SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

RICHARD JOCHIMS, **HF No. 1, 2001/02**
Claimant,
v. **DECISION**

YANKTON COUNTY,
Employer,
and

EMC INSURANCE COMPANIES,
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 May 13, 2003, in Sioux Falls, South Dakota. Claimant, Richard Jochims, (hereafter Claimant), appeared personally and through his counsel, Michael D. Stevens. William C. Garry represented Employer Yankton County, and Insurer EMC Insurance Companies (hereafter Employer/Insurer).

Issue:

Is Claimant permanently and totally disabled under the "odd-lot" doctrine?

Facts:

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

The parties stipulated that Claimant was injured in the course of his employment. The parties also stipulated that Claimant's average weekly wage at the time of his injury was $469.38 resulting in a worker's compensation rate of $313.08 per week or $7.82 per hour.

At time of hearing, Claimant was 38 years old. He has a GED, has completed a course in auctioneering and an eight-week course at the police academy in Pierre, South Dakota. Claimant worked as a deputy sheriff for five years before his injury. He has worked as a counselor at Threshold Youth Services, as a mechanic at Hillcrest Country Club in Yankton, as a mechanic at an Amoco station in Yankton, as an assistant manager at a convenience store in Yankton and as a youth counselor at the Missouri River Adolescent Development Center in Springfield, South Dakota.

On December 6, 1998, Claimant was injured in the course and scope of his employment as a Deputy Sheriff for Yankton County, South Dakota. Claimant suffered an injury to his neck. Claimant treated with Dr. Robert Suga. Dr. Suga diagnosed disc herniations

at C4-5 and C5-6 and a disc bulge at the C6-7 level. On May 25, 1999, Dr. Quentin Durward, a neurosurgeon, performed an anterior C4-5, C5-6 discectomy with fusion and plating.

Approximately five months later, Claimant had an onset of additional neck symptomatology following a sneezing episode on Halloween night. Dr. Durward ordered an MRI scan which indicated a disc herniation at the C6-7 level.

In late December, 1999, Dr. Durward assessed Claimant with a seventeen percent permanent partial whole body impairment. In late June, 2000, Claimant underwent a functional capacity evaluation (FCE) at Sioux Valley Hospital and University Medical Center. The FCE report indicated that Claimant did not fit into any classification of employment. The FCE report noted that Claimant could lift and/or carry 5 to 12 pounds on an occasional basis. The FCE found that Claimant could sit, stand, and walk frequently. However, no exertional level was recommended.

On August 16, 2000, Dr. Durward reviewed the results of the functional capacity evaluation with Claimant. He stated that structurally Claimant would be able to lift more than what the FCE indicated, but that Claimant was limited by pain. Dr. Durward related Claimant's poor performance on the FCE to his pain complaints. After review of the FCE with Claimant, Dr. Durward recommended that Claimant could work with limitations, including infrequent neck extension and flexion. Dr. Durward indicated that Claimant could drive. Dr. Durward stated that Claimant could safely lift up to 10 pounds occasionally.

Dr. Durward last saw Claimant on February 21, 2001, at which time he noted that Claimant continued to have residual pain. Dr. Durward believed the pain was a combination of discogenic pain from the C6-7 disc, spinal cord damage, and a soft tissue injury. Finally, Dr. Durward noted that Claimant remained capable of lifting up to 10 pounds and that he could have a job where he could sit, stand, or walk, plus his previous limitations.

Claimant has not received any other medical treatment since seeing Dr. Durward on February 21, 2001. Claimant has not worked since December 6, 1998, with the exception of one 4-hour shift at the Yankton Sheriff's Office in March, 1999.

Rick Ostrander, a vocational rehabilitation counselor, evaluated Claimant's vocational status in 2000 and again in 2002. Ostrander found that based upon his evaluations of Claimant, the medical records, the FCE, Claimant's physical condition, age, training, and experience and the type of work available in his community, Claimant is unable to secure anything more than sporadic employment resulting in insubstantial income. Ostrander concluded that Claimant would not be able to attend work on a regular basis because of his headaches and pain. Ostrander opined that it is not "reasonable for [Claimant] to look for work" because of his physical condition. Ostrander opined that vocational rehabilitation would be futile because of Claimant's low level of intellectual functioning, his low education orientation, and his difficulties with memory and concentration, these in addition to his attendance difficulties because of pain.

Dr. Michael McGrath, a clinical psychologist, performed psychological testing on Claimant at Mr. Ostrander's request. Dr. McGrath opined that Claimant did not suffer "any decline in basic intellectual functioning as a consequence of a potential head injury in an accident." Dr. McGrath further opined, "all of the memory scores are about what you would expect given what his intellect is. So the results suggest there hasn't been a decline in that respect." Dr. McGrath opined that Claimant is "cognitively capable of pursuing other employment or further education."

Jim Carroll, a vocation rehabilitation consultant, was hired by Employer/Insurer to perform a vocational assessment of Claimant. Carroll identified three positions, a switchboard operator position, a position at Serv-A-Check and a telephone solicitor, that he felt met Claimant's qualifications, his physical restrictions, and his compensation rate. In making his vocational assessment, Carroll did not personally interview Claimant and considered Claimant limited to sedentary employment. Carroll defined sedentary as "lifting up to 10 pounds or not to exceed 10 pounds on an occasional basis with frequent lifting of minimal amounts [or] a positional [limitation] where it can involved standing or -- sitting predominantly throughout the day."

Other facts will be developed as necessary.

Issue

Is Claimant permanently and totally disabled under the "odd-lot" doctrine?

Claimant asserts that he is entitled to permanent total disability benefits. At the time of Claimant's injury, SDCL 62-4-53 defined permanent total disability:

> 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 claimant in the community. 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.
> If an employee chooses to move to an area to obtain suitable employment that is not available within the employee's community, the employee shall pay moving expenses of household goods not to exceed four weeks of compensation at the rate provided by 62-4-3.

A recent 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 out 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."
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> 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).

Claimant's first avenue of demonstrating permanent total disability is by 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." Claimant's treating physician, Dr. Durward, has opined that Claimant can work eight hours a day with a lifting restriction of 10 pounds where "he does sit, stand, and walk," in addition to infrequent neck extension and flexion. Claimant's expert psychologist, Dr. McGrath, opined that Claimant is "cognitively capable of pursuing other employment or further education." Claimant has a GED, police academy training and is only thirty-eight years old. Claimant's condition, coupled with his education, training and age do not make it obvious that his is permanently totally disabled under the odd-lot doctrine.

Claimant's second avenue for demonstrating "obvious unemployability" and permanent total disability is by "persuading the trier of fact that he is in the kind of continuous, severe and debilitating pain which he claims."

Claimant alleges that his neck injury has left him permanently and totally disabled due to pain. Claimant has medically documented injuries to three cervical discs, soft tissue injuries, and his spinal column. Dr. Durward assessed Claimant with a seventeen percent impairment to his whole body. Claimant offered testimony alleging that he suffers from continuous daily pain, numbness and tingling in his upper extremities, vision problems, memory and concentration problems when the pain is at its worst, and daily debilitating headaches. Claimant's wife testified to her husband's difficulties with daily activities because of his pain.

There is no medical evidence in the record to dispute Claimant's complaints. There is nothing in the record to suggest that Claimant's physicians were not aware of each of Claimant's symptoms. Dr. Durward, the treating physician, opined that Claimant could work, but would suffer from ongoing pain that might require further surgery.

Dr. McGrath performed psychological testing and diagnosed Claimant with a pain disorder. Dr. McGrath opined that Claimant was not malingering or exaggerating his symptoms. Claimant's testimony and his wife's testimony regarding his pain complaints are credible. Dr. McGrath testified that working could be beneficial in treating Claimant's conditions, but also that his pain is real. Although Dr. McGrath opined that Claimant's complaints are not necessarily incapacitating, Claimant's unrefuted complaints of daily pain cannot be ignored in evaluating his ability to return to work.

Employer/Insurer's intimations that Claimant, if he is in pain as severe as he claims, should be seeking additional medical treatment and prescription medication for his pain are not supported by medical evidence that there are any such treatments or medications that could benefit Claimant's vocational status. The medical evidence does not support a finding that Claimant has unreasonably refused necessary, reasonable medical care.

Claimant has demonstrated that he is in continuous and severe pain, the medical records document that Claimant suffered a serious injury to his neck and spinal column

which cause ongoing, untreatable pain. Claimant is "obviously unemployable" because of continuous, severe and debilitating pain.

Because Claimant has met his burden of demonstrating "obvious unemployability," the burden shifts to Employer/Insurer to demonstrate that some form of suitable, substantial and gainful employment is open and available to Claimant.

Carroll's opinions on Claimant's employability are based on his interpretations of Dr. Durward's physical restrictions for Claimant. Carroll opined that Dr. Durward released Claimant to sedentary employment. According to Ostrander, sedentary employment includes six to eight hours a day sitting. Dr. Durward recommended that Claimant be allowed to sit, stand, and walk throughout the day. Carroll's opinions are rejected because he used the wrong classification for Claimant's restrictions and lacked the thorough understanding of Claimant's present condition and limitations that Ostrander has. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 N.W.2d 396, 398 (S.D. 1988). Claimant is not capable of working an eight-hour workday at sedentary employment as opined by Carroll.

Even if Carroll's opinions had not been rejected, his testimony does not meet Employer/Insurer's burden. Carroll identified three positions, a switchboard operator position, a position at Serv-A-Check and a telephone solicitor, that he felt met Claimant's qualifications, his physical restrictions, and his compensation rate. Ostrander opined that the three positions identified by Carroll were not feasible. The switchboard operator position requires typing and memory skills that Claimant does not have. The Serv-A-Check position is limited in positional changes, starts below Claimant's workers' compensation rate, is tied to a commission basis, and requires a 60-mile round-trip commute. Ostrander questioned Claimant's ability to withstand the stress of telephone work and the physical requirements of the job and commute given Claimant's pain and headaches.

The third position identified by Carroll involves telephone solicitations for which Claimant has no experience. Ostrander opined that Claimant would have great difficulty with this position given Claimant's need to be free to change his position from sitting, standing, and walking as needed, his memory and concentration problems, and his low level of intellectual functioning. Ostrander opined that Claimant would have difficulty maintaining the stable attendance required of all positions identified by Carroll. Ostrander's opinions are accepted as credible, well reasoned and based upon a thorough understanding of Claimant's physical and psychological condition. Based on Ostrander's opinions regarding the feasibility of the positions identified by Carroll, Employer/Insurer failed to demonstrate some form of suitable work is regularly and continuously available to the claimant.

Carroll also testified that Claimant could benefit from a two-year or four-year program of retraining. He opined that Claimant's limited intellectual capabilities would not make school infeasible, but merely more difficult. Carroll failed to identify a specific program

of rehabilitation within Claimant's community that could accommodate his physical restrictions and that would return Claimant to suitable, substantial, and gainful employment. Carroll's opinions are rejected. Id. Ostrander opined that retraining was not feasible given Claimant's limited intellectual functioning, his lack of education orientation, and his complaints of signification pain. Retraining will not return Claimant to suitable, substantial, and gainful employment.

Claimant has met his burden of production to demonstrate "obvious unemployability." Employer/Insurer has not met their burden to show some form of suitable work is regularly and continuously available to the claimant. Claimant also met his burden of persuasion. He has not been shown to be malingering or exaggerating his pain complaints. Claimant and his wife presented credible testimony. His treating physician has documented the fact that Claimant sustained an injury to his spinal column and will suffer ongoing pain. Claimant has met his burden of persuasion. He is in continuous, severe and debilitating pain and is permanently and totally disabled under the odd-lot doctrine.

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 thereto 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 20th day of July, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge