SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

BARBARA McNEIL,
Claimant,

HF No. 136, 2002/03

v.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

RAPID CITY REGIONAL HOSPITAL,
Employer,

and

MEDICAL ASSURANCE COMPANY,
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 September 26 and 27, 2007, in Rapid City, South Dakota. Scott Sumner represented Claimant. Comet H. Haraldson represented Employer/Insurer.

Issues:

1. Medical causation, work connectedness, and compensability (SDCL 62-1-1(7)).
2. Compensability of medical expenses (SDCL 62-4-1).
3. Nature and extent of disability, odd lot (SDCL 62-4-53).

Facts:

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

1. Claimant was born in England on August 23, 1952. While living in England, Claimant completed the equivalent of a high school education in the United States.
2. Claimant has one year of post-secondary education at a vocational technical school for nutrition and occupational therapy along with one year of nurse's training.
3. After her post-secondary education Claimant worked many different jobs, including as a clerical worker, a nurse's aid, a bar maid, a veterinarian assistant, and a cashier. She has also worked in the domestic cleaning and fast food industries.
4. As well as living in England, Claimant also lived in Germany. She left Germany in 1995 and moved with her husband to Rapid City, South Dakota, specifically, Ellsworth Air Force Base.
5. Claimant is not yet a United States citizen, but has a "green card."

6. Claimant has suffered from several different medical conditions over the course of her lifetime.
7. In 1996, Claimant suffered a coronary spasm.
8. In 1999, Claimant had a gallbladder attack that resulted in a complete removal of her gallbladder. Following the removal of her gallbladder, Claimant suffered from severe acid reflux and was ultimately diagnosed with a hiatal hernia.
9. While working for Credit Bureau of Rapid City, Claimant filed a workers' compensation claim. The claim was for trigger thumb, tennis elbow, and tendinitis in her right arm and resulted in Claimant undergoing surgery on her right thumb and elbow.
10. In March 2001, while climbing seven floors of stairs, Claimant suffered exercise-induced asthma.
11. Claimant has a history of back injuries.
12. In a 1982 motorcycle accident, Claimant suffered a complete spinal cord compression that left her bedridden for three weeks. Claimant has continued to suffer pain from her injuries in the accident.
13. Claimant began suffering pain in her neck while living in Germany in 1995, but put off treatment due to her anticipated move to the United States.
14. Once in the United States, Claimant underwent physical therapy for her neck pain. Physical therapy relieved the pain and Claimant remained pain free for a period of three years.
15. Claimant began working for Employer/Insurer in October 1998 as a health-unit clerk.
16. As a health-unit clerk, Claimant performed clerical work. She sat in front of a computer most of each day, inputting data. Claimant was responsible for transcribing doctor's orders into a computer and filing those orders in the correct patient's chart. She also was responsible for alerting nurses to any important copies of test results. Claimant also set up medical charts for new patients.
17. In late 1998, Claimant's neck pain returned, causing a decreased range of motion in the upper part of her neck.
18. Claimant was treated by Dr. Larry Teuber, a neurosurgeon, who diagnosed Claimant with cervical spondylosis (deterioration of the disks in her cervical spine).
19. A January 21, 1999, MRI showed severe degenerative changes at C3-4, among other abnormalities. A 1998 MRI had shown similar results.
20. On March 2, 1999, Claimant underwent a C3-4 anterior cervical microdiscectomy arthrodesis for left C4 radiculopathy.
21. Claimant was able to return to work after recovering from the surgery.
22. On November 1, 2000, Claimant's cervical problems returned. She suffered complaints similar to those before her 1999 surgery, and also suffered from left arm discomfort and numbness in her left hand.
23. A November 1, 2002, MRI showed Claimant had a new non-work-related disk herniation at C6-7 with right-side cord compression.
24. Claimant again was treated by Dr. Teuber and he diagnosed ulnar neuropathy and degenerative cervical osteoarthritis.
25. Dr. Teuber recommended an EMG, but no EMG study was done; instead, Claimant underwent breast reduction surgery.

26. On March 1, 2001, Claimant bumped her neck while working for Employer/Insurer when she pulled a chart out of a chart rack. She was twisting and pulling the chart when she claims she felt something pop and felt pain in her low back. Claimant was treated by Dr. David Evans for the onset of this new low-back pain. Eventually her pain disappeared and she did not seek further treatment for this low back pain.
27. On May 28, 2001, Claimant was admitted to the Emergency Room at Rapid City Regional Hospital due to a non-work-related recurrence of neck pain.
28. A 2001 MRI showed mild degenerative changes at C3-4 and a small disk herniation at C6-7 that was likely compressing the C7 nerve root. Claimant also had a myelogram and CT myelogram done, which revealed disk bulges at C5-6 and C6-7.
29. Dr. Steven Schwartz treated Claimant for the May 28, 2001, non-work-related recurrence of neck pain. Dr. Schwartz recommended surgery, a posterior cervical approach with a multi-level laminectomy and a foraminaotomy on the left at C5-6 and the right at C6-7. Dr. Schwartz performed this surgery on June 19, 2001.
30. Approximately one month later in July 2001, Claimant was able to return to work with restrictions. Claimant was told not to lift anything weighing more than ten pounds and to do no twisting, bending, or lifting of anything above her shoulders.
31. Claimant had not fully recovered from the non-work-related neck surgery when, on August 6, 2001, she was at work and bent over at the waist to pick up an object on the floor. When she stood up, she bumped her head, neck, and shoulder on a chart rack. Claimant felt immediate onset of pain.
32. Claimant was seen in Employer's Emergency Room and an MRI was performed. The MRI showed a C5-6 disk herniation that could be affecting the C6 nerve root.
33. Following the August 6, 2001, incident, Claimant was off work for two days and then was able to return to work on August 8, 2001.
34. Dr. Schwartz treated Claimant for the August 6, 2001, incident. He prescribed physical therapy, which was already in place prior to this new incident, as it was part of Claimant's recovery for her June 19, 2001, surgery.
35. Claimant returned to work and remained relatively symptom free for approximately one month after August 8, 2001.
36. In September 2001, Claimant's symptoms began to change. She was having numbness across her entire left hand, the left side of her neck started to get stiff, her left shoulder felt bruised, the upper part of her left arm burned and she had pain shooting down the outer portion of her left arm.
37. Claimant's physical therapy treatments were not helping her new symptoms, so Dr. Schwartz referred Claimant to Dr. Steven Frost. Dr. Frost began treating Claimant on November 1, 2001.
38. Dr. Frost performed a nerve root block at C5-6 and C6-7 for Claimant that provided four days of relief.
39. At the end of 2001, Dr. Alan Smith took over Claimant's general care.
40. Dr. Smith and Dr. Frost tried treating Claimant's continuing symptoms with pain patches, different oral medications, and injections.
41. Dr. Smith first postulated the diagnosis of complex regional pain syndrome in early 2002.

42. Claimant's condition continued to present difficulties throughout 2002. In October 2002, a spinal cord stimulator was implanted. The implant was complicated by a cerebral spinal fluid leak, which eventually resolved.
43. Claimant's employment with Employer ended in May 2002.
44. Claimant began working for Stampers in February 2003.
45. Claimant's work with Stampers ended on August 23, 2004, due to her action of giving a co-worker one of her prescription pain pills.
46. Claimant moved to Holiday, Florida, in February 2005.
47. Claimant has not looked for work since her employment with Stampers ended in August 2004.
48. Claimant underwent a functional capacities evaluation on December 22, 2004. The results of the FCE showed that Claimant is capable of doing sedentary work for eight hours a day, changing from sitting to standing to walking occasionally. Claimant is to avoid leaning over for long periods as well as avoid doing any work with her arms above shoulder level.
49. Claimant's treating physician in Florida was Dr. Orlando Benitez, then Dr. Yarkey.
50. Claimant also sees Dr. Shaukat H. Chowdhari in Florida, who gives Claimant injections every month that he sees her. These injections alleviate Claimant's pain for approximately 3 weeks.
51. Claimant is currently able to visit friends and neighbors. She can garden only with difficulty. She is able to do laundry and other household chores such as vacuuming and making her bed.
52. Employer/Insurer had Claimant undergo medical examinations with Dr. Wayne Anderson, Dr. Michael Smith, and Dr. Charles Friedman.
53. Dr. Steven Schwartz has left his practice in Rapid City, South Dakota, and refused to make himself available to the parties.
54. Claimant offered the opinions of Dr. Chowdhari and Dr. Anthony Kirkpatrick.
55. Dr. Chowdhari could not opine on the causation of Claimant's opinion.
56. Dr. Kirkpatrick saw Claimant twice, the first time in August 2006 and the second time in October 2006.
57. Dr. Kirkpatrick had no recollection or knowledge of Claimant's work history, her previous low back problems prior to the summer of 2001, her prior neck problems prior to the summer of 2001, or any psychological or psychiatric problems Claimant had prior to August 2001. Dr. Kirkpatrick also dismissed any relevance of Claimant's activity levels after the incident of August 2001. Dr. Kirkpatrick's opinions are rejected.
58. The August 6, 2001, incident did not result in a disk herniation at C5-6. Based upon the expert medical opinions, the herniation existed prior to the incident.
59. The August 6, 2001, incident is not a major contributing factor to Claimant's complex regional pain syndrome or her chronic pain syndrome. This finding is based upon the expert medical opinions of Dr. Anderson, Dr. Michael Smith, and Dr. Friedman.
60. The Department accepts the opinions of Dr. Anderson, Dr. Michael Smith, and Dr. Friedman.
61. Employer/Insurer has properly paid all compensable medical expenses associated with the August 6, 2001, injury and owes no more.

62. Employer/Insurer issued a denial of benefits letter to Claimant on December 13, 2001.
63. Based upon the accepted expert medical testimony, no further reasonable and necessary medical treatment can be attributed to the August 6, 2001, injury.
64. Claimant did not provide sufficient evidence supporting the foundation of existing medical expenses, detailed in Exhibit 32. Exhibit 32 contains references to irritable bowel syndrome and psychiatric issues, which clearly are not reasonably and medically necessary to treat a neck bruise.
65. Claimant is not in such severe and debilitating pain based on the August 6, 2001, incident that she cannot sustain more than sporadic employment.
66. Based upon the accepted expert medical testimony, the August 6, 2001, injury has not left Claimant in such severe, debilitating pain that she is permanently and totally disabled from working.
67. Based upon the accepted expert medical testimony, the August 6, 2001, injury has not caused Claimant physical restrictions or limitations that disable her from working.
68. Claimant is capable of performing sedentary work.
69. Claimant's community for purposes of a permanent total disability analysis is a 60-mile radius around Holiday, Florida.
70. Claimant failed to perform any work search in Rapid City, South Dakota, from August 2004, to February 2005. Furthermore, Claimant failed to offer any evidence regarding the work available in the Rapid City area. Therefore, she is not entitled to benefits for this period.
71. Based upon the December 22, 2004, FCE, Claimant is capable of working eight-hours a day at a sedentary job.
72. No medical provider has taken Claimant permanently off work.
73. Claimant failed to perform a good faith work search.
74. Claimant failed to present a prima facie case of permanent total disability in that she failed to look for work despite being told that she was capable of working and she presented insufficient evidence, medical or vocational, to satisfy her burden under SDCL 62-4-53.
75. The opinions of James Carroll are accepted as expert vocational opinions.
76. Claimant's workers' compensation rate is $260.00 per week, or $6.50 per hour for a 40-hour work week.
77. Based upon Carroll's analysis of the labor market in Holiday, Florida, and his expert vocational opinions, Employer/Insurer satisfied its burden of proof under SDCL 62-4-53.
78. Claimant failed in her ultimate burden of persuasion to show that any disability caused by the August 6, 2001, injury leaves her permanently and totally disabled under SDCL 62-4-53.
79. Claimant failed to meet her burden under SDCL 62-4-53 to show that she is permanently and totally disabled.
80. Any finding of fact improperly denominated a conclusion of law herein is hereby incorporated as a finding of fact.

Analysis

Issue One

Medical causation, work connectedness, and compensability (SDCL 62-1-1).

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).

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

> [O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
>
> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment.
>
> (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

Claimant alleges that she suffered a herniated disk and developed a chronic pain condition, known as complex regional pain syndrome, as a result of the incident on August 6, 2001. In support of her argument, she offered the opinions of Dr. Shaukat H. Chowdhari, MD, Dr. Anthony Kirkpatrick, MD, as well as the affidavits of Craig Mills, MD, Larry Teuber, MD, Robert C. Finley, MD, Sherri J. Jackson, CNP, Stephen P. Manlove, MD, Alan Smith, MD, Steven Frost, MD, and Kathleen Boyle, OT/L. Claimant's medical records were offered and received at hearing.

The records of Claimant's treating physician, Dr. Steven Schwartz, are received into evidence without affidavit and without his testimony as he has apparently made himself unavailable to both parties. His records are significant in this case because he performed Claimant's second fusion surgery and treated her thereafter. Neither party offered any evidence tending to suggest that Dr. Schwartz's records are not authentic. However, Dr. Schwartz's opinions expressed in his records are entitled to little, if any, weight compared to the opinions expressed by other physicians in this matter. Dr.

Schwartz's opinions fail to explain his reasoning and are self-serving. His failure to make himself available as a witness, despite his professional status, leave his opinions suspect at best. His opinions are further diminished by the opinions of Dr. Wayne Anderson, Dr. Michael Smith, and Dr. Charles Friedman, each of whom carefully considered Claimant's medical records, rendered written reports explaining his opinions, and convincingly withstood cross-examination.

Dr. Anderson examined Claimant on December 4, 2001. He opined that the incident of August 6, 2001, was not a major contributing cause of the herniated disk on the left at C5-6, stating that the herniation was present long before August of 2001.

Dr. Smith opined that the August 6, 2001, incident was not a major contributing factor to her condition. Dr. Smith explained, "The consequences of her degenerative disc disease and tobacco use and deconditioning and psychosocial morbidities, all those things factor in [to her chronic pain] to a much greater degree than any probable contribution of a contusion." In light of the opinions of Dr. Anderson, Dr. Michael Smith, and Dr. Friedman, Dr. Schwartz's opinions are rejected.

Claimant offered the deposition testimony of Dr. Anthony Kirkpatrick and Dr. Shaukat H. Chowdhari. Dr. Chowdhari could not opine on the causation of Claimant's condition, stating, "I can't give you any opinion that what [sic] was the causation for that injury, whether it just happened, even long before the patient came."

Dr. Kirkpatrick testified that he was confident that the August 6, 2001, incident caused Claimant's to develop CRPS, going so far as to say it is "a scientific fact." Dr. Kirkpatrick did not take into account Claimant's prior medical problems or her physical activities after the August 6, 2001, incident. Despite his insistence that he does not have to consider Claimant's prior history or her abilities after the incident, such consideration is required by SDCL 62-1-1(7) only because Claimant's case involves multiple pre-existing events. In light of the medical evidence, Dr. Kirkpatrick's opinions are rejected.

Claimant has demonstrated that she has suffered a great deal due to her medical condition. She has endured numerous painful procedures and has seen her physical condition deteriorate. However, Claimant has failed to sustain her burden of proof to show that the August 6, 2001, incident is a major contributing cause of her condition, her current complaints, or her current need for treatment.

Issue Two

Compensability of medical expenses (SDCL 62-4-1).

The law provides that Employer/Insurer must provide necessary medical and surgical treatment. SDCL 62-4-1. The determination of what is necessary is decided by competent medical personnel. "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." Engel v. Prostrollo Motors, 2003

SD 2, ¶ 32, 656 NW2d 299, 304 (citing Krier v. John Morrell & Co., 473 NW2d 496, 498 (SD 1991)).

Employer/Insurer argues that it has paid all compensable medical expenses associated with the August 6, 2001, injury. Employer/Insurer paid medical expenses for the August 6, 2001, contusion until December 13, 2001. Based upon the medical examination performed by Dr. Anderson and his opinions, Employer/Insurer issued a denial of benefits letter to Claimant on December 13, 2001. Dr. Anderson's opinions are substantiated by Dr. Michael Smith and Dr. Friedman. Dr. Anderson, Dr. Michael Smith, and Dr. Friedman all agree that there is no additional reasonable and necessary medical treatment that can be attributed to the August 6, 2001, injury. Claimant has done little to disprove the opinions of the qualified physicians.

Claimant did not provide sufficient evidence supporting the foundation of her medical expenses. At the hearing, Claimant offered Exhibit 32, a compilation of her medical expenses. Claimant provided no medical testimony to support a causal relation or compensable status of the bills in Exhibits 32. None of the Affidavits of medical professionals that Claimant submitted for hearing contained any invoices. There were no doctors that provided testimony for Claimant on either examination or cross-examination, by either deposition testimony or live hearing testimony, as to the reasonableness, necessity, or compensability of their outstanding invoices.

Exhibit 32 contains references to medical conditions clearly unrelated to treatment for a contusion injury. Given Claimant's significant medical history, Exhibit 32 is insufficient evidence upon which the Department of Labor could make an award of medical expenses. Any award based upon Exhibit 32 would be speculation on the part of the Department in deciphering which medical bill was for treatment necessitated by the incident of August 6, 2001.

Employer/Insurer has met its burden of proof regarding reasonable and necessary medical expense. Dr. Anderson, Dr. Michael Smith, and Dr. Friedman all testified that Claimant's current need for treatment is in no way related to the August 6, 2001, incident. These are three different doctors, in three different fields, in three different geographical locations, and the concurrence of their opinions as to diagnosis, causation, and compensability is striking and compelling. Employer/Insurer has shown through the testimony of these doctors that because the August 6, 2001, incident is not a major contributing cause of Claimant's current condition, and because the August 6, 2001, incident is not a major contributing cause of Claimant's current need for treatment, there exists no obligation by Employer/Insurer to provide treatment for Claimant after December 13, 2001.

Issue Three

Nature and extent of disability, odd lot (SDCL 62-4-53).

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.

SDCL 62-4-52(2) defines "sporadic employment resulting in an insubstantial income" as "employment that does not offer an employee the opportunity to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury." Claimant's workers' compensation rate is $260.00 per week or $6.50 per hour for a 40-hour workweek.

A South Dakota 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.
>
> 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 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).

At the time of her injury, Claimant resided in Rapid City, South Dakota. In the winter of 2005, Claimant moved to Florida to live with her husband who had found work at a hospital there. In order for Claimant to claim her current residence in Holiday, Florida, as her community for purposes of determining her permanent total disability claim, she must demonstrate that her move to Florida 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. There is no evidence to support a conclusion that Claimant moved to leave the labor market. 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, Holiday, Florida.

In Reede, 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 employment with Employer ended and before she moved to Florida, Claimant performed a successful job search. In fact, after her employment with Employer ended, Claimant obtained employment as a jewelry inspector at Stampers in February 2003. Claimant's employment with Stampers ended on August 23, 2004, for reasons unrelated her physical abilities or disabilities. Claimant

made no showing whatsoever of unemployability in her Rapid City community. Claimant is not entitled to permanent total disability benefits from August 23, 2004, until she moved to Florida on February 24, 2005.

Claimant offered no evidence of the "type of work available in [her] community" in Florida. She offered no vocational testimony at all. Claimant has not looked for work since August 2004. Claimant testified that she feels that no one will hire her because of her physical condition, but the medical evidence supports a finding that she is capable of working. Claimant cannot meet her burden of proof regarding the first option to show "obvious unemployability" by demonstrating 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."

Claimant can still show "obvious unemployability" by "persuading the trier of fact that [s]he is in the kind of continuous, severe and debilitating pain which [s]he claims." Claimant's pain and discomfort are obvious, but whether that pain leaves her unable to work at all is not obvious from her testimony alone. Claimant had a Functional Capacities Exam (FCE) performed on December 22, 2004. The FCE proved that Claimant is capable of working eight hours a day at a sedentary job. Claimant has not tried to find a sedentary job. Claimant was working full time up until August 2004. She did not quit her work at Stampers due to any inability to perform the job functions because of pain caused by the August 6, 2001, incident. Claimant was fired from her job at Stampers because she gave her personal prescription pain medication to a co-worker. Claimant is still capable of working within the guidelines established in the FCE. Claimant offered no vocational testimony regarding her work capabilities at time of hearing. Claimant did not "introduce evidence of a reasonable, good faith work search effort." SDCL 62-4-53. The medical evidence does not show that a reasonable, good faith work search effort would be futile. SDCL 62-4-53. Claimant did not introduce "expert opinion evidence that [she] is unable to benefit from vocational rehabilitation or that the same is not feasible." SDCL 62-4-53.

Claimant has failed to meet a prima facie burden to show "obvious unemployability." Despite this failure, the Department will consider the evidence offered by Employer/Insurer in support of its burden "to show that some form of suitable work is regularly and continuously available to the employee in the community."

In support of its burden, Employer/Insurer offered the testimony of Dr. Anderson, Dr. Michael Smith, and Dr. Friedman, as well as the live testimony of James Carroll, a vocation rehabilitation consultant.

Dr. Anderson, a board-certified occupational medicine physician, has extensive training and expertise in return-to-work issues. As Dr. Anderson described it, "Occupational medicine is the specialty that deals with work-related disorders. Occupational physicians are trained to use methods of toxicology and to assess exposures in humans and the effects work has on their bodies. That especially also includes, of course, treating work-related injuries." Dr. Anderson opined that Claimant is not permanently and totally disabled from the August 6, 2001, incident. Dr. Anderson opined that

Claimant's physical condition does not preclude her from performing sedentary work for 30 to 40 hours per week

Dr. Michael Smith, a board-certified orthopedic physician, opined that Claimant does not have work restrictions attributable to the August 6, 2001, incident. Dr. Friedman, board-certified in osteopathic medicine and pain management, opined also that Claimant does not have work restrictions attributable to the August 6, 2001, incident.

Employer/Insurer offered the vocational testimony of Mr. Carroll to demonstrate that there is regular and continuous employment available for Claimant. Carroll considered Claimant's medical condition, her psychological condition, her functional limitations, her vocational background, her transferable skills, her education and work experience and he compared all that to the labor market in Claimant's Holiday, Florida community, after conducting a labor-market survey. Carroll used a workers' compensation rate of $260.00 per week. Carroll also considered Claimant's medical records, the FCE, and the expert depositions and opinions. In his report, Carroll explained the FCE results:

> [Claimant] was able to perform simple grasping, firm grasping and fine manipulation and utilize her head and neck in static position, frequent rotating, with her to avoid prolonged forward flexion.
>
> . . .
>
> [Claimant] is capable of sitting, standing and walking on a frequent basis with change of position after sixty minutes. She is limited to carrying and lifting a maximum of 11.5 lbs. She is able to frequently kneel and climb stairs, occasionally, stoop/bend, reach at shoulder level, crawl, with her limited to infrequent balance and crouch/squat, and reaching above shoulder level is contraindicated with climbing ladders rated rarely.

Carroll also noted that the "FCE is inconsistent with an individual who is putting forth maximum effort and there was symptom magnification, as complaints of pain did not match her abilities to perform when distracted." Based upon his analysis of the labor market and Claimant's education, background, training, limitations and medical history, Carroll opined, "that there were numerous employment opportunities available that would pay a salary level equal to or [would exceed] [Claimant's] workers' compensation rate." Carroll also opined that Claimant is not "obviously unemployable." The positions demonstrating Employer/Insurer's burden "to show that some form of suitable work is regularly and continuously available to the employee in the community" include 20 job openings listed in his report.

Claimant did not meet her prima facie case to show "obvious unemployability." Employer/Insurer demonstrated 20 different sedentary positions regularly and continuously available in Claimant's Florida community that would pay at least Claimant's workers' compensation rate. Claimant did not meet her burden of persuasion. She failed to look for work after her employment ended at Stampers. She failed to look for work in Florida. She presented no vocational testimony regarding her current physical condition and its effects on her employability. Claimant did not meet

her burdens under SDCL 62-4-53. She presented little medical evidence to demonstrate that her current disability is causally related to the August 6, 2001, event. Claimant's situation is extremely unfortunate, but she has not demonstrated that the August 6, 2001, incident is a major contributing cause to her disability, impairment, or need for treatment. Her claim for workers' compensation benefits must be denied.

CONCLUSIONS OF LAW

1. The Department of Labor has jurisdiction over the parties and subject matter of this case.
2. A workers' compensation claimant has the burden of proving all elements necessary to qualify for compensation.
3. Claimant failed to meet her burden of proof under SDCL 62-1-1(7).
4. Claimant failed to meet her burden of proof under SDCL 62-4-1.
5. Employer/Insurer has provided and properly paid for all medical care causally related to the August 6, 2001, incident as required by SDCL 62-4-1.
6. Employer/Insurer has shown that Claimant's medical expenses from and after its denial-of-benefits letter are not reasonable and necessary expenses causally related to the August 6, 2001, injury.
7. Claimant failed to meet her burdens under SDCL 62-4-53 and related case law to demonstrate that she is entitled to permanent total disability benefits.
8. Any conclusion of law improperly denominated a finding of fact herein is hereby incorporated as a conclusion of law.

Let an Order be issued accordingly.

Dated this 23rd day of May, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge