SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

ILLA LARSON,
Claimant,

HF No. 157, 2002/03

v.

DECISION on REMAND

OTTER TAIL POWER COMPANY,
Employer/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, Illa Larson (Claimant) appeared personally and through her counsel, Robert E. Spears. Reed Rasmussen represented Employer/Self-Insurer (Employer).

Procedural history

The Third Circuit Court reversed the Department's April 15, 2005, Decision and remanded the above-referenced matter to the Department "for further proceedings consonant with this Conclusion of Law, that the barrel incident was a major contributing cause of the medical condition the claimant now complains of."

Therefore, the following issues remain for determination:

1. **Whether Claimant provided notice pursuant to SDCL 62-7-10.**
2. **Whether Claimant is permanently, totally disabled under the odd-lot doctrine.**
3. **Whether Claimant is entitled to permanent partial disability and if so, in what amount.**
4. **What amount of temporary total disability benefits are owed to Claimant?**
5. **Whether Claimant is entitled to unpaid medical expenses in the amount of $3,812.85?**

On March 31, 2004, the parties entered into the following Stipulation:

1. Claimant began working for Otter Tail Power Company at its Big Stone plant on May 28, 1996. She continued to work there until December 4, 2002, when she took a medical leave of absence.
2. From November 2000 through November 2001, Claimant worked 40 hours per week at a rate of pay of $15.69 per hour. During this period, her compensation rate for worker's compensation benefits was $418.61 per week.
3. From November 2001 through November 2002, Claimant worked 40 hours per week at a rate of pay of $16.17 per hour. During this period, her compensation rate for worker's compensation benefits was $431.42 per week.

4. A First Report of Injury form was signed by Claimant on May 14, 2002, regarding an alleged work-related injury occurring on May 13, 2002. No First Report of Injury form was completed regarding any work related injuries in October or November 2001.
5. For purposes of the hearing, neither party will object on foundation grounds to the entry into evidence of any medical records concerning Claimant.

Claimant is fifty-three years old. She has a high school diploma. She began working for Employer on May 28, 1996, as a laborer. Her other work history includes owning and operating a dairy farm with her husband from 1971 to 1987, raising five sons, and working at a cheese factory for nine years before working for Employer.

Claimant filled out a First Report of Injury Form on May 14, 2002, stating that she suffered an injury while shoveling ash. Claimant began treating with Dr. Gregory Peterson, a chiropractor. She was diagnosed with a cervical spine strain/sprain. Dr. Peterson treated Claimant extensively throughout 2002. Claimant showed improvement of her condition but could not continue with her duties due to her pain and other issues. Dr. Peterson took her off work for complete rest on December 4, 2002. Dr. Peterson opined that Claimant reached maximum medical improvement on February 13, 2003, but Claimant never returned to work for Employer. Dr. Peterson's last treatment of Claimant was in March of 2003.

Dr. Rodney Peterson, an orthopedic surgeon certified by the American Board of Orthopedic surgeons, performed an independent medical evaluation (IME) of Claimant on October 24, 2002, at Employer's request.

Dr. Walter O. Carlson, an orthopedic surgeon certified by the American Board of Orthopedic Surgeons, treated Claimant on Chiropractor Peterson's referral. On July 24, 2002, Dr. Carlson examined Claimant, found "no neurologic deficits," and recommended an MRI of the cervical spine. On August 8, 2002, Dr. Carlson noted that Claimant's MRI showed "some cervical degenerative facet arthrosis at C4 left and C6 left." Dr. Carlson prescribed Bextra and recommended home therapy, including home traction, and a physical therapy evaluation.

In the summer of 2003, Claimant moved to Saratoga Springs, Utah. Her husband had moved to Utah to work before Claimant was injured and Claimant decided to join him there. Claimant currently resides in Saratoga Springs, Utah.

Claimant's physical condition related to her work injury does not restrict her from working. Claimant's treating medical practitioner, Dr. Peterson, opined that Claimant "definitely can accept some type of employment, as long as the restrictions are within what I had said." Dell Felix, a physical therapist who conducted a functional capacities evaluation of Claimant, found that she could return to a medium physical demand level of employment, with certain restrictions. Those restrictions included limiting sitting to no more than one to two hours at a time, or four to six hours a day; limiting cervical flexion or excessive reaching; and limiting climbing or reaching to only occasional throughout

the workday. Felix expressed concern that Claimant's cardiovascular deconditioning, high blood pressure and high resting heart rate might restrict her work. Dr. Peterson agreed at hearing that Claimant could work within the restrictions given by Felix.

Claimant hired Rick Ostrander, a vocation rehabilitation counselor, to perform a vocational evaluation to determine her capacity for employment. Ostrander interviewed Claimant, performed a labor market survey, and prepared a report on March 17, 2004. After considering Felix's FCE report and a vocational assessment report completed by Terri L. Marshall on July 16, 2004, Ostrander issued a supplemental report on July 23, 2004.

Other facts will be developed as necessary.

Issue One

Whether Claimant provided notice pursuant to SDCL 62-7-10.

The general rule is that a 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 Bros. Constr. Co., 155 N.W.2d 183, 185 (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).

"Notice to the employer of an injury is a condition precedent to compensation." Westergren v. Baptist Hosp. of Winner, 1996 SD 69, ¶ 17, 549 N.W.2d 390, 395 (*citing* Schuck v. John Morrell & Co., 529 N.W.2d 894, 897-98 (S.D. 1995)). SDCL 62-7-10 sets the rules for providing notice:

> An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three business days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:
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> (1) The employer or the employer's representative had actual knowledge of the injury; or
> (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three business-day period, which determination shall be liberally construed in favor of the employee.

There is no dispute that Claimant did not provide written notice of an incident at work, which will be referred to as "the barrel incident." The exact date of the barrel incident is not known, but it occurred in either October or November of 2001. Claimant informed her supervisor Steve Brotzel that she fell while attempting to move a barrel of soap. Brotzel does not dispute that Claimant told him about the barrel incident and that she fell down. Brotzel could not recall how long after the incident Claimant told him about it, testifying that it could have been "a week or a day or a month." Although no report of the incident was filed, Brotzel instructed the maintenance crew to redesign and replace the barrel-holding device to prevent a similar incident.

Claimant argues that Employer had actual knowledge of the incident pursuant to SDCL 62-7-10 subparagraph 2. To aid in the determination of whether an employer has actual knowledge, the Supreme Court considers several different factors. One factor for consideration is whether the employer actually began investigating the claim after the employee allegedly provided notice of it. See Westergren, 1996 S.D. 69, ¶ 20, 549 N.W.2d 390, 396 (holding that the employer did have actual knowledge of a possible claim as evidenced by its immediate investigation). Claimant verbally informed her supervisor, Steve Brotzel, about the barrel incident shortly after it happened. Brotzel admitted that Claimant told him that she had taken a fall due to the malfunction of the barrel-holding device.

Employer was on notice that an incident had occurred and that Claimant had fallen down on the floor, landing on her "rear." Employer took action to ensure that no further accidents of that nature happened again. Employer had the opportunity to investigate the circumstances of the incident and that Claimant had fallen down. Employer had actual knowledge of the incident. The Supreme Court has found that "sufficient knowledge to indicate the possibility of a compensable injury" is enough to meet the actual knowledge requirement. See Streyle v. Steiner Corporation, 345 N.W.2d 865 (S.D. 1984). Claimant's failure to provide written notice within three business days of the injury does not preclude her worker's compensation claim because she has shown that Employer had actual knowledge of the possibility of a compensable injury.

If her notification of the barrel incident is later found to be insufficient to satisfy the actual knowledge requirement of SDCL 62-7-10(2), then it can be found that the statute of limitations did not begin to run until Claimant realized she suffered a compensable injury. Claimant did not feel that she suffered a compensable injury at the time of the barrel incident. She did not suspect that she had suffered a compensable injury until it was suggested by her medical providers that her condition could have been caused by a traumatic incident, such as a fall. "A claimant cannot be expected to be a diagnostician and, while he or she may be aware of a problem, until he or she is aware that the problem is a compensable injury, the statute of limitations does not begin to run." Bearshield v. City of Gregory, 278 N.W.2d 164, 166 (S.D. 1979). Claimant informed James Hicks, maintenance supervisor for Employer at its Big Stone plant, that her medical providers may have found a link between her condition and the barrel incident. Employer had actual knowledge of the possible compensable nature of the barrel incident. Claimant did not provide written notice of her medical providers'

opinions, but Hicks acknowledged that Claimant personally informed him of the medical opinion that she had possibly suffered a compensable injury during the barrel incident. Hicks admitted to investigating the barrel incident after his conversation with Claimant. Employer had actual knowledge of the probable compensable nature of the barrel incident. Claimant has satisfied her burden under SDCL 62-7-10.

Issue Two

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

Claimant asserts that she is entitled to permanent total disability benefits. 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.

A recent Supreme Court opinion 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.
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> 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).

The first question that must answered is what is Claimant's community for purposes of her odd-lot claim. At the time of her injury, Claimant resided in Corona, South Dakota. In the summer of 2003, Claimant moved to Utah to live with her husband and two of her sons who reside and operate a business there.

In order for Claimant to claim Saratoga Springs, Utah, as her community for purposes of determining her permanent total disability claim, she must demonstrate that her move to Utah was done in good faith and not for improper motives. See Reede v. State of South Dakota Dept. of Transp., 2000 SD 157, ¶ 18 and SDCL 62-4-53. It should be noted that while she was still working for employer, Claimant's husband moved to Utah to work. Claimant stayed behind in Corona because of her job with Employer. When Claimant moved in the summer of 2003, it was partially for financial reasons. At time of hearing Claimant was still living Saratoga Springs, Utah. There is no evidence to support a conclusion that Claimant moved to purposefully leave the labor market. The Reede Court stated that an employee "has the right to choose where to live." Id. at ¶ 16. "[I]f an employee chooses to live in an area where employment opportunities are virtually

non-existent, an employer-insurer [is not required to] subsidize him." Id. There is no evidence to suggest that the Saratoga Springs community has fewer employment opportunities than Corona. Claimant's move was done in good faith and was not done to thwart her job search. For purposes of her permanent total disability claim, Claimant's community is a sixty-mile radius around her current residence, Saratoga Springs, Utah.

However, in Reede v. State of South Dakota Dept. of Transp., the Supreme Court ruled that a claimant must meet her prima facie burden "in the community in which she resided when injured to recover for that period." 2000 SD 157, ¶ 18. The Reede court continued,

> An entitlement to benefits in a single community, based on an inability to secure anything more than sporadic employment does not allow a claimant to recover benefits for periods outside that community. Such recovery is not warranted absent an independent showing the benefits are justified.

Id. at ¶ 20. While living in South Dakota after her injury and before she moved to Utah, Claimant performed no job search. She did not make a single application for employment in her Corona community. Her vocational expert, Rick Ostrander, offered opinions on her employability in the Saratoga Springs, Utah, community. Claimant made no showing whatsoever of unemployability in her Corona community. Therefore, Claimant is not entitled to permanent total disability benefits from February 13, 2003, until she moved to Utah.

Claimant met her prima facie burden to demonstrate that her physical condition, combined with her age, training, and education leave her "obviously unemployable" in her Utah community. Although Claimant did not attempt whatsoever to find employment, she presented the opinions of Rick Ostrander to meet her burden. After conducting a labor market survey of the Saratoga Springs area, Ostrander opined that Claimant's physical restrictions and skills are such that she will not be able to find employment at or above her worker's compensation rate.

Claimant failed to argue or demonstrate that she is in such continuous, severe, and debilitating pain that she should be considered "obviously unemployable." Her medical providers each indicated that she is capable of working despite the pain caused by her condition.

Claimant has also met her prima facie burden for the second avenue by which to prove her "odd-lot" case. Claimant demonstrated the unavailability of suitable employment by showing that she has made reasonable efforts to find work and was unsuccessful. Ostrander opined that suitable employment is unavailable to Claimant and a job search would not yield suitable employment. After his labor market survey, Ostrander found that Claimant is "not reasonably employable at or above her worker's compensation rate. Ostrander also opined that retraining is not feasible given Claimant's age and worker's compensation rate.

Because Claimant has met her prima facie burden of showing "obvious unemployability" in her Utah community and that a work search would be futile, the burden shifts to Employer to show that "some form of suitable work is regularly and continuously available to the claimant." In Shepherd v. Moorman Manufacturing, 467 N.W.2d 916, the Supreme Court explained:

> For the employer to have met this burden, the evidence must show more than a general availability of jobs to persons with some of claimant's disabilities. 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.

(citations omitted). Employer did not offer any vocational testimony regarding Claimant's employability in Utah or in her former community in South Dakota. Employer did not offer any evidence that retraining is a feasible option for Claimant. Instead, Employer offered Claimant her former position, with accommodations, at the Big Stone Plant. The offered position is intended to be the same position she last worked in for Employer. Employer agreed that any "documented doctor's work restrictions relating to the alleged work injury would be followed" and agreed to pay Claimant over $18.00 per hour.

There are several problems with Employer's offer. First, it is not within Claimant's community for purposes of her worker's compensation claim as required by SDCL 62-4-53. Second, Employer did not demonstrate that it is a position "regularly and continuously available" to Claimant "in the community where Claimant is already residing." Id. Third, Employer's argument that Claimant is required to at least try this position even though she moved to Utah is rejected. Claimant's move to Utah was done in good faith and; therefore, the move changed her community.

Employer cites to McClaflin, in support of its argument. McClaflin is distinguishable. The claimant in McClaflin was employed in a specially created position at the time he made his claim. Claimant in this case was not working for Employer at the time she made her claim. In McClaflin, the claimant was already working in a position created especially for him so that his employer would not have to pay disability benefits to him. In this case, Claimant was not working for Employer when the position was offered. Claimant lived in Utah for almost a year before she was offered her position back with special accommodations. The position in McClaflin was within the claimant's community. Employer's offered position is not within Claimant's community.

Employer has failed to meet its burden to demonstrate that "some form of suitable work is regularly and continuously available to" Claimant in her Utah community.

The ultimate burden of persuasion remains with Claimant. Although Claimant did not try at all to find work, Ostrander's unanswered and unchallenged vocational opinions meet her burden to show "obvious unemployability" and to show that any work search would

have been futile. Claimant was a credible witness. Employer offered no medical testimony to rebut the restrictions placed on Claimant by the FCE examiner Felix or by Dr. Peterson. Employer offered no vocational testimony to rebut Ostrander. Claimant moved in good faith to Utah when she could not return to work for Employer. Claimant has met her burden of persuasion. She is permanently and totally disabled beginning on the date she moved to Utah.

Issue Three

Whether Claimant is entitled to permanent partial disability and if so, in what amount.

Claimant is not entitled to permanent partial disability benefits because she has been found to be permanently totally disabled under the odd-lot doctrine. SDCL 62-4-6 precludes an award of both permanent partial disability benefits and permanent total disability benefits. For purposes of completeness, the Department will rule on this issue despite its award of permanent total disability benefits.

Claimant seeks permanent partial disability benefits for her injury pursuant to SDCL 62-4-6, which states in relevant part:

> For injuries in the following schedule, an employee shall receive in addition to compensation provided by §§ 62-4-1, 62-4-3, and 62-4-5.1, compensation fro the following further periods, subject to the limitations as to rate and amounts fixed in § 62-4-3, for the specific medical impairment herein mentioned, but may not receive any compensation under any other provisions of this title:
> . . .
>
> (21) For permanent partial disability resulting from injury to the back, compensation for that proportion of three hundred twelve weeks which is represented by the percentage that such permanent partial disability bears to the body as a whole;
> (22) In all cases in the above schedule under this section, if the medical impairment is partial and permanent, the compensation shall bear such relation to the maximum amount for complete and permanent loss as defined in this section as the medical impairment bears to the complete loss;
> . . .;
>
> (24) For permanent disfigurement, or permanent disability resulting form injury to any part of the body not hereinbefore listed, compensation for that portion of three hundred twelve weeks which is represented by the percentage that such permanent partial disability or permanent disfigurement bears to the body as a whole.

SDCL 62-1-1.2 defines “impairment”:

> For the purposes of this chapter, impairment shall be determined by a medical impairment rating, expressed as a percentage to the affected body part, using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, fourth edition, June 1993.

In support of her claim for permanent partial disability benefits, Claimant offered the impairment rating conducted by Dr. Peterson. Dr. Peterson found that Claimant suffered an impairment of 15% of the whole body due to her cervical spine condition.

Employer disputes Dr. Peterson's findings, arguing that Dr. Peterson's impairment rating lacks the foundation necessary to sustain an award under Title 62. First, Employer asked the Department to strike any new opinions offered by Dr. Peterson at hearing arguing that were undisclosed prior to hearing. Employer's Motion is granted.

Second, Employer argued that Dr. Peterson's opinion of Claimant's impairment lacks foundation. Employer's argument is rejected. Dr. Peterson is Claimant's treating medical practitioner. Claimant offered his medical opinion she suffers from a fifteen percent impairment rating under the Guides to the Evaluation of Permanent Impairment (the Guides). Employer did not offer a contrary medical opinion. Instead, Employer asked the Department to accept Employer's interpretation on the correct use of the Guides. The Guides themselves were not offered. The Department accepts Dr. Peterson's opinion that Claimant suffers from a fifteen percent impairment to the whole person. If Claimant had not been found to be permanently and totally disable as of February 13, 2003, she would be entitled to permanent partial disability benefits pursuant to SDCL 62-4-6 and Dr. Peterson's opinion.

Issue Four

What amount of temporary total disability benefits are owed to Claimant?

SDCL 62-1-1(8) provides this definition of temporary disability, total or partial: "the time beginning on the date of injury, subject to the limitation set forth in 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first."

SDCL 62-1-1(2) defines "ascertainable loss." This statute states that "a loss becomes ascertainable when it becomes apparent that permanent disability and the extent thereof has resulted from an injury and that the injured area will get no better or no worse because of the injury." Dr. Peterson opined Claimant was at maximum medical improvement on February 13, 2003. Claimant's last day of work was on December 4, 2002. Claimant is entitled to 11.57 weeks of benefits, which at her benefit rate would equal $4,991.53.

Issue Five

Whether Claimant is entitled to unpaid medical expenses in the amount of $3,812.85?

Claimant argued that she is entitled unpaid medical expenses in the sum of $3,812.85. The only evidence submitted at the hearing with regard to medical expenses was Exhibit 33, a fax from Peterson Chiropractic Clinic. All but $285 of that sum was paid by Employer or Blue Cross/Blue Shield. Employer agreed that if Claimant's claim is determined to be compensable, which it has been, Claimant would be entitled to reimbursement for the $285 she personally paid. It should be noted that SDCL 62-1-1.3 requires that "[i]f it is later determined that the injury is compensable under this title, the employer shall immediately reimburse the parties not liable for all payments made, including interest at the category B rate specified in § 54-3-16."

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 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 3rd day of February, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge