SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

TAMMY LAGLER, **HF No. 31, 2008/06**

Claimant,

v. **DECISION**

MENARD, INCORPORATED,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The issues involved in this case were bifurcated. The initial hearing was conducted on May 10, 2011. The Department conducted a second hearing on September 20, 2012, in Sioux Falls, South Dakota. This Decision deals with the legal issues presented during the second hearing. The hearings were heard by Donald W. Hageman, Administrative Law Judge. Claimant, Tammy Lagler, was represented by Scott Heidepriem and Sara Show. The Employer and Insurer, Menards, Incorporated and Zurich American Insurance Co. were represented by J. G. Shultz.

Evidentiary Rulings:

Social Security Determination:

During the hearing, Tammy Lagler (Claimant) offered a Social Security Administration Determination that concluded that Claimant was "disabled as of April 10, 2011". Menards, Incorporated (Employer) and Zurich American insurance Co. (Insurer) objected to the admission of the document contending that the determination was not relevant. The Department sustained the objection.

Later in the proceedings, the Claimant asked the Department to reconsider its ruling. The Department then instructed the parties to address the admissibility of the Social Security Determination in their post-hearing briefs and indicated that the ruling would be reconsidered in this Decision.

The South Dakota Supreme Court held in Vilhauer v. Dixie Bake Shop, 453 NW2d 842, 846 (SD 1990) that Social Security Administration disability decisions were admissible in workers' compensation cases as evidence of disability. In accordance with the Vilhauer case, the Department now admits the Social Security administration determination here.

However, it must be pointed out that the Supreme Court also stated that the Social Security Administration decision was not "binding" in the workers' compensation case. A determination of permanent total disability under the workers' compensation laws of this state is governed by the provisions of SDCL 62-4-53 and the determination of the Social Security Administration was made in accordance with separate federal regulations. Consequently, the Social Security Administration determination will only carry as much weight with this decision as may be applicable to SDCL 62-4-53.

Credit Information:

During the hearing, Claimant offered evidence of her credit score before Insurer denied her benefits and her current credit score. The Department admitted the evidence over the Employer and Insurer's objection. Employer and Insurer now renew their objection.

Employer and Insurer contend that Claimant's credit scores are not relevant to the question of her disability. While this is true, the evidence is relevant to the question of whether Claimant's move to Winner, South Dakota, was made for financial reasons and in good faith. Claimant argues that her low credit score was one of the reasons that housing was not available to her in Sioux Falls. The motivation for Claimant's move is pivotal in determining which community's job market must be used to determine whether she is permanently and totally disabled. See analysis below. Therefore, Employer and Insurer's objection is overruled and Claimant's credit scores remain admitted into evidence.

Dr. Hagen's Report:

Employer and Insurer also objected to the admission of a letter written by Dr. Hagen to Claimant's counsel which was included in an exhibit containing Dr. Hagen's records. The letter contains Dr. Hagen's opinion regarding Claimant's back to work restrictions. At hearing, the Department admitted the letter into evidence along with the rest of the exhibit. The Employer and Insurer now renew their objection.

Employer and Insurer argue that the letter was not disclosed by the time set by the Department's Amended Scheduling Order dated July 9, 2012. That Amended Scheduling Order states, "(2) That the deadline for Claimant to disclose and identify its expert(s), together with the expert(s) report, is July 31, 2012." The letter was provided to Employer and Insurer on August 22, 2012.

The South Dakota Supreme Court considers the Department's scheduling orders as a component of the discovery process. See, Dudley v. Huizenga, 2003 S.D. 84, 667.

NW2d 644. In this case, Claimant timely disclosed Dr. Hagen as an expert along with his initial report. In August of 2012, Claimant's counsel asked Dr. Hagen for an updated opinion. Dr. Hagen complied with that request in a letter dated August 15, 2012. Claimant's counsel then provided a copy of the letter to Employer and Insurer's counsel on August 21, 2012.

Under these circumstances, Claimant complied with the Amended Scheduling Order when she disclosed Dr. Hagen and his initial report. The letter at issue was a supplemental report which was properly provided to Employer and Insurer as supplemental response to discovery. This was not a matter of "trial by surprise". The letter was provided more than 30 days before hearing and the Employer and Insurer were not prejudiced by the admission of the document. Consequently, the letter is admissible and was properly received into evidence by the Department.

Legal Issues:

The second hearing presented the following legal issues:

1. Whether Claimant is entitled to Permanent Total Disability Benefits (PTD) under the odd-lot doctrine?

2. Whether chiropractic services provided by Dr. Hagen are compensable?

Facts:

1. Claimant is 53 years old. She graduated from high school in Sioux Falls, South Dakota in 1977. She later completed cosmetology school.

2. Claimant has held a variety of jobs. Prior to April 21, 2007, Claimant had a work history of nearly 30 years working at jobs which required her to be on her feet, walking and active. Most of her jobs involved strenuous labor. She has very little experience and no training in operating office equipment and computers.

3. Claimant was a hard-working single mother who would often work two jobs to support her family. Claimant had an active lifestyle, was in good physical condition and had no chronic pain.

4. In 1990, Claimant began working for Employer in Sioux Falls. She started as a cashier. Eventually, Claimant began working in sales and hardware where she also helped in the garden center.

5. In 1994, Claimant left Employer and went to work at Electronic Systems Incorporated (ESI). She was at ESI for about six months and then was laid off. Claimant then worked at the Sioux Falls Regional Airport until 1998, loading luggage, parking planes and assisting passengers.

6. In 1998, Claimant returned to Employer where she again worked in hardware. Claimant became an assistant manager for a short time in 2001. Claimant's job required her to be on her feet all day. The business occupies a large store and Claimant walked many miles each day while working.

7. On April 21, 2007, Claimant seriously injured her right foot and ankle while working for Employer when she backed off a planter stand and fell. Within hours of her fall, Claimant sought medical treatment at Sanford Wellness.

8. At the time of her injury, Claimant was earning $12.30 per hour with a $2.50 differential for weekends. She had an average weekly wage of $480.90 per week with a compensation rate of $320.34.

9. On April 22, 2007, Claimant returned to work. She limped while performing her work duties.

10. Over the next several years, Claimant sought treatment for her right foot from a variety of doctors. During this time Claimant experienced swelling and pain in her right foot which were treated with pain medication and anti-inflammatories with limited success.

11. In February 2008, Dr. Watts, an orthopedic surgeon, performed surgery on Claimant's right foot.

12. Claimant later began seeing Dr. Watson and a second surgery was discussed.

13. On September 15, 2008, the Insurer notified Tammy via email and followed up with a letter on September 17, 2008, that it was denying coverage for her second surgery. On September 22, 2008, Insurer discontinued the payment of Total Temporary Disability benefits.

14. On February 19, 2009, Dr. Watson performed a second surgery on Claimant's right foot.

15. From June 2, 2008 until August 15, 2012, Claimant was issued the following work restrictions by treating physician:

- June 2, 2008 – Dr. Watts - Sedentary work only, no ladders, lifting greater than ten pounds, walking up to 15 minutes, no repetitive up and down movements on the left leg for two months.

- October 26, 2008 – Dr. Watts - Sedentary work only for two months.

- November 10, 2008 – Dr. Watts - Sedentary duty only through 12/21/2008.

- On February 19, 2009 – Dr. Watson performed a second surgery.

- March 6, 2009 – Dr. Watson - Sit down work only.

- April 6, 2009 – Dr. Watson - Needs to be able to sit down frequently while working, four hour days and then increase two hours each week.

- May 18, 2009 – Dr. Watson - No more than 35 hours per week, primarily sit-down work and progress as tolerated to regular duty.

- January 13, 2010 - Dr. Watson - Maximum of 35 hours per week with option to sit frequently and to elevate and ice if needed. Tammy may miss work intermittently one or two days per month due to chronic pain.

- February 24, 2010 – Dr. Watson - No more than 35 hours per week, can work as tolerated, may not be able to be back to permanently standing job due to foot discomfort.

- June 11, 2010 – Dr. Watson - No more than 30 hours per week. Waiting for final recommendations from Dr. Blow as far as work duration and what she can actually do.

In April, 2011, Claimant resigned her position with Employer and moved to Winner.

- August 19, 2011 – Dr. Blow - No insurance coverage for a formal assessment of capacity to work.

- September 1, 2011 – Dr. Marts - Stay off her feet at most times. Needs to keep her feet up most of the day. She cannot be expected to work even on a part-time basis.

- August 15, 2012 – Dr. Hagen - Tammy should try to secure a job that is sedentary in nature because of her ankle injury. She will never be able to work in any position but one that is sedentary and will not be able to work more than 30 hours.

16. Claimant was on leave from work from the time of her first surgery in February 2008 until April 2009.

17. Claimant notified Employer on three occasions between June 2, 2008 and October 2008 that she could return to work in a sedentary capacity.

18. In April 2009, Claimant went back to work for Employer, who tried to accommodate her work limitations by having her work as a cashier. In this position, Claimant could sit down through much of the days. Employer also arranged for her to park in front of the building, close to her work station.

19. On July 1, 2009, Claimant began treating for back, upper leg, and hip pain with Dr. Hagen, a Chiropractor. Dr. Hagen concluded that the work related accident caused Claimant's symptoms. He has continued to treat her, but has given her a poor prognosis stating that she will not ever have a good result with the treatments.

20. After Insurer denied coverage of Claimant's second surgery and ceased making disability payments in September 2008, Claimant began having financial difficulties. Claimant had no income between September 2008 and April 2009 when she returned to work in only a part-time capacity, 27 to 30 hours per week. Claimant did not have healthcare insurance; so she was also burdened with the cost of the surgery and medications.

21. Initially, Claimant tried to cope with her financial problems with money given to her by relatives and by paying bills with her credit cards. However, eventually she lost her house when the bank foreclosed on her mortgage. The bank required her to vacate her house by April 18, 2011.

22. During her financial difficulties, Claimant's credit rating dropped from 697 before Insurer discontinued her benefits to 566 at present. She also lacked the funds for a deposit on an apartment or other rental property.

23. Claimant's daughter, son-in-law and grandchildren live in Winner, South Dakota. Claimant's daughter offered to let her live in a house she and her husband owned in Winner for $400.00 per month without paying a deposit.

24. On April 11, 2011, Claimant resigned her position with Employer without notice.

25. Claimant's son-in-law traveled from Winner to Sioux Falls with a truck and moved Clamant to Winner.

26. Claimant began looking for employment within a week or two following her move to Winner.

27. On September 1, 2011, Claimant began seeing Dr. Marts, a family practice doctor in Winner, who recommended that she stay off her feet most times and noted that she may need to have her ankle fused. Dr. Marts has prescribed numerous pain medications to help alleviate Claimant's pain.

28. Claimant went back to Dr. Watts on March 27, 2012, for her hip and leg pain. He concluded that her work injury had caused an abnormal gait, which in turn caused her hip and leg pain.

29. In his hearing testimony, Dr. Hagen agreed with Dr. Watts' conclusions regarding Claimant's leg and hip pain.

30. Richard Ostrander testified on behalf of the Claimant at the hearing. Ostrander is a vocational expert and rehabilitation counselor. Ostrander opined that Claimant is "obviously unemployable within the Winner community. Ostrander found that Claimant's age of 53 is significant because based upon his research and training, workers over the age of 45 and 50 have extended periods of unemployment and a more difficult time finding work.

31. Ostrander also testified that it would be difficult for Claimant to find employment because of her need to elevate leg above waist height. He further stated that anyone who has to miss two days per month or more of work is not able to maintain employment.

32. Ostrander did not believe that Claimant would be able to obtain employment because she was limited to less than full-time work and, within the Winner community; there is not any sedentary work that Claimant is qualified to perform. Ostrander found that based upon the medical evidence, Claimant is limited to work that keeps her off of her feet most of the day. He took into account that Claimant "has no transferrable skills to sit-down type of work." Furthermore, Claimant is in an "extremely limited labor market" in Winner.

33. Ostrander identified 31 businesses within the Winner area who were most likely to have sedentary positions. Claimant contacted all 31 of those businesses and none of them had a position open.

34. At present, Claimant is working at the Winner Regional Medical Center as a dietary aide. She works 20 hours per week at $8.68 per hour. This job requires her to be on her feet much of the time.

35. Additional fact will be discussed in the analysis below.

Analysis:

The first issue is whether Claimant is entitled to Permanent Total Disability Benefits (PTD) under the odd-lot doctrine. The standard for determining whether a claimant qualifies for "odd-lot" benefits is set forth in SDCL 62-4-53, which provides in pertinent part:

> An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income….

SDCL 62-4-53. SDCL 62-4-52(2) defines "sporadic employment resulting in an insubstantial income" as "employment that does not offer an employee the opportunity

to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury…." Claimant's workers' compensation rate is $320.34 per week. She has a work limitation of 30 hours per week. Therefore she must make $10.68 per hour to equal her compensation rate.

Our Supreme Court has described the analysis of SDCL62-4-53 as follows:

> The claimant has two avenues to make the required prima facie showing for inclusion in the odd-lot category as recognized by this Court: First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment is actually available in claimant's community for persons with claimant's limitations. Obvious unemployability may be shown by: (1) showing that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category, or (2) persuading the trier of fact that he is in fact in the kind of continuous, severe and debilitating pain which he claims. Second, if the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated to the odd-lot category then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work. Under this test, if the claimant is obviously unemployable, he will not bear the burden of proving that he made reasonable efforts to find employment in the competitive market. Likewise, it is only when the claimant produces substantial evidence that he is not employable in the competitive market that the burden shifts to the employer.

Fair v. Nash Finch Co., 2007 S.D. 16, ¶ 19, 728 N.W.2d 623 ((quoting, Kassube, 2005 S.D. 102, ¶34, 705 N.W.2d at 468 (internal citations and quotations omitted).

SDCL 62-4-52(1) defines "community" as "the area within sixty road miles of the employee's residence". To establish a prima facie case that Claimant is totally disabled based on her "physical condition, in combination with her age, training, and experience, and the type of work available in the community, she must show that she is obviously unemployable in her community. See Reede v. State of South Dakota Dept. of Transp., 2000 SD 157, ¶ 11, 620 NW2d 372.

At the time of her injury, Claimant resided in Sioux Falls. On April 18, 2011, Claimant moved to Winner to live with her daughter. In order for Claimant to claim Winner as her community for purposes of SDCL 62-1-53, she must demonstrate that her move was done in good faith and not to withdraw from the Sioux Falls job market or to collect workers' compensation benefits. Id. at ¶ 14.

In April of 2011, Claimant's home in Sioux Falls was repossessed by the bank. This was due to the fact that she suffered a substantial drop in income after her injury.

Her ability to find new housing in Sioux Falls was complicated by several factors. First, her credit rating was poor after losing her house and many renters require a credit check before renting to new tenants. Second, she did not have the money for a damage deposit which most renters require. Finally, she also owned dogs that she did not want to give up.

It was apparent from watching Claimant's testimony about losing her house that the event was a very traumatic episode in her life. When her daughter offered to let her live with her in Winner, it provided her with both a place to live and the emotional support that she needed at that time from her family. The Department finds that these were both legitimate reasons for her to move to Winner.

Employer and Insurer point out that Claimant moved without looking for other employment or another place to live. While this is true, the Department believes that her assumptions about the difficulty in finding another place to live in Sioux Falls were rational and likely correct. The Department does not believe that the law does not require Claimant in this situation to sacrifice her safety and comfort by living in some "vermin infected" apartment to avoid a change of community.

Employer and Insurer also suggest that Claimant could have better arranged her finances by filing for bankruptcy. The Department also believes that bankruptcy was not necessary before choosing to move to Winner. Nor was it required for Claimant to explore every option available to her just to enhance Employer and Insurer's economic interests. All that is required is that Claimant moved to Winner in good faith and not to avoid the Sioux Falls job market.

It is also worth noting that Claimant's financial problems were not of her own doing. In light of the Department's September 9, 2012 Decision, which determined that Insurer was responsible for Claimant's second surgery, Insurer was at least partially responsible for Claimant's financial problems and her need to move. The Department finds that Claimant moved to Winner in good faith for financial and emotional reasons and not to avoid the Sioux Falls job market.

The Department must next determine whether Claimant is "obviously unemployable" in the Winner community. Both parties acknowledge that Winner has a very limited job market when compared to Sioux Falls. At hearing, Richard Ostrander testified on behalf of Claimant as a vocational expert and rehabilitation counselor. Ostrander testified that Claimant is "obviously unemployable in the Winner job market." Ostrander testified that Claimant's age puts her in a class that have extended periods of unemployment and a more difficult time finding work. He testified that Claimant's condition requires her to find a sedentary position and that she has no transferrable skills for a sit down type job. He stated that the Claimant's need to have her leg elevated much of the time further complicates her job search. In addition, the fact that Claimant could expect to missing two days of work per month makes her virtually unemployable in any labor market.

The Department finds Ostrander's testimony to be well founded and persuasive. Consequently, the Department finds that Claimant has made a prima facie showing that she is obviously unemployable because of her physical condition, coupled with her education, training, and age.

However, Claimant has not convinced the Department that she is obviously unemployable due to her pain. This is perhaps due in part to her work ethic and her ability to work with pain. In any event, the fact that she worked nearly up until the time that she moved and that she is now working a job which requires her to be on her feet, though for only 20 hours per week, evidence that pain alone is not preventing her from working.

Nevertheless, with a showing of obvious unemployability, the burden shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the Winner community. The employer may meet this burden by showing that a position is available which not sporadic employment is resulting in an insubstantial income…." SDCL 62-4-53.

Jim Carroll, a vocational expert who testified on behalf of the Employer and Insurer only provided one sedentary job that was available in the Winner area. That job was with the Winner Medical Center. However, Claimant testified that she inquired about that position and that it required computer skills that she did not possess. Consequently, the Department finds that Employer and Insurer have not met their burden of showing that work is regularly and continuously available to Claimant in the Winner area.

On the other hand, Claimant made a thorough search for work without success. Ostrander identified 31 businesses within the Winner area that were the most likely to have sedentary positions. Claimant contacted all 31 of those businesses and found that none of them had a position available for her. Consequently, the Department acknowledges that Claimant has made a reasonable work search in the Winner area without finding suitable employment. At present, Claimant is working at a job which exceeds her work limitations and pays her a wage which is below her compensation rate.

Finally, the Department concludes that Claimant is not a candidate for retraining. The only institution in the Winner area that could offer Claimant retraining is Sinte Gleska University. Ostrander testified that Sinte Gleska University has a job placement rate of 0%. This statistic indicates to the Department that this program is not a viable option. In addition, Claimant is now 53 years old. After retraining, she would only have a few years before retirement. She would still have the problems faced by older job seekers and she would have not experience in her new field. She would also still have the physical limitations she has in a small job market. Consequently, the Department finds that Claimant is permanently and totally disabled under the odd-lot doctrine. This ruling does not pertain to the time period when Claimant lived in Sioux Falls.

Dr. Hagen's Treatment:

Employer and Insurer also argue that the chiropractic serves provided by Dr. Hagen to Claimant are not compensable. Dr. Watts and Dr. Hagen have both testified that Claimant's right hip and leg pain is due to Trochanteric bursitis which was caused by a chage in her gait. In turn, Claimant's change in gait was caused by her work injury. Dr. Watts also testified that the pain suffered by Claimant in her lower back was due to the Trochanteric Bursitis and not a back herniation which Claimant also suffers. There is inconclusive evidence that the herniation was caused by the work injury. Consequently, any treatments Dr. Hagen provided to Claimant's hip and leg are compensable, but any treatment of Claimant's back is not. Insurer is responsible for the prorate portion of Dr. Hagen's services associated with the treatment of her leg and hip.

Conclusion:

Counsel for Claimant shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision and if desired Proposed Findings of Fact and Conclusion of law, within 20 days of the receipt of this Decision. Counsel for Employer and Insurer shall have an additional 20 days from the receipt of Claimant's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Counsel for Claimant shall submit such stipulation together with an Order.

Dated this 11th day of January, 2013.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge