DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

MAHMOUD AMER, **HF No. 4, 2012/13**

Claimant,

v. **DECISION**

JOHN Q. HAMMONS HOTELS, INC.,

Employer,

and

TRAVELERS INDEMNITY,

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 case was heard by Donald W. Hageman, Administrative Law Judge, on May 22, 2014, in Sioux Falls, South Dakota. Claimant, Mahmoud Amer, was represented by Lee C. (Kit) McCahren. The Employer, John Q. Hammons Hotels, Inc. and Insurer, Travelers Indemnity were represented by Charles A. Larson.

Legal Issue:

The legal issues presented at hearing are stated as follows:

Whether Mahmoud Amer is entitled to permanent total disability benefits?

Facts:

The Department finds the following facts:

1. Mahmoud Amer (Amer) grew up in Egypt and was 56 years old at the time of the hearing.

2. Amer worked for TWA for sixteen years until he was laid off in 2000.

3. Amer did not work from 2000 to 2005. In 2005, he drove truck for a couple months, and then was off of work again until 2007.

4. Amer attended hotel management schools in Switzerland. After graduating, Amer was employed by John Q. Hammonds Hotels, Inc. (Employer in Sioux Falls.) Amer was employed by Employer from March 19, 2009, to April 15, 2011.

5. It is undisputed that while working for Employer, Amer slipped on ice and injured his knees and eventually underwent bilateral knee replacement surgery. Travelers Indemnity (Insurer) has paid all medical bills associated with Amer's knee injury. Insurer has also paid temporary total disability, temporary partial disability and permanent total disability benefits to Amer. The only benefits disputed by Insurer are those claimed by Amer for permanent total disability benefits (odd lot).

6. Amer had his first knee replacement surgery on October 20, 2010.

7. When Amer returned to work for Employer after his first surgery, he had the restrictions of no prolonged standing which was accommodated by the Employer.

8. After his first knee replacement he returned to work with Employer and was accommodated with his restrictions.

9. Amer testified that he physically had difficulties working after his first surgery, but he never complained to anyone at work about his pain or being unable to do his job.

10. Amer had his second knee replacement surgery on January 24, 2011.

11. Amer was released to work on March 19, 2011, after his second knee replacement surgery. However, he never gave his work restrictions to Employer. Instead, he simply quit his job.

12. The only contact Amer had with Employer after his second surgery was an email resigning his employment. The email gave his two weeks' notice on April 1, 2011.

13. Amer initially stated that he quit his employment with Employer because it could not accommodate his injury. However, Brita Barnes, the Director of Human Resources for Employer, testified that Employer could have accommodated Amer's restriction and has a policy to do so if possible. Barnes also testified that Amer gave her no reason for his leaving. Barnes' testimony was more credible than Amer's.

14. Amer later admitted on cross-examination that he quit his job with Employer because he was going to work for Grand Falls Casino. He accepted the job at Grand Falls because it paid $4.00 more per hour than he made with Employer.

15. Amer testified that he did not notify Grand Falls about his injury as he knew if he told them about his injury or put it on his job application he would not have been hired. Claimant was hired as the front desk auditor and night auditor.

16. Amer began working for Grand Falls Casino on April 8, 2011. He worked forty hours a week.

17. Amer received a return to work form on April 19, 2011, which released him to work without restrictions. He initially testified he did not know if he looked at the restrictions or paid any attention to them. He then testified he did not recall receiving the work restrictions. However, in a pretrial deposition, Amer acknowledged that he received Dr. Hurd's release to work without restrictions. When Amer was confronted with his deposition testimony at the hearing, Amer stated that he really was not paying any attention during his deposition. Amer's testimony during this exchange was not credible.

18. Dr. Ripperda gave an impairment rating to Amer on June 16, 2011. He assessed 50% lower extremity impairment for Amer's right knee and 75% lower extremity impairment for his left knee. When combining the two lower extremity impairments, resulted in a total lower extremity impairment of 88%. Dr. Ripperda's impairment rating did not include any work restrictions.

19. Amer worked with Pat Lund (Lund) at Grand Falls Casino for approximately six months, and the two had a good relationship. Lund was the former Director of Human Resources at Grand Falls Casino, and is the current Director of Human Resources at the Hard Rock Hotel and Casino in Sioux City.

20. Amer testified that he was walking with a "significant limp" while working at the Grand Falls Casino, and it would have been noticeable to anyone who saw him. He testified that he tried to hide his pain and issues, but that he certainly did not walk normally. Amer testified that he had to quit Grand Falls Casino because his job changed and he was required to stand for eight hours a day. He stated that he never approached anyone at Grand Falls Casino to indicate that he was unable to stand for eight hours a day. He denied that he simply failed to show up for work, and that he specifically told Lund that he was quitting his employment but did not tell her why.

21. Lund's testimony differed from Amer's. Lund testified that Amer worked for her at Grand Falls Casino, and she was the one who hired him. She observed him on a frequent basis and spoke to him nearly every day. Lund never saw Amer walk with a limp and never observed him to be in pain. She also testified that Amer never complained of knee pain or problems. If an employee at the casino needed accommodations to perform their job, they would have discussed that need with Lund. Amer never approached her about work restrictions or accommodations. Lund testified that his job did not change. Lund testified that Amer was not required to stand eight hours a day, and she was surprised that he

claims that he was physically unable to do his job and that she had no knowledge of a disability or pain. In addition, Lund testified that Amer never actually quit work; he simply stopped showing up for work. After he missed his shifts, Lund tried calling him multiple times, but Amer never returned her phone calls. He did not send an email to Lund, or called and she had not seen or heard from him since October of 2011.

22. Amer's testimony at the hearing was not credible. It conflicted with the testimony of Lund whose testimony was much more credible. Amer's testimony contained many inconsistencies which are discussed in both the facts and analysis of this decision. In addition, Amer's appearance at the hearing was not credible. His movements while standing and walking were forced and exaggerated. At times he seemed unable to flex his hips and knees while at other times when he was not thinking about it, he flexed those joints with little difficulty. Amer also did not show any indication of having much pain while struggling to stand or walk.[1]

23. Lund's testimony was credible. Her testimony was straightforward and she spoke confidently and responded without hesitation. She also had no motive to either lie or "color" her testimony.

24. A doctor did not take Amer off of work before he quit working at Grand Falls Casino; it was his decision to quit in October of 2011.

25. Amer has not sought medical treatment for his knees since October 9, 2012, even though he knew that workers' compensation would cover the cost of his treatment. He has also not received any prescription pain medication during this time.

26. The doctors have told him the x-rays demonstrate everything structurally looks good.

27. Amer had an independent medical evaluation (IME) on May 22, 2012, which was performed by Dr. Bell. Dr. Bell assessed Amer with bilateral knee pain but did not issue any work restrictions.

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[1] The Department did not find the video admitted into evidence to be of much evidentiary value. Amer's movements on the video were clearly staged for purposes of video-taping. Moreover, there was no evaluation of the video by a medical professional, which may have been more helpful than the subjective conclusions drawn by the Department.

Nevertheless, the Department found that the acting on the video was better than it was at the hearing. However, there is still little indication of any severe pain on the part of Amer. It also occurred to the Department that the use of a wheelchair would have provided anyone struggling as much as Amer did, with better mobility and a better platform from which to stand. The low, soft, armless sofa from which Amer struggled to stand would have presented difficulty to many who have no disability.

It is also noteworthy that Amer's left knee, which is his worst knee, inadvertently bent further than it had in other portions of the video, while he was getting into the vehicle.

28. Amer has returned to Egypt at least three times since his injury. The flights, with connections, mean approximately twelve and a half hours in the air, with layovers in each airport. He spent several months in Egypt in 2013. Amer did not disclose his trips to Egypt to Ostrander. Ostrander learned about the trips from testimony at the hearing.

29. Lund reviewed the impairment rating during her cross-examination during the hearing. The impairment rating was wholly inconsistent with Lund's personal observations of Amer during that time period. The impairment rating was completed on June 16, 2011, which is the week after Grand Falls Casino opened.

30. Amer testified that in October of 2012, he was having an extreme amount of pain in his knees, had problems walking, sitting, and standing, and needed to use a cane or a walker to ambulate. He also testified that he told this to Dr. Hurd. However, during the final treatment on October 17, 2012, Dr. Hurd's records indicate that Amer's pain was better and was very tolerable. He was no longer having any pain in his knees and was ambulating without any significant discomfort and without the need for any assistive devices.

31. Amer received new work restriction from Dr. Hurd on November 9, 2012. At that time, Dr. Hurd limited Amer's walking to three hours a day, his standing to four hours a day, limited his bending and twisting, and indicated that Amer was not to squat, kneel, crawl, climb stairs, ladders, or scaffolding.

32. Rick Ostrander is a vocational expert who testified on behalf of Amer. Ostrander testified that in his opinion Amer was obviously unemployable. His opinion was based on Dr. Ripperda's impairment rating and Amer's description of his limitations.

33. Jim Carroll is a vocational expert who testified on behalf of the Employer and Insurer. He testified that he found 18 jobs that were available to Amer which fell within the job restrictions provided by Dr. Hurd on November 9, 2012, and paid at or above Amer's compensation rate. Ostrander agreed that work was available to Amer using Dr. Hurd's work restrictions.

34. Jim Carroll testified that in his opinion Amer did not make a reasonable job search.

35. Amer quit his job at Grand Falls Casino in October of 2011. The first application for work that he made after that time was on June 26, 2013.

36. Amer received a copy of Jim Carroll's vocational report. There were numerous jobs listed in the report, along with the pay information, but Amer did not apply for any of the job leads provided. Instead, he applied for jobs at random hotels and motels without knowing whether the business was hiring. He also limited his job

search to hotels and motels despite the fact that he had job skill that are transferrable to other job industries.

37. When Amer did apply for work, he wrote on several of the applications that he was disabled. In his application to Value Place, Amer was asked what "special qualifications" he had, and his response was "Knees replaced. Can't sit, stand or walk long." In that same application, he indicated the reason he left Employer was because he had an accident that resulted in his knees being replaced. He wrote that he left Grand Falls Casino because his knees were replaced and he could not sit or stand very long.

38. Amer testified that he did not know if putting his disability on his job application would preclude him from getting an interview. This testimony was not credible in light of the fact that he did not put his injury on his application to Grand Falls Casino because they would not have hired him had they known.

39. Rick Ostrander testified that if someone indicates on a job application that they are disabled, it pretty well guarantees they are not going to get an interview.

40. Additional facts will be discussed in the analysis below.

Analysis:

In this case, the Department must determine whether Amer is entitled to permanent total disability benefits (PTD). The standard for determining whether a claimant qualifies for “odd-lot” benefits is set forth in SDCL 62-4-53, which provides in relevant 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. 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 employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). 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.

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."

In McClaflin v. John Morrell & Co., 2001 SD 86, the South Dakota Supreme Court decision discussed the burdens of proof required in odd-lot cases:

> 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.
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> We have recognized two avenues in which a claimant may pursue in making 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."
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> 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 at ¶ 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).

Here, Rick Ostrander's testimony is sufficient to make a prima facie showing that Amer is "obviously unemployable" because his physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category.

Therefore, the burden shifts to the Employer to show that some suitable work is regularly and continuously available to the Amer.[2]

When considering whether suitable work is available, Amer's work restrictions must be considered. Dr. Hurd is in the best position to provide those restrictions. He treated Amer on an ongoing basis from October of 2010 until November of 2012. He also performed two knee replacement surgeries on Amer during that time. On the other hand, Dr. Ripperda and Dr. Bell only saw Amer on one occasion. Dr. Hurd's November 9, 2012, work restrictions were also provided after Dr. Bell's and Dr. Ripperda's observations of Amer. Finally, Dr. Bell and Dr. Ripperda did not provide Amer with any actual work restrictions and Dr. Ripperda declined when asked to do so.

Both vocational experts agreed that work was available to Amer in the Sioux Falls job market under the last work restrictions provided by Dr. Hurd. Jim Carroll found 18 such jobs available to Amer which required skills that were transferrable from Amer's former employment and paid a wage equal to or greater than Amer's compensation rate. Therefore, the Department finds that Employer and Insurer have met their burden of showing that suitable work within claimant's limitations is actually available in the community.

In addition, Amer has failed to show that he has made a reasonable, good faith work search effort. First, he did not apply at any of the job openings provided to him by Jim Carroll. He also limited his search to certain motels and hotels without inquiring whether those businesses had any job opening. Finally, he stated on his job applications that he was disabled knowing that that information would likely preclude him from getting hired.

Throughout this case, Amer has emphasized the fact that Dr. Ripperda has given him an 88% lower extremity impairment rating. However, the testimony of both vocational experts suggests that impairment ratings are not a good indicator of either disability or employability. Someone can have a 100% impairment to a body part without any impact on their ability to work. Indeed, many wheelchair bound individuals are successfully engaged in full time employment. Further, people with high impairment ratings often have less work restrictions than someone with a lower impairment rating. Here, Amer has a post-secondary degree in hotel management with transferable skills to many customer service type jobs. With minor accommodations, Amer is capable of working at a hotel management type job even if he were wheelchair bound.

Further, there are several facts in this case that cast doubt on the validity of the impairment rating. Amer argues that Employer and Insurer are precluded from challenging the validity of the impairment rating citing Hayes v. Rosenbaum Signs, 2014

[2] Amer did not meet his burden of showing that he was "obviously unemployable" under the second method stated in McClaflin. That is by "persuading the trier of fact that he is in the kind of continuous, severe and debilitating pain which he claims." In addition to Amer's lack of credibility at the hearing, he has not sought medical treatment or taken any prescription pain medication since at least October of 2012.

SD 64. The Department disagrees. While the impairment rating is not at issue here, there has be no judicial acceptances of the impairment rating at this point in time and judicial acceptance is a necessary requirement of judicial estoppel. Further, the Department, hereby, retains jurisdiction of the permanent total disability benefits paid to Amer should the parties decide to address that issue in the future.

Conclusion:

In conclusion, the Department finds that Amer has failed to meet his burden of showing that he is entitled to permanent total disability benefits due to his work injury and bilateral knee replacements.

Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Amer shall have an additional 20 days from the date of receipt of Employer and Insurer'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, Employer and Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this __11th__ day of November, 2014.

__/s/ Donald w. Hageman_____
Donald W. Hageman
Administrative Law Judge