SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JAMES V. FERRAZZANO,
Claimant,

HF No. 81, 2007/08

v.

DECISION

RUSHMORE FOREST PRODUCTS INC.,
Employer,

and

WESTERN NATIONAL INSURANCE,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL §62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Rapid City, South Dakota. Claimant, James V. Ferrazzano appeared personally and through his attorney of record, Michael J. Simpson. Eric C. Blomfelt represented Employer, Rushmore Forest Products Inc. and Insurer Western National Insurance.

Issues

1. Whether Claimant's claim for benefits is barred by res judicata?
2. Whether Claimant is entitled to permanent total disability benefits?
3. Whether Claimant is entitled to payment for any unpaid medical bills?

Facts/Medical History

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence.

James V. Ferrazzano (Claimant) was 63 years old at the time of hearing. He holds a degree in dance from The Julliard School. In the past, Claimant has worked primarily raising and training horses and as a dance instructor/choreographer. Claimant injured his neck in 1997 and had neck surgery in 2000. Claimant was off work from 1997 to 2000 due to his neck injury and due to colon cancer treatment.

Following Claimant's neck surgery and subsequent recovery and his successful cancer treatment, Claimant returned to work. Claimant held a variety of jobs, he worked at a restaurant as a manager, at Sanders Sanitation as a laborer, at Black Hills Workshop taking care of the mentally impaired, at a nursing home, at a saw mill as a laborer, and as a fry cook.

Claimant was hired at Rushmore Forest Products in the spring of 2006 to run a bander machine. The bander machine wrapped metal bands around a bunk of wood. On June 6, 2006, Claimant was running the bander machine when he ran out of banding material. He shut the machine off and proceeded to thread the metal through the machine. A co-worker hit the "go button" on the machine and the bunk of wood came down on his foot and twisted it. Claimant was able to get his foot out from under the bunk of wood. Claimant tried to work the evening after he injured his foot, but was unable to work. Claimant went to the doctor the next morning.

On June 8, 2006, Claimant saw Dr. Denise Hanisch at the Custer Community Clinic. Dr. Hanisch diagnosed a left ankle sprain and gave Claimant an Ace wrap and a splint to stabilize the ankle. Claimant returned to the Custer Community Clinic on June 13, 2006 and was seen by Dr. Robert Nischelm. Dr. Nischelm diagnosed a soft tissue injury resulting from twisting as well as direct impact from the log bunk. Dr. Nischelm recommended continued ice and elevation. At a follow up appointment, on June 15, 2006, Dr. Nischelm referred Claimant to Dr. Michael Kadrmas at Black Hills Orthopedic and Spine Center and recommended physical therapy.

On June 22, 2006, Claimant saw Dr. Wayne Anderson for a fitness for duty consultation arranged by Employer. Dr. Anderson's exam revealed left ankle pain over the distal fibula and pain in the Achilles tendon. Dr. Anderson also noted significant swelling of the ankle. Dr. Anderson diagnosed left foot pain with Achilles tendon pain and a possible partial tear. Dr. Anderson recommended Claimant only do sedentary, seated work.

On July 12, 2006, Claimant saw Dr. Kadrmas. Dr. Kadrmas noted Claimant's persistent discomfort involving his mid foot as well as the Achilles tendon and pain and swelling when on foot for protracted periods of time. Dr. Kadrmas diagnosed a soft tissue Lisfranc injury without any evidence of instability. Dr. Kadrmas also noted evidence of an Achilles tendon contusion and resultant tendonitis. Dr. Kadrmas recommended immobilization of the left ankle in a CAM walking boot.

On August 22, 2006 Dr. Kadrmas obtained an MRI which demonstrated findings consistent with chronic lateral and medial collateral ligament sprain. There was also evidence of mild Achilles tendonitis and peritendinitis without partial tear, rupture or bursitis. Dr. Kadrmas continued to limit Claimant's work duties and recommended physical therapy in Custer. Dr. Kadrmas noted at that time there was "nothing directly fixable with any type of surgical intervention." On October 3, 2006, was seen by Dr. Kadrmas for a follow up appointment and had not responded to immobilization, physical

therapy modalities, or activity modification. Dr. Kadrmas noted, “I am at a loss as to provide him any additional therapeutic intervention…at this time I am electing to seek the expertise of Dr. Den Hartog who has special expertise in this regard. “

On referral from Dr. Kadrmas, Claimant saw Dr. Bryan Den Hartog on October 25, 2006. Dr. Den Hartog diagnosed left plantar fascitis, left Achilles tendonitis, and left mild tarsal tunnel syndrome. Dr. Den Hartog gave Claimant an injection in his heel for pain and put him in a walking cast to rest the plantar fascia, the tarsal tunnel and also the inflamed Achilles tendon. Claimant was released to work 8 hours, mostly sit down work.

Claimant returned to Dr. Den Hartog on November 22, 2006 for a follow up appointment. Dr. Den Hartog noted that Claimant had been experiencing significant pain for several months despite a stretching program, therapy, appropriate shoe wear, casting, etc. Dr. Den Hartog talked to Claimant about the possibility of doing a partial resection of the plantar fascial origin and decompressing Baxter’s nerve in the tarsal tunnel. Dr Den Hartog explained to Claimant that there was a 50/50 chance of improvement with the surgery. Claimant decided to go forward with the surgery. Claimant was given restrictions of light duty, sit down mostly, no more than two hours of standing or walking total in a given eight hour shift.

Dr. Den Hartog preformed a left tarsal tunnel release and left partial plantar fasciectomy on December 11, 2006. Following surgery Claimant continued to treatment with Dr. Den Hartog who noted Claimant was experiencing swelling, tenderness, persistent pain in his foot, shooting pain up his calf and electric-like shock sensations. Dr. Den Hartog diagnosed persistent neuritis left heel status post tarsal tunnel release. Dr. Den Hartog prescribed Lyrica for Claimant’s nerve pain; however Claimant did not tolerate the side effects. By February 2007, Claimant had not returned to work following his surgery and Dr. Den Hartog recommended physical therapy as well as an assessment by the pain clinic to see whether or not there was any other kind of modalities they could use that would be more effective.

Claimant attended physical therapy in Custer with Jim Simons, a physical therapist. Simons recommended four to eight weeks of therapy to try to decrease Claimant’s pain and increase range of motion. Claimant was discharged from physical therapy on April 30, 3007, at which time, Simons gave Claimant a home program consisting of contrast baths and sensitivity treatments which could be repeated two or three times a day.

On March 15, 2007, Claimant saw Dr. Christopher Dietrich, a pain specialist in Rapid City. Claimant reported numbness, tingling, and stabbing pain in his left foot. Claimant’s pain was 4/10 at its best and 10/10 at its worst. Claimant explained that elevating his leg and gentle massage helped as well as lying down. Dr. Dietrich noted that Claimant had significant neuropathic pain and swelling of the foot and ankle. Dr. Dietrich recommended a lower dose of Lyrica, TENS unit, Lidoderm patches, as well as

desensitization techniques. The Lyrica was not tolerated well, but Claimant continued the rest of the treatment.

At Claimant's follow up appointment on April 3, 2007, Dr. Dietrich noted improved coloration in the foot. Claimant was released to sedentary work and he was encouraged to continue with the previous treatment plan. On May 1, 2007, Claimant again followed up with Dr. Dietrich. Claimant's pain had decreased to a 3/10. Dr. Dietrich noted marked tenderness over the Achilles and its insertion, tenderness of the medial aspect of the left heel, with some contusion and bruising, tenderness at the insertion of the planter fascia. Dr. Dietrich recommended continuing with the treatment plan with the edition of Hydrocodone and Ibuprofen. Dr. Dietrich recommended switching to Black Hills Orthopedics for additional physical therapy.

Claimant attended physical therapy at Black Hills Orthopedic & Spine Center with Jesse Hamm, a physical therapist. At that time Claimant was using his TENS unit four to seven times a day for up to an hour. Claimant attended regular therapy until he was discharged August 30, 2007. Hamm noted that Claimant had made progress toward many physical therapy and functional goals, but had not fully attained any at that point.

On July 5, 2007, Dr. Dietrich released Claimant to sedentary duties only, limit walking 50 yards or less with crutch, limit to less than 8 hours per day. On July 5, 2007, Dr. Dietrich noted some improvement and continued the sedentary work restrictions. On August 2, 2007, Dr. Dietrich noted that Claimant was very active with his home exercise program and suggested that he was probably performing it too often. Dr. Dietrich did note improvement with physical therapy.

On August 30, 2007, Claimant saw Dr. Dietrich due to a flare in his symptoms since he had returned to sedentary duties. Claimant reported increased swelling when he was seated with his leg in a dependent position for more than a couple hours. Claimant also was not gaining any further improvement from physical therapy. Claimant was still using Lidoderrm patches, his home E-stim unit and Hydrocodone and Ibuprofen. Dietrich recommended a trial of Neurontin for neuropathic pain relief, continuation of sedentary duties, continuation of home exercise program, and discontinuation of physical therapy. Dr. Dietrich also recommended a functional capacity evaluation (FCE).

Dr. Dietrich reviewed the FCE on September 26, 2007. The FCE revealed that Claimant was able to work at light to medium physical demand for eight hours per day, although he is significantly limited in dynamic activities that require walking and prolonged weight bearing using the left foot. Dr. Dietrich released Claimant to work per his FCE (lifting no more than 20 pounds, no squatting, or kneeling, no climbing steps or ladders, standing less than 10 minutes at a time, and walking less than 10 minutes at a time). Dr. Dietrich recommended a limited amount of standing or weight bearing in the lower extremity, light duty with protection of the left foot and frequent changes in position. Dr. Dietrich assigned a 7% whole person impairment rating.

On October 23, 2007, Claimant returned to Dr. Dietrich complaining of increased swelling and difficulty ambulating or standing for any length of time. Dietrich instructed Claimant to continue with his home program and medications and added Ultram ER. Dr. Dietrich also wrote a prescription for support shoes with custom orthodic inserts. Claimant was also encouraged to participate in water-based exercise and become more active.

On November 6, 2007, Claimant saw Dr. Jerry Blow, a physiatrist from Sioux Falls, for an independent medical evaluation (IME). Following a review of Claimant's medical records and a physical examination, Dr. Blow assigned a 4% whole person impairment rating or 14% foot impairment.

On November 27, 2007, Claimant returned to Dr. Dietrich presenting with worsening pain, swelling, burning in the left great tow, and bruising or discoloration around his surgical site and scar tissue. Claimant had been unable to obtain the orthodic shoe inserts as he had lost the prescription. Dr. Dietrich wrote another prescription for custom orthodic inserts at Hanger Prosthetics & Orthotics. Dr. Dietrich ordered a MRI specifically looking for retrocalcaneal bursitis or significant inflammation, as well as Achilles tendonitis and posterior tibialis tendonitis.

On January 2, 2008, Dr. Dietrich notes that Claimant had significant hypersensitivity with palpation of the foot. Dr. Dietrich also notes that there was increased nail growth on the left foot and a significant temperature difference from side to side with the left foot being much colder than the right. Dr. Dietrich expressed concern that Claimant's symptoms were developing into a CRPS[1] type picture. Claimant was unable to tolerate neuropathic medications and his MRI showed significant inflammation in the area of the Achilles tendon and posterior tibialis region. Dr. Dietrich recommended ultrasound guided injections. On January 8, 2008, Dr. Dietrich administered an ultrasound guided left posterior tibial tendon sheath injection and an ultrasound guided left Achilles tendon sheath injection. Dr. Dietrich took Claimant off work due to his subjective complaints of pain and his objective symptoms at that time.

On February 5, 2008, Claimant returned to Dr. Dietrich. Claimant had not experienced any benefit from the injections and he had ongoing hypersensitivity and tenderness limiting his ability to walk and ambulate. Claimant had filled his prescription for orthotics from Hanger Prosthetics & Orthotics; however they were not the custom orthotics with pressure relief that were prescribed. Dr. Dietrich referred Claimant back to Dr. Den Hartog to review the MRI and evaluate Claimant given his symptoms.

On February 15, 2008, Claimant saw Dr. Den Hartog. Dr. Den Hartog noted that the MRI scan showed some possible evidence of arthritis in the forefoot and some persistent thickness and swelling along the tarsal tunnel. Dr. Den Hartog discussed the

[1] Complex Regional Pain Syndrome

possibility of doing a nerve stimulator but, again there was limited probability of success. Claimant was not interested in pursuing the surgery. Dr. Den Hartog stated, “I think he is going to have to live with this nerve pain and adjust to his reduced activity level unless Dr. Dietrich has more to offer him. Again there is nothing else I can do for him at this time”.

On February 26, 2008, Claimant returned to Dr. Dietrich. The orthotic done by Hanger was not providing significant relief, and Claimant was sent to Eric Pickering at the Children’s Care Hospital for an orthotics evaluation. Dr. Dietrich noted some duskiness and discoloration to the foot, significant skin hypersensitivity and tenderness to touch. Dr. Dietrich prescribed a neuropathic pain compound to apply to the area for desensitization as well as his other prescriptions.

On March 25, 2008, Claimant reported to Dr. Dietrich that the pain compound had been helpful as well as the acquisition of orthodics and shoe modifications he received at Children’s Care Hospital. Dr. Dietrich noted that Claimant had exhausted rehabilitative, medication, and injection treatments and was not a candidate for surgery. Dr. Dietrich placed Claimant at maximum medical improvement. Claimant was released to sedentary work duties, two hour shifts to start with to see if he can tolerate. Claimant was also to continue with his treatment regime.

On September 9, 2008, Dr. Dietrich discussed a possible left sympathetic block treatment. Claimant was not interested in the sympathetic block treatment and wanted to continue with his current treatment regime.

On July 22, 2008, Claimant saw Dr. Dale Anderson, an orthopedic surgeon in Rapid City, for an IME. Dr. Anderson noted that Claimant was complaining of shocks going up his leg from the arch of the foot and shocks and electricity going from the mid portion of the arch to the toes and forefoot. Claimant described his symptoms as “billions of needles sticking him in the foot and ankle area. Dr. Anderson noted that Claimant did not place weight on the left foot and was walking with the assistance of two crutches. Dr. Anderson did not observe any swelling or redness of the foot but did notice extreme hypersensitivity and tenderness of the area. Dr. Anderson opined that Claimant could be employed eight hours per day, but should primarily be at a sit down job, standing or walking less than two hours during an eight hour shift. Dr. Anderson agreed that the 7% impairment rating assigned by Dr. Dietrich was reasonable.

Vocational experts, Mr. Rick Ostrander and Mr. Jim Carroll each evaluated Claimant. Both experts reviewed Claimant’s medical records and conducted a personal interview with Claimant. Ostrander and Carroll each made a report.

At the time of the hearing, Claimant performed a daily treatment regime in regard to his foot. The regime consisted of alternating hot and cold water baths, TENS unit,

sensitivity cloth treatment,[2] home exercises with a Thera-band, and finally application of neuropathic pain compound cream. Claimant does this regime at 8:00 a.m., 12:00 p.m., and 4:00 p.m. Claimant also elevates his foot above heart level when necessary to relieve pain and swelling.

Based on the totality of the evidence presented, including his own candid testimony, the medical evidence, and on the opportunity to observe Claimant's demeanor at the hearing, Claimant was a credible witness. Other facts will be developed as necessary.

Analysis

Issue 1 Res Judicata

The first question addressed by the parties is whether Claimant's claim for benefits is barred by the doctrine of res judicata. Employer/Insurer argues that Claimant received a settlement of his permanent partial impairment in December 2007 pursuant to a South Dakota Department of Labor Form 111 filed with the Department. Employer/Insurer argue the Form 111 was a compensation agreement, and therefore Claimant must make a showing of some change in his physical condition pursuant to SDCL §62-7-33 to "reopen" his claim for permanent total disability for the same work related injury.

Employer/Insurer relies on *Larsen v. Sioux Falls School District. No 49-5*, where the South Dakota Supreme Court held that Larsen's claim was "barred by the doctrine of res judicata from pursuing a claim for total permanent disability benefits because he previously entered a Department approved settlement for permanent partial benefits; the claims for both types of benefits [were] based on the same injury; there [was] no change of physical condition since settlement; Larsen did not reserve for himself, in the settlement document, the right to pursue any potential claim for permanent total disability; Department did not reserve continuing jurisdiction over this issue." 509 NW2d 703 (SD 1993).

The case at hand is distinguishable from *Larsen.* In *Larsen* the Department Form 111 was a 1980 version that has since been revised by the Department. The Form 111 signed by Claimant in the case at hand specifically states, "[t]his memorandum is a receipt only. It does not constitute an agreement, stipulation or release. The Division of Labor and Management retains jurisdiction as to all issues. The employee does not waive his/her right to pursue any benefits to which s/he may be entitled."

Employer/Insurer's argument is without merit and is rejected. The Department Form 111 is not a compensation agreement, Claimant reserved the right to pursue other potential claims and the Department retained jurisdiction over any future issues. Therefore,

[2] Claimant rubs clothes of various textures on the affected area to decrease sensitivity to the area.

Claimant's claim for permanent total disability is not barred by the doctrine of res judicata.

Issue 2 Extent and degree of disability

The second question addressed by the parties is whether Claimant is permanently and totally disabled under the odd-lot doctrine and/or SDCL §62-4-53.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). Claimant alleged that he is permanently and totally disabled 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 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 §62-4-52(2) defines "sporadic employment resulting in an insubstantial income" as,

> [E]mployment 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.

There are two recognized ways that Claimant can make a prima facie showing that he is entitled to benefits under the odd lot doctrine. *Eite v. Rapid City Area Sch. Dist., 2007 SD 95, ¶21, 739 NW2d 264*, 270.

> 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.

Id. (quoting *Wise*, 2006 SD 80, ¶28, 721 NW2d at 471 (citations omitted)).

Claimant argues that he is in continuous, severe, and debilitating pain. Claimant testified at the hearing that the pain is always there and is made worse by cold, damp weather, standing on his foot too long, trying to walk, and sitting in a chair with his foot down below him. Claimant characterized his pain as billions of needles sticking him in the foot and ankle. Claimant testified that he has three or four good days and three or four bad days per week with his pain ranging from a 3/10 to a 9/10. Claimant reduces his pain by performing a therapy regime and elevating his left foot above heart level to reduce the pain and swelling. Claimant testified that he elevates his foot approximately four times a day for 45 minutes to an hour on his good days and five or six times for 45 minutes to an hour on his bad days.

Dr. Dietrich, Claimant's treating physician, testified at his deposition regarding Claimant's pain and the work restrictions. Dr. Dietrich testified,

> Q. In this case has Mr. Ferrazzano, through his course of treatment with you complained of severe and often debilitating pain in his foot?
> A. Those are his subjective complaints.
> Q. And those subjective complaints are, in part the reason that he was limited to the two hours of sedentary work?
> A. The subjective complaints are a portion of that. Also, the inability to stand, walk, or ambulate for lengths or long distances due to the pressure in the pain in his arch or forefoot there. Also his response or abilities in physical therapy and what he has been able to demonstrate in therapy previously all led to devising this regime.

Q. And I would imagine that in addition to those factors the objective findings that you made in your examinations as well as the results of the diagnostic test results would also support the work restrictions?

A. Correct. Also during—I'm not sure the exact dates, during his previous care he had been released back to some sedentary duties and I believe had made some attempts at driving to physical therapy, participating in some Red Cross volunteer phone activities or volunteer sedentary duties and wasn't able to tolerate these or had failed at previous attempts to get him back to those types of duties.

Dr. Dietrich explained that Claimant's work restrictions as of January 2008 were based on Claimant's subjective complaints of sensitivity and pain as well as the objective observations of worsening edema and coloration changes. In regard to Claimant's problems with swelling, Dr. Dietrich explained that when Claimant's leg was in a dependant position his leg would swell and Claimant would periodically need to raise his leg above heart level to reduce the swelling. Dr. Dietrich further explained that dependant position meant "down low on the floor, weight bearing position; or any of it below the level of the heart." In this position, "venous drainage and fluid and edema would accumulate." Dr. Dietrich agreed that it was medically recommended to elevate the leg to alleviate his swelling.

Although Dr. Dietrich did not instruct Claimant as to the number of times and the duration of time Claimant should elevate his leg above his heart, Dr. Dietrich agreed that it was an accommodation that would need to be made as needed to return Claimant to the work force. When asked about Claimant's work restrictions, Dr. Dietrich testified,

Q. Okay. So if I am understanding this, your medical opinion at this point in time is that if Mr. Ferrazzano is to make it into the workforce and work eight hours a day, five days a week, it is necessary that he start out at two hours a day sedentary and then we can continue on and hopefully increase his hours incrementally until he gets up to eight hours a day, is that correct?

A: I think that would be the most reasonable and logical progression to try to return back to the work force.

Q: And in addition to that, although the frequency that he needs to elevate his leg is unclear to you, he is going to need to have the opportunity to elevate his leg from time to time in order to get back into an eight hour day job, is that fair?

A: I would agree.

Dr. Dale Anderson performed an independent medical evaluation at the request of Employer/Insurer. Dr. Anderson agreed with the impairment rating issued by Dr. Dietrich, stating that it was a reasonable rating and he "would not add or detract from

the impairment rating." Dr. Anderson opined that Claimant had sustained a crush injury to his foot, and tried many different therapies and pain medications and yet had residual symptoms after all that treatment. When asked about work restrictions, Dr. Anderson testified that standing with the foot in a dependant position all day would probably exacerbate or make his symptoms worse, and Dr. Anderson recommended a sit down job which would allow Claimant to move and change positions and keep weight off his foot.

Dr. Anderson was asked about Claimants pain and whether his need to elevate his leg above heart level was reasonable:

Q: Those pain complaints that we find in the records and that he made to you of severe pain are consistent with this man's medical condition, true?
A: Yes.
Q: And you're not saying that when he's complaining of pain to his doctors, as I've just described it, that he is malingering or overstating his pain in any way, true?
A: Well, I guess I can't – I didn't find that he was way out of line. I guess I thought that his avoiding walking on the foot seemed a little exaggerated. But he has had pain for a long time and he probably still has pain. And I don't think it has changed much in the interim.
Q: One of the things that Dr. Dietrich, both Dr. Dietrich and Dr. Den Hartog addressed in their depositions was this man's description that he needed to elevate his leg from time to time to get pain relief. Did you see in your review of the medical records references to that?
A: Yes.
Q: And in your experience, doctor, people with this type of a crush injury-well, the condition that we're describing, do describe the need to elevate their leg for pain relief, true?
A: Yes.
Q: And that's because when the leg is in the dependant position it can cause increased pain and /or swelling, true?
A: Yes.
Q: And by putting the leg up above the heart, that causes the blood to come back out of the extremity and decrease the pain for the patient, true?
A: Yes.
Q: And so when Mr. Ferrazzano says that he needs to do that from time to time during his day to relieve his pain, you're not disputing that as a doctor, true?
A: No, not from time to time. I guess I would – I would have a hard time saying every ten minutes he needs to elevate his foot, because to me then he would be completely bedridden. And I don't see any indication that that's the situation.

Q: Right. And every patient is different. And so there are some patients who have this condition who may have to elevate it a certain amount of time and others that not as much and it depends on the day. There's a lot of different factors, aren't there?
A: Different events or temperatures and time of day can affect that, yes.
Q: But in general terms, when this man says from time to time during my day I need to put my foot up and get the welling down and get the pain to relieve itself, you're in agreement with that, fair?
A: Yes.

Claimant also presented the testimony of Rick Ostrander, a vocational rehabilitation counselor with over twenty five years of experience. Mr. Ostrander conducted a personal interview with Claimant as well as reviewed the Claimant's medical records and the depositions of Claimant, Dr. Dietrich, and Dr. Den Hartog. Based on this information Mr. Ostrander prepared a vocational report. Mr. Ostrander also reviewed the deposition of Dr. Anderson prior to the hearing.

Mr. Ostrander opined that based on Claimant's limitations, Claimant is obviously unemployable and therefore obviously disabled from work. Mr. Ostrander also concluded that there is not any formal vocational rehabilitation or retraining that could be reasonably expected to restore Claimant to work at or above his workers' compensation rate. At the hearing, Mr. Ostrander testified that he was unable to identify a single job that Claimant could physically do, for which he would have the necessary qualifications. Mr. Ostrander relied on Claimants description of his condition and his need to elevate his foot which was confirmed by Dr. Dietrich and Dr. Anderson who were in agreement that elevation was reasonable and necessary based on Claimant's condition. Mr. Ostrander testified at the hearing,

> [I]f he could do a full range of sedentary work, theoretically there might be some sedentary jobs that fit. From a practical standpoint, not really. His age, his background, would pretty much preclude him from being a reasonable candidate for sedentary work, but at least I would be able to identify something that technically he might be able to do. But when we factor in the other problems that he has, and most notably the difficulty with pain, swelling, and the need to elevate his foot, its obvious there is no work out there for him, whether it be in Custer or in Rapid City.

Mr. Ostrander testified that in his previous experience working with claimants who needed to elevate their leg above heart level, he had never been able to place any of those workers in employment. Mr. Ostrander testified that it would have been futile for Claimant to conduct a job search. Ostrander also considered that Dr. Dietrich had limited Claimant to two hours sedentary work to start out. Mr. Ostrander testified that,

> [A]s a practical situation, its is pretty much impossible to identify an employer who is looking for someone on a full time basis but can start them out at two hours a day and then progress them as they are able to tolerate.

Based on the evidence presented, Claimant has shown that he is obviously unemployable. Claimant established a prima facie case that he is entitled to benefits under the odd lot doctrine and the burden shifted to the Employer to show that some form of suitable work was regularly and continuously available to Claimant.

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)." SDCL § 62-4-53. Employer must demonstrate the specific position is "'regularly and continuously available' and 'actually open' in 'the community where the claimant is already residing' for persons with *all* of claimant's limitations." *Shepard v. Moorman Mfg*., 467 N.W.2d 916, 920 (S.D. 1991).

In support of its burden, Employer/Insurer presented testimony of Jim Carroll, a vocational rehabilitation consultant with over twenty five years experience. In preparing his report, Mr. Carroll reviewed Claimant's medical information, educational background, and vocational history. Relying on Dr. Anderson's report and the FCE results, Mr. Carroll opined that Claimant is employable full time in the sedentary to light level of exertion, and that there are employment opportunities regularly and continuously available to Claimant within his community. Mr. Carroll specifically identified six jobs available to Claimant at the time of hearing that fit Claimant's work restriction criteria, and exceeded Claimant's workers' compensation rate.

Mr. Carroll testified that the need for Claimant to elevate his leg above heart level was not identified anywhere in Claimant's medical records as a work restriction or medical restriction. Mr. Carroll did however identify employers that would be able to accommodate Claimant raising his leg on a chair next to him. Additionally, Mr. Carroll testified that employers would be willing to allow Claimant to raise his leg however far he needed during morning and afternoon breaks as well as during lunch breaks.

Mr. Ostrander agreed that employers would be willing to provide accommodations to elevate the leg on a chair, however the Claimant needs to elevate his leg above heart level to relieve pain and swelling in his foot. On direct examination, when Mr. Carroll was questioned whether employers could accommodate the need to elevate the leg above the heart level, he testified:

> Well, they could accommodate it in the respect that if he took, lets say a break in the morning, a lunch break, and a break in the afternoon where he could go into a break room, go out to his vehicle and elevate his leg above heart level, that would give you three times during an eight hour period that could be

> accommodated. Accommodated at a work station, I would have to concede that's probably not a workable situation.

Because he did not consider the Claimant's need to elevate his leg above heart level when necessary as a medical or work restriction, Mr. Carroll did not contact the employers he identified and specifically ask whether they could accommodate someone who needed to elevate his foot above heat level. Mr. Carroll's opinion is rejected. Both Mr. Ostrander and Mr. Carroll testified that in their previous experience, they have contacted employers and inquired whether the they would make such accommodations and were unable to find an employer that would reasonably accommodate the need to elevate the leg above heart level.

While the doctors were not able to specify the number of times per day and duration of time that Claimant needed to elevate his leg, both Dr. Dietrich and Dr. Anderson testified that it was medically reasonable for Claimant to elevate his leg above heart level as necessary to alleviate pain and swelling.

Claimant has met his burden of persuasion to establish that he is permanently and totally disabled under the odd-lot doctrine. Claimant's permanent total disability began on January 2, 2008, the date Dr. Dietrich took Claimant off work due to his injury. Claimant has been unable to work since that time. Claimant's request for permanent total disability benefits is granted.

Issue 3 Medical Expenses

The last question briefed by the parties is whether Claimant is entitled to reasonable and necessary medical expenses pursuant to SDCL §62-4-1.

Pursuant to SDCL §62-4-1, the employer must provide reasonable and necessary medical expenses. It is well established by the South Dakota Supreme Court that the Employer/Insurer has the burden of showing reasonable and necessary medical expenses.

> Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. 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.

Hanson v. Penrod Construction Co., 425 NW2d 396,399 (SD 1988).

The only medical expense that has not been paid is one from Hanger Prosthetics & Orthotics. Employer/Insurer argue that this expense was not reasonable and necessary

because Claimant went on his own to obtain these orthotics when he should have gone to Children's Care Hospital to fill his prescription.

A review of the medical records show that Claimant's treating physician, Dr. Dietrich wrote a prescription for custom orthotic shoes on October 23, 2007. The prescription did not specify where claimant was to obtain the orthotics. On November 27, 2007, Dr. Dietrich noted that claimant had been unable to obtain the orthotic shoe inserts as he had lost the prescription. Dr. Dietrich wrote another prescription for custom orthotic inserts at Hanger Prosthetics & Orthotics. Claimant had filled his prescription for orthotics from Hanger Prosthetics & Orthotics. On February 26, 2008, Claimant returned to Dr. Dietrich. The orthotic done by Hanger was not providing significant relief, and Claimant was sent to Eric Pickering at the Children's Care Hospital for an orthotics evaluation. Employer/Insurer has failed to establish that the medical expenses were not reasonable and necessary. Employer/Insurer is responsible for payment of medical expenses incurred at Hanger Prosthetics & Orthotics.

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Counsel for Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 17th day of April, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M. Dockter
Administrative Law Judge