SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CAROL HATTEN,
Claimant,

HF No. 111, 2005/06

v.

DECISION

ARAMARK CORP. – SOUTH DAKOTA SCHOOL OF MINES,
Employer,

and

SPECIALTY RISK SERVICES, INC.,
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. A hearing was held before the Division of Labor and Management on December 4, 2007, in Rapid City, South Dakota. Margo Tschetter Julius represented Claimant. Patricia A. Meyers represented Employer/Insurer.

Carol Hatten, Mabel Fatherlos, and Rick Ostrander testified at hearing for Claimant. Marie Lehrkamp, Tammy Kursave, Rick Gilson, and Jerry Gravatt testified at hearing for Employer/Insurer. Exhibits A through K were offered and received into evidence at hearing. The depositions of Dr. Steven Waltman, Dr. Greg Swenson, Dr. Dale Anderson, Dr. Thomas Litman, and physical therapist Michael Miner, and the Affidavit of Kathleen Boyle were all offered and received into evidence. Exhibit A is a notebook or binder of medical records that the parties stipulated into the record.

Issues:

1. Whether Claimant proved that her May 19, 2005, work injury was a major contributing cause of her current condition and disability.
2. Whether Claimant proved her prima facie case for odd lot permanent and total disability benefits.
3. Whether Employer met its burden of showing suitable work is regularly and continuously available to Claimant.
4. Whether Claimant is entitled to arrearages from October 18, 2005, her date last employed with Aramark.

Facts:

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

Claimant was 62 years old at time of hearing. She has lived in Rapid City since 1990. Claimant obtained her GED when she was 30 years old. She attended two and a half years of college, but did not obtain a degree or any other vocational certificates. Claimant does not know how to use a computer.

Claimant has severe hearing loss. She is completely deaf in her right ear and has only 15% hearing in her left ear. Despite her severe hearing loss, Claimant was able to work throughout her adult life, primarily in housekeeping and cleaning positions. Claimant worked for multiple employers, and would perform day labor, mostly cleaning.

Claimant had back fusion surgery in 1997 and returned to work after recovering from the surgery. Claimant continued to have some pain following the surgery, but she was able to work regularly. Claimant performed mostly cleaning duties and did not have physical difficulty completing her work. Claimant usually walked to work, no matter the weather conditions. Claimant liked to work and worked hard at all of her jobs.

Employer hired Claimant in August of 2004. At the same time she was employed with Employer, Claimant also performed housework and yard work duties for an elderly woman named Mabel Fatherlos. Claimant worked for Employer until she was terminated in October of 2005.

On May 19, 2005, Claimant suffered an injury arising out of and in the course of her employment when a buffing machine malfunctioned or "went haywire," jerked Claimant to the ground and ran into her repeatedly. Claimant suffered extensive bruising to her legs, hips, arm, back, and chest.

Before her May 19, 2005, work injury, Claimant performed all duties required of her by Employer, which included lots of bending, climbing ladders, and reaching. Claimant's co-workers agreed that Claimant was an excellent worker and had little difficulty getting along with co-workers. After the injury, Claimant was unable to perform her duties because of pain and was irritable. Claimant was also unable to perform her regular tasks for Mabel Fatherlos.

Claimant received physical therapy, injections, and pain medication as treatment for her injury. Claimant was taken off work for one week and then placed on light duty by her treating physician, Dr. Steven Waltman. Employer accommodated Claimant's light duty restrictions by having two people work with Claimant when normally she worked alone. Claimant's duties caused her pain and she was irritable because of the pain. Claimant had difficulties coping with her employment due to her pain. Claimant was terminated on October 18, 2005, for leaving work early without permission.

Claimant has not worked since October 18, 2005. Claimant conducted a job search in her usual manner, one that had worked for her all her life. She went to "Job Service" and applied at various hotels and motels in Rapid City. Claimant did not find any work. She went to Vocational Rehabilitation, but did not receive any recommendations or results from that visit. Claimant quit looking for work and applied for Social Security

Disability. Claimant was discouraged because she had done everything she knew how to do to find employment and was unable to find another job.

At the time of hearing, Claimant lived in a subsidized apartment. Three or four days a week, Claimant cares for her two-year-old granddaughter, but she does not carry the girl because she is too heavy. Claimant's daily activities are limited by pain, but she is able to keep up with the dusting and light housework in her small apartment.

Claimant's testimony revealed that she is not a very good historian, but overall her testimony was credible.

Other facts will be developed as necessary.

Issue One

Whether Claimant proved that her May 19, 2005, work injury was a major contributing cause of her current condition and disability.

Claimant "must establish a causal connection between her injury and her employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

In support of her burden, Claimant offered the opinions of Dr. Waltman, a board-certified family practice medicine doctor. Dr. Waltman has extensive experience with occupational medicine and workers' compensation injuries. As part of his practice in dealing with workers' compensation and injuries in the workplace, Dr. Waltman routinely advises employers and injured workers as to restrictions and returning to specific job positions. Dr. Waltman's opinions support a finding that Claimant's work injury of May 19, 2005, was a major contributing cause of her current condition and disability.

Employer/Insurer disputed Dr. Waltman's findings, alleging that he misunderstood the nature of her prior condition and disability, caused by a 1997 lower back fusion. Employer/Insurer argued that Dr. Waltman's findings should be rejected in that he relied upon Claimant's description of her prior condition and disability and that that description was misleading. Claimant's testimony regarding her prior condition and disability, or her ability to work, was credible. Claimant was capable of and worked full-time prior to her May 19, 2005, injury, and she told Dr. Waltman so. Other evidence received at hearing demonstrated that before the injury of May 19, 2005, Claimant was able to perform a full range of her job duties for Employer and that after the injury, she was unable to do so. Dr. Waltman is a qualified medical practitioner and is a workers' compensation expert. Employer/Insurer failed to demonstrate that Dr. Waltman's opinions are incorrect and should be rejected. Dr. Waltman relied on Claimant's description of her history. That history, as it is relevant to Dr. Waltman's opinions and this workers' compensation

matter, was accurate. Neither the report of Dr. Litman nor the report of Dr. Anderson is persuasive rebuttal of Dr. Waltman's opinions.

Employer/Insurer also argued that Claimant's failure to perform home exercises led to her current condition and disability. In support of that argument, Employer/Insurer offered the opinions of Michael Miner, physical therapist. Miner, while a competent and knowledgeable physical therapist, was not in a position to opine on Claimant's condition over two years after she completed her physical therapy on September 15, 2005. Dr. Waltman assessed Claimant at maximum medical improvement on September 19, 2005. Dr. Waltman examined Claimant in November of 2006 and continued Claimant's work restrictions. A May 2007 FCE revealed the same restrictions in Claimant's ability to work. Employer/Insurer's argument that Claimant somehow caused her current condition and disability by not following through with home exercises is rejected as unsupported by the evidence.

Claimant has met her burden to demonstrate that her work injury was a major contributing cause of her current condition and disability.

Issue Two

Whether Claimant proved her prima facie case for odd lot permanent and total disability benefits.

The standard for determining whether a claimant qualifies for "odd-lot" benefits is set forth in SDCL 62-4-53, which provides 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 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 in not feasible.

The South Dakota Supreme Court recently provided:

> Pursuant to SDCL 62-4-53, there are two ways [a claimant can] make a prima facie showing that [s]he is entitled to benefits 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 [her] physical condition, coupled with [her] education, training, and age make it obvious that [s]he is in the odd-lot total disability category, or 2) persuading the trier of fact that [s]he is in the kind of continuous severe and debilitating pain which [s]he claims.
>
> Second, if the claimant's medical impairment is so limited or specialized in nature that [s]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 [s]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.*

Eite v. Rapid City Sch. Dist., 2007 SD 95, ¶ 21 (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).

Claimant met her prima facie burden to establish that her 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.

Claimant suffered a work-related, compensable injury on May 19, 2005. She was diagnosed with a strained lumbar spine and soft tissue injuries. She demonstrated that her physical condition limits the type of work she can perform to a restricted range of sedentary work with no lifting over 10 pounds and other restrictions as provided by Dr. Waltman and a functional capacities evaluation performed by Kathleen Boyle, P.T. Claimant also suffers from significant hearing loss, depression, and anxiety.

Claimant is 62 years old. She has a GED, but no other degrees or certificates. She attended two and a half years of college and has some training in sign language. Claimant has no other formal training and no computer skills. Claimant has worked

primarily in housekeeping and cleaning positions throughout her adult life. At the time of her injury, Claimant earned $8.00 per hour.

Rick Ostrander, a vocational expert, testified on behalf of Claimant. Ostrander is a recognized expert in workers' compensation matters. Ostrander conducted a vocational evaluation, including a transferable skills analysis and labor market research, and opined that Claimant is unable to return to her former occupation. Ostrander further opined that he was "unable to identify any work available within the Rapid City Labor Market fitting within her capacity." Ostrander also opined that "no vocational rehabilitation or retraining can be identified which can be reasonably expected to restore [Claimant] to 85% of her pre-injury earning capacity or for that matter to any kind of regular gainful employment." Ostrander opined, "vocational rehabilitation would be futile."

The evidence presented by Ostrander, specifically that Claimant is "not employable and is disabled from work within the Rapid City Labor Market," along with Claimant's credible testimony, demonstrate that a work search would be futile, given Claimant's condition and restrictions. Nevertheless, Claimant, given her skills and experience, conducted a reasonable, good faith job search. Employer/Insurer's argument that Claimant has removed herself from the labor market is rejected. The cause or reason for termination of her employment with Employer is irrelevant given the finding that Claimant's current condition and disability are compensable and because of that compensable condition and disability, she is limited to restricted sedentary employment. The evidence presented by Employer/Insurer fails to demonstrate that Claimant's position with Employer at the time she was terminated was within these permanent restrictions or would have been available for Claimant at time of hearing. Furthermore, Jerry Gravatt, Employer/Insurer's vocational expert, admitted that Claimant is unable to return to her former work.

Claimant met her prima facie burden to show that she is permanently and totally disabled pursuant to the odd-lot doctrine.

Issue Three

Whether Employer met its burden of showing suitable work is regularly and continuously available to Claimant.

Once Claimant makes her prima facie case, the burden then sifts to Employer/Insurer to show that some form of suitable work is regularly and continuously available to Claimant. Rank v. Lindblom, 459 NW2d 247, 249 (SD 1990). For Employer/Insurer to meet this burden, the evidence must show more than a general availability of jobs to persons with some of Claimant's disabilities. Employer/Insurer 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. Shepherd v. Moorman Manufacturing, 467 NW2d 916, at 920 (citing Rank v. Lindblom at 249; Bumble Bee Seafoods v. Director, Office of Worker's Compensation, 629 F2d 1327, 1329-30 (9th Cir. 1980)).

In support of its burden, Employer/Insurer offered Jerry Gravatt's vocational testimony. Gravatt failed to identify any specific positions that were open and available for someone with all of Claimant's limitations. Gravatt admitted that the prospective employers he identified were not informed of Claimant's restrictions or limitations. "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." Eite v. Rapid City Sch. Dist, at ¶ 28. Employer/Insurer failed to meet its burden of showing suitable work is regularly and continuously available to Claimant.

Finally, Claimant satisfied her burden of persuasion through her credible testimony, the medical records and medical testimony and through Ostrander's credible vocational testimony. Claimant established by a preponderance of the evidence that she is permanently, totally disabled under the odd lot doctrine.

Issue Four

Whether Claimant is entitled to arrearages from October 18, 2005, her date last employed with Aramark.

Claimant has prevailed on the issues presented at hearing. She is permanently, totally disabled as of October 18, 2005, and is entitled benefits from and after that date, including cost of living adjustments and interest.

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 of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. 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 14th day of August, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge