SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

GINGER VOLLMER,

Claimant, **HF No. 80, 2006/07**

vs. **DECISION**

WAL-MART,

Employer,

and

NATIONAL UNION FIRE INSURANCE,

Insurer.

This matter comes before the Department by way of remand order from the South Dakota Supreme Court. Vollmer v. Wal-Mart, 2007 SD 25, 729 NW2d 377. That order required the Department to make further findings "on the precise extent of her work related disability and a re-examination of her claimed medical expenses." The Department considered the matter on written submissions, without additional proceedings.

From September, 1999 forward, Claimant worked four or five hours a day for Employer. She got off work at 1:00 p.m., then went to doctor's appointments, physical therapy, massage therapy, picked her children up from school, picked up groceries and did "regular things a mother has to do on top of everything else."

On or about April 24, 2000, Claimant began working four to five hours a day for Medicap Pharmacy (Medicap) as a pharmacy tech. She took this job because Employer had not allowed her to return to work, as she was not 100 percent able to work.

In the spring of 2001, Claimant began suffering from Guillian-Barré Syndrome (GBS), or "French polio." She lost all feeling and control of her muscles. After treatment, however, she was able to return to work at Medicap in January, 2002. She acknowledged that the GBS causes her to have sore legs and head pain sometimes. She has no work restrictions specific to GBS.

Claimant's rates her left shoulder and neck pain as a three or four out of ten at best, a nine at worst. Her pain increases as the day goes on, getting to the point that "I can't push it aside anymore." Peeling potatoes is very painful, as are vacuuming and laundry. She continues to work at Medicap, earning $11.18 an hour but limited to four hours a day. Even five hours makes her pain worse. Once every five Saturdays, she works for four additional hours.

When Claimant gets home, she sits in a recliner with her feet up, sometimes with heat on her arms or ice on her neck. She does not do much otherwise. Before her injury, she was very active with her children doing outdoor sports activities; now, she does a little fishing and tries to walk.

Lynn Meiners (Meiners) testified as Claimant's vocational expert. She interviewed Claimant, reviewed Claimant's medical records, performed some vocational testing, was aware of Claimant's inability to perform more than four hours of work a day, and performed a labor market survey/transferable skills analysis. Meiners concluded that Claimant was working at the "high end" of her earning capacity, and no longer able to earn wages at a level equal to or greater than her workers' compensation rate of $307.14 a week. Vocational retraining was not feasible considering Claimant's vocational aptitudes and functional limitations, in particular her difficulty in doing paper and pencil tasks.

Employer/Insurer did not offer vocational expert testimony. Instead, it challenged Meiners' methodology and conclusions. It is true that if there is no medical basis for a vocational expert's opinion, it should be rejected. Zoss v. United Building Centers, Inc., 1997 SD 93, ¶17, 566 N.W.2d 840. Meiners based her opinions, however, on a limitation of twenty hours of work a week, supported by Dr. Mills, Claimant's treating physiatrist; the Supreme Court found Claimant's testimony on that (and all other subjects) credible.

SDCL §62-4-53 establishes the standard for permanent total disability benefits:

> 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.

In Capital Motors v. Schied, 2003 SD 33, 660 N.W.2d 242, the claimant was able to establish that, while able to work full-time, he was not able to make $408 a week, his compensation benefit rate. Schied , ¶12. Applying SDCL §62-4-53, the Supreme Court agreed that Schied had met his burden of establishing his permanent total disability. Schied, ¶17. Here, Claimant put forward prima facie evidence that she is unable to earn $307.14 a week in any occupation, even with retraining.

The burden then shifted to Employer/Insurer to show that Claimant has suitable work regularly and continuously available. Eite v. Rapid City Area School Dist., 2006

SD 99, 724 NW2d 586 ¶21. Employer/Insurer presented no evidence on this issue, and therefore did not meet its burden. Where it did not do so, the remaining issue of whether Claimant carried her burden of proof under the odd-lot doctrine need not be considered. Eite, ¶28. Claimant is found to be permanently and totally disabled as a result of her work injury.

Claimant has submitted claims for medical bills in the total amount of $22,072.23. These bills are from Dr. Richard Beasley, Julie Ramsey, Dr. William Blickensderfer, Dr. Brett Lawlor, ProMotion Rehabilitation Center, Dr. Alexander Schabauer, the Rehabilitation Institute of Chicago, Medicap Pharmacy, and Dr. Craig Mills.

It is in the doctor's province to determine what is necessary or suitable and proper. When a disagreement arises as to the treatment rendered or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper. Streeter v. Canton School District, 2004 SD 30, ¶25, 677 N.W.2d 22.

The course of Claimant's medical treatment has largely been discussed in the Supreme Court's ruling on this case. Dr. Beasley saw her immediately after her injury on September 3, 1999, and tried conservative treatment such as physical therapy and medications. He ordered massage therapy with Julie Ramsey, which began on or about that date. Dr. Blickensderfer offered chiropractic treatment beginning October 6, 1999. Dr. Lawlor and Dr. Mills, both physiatrists, opined that this course of treatment was reasonable. Employer/Insurer is responsible for these bills.

Dr. Beasley referred Claimant to Dr. Lawlor, who started treating December 8, 1999. Dr. Lawlor offered trigger point injections and medications, and he ordered physical therapy with ProMotion. Dr. Michael Smith, a medical examiner for

Employer/Insurer, acknowledged Dr. Lawlor's treatment was appropriate. Employer/Insurer is responsible for these bills.

Dr. Beasley and Dr. Lawlor sent Claimant to Dr. Schabauer, a cardiologist and vascular specialist, for consultation. He ruled out vascular problems as a source of her pain. Whenever the purpose of the diagnostic test is to determine the cause of a claimant's symptoms, which symptoms may be related to a compensable accident, the cost of the diagnostic test is compensable, even if it should later be determined that the claimant suffered from both compensable and noncompensable conditions. Mettler v. Sibco, Inc., 2001 SD 64, ¶9, 628 NW2d 722. Dr. Smith agreed this treatment was appropriate. Employer/Insurer is responsible for these bills.

Dr. Schabauer referred Claimant to the Rehabilitation Institute of Chicago, where they focused on pain management. There is no issue from the record that this was work-related and necessary treatment. Dr. Mills and Dr. Robert Finley treated her for her GBS, and Dr. Mills continued to treat for her work-related problems beginning in the spring of 2002. As Dr. Smith agreed Dr. Mills' treatment was appropriate, Employer/Insurer is also responsible for those bills. The total award for medical expenses based on Claimant's submissions is $22,072.23.

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/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections to them and/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 2nd day of January, 2008.

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James E. Marsh
Director