SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

ROBERT HYBERTSON, **HF NO. 313, 1996/97**

Claimant,

vs. **DECISION**

BUTLER MACHINERY CO.,

Employer,

and

JOHN DEERE INSURANCE,

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 December 17, 2002, in Rapid City, South Dakota. Claimant appeared personally and through his attorney Brian Utzman. Robert B. Anderson represented Employer/Insurer.

Procedural History

Robert Hybertson (Claimant) filed his Petition for Hearing on April 10, 1997. Claimant sought additional workers' compensation benefits arising from a compensable injury that he suffered while in the employ of Butler Machinery Company (Employer) on February 13, 1995. The Claimant's request for a bifurcated hearing was granted and a hearing was held on July 21, 1999, to address Claimant's request for reinstatement of Claimant's temporary total disability benefits. The Department denied Claimant's request, which the Circuit Court and South Dakota Supreme Court affirmed that denial. A second hearing was held on December 17, 2002, to resolve the remaining issues raised by Claimant's Petition for Hearing. The following facts are found by a preponderance of the evidence. Facts found by the Department in its Decision, dated November 17, 1999, are incorporated by this reference.

The issues are:

Whether Claimant is permanently and totally disabled under the South Dakota Workers' Compensation Act.

Whether Claimant is entitled to additional permanent partial disability benefits.

Facts

1. Claimant is forty-five years old. He has a high school diploma and has worked as a heavy equipment mechanic most of his adult life.
2. Claimant was injured on February 13, 1995, while employed by Employer as a heavy equipment mechanic.
3. Claimant was pinned between two transmission housings.
4. A first report of injury was completed and filed on February 14, 1995.
5. Claimant was paid TTD for two months and then returned to work.
6. Since the injury, Claimant has been treated by a number of medical professionals.
7. Claimant initially treated with Dr. Robin Lecy, a chiropractor. Dr. Lecy's diagnosis in 1995 was a soft tissue injury to the lower back and cervicothoracic strain.
8. Dr. Lecy referred Claimant to Dr. Larry Teuber, a neurosurgeon.
9. Dr. Teuber diagnosed a possible synovial cyst, incidental to Claimant's pain complaints.
10. Dr. Teuber recommended that Claimant pursue a course of therapy with Dr. Lecy, that he avoid lifting and bending, and consider work hardening. He deferred entirely to Dr. Lecy's conservative management and would not recommend that Claimant consider a surgical option.
11. Dr. Edward Seljeskog, a neurosurgeon and colleague of Dr. Teuber, performed an impairment rating at the request of Twila Wallmann, a rehabilitation consultant hired by John Deere Insurance (Insurer).
12. At the time of the impairment rating, July 3, 1995, Claimant was able to lift between 50 and 60 pounds based upon the findings of Nano Johnson, an occupational medicine therapist who helped Claimant meet his physical therapy goals.
13. Dr. Seljeskog assigned an impairment rating of five percent to the whole person.
14. In September of 1995, Dr. Lecy referred Claimant to Dwight K. Caughfield, M.D., because Claimant's lower back pain continued.
15. Dr. Caughfield diagnosed "SI dysfunction with FRS at L5-S1" and prescribed a home exercise program and pool therapy.
16. In February of 1996, Dr. Caughfield reported that Claimant "overall is doing well at work, except that for about every three weeks he has to come back in and get traction."
17. Dr. Caughfield recommended a motorized traction table for Claimant's use at home.
18. Claimant filed this action due to Insurer's refusal to pay for the traction table. Employer/Insurer have paid for the traction table.
19. Dr. Caughfield restricted Claimant to lifting 80 pounds, but did not take him off work entirely.
20. In October of 1997, Claimant's employment ended with Employer. He began working for Morris Construction shortly thereafter.
21. In February of 1998, Claimant was seen by Craig Mills, M.D., at the request of Insurer. Claimant's case manager had performed a job analysis of Claimant's position at Morris Construction.
22. Dr. Mills was asked to finish the job analysis by completing the physician's section of the analysis. Dr. Mills, relying on the case manager's description of Claimant's position at Morris Construction, indicated that Claimant may continue work fulltime,

but Claimant "may need to frequently change positions as needed for comfort and to break up his work activities for comfort."

23. Dr. Mills recommended a repeat evaluation if Claimant encountered difficulties.
24. On October 15, 1998, Claimant, at his own request, was seen by Dr. Mills for "continuing difficulties with complaints of low back pain and discomfort into the left gluteal region from the lumbar area and down the left leg." Dr. Mills prescribed nonsteroidal anti-inflammatory medication and "TENS unit for trial for further pain modulation."
25. Dr. Mills did not take Claimant off work, but stated "further reassessment may [be] needed" to determine Claimant's actual lifting responsibilities at his Morris Construction job.
26. Dr. Mills saw Claimant next on October 22, 1998. He restricted Claimant to 25 pounds lifting and no work at elevations.
27. Dr. Mills saw him again on October 29, 1998. He recommended Claimant undergo a functional capacities assessment for further evaluation of Claimant's work capability.
28. Dr. Mills also recommended pain medication and referred Claimant to Dr. William F. Ganz, for a second opinion.
29. Dr. Ganz diagnosed severe muscle spasticity. Dr. Ganz recommended physical therapy for Claimant "so he can learn how to stretch these spastic muscles and once this is done the majority of his pain will dicipate[sic]." Dr. Ganz did not find any indication for surgical intervention.
30. Dr. Brett Lawlor, at the request of Claimant, performed an impairment assessment of Claimant in February of 1999. He diagnosed mechanical left-sided low back pain. Dr. Lawlor assessed Claimant a five percent impairment to the whole person. This is the same five percent given by Dr. Seljeskog. On November 5, 1998, Claimant underwent a functional capacities assessment at the Black Hills Rehabilitation Hospital in Rapid City at the request of Dr. Mills.
31. The November 5, 1998, FCA revealed that Claimant was able to work at the "light-medium" physical demand level for an eight-hour day.
32. In 1998 and 1999, Claimant was capable of working at the "light-medium" physical demand level for an eight-hour day.
33. Dr. Caughfield referred Claimant to Ivanka Kuran, a physical therapist with Rapid City Regional Hospital. On September 7, 1995, Kuran began treating Claimant. Claimant was treated forty-seven times at Black Hills Rehabilitation Hospital until August 7, 1996, when his care was transferred to Pro-Motion physical therapy for traction treatments.
34. Kuran found "objective findings that show that he does have definite dysfunctions and limitations in movement."
35. Kuran also opined that Claimant reported, "[m]ore pain than the average patient and demonstrates that by the way he walks and just facial grimacing."
36. Kuran opined that Claimant's facial grimaces were "extreme in comparison with [other patients]." Kuran reported "any time we've attempted to try increasing his land exercises [as opposed to pool therapy] or stabilization exercises, he's had a subjective setback." Kuran opined that Claimant's prognosis was poor. Kuran found stiff movements in his joints. Kuran did not observe Claimant's left leg "giving way on a consistent basis" as reported by Claimant.

37. Kuran began treating Claimant again in May of 2001. At that time, Claimant was using a cane to walk and subjective testing revealed that Claimant could walk only a short distance without increasing his pain. Kuran found Claimant's limitations to be the same in May of 2001 as they were in 1996.
38. On April 17, 2000, Dr. Greg Swenson, a licensed psychologist, evaluated Claimant and diagnosed an adjustment disorder with depressed mood. Dr. Swenson also provisionally diagnosed a somatoform pain disorder warranting further evaluation.
39. At the request of Bill Peniston, Brad Ferguson administered a functional capacity evaluation on Claimant on November 29, 2000. At the time, Ferguson was a physical therapist and the administrator of the rehabilitation clinic at HEALTHSOUTH. Ferguson found that Claimant put forth valid and consistent effort, yet also found that "exaggerated pain behavior was noted throughout physical testing, including disproportionate facial expression/verbalization, and muscular giving way, with manual muscle tests and functional testing."
40. Ferguson opined that Claimant was functional at a sedentary level for two to four hours a day.
41. Dr. Richard Farnham conducted an independent medical examination of Claimant on April 20, 2001. Dr. Farnham took a history from Claimant, read Claimant's medical records, and examined Claimant.
42. Dr. Farnham diagnosed Claimant with "mechanical low back pain localized to the left lumbosacral region and probably secondary to congenital spondylolysis of the L5 pars interarticularis."
43. Dr. Farnham also found that Claimant "has already consulted several neurosurgeons, neurologists, rehabilitation professionals and one independent medical examiner [and] has been evaluated by multiple health care professionals all with a particular interest and expertise in the treatment of low back pain."
44. Dr. Farnham recommended no additional treatments of any kind except non-steroidal anti-inflammatory medication and/or a muscle relaxant.
45. Dr. Farnham opined, "Claimant's current subjective complaints of low back pain are neither the direct nor proximate result of the work related injury which occurred on February 13, 1995."
46. Dr. Farnham opined, "Claimant did sustain a low back injury in the form of lumbosacral sprain/strain and which does heal as a function of time."
47. Dr. Farnham found "a general lack of objective evidence to substantiate [Claimant]'s persistent subjective complaints of considerable left-sided low back pain and there is evidence of symptom magnification as document in the medical records."
48. Dr. Farnham found documented evidenced of Claimant's symptom magnification in the November 29, 2000, HEALTHSOUTH FCE report under the commentary section:

> All activities were performed with upper extremity bracing or with cane. Client refused to perform activities without bracing, citing fear of pain and falling. Exaggerated pain behavior was noted throughout physical testing including disproportionate facial expression/verbalization and muscular giving way with manual muscle tests and function testing. Client requested and was given 6 breaks to lie down during testing sequence. On next day follow up, client reported that he "hurts all over" and rated his pain as 8/10.

49. Dr. Farnham himself observed "exaggeration of subjective symptomatology with verbalization of pain and discomfort relative to his left low back." Dr. Farnham found "no significant increase in heart rate with subjective verbalization of pain and discomfort relative to his low back during the interview process or during the physical examination process." Dr. Farnham supported his opinion with the results of the Minnesota Multi-Phasic Personality Index -2 (MMPI-2) administered to Claimant on January 21, 2001, which indicated that Claimant displayed elements of symptom exaggeration.
50. Dr. Farnham opined that Claimant had reached maximum medical improvement "relative to the recommended claim allowed condition of lumbosacral sprain/strain as a direct result of the mechanism of injury as described to his examiner and as having occurred on February 13, 1995."
51. Dr. Farnham was "unable to explain [Claimant]'s verbalization of significant pain relative to his left low back based upon the mechanism of injury as described by this claimant as having occurred on February 13, 1995."
52. Dr. Farnham opined:

> After leaving Butler Machinery, he did go to work at another physically demanding job at Morris Construction, during which time he states that he fell between 5 and 10 times per day while working at this regular occupation of heavy equipment mechanic. He states that he did not file any Workers' Compensation Claims against Morris Construction at that time. It is of interesting note that the specialist consultation report from Dr. William F. Ganz of West River Neurosurgery and Spine indicates in his report of 05-03-99 that the claimant revealed to him that .... "In 1998, he fell off a scraper wall at work and reports continuing problems since that time." The [c]laimant denies filing a Workers' Compensation Claim against Morris Construction as a result of that work related injury. And, the claimant states that he continues to fall periodically, losing control of his left lower extremity on a periodical and sporadic basis. However, physical examination does not reveal any skin bruises or abrasions or subcutaneous ecchymosis (black and blue marks) or other evidence of falls to the ground as indication by the claimant. It would be my professional medical opinion and best medical judgment that within reasonable medical certainty and to a logical degree of medical probability, and after review of all documentation presented to this examiner for review, the documentation is not supportive of the historical deterioration of his low back, by history, as related to this examiner from the claimant. It is the impression of this examiner that there is clear secondary gain to be obtained by this claimant by his persistent subjective complaints. He ambulates with a non-medical cane held in the wrong upper extremity and with a very clear theatrical limp, placing the cane on the ground immediately next to his left foot upon ambulation.

53. Dr. Farnham noted that Claimant's description of the mechanism of injury changed throughout his treatments.
54. Dr. Farnham found that Claimant did not suffer a "crush" injury, but rather a classic lumbosacral sprain/strain that has resolved.

55. Dr. John Meyers, a licensed psychologist, performed an independent psychological evaluation of Claimant on March 20, 2001. He diagnosed Claimant as a malingerer as that term is defined by the Diagnostic and Statistical Manual-IV (DSM-IV), a standard reference for psychologists and psychiatrists. Dr. Meyers based this opinion on the results of neuropsychological tests that were administered to Claimant. The tests contain eight internal checks of validity. Claimant passed six and failed two. The two failures suggested to Dr. Meyers "variable motivation for the testing and the results are questionable. Submaximal effort is strongly suspected. The presence of secondary gain cannot be ruled out."
56. Dr. Meyers also studied a previous MMPI-2 administered to Claimant by Dr. Kugler. Dr. Meyers, scoring the test himself, concluded that the MMPI-2 revealed "questionable validity" due to "malingering."
57. Dr. Meyers opined that Claimant "is purposely exaggerating his difficulties."
58. Dr. Meyers did not opine that Claimant does not have pain or difficulties stemming from his work-related injury, but that "whatever difficulty he may have, no one can tell because he's exaggerating it. It's not possible to tell if he has chronic pain because of the exaggeration, the malingering."
59. Dr. Meyers opined that "there's an eighty-six percent probability that" Claimant is malingering or exaggerating his symptoms with his medical providers.
60. Claimant stopped working in October of 1998 and has not worked in any capacity since that time.
61. Claimant has made applications for employment as a heavy equipment mechanic at two businesses since October of 1998. Peniston testified that there are only three employers in Rapid City where Claimant could work as a heavy equipment mechanic. Claimant checked into those employers, but was not hired.
62. Claimant registered with Job Service on November 30, 1998. His file went inactive in February 28, 1999, because Claimant did not follow up or contact Job Service for three months.
63. Claimant returned to Job Service on July 6, 1998, to take an aptitude test (the GATB). Claimant did not seek any additional assistance or make any applications through Job Service.
64. Claimant failed to provide Job Service with his physical restrictions as outlined in the FCA.
65. Claimant's claim that he did not know what his restrictions were at the time lacks credibility.
66. Claimant did not perform a reasonable work search after he left Morris Construction in 1998.
67. Despite his obvious intelligence, Claimant has not sought retraining other than a weeklong course in becoming some type of "broker."
68. Claimant's own vocational expert, William Peniston, agreed that various occupations within the November 10, 1998, restrictions would have been suitable and that Claimant should have looked for employment. Peniston also agreed that retraining would have been a reasonable option to pursue.
69. As the testimony of Penny Kutz, a Job Service representative, established, South Dakota Job Service is designed to help people find employment within their physical and educational restrictions. Kutz also confirmed that in order for a work search to

be successful, the prospective worker must cooperate with the efforts of Job Service. Claimant did not do this.

70. Employer/Insurer offered approximately eight and one half hours of surveillance video taken during 1999.
71. The surveillance videos and photos clearly show Claimant engaged in physical activity. Claimant's activities do not appear to be limited to the extent that Claimant claims he is limited. He never used a cane and his left leg never "gave out." He did not fall or stumble.
72. Claimant testified that during 1999, he was very limited in his physical activities due to his pain and mobility, that he was "like a dog with a broken leg," and that he had ended all physical activities by mid 1999.
73. Dr. Farnham's description of Claimant's movements, including his "theatrical gait," use of a cane, verbalizations of pain, and facial grimacing, do not match the behavior of Claimant on the surveillance videos. Claimant's physical activities seemed normal, with none of the limitations described by Claimant, or the behaviors documented by Dr. Farnham.
74. The surveillance video shows Claimant walking with a normal gait. He does not appear to have any difficulty getting in and out of his Chevy Suburban. He does not appear to have difficulty leaning over the engine to make repairs, or opening and closing the hood of the full-sized vehicle. He does not have difficulty retrieving items from the cargo area in the back.
75. Claimant can be observed moving furniture, including a rolled-up foam mattress with the bed covers still on it and lifting a large wicker chair above his head. Again, his movements are fluid and he does not appear to be limited in any way.
76. Claimant is also videotaped helping a friend carry an easy chair. Claimant is holding the front of the chair with his right hand, while his body if facing forward. Claimant is not observed to have any difficulty walking in this somewhat awkward position.
77. Claimant is observed lying on his back beneath his Chevy Suburban and working on something on the underside of the vehicle.
78. On the day of the hearing, Claimant relied heavily on his cane and appeared to be in great pain, moving very slowly at times and using a jerking type of walk. None of these behaviors can be observed on the videotape.
79. Comparing Claimant's activities documented in the surveillance taken in 1999 to Claimant's description of his limitations in 1999, the observations noted in Dr. Farnham's report, Kuran's records, the FCE report of November 3, 1998, and other medical records, Claimant's testimony regarding his limitations lacks credibility.
80. Other facts will be developed as necessary.

Whether Claimant is permanently and totally disabled under the South Dakota Workers' Compensation Act.

Claimant asserts that he 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).

Because Claimant's request for permanent total disability benefits depends heavily on his complaints of pain, his credibility is the cornerstone of his claim. Employer/Insurer have presented evidence that Claimant lacks credibility and also that he is a malingerer.

> In a workers compensation case, where the claimant's subjective experience of pain is central to the issue of whether recovery is warranted, the credibility of the claimant is always at issue. Johnson v. Albertson's, 2000 SD 47, 610 N.W.2d 449; Wagaman v. Sioux Falls Const., 1998 SD 27, 576 N.W.2d 237; Petersen v. Hinky Dinky, 515 N.W.2d 226 (SD 1994). Nowhere in our prior case law have we held that credibility cannot be attacked at the prima facie stage. To the contrary, we have on several occasions pronounced that credibility of the claimant can be attacked at the prima facie stage. Baker v. Dakota Mining & Constr., 529 N.W.2d 583 (SD 1995); Wagaman, supra; Petersen, supra.

Lends His Horse v. Myrl & Roy's Paving, 2000 SD 146, ¶ 14.

Claimant lacks credibility in his testimony regarding his physical limitations. Claimant's physical activities on the surveillance video seemed normal, with none of the limitations described by Claimant, or the behaviors documented by Dr. Farnham, Kuran, Dr. Meyers, or Dr. Lecy. Dr. Farnham's description of Claimant's movements, including his "theatrical gait," use of a cane, verbalizations of pain, and facial grimacing, do not match the behavior of Claimant on the surveillance videos.
On the day of the hearing, Claimant relied heavily on his cane and appeared to be in great pain, moving very slowly at times and using a jerking type of walk. None of these behaviors can be observed on the videotape. Comparing Claimant's activities documented in the surveillance taken in 1999 to Claimant's description of his limitations in 1999, the observations noted in Dr. Farnham's report, Kuran's records, the FCE report of November 3, 1998, and other medical records, Claimant's testimony regarding his limitations lacks credibility.

Employer/Insurer has demonstrated that Claimant is a malingerer. The testimony of Kuran, Dr. Farnham, and Dr. Meyers, and the medical records of Dr. Kugler and Dr. Swenson, all undeniably demonstrate that Claimant has exaggerated his symptoms to his medical providers. Although Claimant disputes the testimony of Dr. Meyers, Dr. Meyers' testimony as a psychological expert is reliable and persuasive. He is a clinical neuropsychologist, has a doctor's degree in clinical psychology, and is board certified in that area. He is a Fellow of the Academy of Neuropsychology which includes people who have made significant contributions in the field. He treats patients and sees people, as well as admits and treats patients in hospitals.

Dr. Meyers interviewed Claimant, took a history from him, and administered both standardized and self-generated neuropsychological tests. Dr. Meyers also reviewed medical information, depositions, and other information. At hearing, Dr. Meyers discussed at length the nature and general purpose of the neuropsychological tests administered to Claimant and the results of those tests. Dr. Meyers' unanswered psychological opinions were that Claimant failed two of eight validity checks on those tests and that Claimant is a malingerer. Dr. Meyers opined that there is no other clinical explanation for Claimant's failure on the validity checks other than that Claimant is purposefully trying to fail the test in an effort to look more disabled than he really is. Dr. Meyers crosschecked and verified his results by comparing the results of the MMPI tests conducted by Dr. Kugler.

Although the Department does not have to accept all expert testimony, Dr. Meyers does not lack credibility nor do his opinions lack foundation. Dr. Meyers is the only psychological expert whose testimony was offered in this matter. He testified live at hearing and he testified credibly, and without bias. Dr. Meyers did not offer opinions regarding the effect of Claimant's injury on his physical abilities. Dr. Meyers, as a licensed psychologist, opined that Claimant is exaggerating his symptoms from these conditions.

Because Claimant lacks credibility in reporting his symptoms and he has been found to be a malingerer, Claimant's reports to his medical providers also lack credibility. His medical providers relied heavily on Claimant's subjective reports of pain and therefore, those providers' opinions relying on Claimant's reports of pain and limitation are not reliable. The most recent FCE report, Kuran's physical therapy notes and her testimony, and Dr. Farnham's notes and testimony document Claimant's symptom magnification and exaggeration. The video surveillance demonstrates that Claimant is capable of a greater level of physical activity than he claims. Dr. Meyers' opinions document Claimant's symptom magnification and malingering. Claimant's lack of credibility, documented exaggeration of symptoms and malingering makes assessment of his physical abilities impossible. Because of this, Claimant has failed to demonstrate that his "physical condition, in combination with [his] age, training, and experience and the type of work available in the employee's community, cause" him "to be unable to secure anything more than sporadic employment resulting in an insubstantial income[1]."

[1] The maximum allowable compensation rate for a February 14, 1995, date of injury is $349.00, not $583.20, as argued by Claimant.

Claimant failed to present objective medical testimony supporting his claim that he is in severe, continuous, and debilitating pain. The medical opinions depend on Claimant's subjective reports of pain. Because Claimant has been found to be a malingerer, any opinion based upon Claimant's self-reports is unpersuasive. In light of the evidence in this record, Claimant has failed his burden of persuading that he suffers from severe, continuous, and debilitating pain that he cannot work. Claimant was injured on February 14, 1995, and is in pain, but his lack of candor and symptom magnification interfere too much with the medical opinions for a determination of the impact of his pain.

Furthermore, Claimant failed to conduct a reasonable job search. He has applied for only a few jobs since October of 1998, despite being released to full-time, "light-medium" duty in November 1998. He has not reasonably attempted retraining, despite obvious intellectual abilities documented by the psychological reports. His own vocational expert testified that retraining would have been a feasible option in light of Claimant's release to "light-medium" duty in November of 1998.

Claimant has failed his burden of production and persuasion. The evidence relied on by Claimant in support of his claims is not credible, and the evidence of his symptom magnification and malingering is persuasive. His request for permanent total disability benefits and additional permanent partial disability is denied.

Employer/Insurer 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. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this _____ day of November, 2003.

SOUTH DAKOTA DEPARTMENT OF LABOR

_____
Heather E. Covey
Administrative Law Judge