

**SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota**

CARLOS CID,

HF No. 211, 2009/10

Claimant,

v.

DECISION

ARAMARK CORPORATION,

Employer,

and

SPECIALTY RISK SERVICES,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Glenn J. Boomsma of Breit Law office, P.C., represents Claimant, Carlos Cid (Claimant). Richard L. Travis and Lindsay K. Edwards of May & Johnson, P.C., represent Employer, Aramark Corporation (Employer), and Insurer, Specialty Risk Services (Insurer). A hearing was held in the matter on July 29, 2011 in Sioux Falls, South Dakota. Testifying at the hearing were Carlos Cid (Claimant), Paul Rodman, Gary Gregerson, Tom Audet, Roger Nordstrom, Jacqueline Peters, Joshua Cid, William Gustafson, Byron Gonzalez, Shane Kingsbury, Beth Claussen, and Charles Cunningham.

ISSUES

1. Whether Claimant's condition or injury arose out of and in the course of his employment with Aramark?
2. Is Employer and Insurer are responsible for the payment of reasonable and necessary medical bills incurred by Claimant for the treatment of his injury or condition?
3. Is Claimant entitled to workers' compensation benefits including permanent total, temporary total, or permanent partial benefits?

FACTS

Claimant is a resident of Sioux Falls and was 60 years of age at the time of hearing. Claimant was born in Santiago, Chile and completed high school in Argentina. Claimant did not attend any college or university after high school. Claimant was trained to be a leather worker and more specifically, a cobbler or shoe maker. He made shoes and worked with other leather goods from age 13 to 23 (1974). Claimant moved to the United States in 1978. He worked in a hotel banquet room for four years before moving to Texas.

While in Texas, Claimant worked in as a meat packer. From 1982 to 1991, Claimant worked in a few different meat packing facilities on the production lines. In 1995, Claimant moved to Sioux Falls, South Dakota to work at John Morrell & Co. He stayed there until 1997 when he moved to Huron to work at Dakota Pork. Claimant transferred from Huron to the Mitchell facility and worked there until 2007. In 2007, Claimant moved to Pipestone, Minnesota and worked as a steak cutter with a different meat company. Claimant only worked there a short length of time due to the unexpected death of his son in Kansas.

Towards the end of 2007, Claimant returned to Sioux Falls and started working as a dishwasher at the Timberlodge Steakhouse. He was there for several months before starting a job with Employer. On January 22, 2008, Claimant started working for Employer as a cafeteria utility worker. After leaving his employment with Employer, on April 1, 2008, Claimant took a job as a dishwasher at CJ Callaway's in Sioux Falls until June 2008. Claimant then worked at Tinner's Bar and Grill from June 2008 until March 2009.

Employer is a Food Service Company with a location at the Citibank complex. When Claimant started working for Employer, he started as a part-time "P.M. Utility" position in Building Two. His hours were from 3 to 9 pm. His duties included general utility duties, such as dishes, sweeping, mopping, taking out the trash, and filling the pop machine with ice. Claimant was looking for more hours and he requested to be transferred to a full-time position. After a few weeks in Building Two, Claimant took a full-time position as "A.M. Utility" in Building Three. Claimant's working hours were then from 7 am to 3:30 pm.

The restaurant facility in Building Three has one less serving line than Building Two. Building Two has more serving lines and is the busiest of the kitchens. The Utility position in Building Three is also in charge of making pizzas, and other similar items, and moving them to Building Two. The A.M. shift in both kitchens is busier than the P.M. shift because of the morning preparation work and that the A.M. shift serves both breakfast and lunch. Employer has one utility person for each shift, A.M. and P.M., in each building. In Building Three, the utility person has more responsibilities.

While at Building Three, Claimant failed to show up for work or call in, on occasion. Claimant told his supervisors that he was overwhelmed with the extra responsibilities involved with working in Building Three. Employer moved Claimant from Building Three back to Building Two for the A.M. shift. This A.M. shift in Building Two is busier than the P.M. shift in Building Two and has less responsibility than the A.M. shift in Building Three. After being moved back to Building Two, Claimant continued to struggle to complete his work duties.

At or about March 23, 2008, Claimant's supervisor spoke with Claimant about his work performance. Claimant was given a warning that he needed to be completing all his tasks on a regular basis. After being given this warning, Claimant stepped up his efforts and was completing his tasks on an acceptable level.

Part of Claimant's job duties was to empty the garbage cans in the kitchen. The two large garbage cans filled up with food and produce scraps as well as boxes and plastic. The cans were emptied about two times per shift. These bags, when full, were not light. Claimant would push a 55-gallon container lined with a garbage liner. Claimant would double-bag the container due to leakage. This doubled 55-gallon bag, when full, weighed between 40 and 80 pounds, depending upon the contents. Claimant then had to take this bag and lift it into a garbage chute.

It is Claimant's contention that on or about Friday, March 27, 2008, Claimant injured his back while at work. Claimant testified that at about 11 am, while lifting garbage bags, he felt a sharp pain in his back, like someone sticking a screwdriver in his back. He testified that he told Shane Kingsbury about the back pain and asked for assistance with the garbage. Shane denies

that this occurred. Claimant also asked Beth Claussen for assistance with sweeping. Ms. Claussen does not have a clear recollection of working with Claimant. Ms. Claussen does not recall Claimant asking her to sweep or mop for him or telling her that he was in pain or injured. Ms. Claussen credibly testified that if a Utility worker asked her to help sweep or mop the floor because he was in severe pain, it would be sufficiently out of the ordinary that she would remember if it happened.

During that last week, the parties agree that Claimant's work slowed down dramatically. Claimant was not getting his work done and Employer was dissatisfied with Claimant because of his failure or inability to do the work for which he was hired. On March 31, 2008, Claimant met with Shane Kingsbury and Chuck Cunningham (Claimant's supervisors). During that meeting, Mr. Cunningham directly asked Claimant if there were obstacles preventing Claimant from getting the work done. Claimant asked for assistance from other employees to help him complete his tasks. Claimant did not inform Mr. Kingsbury or Mr. Cunningham, during that meeting that he was suffering from back pain or injury.

The evening of March 31, 2008, Claimant telephoned Mr. Kingsbury on his phone and said he could not come into work the following day, Tuesday, April 1, 2008. Again, Claimant did not tell Mr. Kingsbury that he was in pain or injured. On Wednesday, April 2, 2008, Claimant was discharged by Employer for missing work. Later on April 2, 2008, Claimant came into work to return work items and Claimant spoke with Mr. Cunningham. Claimant did not tell Mr. Cunningham that he was in pain or injured.

On April 4, 2008, Claimant telephoned Mr. Cunningham and informed him that he had hurt his back on the job with Employer and needed medical treatment. Mr. Cunningham immediately contacted Employer's Human Resources office, as this injury was reported after Claimant was dismissed. Claimant filled out paperwork with Employer on Tuesday, April 8 and saw Employer's occupational health provider, Dr. Clayton Van Balen, on April 9, 2008.

Claimant saw Dr. Clayton Van Balen on April 9, 2008. Dr. Van Balen practices with Sanford Clinic Occupational Medicine. Claimant presented with pain in the "mid and lower

dorsal spine” and was diagnosed with a “muscle strain, dorsal spine.” Claimant returned to Dr. Van Balen again on April 28 with the same continuing pain in the area between the scapulae. Dr. Van Balen noted that the problem was not resolving. Dr. Van Balen recommended Claimant have an orthopedic consultation at the Spine Center. Claimant was scheduled for physical therapy, but the appointments were cancelled due to various issues ranging from a fire alarm at the building to the Insurer not willing to pay for the visits.

Insurer then requested that Claimant to go to an Independent Medical Exam with Dr. Blow. Claimant refused to see Dr. Blow as he was not referred to Dr. Blow by Dr. Van Balen and Claimant had heard negative things about Dr. Blow. As requested by Employer and Insurer, Dr. Blow completed a records review of Claimant’s post-injury medical history on July 9, 2008. Insurer denied Claimant any further treatment after Claimant refused to see Dr. Blow.

Dr. Van Balen referred Claimant to Dr. Boetel at Sanford Hospital. Claimant saw Dr. Boetel on December 24, 2008, after missing two previous appointments that were made with Dr. Boetel. Dr. Boetel’s assessment was that Claimant had persistent lower thoracic pain. The x-ray of his thoracic spine was reviewed by Dr. Boetel and he suggested Claimant participate in physical therapy two to three times per week for four weeks.

On February 6, 2009, due to his continued pain and need for continued treatment Claimant went to Sioux Falls Community Health Clinic. The Claimant had previously been seen at that Clinic for other issues. Previous to his work with Employer, on February 8, 2007, Dr. Suzannah Spencer assessed Claimant has having muscular thoracic back pain. Claimant also saw Dr. Hagen with the Hagen Chiropractic Clinic from April to May 2007 for back pain.

Dr. Christopher Jones with Falls Community Health ordered a CT myelogram of Claimant lumbosacral spine which was performed on February 24, 2009. The results of the CT scan are that Claimant has disc disease and degenerative changes in all levels of his lumbar (lower) spine. Dr. Jones notes that Claimant has some thoracic (mid-back) pain with activity. Dr. Jones recommended and ordered physical therapy for Claimant due to the low back pain.

On June 15, 2009, Claimant returned to Dr. Boetel at the Sanford Spine Center. Dr. Boetel recommended continued physical therapy. Claimant then saw Dr. Richardson on June 17. Dr. Richardson ordered a CT of Claimant's thoracic spine. The result of the CT scan is that Claimant has disc protrusions on spinal levels T7-8, T8-9, T10-11, T11-12; disc disease and degenerative changes in Claimant's thoracic spine. Dr. Richardson did not recommend surgery and recommended continued physical therapy.

As noted by Sanford Clinic on June 30, 2009, Claimant was noncompliant with his physical therapy. Just over a week later, Claimant goes to yet another doctor, Dr. Myung Cho with Midwest Pain and Rehabilitation. She recommended a series of trigger point injections along with myotherapy to control the severe myofascial (muscle) tightness.

On August 6, 2009, Claimant sought treatment from Dr. Charles Miller and Krista Seurer, PA-C, with the Sanford Neurosurgery. Claimant was referred there by Dr. James Olson, Claimant's heart doctor. Dr. Miller, like previous providers, reviewed the lumbar and thoracic CT. Dr. Miller noted that Claimant had osteophyte spurs at T5-6 and T10-11 and that his pain was irritation of the local musculature and facets. Dr. Miller did order updated views of the thoracic spine that were taken on August 6, 2009. It was noted that the resulting diagnosis was multilevel degenerative disc disease without acute bony abnormalities.

On August 24, 2009, Claimant goes to see Dr. Walter Carlson with the Orthopedic Institute. Dr. Carlson recommended physical therapy, which Claimant attended. Claimant received injections at T8 and T12 on September 25, 2009 from Dr. Sanders at Sanford Hospital. Claimant returned to Dr. Carlson on October 13, 2009 with the report that physical therapy has helped somewhat. On October 22, 2009, Dr. Atchison with Sanford Hospital performed a T8-9 epidural. Dr. Atchison gave the opinion that Claimant's back pain is likely postural. Dr. Carlson referred Claimant to Dr. Thomas Ripperda, a physiatrist and pain specialist with Avera.

Claimant is seen by Dr. Thomas Ripperda with Avera Rehabilitation Associates on March 9, 2010, about two years after the injury was reported to Employer. Claimant reported to Dr. Ripperda that he had no history of prior back pain. When giving his history to Dr. Ripperda, Claimant did not relate his symptoms to a specific onetime incident, but spoke about his job in

general. Dr. Ripperda also noted that Claimant was continually stressing to Dr. Ripperda that his job caused the injury and this is was work-related. From that history and the record review, Dr. Ripperda gave the opinion that Claimant's condition came on gradually and was not the result of one specific incident. Dr. Ripperda answered questions posed by Claimant's attorney after seeing Claimant for the second time on March 29, 2010. Dr. Ripperda does not believe that Claimant's work with Aramark was a major contributing cause of his back complaints and symptoms. Dr. Ripperda wrote:

He is experiencing neck, thoracic, and lumbar discomfort as recent to May 2007, which he sought chiropractic care and was having ongoing symptoms at completion of that care. The symptoms onsets in March 2008 were gradual and were not related one specific incident. He reports having general increase in overall discomfort with increase in activities. This should be more consistent with the degenerative spondylosis noted on his films and arthritic component to his ongoing symptomology. I feel the major contributing cause is the underlying thoracic spondylosis. At this point in time, the patient is not complaining of neck or low back pain but just mid thoracic discomfort.

Claimant then sought out another rehabilitation specialist, Dr. Judith Peterson with SoDak Rehab. Dr. Peterson is a board certified Physiatrist. She also serves as a Clinical Assistant Professor for the Department of Neurosciences, Sanford School of Medicine of the University of South Dakota. She specializes in physical medicine and rehabilitation with a subspecialty of pain medicine.

Dr. Peterson reviewed Claimant's medical history and disagrees with Dr. Ripperda's opinion. Her explanation is that Claimant was frequently lifting heavy amounts of material at work and that Claimant's symptoms and complaints are consistent with the type of work that he was doing for employer and that Claimant suffered a work-related injury. Dr. Peterson gave the opinion, during her deposition, that she believed Claimant was regularly lifting heavy amounts over 50 pounds. She also gave the opinion that Claimant's injury was likely an aggravation of his ongoing disc disease. Dr. Peterson's opinion then states that her opinion is based upon the

Claimant's report that he had a single incident on March 30, 2008¹, that caused a chronic thoracic sprain and strain.

Dr. Peterson reviewed Claimant's full medical history and the CT scan of his thoracic spine taken on June 16, 2009. Dr. Peterson noted that Claimant's records indicated "significant herniated disc abnormalities in the midthoracic region." Dr. Peterson prescribed Lidoderm pain patch and other conservative treatments. Dr. Peterson continued to see Claimant through the Spring and Summer of 2010 without any noted improvement in Claimant's condition. Dr. Peterson continued to prescribe pain patches, pain medication, and acupuncture. Dr. Peterson assigned Claimant a 5% whole person impairment rating, in accordance with the *AMA Guide to Evaluation of Permanent Impairment 4th Edition*. Dr. Peterson is of the opinion that Claimant's medical condition was caused by his employment with Employer. Dr. Peterson continues to see Claimant for mid back pain. The most recent records indicate that conservative treatments such as injections, physical therapy, and nerve blocks do not seem to help the pain.

Additional facts will be developed during the Analysis.

ANALYSIS & DECISION

ISSUE I

Whether Claimant's condition or injury arose out of and in the course of his employment with Aramark?

Claimant has a long history of back pain; upper, middle, and lower back pain. Back to February, 2001, Claimant treated for mid-back pain. At that time, Claimant was treated at Falls Community Health Clinic. Claimant also treated at the Orthopedic Institute in July and August 2004 for mid-thoracic pain. Claimant was seen at the Hagen Chiropractic Clinic in April and

¹ There is some confusion in Claimant's testimony about whether the injury occurred on March 27 or March 30, 2008. Claimant was giving the date of March 30 to the doctors and during his deposition, yet by the end of his

May 2007, about one year prior to his claimed injury on March 27, 2008 and prior to becoming employed with Employer. Claimant's symptoms did improve after being seen by the Orthopedic Institute and Dr. Hagen.

Claimant's testimony is that after his injury, he asked other employees to help his sweep and mop the floor and take out the garbage. The cook, Ms. Claussen, did not recall Claimant asking her to help mop the floor because he was in pain. Being injured or in pain is out of the ordinary and something that she would remember. Ms. Claussen has managed restaurants and if someone is injured, she testified that she is trained to report all injuries immediately. The testimony of Ms. Claussen was plausible and credible.

The causation statute, SDCL §62-1-1(7), defines injury (set out in part):

"Injury" or "personal injury," only 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...

SDCL §62-1-1(7). The Claimant has the burden of proving an injury under the above statute.

The South Dakota Supreme Court has interpreted this statute on numerous occasions. Recently, the Supreme Court wrote:

To prevail on a workers compensation claim, a claimant must establish a causal connection between [her] injury and [her] employment. That is, the injury must have its origin in the hazard to which the employment exposed the employee while doing [her] work. *Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, 20, 653 NW2d 247, 252 (citation omitted) (alteration in Rawls). Employees need not prove that their employment activity was the proximate, direct, or sole cause of

testimony during the hearing, it was pointed out that he did not work on March 30, as that was a Sunday, so Claimant reasoned that he must have been injured on March 27, 2008.

their injury, only that the injury arose out of and in the course of employment. SDCL 62-1-1(7). And, an injury is not compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.] SDCL §62-1-1(7)(a); *Caldwell v. John Morrell & Co.*, 489 NW2d 353, 358 (SD 1992) (citations omitted).

Vollmer v. Wal-Mart Store, Inc., 2007 SD 25, ¶13, 729 NW 2d 377, 382 (footnote omitted). The Supreme Court has further stated that:

[T]he 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Westergren v. Baptist Hospital of Winner, 1996 SD 69, ¶31, 549 NW2d 390, 398 (quoting *Day v. John Morrell & Co.*, 490 NW2d 720, 724 (SD 1992)). A medical expert's finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.*, 443 NW2d 5, 6 (SD 1989). See also *Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, ¶21, 653 NW2d 247, 252-53 (quoting *Day*, 490 NW2d at 724) (Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers] compensation statutes.). Instead, [c]ausation must be established to a reasonable medical probability[.] *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶19, 624 NW2d 705, 709.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶34. Furthermore, the Court has opined on the "level of proof" that must be shown by a claimant.

"The burden of proof is on [Claimant] to show by a preponderance of the evidence that some incident or activity arising out of [his] employment caused the disability on which the worker's compensation claim is based." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. This level of proof "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." *Id.* To meet his degree of proof "a possibility is insufficient and a probability is necessary." *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

The law regarding the opinions of experts is well established in South Dakota. "The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Johnson v.*

Albertson's, 2000 SD 47, ¶25, 610 NW2d 449, 455. Dr. Peterson bases most of her opinion on Claimant's statement to her that one specific lifting incident at work caused the chronic thoracic sprain and strain. She then disputes Dr. Ripperda's opinion because it does not specify that Claimant's symptoms and complaints are consistent with a work-related injury, if the work involved frequent lifting. Dr. Peterson, in her deposition and in her opinions, seems to vary between whether the condition occurred over time and whether there was a sudden onset of pain.

Dr. Peterson's deposition states, "He had a gradual onset of mid back pain during the times that he was lifting these heavy objects. There was not one specific incident to my knowledge associated with the onset of his pain." Furthermore, in the Impairment Rating which she authored, Dr. Peterson wrote, "There was not one specific incident to my knowledge associated with the onset of his pain." This is completely in opposite to what Claimant testified to, that there was one specific incident in which he injured his back while lifting a bag of garbage. And furthermore, it is the opposite of what she based her opinion upon, the Claimant's report to her that he injured his back on March 30.

Dr. Thomas Ripperda, a physiatrist with the Avera Rehabilitation Associates, is board certified in Physical Medicine and Rehabilitation, Pain Medicine, and as an Independent Medical Examiner. His opinions, in his report and in the deposition, were given with a reasonable degree of medical probability and certainty. Dr. Carlson referred Claimant to Dr. Ripperda for back pain management. Dr. Ripperda saw Claimant as a patient and not for an Independent Medical Exam. Dr. Ripperda reviewed Claimant's records and examined Claimant on at least two occasions. Dr. Ripperda gave Claimant a 5% whole person medical impairment. However, it is his opinion that Claimant's condition was ongoing and preceded Claimant's employment with Employer. According to Dr. Ripperda, Claimant's condition is "consistent with the degenerative spondylosis noted on his films and arthritic component to his ongoing symptomology."

Dr. Ripperda explained his reasoning in his deposition. He gave this opinion that Claimant's mild to moderate disc protrusions in the thoracic spine developed over many years and can cause the pain for which Claimant is suffering. Dr. Ripperda reviewed the CT scan

taken June 19, 2009 to make his opinion on this. In response to a question asking him to explain the results of Claimant's CT scan and the relationship of the disc protrusions and the osteophytes, Dr. Ripperda said:

A Not caused by the osteophytes, but it's suggestive that [the disc protrusions are] chronic based on their association with the osteophytes.

Q And when you say "chronic," meaning preexisting for many years?

A Correct. What happens is you get a – you start developing some disc degeneration of those discs. The annulus of that disc gets weak and will protrude. Your body tried to repair that the best it can and, in that process, will lay down bone spurs called osteophytes. So the osteophytes that they're describing are actually not just a pure protrusion but it's actually a protrusion plus bones, which is suggestive of a chronic development. An acute herniation, you would just have protrusion without osteophytes because the osteophytes wouldn't have had a chance to develop.

Q And that condition in your opinion would have predated March of 2008?

A Very much so.

Both Dr. Peterson and Dr. Ripperda are highly qualified physiatrists. Both saw Claimant as a patient and have reviewed the full-medical history of Claimant. Neither doctor saw Claimant immediately, but only saw Claimant after over two years had passed. Claimant then gave two different histories to these doctors. Dr. Ripperda was told by Claimant that his pain increased over time. Dr. Peterson was told that the pain came on very suddenly from one incident. Neither doctor was informed by Claimant that he had a long history of back pain, both doctors gleaned that information from reviewing the records. Both doctors acknowledge the fact that Claimant has chronic back pain and both have given a 5% whole person impairment rating.

Dr. Ripperda gave a detailed analysis of the results of Claimant's MRI, which was taken in June 2009, about 15 months after the date of injury. Dr. Ripperda explained how the disc protrusions were associated with chronic osteophytes and how the development of Claimant's condition was chronic and not acute. This explanation by Dr. Ripperda is more persuasive.

Claimant's current claimed condition did not arise out of and in the course of his employment with Employer. Claimant's work for Employer was not a major contributing cause of Claimant's condition.

ISSUE II

Are Employer and Insurer responsible for the payment of reasonable and necessary medical bills incurred by Claimant for the treatment of his injury or condition?

Employer and Insurer are not responsible for the payment of medical bills incurred by Claimant the treatment of his injury or condition. This issue is based upon the causation decision stated above.

ISSUE III

Is Claimant entitled to workers' compensation benefits including permanent total, temporary total, or permanent partial benefits?

Although Claimant's injury did not occur in the course of his employment with Employer and is not a work-related injury, I will make an analysis and decision on the issue of whether Claimant is permanently and totally disabled. The burden of proving permanent total disability is on Claimant.

"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." SDCL 62-4-53. The burden is on the employee "to make a prima facie showing of permanent total disability." Id.

First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment is actually available in claimant's community for persons with claimant's limitations.

Obvious unemployability may be shown 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 fact 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 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.

Baier v. Dean Kurtz Construction, 761 NW2d 601, 608 (S.D. 2009) (citing *Fair v. Nash Finch Co.*, 728 NW2d 623, 632-22 (S.D. 2007)).

As the South Dakota Supreme Court has written, "A claimant can show obvious unemployability by showing either that [his] physical condition along with [his] education and training make it obvious that [he] is in the odd-lot total disability category, or by convincing the trier of fact that [he] suffers ... continuous, severe, and debilitating pain ...". *Wagaman v. Sioux Falls Construction*, 576 NW2d 237, 242 (S.D. 1998).

To establish that he is in the odd-lot disability category, Claimant must prove that "[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." *Id.* at 241. Claimant's date of birth is April 30, 1951; he is currently 60 years old. Claimant has a 12th grade education that he achieved while living in Chile and Argentina.

Claimant has proven that he is restricted to unskilled light duty work due to his ongoing chronic back pain. His treating physician, Dr. Peterson, is of the opinion that Claimant is not a surgical candidate and that as of January 2011, still suffered from significant mid back pain. Dr. Ripperda was of the opinion that Claimant should be restricted to light duty work. Claimant currently takes Flexeril and Lyrica for pain, as well as an antidepressant. Claimant prepared a pain diary to record how much pain he is in on a regular basis.

Claimant has proven obvious unemployability. Claimant's physical condition and chronic continuous pain, combined with his mature age and his lack of education and training prove that Claimant is unable to secure meaningful employment or at least nothing more than sporadic

