SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT

PATRICIA A. OLWELL,	**HF No. 52, 2022/23**
Claimant.	
v.	
AVERA MCKENNAN HOSPITAL,	**DECISION**
Employer, **and**	
AVERA WORKERS' COMPENSATION FUND,	
Insurer,	

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management, pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by James E. Marsh, Administrative Law Judge, on January 17, 2024. Claimant, Patricia A. Olwell, was present and represented by Jami J. Bishop, Johnson, Janklow, and Abdallah, Sioux Falls. Employer, Avera McKennan Hospital, and Insurer, Avera Workers' Compensation Fund, were represented by Laura K. Hensley, Boyce Law Firm, Sioux Falls.

Facts:

Claimant was 67 at the time of hearing. She graduated from nursing school in 1980 and worked as a nurse continuously after that, including fourteen years with Employer. Her duties included pushing and lifting a heavy corrugated metal door over her head 15 to 20 times a day to administer medication to her patients. She began to feel pain in her right shoulder, elbow, wrist, and hand, and experience numbness and tingling in her fingers as she did this. On February 26, 2018, she notified her employer she was experiencing pain and numbness in her

right extremity. Employer/Insurer accepted the claim and began paying medical and temporary disability benefits; there is no dispute that claimant had a work-related injury to her elbow, wrist, hand, and fingers, or that claimant gave Employer sufficient notice of her claims.

Claimant had extensive medical treatment over the next five years. She had a full thickness tear of her right shoulder, and a smaller tear in the underside of her arm, along with a calcium deposit and a bone spur. She is right-hand dominant. She underwent four surgeries for right extremity problems, including a right shoulder repair, surgery for a frozen shoulder, and two right carpal tunnel releases. (She also had two left extremity surgeries during this time, but Claimant has not claimed these problems are work-related; she also has back pain which is not work-related.) She continues to experience numbness and tingling in her right hand and fingertips. She frequently drops items and experiences difficulties grasping and pinching objects. On July 21, 2022, her treating physician, Dr. Scott McPherson, placed her on permanent work restrictions of no lifting more than five pounds with her right hand, and no repetitive grasping or gripping.

Claimant began receiving temporary total disability benefits as of February 18, 2018; her weekly benefit rate was $495.50 a week. She returned to work in a clinic position for the month leading up to her December 27, 2018 surgery, but was taken off work again at that time. On May 28, 2019, a few days after her third surgery (a right carpal tunnel release and manipulation of her shoulder,) Employer terminated her because she was physically unable to perform the nursing duties at their facilities. The parties agree the only remaining issue is her eligibility for permanent total disability benefits.

Additional facts will be recited as necessary.

Issue:

Does Claimant qualify for permanent total disability benefits?

Analysis:

SDCL § 62-4-53 sets the standards for permanent total disability claims:

> 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 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 not able to benefit from vocational rehabilitation or that the same is not feasible.

Two avenues exist for a claimant to make her prima facie showing of entitlement to permanent total disability benefits: "(1) claimant is obviously unemployable due to his or her physical condition, coupled with his or her age, training, and experience, or (2) unavailability of suitable employment by showing that he or she has made reasonable efforts to find work and was unsuccessful." *Billman v Clarke Machine, Inc.*, 2021 SD 18, ¶25, 956 N.W.2d 812, 819-20. "If a claimant shows she is obviously unemployable, the burden shifts to Employer/Insurer to show that some suitable employment is actually available in Claimant's community for people with Claimant's limitations." *Fair v Nash Finch Co.*, 2007 SD 16, ¶19, 728 N.W.2d 623, 632-33.

Obvious unemployability may be established by: (1) showing that a claimant's physical condition, coupled with her education, training, and age make it obvious that she is in the odd lot total disability category, or (2) persuading the trier of fact that she is in fact in the kind of continuous, severe and debilitating pain which she claims. *Baier v. Dean Kurtz Constr., Inc.*, 2009 S.D. 7, ¶ 25, 761 N.W.2d 601, 608. If Claimant's medical impairment "is so limited or specialized in nature that she 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 she has made reasonable efforts to find work and was unsuccessful." *Id.*

Here, Claimant's inability to even intermittently lift, push or move patients, as well as her inability to repeatedly grip, grasp, or pinch objects, necessary for her to feel a patient's vein, open medication bottles, drag back on a syringe, grasp a needle, or repeatedly accurately type the documentation needed for patient records, make it impossible for her to return to her previous duties as a nurse. Employer acknowledged this when it terminated her in 2019. Additionally, her constant pain, which she rates as a 4 out of 10 on a constant basis, has an impact on her ability to perform any job for which she might otherwise be suited.

Claimant is 67, an important factor in evaluating her disability. Her vocational expert, Rick Ostrander, testified: "[I}t's acknowledged in law by the Social Security Administration that the older you get the harder it is to secure new employment, especially if you have a disability condition. And so they actually changed the rules on disability at different ages 50, 55 and 60 because the reality is unemployment rates rise for disabled workers as they get older, it's just harder to find work." The claimant in *Billman* was 64, acknowledged to be "a hinderance to his employment" as a factor in the conclusion that he was obviously unemployable. *Billman,* 2021 SD 18, ¶32, 956 N.W.2d at 821. Baier was 48. *Baier*, 2009 SD 7, ¶26, 761 N.W.2d at 608. This is not a case, on the other hand, where Claimant appears to have abandoned the labor market in favor of retirement; she was a highly motivated nurse, received favorable job evaluations while working for Employer, and credibly testified leaving that work was devastating.

Her forty years of training and experience as a registered nurse could be significant factors in her unemployability. The only evidence presented by either side addressing that was from Ostrander, who concluded this training and experience would not translate into access to employment. Claimant's work injuries limit her ability to write, drive, text, or do simple daily activities. When he considered all her restrictions, limitations, and pain, she was "unable to return to her previous occupation as a registered nurse," and "no work can be identified which she would be capable of performing in a regular labor market which would allow her to earn at least her workers compensation benefit of $495.50." He further concluded a job search under

her circumstances would be futile, saying: “I can't recommend a job search. And the reason I can't is I can't identify a position that fits the parameters we have identified. When I do a job search I do what's called a targeted job search where we identify first the kind of work a person can do and then we go after the labor market to see if they can secure a position. If you can't identify a goal then you've got no place to go in a job search so I didn't recommend it.” is therefore concluded Claimant met her *prima facie* burden of establishing obvious unemployability.

Employer/Insurer therefore holds the burden of establishing that suitable employment within Claimant’s limitations is regularly and continuously available in her community. SDCL 62-4-53. To meet the burden the Employer/Insurer must establish more than the mere possibility of employment; it must establish that a position is actually open and available. *Billman,* 2021 SD 18, ¶43, 956 N.W.2d at 823. It did not present vocational expert testimony; it offered depositions of two Avera employees, Peggy Leslie-Smith, the employee health director, and Nikki Tiff, a talent acquisition recruiter, who had contact with Claimant related to employment after her injury. They referred to six jobs between them available at Avera which Claimant might, in their view, have been able to perform.

Reviewing the jobs Leslie-Smith and Tiff had available, and the information the two had about Claimant’s circumstances, it is concluded Employer/Insurer did not meet its burden of rebuttal. Claimant returned to work briefly at the end of 2018, in an area of nursing for which Claimant was not trained, and which ended when Claimant had more surgery. Leslie-Smith contacted Claimant in 2019 to inform her she was terminated because she was medically unable to work. Leslie-Smith did not attempt to place her in a different position with Employer at that time. Claimant applied for three positions after that; Employer cancelled two of those openings for budget reasons. She was encouraged to apply for jobs in employee health and pre-anesthesia. Neither of these paid $495.50 a week. The employee health position was sporadic employment, being PRN or “as-needed on call.” Claimant would be working anywhere

from one to forty hours a week.; the jobs had to involve more than “sporadic employment resulting in an insubstantial income. SDCL 62-4-53(2):

> "Sporadic employment resulting in an insubstantial income," employment that does not offer an employee the opportunity to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury.

An employer is not required to actually place an employee in an open job to meet this requirement, but a job that is not open at the time of hearing, not regularly open and available, experiences little turnover, or pays wages below Claimant’s workers’ compensation benefit rate, is not “suitable work regularly and continuously available in the community” under this standard. *Capital Motors v Schied,* 2003 SD 33, ¶11, 660 N.W.2d 242, 246.

Apart from the rate of pay, the record does not demonstrate that either Leslie-Smith or Tiff was in a position to evaluate Claimant’s suitability for the openings Employer had available. Tiff confirmed she did not know the positions’ physical require by requirements, Claimant’s limitations or current work restrictions, Claimant’s pain issues, or know whether Claimant had the computer skills required. Leslie-Smith did not know the rate of pay, which arm Claimant injured, Claimant’s current work restrictions, or about Claimant’s residual pain problems. Job searches that focus on a claimant’s capabilities to the exclusion of limitations are insufficient as a matter of law. *Billman*, 2021 SD 18, ¶49, 956 N.W.2d at 825.

As Claimant made the required *prima facie* showing of permanent total disability based on obvious unemployability, and Employer/Insurer did not rebut by showing the availability of suitable employment, Claimant has established by a preponderance of the evidence she is permanently and totally disabled, and therefore qualified for permanent total disability benefits.

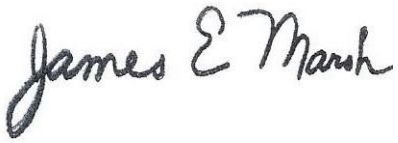
Conclusion:

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within 20 days from the date of receipt of this decision. Employer/Insurer shall have an additional 20 days from the date of receipt of Claimant’s proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact

and Conclusions of Law. 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 consistent with this Decision.

Dated this 28th day of May, 2024.

BY THE DEPARTMENT:



James E. Marsh
Administrative Law Judge