SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

ANNA FAIR,

Claimant,

vs.

NASH FINCH COMPANY,

Employer,

and

ROYAL & SUN ALLIANCE,

Insurer.

HF No. 96, 2003/04

DECISION ON PTD AND MEDICAL EXPENSES

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 on April 28, 2005, in Rapid City, South Dakota. Anna Fair (Claimant) appeared personally and through her attorney of record, James D. Leach. J.G. Shultz represented Employer and Insurer (Employer).

This matter first came before the Department on the issue of whether Claimant's injury on July 8, 2003, arose out of and in the course of her employment with Employer. The Department ruled in its Decision dated July 28, 2004, that Claimant failed to establish by a preponderance of the evidence that her injury on July 8, 2003, arose out of and in the course of her employment with Employer. Thereafter, Claimant appealed this determination to the Seventh Judicial Circuit. On November 19, 2004, the Honorable John J. Delaney reversed the Department's decision and remanded the case back to the Department for determination of the remaining issues.

The issues presented at this hearing included whether Claimant is permanently and totally disabled under the odd-lot doctrine and if so, what was the date of onset, and medical expenses. Employer stipulated prior to the hearing that it "will not offer any medical evidence that Claimant's ankle condition and the related disability is not caused by her injury of July 8, 2003."

FACTS

At the time of the hearing, Claimant was seventy-two years old. Claimant graduated from high school in 1950 and has two living children, four grandchildren and one great-grandchild. For the past twenty years, Claimant has worked as a grocery store cashier, a night supervisor at a country store, a hostess in a cafeteria, a part-time sales clerk, a laundress, a maid supervisor and also making beef jerky.

Claimant suffered work-related injuries to her left ankle in 1993, 1996, 1999, 2001 and 2002. Claimant's only lost time from work was from June 1, 2002, to July 15, 2002. Claimant then returned to work for Employer and assumed her regular duties as a cashier.

Around 7:00 p.m. on July 8, 2003, Claimant completed her shift as a cashier at the Family Thrift Center in Rapid City. After Claimant punched out, she spent approximately ten to fifteen minutes shopping for some groceries in the store. Claimant went through the checkout line and paid for her groceries. As Claimant carried her groceries to leave the store, she tripped over a rug in front of the door that led out of the store. Claimant fell forward and hit the floor, including her head on the cement. Claimant stated, "[i]t was the hardest fall I've ever fell in all my life."

Claimant's night supervisor, Russell Shacklett, worked at the Family Thrift Center on July 8, 2003. Shacklett was at the customer service desk, which is very close to the area where Claimant fell. Shacklett did not see Claimant fall, but he "heard . . . when she fell." Claimant told Shacklett that she had scraped her leg. Shacklett provided assistance to Claimant and he completed an accident report. In addition, Shacklett, via telephone, completed a First Report of Injury on July 9, 2003, and indicated that Employer was notified of the injury on July 8, 2003.

When Claimant returned home on July 8th, she noticed her left ankle had started seeping. There was a slight amount of fluid coming out where she had bumped her ankle. The bump was not in the same spot on her left ankle where she had previous problems. Claimant cleaned her injury and bandaged her ankle. Claimant returned to work the next day and Shacklett noticed that Claimant was limping. Claimant continued to work her regular hours for Employer.

Claimant continued to doctor her ankle herself. Her ankle continued to seep, then turned pink and then red. Her left ankle finally became so sore that Claimant decided to seek medical attention. Claimant made an appointment with Dr. Robert Preston, her treating physician. On August 18, 2003, Claimant saw Robert VandeVenter, PA and then returned to see Dr. Preston on August 21st. Dr. Preston noted that Claimant had a stasis ulcer on her left ankle and provided treatment.

Claimant continued to see Dr. Preston for treatment on her left ankle. In addition, Claimant continued working for Employer. Finally on October 23, 2003, Dr. Preston took Claimant off work until further notice, starting October 26, 2003. Dr. Preston took Claimant off work because her left ankle ulcer was not healing because Claimant was standing on her feet all day. Claimant was unhappy about being taken off work by Dr. Preston as she was used to working. Claimant liked her job and she enjoyed visiting with customers while she worked. While she was off work, Claimant stayed in touch with Employer's night managers, her manager and assistant manager about returning to work. But, there were never any jobs available that she could perform within Dr. Preston's restrictions.

Claimant continued to treat with Dr. Preston for her persistent left ankle condition. On June 4, 2004, Dr. Preston provided a permanent work restriction for Claimant. Dr. Preston stated, "I think perhaps it is not realistic for her to even be up on her feet at all while working. She is able to work when she is able to sit down and keep her leg elevated. She can work a full 8-hour day doing this. She is able to work at this time." These restrictions are still in effect at the present time, and they are final and permanent.

Dr. Preston explained why he placed these restrictions on Claimant:

> Well, whenever she tries to stand up for any length of time, she has swelling in that leg, and that leads to a predisposition for that ulcer to open back up again,

> that stasis ulcer. She's able to walk and perform, you know, her daily activities, but standing for a long length of time is not possible for her.

Dr. Preston showed Claimant what he meant by keeping her leg elevated. Claimant must keep her leg horizontal to the ground to help keep her blood circulating. Dr. Preston provided these permanent restrictions despite the fact that he knew Claimant wanted to return to work. He testified, "I think it's just her character. I think she's - - when she - - she was working at age 70 at a job fairly full-time when she first came in for the initial injury, or she was somewhere close to 70, and I think she's indicated to me many times that she wanted to stay on the job. She enjoyed her job, and she was going to work for an indefinite period of time." But, according to Dr. Preston, to address her persistent problems, Claimant must stay off her feet and keep her left leg elevated.

On February 24, 2005, Claimant resigned from her employment with Employer due to her medical condition. Claimant would like to return to work. She was a very responsible and highly motivated employee and she liked working. She does not enjoy sitting at home not being active. As Claimant stated, "I'm not a homebody person." Claimant searched for job openings three times at the local Career Center. Claimant did not find any jobs that she thought she could do. Claimant stopped going to the Career Center because she had no hope that she could find a job.

On April 12, 2005, Claimant received five job leads from James Carroll, Employer's vocational expert. Four of the jobs were located in Rapid City and one was located in Hill City. Claimant did not contact the employer in Hill City because her car was in poor condition. Claimant stated, "[m]y car is about to fall apart. I wouldn't dare take it that far." A ball joint is going out and she recently repaired a crack in the molding holding the engine in place. Claimant does not feel safe driving her car for long distances.

On April 12th, Claimant called the four employers in Rapid City. Three employers were taking applications. One employer, Knight Security, informed Claimant there were no openings and no openings were anticipated in the future. All three of the positions were for computer work. Claimant picked up applications at Golden West Technology, ASI and Heartland America. Claimant completed the applications, made copies and then took the applications to the potential employers and turned them in.

On April 14, 2004, Golden West sent Claimant a letter declining to hire her. In late April 2005, a representative from Heartland America called Claimant for an interview. Claimant was asked about her computer and typing skills. Claimant informed the representative that she had no computer skills and had limited typing skills, "like hunt and peck." The telephone conversation abruptly ended and Claimant was not offered an interview. On May 4, 2005, Claimant received a letter from ASI stating that ASI did not "have an appropriate position" for Claimant at the present time.

Claimant is currently unemployed. Claimant's weekly workers' compensation rate is $249.00. Claimant was a credible witness. This is based on her consistent and forthright testimony and on the opportunity to observe her demeanor at the hearing. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED UNDER THE ODD-LOT DOCTRINE AND IF SO, WHAT WAS THE DATE OF ONSET?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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).

Claimant argued that she is permanently and totally disabled under the odd-lot doctrine. At the time of Claimant's injury, permanent total disability was statutorily defined by SDCL 62-4-53. This statute states:

> 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 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 recognized at least two avenues by which a claimant may make the required prima facie showing for inclusion in the odd-lot category. Peterson v. Hinky Dinky, 515 N.W.2d 226, 231 (S.D. 1994). The Court stated:

> 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 fact in the kind of continuous, severe and debilitating pain which he claims. Second, if "'the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated to the odd-lot category,' then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made 'reasonable efforts' to find work." The burden will only shift to the employer in this second situation when the claimant produces substantial evidence that he is not employable in the competitive market. Thus, if the claimant is "obviously unemployable," he does not have to prove that he made reasonable efforts to find employment in the competitive market.

Id. at 231-32 (citations omitted). Even though the burden of production may shift to Employer, the ultimate burden of persuasion remains with Claimant. Shepard v. Moorman Mfg., 467 N.W.2d 916, 918 (S.D. 1991).

Claimant did not argue that she is obviously unemployable due to continuous, severe and debilitating pain. Claimant argued she is obviously unemployable due to her physical condition, coupled with her age, training and experience and the type of work available in her community. Claimant cannot return to work in a position that requires standing, such as her former job as a cashier for Employer. Dr. Preston opined Claimant can return to work only if she is able to sit down throughout the day and keep her left leg elevated. If this restriction cannot be met, Claimant cannot be employed on a full-time basis.

Claimant presented testimony from Rick Ostrander, a vocational rehabilitation counselor for twenty-five years. Ostrander interviewed Claimant and reviewed her medical records, work history, Dr. Preston's deposition and Carroll's report. Ostrander noted that Dr. Preston restricted Claimant to working in a sedentary position with her left leg elevated. Relying upon his past experience with the Rapid City labor market and taking these restrictions into account, Ostrander concluded after his interview with Claimant that she was not employable. Ostrander informed Claimant "her working days were over." This made Claimant sad and teary.

Ostrander did not recommend that Claimant undergo any vocational testing because it would be unnecessary. Ostrander determined a transferable skills analysis was the best tool to evaluate Claimant's employability because it provided Ostrander with pertinent information about Claimant's interests, orientation and ability to perform other work. Ostrander conducted a transferable skills analysis and found that Claimant's work history and skills were as a sales clerk and cashier and this past work would be classified as light duty and semi-skilled in nature. Ostrander noted that with her permanent work restrictions, Claimant was limited to less than sedentary work because she must sit down while working and must have her left leg elevated. In twenty-five years, Ostrander has never identified sedentary employment at the unskilled or semi-skilled level that would accommodate an individual's need to sit with his or her leg elevated.

Ostrander opined that Claimant is obviously unemployable and incapable of working as a result of her limitations. More specifically, Ostrander opined that Claimant's physical condition, in combination with her age, training and experience and the type of work available in her community, causes her to be unable to be employed in anything other than sporadic employment resulting in an insubstantial income. Claimant is limited to unskilled sedentary or entry level semi-skilled work. But, Ostrander opined, "given her age and background, that's not terribly realistic." She must elevate her leg while working. Ostrander has never found any unskilled or semi-skilled work where a person can work with his or leg elevated at the appropriate height because this positioning interferes with work stations and curtails productivity.

Ostrander opined that a job search by Claimant would be futile because "[t]here's certainly no work in the labor market that would accommodate her limitations." In addition, Ostrander opined that given Claimant's age and her restrictions, there is no formal vocational rehabilitation or retraining that could reasonably be expected to restore her to employment. Ostrander did not need to contact employers about possible

positions for Claimant. Ostrander stated, "[h]er case is very obvious. I felt it would be inappropriate to perform that activity since it would be fruitless."

Based on Claimant's credible testimony, her permanent physical restrictions and on Ostrander's credible testimony, Claimant has established that she is obviously unemployable due to her physical condition, coupled with her age, training and experience and the type of work available in her community. Claimant's physical condition causes her to be unable to be employed in anything other than sporadic employment resulting in an insubstantial income. Because Claimant is obviously unemployable, she does not have to demonstrate "the unavailability of suitable employment by showing that [she] has made 'reasonable efforts' to find work" and was unsuccessful. Peterson, 515 N.W.2d at 231.

Based on the foregoing, Claimant established a prima facie showing that she is permanently and totally disabled under the odd-lot doctrine. Therefore, the burden of production shifts to Employer to show that some form of suitable employment is regularly and continuously available to Claimant within her community. "Employer must have demonstrated the existence of 'specific' positions '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, 467 N.W.2d at 920.

Employer presented testimony from Carroll, a vocational rehabilitation consultant for over twenty-five years. Carroll reviewed Claimant's medical records, Dr. Preston's deposition and Claimant's depositions. Carroll acknowledged that Claimant had a very good and stable work history. Carroll also recognized that Claimant has permanent work restrictions imposed by Dr. Preston on June 4, 2004. Carroll used these restrictions to identify positions open and available in Claimant's community.

Based on his work experience, Carroll opined, "I think there are accommodations that can be made with people that need to elevate their leg so that they could work in a situation such as I've described." Carroll identified three specific employers with positions open and available at the time of the hearing that would accommodate Claimant's need to elevate her leg. The three employers were ASI, Heartland America and Golden West.

Golden West had Answering Service Operators positions open and available. The starting salary was $8.00 per hour with a raise to $9.00 per hour after three weeks of training. Potential applicants needed to have minimal knowledge of computers. Carroll learned through his contact with Golden West that the job consisted of 90% sitting with the opportunity to stand at will. Golden West could accommodate individuals who needed to elevate their legs within their work stations.

ASI had several Outgoing Call Center positions open and available. The job entailed sitting at a computer and the worker could stand if needed. ASI could accommodate individuals who needed to elevate their legs, but employees must provide their own adaptive devices. The starting salary at ASI was $8.55 per hour with forty hours of work per week available.

Heartland America had at least five Inbound Call Center Representative positions available. These were full-time positions that paid $8.00 per hour plus commission. The job required sitting 90% of the time, but workers would have the opportunity to stand as needed. ASI could accommodate individuals who needed to elevate their legs throughout the day.

Carroll also identified Knight Security as an employer having a full-time Security Monitor position available in the near future. However, Knight Security did not have any current openings and cannot be considered as a potential employer. Carroll also identified a potential employer in Hill City. However, the position paid only $7.00 to $8.00 per hour with twenty-five hours per week available. This position also would not be suitable employment for Claimant as the job would not pay at least her compensation rate, especially considering the cost of commuting.

Based on his labor market survey, Carroll opined there was employment available in Claimant's community within her restrictions. Carroll opined Claimant was not obviously unemployable because there is suitable employment regularly and continuously available to Claimant in her community offering a wage equal to her workers' compensation rate of $249.00 per week. In addition, Carroll suggested that Claimant should consider going to the Career Center to take a basic keyboarding class to "bring [her] typing skills up to speed." Finally, Carroll opined that Claimant could benefit from vocational retraining.

Based upon Carroll's credible testimony, Employer demonstrated that there were specific positions open and available within Claimant's community that would meet all her limitations and pay her a suitable wage. Even though Employer satisfied its burden of production with Carroll's testimony, the ultimate burden of persuasion remains with Claimant.

Prior to the hearing, Ostrander visited ASI, Heartland America and Golden West to assess various ways to accommodate different limitations. Carroll did not visit any of the job sites. Ostrander also viewed how the various jobs were performed. Ostrander opined that none of the employers identified could reasonably accommodate Claimant's restrictions. At Heartland America, Ostrander noted that accommodation was not possible due to the cramped quarters and nature of the work setting. At Golden West, Ostrander toured the call center and found that this employer could not accommodate individuals who needed to elevate their legs. A person would be able to prop his or her foot up six to twelve inches under the desk, but could not extend his or her leg out in front of them.

Therefore, taking into consideration Ostrander's credible assessment of these positions, the jobs identified by Carroll were regularly and continuously available, but the positions were not suitable because the positions could not accommodate all of Claimant's restrictions. Because of her medical restrictions including the need to sit and elevate her leg, Claimant would be physically unable to perform any of the jobs identified by Carroll. In addition, the positions required some computer skills. Claimant has not used a computer in over five years. She can only hunt and peck on a typewriter. Carroll opined that Claimant would benefit from a taking a remedial computer class. To the contrary, Ostrander opined such a class would not provide any vocational benefit to Claimant. Even if Claimant received some form of computer education, she would be physically unable to perform computer work due to her permanent restrictions.

Claimant credibly testified that she would like to return to work. Despite Ostrander's opinion that a job search would be futile, Claimant searched the job listings at the Career Center and applied for three positions identified by Carroll. In addition, Claimant contacted Knight Security on two occasions, but discovered there were no openings. Ostrander also confirmed that Knight Security was not currently hiring.

Claimant did not receive even an interview from the employers identified by Carroll. Unfortunately, due to her work restrictions, Claimant has been unable to find suitable employment.

Despite her desire and reasonable efforts to become employed, Claimant is obviously unemployable due to her physical condition, coupled with her age, training and experience and the type of work available in her community. Claimant has met her burden of persuasion to establish that she is permanently and totally disabled under the odd-lot doctrine. Claimant's permanent total disability began on October 26, 2004, the date Dr. Preston took Claimant off work due to her injury. Claimant has been unable to work since that time. Claimant's request for permanent total disability benefits is granted.

Claimant is also entitled to payment of medical expenses. Those medical expenses were set forth in Exhibit 10. Of course, Employer need not pay for any medications shown in Exhibit 10 that were not prescribed for her work injury. Employer must reimburse those parties who have paid these medical expenses. See SDCL 62-1-1.3. Claimant's request for payment of work-related medical expenses is granted.

Claimant shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Employer shall have ten days from the date of receipt of Claimant's Findings and Conclusions to submit objections or to submit its own 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 7th day of July, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge