

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT**

THOMAS PALLETT,

HF No. 162, 2013/14

Claimant,

v.

DECISION

U.S. HOTEL & RESORT MANAGEMANT,

Employer,

and

AMERICAN INSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held before the Division of Labor and Management on September 30, 2015, in Rapid City, South Dakota, before Donald W. Hageman, Administrative Law Judge. Michael Simpson represented Claimant, Thomas Pallett. J.G. Shultz represented Employer and Insurer, U.S. Hotel & Resort Management and American Insurance Company.

Issues:

1. Whether Thomas Pallett met his burden of showing entitlement to odd-lot benefits (SDCL 62-7-53)?
2. Whether Pallett's retirement bars his entitlement to odd-lot benefits?

Facts:

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

1. Thomas Pallett (Pallet or Claimant) was 63 years old at the time of hearing. He grew up in Plainwell, Michigan on a farm, and did farm work from a young age.
2. Pallett went to school through the 10th grade and does not have a GED. He has difficulty reading and writing.

3. After working on the farm, Pallett worked in a factory running a buffing machine.
4. Pallett was drafted into the Army and served from 1971 to 1973, when he was honorably discharged.
5. After serving In the Army, Pallett went back to work at the buffing factory.
6. Pallett began driving truck, over the road, in the 1970's. He drove truck for over 30 years, starting out working for other people and eventually buying his own truck.
7. In 2007, Pallett retired from trucking and began working as a seasonal worker at the Custer State Park Game Lodge. The State Game Lodge is a property which is managed by U.S. Hotel and Resort Management (Employer).
8. In 2008, Pallett was hired as a full time maintenance person for the State Game Lodge. In this job, Pallett was responsible for repairing "anything that breaks" in the 21 cabins in the Game Lodge area, the 40 guest rooms at the State Game Lodge, the 30 motel rooms at the Creekside Lodge, as well as the 60 dorm rooms for employees, for a total of 159 rooms. In addition to all the rooms, Pallett was responsible for repairs and minor renovations of the common areas as well as the Game Lodge restaurant. This job included a lot of heavy lifting, for example, air conditioners, water heaters and plumbing snakes.
9. Custer State Park has four different properties that are managed by Employer. Each has cabins and/or hotels and restaurants: (1) the State Game Lodge; (2) Sylvan Lake; (3) Blue Bell Lodge; and (4) Legion Lake. At the time Pallett worked there, each property had a full time, maintenance person assigned to it with one, Robert Stewart, acting as supervisor over the others. When there was a particularly heavy job to do, a maintenance person could ask for help from one or more of the others.
10. Pallett was paid a salary and was expected to work six days a week in the summer and five days a week in the winter. He usually worked seven days a week. On Sundays, he would work a few hours, sometimes more, "just to check on things and make sure things were running smoothly."
11. Pallett's supervisor referred to him as a "damn good worker" who took pride in his work.
12. On January 10, 2012, Pallett loaded and unloaded an oven that weighed 400 or 500 pounds that the Lodge had bought at an auction. The next day his back "hurt pretty bad" and his supervisor told him to see a doctor.
13. On January 19, 2012, Pallett was seen by Dr. Lisa Brown at Custer Medical Clinic. Pallett was complaining of pain of 10 out of 10 down the back of his leg and tingling all the way to his toes. Her notes indicate that "he has a hard time

standing upright and has an antalgic gait bearing weight on the left leg." He was referred to physical therapy and restricted to lifting no more than 10 pounds.

14. From January 19, 2012 through July 16, 2012, Pallett was treated by several doctors who provided conservative treatment. This treatment involved epidural injections and work restrictions.
15. After conservative treatment failed, Dr. Watt performed a decompression and fusion surgery at L4-5 on July 16, 2012.
16. American Insurance Company (Insurer) accepted responsibility for Pallett's injury and paid for his medical treatment.
17. The surgery largely eliminated Pallett's back and leg pain. In October 2012, approximately four months after the surgery, Dr. Watt released Pallett to return to work full time, without restrictions. At that time, Dr. Watt noted that Pallett was doing "quite well," he was taking no pain medications, and he had no complaints of pain.
18. Upon returning to his job at the Game Lodge, Pallett's co-workers assisted him with projects involving heavy lifting, but he was otherwise able to perform all of the same job duties he had performed prior to his injury.
19. The notes from Dr. Watt's January and July of 2013 follow-up appointments indicated that Pallett's recovery was doing well and he was authorized to work full time without restrictions.
20. In November of 2013, Pallett decided to retire from his job at the Game Lodge. He "didn't want to break [his] back again." In November of 2013, his plan was to go to Mexico with his wife, live in Mexico for the winter and build a cabin in Alaska and live there in the summer.
21. While Pallett did travel to Mexico for a time, he eventually moved to Fort Collins, Colorado. He never did move to Alaska.
22. About January of 2014, Pallett's back pain started to worsen.
23. On March 25, 2014, Pallett was seen by Dr. Dietrich at the request of Insurer for an impairment rating of the lumbar spine. Dietrich gave Pallett a 10 percent impairment of the whole person for his lumbar radiculopathy status post lumbar fusion at L4-5.
24. On August 27, 2014, Pallett was seen by a physical therapist, Myron Sorestad, for a functional capacity exam (FCE) at the request of Dr. Dietrich. Sorestad noted that initially following lumbar surgery, "the condition was better however daily pain is experienced at present." Sorestad noted a pain in the left low back

region is described as being continuous in nature. Sorestad noted "intermittent pain and paresthesia is experienced in the left more so than right lower extremity." Sorestad noted "current numeric pain rating is 7/10 localized to the left low back region. Pain ranges between 6/10 at best and 10/10 at worst." Sorestad noted "aggravation of pain is recorded with standing, sitting, bending, lying in bed, lifting, and performing household duties." Sorestad noted that Pallett's sleep is disturbed as a result of pain. Sorestad's examination revealed "loss of lumbar lordosis and mild accentuation of the left lateral trunk skinfold" as well as "bilateral lumbar paraspinal muscles appear hypertonic." Sorestad also noted Pallett's "gait is characterized by a forward trunk lean maintained throughout" as well as "limited trunk rotation noted" and "transitional movement from sitting to standing and bed mobility appear mildly guarded/inhibited due to pain." Sorestad assessed "abnormal postural presentation, residual lumbar muscle hypertonicity and significantly limited lumbar mobility status post L4-5 PLIF procedure."

25. Sorestad concluded that Pallett could return to full time work, with restrictions. Pallett was limited to lifting between 35 and 55 pounds, sitting and standing frequently (1/3 to 2/3 of a work day, or 2 1/3 to 5 1/3 hours) and walking occasionally (up to 1/3 of a work day or up to 2 1/3 hours).
26. Dr. Dietrich was deposed on June 16, 2015. Dietrich testified that Pallett's pain symptoms had worsened between the times that Dr. Watt saw Pallett in July of 2013 and Dietrich's examination in March of 2014. Dietrich explained that Pallett suffered from "adjacent segment degeneration" which is a common condition after fusion surgery where there is wear and tear at a level either right above or right below a fusion. The fusion is solid. It's not moving at L4-5. More stress is put at L5-S1. He explained that Pallett's condition now at L5-S1 is the same as it was at L4-5 prior to his surgery.
27. Dr. Dietrich testified that in March of 2014, Dietrich diagnosed Pallett with a "lumbar radiculopathy which is an injury to a nerve root causing ongoing down the leg numbness, tingling, nerve pain, noxious sensations and/or weakness."
28. Dr. Dietrich opined:
 - a. The work injury is and remains a major contributing cause of Pallett's current low back condition and disability.
 - b. He released Pallett to working within the weight restrictions and the limitations on sitting, standing and walking as specified in functional capacities evaluation. In addition, Dietrich recommended that Pallett be allowed frequent changes in position from sitting, standing and walking to accommodate his pain level.

- c. Pallett's pain complaints of 4/10 to 9/10 as well as pain radiating down his leg and numbness and tingling in his leg are symptoms that are consistent with Dietrich's objective medical findings.
 - d. Pallett is not malingering or overstating in any way his pain complaints.
 - e. As for future medical treatment, Dietrich believed that Pallett was a candidate for additional epidural steroid injections, maybe occasional physical therapy, neuropathic medication, and potentially fusion of the L5-S1 level.
29. On June 26, 2015, Dietrich saw Pallett, who was continuing to have "ongoing severe lumbar radiculitis and left L5-S1 radicular pain." Dietrich noted "he is failing conservative measures and he is not finding significant benefit from current medication regime. He's off the Gabapentin. This did not help. He is not able to work. His pain is 8/10 in severity and he is markedly limited in activities." Dietrich noted Pallett had a positive straight leg raise, radicular complaints in a left L5-S1 distribution and distal -1 to -1.5 L5 muscle strength. Dietrich recommended an updated MRI of the lumbar spine and adding Cymbalta for "additional neuropathic relief."
30. On June 26, 2015, a lumbar MRI showed moderate bilateral neural foraminal stenosis and exiting nerve impingement as well as mild lateral recess stenosis and descending nerve abutment at L5-S1.
31. On August 18, 2015, Dietrich noted the MRI results and recommended a left L5-S1 transforaminal epidural injection to try to "settle down symptoms."
32. Rick Ostrander testified as a vocational expert for Pallett. Ostrander has worked as a vocational consultant for 34 years. Ostrander did a structured interview with Pallett, reviewed his medical records, and Dr. Dietrich's deposition, and performed a transferrable skills analysis. Ostrander summarized Pallett's limitations as lifting between 35 and 55 pounds, walking up to one third of the work day, sitting and standing frequently (or one-third to two-thirds of the work day) and needing to change positions frequently due to his pain complaints.
33. Ostrander explained how Pallett's restrictions impact employment. He explained that a restriction to frequent sitting would keep Pallett from going back to truck driving such as an over the road truck driver because you have to drive continuously and sit on a continuous basis in that job.
34. During his testimony, Ostrander explained how Pallett's ability to only sit for 45 minutes on a good day and 15 minutes on a bad day and stand for 45 minutes on a good day and 15 minutes on a bad day would impact unskilled work. Ostrander testified "It essentially eliminates it, for all practical purposes." Ostrander explained "He can't tolerate prolonged standing and walking, which most unskilled work is going to involve. And even some type of production work in a

factory setting, you've got to maintain your posture at a work station for extended periods." Ostrander stated, "if you can't maintain posture for half hour increments, you can't really be productive in a production setting.... So, for a guy who can only sit for 15 minutes, can only stand for 15 minutes on a bad day, he's not going to be able to work in a production setting."

35. Ostrander testified that Dr. Dietrich's testimony that Pallett was not overstating or malingering in any way his pain complaints is important because Dietrich identifies "that there's objective reasons for his pain complaints." Ostrander explained that the lifting restrictions are really not significant from a vocational standpoint "but the significant limitations that impact work are the sitting and standing tolerances which are noted as frequently and walking as occasionally."

36. Ostrander opined:

- a. Pallett was incapable of performing more than sporadic employment resulting in an insubstantial income, which is defined by law as Pallett's benefit rate of \$411 per week. Ostrander explained "He doesn't have the physical capacity, combined with his age, educational background, work history and transferrable skills, to be employed in that type of occupation."
- b. Pallett was obviously unemployable because "I can't identify any work that exists within his community that he's qualified to perform that fits within his physical capabilities that would pay his benefit rate. So I can't even ask him to go out and apply for a job because I can't identify one that's going to fit within those parameters."
- c. A job search would be futile because "I can't identify an occupation that he can perform and I've been doing this for 35 years."
- d. Rehabilitation or retraining was not feasible because "the probability of him being successful . . . [is] extremely low." Ostrander explained that Pallett's age is a significant factor. "His lack of education, he's got an 8th grade education. The fact that he's 63 and has never gone back to school or been successful in getting a GED speaks volumes. He's simply not oriented towards school. Even if we could somehow get him a high school diploma, he still wouldn't have the skills necessary to go on and get a college degree. He's virtually certain to fail that. He's not going to be successful in doing that. And even if he could be, by then he'd be in his late 60's and gaining employment would be problematic even if he had those skills."
- e. Pallett's need to use a recliner throughout the day to control his low back pain is "incompatible with any type of employment...." Ostrander testified that even if the reclining restrictions were taken out of the picture, he believed that Pallett was unemployable.

f. Pallett is incapable of performing his past work at the Game Lodge due to his physical restrictions. Ostrander testified that he could not because "He couldn't do the lifting and carrying required. He couldn't do the excessive bending and stooping required periodically. He couldn't do the excessive standing and walking required." Ostrander testified that Pallett's work at the Game Lodge was classified as a heavy exertion level job where he fixed air conditioners, water lines, replaced equipment, did painting, and some electrical. He testified that when he returned to work he was limiting his lifting to 20 to 30 pounds.

37. James Carroll testified as a vocational expert for the Employer and Insurer. Carroll identified eight jobs that he believed that Pallett could perform. However, Carroll did not contact any of the employers that he identified to see if the positions would allow alternating standing, sitting, and walking according to Pallett's pain tolerances. Carroll conceded that in Dr. Dietrich's deposition, Dietrich testified that Pallett would need to frequently change positions from sitting, standing, to walking; according to his pain and that this was an important vocational consideration. Carroll agreed that among vocational experts it is well known that you have to be able to be on task for a certain amount of time in order to work productively in any capacity. Carroll agreed with Ostrander that if someone needs to change positions frequently, as Pallett does, that could be a "game changer" and he's not going to be productive in certain positions.

Analysis:

Permanent Total Disability (PTD)

The first issue is whether Pallett is entitled to PTD benefits pursuant to the odd-lot doctrine. The odd-lot doctrine is codified in South Dakota at SDCL 62-4-53. That statute states the following:

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 62-4-63.

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. 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)).

Pallett has carried his burden of showing that he is obviously unemployable. Rick Ostrander’s testimony as a vocational expert is sufficient to make a *prima facie* showing that Pallett’s physical condition, coupled with his education, training, and age makes it obvious that he is in the odd-lot total disability category. Pallett was 63 at the time of the hearing. He has the equivalent of an 8th grade education. Pallett has difficulty reading and writing. He must change positions frequently. His jobs in the past have either been as a truck driver or of a physical nature. He cannot return to truck driving or a physically demanding job because he must alternate from sitting to standing and walking every 45 minutes on a good day and every 15 minutes on a bad day. He also requires the use of a recliner during the day. With these limitations, Ostrander testified that he was unable to identify any job that Pallett was capable of performing productively. For these same reasons, Ostrander testified that a work search by Pallett would be futile and that he is unable to benefit from vocational rehabilitation.

The Department agrees with Ostrander’s conclusions. It finds Ostrander’s position to be well reasoned and supported by the facts. In addition, the Department as the trier of fact is persuaded that Pallett is in the kind of continuous severe and debilitating pain which he claims. Dr. Dietrich testified that there are objective medical findings to

support his claims of pain. He also testified that Pallett is not malingering or overstating in any way his pain complaints.

Pallett, having met his burden of showing that he is obviously disabled in the odd-lot category, the burden of production shifts to the employer to show that some suitable employment within claimant's limitations is actually available in the community.

James Carroll testified as a vocational expert for the Employer and Insurer. Carroll identified eight jobs that he believed that Pallett could perform. However, Carroll did not contact any of the employers that he identified to see if the positions would allow alternating standing, sitting, and walking according to Pallett's pain tolerances.

Recently, our Supreme Court decided Eite, 2007 SD 95. In Eite, a case which interpreted SDCL § 62-4-53, the Supreme Court found that the Department of Labor erred when it accepted employer's vocational experts' opinions that there were open and available positions within the Rapid City labor market that could accommodate Eite's physical limitations when the vocational expert had failed to inform any of the employers he contacted about Eite's limitations. In Eite, the Supreme Court held "an expert's listing of jobs that focuses on a claimant's capabilities to the exclusion of his limitations is insufficient as a matter of law. When prospective employers were not informed of the nature of the limitations they needed to accommodate, there was no basis for the expert's opinion in concluding that the employers were willing to make modifications to meet those limitations." *Id.* (emphasis added).

Here, Carroll failed to inform the prospective employers to see if they could accommodate Pallett's limitations of changing positions frequently. Therefore, Carroll failed to show that some suitable employment within claimant's limitations is actually available in the community as a matter of law. As a consequence, Pallett has met his burden of showing that he is entitled to PTD benefits pursuant to SDCL 62-4-53 as of June 26, 2015, when Dr. Dietrich noted that Pallett was in too much pain to work.

Retirement:

Whether Pallett's retirement bars his entitlement to odd-lot benefits is an issue of first impression in this state. Workers' compensation is a creature of statute. Scissons v. City of Rapid City, 251 N.W.2d 681, 686 (S.D.1977). Therefore, the parties' relevant arguments focus on the language contained in SDCL62-4-53. That statute states in part:

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.

SDCL 62-4-53.

Employer and Insurer argue that Pallett has not made a reasonable good faith work search and purposefully left the labor market when he retired. Consequently, he is not entitled to odd-lot benefits. However, the Department found above that Pallett met his burden of showing that a work search would be futile. Therefore, the requirement to make a good faith work search is eliminated and the fact that Pallett did not make a work search because he left the labor market is without consequence.

Employer and Insurer argue that Pallett's retirement was meant to be permanent. The Department is not convinced of that. There is conflicting testimony. While Pallett told co-workers that he was going to build a cabin in Alaska, he also testified that he was going to return to the Game Lodge in the spring to help open up. More importantly, plans change. Many people retire, then do to necessity or choice return to employment on a full or part time basis. Pallett no longer has that option. Therefore, the Department finds that Pallett's retirement does not bar him from receiving odd-lot benefits.

Conclusion:

Pallett shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision and if desired Proposed Findings of Fact and Conclusions of Law, within (20) twenty days of the receipt of this Decision. Employer and Insurer shall have an additional (20) twenty days from the date of receipt of Pallett's Findings of Facts and Conclusions of Law to submit objections thereto, and/or Proposed Findings of Facts and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Pallett shall submit such stipulation together with an Order consistent with this Decision.

Dated this 21st day of April, 2016.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge