SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CINDY MARKS,
Claimant,

v.

DEVELOPMENT RESOURCES, INC.
(CEDAR RIDGE TOWNHOUSES)
Employer, and

FIRST DAKOTA INDEMNITY COMPANY,
Insurer.

HF 183, 2002/03

DECISION

This is a workers' compensation proceeding before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and ARSD 47:03:01. Jon J LaFleur represents Claimant Marks. Daniel E. Ashmore, of Gunderson, Palmer, Goodsell & Nelson, L.L.P, represents Employer/Insurer. The parties agreed to submit the sole issue on simultaneous briefs, a stipulated medical record, and certain depositions.

Issue:

Whether Marks is entitled to temporary total disability benefits from September 6, 2002, through March 15, 2004.

It is my determination that Marks is not entitled to temporary total disability benefits for any of the time period in question.

Facts:

1. Marks was working as a housing specialist for Employer on June 28, 2002. On Monday, July 1, 2002, Marks reported an injury she had suffered late in the day on Friday, June 28, 2002. Marks was lifting a box of paper at OfficeMax on June 28 when she felt something happen to her back.
2. As a housing specialist, Marks was required to do monthly paperwork in regard to tenants of approximately 220 housing units. She was to gather information from these residents by mail or telephone, do data-entry on a computer, and generate computer reports or printouts. Her job was essentially a desk job, involving sedentary to no more than light exertion.
3. Marks' job could be done without lifting any more than five to ten pounds. The only lifting involved was taking files in and out of drawers or filing cabinets, and putting away copy paper and envelopes. If Marks needed any help lifting, there were two maintenance men available to assist her. The maintenance office was across the hall from Marks' office. The maintenance men were frequently in and out of Marks' office to pick up repair and maintenance orders, or just to visit.
4. Marks was the only employee in the office where she worked. Her housing specialist job was essentially self-supervising. She could take a break whenever she wanted or needed to.
5. Marks' job allowed her the freedom to sit or stand as needed.
6. Although Marks testified that she was required to sit seventy to eighty percent of her day, Marie Molseed testified for Employer/Insurer that Marks' job did not require her to constantly sit in front of her computer. Molseed had done the same job as Marks and had at times been

responsible for "many" more housing units and more data entry than was Marks. Molseed was able to handle the paperwork generated by these "many" more housing units and was able to sit and stand as needed during her work day. This testimony is accepted as establishing the Marks could stand or sit as needed during the day.

7. After the June 28 incident, Marks did not work from July 1 to July 15, 2002.

8. Marks saw Dr. Herbst on July 1, 2002. Dr. Herbst did not take Marks off work, but told her to avoid lifting for one week.

9. Marks saw Dr. Lassegard on July 2, 2002. She told him she was required to sit at work for eight hours each day. Dr. Lassegard did not take Marks off work, but told her to avoid prolonged sitting, and to do no lifting for a week.

10. Marks saw Dr. Lund on July 8, 2002. He took her off work until she could be seen again on July 15. Dr. Lund then released Marks to work, effective July 16, 2002, with no restrictions.

11. No doctor has taken Marks off work since July 16, 2002.

12. On August 22, 2002, Marks saw Dr. Schleusener. He released her to work with restrictions: no lifting from below the knees, and no lifting more than twenty pounds.

13. Prior to quitting her job, Marks did not inform her supervisor that she was working under restrictions, and did not ask for assistance. The settled record includes an August 15, 2002, letter from Marks' supervisor, Ronald Stokke, indicating he was not aware Marks had been given medical restrictions following her injury.[1]

14. Marks' restrictions would not have prevented her from continuing to do her job. Employer could have, and would have, provided accommodation. Employer has provided accommodation for physical restrictions of other employees, including other employees with back problems.

15. Dr. Schleusener saw Marks again on September 3, 2002. With the aid of an MRI, he told her she had a herniated disk in her low back. He explained her treatment alternatives, which included continued conservative treatment or surgery.

16. Dr. Schleusener told Marks that, if she were to choose surgery, she would be "laid up" for about a month.

17. Marks had experience with similar treatment choices. She had previously been successfully treated by Dr. Schleusener for a non-work-related herniated disk in her neck. Dr. Schleusener had given Marks basically the same treatment alternatives for her neck injury: conservative treatment vs. surgery. Marks chose the conservative course of treatment on that occasion.

18. Marks voluntarily quit her job with Employer in early September 2002. On September 11, 2002, she moved to Virginia.

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[1] Concerning what she told her supervisor, Marks testified in her March 2, 2004, deposition as follows:

Q: Did you talk to your employer about that work that you were not going to be able to do?

A: No, he - - I just remember him calling me at home while I was out sick and I was on pain medications so I can't remember a whole lot that was said, but I told him that I was due back, you know, in the two-week period and he said, "Do you think you will be able to catch it up?" and I said, "Well, I'll try." And he asked me how I was doing and I said, "Well, as well as can be expected." And that was about it.

In her November 20, 2003, deposition, when asked the question whether she had visited with Employer or Insurer about providing assistance while she was recuperating, she testified: "No, I did not ask." She testified that she did not ask because she assumed that her employer would not provide any help.

19. Dr. Schleusener's restrictions, no lifting from below the knees, and no lifting more than twenty pounds, were Marks' only work restrictions at the time she quit her job with Employer.
20. Marks took herself off work.
21. Marks has not worked since quitting her job with Employer.
22. Marks decided to quit her job with Employer some time in mid-August 2002, before she saw Dr. Schleusener, and before Dr. Schleusener informed Marks she was suffering from a herniated disk.
23. After Marks moved to Virginia, Employer/Insurer assigned Stephanie Hurt, a case manager, to Marks' case.
24. Marks unnecessarily complicated the medical management of her case after moving to Virginia by missing no fewer than six medical appointments.
25. To this date, Marks has not had surgery on her low back. No doctor is currently recommending surgery.
26. No doctor in Virginia has taken Marks off work.
27. All doctors who have seen Marks have found her to be capable of sedentary to light work.
28. Marks submitted to a January 13, 2004, functional capacities assessment (FCA) which determined her to be capable of full-time, light duty work.
29. Marks' current treating doctor, Dr. Giordano, concurs with the findings of the FCA.
30. Marks was born July 27, 1956. She has a high school education, two years of college, has additional training and has been certified as a housing manager since 1996. She worked nine years as a property manager before she went to work for Employer.
31. Employer/Insurer assigned Bonnie Martindale, a vocational rehabilitation counselor to Marks' case. Martindale wrote Marks in October 2003. When Marks did not respond, Martindale drove to Marks' residence to interview her.
32. Marks was earning $24,000 per year at the time she suffered her alleged work place injury. This equates to approximately $11.50 per hour. Martindale conducted a labor market survey of Marks' current geographical area and determined the entry level wage for a housing specialist in the Richmond, Virginia area is $13.32 per hour.
33. Martindale's labor market survey identified eight employers with either actual job openings or expected job openings suitable for Marks with her limitations. Each pays more than Marks' $11.50 per hour date of injury wage.
34. Martindale regularly sees openings for property management positions in and around the Richmond, Virginia area that would be suitable for Marks, considering her training and experience and allowing for her limitations.
35. Marks admitted there are probably a significant number of jobs in the Richmond, Virginia area for people with her experience and credentials.
36. Marks has made only a minimal job search since moving to Virginia. She testified she furnished her resume for two property management positions she saw advertised in the newspaper in December 2002 or January 2003. In the summer of 2003 she "tried to apply" for a part-time job

in a "little convenience store". She testified, "I went by there three of four times and they never had any applications, so I just didn't bother with it again."

37. Claimant was not a credible witness. Her testimony was often inconsistent and evasive.

Analysis:

Marks argues she is entitled to temporary total disability benefits from September 6, 2002, through March 15, 2004. She argues she tried to continue working for Employer after the June 28, 2002, incident, but was unable to do so.

"In a worker's compensation dispute, the claimant must prove all of the facts essential to compensation by a preponderance of the evidence." *Davidson v. Horton Industries, Inc.,* 2002 SD 27, ¶28, 641 NW2d 138, 144. "In order to meet this burden of proof, it is necessary that the claimant provide medical evidence." *Enger v. FMC*, 1997 SD 70, 565 NW2d 79.

Titus v. Sioux Valley Hospital, 2003 SD 22 ¶ 11, 658 N.W.2d 388.

SDCL 62-1-1(8) defines total temporary disability:

> "Temporary disability, total or partial," the time beginning on the date of injury, **subject to the limitations set forth in § 62-4-2**, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first. (emphasis added).

SDCL 62-4-2 provides the following limitation: "No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days."

It is undisputed that no doctor has taken Marks off work at any time after July 15, 2002.

Our Supreme Court has applied an "odd-lot" test in determining whether a claimant is incapacitated so as to be entitled to temporary total disability benefits:

> Under the odd-lot doctrine, 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 an insubstantial income. The claimant has the burden to make a prima facie showing that his physical impairment, coupled with his education, training, and age place him in an odd-lot category. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant. However, the burden only shifts when a [claimant] makes a prima facie case of total disability by producing substantial evidence that [he] is not employable in the competitive market.
>
> [I]f the claimant's physical condition, coupled with his education, training and age, make it obvious that he is in the odd-lot total disability category, the burden of production shifts to the employer to show that some suitable employment is actually available in claimant's community for person with claimant's limitations. If, on the other hand, the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated to the odd-lot category, then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work.
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> Whether the claimant made a prima facie showing that he belongs in the odd-lot total disability category is a question of fact. Department concluded that Hendrix offered no medical evidence that he was temporarily, totally disabled at any time since he terminated his

employment and therefore, he failed to sustain his burden of proof in regard to the claim for temporary benefits.

Hendrix v. Graham Tire Co., 520 NW2d 876, 880 (SD 1994). (quotations and citations omitted).

Marks failed to sustain her burden of proof that she was "obviously unemployable." Marks offered no medical evidence that she was temporarily, totally disabled at any time from September 6, 2002, through March 15, 2004. No doctor completely took her off work, and although she was given certain restrictions, the medical evidence establishes that she is still able to work at a sedentary to light exertional level, if she is able to avoid prolonged sitting.

Failing to establish that she was "obviously unemployable", the burden of proof remained with Marks to show that she made reasonable efforts to find work, but was unsuccessful. The evidence shows that Marks made only a minimal job search after leaving employment with Employer. Marks failed to "demonstrate the unavailability of suitable employment by showing that [s]he has unsuccessfully made reasonable efforts to find work," *Id*., (citing *Shepherd v. Moorman Mfg*., 467 NW2d 916, 918 (SD 1991)).

Although the burden of proving the availability of regular employment within Marks' capabilities never shifted to Employer/Insurer, Employer/Insurer did establish, through Marks' admissions concerning the availability of jobs in the Richmond area, and through the testimony if their vocational expert, Martindale, that there is suitable work available to Marks within her restrictions.

Marks failed to meet her burden of production of the evidence, and failed to meet the ultimate burden of persuasion that she is entitled to temporary total disability benefits.

In addition, the evidence establishes that when Marks voluntarily quit her job with Employer, she quit a suitable job within her restrictions.

By voluntarily removing herself from the labor market for reasons other than a medical problem caused by her work injury, Marks forfeited her right to temporary total disability benefits for that time period. *Beckman v. Morrell* 462 N.W.2d 505 (SD 1990).

Counsel for Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Marks shall have an additional 10 days from the date of receipt of the initial sets of proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated: May 21, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge