DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

LISA JACOBSON,
Claimant,

HF No. 83, 2015/16

v.

DECISION

HAUGE ASSOCIATES, INC.,
Employer,

and

STATE FARM FIRE & CASUALTY,
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 Joseph Thronson, Administrative Law Judge, on August 31, 2017, in Sioux Falls, South Dakota. Claimant, Lisa Jacobson, was present and represented by Renee Christensen of Johnson and Christensen Law Firm, PC. The Employer, Hauge Associates, Inc. and Insurer, State Farm Fire & Casualty, were represented by Jeff Shultz of Woods, Fuller, Shultz & Smith, PC, Law Firm.

ISSUES PRESENTED

1. WAS CLAIMANT'S INJURY A MAJOR CONTRIBUTING CAUSE OF HER DISABILITY?

2. IS CLAIMANT PERMANENTLY DISABLED UNDER THE ODD LOTT DOCTRINE?

3. IS CLAIMANT'S RECOVERY LIMITED UNDER SDCL 62-4-43?

4. IS EMPLOYER/INSURER ENTITLED TO SANCTIONS AGAINST CLAIMANT UNDER SDCL 15-6-37(b)?

FACTS

Claimant is a 61-year-old high school graduate with some post-secondary education. For much of Claimant's career, she has worked in sales. At the time of the injury, Claimant was employed by Hauge Associates as a traveling salesperson. As part of her duties, Claimant traveled extensively throughout the region meeting with prospective clients, attending trade shows, and holding education sessions. Along with traveling, Claimant was required to transport various items for distribution to potential customers including brochures, promotional items referred to as "giveaways" and a portable screen for presentations. By all indications, Claimant was highly motivated and very successful in her career. According to Claimant's Social Security earning statement, Claimant earned over $70,000 each year in 2012 and 2013 while working for Employer. In 2014, Claimant earned approximately $58,000.

Claimant sustained an injury to her shoulder while traveling for Employer on June 16, 2014. On that date, Claimant and another employee were in Nebraska visiting a client when a series of tornadoes struck the area. Claimant was returning to Sioux Falls by way of Interstate 29 when it was closed for a time due to the weather. Claimant testified that she exited the interstate at Tea, South Dakota, after the interstate closure. Claimant and her colleague determined that they could no longer continue in Claimant's vehicle and contacted the colleague's husband to drive them the rest of the way. The husband drove a large pickup and the two surmised that they would have an easier time traveling the water-logged roads in the truck. While entering the pickup, Claimant

slipped on the wet running board and lost her balance. Claimant was holding on to a strap at the time and felt a pain in her right shoulder.

After approximately one week, the pain had not subsided and Claimant sought medical treatment. Claimant was referred to orthopedic surgeon Dr. Jason Hurd. Dr. Hurd diagnosed Claimant as having suffered a full thickness tear of the supraspinatus tendon and a high grade partial thickness tear of the infraspinatus of her right shoulder. Dr. Hurd recommended Claimant undergo surgery to repair the tear. Claimant underwent surgery on July 28, 2014 and was put in a sling for six weeks. Following surgery, Dr. Hurd also prescribed physical therapy. Between August and November of 2014, Claimant completed 25 therapy sessions without incident. At the completion of the therapy, Dr. Hurd noted that Claimant's shoulder injury had progressed significantly. Claimant had a greater range of motion and reported a reduction of pain. Dr. Hurd discharged Claimant to home therapy and removed all work restrictions.

During this time, Claimant worked for Employer part time and collected temporary partial benefits. Claimant attempted to return to work full time in December 2014. Claimant testified that she had planned to take two weeks of vacation to travel to Washington state and visit her son. Claimant felt that it was necessary for her to meet all her clients for the month in the two weeks before her vacation. As a result, Claimant traveled approximately 2,600 miles in a two-week period. At the end of that two-week period, Claimant decided that traveling alone to Washington would be too strenuous and decided to stay in Sioux Falls for the holidays. She then sought out part-time employment at Macy's department store working as a sales representative at the cosmetics counter.

At that time, Claimant also began to suffer more pain from her injury. On December 18, 2014, Dr. Hurd prescribed an additional 4-6 weeks of physical therapy. Claimant contends that she took the prescription to the Sanford Physical Therapy Clinic that day but later had significant problems obtaining authorization for the therapy from Insurer.

Shortly after the beginning of the new year in 2015, Claimant determined that she could no longer perform her job duties and resigned her position with Employer. Employer testified that Claimant's resignation came as a surprise because Claimant had not sought further accommodations. Claimant then began working full time at Macy's. However, the physical requirements there proved too much for her and Claimant eventually resigned her position there as well. Claimant also testified that she began experiencing deep bouts of depression during this time which made doing her normal routine difficult. The depression also affected Claimant's motivation to engage in more physical therapy.

Claimant sought the opinion of Tom Audet, a certified vocational rehabilitation specialist. Audet testified that, given Claimant's age and physical limitations, it was unlikely that she would be able to obtain employment where she would earn her workers compensation benefit rate of $691 per week. In addition, Claimant was not a suitable candidate for returning to school because of her age.

Employer/Insurer argue that Claimant's injury was not the cause of her disability. It also contends that alternatively, Claimant's condition was made worse when she failed to complete a second round of physical therapy prescribed by Dr. Hurd. To

support its position, Employer/Insurer introduced the deposition of Dr. Paul Cederberg. Dr. Cederberg testified that in his professional opinion, Claimant's failure to complete physical therapy caused her injury to regress.

As part of its discovery request, Employer/Insurer also requested Claimant's mental health records from Claimant's treating counselor, Barbara Christensen. A consent of release form signed by Claimant and admitted as exhibit 23 contained the notation "only bio, psych, soc- nothing more". Based on this release, Christensen advised Employer/Insurer's attorney that she would not release Claimant's entire file because Claimant would not authorize her to do so. At the hearing, Claimant testified that she was unsure what Employer/Insurer were seeking and asked Barbara Christensen for advice on what to do. Christensen advised Claimant that her policy was to turn over only limited information. At the hearing, Christensen testified that, with only one exception, she had only ever turned over "bio,psych, [and] soc" information contained in a client's file.

After Christensen refused to turn over Claimant's entire mental health file, Employer/Insurer filed a petition in circuit court for an order to show cause as to why Christensen should not be held in contempt. Christensen then hired an attorney who advised her to turn over the requested files to Employer/Insurer. Christensen complied with the discovery order per her attorney's advice. Nonetheless, Employer/Insurer filed a motion for sanctions with the Department against Claimant. Employer/Insurer sought to recover the costs associated with bringing its action in circuit court to obtain the documents.

ANALYSIS

1. WAS CLAIMANT'S INJURY A MAJOR CONTRIBUTING CAUSE OF HER DISABILITY?

"To be awarded benefits, an employee must first establish that he has suffered an 'injury arising out of and in the course of the employment[.]'" *Orth v. Stoebner & Permann Const., Inc.,* 2006 S.D. 99, ¶ 32, 724 N.W.2d 586, 592 (Quoting SDCL 62-1-1)(7).

Employer/Insurer argues that Claimant cannot prove that the accident and not some other unrelated medical condition was responsible for her injury. Employer/Insurer points out that Dr. Hurd speculated that Claimant may suffer from Cervical Stenosis. However, a claimant need not prove that a work-related injury is the sole cause of her disability. Rather, SDCL 62-1-1(7(b) provides "[i]f the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment;

Here, both Dr. Hurd and Dr. Cederberg provided medical opinions that Claimant's June 16, 2014 fall was a major contributing cause of her disability. Dr. Hurd admitted that arthritis or stenosis may have been aggravated by the shoulder injury, but this did not alter his opinion that Claimant's fall was a major contributing factor in Claimant's shoulder injury.

Likewise, the Department disagrees with Employer/Insurer's argument that Claimant left her employment with Employer because she desired a change. The opinions of Dr. Hurd and Dr. Cederberg clearly establish that Claimant could no longer fulfill her duties as a traveling salesperson. Additionally, the Department finds Claimant's explanation that she loved her job and was devastated by her inability to continue credible. Claimant's past earnings and the testimony of Claimant's bosses demonstrate that Claimant was dedicated to her job and would not have quit but for her injury. Claimant has proven that her June 16, 2014 injury was a major contributing cause of her disability.

2. IS CLAIMANT PERMANENTLY DISABLED UNDER THE ODD LOTT DOCTRINE?

The South Dakota Supreme Court has explained:

> Under the odd-lot doctrine, "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 an insubstantial income." The ultimate burden of persuasion on this point remains with the claimant. However, if the claimant's physical condition, coupled with his education, training and age, make it obvious that he is in the odd-lot total disability category, 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.

Shepherd v. Moorman Mfg., 467 N.W.2d 916, 918 (S.D. 1991)(internal citations omitted).

SDCL 62-4-52 defines sporadic employment 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.

Employer/Insurer argue that Claimant failed to demonstrate obvious unemployability. At the time of the hearing, Claimant was 61 years old with a high school diploma. Claimant's vocational expert, Tom Audet, testified that it was unlikely Claimant would secure work equal to her benefit rate amount of $691 a week. Audet pointed out that Claimant would be competing with much younger applicants and that her age would put her at a disadvantage. Also because of her age, Claimant was not a candidate for further education or retraining.

Audet testified that he thought Claimant's skills would easily transfer over to a position working customer service or sales with a credit card company. However, Audet determined that this would not be an option for Claimant because the required regular use of a mouse and typing would be difficult given Claimant's shoulder injury. Even working a retail position proved exceedingly difficult to Claimant due to her disability. Claimant attempted to work at Macy's for a time after leaving Employer, but had to resign due to her inability to lift merchandise or perform other necessary tasks. The Department finds that Claimant has met her burden of proving that she falls within the odd-lot category.

Employer/Insurer next argues that Claimant is not obviously unemployable and that she retains the burden to show that she has made a good faith effort to find employment. Employer/Insurer points out that Dr. Hurd testified that Claimant had no limitation on her ability to move her right arm below shoulder level or any restriction on the use of her left arm. It also points out that Dr. Hurd initially allowed claimant to return to work without restriction in December 2014. It must be noted that Dr. Hurd originally allowed Claimant to return to work without restriction before it was evident that one

round of physical therapy would be insufficient to resolve Claimant's injury. After it became apparent that the physical therapy did not resolve Claimant's injury, Dr. Hurd revised Claimant's work restrictions, limiting Claimant from driving long distances and imposed a 5-pound lifting restriction. Audet took this into consideration when he offered his opinion that Claimant would not be able to find another suitable job. The Department finds that Claimant has met her burden of proving that she is obviously unemployable.

However, if Claimant retained the burden of proving that she had made a good faith effort to secure suitable employment, the Department believes she has met this burden. Employer/Insurer acknowledges that Claimant made several inquiries into positions between December 2014 and May 2015, but argues that these are not sufficient because they were made during the time Claimant was employed by Hauge and later Macy's. No case law in South Dakota specifies that a job search need be made in any particular time frame. There is no indication that, given Claimant's disability, the outcome would have been any different had she applied for these positions during a time when she was not already employed. Additionally, Claimant's specialized set of skills and previous salary impacted the number of jobs that would have allowed Claimant the ability to earn her benefit rate, even in a job market the size of Sioux Falls. Therefore, the Department believes that 26 job contacts over a five-month period is sufficient to demonstrate a good faith effort on Claimant's part.

Having met her burden of proving she fit in the odd-lot category, the burden then shifted to Employer/Insurer to prove that suitable employment exists. Employer/Insurer

presented no evidence to support an argument that Claimant would be able to obtain employment which would have paid her at least the benefit amount of $691 per week.

3. IS CLAIMANT'S RECOVERY LIMITED UNDER SDCL 62-4-43?

Employer/insurer argue that since Claimant did not complete a second round of physical therapy, she is precluded from recovering benefits. SDCL 62-4-43 states that "[i]f the injured employee unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment, the employer is not liable for an aggravation of the injury due to the refusal and neglect and the Department of Labor and Regulation may suspend, reduce, or limit the compensation otherwise payable." To support its argument, Employer/Insurer presented the testimony of Dr. Cederberg, who opined that by not completing the second round of physical therapy, Claimant aggravated her shoulder injury. Claimant first counters that she experienced problems with insurer authorizing therapy and was unable to attend. Second, Claimant argues that she cannot be penalized since her condition was not aggravated by her failure to complete the second round of therapy.

The South Dakota Supreme Court was asked to determine whether failure to undergo prescribed treatment was a bar to recovery in *Schlenker v. Boyd's Drug Mart*, 458 N.W.2d 368, 371 (S.D. 1990). There, the Court explained:

> Employer/insurer cite us to 1 Larson's Workmen's Compensation Law § 13.22(b), for the rule that "[t]he question of whether refusal of treatment should be a bar to compensation turns on a determination of whether the refusal is reasonable." That section goes on to state that, "[r]easonableness in turn resolves itself into a weighing of the probability of the treatment's successfully *reducing the disability by a significant amount,* against the risk of the treatment to the claimant." (Emphasis added.) Therefore, the issue is not whether she should have attended

> the pain clinic, but whether her refusal to continue was reasonable based on the likelihood of success. We hold that this requires a showing that a reasonable probability exists that through the pain clinic the claimant will be rehabilitated. *Id.*

Schlenker, 458 N.W.2d, at 371.

The Department notes that Claimant's failure to regularly attend the second round of physical therapy was not due solely to her actions. Claimant alleges that after she left her employment with Employer, she suffered depression which made attending therapy difficult. Claimant did not substantiate this claim because she withdrew the testimony of her counselor at the hearing. However, the record indicates that Claimant also experienced difficulties with obtaining authorization from Insurer for further physical therapy. Both Dr. Hurd and the physical therapist, Kevin Horner, acknowledged in their depositions that they were aware that Claimant had problems obtaining authorization for more physical therapy. Even assuming that Claimant was not excused from irregularly attending therapy due to her depression, she still would not have been able to attend all of them because she experienced difficulties obtaining authorization from Insurer. Claimant cannot be penalized for failing to attend physical therapy sessions which were not available to her.

The Department must consider whether more physical therapy would have resolved Claimant's injury. Claimant had already completed one round of therapy after her surgery. At that time, Dr. Hurd believed that Claimant had progressed to the point where she could return to work without restriction. It later became apparent that the first round of physical therapy had not fixed Claimant's injury. Dr. Hurd opined in his deposition that it was rare for a patient to experience pain from this procedure six

months after surgery, and postulated Claimant's failure to completely recover may have been due by cervical stenosis or arthritis in conjunction with the injury.

Dr. Cederberg opined that completion of a second round of physical therapy would have resulted in Claimant being less restricted at work. However, Dr. Cederberg's testimony does not consider the failure of Claimant's injury to heal after the first round of physical therapy. Neither does Dr. Cederberg address the possibility that the failure of Claimant's injury to heal was due to other preexisting factors. Additionally, on cross-examination, Claimant asked Dr. Cederberg to speculate as to what affect completing the second round of physical therapy would have had on Claimant's restrictions. Dr. Cederberg responded that he believed completing the second round of therapy would have resulted in a 15-pound lifting restriction instead of a 5-pound restriction. Employer/Insurer does not articulate how this less stringent lifting restriction would translate to greater work opportunities for Claimant, as lifting was only a part of her duties. As a traveling salesperson, Claimant was required to drive long distances several times a week. Dr. Hurd testified that Claimant was no longer able to drive long distances and Employer/Insurer provided no testimony to refute this. Audet concluded that even using a computer would be difficult for Claimant because of her injury. The Department finds that Employer/Insurer has failed to prove that the second round of physical therapy would have allowed Claimant to return to work.

4. IS EMPLOYER/INSURER ENTITLED TO SANCTIONS AGAINST CLAIMANT UNDER SDCL 15-6-37(b)?

ARSD 47:03:01:05.02 provides the Department the authority to grant sanctions. It states "[i]f any party fails to comply with the provisions of this chapter, the

Division of Labor and Management may impose sanctions upon such party pursuant to SDCL 15-6-37(b). However, attorney fees may be imposed only for a violation of a discovery *order*." (Emphasis added).

The portion of SDCL 15-6-37(b) relevant here states: "[i]f a party or an officer, director, or managing agent of a party or a person … fails to obey an *order* to provide or permit discovery, including an order made under § 15-6-37(a) or 15-6-35, the court in which the action is pending … shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." (Emphasis added).

The Department believes that Claimant's failure to authorize the release of her entire file was not motivated by bad faith. However, an absence of bad faith alone does not justify failure to comply with a discovery request. Claimant sought the advice of Barbara Christensen who, though an experienced counselor, was not an attorney. Why Claimant did not seek the advice of her own attorney about whether she was obligated to turn over her entire counseling file is not clear.

Though Claimant's actions were ill advised, the language of SDCL 15-6-37(b) clearly bases the granting of sanctions on the violation of an order for discovery. When Employer/Insurer filed a motion for an order to show cause in circuit court, no order was yet in place before the Department. Claimant could not be charged with violating an order which was not in force. Christensen's relinquishing of Claimant's entire file

rendered the need for an order from the Department unnecessary. Finally, the Department notes that its jurisdiction is limited to hearing workers compensation matters and therefore cannot grant costs associated with bringing an action in circuit court. It is unclear whether Employer/Insurer requested sanctions against either Claimant or Christensen in that action but SDCL 15-6-37(a) would have granted the circuit court the authority to consider such an award. Employer/Insurers motion for sanctions is denied.

Conclusion and Order

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, 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 29 day of December 2017.

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge