

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

NICOLE YOUNG BEAR,

HF No. 49, 2005/06

Claimant,

DECISION

v.

**BEHAVIOR MANAGEMENT SYSTEMS/
FULL CIRCLE,**

Employer,

and

RISK ENTERPRISE MANAGEMENT,

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. Nicole Young Bear (Claimant) appeared personally and through her attorney of record, Michael J. Simpson. J. G. Shultz represented Employer and Insurer (Employer). The sole issue presented was whether Claimant is permanently and totally disabled pursuant to SDCL 62-4-53. The Department retained jurisdiction over the issues of payment of outstanding medical expenses relating to Claimant's treatment in Texas and permanent partial disability.

FACTS

Based upon the Department's record and live testimony at hearing, the following facts have been established by a preponderance of the evidence.

At the time of the hearing, Claimant was thirty years old. Claimant graduated from Rapid City Stevens High School in 1996. Claimant attended Oglala Lakota College and graduated in 2001 with a bachelor's degree in human services. After graduation, Claimant intended to pursue a master's degree in counseling with her ultimate goal of obtaining a Ph.D. in clinical psychology.

Claimant started working for Employer in January 2002 as a chemical dependency technician. Claimant provided life skills training and support to clients at the treatment center. On March 2, 2002, Claimant suffered a work-related injury to her back as she attempted to move a stove to clean around it and felt pain in her low back. The parties stipulated that this work injury was a major contributing cause of Claimant's low back condition. Claimant's weekly workers' compensation rate is \$279.27.

Claimant initially treated at Sioux San Hospital on several occasions for low back pain and pain into both legs. An MRI taken on April 24, 2002, revealed a small central disc herniation at L5-S1 that "did not appear to significantly impinge on either thecal sac or traversing nerve roots[.]" Claimant was referred to Dr. Stuart Rice, neurosurgeon, who first saw Claimant on May 1, 2002. Dr. Rice noted Claimant was suffering from low

back and bilateral leg pain and that she had a “relatively large central disc herniation at L5-S1.” Dr. Rice concluded, “I believe that the patient’s pain is related to the disc herniation.” Dr. Rice recommended conservative treatment and prescribed Vicodin and an epidural steroid injection. On June 17, 2002, Dr. Rice noted there was no substantial improvement in Claimant’s pain despite conservative treatment. Claimant continued to experience increasing discomfort in her right lower extremity and Dr. Rice recommended a lumbar microdiscectomy at L5-S1.

On July 8, 2002, Dr. Rice performed microdiscectomy surgery on Claimant’s low back on the right at L5-S1. Claimant also participated in a course of physical therapy, which did not provide much benefit. Claimant continued to experience some back and bilateral lower extremity pain on a daily basis. Dr. Rice recommended that Claimant modify her activities to include minimal lifting and bending. Specifically, in August 2002, Dr. Rice released Claimant to return to school or sedentary work with a ten pound lifting restriction. Dr. Rice also recommended that Claimant have “the ability to take breaks where she is allowed to ambulate, stretch, or relieve any minor discomfort that may occur.”

Employer informed Claimant that she could return to work full-time or on an as needed basis. However, Claimant continued to experience “worse” pain in her low back and she did not think she would be able to perform her job duties. Claimant resigned from her employment with Employer and decided to pursue her master’s degree in counseling.

Claimant’s back condition continued to deteriorate as she experienced increasing low back pain and bilateral lower extremity pain. Claimant continued to treat with Dr. Rice. On September 25, 2002, Dr. Rice stated, “I am concerned that the patient may have not only recurrence of her disc herniation, but she may be experiencing a painful disc as well. The increased back pain specifically when she is sitting, standing, or ambulating strongly suggests a painful disc.” Dr. Rice ordered another MRI, which revealed a very large central disc herniation. Dr. Rice diagnosed Claimant with recurrent disc disease and stated, “[g]iven the size of the lesion, I am not terribly optimistic that she will obtain substantial sustained relief with any conservative measures. The patient is grossly symptomatic and I am not particularly hopeful that she will be able to obtain substantial sustained relief without surgery.” Dr. Rice recommended that Claimant undergo a repeat lumbar microdiscectomy and noted that Claimant would consider this surgical option with her parents.

On December 16, 2002, Dr. Rice indicated that Claimant continued to experience persistent low back pain, with sharp stabbing pain in the mid low back, and occasional pain radiating into both legs. Dr. Rice had a long discussion with Claimant and her father about her treatment options. Dr. Rice “expressed to them that my concern is that her back pain continues to increase in intensity and that the disk herniation is not a good explanation for her back pain. In summary, I am concerned that the patient has a symptomatic annular tear, which is the source of her back pain. As such, a microdiscectomy could potentially relieve her leg pain, but not substantially all her back pain. Given her young age, I am somewhat reluctant to recommend a definitive fusion procedure, unless all other options are exhausted.” Dr. Rice also stated, “she does appear to be capable of returning to school and her pain is at least relatively well controlled with narcotics.”

On January 27, 2003, Dr. Rice noted that Claimant continued to take Percocet for her low back pain and that “she does have a large annular tear, and recurrent herniated disk at L5-S1.” Claimant was also taking Soma, a muscle relaxant. Dr. Rice expressed concern about Claimant’s use of narcotics stating that it was “not good medicine to treat pain long term with short acting narcotics.” Dr. Rice stated, “I am concerned about her use of these medications, although, she does have clear pathology.” Dr. Rice continued Claimant’s use of the narcotics, but noted that if there was no substantial improvement, he would refer Claimant to a pain clinic for epidural steroid injections or comprehensive management.

On January 20, 2003, Claimant saw Dr. Rand Schleusener, an orthopedic surgeon, for a second opinion to discuss treatment options for her back. Claimant reported to Dr. Schleusener that she had back pain at a “fairly significant” rating of 9 out of 10. Dr. Schleusener noted Claimant was taking from four to six Percocet and two Soma a day. Dr. Schleusener also noted that Claimant was going to school and while she had difficulty sitting, she was keeping up with her classes and was encouraged by this. Dr. Schleusener stated that “review of her MRI scan shows a large central herniation at L5-S1 and the post-op films, unfortunately, look a lot like the pre-op films, consistent with a recurrent disk herniation.” Dr. Schleusener did not believe another microdiscectomy would provide any benefit to Claimant because she largely has back pain and surgery was tried without success. Dr. Schleusener discouraged Claimant from undergoing a lumbar fusion due to her young age. Dr. Schleusener concluded, “I think one of her options is to continue as she is doing and live with it, as best she can, with the knowledge that there may be some newer technologies in the future, such as disk replacement, which will probably be available within the next two to three years.”

Claimant decided to continue working on her master’s degree with the hope that by the time she finished, a new surgical procedure would be available for her that would enable her to function well enough to work. On February 12, 2003, Dr. Rice noted, “[h]opefully improvement will be noted in these next months at which point surgery could certainly be avoided. In the meantime, she will be continuing with school and some p.r.n. work.” Subsequently, on April 30, 2003, Dr. Rice wrote to Claimant advising her that “if you wish to continue with nonsurgical management of your lumbar disk disease that a referral to a chronic pain specialist will be necessary. Our office does not prescribe narcotics long-term.”

Dr. Rice referred Claimant to Dr. Craig Mills, who is board certified in physical medicine and rehabilitation and board certified in pain management. Dr. Mills treated Claimant from June 13, 2003, until October 28, 2005, and diagnosed her with failed back syndrome. Dr. Mills explained:

[S]he had, in her case, a back injury which was felt to be work-related. She apparently had the course of pain for multiple months and then had eventually seen a neurosurgeon, Dr. Stuart Rice. She underwent surgery and apparently didn’t really significantly improve after that. She continued to have pain issues. I saw her at the referral of Dr. Rice in June of 2003 for the purpose of pain management with her being accompanied by her case manager at that time as well as I think maybe her mother. One of her family members was with her. And I evaluated her and reviewed her records and kind of discussed a plan for her. Her goal at that time was to have her pain become more manageable as well as

continue with schooling and finish her education and she was hopeful that she might undergo a future surgery that might solve her problems as many people are hopeful of [sic].

Dr. Mills managed Claimant's pain medications and provided injections, if necessary. Dr. Mills opined Claimant suffers from constant, severe and debilitating pain and that she has a chronic pain syndrome.

While Claimant pursued her master's degree, she was able to take two or three classes per semester. Claimant discussed her back condition with her instructors and accommodations were made so that Claimant could sit in the back of the classroom and stand, stretch and move around as needed. By the summer of 2003, Claimant completed eighteen credit hours in her master's program. Also in August 2003, Claimant got married.

In December 2003, Claimant saw Dr. Schleusener for another surgical consultation. Dr. Schleusener noted that Claimant continued to have significant back and leg pain and was taking eight Percocet a day and was under Dr. Mills' care. Dr. Schleusener reviewed an MRI taken on November 25, 2003, which showed "some disk degenerative changes at L5-S1. She has an annular tear at this level. There is no significant focal compression." Again, Dr. Schleusener recommended that Claimant either live with her condition or undergo an interbody fusion. However, given Claimant's age and other factors, Dr. Schleusener was "not too enthusiastic about recommending a lumbar fusion in this woman." Dr. Schleusener noted Claimant was in the middle of her training and told her, "there is a chance her pain may improve over time."

Claimant continued to pursue her master's degree. Before she could complete her program, Claimant participated in an internship for two semesters with Dr. Leslie Fiferman, a clinical licensed psychologist in Rapid City. Claimant had to have a minimum of 600 accumulated hours, 240 of which had to be direct contact time with clients. Claimant fulfilled these requirements and averaged approximately twenty to twenty-four hours per week. Claimant's supervisors were flexible with her schedule and allowed her to use a big, comfortable chair and pillows during counseling sessions. Claimant completed her master's degree in counseling in April 2005. However, Claimant has not yet taken the test to become certified.

On July 27, 2005, Claimant saw Dr. James Nabwangu, another Rapid City neurosurgeon. Dr. Nabwangu noted that Claimant was "somewhat difficult to examine because of her perceived severe pain. She has marked limitation of lumbosacral movements on account of her pain." Dr. Nabwangu also stated, "[s]he is adamant that she would like to have something done to help her even if the chances of getting better are remote." Dr. Nabwangu did not believe Claimant was a candidate for artificial disc replacement because she has radicular problems.

Claimant's husband is in the military and in November 2005, Claimant moved to Ft. Hood, Texas and currently resides there with her husband. Claimant's low back condition continued to deteriorate and is significantly worse from the time she earned her master's degree. Claimant has not looked for a job and has not applied for any openings because of her continuous, severe low back pain. As Claimant stated, most of her days are spent in bed because of her severe low back pain.

Dr. Wayne Anderson, a board certified specialist in occupational medicine, performed an independent medical examination (IME) of Claimant on May 25, 2006.

Dr. Anderson took a history from Claimant, reviewed all of her medical records and performed a physical examination. Dr. Anderson opined Claimant is capable of working full-time in the sedentary to light work category, which should allow her to do the job of a counselor.

Claimant was a credible witness. This is based on the totality of the evidence presented, including her consistent testimony, the medical evidence, and on the opportunity to observe her demeanor at the hearing. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED PURSUANT TO SDCL 62-4-53?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). Claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992). Claimant alleged that she is permanently and totally disabled under the odd-lot doctrine. SDCL 62-4-53 governs whether a person is permanently and totally disabled and provides in 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 is not feasible.

Pursuant to SDCL 62-4-53, Claimant has two ways to make the required prima facie showing that she is entitled to benefits under the odd-lot category:

First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment 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. Under this test, if the claimant is obviously unemployable, he will not bear the burden of proving that he made reasonable efforts to find employment in the competitive market. Likewise, it is only when the claimant produces substantial evidence that he is not employable in the competitive market that the burden shifts to the employer.

Fair v. Nash Finch Co., 2007 SD 16, ¶ 19 (citations omitted). Even though the burden of production may shift to Employer, the ultimate burden of persuasion remains with Claimant. Shepard v. Moorman Mfg., 467 N.W.2d 916, 918 (S.D. 1991).

Claimant's low back condition has worsened significantly since the time she completed her master's degree. Claimant currently suffers from continuous and severe pain in her lower back that goes into her hips and radiates down both legs. Claimant experiences severe muscle cramps, spasms and aches in her lower back, thighs, calves, arches of her feet and toes. Her pain decreases only when she lies down and elevates her feet or when she lays on her side with a pillow. During a week, Claimant usually has two good days compared to five bad days. Claimant has difficulty sleeping because of her continuous pain and will toss and turn a lot. When Claimant was in school, she was active for about five to eight hours a day, but would still lie down to take the pressure off her back during the day. Now, it is rare for Claimant to be active more than a couple hours a day, and most days, she is not able to be active at all.

On a better day, Claimant gets up around 6:00 a.m. and takes an MS Contin, her time-release morphine medication. Claimant then goes back to bed because the medication makes her very sleepy. If Claimant can go back to sleep, she does so because she does not sleep very well due to her pain. Claimant will sleep for a couple hours if possible. When she awakes, she then takes two Percocet and two Soma. Claimant testified:

I usually try to, if it's a better day, I do try to get up and brush my teeth, you know, wash my face, try to get dressed, you know, maybe make my bed. Maybe, you know, fix something to eat for breakfast - - you know, grab myself something to eat for breakfast or . . .

. . . .

Usually around noon I - - my pain usually starts to come back, so I'm usually - - I have to lay back down, and then I'll take my next dose of medication, the two Percocet and two - - two Soma, the muscle relaxers.

Again, the medication makes Claimant drowsy, so she will rest for an hour or two. Claimant described how she tries to sleep, "I'm usually on my bed. I lay on my bed and I put my pillows - - fold them and put - - you know, to elevate my legs and then I have my pillows behind me and I kind of lay - - or I'll lay from side to side."

When she gets up from this nap, Claimant explained:

If it's a better day, I try to do - - you know, like if I have my dishes or, um, you know, like if there's some - - you know, if I need to pick up around the - - the apartment, I try to do, um, you know, as much as I can. If it's - - if it's a good day, I try to accomplish what I can.

...

If I've been - - usually if I'm up and I'm doing dishes, I'll - - or do any kind of cleaning, I'll go and lay back down and then around four, you know, I usually take my next - - my next dose of medication [two Percocet and two Soma].

Claimant also takes ibuprofen, one tablet three times a day. Claimant then rests again for twenty minutes up to two hours. Once she gets up, she tries to fix something to eat and finish up any chores that need to be done. Claimant takes one last dose of Percocet for the day around 8:00 p.m. and then around 10:00 p.m. she takes another MS Contin and an Ambien, to try to help her sleep.

On a bad day, Claimant takes her scheduled pain medication and just stays in bed all day. Claimant uses pillows propped around her to try and get comfortable. Claimant also alternates between using a heating pad and ice packs to try to reduce her severe and continuous pain.

Unfortunately, in June 2006, Claimant's husband was in a car accident and has undergone multiple back surgeries and has been unable to return to work since his accident. Claimant's husband also suffers from chronic back pain and is unable to assist her with household chores. Claimant has several friends on the military base who help her with grocery shopping. Claimant also uses a cart with wheels and a handle to transport items from the car into her apartment.

Claimant's activities have decreased significantly because of her severe and debilitating pain. Claimant rarely participates in activities outside her home because she is in bed most of the day due to the constant pain. In addition, Claimant's ability to concentrate, read and write has been severely affected by her constant and debilitating pain. Claimant has gone from a good student who earned a master's degree, to someone who struggles to carry on a conversation or drives infrequently because she cannot focus or concentrate. Claimant's inability to concentrate was evident at hearing as she testified.

Claimant's testimony concerning her continuous, severe and debilitating pain was credible. Claimant's pain condition was also supported by the medical records. Throughout the treatment of her back condition, Claimant described her pain as between a 6 and a 10 in severity, with 10 being the maximum. Claimant consistently complained of severe, excruciating and stabbing pain in her low back and in both legs. In addition, Claimant consistently described the need to lie down for pain relief, even though temporary in nature. Claimant also takes a significant amount of pain medication to help her cope with the continuous, severe and debilitating pain. No physician opined that Claimant is malingering or overstating her condition.

The finding that Claimant suffers from continuous, severe, and debilitating pain is also supported by the testimony of Dr. Mills, Claimant's treating physician. Dr. Mills treated Claimant twenty-six times during a two-and-a-half year period. Dr. Mills noted, "[Claimant] has consistently reported fairly high levels of pain." Claimant frequently reported to Dr. Mills that she had difficulties with standing, sitting, walking, bending, and

lifting. Dr. Mills was asked whether he thought Claimant was overstating her pain complaints or malingering. Dr. Mills opined:

I'll preface my answer with pain is a subjective phenomenon. I think that she has reliably reported her pain findings which are her own subjective rating of pain. I think she perhaps may be sensitive to pain in what she's going through. I have, besides medication, also tried to refer her to other counseling programs and things like that for additional non-pharmacologic treatments. I think she's a reliable patient in terms of the pain she reports and is trying to moderate that or control it and remain functional in the life that she's trying to undertake when I was treating her with the studies.

Dr. Mills opined Claimant suffers from constant, severe and debilitating pain and concluded that Claimant has a chronic pain syndrome. Dr. Mills defined debilitating pain as "something that interferes with her normal day-to-day activities, avocational as well as vocational activities. And I certainly think she falls into that category."

In order for Claimant to deal with her pain, Dr. Mills recommended:

Continued medical following and management of her pain. There may be other treatments that arise in the future. She may have flarings at times and may need additional treatment. There may be times that should she have some aggravation that she might benefit from therapies. It might be that an injection may benefit her at times. It's kind of hard to say at this point without knowing the exact clinical scenario, but I think she likely will have lifelong chronic pain.

(emphasis added). Dr. Mills further opined, "I believe her condition is chronic in terms of her pain. It's persisted during the length of my treatment and apparently subsequently. I believe it is permanent."

As far as working, Dr. Mills did not provide any formal work restrictions to Claimant. Dr. Mills stated:

I think she could have some form of employment. I have my doubts whether that would be a continuous eight hour day, five days a week type of employment because she needed to break up her activities including sit or stand for prolonged periods of time and had to alternate positions and would have flaring of pain from time to time. I think she could be productive in some capacity. Whether it would be in a day-to-day continuous employment job without some leeway in her employment, I think that would be difficult, if not impossible.

(emphasis added). Dr. Mills recognized that Claimant needed to lie down periodically throughout the day to help manage her pain and that an employer would have to accommodate this limitation. Dr. Mills agreed with Dr. Rice's ten pound lifting restriction and that Claimant needed to avoid bending and twisting.

Dr. Mills testified:

- Q: Is there anything about her condition that would inhibit her ability to perform the type of work that she's trained for now that we know she's got the counseling degree and so forth?
- A: I would perceive that if she's having flares of pain, that certainly can affect attention, concentration and might make it difficult for her to listen or counsel a patient. It might make her need to take time and take a break away from that if she's having a flare of pain and then come back to that situation. That would be what I would perceive to be the greatest difficulty probably.

Dr. Mills opined Claimant could return to work as a counselor "for limited amounts of time." However, Dr. Mills disagreed with Dr. Anderson's opinion that Claimant could return to work on a full-time basis because "I think she would have pain issues that would interfere with that." Dr. Mills' testimony is well-founded and is persuasive.

In addition, Claimant presented expert vocational testimony from Rick Ostrander, a vocational rehabilitation counselor with over twenty years of experience. Ostrander reviewed all of Claimant's medical records, Dr. Mills' deposition, Dr. Anderson's report, and Employer's vocational expert's reports, and interviewed Claimant. Ostrander recognized that Claimant's main debilitating condition is her chronic pain. Ostrander described Claimant's functional restrictions as sitting a maximum of thirty minutes, needing to move about or lie down, limited bending, not being able to handle even a half a day sitting with breaks, standing and walking for a maximum of thirty to forty-five minutes and then needing to sit with her feet up and recline, and lifting no more than ten pounds. Ostrander, comparing the information obtained in Claimant's interview with her hearing testimony, believed her tolerance for standing and walking had diminished even more. Ostrander recognized that Dr. Mills opined Claimant has chronic pain that has been ongoing and that Claimant would have difficulty maintaining employment.

Based upon his review of the record and his understanding of Claimant's continuous, severe and debilitating pain, Ostrander offered two opinions. Ostrander opined:

Dr. Anderson has given an opinion that [Claimant's] capable of sedentary to light duty work. If that is accurate, there's no question that work exists in her labor market that she's capable of doing. However, if one accepts as accurate her description of her dysfunction as she's testified here today, which is fairly consistent with what she told me as indicated throughout the medical records and her description to her physicians and as indicated in Dr. Mills' deposition, if that's accepted as accurate, there's no question in my mind she's not employable in any capacity and no amount of retraining is going to make her employable.

Ostrander explained:

Well, the biggest problem is the nature of the pain. If you accept that as accurate and its debilitating impact and the frequency of five days a week she has these bad days, severe, they're not predictable, she is essentially incapacitated from any activity.

And even though counseling may be a very sedentary activity, it's a very emotionally intense activity that requires a great deal of attention, concentration, and focus. You're also there at the client's need, not yours, so you can't be disruptive in that process. You're involved where they need you.

I can't think of a situation that would allow her to get her license, much less practice, and I can't think of any other employment that would be consistent with her limitations assuming the accuracy of her descriptions.

Ostrander opined a job search would be futile for Claimant because no work exists that would all meet all of her restrictions. Ostrander believed Claimant was not employable in any capacity, even part-time work, because "even part-time work is regular, so you have to be able to attend on a regular basis." Ostrander opined that Claimant's chronic pain, which is predominant throughout the day, "would interfere with her ability to maintain a schedule that would be productive." Ostrander's opinions are credible.

Based on the evidence presented, Claimant made a prima facie showing that she is entitled to benefits under the odd-lot doctrine because she is obviously unemployable due to her continuous, severe, and debilitating pain. This determination is based on Claimant's credible testimony, the medical records, Dr. Mills' persuasive testimony and on Ostrander's credible testimony. A claimant that is obviously unemployable does not have to demonstrate "that she made reasonable efforts to find employment in the competitive market." Fair, 2007 SD 16, ¶ 19.

As Claimant established a prima facie showing that she is permanently and totally disabled under the odd-lot doctrine, the burden of production now shifts to Employer to show that some form of suitable employment was regularly and continuously available to Claimant within her community. 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)." SDCL 62-4-53. Employer must demonstrate the specific position is "'regularly and continuously available' and 'actually open' in 'the community where the claimant is already residing' for persons with *all* of claimant's limitations." Shepard, 467 N.W.2d at 920.

In support of its burden, Employer offered testimony from Dr. Anderson, who testified live at the hearing. Dr. Anderson examined Claimant on May 25, 2006. Dr. Anderson took a complete history from Claimant, reviewed all her medical records and films and performed a physical examination of Claimant. Dr. Anderson diagnosed Claimant with chronic low back pain, status post L5-S1 discectomy. Dr. Anderson recognized that Claimant consistently complained of severe, excruciating, stabbing and severe pain in her low back and in both legs.

Dr. Anderson opined that Claimant is capable of working full-time in the sedentary to light duty category, even with her pain complaints, which would enable her to work as a counselor. Dr. Anderson explained:

I restricted her to ten pounds, maybe light, but in a subsequent report said she can do sedentary work. So that's ten pound maximum lifting. So in other words, I reduced my lifting restriction by 40 pounds based solely on her complaints of pain, nothing else. I have no other basis. There's no disc on the MRI. There were no specific findings on the exam. I did that entirely based on her complaints of pain, because I believed her that she has pain.

(emphasis added). Dr. Anderson opined that Claimant could work full-time as a counselor because “it’s a very flexible kind of job that you can stand, you can sit, and patients are very accommodating.” Dr. Anderson disagreed with Ostrander and concluded that a job search would not be futile for Claimant because she is capable of working as a counselor and there are jobs available for her in this profession. Dr. Anderson also testified that Claimant’s pain would not make a job search futile. He stated, “I’m not ignoring the fact that she has pain. But my opinion of pain, laying on the couch, taking narcotics, is not a solution to chronic pain. Chronic pain patients do much better with an active, productive life.” Dr. Anderson concluded there is no medical reason for Claimant not to be looking for work. However, Dr. Anderson admitted that it is necessary to take into account Claimant’s main pain complaints when assessing whether she can return to work.

Dr. Anderson’s opinions concerning Claimant’s ability to work full-time are not as persuasive as those opinions expressed by Dr. Mills. It is true that both physicians recognized that Claimant has chronic pain syndrome and both believe Claimant’s pain complaints. However, Dr. Mills, who treated Claimant over two dozen times, recognized that it “would be difficult, if not impossible” for Claimant to be employed on a full-time basis without significant accommodation. Dr. Mills also acknowledged that a potential employer must be able to accommodate Claimant’s need to lie down periodically throughout the day.

In addition to Dr. Anderson’s testimony, Employer offered vocational testimony from its expert James Carroll, a vocational rehabilitation consultant. Similar to Ostrander, Carroll has over twenty years experience as a vocational expert and reviewed the entire record in preparation of his testimony. Carroll relied upon Dr. Anderson’s opinion that Claimant could perform sedentary to light duty work.

Carroll performed a labor market survey of the Rapid City, South Dakota and Killeen, Texas areas and concluded suitable work is regularly and continuously available to Claimant in both labor markets. Carroll opined “there are numerous job openings.” But, Carroll did not identify any specific positions open and available for Claimant. In addition, Carroll recognized that Claimant reported experiencing severe pain that she tries to control by lying down frequently throughout the day. Carroll agreed with Ostrander that if Claimant’s description of her pain is accepted, there are no suitable jobs open and available, either part-time or full-time, for Claimant. Further, Carroll did not contact any specific employer to determine if any employer could accommodate Claimant’s limitations.

Claimant’s testimony about her continuous, severe and debilitating pain has been accepted as credible. Therefore, Carroll’s opinions only serve to bolster Ostrander’s credible vocational opinions. The evidence clearly established that due to Claimant’s chronic pain condition, she is unemployable because there are no jobs in either the Rapid City or Killeen labor market that are regularly and continuously open and available that would meet all of Claimant’s limitations. However, even if it were somehow construed that Claimant is capable of performing at least sedentary to light duty work, Carroll’s opinions still are insufficient to satisfy Employer’s burden. Carroll failed to identify specific positions that are regularly and continuously available and actually open in Claimant’s community that would meet all of her limitations. “Although the law does not require an employer actually to place a claimant in an open job, an

employer must show more than mere possibility of employment.” Capital Motors LLC v. Schied, 2003 SD 33, ¶ 12 (citation omitted). Employer failed to demonstrate there were specific positions open and available within Claimant’s community that would meet all her limitations and pay her a suitable wage. Even though Employer failed to satisfy its burden of production, the ultimate burden of persuasion remains with Claimant.

Claimant satisfied her ultimate burden of persuasion that she is permanently disabled pursuant to SDCL 62-4-53. Claimant established by a preponderance of the evidence that she is obviously unemployable due to her continuous, severe, and debilitating pain. Claimant’s testimony concerning her pain was credible and Employer’s attacks on her credibility were unpersuasive. Employer offered surveillance video taken when Claimant returned to Rapid City for the IME with Dr. Anderson. The surveillance video did little to diminish Claimant’s credibility. Even Dr. Anderson admitted the “video was not terribly significant.” Claimant suffers from continuous, severe, and debilitating pain and these pain complaints have worsened significantly over time such that she is not capable of working either on a part-time or full-time basis.

Based upon careful consideration of all the testimony and evidence, Claimant is permanently and totally disabled pursuant to SDCL 62-4-53. Claimant’s request for permanent total disability benefits is granted and Employer is responsible for payment of permanent total disability benefits to Claimant. The Department shall retain jurisdiction over the outstanding issues of payment of outstanding medical expenses relating to Claimant’s treatment in Texas and permanent partial disability.

Claimant shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Employer shall have ten days from the date of receipt of Claimant’s proposed Findings and Conclusions to submit objections 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 19th day of August, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge