maintenance and construction worker and as a service manager.
4. Claimant was temporarily disabled from 1974 until 1976 due to a car accident in California. Claimant fractured his pelvis and sustained some broken ribs.
5. After Claimant recovered from this injury, he continued to work and he did not encounter any difficulties carrying out his job duties or have physical problems for which he sought medical treatment, except for a minor back sprain. Claimant suffered this back sprain while working for his brother, but he received minimal medical treatment and recovered after two weeks.
6. Claimant started working for Employer in April 1984 as a boiler operator and continued working for Employer for over seventeen years.

7. Prior to beginning his employment, Claimant was required to undergo a physical examination. Dr. Ray Strand performed the physical and found Claimant's "trunk and back," upper extremities and lower extremities all to be normal.
8. From April 1984 through March 1999, Claimant missed very little work. In fact, Claimant had thirteen or fourteen years of membership in Employer's President's Club, which recognizes perfect attendance.
9. Prior to March 1999, Claimant did not have any specific problems with his hip.
10. On March 8, 1999, Claimant was walking across the parking lot on his way to check the pH of the sewer, which he was required to do once a month. Claimant slipped and fell on a patch of ice. Claimant held his left arm out to break his fall and landed on his left hip and the CB radio he carried on his left side. As Claimant tried to stand up, he fell again landing on his knees. Claimant went to the guardhouse and reported to one of the guards that he just fell on a patch of ice outside the guardhouse. This incident was recorded in the logbook.
11. Claimant finished his shift and also reported the incident to his supervisor.
12. Employer completed a First Report of Injury. There is no dispute that Employer was notified on March 8, 1999, that Claimant slipped on a patch of ice in Employer's parking lot.
13. Claimant's left arm hurt and he had a bruise on his hip, approximately eight inches in diameter. Claimant decided not to seek immediate medical attention because he thought "it would probably get better."
14. On September 2, 1999, Claimant saw Dr. Strand for a comprehensive physical following hospitalization due to congestive heart failure. During this visit, Claimant discussed with Dr. Strand the injury he sustained in March 1999. Dr. Strand noted, "[h]e also talks about falling at work back in March landing on his shoulder, which was outstretched and his hip and knee and now they are all giving him trouble especially his hip and left shoulder." On examination, Dr. Strand found that Claimant had "a lot of tenderness around the left hip."
15. Dr. Strand diagnosed Claimant with a possible rotator cuff tear and with an injured left hip.
16. Dr. Strand referred Claimant to Dr. Lew Papendick, an orthopedic surgeon, to evaluate Claimant's shoulder and hip condition.
17. Dr. Papendick examined Claimant's left shoulder and hip on September 9, 1999. Dr. Papendick diagnosed Claimant with "1) Left hip osteoarthritis. 2) Left shoulder massive rotator cuff tear, may be chronic in nature out to March."
18. Dr. Papendick explained the term osteoarthritis as "the joint is worn out by an inflammatory or irritation process that destroys the joint surface and creates pain, stiffness, restriction of movement, limp in his gait."
19. Dr. Papendick ordered that Claimant undergo an MRI of his left shoulder.
20. As for Claimant's hip condition, Dr. Papendick discussed with Claimant potential activity modification, use of a cane to offset some pain and the continued use of anti-inflammatory medication. Dr. Papendick also stated that if Claimant's pain "gets to the point where he has trouble walking, we can consider a total hip arthroplasty."
21. The MRI was performed on September 13, 1999, which showed a large rotator cuff tear.

22. On September 21, 1999, Dr. Papendick recommended Claimant undergo surgery to repair the rotator cuff tear.
23. Claimant saw Dr. Strand on September 27, 1999, for unrelated medical concerns. However, Dr. Strand noted that Claimant had a rotator cuff tear in his left shoulder and “degeneration of [his] left hip related to previous workers [sic] compensation injury.”
24. Claimant continued to see Dr. Strand from October 1999 through November 2000 for treatment unrelated to his left shoulder or hip.
25. Dr. Dale Anderson performed an independent medical examination (IME) of Claimant on February 15, 2000. Dr. Anderson evaluated both Claimant’s left shoulder and hip. Dr. Anderson diagnosed Claimant with degenerative arthritis in his left hip. Dr. Anderson estimated that “forty (40) percent of his current complaints and pain are the result of his fall on the ice with injury to the hip and sixty (60) percent of his current complaints are the result of the pre-existing osteoarthritis.”
26. On January 11, 2000, Dr. Papendick responded to a letter from Kelly Flanagan, nurse case manager for Insurer. Dr. Papendick opined that Claimant’s fall on March 8, 1999, was “the major contributing factor to his current condition on his hip.” In addition, Dr. Papendick opined that Claimant’s fall was “the major contributing factor to Mr. Leetch’s current need for a rotator cuff repair.”
27. On January 20, 2000, Dr. Papendick clarified his previous response to Flanagan’s letter. Dr. Papendick wrote:

Clarification on history, he had one fall that he documents was March 8, 1999. Question #2; his initial exam by me showed degenerative arthritis of his hip, but his fall irritated or aggravated his hip condition. As a result, I felt the fall was a major contributing factor to his hip condition of pain at that time, not to his osteoarthritis. Question #3; concerning his treatment. When he initiated treatment, I feel, has nothing to do with his condition of his hip exacerbating pain in that joint from his fall. Certainly, the fall did not cause osteoarthritis, but the fall did irritate the osteoarthritis and created increased pain.

28. On February 23, 2000, Dr. Papendick performed surgery on Claimant’s left shoulder to repair the rotator cuff tear.
29. Claimant saw Dr. Papendick on May 18, 2000, for a follow-up visit for his shoulder. Claimant also complained that his left hip was giving him increased pain. Dr. Papendick prescribed Celebrex and Ultram to alleviate pain in Claimant’s shoulder and hip.
30. An MRI performed on June 1, 2000, showed Claimant had a recurrent rotator cuff tear. Dr. Papendick recommended a second surgery.
31. On November 7, 2000, Claimant saw Dr. Strand for a comprehensive physical. Dr. Strand noted that Claimant had an injured left hip with degeneration and continued Claimant on his medications, including Ultram for pain and Vioxx, an anti-inflammatory. Claimant was taking Celebrex, but Dr. Strand changed the prescription to Vioxx.

32. Dr. Papendick performed another surgery to repair Claimant's shoulder on February 23, 2001.
33. On June 14, 2001, Dr. Papendick noted that Claimant continued to have "a lot of pain" associated with his left shoulder, even after the second surgery. Dr. Papendick released Claimant to return to light duty work as of July 1, 2001, but gave Claimant a permanent restriction of no lifting with his left arm. Claimant was also restricted to keep his left arm at his side and no lifting above waist level. Dr. Papendick also noted that Claimant was taking Ultram and Vioxx and wanted Dr. Strand to monitor Claimant's medications "due to renal and GI potential side effects."
34. On July 26, 2001, Dr. Papendick opined that Claimant had a twenty-three percent permanent impairment to his left upper extremity.
35. On August 14, 2001, Claimant saw Dr. Strand for a check-up. Dr. Strand stated:

This patient has multiple problems. He has lost the vision in his right eye and has pretty much most of his life. He had a fall here back in March 1999 where he injured his left shoulder and left hip. His shoulder hurt immediately and his left hip began bothering him shortly thereafter. Dr. Papendick has been evaluating this and has basically stated that he should not be using his left arm whatsoever and he is not a surgical candidate. His left hip is being evaluated for possible hip replacement and it all is directly related back to this fall. He also has coronary artery disease and cardiomyopathy with the last echocardiogram showing him an ejection fraction of 30-35%. He also has prostate cancer.

36. Following his examination, Dr. Strand noted that Claimant had "[s]ignificant injury to left shoulder and left hip significantly disabling and has essentially lost the function of his left arm." Dr. Strand opined:

I feel this patient is totally disabled, primarily because of his cardiomyopathy and loss of use of his left arm and now his left hip. I have encouraged him to go to Social Services and apply for permanent long-term disability through the Social Security program. Otherwise will continue the same medication. He is following through [] with orthopedic surgeon as far as his hip replacement. We are going to keep him on the same medications which are Ultram 50 mg q.i.d for pain. I am discontinuing the Vioxx because he is showing some decrease in renal function that is probably related to that and am switching him to Naprosyn 500 b.i.d.

37. On August 30, 2001, Dr. Papendick discontinued Claimant's use of all nonsteroidal anti-inflammatory medication and Ultram because of Claimant's renal function.
38. Due to his physical condition, Claimant could not return to his boiler operator job.
39. Dr. Papendick opined, "[c]oncerning his ability to work, I do not believe he can do the work that he used to do because of the pain in his shoulder and inability to lift and function."

40. Employer has a long-standing practice to provide accommodations to injured employees, including retraining injured employees.
41. Employer provided Claimant with a computer data entry position. This was a new light duty position created, in part, by Paula Jensen, Employer's materials manager. Most of the duties in this new position were previously performed by other employees. The two main duties of Claimant's new job were inventory and data entry. The job description provided:

Employee will be required to go out on the floor and gather data, (part numbers, bar code numbers, equipment ID numbers etc.). After the information is gathered from the floor, the employee will enter the data into a computer.

The employee sits at a computer desk with the keyboard directly in front, so that no reaching or overhead use of the arms is required.

42. Dr. Papendick reviewed this job description. Dr. Papendick opined, "the computer data-entry position would be appropriate work for Mr. Leetch."
43. Claimant described his new position as, "I was supposed to go out on the floor and get information by inventorying the racks and mark that on sheets and then come back into the computer and enter that data or changes that they wanted made with that information into the computer." Claimant's work station was located in an office on the second floor of the warehouse. Claimant had to walk up and down a set of stairs to get to his work station.
44. Claimant encountered physical problems while carrying out his job duties, including pain in his hip from walking and "reaching and maintaining one position with [his] arm and shoulder that caused [him] a lot of pain." Claimant complained to Deborah Bench, inventory coordinator, about his pain.
45. Bench was primarily responsible for Claimant's training. Bench described what was involved in his training:

Turning on the computer, signing on, bringing up reports, learning how to key in data, and then familiarizing Matt with finishing - - the finishing floor. Matt's worked there many years, but he didn't know which machine was called what. He didn't even know the colors of the product. So it was to take him down and show him the different colors. Like Paula said, she wanted him to know what he was entering and why rather than just this number and this.

46. Bench testified that Claimant was anxious to learn and learned quickly. She was "pleased with the training, the way training was going, and how fast."
47. Jensen testified that Claimant had a good attitude about the data entry position. She stated, "he was really excited about learning how to use the computer."
48. Claimant worked in the data entry position for nine days. Claimant started on September 4, 2001, and worked through September 17, 2001.
49. Claimant worked eight-hour shifts and was able to complete the full eight hours each time he worked.

50. Claimant did not return to work for Employer after September 17, 2001. Claimant explained why he did not return to work:

I started taking the vacation time so I could have my yearly physical. It had been over a year since I had one. So during the interim of taking the physical, Dr. Strand discovered that something was making my stomach bleed. And we discovered later it was the Vioxx more than anything else, but he took me off the Vioxx and the Ultram and sent me back to Dr. Papendick for him to recommend some type of pain medication, which he did, which was Darvocet he said which was a light narcotic. And they made me terrible sick, and I couldn't take them. So, therefore, without the pain reliever, I couldn't do the job.

51. Dr. Papendick had prescribed Darvocet for Claimant on September 25, 2001. On September 27, 2001, Dr. Papendick stated that Claimant was to remain off work until further notice, but that Claimant could perform data entry work.
52. On October 1, 2001, Claimant saw Dr. Strand with "terrible shoulder pain." Dr. Strand wrote in his medical note, "Dr. Papendick put him on hydrocodone and has really not done well with that. He had a reaction to that and just could not take it. He is in significant pain. Dr. Papendick thinks he should return to work but patient states that he just cannot function at work, I have to take so much medication to handle the pain, that I cannot function safely. He states that both his left shoulder and left hip are hurting him significantly." Dr. Strand recommended Claimant see Dr. Schleusener to examine his left hip and Dr. Lawlor for "better pain relief." Dr. Strand opined that Claimant should not be working until these evaluations were completed.
53. On October 1, 2001, Dr. Strand provided Claimant with a written statement stating that Claimant should remain off work until further notice due to his left arm and leg pain.
54. On October 24, 2001, Dr. Brett Lawlor, physiatrist, saw Claimant for further evaluation of his hip and shoulder pain and for consideration of an impairment rating based on a referral from Dr. Strand. Dr. Lawlor noted that Claimant's hip pain "has been present since two weeks or so after the fall. He has had no specific treatment for this." Dr. Lawlor provided an impairment rating for Claimant's left shoulder. Dr. Lawlor did not develop any opinions concerning Claimant's complaints of left hip pain.
55. Claimant has not returned to work for Employer since September 17, 2001, and Claimant has not worked anywhere else since that time.
56. Claimant experiences pain in both his left shoulder and left hip on a daily basis. Claimant explained:

I have pain in my shoulder, the left shoulder, and it radiates sometimes down to my fingers, which I can't - - they get numb, and I can't move them. And it moves around and it goes up the back of my neck to the back of my head and causes me headaches. And my neck gets so stiff and sore that I can't hardly hold it up after a while.

57. Claimant explained that he experiences pain in his left hip whenever he moves.
58. The only time Claimant does not have shoulder pain or hip pain is when he sits in a chair and immobilizes his shoulder and takes the weight off.
59. Claimant currently takes four Ultram a day for pain, Naprosyn and an anti-depressant medication.
60. Claimant typically uses a cane when he walks. Claimant stated, “[s]ome days are better than others. There’s some days I can walk five or ten minutes without a cane, like if I’m just going to go in a store or back and back out right away or in a bar, I don’t even bother with it. I just put up with the pain and the limp and - - for a few minutes.”
61. The evidence established that Claimant walked with an unusual gait prior to his injury in March 1999, but Claimant did not use a cane prior that time.
62. Dr. Wayne Anderson performed an IME on April 15, 2002. Dr. Anderson examined both Claimant’s left shoulder and hip. Dr. Anderson diagnosed Claimant with left rotator cuff tear, status post two surgical repairs and left hip degenerative arthritis.
63. Dr. Anderson opined that Claimant’s fall in March 1998 was not a major contributing cause of his left hip condition.
64. Dr. Anderson reviewed the data entry position on a site visit to Employer and opined “[t]here were no duties involved with that job, which Mr. Leetch’s hip problem would prevent him from performing.”
65. Claimant currently is not employed and receives Social Security Disability.
66. Claimant was a credible witness. This determination is based on the opportunity to review all testimony presented, the medical records and on observations of Claimant’s demeanor at the hearing.
67. Other facts will be developed as necessary.

ISSUE I

IS CLAIMANT’S MARCH 8, 1999, FALL A MAJOR CONTRIBUTING CAUSE OF HIS CURRENT HIP 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). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992). “The law in effect when the injury occurred governs the rights of the parties.” Westergren v. Baptist Hosp. of Winner, 549 N.W.2d 390, 395 (S.D. 1996). “In order to collect worker’s compensation benefits, [Claimant] must establish a causal relationship between his injury and his employment. This causation requirement does not mean that the employee must prove that [his] employment was the proximate, direct, or sole cause of [his] injury; rather the employee must show that [his] employment was a ‘contributing factor’ to [his] injury.” Gilchrist v. Trail King Indus., 2000 SD 68, ¶ 7 (citations omitted). SDCL 62-1-1(7) defines 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:

....

(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.

“Where there is no causal relationship the testimony of a medical expert may be necessary to establish the causal connection.” Gilchrist, 2000 SD 68, ¶ 7 (citation omitted). “The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an 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).

Dr. Strand opined that when Claimant fell in March 1999, he injured his left hip. Dr. Strand noted, based on Dr. Papendick’s reports, that Claimant had degenerative arthritis. Even with this preexisting condition, Dr. Strand opined Claimant’s “fall definitely aggravated that problem and caused significant hip pain, it could be directly related back to the fall.” Dr. Strand explained that Claimant’s fall irritated the hip joint and caused pain. Dr. Strand opined:

I don’t think [the fall] caused the degenerative arthritis. But it - - the fall aggravated an underlying preexisting problem. And he was not having pain prior to the fall, and he had the degenerative arthritis, and he had significant pain after the fall which has created chronic pain and chronic medication [use].

Dr. Strand opined that the fall Claimant sustained in March 1998 remains a major contributing cause of his current left hip problems. Dr. Strand explained, “I believe that [the March 1999 fall] aggravated an underlying problem and it’s a major contributor to the pain that he was suffering in the hip, primarily because he was not having trouble before the fall.” Dr. Strand opined the March 1999 fall aggravated the arthritis in Claimant’s left hip. Dr. Strand testified:

As clearly as I can state, in my opinion, it’s a fact that he had some degenerative arthritis in that hip prior to the fall. But because of that, it made him vulnerable to injury, and he fell, not only hurting his shoulder, but he aggravated his left hip which had some underlying arthritis.

In addition, Dr. Strand opined, “I feel both the pain that he suffers, the lack of mobility, are both contributing factors of his inability to work at this time.”

Dr. Strand’s opinions are credible and persuasive. Dr. Strand treated Claimant for many years, since the beginning of his employment, and was familiar with his pre and post injury condition. Dr. Strand recognized that Claimant did not experience any hip problems while working for Employer prior to March 1999. Dr. Strand’s opinions are well-founded given Claimant’s medical history.

Dr. Papendick treated Claimant for both his left shoulder and hip conditions. Dr. Papendick diagnosed Claimant with left hip osteoarthritis, or degenerative arthritis. Dr. Papendick opined that Claimant's degenerative arthritis was a preexisting condition, but the fall in March 1999 aggravated this preexisting condition. Dr. Papendick opined that Claimant's fall was a major contributing cause of his hip pain, and not his osteoarthritis. Dr. Papendick testified:

Q: When you say that his initial examination showed degenerative arthritis but his fall irritated or aggravated his hip condition, are you saying that the arthritis predated or pre-existed the March fall but that the fall irritated or aggravated that pre-existing condition, is that what you're saying?

A: Yes.

Q: The[n] you go on to explain that you feel the fall was a major contributing factor to his hip condition of pain at that time, not to his osteoarthritis?

A: Correct.

Q: And that's still your opinion today, is it not?

A: Yes.

Q: And was that opinion then given within reasonable medical probability?

A: Yes.

Q: And is that still your opinion within reasonable medical probability?

A: Yes.

Later in his deposition, Dr. Papendick stated the pain Claimant experienced after the fall, should have resolved long before he saw Claimant on September 9, 1999. Dr. Papendick testified:

Q: Did you ever find any evidence that this fall in March of 1999, some six months previous to the first consult, had permanently aggravated the degeneration of the left hip?

A: It would not have permanently aggravated the degeneration.

Q: So again we're back to suffering temporary pain fairly promptly after the incident?

A: Yes.

Q: Which should have resolved?

A: Yes.

Q: The pain complaints that were voiced from the time you first saw Mr. Leetch in September of 1999 then would have been attributable only to his arthritic condition, is that correct?

A: Yes.

Dr. Papendick's opinions are equivocal, at best, and are unpersuasive.

Dr. Anderson, following the IME in April 2002, opined that Claimant's fall in March 1999 was not a major contributing cause of his current left hip condition. Dr. Anderson explained Claimant had significant degenerative disease stemming back from the mid-1970s. In addition, Dr. Anderson thought it important that Claimant did not seek medical care for his hip condition until six months after the fall.

Dr. Anderson opined Claimant's degenerative disease in the left hip is a major contributing cause of his current condition. Dr. Anderson explained:

Mr. Leetch has significant degenerative disease of the left hip. This obviously has been progressing since at least 1976. Given the fact that he had significant pelvis fractures due to the motor vehicle accident in 1974, already had early degenerative changes in 1976, was found to have crepitation in that hip in 1976, and was given a 15% permanent, partial impairment due to the motor vehicle accident, one can certainly assume that the motor vehicle accident of 1974 is the cause of the left hip condition.

Dr. Anderson admitted Claimant's hip condition was probably accelerated due to the injury in March 1999. But, Dr. Anderson opined, "the slip and fall brought about no permanent change in the underlying condition of his left hip, but it simply could have produced a temporary flare of pain."

Dr. Anderson failed to take into consideration that Claimant was functioning and working without any hip pain during his employment with Employer until Claimant fell in March 1999. Dr. Anderson ignored the fact that Claimant, after a two-year layoff from the 1974 car accident, worked steadily until the March 1999 injury. Claimant worked for seventeen years for Employer, thirteen or fourteen of those with perfect attendance. Finally, Dr. Anderson ignored the fact that after 1976, Claimant never sought medical treatment for his left hip until after the fall in March 1999. After the fall, Claimant suffered significant hip pain. Because Dr. Anderson ignored these significant factors, his opinions are unpersuasive. "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). Dr. Anderson's opinions concerning Claimant's left hip condition are rejected.

Based on Dr. Strand's credible opinions, the medical evidence and Claimant's credible testimony, there is sufficient evidence showing that Claimant's fall in March 1999 is a major contributing cause of his left hip condition. Claimant has established by a preponderance of the evidence that his March 8, 1999, injury continues to be a major contributing cause of his left hip condition.

ISSUE II

IS CLAIMANT PERMANENTLY AND TOTALLY DISABLED?

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.

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).

It is undisputed that Claimant cannot return to his former position of a boiler operator from a physical capacity standpoint. Dr. Strand opined that Claimant was totally disabled. On August 14, 2001, Dr. Strand stated:

[O]verall, he had three major problems. And one is his heart, and of course, it was still there. He had significant congestive heart failure. And he was in chronic pain due to both his left arm and left hip. And we had discussed, you know, disability, and I made specific notes at that time that I thought he was totally disabled because of the limitation of his left arm, left hip, and because of the pain.

Dr. Strand was concerned about the amount of medication Claimant was taking and his renal function. Dr. Strand noted that when Claimant was not working, he would take about three or four Ultram a day, but when Claimant was working or had an increase in physical activity, Claimant would take six to eight Ultram a day. Dr. Strand stated:

If he wasn't doing a lot, he got by with less medication. I was a little bit concerned, because Dr. Papendick had put him on Hydrocodone. And what had happened is he basically was not functioning very well when he'd get on these drugs, especially a mixture of the medication. And so I was worried about two safety factors. One, he's in a lot of pain. And the more he worked, did anything, any kind of movement made it worse, simply being up and around. And second of all, he was taking too much medication to try to work.

Dr. Strand testified, "I actually felt that his ability to do anything safely was compromised" when Claimant increased his pain medication with increased physical activity or returning to work.

Dr. Strand opined that Claimant suffers from chronic debilitating pain. Dr. Strand explained that Claimant has "chronic pain and does better when he's not working. But any situation that requires him to work does increase the pain and his use of pain medication." Dr. Strand disagreed with Dr. Papendick and opined that Claimant should be off work as of October 1, 2001.

Claimant's vocational expert, Bill Peniston, opined that Claimant was unemployable in anything other than sporadic employment resulting in an insubstantial income. Peniston also opined that Claimant is unable to benefit from vocational retraining. Peniston could not identify any feasible program of retraining for Claimant.

Claimant's physical condition, in combination with his age, training and experience make it obvious that he is permanently and totally disabled. Dr. Strand opined that Claimant was totally disabled due to his physical condition. Peniston opined

that Claimant was incapable of obtaining suitable employment within his community that would provide him with a substantial income.

Claimant also demonstrated that he is obviously unemployable due to his continuous, severe and debilitating pain. As previously stated, Claimant was a credible witness. Claimant suffers from constant and severe pain in both his left shoulder and hip. Claimant rated the severity of his pain as “five to eight on the shoulder; and for the hip, it was like six to nine. And that has stayed pretty much the same. Claimant’s pain in his shoulder radiates down his arm, which causes his fingers to go numb so he cannot move them. The shoulder pain will also radiate up into his neck and cause headaches. Claimant must immobilize himself in order to take the weight off his arm and hip. This helps to reduce his pain. Claimant takes medication on a daily basis to control his pain. Claimant takes four Ultram and two Naprosyn a day. Claimant has also been using a cane when he walks to help relieve some of the pain when he moves around. Claimant has significantly limited his daily activities due to his shoulder and hip pain. Even Dr. Strand recognized that Claimant suffers from chronic debilitating pain and that Claimant is able to control his pain better when he is not working.

Claimant established a prima facie showing that he is permanently and totally disabled due to his physical condition and due to his continuous, severe and debilitating pain since September 17, 2001. Therefore, the burden of production shifts to Employer to show that some form of suitable employment is regularly and continuously available to Claimant within his 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 provided Claimant with a data entry position. This position met Claimant’s physical restrictions and offered a competitive wage. However, Claimant was physically unable to perform the requirements of this job on a regular and continuous basis. Claimant attempted to work in the data entry position for nine days, but could not continue due to the problems with his pain medication. Employer criticized Claimant as looking for any excuse not to return to work for Employer. However, both Claimant’s coworkers testified that Claimant had a positive attitude about his new position and that he was a quick learner. Dr. Strand opined that Claimant should be off work due to his pain. Claimant’s testimony about his severe and constant pain is credible. Employer did not show that any other form of suitable employment is regularly and continuously available for Claimant.

Employer failed to meet its burden to show there are positions available in Claimant’s community within his work limitations. Based on the evidence presented, Claimant met his burden of persuasion that he is permanently and totally disabled. The medical evidence, vocational evidence and Claimant’s own credible testimony demonstrated that Claimant is obviously unemployable due to his physical condition and severe and debilitating pain. Claimant established by a preponderance of the evidence that he is permanently and totally disabled as of September 17, 2001.

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 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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 25th day of August, 2003.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge