SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DARRELL A. STREHLO,
Claimant,

HF No. 79, 2006/07

v.

DECISION

ARAMARK EDUCATIONAL SERVICES, INC.,
Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
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 February 12, 2008, in Rapid City, South Dakota. John Stanton Dorsey represented Claimant. Patricia A. Meyer represented Employer/Insurer.

Issues:

1. Whether Claimant is entitled to PTD benefits or supplemental wage benefits.

Facts:

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

1. Claimant was born on April 7, 1964 and, on the date of hearing, was 43 years old.
2. Claimant began working in a restaurant at age 13 and continued to work in the food services industry.
3. Employer is an international company specializing in food services for stadiums, arenas, campuses, businesses and schools. One of Employer's clients is the South Dakota School of Mines & Technology (SDSM&T), where Employer manages student food services.
4. Claimant began working for Employer on February 14, 2000.
5. When Claimant began at SDSM&T, his job title was Assistant Food Service Director. He was later promoted to Location Manager, a position that was very similar to the Assistant Food Service Director.

6. As Assistant Food Service Director and Location Manager, Claimant had multi-tier supervisory responsibility. He supervised people who supervised people.
7. Claimant's job duties included physical tasks, such as lifting 98 pounds or more when receiving stock orders of food from food service companies.
8. Claimant's beginning salary was $36,000.00 per year.
9. Employer's position description explained that, under direction, a Location Manager was to "plan, coordinate, direct and control all activities related to a specific food production and service location in accordance with the standards established by [Employer], all regulatory agencies and the client." The physical demands of the job required "lifting 20 lbs. maximum with frequent lifting and/or carrying of objects weighing up to 10 lbs. Requires walking or standing to a significant degree. Reaching. Handling. Fingering. Feeling. Talking. Hearing. Seeing."
10. The Location Manager's position was a salaried position, at $40,376.62 per year.
11. The Location Manager's position required "90/10" at 50 hours per week. "90/10" means 90 percent of the Location Manager's time should be spent with customers and 10 percent of the Location Manager's time should be spent in the office at a desk.
12. Location Managers typically worked 50 hours per week.
13. A Location Manager's actual duties were more physical than detailed in the position description. The position often required lifting of 50 lbs. with frequent carrying of objects weighing greater than 30 lbs.
14. During his employment with Employer, Claimant sustained a series of low-back injuries which were reported as having occurred on August 21, 2003; September 18, 2004; October 8, 2004; and May 10, 2005. The October 8, 2004 injury resulted in an MRI being performed on the same day which revealed a right paracentrel disc herniation at L5-S1.
15. Dr. Marius Maxwell, a neurosurgeon, performed a microdiscectomy on November 24, 2004.
16. Claimant returned to work after the November 2004 surgery. Unfortunately, while moving a 22-ft. long dishwasher conveyor belt at work, he sustained another injury on May 10, 2005. Initially he treated with his general practitioner, Dr. Welsh, who diagnosed a low-back strain secondary to moving the belt. Later testing and an MRI revealed a "new right L3-4 disc protrusion that is moderate to large."
17. Dr. Maxwell gave Claimant the options of physical therapy or surgical repair. Claimant chose surgical repair and underwent a right L3-4 microdiscectomy and L5-S1 PLIF (fusion) performed by Dr. Maxwell on July 11, 2005.
18. The parties stipulated that Claimant sustained an injury to his lower back on May 10, 2005, in the course and scope of his employment.
19. The parties stipulated that Claimant was earning an average weekly wage of $776.48 on May 10, 2005.
20. The parties stipulated that Claimant is entitled to the maximum weekly compensation rate of $513.00 per SDCL 62-4-7.
21. The parties stipulated that the job injuries suffered by Claimant in the course and scope of his employment with Employer resulted in a 10 percent permanent

partial impairment rating consistent with the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, as assessed by Dr. Brett Lawlor, a treating physician of Claimant specializing in musculoskeletal injuries and rehabilitation.

22. Payment was made on the permanent partial impairment rating on September 11, 2006.
23. After Claimant's last surgery, he was unable to perform the essential functions of the Location Manager position.
24. Employer/Insurer had no salaried positions available for Claimant within his restrictions and limitations.
25. On October 6, 2006, Claimant was given a job as Office Support Assistant that paid $10.00 per hour for a 37½-hour work week.
26. The Office Support Assistant position did not exist at Employer, but was created for Claimant by Jo Lee Fredericksen, the Food Service Director.
27. Fredericksen, as Food Service Director, is in charge of all other managers as well as hourly employees at the Rapid City SDSM&T location.
28. Fredericksen and District Manager, John Sterbis, determined the pay for Office Support Assistant based upon the Office Manager's hourly wage of $12.00 per hour. The Office Manager has greater responsibilities that influenced the daily business. Fredericksen and Sterbis determined that the assistant's job should pay only $10.00 per hour.
29. Claimant remained the Office Support Assistant from October 6, 2006, through June 1, 2007.
30. From June 1, 2007, to July 3, 2007, Claimant was laid off because of the summer shutdown of the school campus. The normal school year is 32 weeks for hourly employees.
31. On June 29, 2007, Employer offered Claimant the position of Office Manager, which was vacant. Claimant accepted the offer.
32. Previously, the position had paid a range of $11.50 per hour to $12.00 per hour.
33. Claimant was offered the Office Manager position at $13.00 per hour for a 37 ½-hour week. The job offer included the caveat that "there may be times due to holidays/shut downs that you will be scheduled off during a normal workweek." The offer further provided that "Your job performance will be evaluated in 90 days on October 1, 2007, and you will be eligible for a wage increase based upon the results of that performance evaluation. Then annually on October 1."
34. At $13.00 per hour, Claimant's average weekly wage is $487.50. This is $25.50 per week less than his temporary total disability rate of $513.00 per week.
35. On October 1, 2007, after a positive job performance evaluation, Claimant received the typical 3 percent raise (39 cents) and was being paid $13.39 per hour. At 37½ hours per week, Claimant averaged $502.13 per week. At $13.39 per hour, Claimant earns $10.87 less than his TTD rate of $513.00.
36. The injuries to Claimant's back are compensable.
37. Claimant suffers from chronic pain that is severe, continuous, and debilitating.
38. Claimant's chronic pain requires continuing treatment, including pain medications.
39. Claimant also suffers from depression symptoms and is in need of treatment for those symptoms.

40. Claimant's physical condition is permanent.
41. Claimant's work injuries are a major contributing cause of his impairment.
42. Claimant is capable of working full time, but with significant physical restrictions/limitations, including but not limited to: a maximum lift limit of 10 pounds from floor to waist, a two-hand carry of 15 pounds, limited walking and push/pull, bending, squatting, standing, forward reaching, overhead reaching, and sitting.
43. Claimant's testimony was credible.
44. Claimant suffers pain every day and his condition is getting worse.
45. Claimant works despite his continuous, severe, and debilitating pain, making many sacrifices to continue his employment.
46. Claimant's pain limits his ability to exercise, resulting in significant weight gain.
47. Based upon the unrefuted opinions of Rick Ostrander, it is found that there is no work available within Claimant's limitations in the existing labor market that is not sporadic employment resulting in an insubstantial income.
48. Vocational rehabilitation or retraining is not a feasible option for Claimant.
49. Claimant made reasonable, but unsuccessful efforts to find employment.
50. Claimant's physical condition, in combination with his age, training and experience, and the type of work available in his community, cause him to be unable to secure anything more than sporadic employment resulting in an insubstantial income.
51. Claimant did not make a claim for vocational rehabilitation or retraining benefits.
52. Claimant is unable to return to his usual and customary line of employment.
53. Other facts will be developed as necessary.

Whether Claimant is entitled to PTD benefits or supplemental wage benefits.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The 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).

Permanent Total Disability (PTD) Benefits:

The standard for determining whether a claimant qualifies for "odd-lot" benefits is set forth in SDCL 62-4-53, which provides in relevant 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 in not feasible.

SDCL 62-4-52(2) defines "sporadic employment resulting in an insubstantial income" as "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." Claimant's workers' compensation rate is $513.00 per week or $12.825 per hour for a 40-hour workweek.

In McClaflin v. John Morrell & Co., 2001 SD 86, the South Dakota 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 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."

> 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 at ¶ 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 physical condition and limitations are not disputed. Claimant sustained serious injuries to his lower back. Claimant's complaints of pain are consistent with the objective medical evidence. Claimant suffers from chronic pain that is severe, continuous, and debilitating. Dr. Bret Lawlor, one of Claimant's treating physicians, opined that Claimant has "post laminectomy syndrome" which is a permanent condition. Dr. Lawlor, a physiatrist, assigned Claimant a 10 percent whole-person impairment due to Claimant's work injuries. Dr. Lawlor opined that the job injury sustained by Claimant was a major contributing cause of the impairment and that a functional Capacities Assessment completed on September 21, 2006, placed Claimant at a maximum lift limit of 10 pounds from floor to waist, a two-hand carry of 15 pounds, limited walking, push/pull. Lawlor also opined that Claimant is "limited in his bending, squatting, standing, walking, forward reaching, and overhead reaching to an occasional basis and that Claimant could sit on a frequent basis. Dr. Lawlor also recommended that Claimant "do no ladder climbing" and he must "limit stair climbing and crawling [to] an infrequent basis." Dr. Lawlor also opined that medications would be necessary permanently to treat Claimant's lower back injury.

Dr. Wayne Anderson, who performed two examinations on behalf of Employer/Insurer, opined that Claimant suffered from "chronic low back pain with L5-S1 fusion and right L3-4 diskectomy with recurrent disk." Dr. Anderson opined that the cause of Claimant's current condition and need for treatment was the May 10, 2005, job injury. Dr. Anderson noted that Claimant "is not sleeping at night; he had significant pain and has some signs of depression." Dr. Anderson also opined that it was "imperative" that Claimant be treated for his depression, which "can be associated with the use of narcotics and with chronic pain."

Claimant's testimony was credible. Claimant suffers pain every day and feels that his condition is getting worse. He testified that he thinks his pain will not allow him to continue to perform in his current position until he reaches retirement age. Claimant works despite his pain. Claimant has made many sacrifices in his personal life due to his chronic pain. Claimant has also suffered severe weight gain due to his inability to exercise because of the pain.

In further support of his burdens, Claimant offered the expert vocational testimony of Rick Ostrander, a vocational rehabilitation counselor. Ostrander conducted a vocational evaluation and could not identify any work within Claimant's limitations and in the existing labor market that is not "sporadic work resulting in an insubstantial income." Ostrander also opined that rehabilitation or retraining is not a feasible option for Claimant. Ostrander's opinions are accepted as persuasive.

Claimant made reasonable efforts to find work and has been unsuccessful. Based upon his credible testimony, the unrefuted opinions of vocational expert Rick Ostrander, and the medical evidence, Claimant has met his burden to show 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."

Employer/Insurer did not offer vocational testimony showing that "some form of suitable work is regularly and continuously available to the claimant," but instead relied upon the argument that Claimant's current position meets the requirements of SDCL 62-4-52(2), which provides in relevant part:

> If a bona fide position is available that has essential functions that the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury the employment is not sporadic.

Claimant's current position is "sporadic employment resulting in an insubstantial income" because Claimant is not making "wages equivalent to, or greater than, [his] workers' compensation benefit rate." SDCL 62-4-52(2). Employer/Insurer's argument that SDCL 62-1-1(6) requires the inclusion of accrued sick leave and vacation leave in calculating Claimant's current wages is rejected. SDCL 62-1-1(6) provides, in part, "whenever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, they shall be deemed as part of his earnings." Employer/Insurer's argument ignores SDCL 58-20-3.1, which provides: "Premiums for workers' compensation insurance may not be based on wages paid to employees while they are on vacation, holidays, or sick leave." Claimant earned sick leave and vacation leave at the time of his injury, yet those earnings were not included in the calculation of his average weekly wage. SDCL 62-4-5. Accrued sick leave and vacation leave are

also not considered in the Department of Labor's calculations of the maximum and minimum workers' compensation benefit rate. See SDCL 62-4-3 and 62-4-3.1.[1]

Claimant is not earning wages equivalent to or greater than $513.00 per week. Claimant may in the future receive an increase in his current wages, but at the time of hearing Claimant was not earning $513.00 or more per week. Employer/Insurer has failed to meet its burden to that "some form of suitable work is regularly and continuously available to the claimant."

Claimant met his burden of persuasion. His testimony was credible. The medical evidence establishes that his condition is chronic, permanent, and significantly limits the type of work he is capable of performing. Claimant has met his burden under SDCL 62-4-53 to show that his "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." Claimant is entitled to permanent total disability benefits.

Supplemental wage issue:

SDCL 62-7-41 provides:

> If an employee is not totally disabled but is unable to return to the employee's usual and customary employment, the employer may, in lieu of rehabilitation,

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[1] SDCL 62-4-3 provides:

> The amount of temporary total disability compensation paid to an employee for an injury is equal to sixty-six and two-thirds percent of the employee's earnings, but not more than one hundred percent computed to the next higher multiple of one dollar of the average weekly wage in the state as defined in § 62-4-3.1 per week and not less than one-half of the foregoing percentages of the average weekly wage of the state per week. However, if an employee earned less than fifty percent of the maximum allowable amount per week, the amount of compensation may not exceed one hundred percent of the employee's earnings calculated after the earnings have been reduced by any deduction for federal or state taxes, or both, and for the Federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's earnings.

SDCL 62-4-3.1 provides:

> For the purpose of § 62-4-3 the average weekly wage in the state shall be determined by the Department of Labor as follows: On or before June first of each year, the total wages reported on contribution reports to the agency administering the Employment Security Act for the preceding calendar year shall be divided by the average monthly number of insured workers (determined by dividing the total insured workers reported for the preceding year by twelve). The average annual wage thus obtained shall be divided by fifty-two and the average weekly wage thus determined rounded to the nearest cent. The average weekly wage so determined shall apply to injuries and disablements in the case of disease which occur within the fiscal year commencing July first following the June first determination and shall be applicable for the full period during which weekly benefits are payable, except as provided in § 62-7-33.

> require the employee to accept, in addition to an earned income, a supplemental wage benefit to be paid by the employer which, in total with the earned income, equals the workers' compensation benefit rate applicable to the employee at the time of the employee's injury, plus a return to work incentive of twenty percent of the rate otherwise payable to the employee under § 62-4-3, provided the employee is actually offered employment or is employed.

Claimant has made a claim for permanent total disability benefits. Claimant is not making a claim for rehabilitation benefits. Claimant has shown that he is unable to return to his usual and customary employment and that he is restricted to sedentary employment. Claimant has demonstrated through Ostrander's unrefuted testimony that rehabilitation is not feasible for him. Benefits cannot be awarded "in lieu of" rehabilitation because no rehabilitation is feasible. See Capital Motors, LLC v. Schied, 2003 SD 33. Furthermore, SDCL 62-7-41 contains no provision for its application in a permanent total disability case. SDCL 62-7-41 does not apply to the facts of this case.

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 of Law to submit objections thereto or to submit 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 in accordance with this Decision.

Dated this 23rd day of June, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge