SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

LYLE G. WIEDMANN
Claimant,

HF No. 77, 2004/05 and 377, 1995/96

v.

DECISION

MERILLAT INDUSTRIES,
Employer and Self-Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. Claimant appeared personally and through his counsel, Margo Tschetter Julius. Richard Travis represented Employer/Self-Insurer (Employer).

Issues:

1. Whether continued biofeedback sessions, epidural injections and a YMCA membership are reasonable and necessary medical expenses.
2. Whether Claimant has demonstrated a change in condition pursuant to SDCL 62-7-33.
3. Whether Claimant is permanently totally disabled under the "odd-lot" doctrine.

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

1. Claimant injured his low back on March 21, 1994, while working for Employer.
2. Claimant had worked for Employer since June of 1987.
3. Claimant's injury was accepted as compensable. Employer paid Claimant's numerous medical expenses for treatment of his herniated disk, chronic pain, fibromyalgia, and depression.
4. Claimant made an unsuccessful claim for permanent total disability benefits in 1996. At the time of his claim, he was working part-time for Employer. His claim was rejected by the South Dakota Supreme Court in Wiedmann v. Merillat, 623 N.W.2d 43 (S.D. 2001). The basis for the rejection was Claimant's refusal to participate in a pain management program designed to help his condition. Id. at p. 49.
5. Claimant participated in and successfully completed the pain clinic at Black Hills Rehabilitation Hospital in 2001.
6. Claimant continued some of the treatment instituted at the pain clinic as recommended by his doctors, including biofeedback, periodic injections for pain relief, and a regular exercise program at the YMCA.

7. Claimant no longer works for Employer. He was forced to stop working due to his pain in February 1998.
8. Claimant has not worked since February 19, 1998.
9. In the fall of 2001, Claimant moved in with his mother in Aberdeen, South Dakota, out of financial necessity.
10. Claimant treated with board certified rheumatologist Dr. James Engelbrecht.
11. Claimant was referred to Dr. Heloise Westbrook, a physiatrist and pain medicine specialist, and Dr. Thomas Price, a licensed psychologist and pain therapy specialist.
12. Claimant continued his YMCA exercise program with membership paid for by Employer up until October 2004.
13. Dr. Richard Farnham conducted an examination pursuant to SDCL 62-7-1 and issued a report dated October 24, 2004. Based upon Dr. Farnham's report, Employer denied the compensability of continued biofeedback expenses, injections for pain relief, and YMCA memberships.
14. Claimant's condition has changed in that he has now participated and successfully completed a pain clinic program. It has been more than five years since the South Dakota Supreme Court reviewed his case. Pursuant to SDCL 62-7-33, Claimant's claim for permanent total disability payments is fully reviewable.
15. Claimant's testimony at the August 2006 hearing regarding the severity of his pain is credible.
16. Claimant's testimony at the August 2006 hearing regarding the debilitating nature of his pain is credible.
17. Based upon Claimant's credible testimony and the testimony and reports of his treating medical providers, Claimant is in severe and debilitating pain.
18. Claimant is obviously unemployable due to his severe and debilitating pain.
19. Claimant's community for purposes of a permanent total disability analysis is Aberdeen, South Dakota.
20. Employer/Insurer failed to demonstrate the availability of some form of suitable work that is regularly and continuously available to Claimant in his community.
21. The medical evidence demonstrates that work search efforts by Claimant would be futile given his severe and debilitating pain.
22. As acknowledged by Employer, Claimant possesses two associates degrees and further vocational rehabilitation would provide no benefit to Claimant.
23. Other facts will be developed as necessary.

Issue One

Whether continued biofeedback sessions, epidural injections and a YMCA membership are reasonable and necessary medical expenses.

The general rule is that the claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967). The claimant must prove

the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992). The South Dakota Workers' Compensation law provides that an employer is responsible for "necessary first aid, medical, surgical and hospital expense, or other suitable and proper care." SDCL 62-4-1.

There is no dispute that Claimant suffered a compensable injury. Dr. Engelbrecht, Dr. Westbrook, and Dr. Tom Price are Claimant's treating medical providers. "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, suitable or proper." Engel v. Prostrollo Motors, 2003 SD 2, ¶32, 656 N.W.2d 299 (citations omitted).

In support of its burden, Employer offered the opinions of Dr. Richard Farnham. Dr. Farnham is a Diplomate of the National Board of Medical Examiners, American Board of Forensic Examiners, American Board of Disability Analysts, American Board of Forensic Medicine, and American Association of Medical Review Officers. Dr. Farnham operates Farnham Forensic Medical Evaluations, P.C., in Sioux Falls, South Dakota. Dr. Farnham conducted two medical examinations of Claimant. He has not treated Claimant. He agrees that Claimant suffers from depression and chronic pain syndrome. Dr. Farnham opined that Claimant's biofeedback sessions, epidural injections, and YMCA membership are not reasonable and necessary medical expenses.

BIOFEEDBACK SESSIONS:

Claimant participates in biofeedback sessions with Dr. Thomas Price, a clinical psychologist. Dr. Price conducted a psychological evaluation of Claimant in March of 2003. Dr. Price treated Claimant and instructed him on biofeedback. Dr. Price's records reveal that Claimant has been unable to achieve the desired results of biofeedback when he practices on his own. Dr. Westbrook's records reveal that she has continually recommended that Claimant undergo biofeedback sessions for pain management.

Dr. Farnham opined that Claimant does not need continuing biofeedback sessions. He explained:

> Q: So, why then do you say that additional medical -- or biofeedback sessions are not medically indicated?
> A: Because he already had biofeedback. Biofeedback is something you practice at home. You don't have to keep going to biofeedback sessions with a psychologist. It's something you're taught over a period of time, and he had already attended a pain management program from March of 2000 through November of 2001. Therefore, I did not believe that additional biofeedback was appropriate.

Dr. Farnham did agree that Claimant "needs some psychological counseling to help him deal with his pain issues so that he could perhaps go back to work."

Dr. Westbrook is a pain management specialist. Dr. Price is a clinical psychologist who has worked with and treated Claimant for his pain. Dr. Farnham's opinion that Claimant should already know how to perform biofeedback exercises and further biofeedback sessions are not reasonable and necessary medical expenses is rejected. It is clear from the medical records that biofeedback sessions are reasonable and necessary medical treatment for control of Claimant chronic pain syndrome and depression.

EPIDURAL INJECTIONS:

Claimant receives periodic epidural injections from Dr. Westbrook. Her records reveal that Claimant receives beneficial pain control from these injections. Dr. Farnham opined that epidural injections are not reasonable and necessary medical expenses for Claimant because they bring only "temporary" pain relief. Dr. Farnham is not a pain specialist. Claimant's testimony regarding his pain is credible and his pain complaints are corroborated by the medical records of Dr. Westbrook, Dr. Price, and Dr. Engelbrecht. The periodic epidural injections are reasonable and necessary medical expense.

YMCA MEMBERSHIP:

Dr. Farnham says Claimant should be able to do these exercises on his own. The medical records do not support this conclusion. Dr. Price has encouraged Claimant to continue with the YMCA exercises for both his physical and mental health. No evidence was offered which would show the YMCA membership is too expensive for the benefit. Dr. Farnham says simply that Claimant should be able to do these exercises on his own. Dr. Farnham's opinions are rejected. Claimant's treating medical providers agree that regular exercise is beneficial to Claimant's condition. The YMCA membership is a reasonable and necessary medical expense.

Claimant's treating physicians recommend that Claimant receive injections, biofeedback and YMCA therapies for assisting with his pain. Despite Employer's denial of the YMCA membership expense, Claimant has continued his membership under a scholarship program provided by the Aberdeen YMCA, which allows him a membership for five dollars a month. Dr. Engelbrecht opined that Claimant's condition had deteriorated to the point that Claimant was obviously unemployable. Dr. Engelbrecht expressed concern about Claimant's ability to maintain independent living if he does not maintain his current level of functioning. Biofeedback provides Claimant with some help with his chronic pain and is a reasonable and necessary medical expense. Epidural injections provide Claimant with relief of the "shooting pain" in his left leg, which Claimant credibly described as feeling like electric shocks down into his leg. The periodic epidural injections as recommended by Claimant's treating physicians are reasonable and necessary medical expenses. Claimant's YMCA membership, whereby he participates in aerobic exercise 2 to 3 times per week, alternating between a cross trainer, elliptical trainer, aerodyne bicycle and an incline treadmill is a reasonable and necessary medical expense.

Issue Two

Whether Claimant has demonstrated a change in condition pursuant to SDCL 62-7-33.

SDCL 62-7-33 provides:

> Any payment, including medical payments under 62-4-1, and disability payments under 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the department of labor pursuant to 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action. Any case in which there has been a determination of permanent total disability may be reviewed by the department not less than every five years.

The Supreme Court held that Claimant had to undergo a pain management program before his claim for permanent total disability could be accepted or evaluated. Claimant has now undergone that program. Given the procedural and factual history of this case, Claimant's participation in the pain management program is enough to show a change in condition.

Issue Three

Whether Claimant is permanently totally disabled under the "odd-lot" doctrine.

At the time of Claimant's injury, SDCL 62-4-53 (1994) defined permanent total disability 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 claimant in the community. An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

The South Dakota Supreme Court has further defined the burdens of proof:

> To qualify for odd-lot worker's compensation benefits, a claimant must show that he or she suffers a temporary or permanent "total disability." Our definition of "total disability" has been stated thusly:
>
> > A person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in insubstantial income.
>
> Under the odd-lot doctrine, the ultimate burden of persuasion remains with the claimant to make a prima facie showing that his physical impairment, mental capacity, education, training and age place him in the odd-lot category. If the claimant can make this showing, the burden shifts to the employer to show that some suitable work is regularly and continuously available to the claimant.
>
> We have recognized two avenues in which a claimant may pursue in making out the prima facie showing necessary to fall under the odd-lot category. First, if the claimant is "obviously unemployable," then the burden of production shifts to the employer to show that some suitable employment within claimant's limitations is actually available in the community. A claimant may show "obvious unemployability" by: 1) showing that his "physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category," or 2) "persuading the trier of fact that he is in the kind of continuous, severe and debilitating pain which he claims."
>
> Second, if "'the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or regulated to the odd-lot category,' then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has made [] 'reasonable efforts' to find work" and was unsuccessful. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that "some form of suitable work is regularly and continuously available to the claimant." Even though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

McClaflin v. John Morrell & Co., 2001 SD 86, ¶ 7 (citations omitted).

> A recognized test of a prima facie case is this: "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" 9 Wigmore, Evidence, (3rd {*506} Ed.) § 2494; see Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585, 72 A.L.R. 7.

Northwest Realty Co. v. Perez, 81 S.D. 500, 505, 137 N.W.2d 345, 348 (S.D. 1965).

Claimant testified credibly that he is in continuous, severe and debilitating pain that causes him to be permanently totally disabled. The medical records of Claimant's

treating medical providers corroborate his claim of pain. Even Dr. Farnham found that Claimant suffered from depression and a chronic pain syndrome.

Claimant's treating physician, Dr. Engelbrecht, a board certified rheumatologist, opined that Claimant suffers from chronic pain and is not employable. Dr. Engelbrecht also opined that a job search would be futile. Claimant has met his burden to show "obvious unemployability" due to continuous, severe, and debilitating pain. The burden shifts to Employer to demonstrate that suitable work is regularly and continuously available in Claimant's community. Employer did not meet this burden. Employer failed to identify any suitable position regularly and continuously available for a person with each of Claimant's physical limitations.

Employer argued that Claimant cannot meet his burden to show obvious unemployability because Claimant has not made any effort to find employment since he left his position with Employer in 1998. Employer rests its case on the testimony of Dr. Farnham that Claimant should undergo a serial functional capacities evaluation to determine his functional limitations. Dr. Farnham opined that Claimant is unmotivated to return to work. He recommended that Claimant undergo psychological counseling and a functional capacities assessment to determine his current physical limitations. However, Dr. Farnham did not find Claimant to be a malingerer. Employer has not shown that Claimant has refused to undergo a functional capacities assessment or refused medical treatment. Claimant has not refused any offers of suitable work. Claimant's treating medical providers have opined that Claimant is not employable due to his pain. Claimant has met his burden of persuasion. His testimony regarding his pain is credible. He has undertaken all treatment that has been recommended for his condition. He has met his burden to show that he is obviously unemployable. Employer did not show that suitable work is regularly and continuously available in his community. Claimant is permanently and totally disabled.

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

Dated this 14th day of November, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge