SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

RANDALL W. MYERS, **HF No. 35, 2007/08**

Claimant,

v. **DECISION**

HIGHMARK, INC.,

Employer,

and

ACUITY,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held in this matter on January 16, 2009 at 9:00 am MT in Rapid City, South Dakota. Mr. Jeffrey P. Maks, of Finch Maks, Prof., LLC, represents Claimant, Randall W. Myers (Claimant). Mr. Michael S. McKnight and Charles A. Larson of Boyce, Greenfield, Pashby & Welk, L.L.P., represent Employer, Highmark Inc., and Insurer, Acuity (Employer/Insurer).

The issues, as stipulated by the parties, are:

1) Whether and to what extent Claimant is entitled to temporary total disability (TTD) or temporary partial disability (TPD) benefits following his separation from employment in July 2007 and until such time as he was assigned a physical impairment rating in September 2007?

2) Whether and to what extent Claimant's surgery of August 2007 represented reasonably necessary medical treatment and a treatment modality suitable and appropriate under the attendant circumstances?

3) Whether Claimant qualifies for a finding of permanently total disability status by application of the "odd-lot" doctrine?

FACTS

1. At the time of hearing, Claimant was 52 years of age and living in Rapid City, South Dakota. Claimant's residence is a camper trailer that is parked in a driveway at his parents' residence.

2. Claimant graduated from Rapid City High School in 1975 with an estimated grade point average of 3.3 out of a possible 4.

3. Claimant has no education beyond high school and no military service.

4. Claimant worked at his father's full service gas station while attending and after graduating from high school. Claimant performed all tasks and eventually performed the work of an automobile mechanic.

5. In 1979, Claimant's father opened a new business, the Shade Tree, a self-service auto repair shop. Claimant was the sole manager and operator of the business. Claimant performed mostly mechanical work, but also did some invoicing. Claimant continued in this business until 1986.

6. In 1986, Claimant and a partner opened Digger's Auto Salvage. Claimant managed the business. Claimant performed both heavy physical labor and desk work.

7. In 1998, Claimant closed the auto salvage shop and went to work for Bear Country USA as the fleet operations manager for two years.

8. Claimant next worked at Western Mechanical, a plumbing contractor, as a heavy equipment operator. This work was seasonal in nature, and Claimant was laid off over the winter months. During the winter, Claimant worked as a bartender at the Black Hawk Lounge.

9. In March 2003, Claimant went to work for Dan's Ditching as a temporary laborer. Claimant agreed to leave the employment when the owner's son was able to return to the business.

10. In February 2004, Claimant returned to Western Mechanical as a heavy equipment operator.

11. Claimant opened his own excavation company, Myexco, in October 2004. Claimant continued this operation until it closed in March or April 2006.

12. While running Myexco, Claimant was responsible for keeping track of the books, applying for permits, and performing other "paperwork" functions related to the business in addition to the physical functions.

13. Employer hired Claimant as a heavy equipment operator and truck driver in April 2006.

14. Claimant's work for Employer entailed operating belly dump trucks, side dump trucks, manual shoveling of product, and running hand power tools.

15. On July 17, 2006, Claimant sustained an injury while working for Employer.

16. Claimant was performing a daily DOT inspection of a truck. Claimant climbed onto the front bumper of the truck and grabbed the handle of the engine hood to open the hood. The hood handle broke off in Claimant's hand and Claimant fell backwards, from a height of 3-4 feet, onto the ground. Claimant landed on his left arm and side.

17. Claimant was taken by his supervisor to the Rapid Care Acute Care Clinic and was immediately referred to Rapid City Regional Emergency Room and was admitted to the hospital.

18. Claimant had broken several ribs, his left lung had collapsed 50%, and he sustained an elbow injury and a shoulder injury.

19. Claimant spent four days in the hospital due to treatment of the collapsed lung.

20. The treating physician at the hospital referred Claimant to Dr. Stuart Fromm of the Black Hills Orthopedic and Spine Center for treatment of the injury to Claimant's left shoulder.

21. Claimant underwent an MRI of the left shoulder on August 4, 2006, as ordered by Dr. Fromm.

22. Dr. Fromm advised Claimant that he had sustained a massive and full thickness tear of the rotator cuff of the left shoulder. Dr. Fromm performed the initial surgery on September 5, 2006.

23. Dr. Fromm told Claimant that Claimant had severed in half all three of the straps that hold a shoulder joint together. Dr. Fromm is of the opinion that Claimant's tear was one of the worst that Dr. Fromm had seen in his clinical practice.

24. After the surgery, Dr. Fromm sent Claimant to physical therapy that was to last a few months. Dr. Fromm remarked that Claimant could only have a passive range of motion with his shoulder for four to five weeks.

25. Dr. Fromm gave Claimant a return to work slip for light duty work to start on September 18, 2006. Dr. Fromm's restriction for Claimant was that he cannot use his left arm.

26. Claimant is right-handed.

27. Employer told Claimant that he could return to work for Employer when he was 100% or can work at full duty.

28. Claimant kept in contact with Employer during the time he was off work. Claimant provided Employer with copies of the doctors' notes and work slips.

29. In January 2007, Dr. Fromm ordered a repeat MRI scan of Claimant's shoulder to check the integrity of the repair.

30. After reviewing the MRI, Dr. Fromm scheduled another surgery for Claimant. Claimant did not improve significantly with the second surgery.

31. Claimant continued with physical therapy following his second surgery. Claimant continued to suffer pain and weakness in his left arm and shoulder and had difficulty moving his left arm and hand.

32. In June 2007, Dr. Fromm recommended that Claimant undergo a third surgery. This surgery was to be primarily diagnostic as it was Dr. Fromm's belief that an MRI was inadequate to show whether the rotator cuff was repaired or whether there was other surgical treatment that could be accomplished.

33. Dr. Fromm was adamant that an additional MRI scan would not assist in diagnosing any further issues in Claimant's shoulder but was medically unnecessary.

34. On July 16, 2007, Employer contacted Claimant by telephone and ordered Claimant to return to a light duty temporary job at 6 am the following morning.

35. Employer accused Claimant of faking his injury. Employer accused Claimant of costing Employer money for unnecessary medical treatments.

36. Claimant told Employer that based upon the phone conversation and the attitude of Employer that he was not going to be at work the following morning.

37. Claimant quit his job due to Employer's accusations and behavior shown towards Claimant.

38. Claimant felt threatened by Employer and reported the phone call to the police. The Rapid City Police Department filed a report.

39. The day after the incident with Employer, Insurer wrote Claimant a letter denying Claimant benefits for a third surgery, based upon an updated records review by Dr. John Dowdle. Insurer also informed Claimant that his weekly benefits were discontinued due to the fact that he voluntarily quit his job with Employer and refused work offered by Employer.

40. Dr. John Dowdle was hired by Employer/Insurer to conduct an independent medical exam (IME) of Claimant. This was conducted on January 26, 2007. At that time, Dr. Dowdle was of the opinion that Claimant should reach maximum

medical improvement (MMI) by July 9, 2007 and that there was no indication or a need for additional surgery.

41. Dr. Dowdle, during his pre-hearing deposition, agreed that if the surgery alleviated Claimant's pain, that the surgery was a therapeutic benefit to Claimant.

42. Dr. Fromm performed the third and final surgery on Claimant on August 2, 2007.

43. Employer/Insurer has not accepted compensability for the third surgery. All bills from this surgery are currently in collections and remain unpaid.

44. During the surgery, Dr. Fromm found that Claimant's bicep tendon was impinged and was a source of Claimant's shoulder pain. Dr. Fromm severed the tendon to relieve the impingement.

45. Dr. Fromm is of the opinion, based upon observations made during the third surgery, that Claimant's rotator cuff tear is completely irreparable, despite surgical efforts and continued physical therapy.

46. Dr. Fromm is of the belief and gave the opinion with a reasonable degree of medical certainty that Claimant's tear is irreparable and will lead to arthritis of the shoulder joint. Claimant will likely need future medical treatment of his left shoulder.

47. On September 24, 2007, Dr. Dowdle assigned Claimant a 5% permanent physical impairment rating of his upper left extremity. At that time, Dr. Dowdle told Insurer that Claimant could return to work with restrictions of 20-25 pound maximum lifting, and no overhead work or heavy lifting.

48. Claimant's pain was alleviated slightly following the third surgery. Claimant did not believe that his shoulder's motion or strength improved with surgery.

49. A few weeks after surgery, Claimant started to make attempts to find employment. Claimant asked Dr. Fromm for a letter explaining Claimant's shoulder limitations and restrictions.

50. Claimant looked for work in the fields for which he had experience, but for which he could work with lifting restrictions and no use of his left arm.

51. Claimant started work in September 2007 with the Airport Express Shuttle, Inc., as a driver. Claimant transported passengers and luggage to and from the Rapid City Regional Airport. Claimant was soon working full time.

52. Claimant started having physical problems with the work during the winter holiday season. Due to physical limitations and continued pain, Claimant could no longer work at the job. After the 2007 holiday season, Claimant resigned.

53. In November 2007, Claimant began working with Mr. William Peniston, a vocational rehabilitation consultant. Mr. Peniston assisted Claimant with a job search.

54. Dr. Fromm requested that Claimant undergo a functional capacity evaluation (FCE) at the Rapid City Regional Rehabilitation Institute in November 2007.

55. The FCE was deemed to be valid, in that Claimant was giving an honest effort throughout the exam. The FCE showed no symptom magnification or disability exaggeration on the part of Claimant.

56. The FCE examining therapist was of the opinion that Claimant qualifies for a limited range of light to medium employment. However, the test also showed Claimant's limitations in using his left upper extremity for unilateral lifting and general usage. Claimant is able to lift bilaterally to the waist or to the shoulder, and may lift unilaterally with his right hand. Claimant has a bilateral lifting restriction of 13 pounds from the floor. The FCE warned against Claimant performing any over the shoulder lifting as he overcompensates with his right side making him at risk for injury.

57. The FCE rated Claimant's body strength for activities tested as below average to very poor. The FCE results indicate that Claimant is only capable of performing tasks such as lifting or carrying to an occasional basis or from 3-33% of an average workday. The FCE indicates Claimant cannot perform a barrier lift or an overhead lift; cannot climb ladders or crawl; and can perform forward or overhead reaching on an occasional basis. The only tasks Claimant can perform on a frequent (34-66% of workday) or constant basis (67-100% of workday) is sitting, standing, and walking.

58. Claimant also took the Purdue Pegboard Assembly Test as part of the FCE. This tests the ability of Claimant for assembly work and his dexterity. The test results indicate that Claimant may assemble pieces in the 1-4 mm range or larger at a Non-Production rate. Claimant scored in the lowest range for this test, a 6%.

59. Dr. Fromm referred Claimant to Dr. Brett Lawlor to assess Claimant's restrictions based upon Claimant's injuries and abilities. Dr. Lawlor is board certified in physical medicine and rehabilitation as well as pain medicine. Dr. Lawlor specializes in identifying appropriate work restrictions for injured people.

60. Dr. Fromm, in his deposition, specifically defers to Dr. Lawlor's opinion regarding work restrictions, impairment ratings, future disabilities, future work abilities, and all related topics.

61. On January 29, 2008, Dr. Lawlor performed a physical exam on Claimant to determine what restrictions would be appropriate. Dr. Lawlor also had the FCE report to use in formulating his opinion.

62. Dr. Lawlor observed that Claimant had notable atrophy of the muscle mass of Claimant's left shoulder in addition to a limited active overhead range of motion.

63. Dr. Lawlor also observed that Claimant was overcompensating with the use of his right arm and shoulder. Dr. Lawlor is of the opinion that compensating with the right arm when making bilateral lifts puts Claimant in danger of further injuries.

64. On January 29, 2008, Mr. Peniston requested a meeting with Dr. Lawlor to go over work restrictions that may be placed upon Claimant. Dr. Lawlor and Mr. Peniston met. Mr. Peniston took notes at the meeting and typed a report listing Claimant's work restrictions that Dr. Lawlor later signed.

65. Dr. Lawlor restricted Claimant from working with heavy equipment or driving truck.

66. Dr. Lawlor restricted Claimant from using a computer for an extended period of time. Claimant may use a computer occasionally or less. This restriction was based upon Claimant's shoulder problems and the typical method of using a computer keyboard and mouse. Dr. Lawlor took into account that Claimant could use a mouse with just his right arm; however, Dr. Lawlor is of the opinion that extended use would cause pain in his left shoulder because of the typical posture of a person sitting at a computer.

67. Dr. Lawlor is of the opinion that Claimant's ability to perform certain tasks is in the low end of occasional; only about 3% of Claimant's average workday can be spent performing tasks such as lifting, reaching, pulling, or carrying.

68. Dr. Lawlor's other restrictions for Claimant were: no lifting over five to ten pounds with left arm, no climbing ladders or scaffolding, no crawling, limited repetitive use of left arm, and only occasional reaching away or overhead with left arm.

69. Prior to issuing his report on January 14, 2008, Mr. Peniston reviewed Claimant's medical records, the nature and severity of the injury sustained, Claimant's educational background, work history, transferable skills, the FCE, the initial release to return to work, and Claimant's job search efforts.

70. Mr. Peniston also performed a Labor Market Employability Assessment; a computerized analysis or job matching program that compares a person's pre-injury profile with his post-injury profile. The profile focuses on physical and mental skills or traits as well as the type of jobs performed pre-injury. The computer program did not suggest any jobs for Claimant post-injury. Mr. Peniston is of the opinion that this analysis suggests that Claimant will require substantial accommodation if he finds an employer that will hire him with his limitations.

71. Claimant utilized the programs at the local Career Learning Center (CLC) and the SD Department of Labor local office (DOL) (formerly known as Job Service).

72. The CLC tested Claimant for psychomotor testing; this measured Claimant's level of finger dexterity, manual dexterity, and motor coordination. Claimant scored very low, as compared to the general population, in his ability to assemble fine objects. Claimant can work with small objects, but is slow. This test confirmed the FCE findings regarding Claimant's dexterity and ability to work with small objects.

73. Claimant has played guitar, for personal enjoyment, for a number of years. Claimant continues to attempt to play guitar. Claimant suffers pain when he attempts to play guitar. There is no indication on the record of Claimant's proficiency at this hobby.

74. Mr. Peniston issued a final report on April 25, 2008. The report included a definitive transferable skills analysis. Mr. Peniston was of the opinion that Claimant had made a substantial and reasonable effort to find work. He also opined that it was unlikely that Claimant would be able to secure employment at a substantial wage.

75. In March 2008, Employer/Insurer's vocational expert, Mr. Thomas Karrow, started assisting Claimant in finding employment.

76. Mr. Karrow had access to Claimant's release to work forms and Dr. Lawlor's work restrictions. Mr. Karrow knew that Claimant could work at an adjusted light to medium work, but within the restrictions issued by Dr. Lawlor. Mr. Karrow informed prospective employers that Claimant could work at light to medium employment.

77. Dr. Lawlor's restrictions limit Claimant to working at almost sedentary jobs.

78. Claimant applied for any job suggested by either Mr. Peniston or Mr. Karrow.

79. Claimant filled out applications at any business that may have a job that Claimant could work at with his restrictions and for which Claimant was qualified to perform.

80. Mr. Karrow suggested jobs in commission sales such as automobile sales. Claimant has no experience or training in commission car sales.

81. Between January 4 and November 13, 2008, Claimant applied for over 90 jobs.

82. Mr. Karrow initially told Claimant that Claimant was readily employable and did not require retraining. Mr. Peniston told Claimant that retraining was not feasible given Claimant's age and restrictions.

83. Claimant is generally computer illiterate. Claimant has taken advantage of the computer classes at the CLC and has learned how to use a computer to type a resume and apply for jobs.

84. Mr. Karrow contacted Western Dakota Vo-Tech to determine which programs would be available for a person with Claimant's capabilities. Mr. Karrow also gave the description of a person with light duty restrictions, a maximum lift of 20 pounds, sit constantly, stand and walk frequently, and no upper extremity limitations.

85. The Western Dakota Vo-Tech admissions coordinator recommended the computer aided drafting and paralegal programs based upon Mr. Karrow's description of Claimant.

86. The computer aided drafting program requires constant computer use or approximately 30% keyboarding and 70% mouse work.

87. The paralegal program required more computer and keyboarding use than the computer-aided drafting program.

88. There is no evidence in the record regarding specific computer accommodations being available for Claimant through Western Dakota Vo-Tech.

89. Due to the medical restrictions given to Claimant specifically for computer usage, Mr. Peniston did not believe Claimant was capable of retraining at Western Dakota Vo-Tech in any of the programs available.

90. Mr. Peniston contacted Western Dakota Technical Institute and spoke with instructors and department heads to determine if any programs were suitable for Claimant. Mr. Peniston could not identify a program that would accommodate Claimant's disabilities.

91. Mr. Peniston spoke with the disabilities coordinator. He indicated Claimant's specific abilities and disabilities as well as medical restrictions. The disability coordinator could not identify a suitable program for Claimant, even with accommodations.

92. Claimant is currently housesitting properties for people when they are on vacation. Claimant does this as the living accommodations are better than living in a trailer home in his parents' yard.

93. Claimant's worker's compensation rate is $386 per week or about $9.65 per hour for a forty-hour work week.

94. Claimant's testimony at hearing was credible.

Further facts will be developed as necessary.

ANALYSIS

Whether and to what extent Claimant is entitled to temporary total disability (TTD) or temporary partial disability (TPD) benefits following his separation from employment in July 2007 and until such time as he was assigned a physical impairment rating in September 2007?

The Supreme Court has adopted the "favored work" doctrine in determining whether claimants are entitled to workers' compensation benefits. "In general, a claimant who refuses favored (light duty) work, due to non-medical reasons, temporarily forfeits his right to compensation benefits." *Beckman v. John Morrell & Co.*, 462 N.W.2d 505, 509-10 (S.D. 1990). The Supreme Court explained the doctrine:

> The "favored work" doctrine, a judicial creation and term of art, imposes limits on claimants so as to "allow an employer to reduce or completely eliminate compensation payments by providing work within the injured employee's physical capacity." See *Pulver v. Dundee Cement Co*., 515 NW2d 728, 736 (Mich. 1994). … [T]he "favored work" doctrine is implicated when an employee is given the opportunity to continue employment through "favored work" with his or her employer. If the employee refuses such "favored work," then, under the doctrine, the employer cannot be legally obligated to remit workers' compensation benefits to that employee, due to his or her refusal of such work.

McClaflin v. John Morrell & Co., 2001 SD 86, ¶14 n.5, 631 NW2d 180, 185 n.5 (2001). In a heated telephone call, Employer ordered Claimant to report to work in July 2007 after Claimant had been given restrictions from his doctor. This work would have fit the restrictions and would be considered "favored work." Claimant refused the work for non-medical reasons.

South Dakota courts have provided precedent for when a claimant refuses "favored work" for medical reasons, but there is no case law in South Dakota for when a claimant refuses "favored work" for non-medical reasons. In his dissent in the case of *Beckman v. John Morrell & Company*, Chief Justice Miller wrote, "[u]nder the favored-work doctrine, the employer carries its burden of persuasion to show that the tendered job is within the claimant's residual capacity. Upon such showing, the burden of persuasion then shifts to the claimant to show that he is justified in refusing the offer of modified work." *Beckman v. John Morrell & Co.*, 462 NW2d 505, 510 (SD 1990) (Miller, C.J. dissent) (citing *Talley v. Goodwin Brothers Lumber Co.*, 224 Va. 48, 294 SE2d 818 (1982)).

In the *Beckman* case, the claimant made himself unavailable for "favored work" due to his participation in a union strike; therefore the employer did not offer the claimant any

light-duty or favored work. *Beckman* at 509-510. The claimant did not refuse any favored work as it was never offered by the employer. *Id*. The Department of Labor denied temporary total disability benefits to the claimant based upon claimant's unavailability for favored work. The Supreme Court affirmed the Circuit Court and the Department's denial of temporary total disability benefits. See *Beckman* generally. The Court did not consider whether Claimant's reasons for his unavailability were justified or whether Claimant's reasons were "good cause." *Id.*

Employer/Insurer has shown, through testimony of Employer, that the work offered by Employer was "favored work." The burden then shifts to Claimant to show good cause why he refused the work. Claimant has shown that he refused "favored work" for non-medical reasons; a previously scheduled physical therapy appointment (which Employer could have accommodated), coupled with threats and unfounded accusations made by Employer to Claimant. Those reasons may have been "good cause" for refusing to work for Employer, but the reasons were still non-medical. Workers' compensation benefits are to relieve a claimant who is out of work due to medical reasons.

Claimant is not entitled to TTD or TPD after being offered light-duty or "favored work" by Employer and before receiving his physical impairment rating.

Whether and to what extent Claimant's surgery of August 2007 represented reasonably necessary medical treatment and a treatment modality suitable and appropriate under the attendant circumstances?

South Dakota law requires an employer to provide necessary medical and surgical treatment to employees covered by workers' compensation insurance. SDCL 62-4-1. The South Dakota Supreme Court has clarified the burden of showing reasonable and necessary medical expenses. "It is in the doctor's province to determine what is necessary or suitable and proper. *When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.*" *Engel v. Prostrollo Motors*, 2003 SD 2, ¶ 32, 656 NW2d 299, 304 (SD 2003)(quoting *Krier v. John Morrell & Co.*, 473 NW2d 496, 498 (SD 1991) (emphasis in original).

"In general, if Claimant gets conflicting instructions on treatment from different doctors, and chooses to follow his own doctor's advice, this is not unreasonable." Larson's Workers' Compensation §10.10(5).

Employer/Insurer brought forward the deposition and opinion of Dr. John Dowdle, a Board Certified Orthopedic and Spinal Surgeon. Dr. Dowdle does not currently perform shoulder surgeries, but does diagnose injuries. Dr. Dowdle also performs evaluations and medical exams for EvaluMed, a company specializing in IMEs. At the request of Employer/Insurer, Dr. Dowdle examined Claimant in person as well as all relevant medical records. He issued his initial report on January 29, 2007. This report was issued prior to his first rotator cuff surgery. After the second surgery, Dr. Dowdle

reviewed the updated medical records. He issued a second report on June 19, 2007. In that addendum, Dr. Dowdle gave the opinion that Claimant's rotator cuff was completely repaired and that no further surgery was necessary at that point. Dr. Dowdle gave that opinion even though he also recognized that Claimant was not yet at MMI.

Based upon Dr. Dowdle's report addendum, Employer/Insurer denied coverage for a third surgery recommended by Dr. Fromm. Dr. Fromm is also a Board Certified Orthopedic Surgeon. Approximately 75% of Dr. Fromm's surgical practice involves the treatment of joints such as shoulders and knees. After seeing two separate MRIs and performing two surgeries, Dr. Fromm did not believe he could truly see the progress of Claimant's shoulder without an additional diagnostic surgery. Dr. Fromm gave the opinion that an MRI scan, even with enhancements, does not clearly distinguish between tissue tears, scar tissue or surgical adhesions. Dr. Fromm said that, in retrospect, the second MRI was inadequate as well and should not have been ordered.

The third surgery was performed in August 2007. Dr. Fromm observed during the operation that Claimant's rotator cuff was permanently and irreparably torn. Dr. Fromm was also able to see that Claimant's bicep tendon was impinged and was the likely cause of Claimant's pain. Dr. Fromm severed the bicep tendon, otherwise referred to as a tenotomy, to alleviate Claimant's pain. Claimant experiences less pain in his shoulder as a result of the tenotomy.

Dr. Dowdle made a third addendum to his report on September 24, 2007. He gave the opinion that Claimant had reached a healing plateau in July 2007, as the third surgery found that the rotator cuff was not repairable. He was on to say, "[o]ther than the diagnostic findings at the time of surgery the additional debridement and manipulation was not necessary." This opinion did not mention the fact that Dr. Fromm performed a tenotomy or that Claimant received therapeutic benefit from the third surgery. Dr. Dowdle did testify during the pre-hearing deposition that if the surgery served some therapeutic benefit, it was necessary.

Dr. Fromm's opinion and findings are deemed to be more persuasive than Dr. Dowdle's. Dr. Fromm has more expertise in joint surgery and shoulder work than Dr. Dowdle. Employer/Insurer has failed to show that the third surgery performed in August 2007 was not medically necessary or suitable and proper pursuant to SDCL 62-4-1 and subsequent case law. Employer/Insurer is responsible for the payment of medical expenses associated with Claimant's third surgery of August 2007.

Whether Claimant qualifies for a finding of permanently total disability status by application of the "odd-lot" doctrine?

Claimant makes the argument that he is permanently and totally disabled and is eligible to receive benefits under the "odd-lot" doctrine. The criterion for finding a status of permanent total disability is described in SDCL §62-4-53:

> 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.

The Supreme Court has set out that the Claimant has two avenues to make the required prima facie showing for inclusion in the odd-lot category:

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

Kassube v. Dakota Logging, 2005 SD 102, ¶34, 705 NW2d 461, 468 (internal citations and quotations omitted). See also *Fair v. Nash Finch Company*, 728 NW2d 623, 623-633 (SD 2007).

The facts of each case determine whether there is sufficient evidence to support the Department's findings that the claimant was permanently and totally disabled under the odd-lot doctrine. *Kassube* at ¶35.

In October 2007, Dr. Fromm referred Claimant to a physical therapist for a functional capacity evaluation (FCE) to be conducted. The FCE was performed on November 14, 2007. The physical therapist who performed the test, found the test results to be valid. The FCE is not a perfect measurement of the abilities of a claimant, but it is an objective test that helps and guides professionals in determining what actions a claimant can and cannot perform or how often a claimant may perform certain actions.

Dr. Brett Lawlor, a board certified specialist in physical medicine and rehabilitation as well as the treatment of pain, reviewed the FCE at the request of Dr. Fromm. Dr. Lawlor met with Mr. Peniston regarding Claimant's work restrictions. Dr. Lawlor reviewed the FCE and made recommendations regarding Claimant's return to work restrictions and general physical restrictions. Dr. Lawlor's restrictions limit the use of Claimant's left hand and arm to light work. More specifically, Claimant may not lift over five to ten pounds with his left arm; he cannot climb ladders or crawl; he has a limit on the repetitive use of his left arm; and Claimant can only reach away or overhead with the left arm on an occasional basis (defined as 3-33% or 24 minutes to 2 ½ hours of an eight-hour workday), this includes the bilateral use of a computer keyboard and mouse (using both the right and left hands and arms). Claimant is also restricted from returning to his usual and customary employment as a heavy-equipment operator, driving heavy trucks, or driving over-the-road tractor-trailers.

The restrictions do not limit the repetitive use of Claimant's right arm. Claimant is still able to lift up to 30 pounds with his right arm on an infrequent basis or 25 pounds on an occasional basis. Claimant may perform bilateral lifts or back lifts of up to 13 pounds on an occasional basis or 23 pounds on an infrequent basis. Claimant may also perform fine hand work on a regular basis.

In September 2007, after the FCE was performed and before Dr. Lawlor gave his opinion regarding Claimant's restrictions, Claimant obtained a job with the Airport Shuttle Service at minimum wage. The South Dakota minimum wage is less than Claimant's work-comp rate of $9.65 per hour for a 40-hour work week. Claimant was able to find a job that was mostly within his restrictions. Claimant soon found that his physical disabilities did not allow him to keep that position. Although it fit within the restrictions set down on paper, Claimant could not handle the amount of luggage and packages required of him without experiencing pain in his shoulder and back. Claimant left that job in late December 2007. Claimant did not find any suitable jobs after leaving the taxi driver position.

Claimant is not obviously unemployable, as set out in the *Kassube* test. Moreover, Claimant has not made the argument that he is obviously unemployable. However, I will address whether the evidence shows otherwise. A private investigator hired by Employer/Insurer, videotaped Claimant. Claimant was seen raking a section of his parents' yard with one arm, and performing a bilateral lift of a plastic garbage can of leaves and yard waste. Both of these activities are within the restrictions set out by Claimant's medical providers. Claimant's physical condition limits Claimant's ability to use his upper extremities as well as his back, but he can still use his right hand and arm for most activities. Claimant does not have any formal higher education or formal training in any profession. Claimant has operated his own business. However, most of Claimant's informal training and experience is with heavy equipment, manual labor or automobile mechanics. Claimant is in his early-50's. Claimant is not obviously unemployable based upon his physical condition coupled with his education, training, and age.

During the hearing on January 16, I observed Claimant in obvious pain or discomfort on a number of occasions. After taking his seat in the room, Claimant appeared to show signs of discomfort or pain every 10-15 minutes. Claimant adjusted his position frequently and changed his position from sitting to standing. Claimant did remain seated for most of the 6-hour hearing. Despite his pain and his changing positions frequently, I do not believe Claimant is obviously unemployable based upon pain alone, as it is not continuous, severe and completely debilitating.

Availability of suitable work

In this case, the burden remains on Claimant to show that his disability is so specialized in nature that suitable work is unavailable to him, despite reasonable efforts to find work. The Supreme Court has ruled that "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 claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made 'reasonable efforts' to find work." *Peterson v. Hinky-Dinky*, 515 NW2d 226, 232 (SD 1994).

Since high school, Claimant had always been employed. There are few instances in Claimant's history where he was without work. Claimant, prior to and then with the assistance of Mr. Bill Peniston, made job contacts to anyone that may be searching for employees. Claimant utilized the local DOL office and the Career Learning Center. He looked for jobs in the want ads and with those who registered open positions with the DOL. Claimant performed all testing requested by the DOL and the CLC, including psychomotor testing at Black Hills Special Services as requested by Mr. Peniston. Claimant made contacts with former employers and business contacts. Claimant applied for every job that may have an opening for which he was qualified or could work within his restrictions. Claimant's job search continued after Employer/Insurer's expert, Mr. Karrow, began helping Claimant. Both vocational experts worked diligently to find open positions that may fit within Claimant's job restrictions. Initially, both vocational experts believed that Claimant may be employable within his restrictions. Claimant applied for over 90 jobs between January 4 and December 13, 2008. Claimant interviewed with every employer that asked for an interview.

"South Dakota has generally applied a reasonableness standard when analyzing the job search of an odd-lot claimant. When determining if a claimant qualifies for odd-lot classification, courts have considered the age, training, and experience of the person seeking classification. South Dakota courts have also considered the intent of the claimant, to the extent that he or she must show some motivation to become re-employed." *Johnson v. Powder River Transportation*, 2002 SD 23, ¶15, 640 NW2d 739 (SD 2002) (internal citations omitted).

In this case, and similar to *Johnson*, Claimant's work search was valid, honest, and reasonable. Employer/Insurer has not shown evidence that Claimant refused to search for work or has unreasonably declined work offers. *Johnson* at ¶18. Claimant has

produced substantial evidence that he is not employable in the current competitive market due to his disability. Claimant has met his burden of unemployability and has made a prima facie showing of permanent total disability, pursuant to SDCL 62-4-53.

The Supreme Court set out the parties' burdens of proof in the *Spitzack* case. They wrote:

> We held that under the odd-lot test for determining total disability, once an employee has made a prima facie showing that suitable employment is unavailable, the employer then has the burden of establishing that the employee would be capable of finding such employment without rehabilitation. Once a claimant establishes inability to find suitable employment, the employer is left to show that job opportunities exist in the competitive market. Logically, if an employer asserts that jobs are available to a claimant upon retraining or rehabilitating, then the employer must prove such assertion by establishing that retraining or rehabilitation is a reasonable means of restoring the claimant to suitable employment.

Spitzack at 77 (internal citations omitted). See also *Baier v. Dean Kurtz Construction, Inc.*, 2009 SD 7, 761 NW2d 601; and *Capital Motors, LLC v. Schied*, 2003 SD 33, 660 NW2d 242.

"The burden will only shift to the employer in this second alternative when the claimant produces substantial evidence that he is not employable in the competitive market. Then the employer must show that some form of suitable work is regularly and continuously available to the claimant." *Shepard v. Moorman Mfg*., 467 N.W.2d 916, 918 (SD 1991). "While it is not required that an employer actually place a claimant in an open job position, more than mere possibility of employment must be shown; the employer must establish that there are positions actually open and available. *Spitzack* at 76. (citing *Rank v. Lindblom*, 459 N.W.2d 247, 249 (S.D. 1990).

Mr. Karrow listed in his report, a number of different businesses in the Rapid City area that may have jobs available in the light to medium category. The list, as later explained by Mr. Karrow, was not a list of businesses with current openings or with openings that Claimant was asked to make application. Mr. Karrow had Claimant apply for jobs at some of the businesses, but not all. Mr. Karrow did not contact these businesses to check whether they can accommodate someone with Claimant's disabilities. In fact, Mr. Karrow specifically remarks that he did not see any need for accommodations to be made for Claimant. Mr. Karrow testified that if he did call and ask whether there was work open for Claimant, he would not have provided the business with Claimant's specific medical restrictions or disabilities.

Mr. Karrow's potential job list consists of computer jobs, commissioned sales positions, building inspector, blood bank technician, assistant department manager for home supply store, phone representative, bus driver, and automobile service consultant. Mr. Karrow did not specifically contact these employers to enquire whether the jobs are usually available or whether the businesses are able to accommodate someone who

cannot use a computer for more than 30 minutes a day and cannot lift anything over 20 pounds, bilaterally. Some of the jobs, such as blood bank technician, require retraining. Employer/Insurer's evidence, regarding the ongoing availability of suitable jobs for Claimant, is insufficient to meet their burden.

Retraining or vocational rehabilitation

Under SDCL 62-4-53, Claimant must make a showing, by expert opinion, that he is unable to benefit from vocational rehabilitation or that the same is not feasible. Claimant's experts have shown that retraining is not feasible given Claimant's work restrictions. Claimant's medical restrictions, as set by Dr. Lawlor, limit Claimant's use of a keyboard and mouse to about 3% of the average 8-hour workday, or about 30 minutes per day. The retraining programs, as suggested by Mr. Karrow, involve extensive classroom computer usage or the bilateral use of Claimant's arms outstretched for longer than what the medical restrictions allow. The teachers contacted by Mr. Peniston indicated that accommodations, such as a voice-activated computer, can be used by students when working at home, but are not available to be used in the classroom. There is no longer a retraining program for public safety dispatchers. The phlebotomy program required that Claimant use both arms outstretched 40 to 50 times per day. The instructor did not believe Claimant's restrictions could be accommodated within that program. The Disability Coordinator for Western Dakota informed Mr. Peniston that there were no suitable programs at the facility that would meet Claimant's restrictions.

Mr. Peniston, in his report, looked at the type of work that may be available to Claimant, if he was to receive vocational training. Mr. Peniston was unable to match Claimant with potential jobs because of Claimant's physical limitations. Claimant has produced substantial evidence that he is not employable in the competitive market, even with retraining. *Spitzack v. Berg Corporation*, 532 N.W. 2d 72, 75 (SD 1995), *Shepard v. Moorman Mfg*., 467 N.W.2d 916, 918 (SD 1991).

Employer/Insurer has not shown that Claimant is able to attend a retraining course that meets the medical and physical restrictions as set by Dr. Lawlor. Mr. Karrow alluded to some possible accommodations that may be made by Western Dakota Vo-Tech, but did not confirm with the school whether these accommodations are possible. Mr. Karrow did not give details of Claimant's disability and limitations when speaking with the Vo-Tech. Mr. Karrow noted in his report that it is not necessary for Claimant to undergo training in order to return to full-time suitable, substantial and gainful employment. Mr. Peniston's opinion regarding retraining is deemed to be more persuasive than Mr. Karrow's and is adopted by the Department. Employer/Insurer's evidence is insufficient to overcome Claimant's expert evidence and show that Claimant would benefit from retraining.

In conclusion, Claimant has shown that due to the specialized nature of his disability he falls into the odd-lot doctrine of permanent total disability as suitable work is unavailable to Claimant in the competitive market. Claimant made reasonable efforts to find employment and retraining is not available to Claimant given his medical restrictions.

Employer/Insurer has not met their burden of showing ongoing suitable employment is available in this competitive market for which Claimant is capable of performing within his restrictions and without retraining.

Issue 1 - Counsel for Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law for Issue 1, within 20 days of the receipt of this Decision. Claimant shall have an additional 20 days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections.

Issues 2 & 3 - Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, for issues 2 and 3, within 20 days of the receipt of this Decision. Employer/Insurer shall have an additional 20 days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections.

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 consistent with this Decision.

Dated this 15th day of June, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Catherine Duenwald
Administrative Law Judge