

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

LEONARD E. SALWAY,

HF No. 84, 2013/14

Claimant,

v.

DECISION

HANSON MAVES COMPANY,

Employer,

and

**ZURICH AMERICAN INSURANCE
COMPANY,**

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on February 10, 2015, in Rapid City, South Dakota. Claimant, Leonard E. Salway was represented by James D. Leach. The Employer, Hansen Maves Company and Insurer, Zurich American Insurance Company were represented by Rebecca L. Mann.

Legal Issues:

The legal issues presented at hearing are stated as follows:

1. Whether Claimant is receiving favored work?
2. Whether the Department should retain jurisdiction in this matter?

Facts:

The Department finds the following facts by a preponderance of the evidence:

1. On August 26, 2013, Leonard Salway (Salway) sustained a work-related injury employed by Hansen Maves Company (Employer) when he broke his right ankle.
2. Zurich American Insurance Company (Insurer) accepted the injury as compensable.
3. At the time of his injury Salway was 76 years old.

4. Salway was employed as a “packer, mover, driver” which is the only position he has ever held with Employer for the past 20 years. Employer has seven employees and all, with the exception of one, holds the same position.
5. Salway had surgery on his ankle in August of 2013 and was released back to work with restrictions on December 18, 2013.
6. On February 18, 2014, Salway was placed at MMI with no impairment rating and released back to work with no restrictions.
7. Salway returned to work full-time in February 2014 with Employer and continues to work full-time with Employer.
8. Employer is a packing and moving company that packs and loads household items and furniture into crates to be shipped overseas.
9. Since his injury, Salway can lift and carry 75-80 pounds on a flat surface. He can move furniture up and down stairs by himself with the use of a cart. He can move furniture up and down stairs with another person. Salway “chains” boxes. This is done when a line of movers passes boxes down the line, mover to mover. By this process, the boxes are moved out of the house and loaded into crates on the truck. Salway can also drive the “pack van” or truck.
10. Salway has done more packing than moving, both before and after his injury, because he is a proficient packer. Salway’s productivity for packing and preparing furniture has not decreased since the injury.
11. Since his injury, Salway goes to moving jobs if no pack jobs are available. His boss sends him on 2-man moving jobs, jobs with 1,500-2,000 pounds total freight, once a week and he gets the job done. Co-workers have never complained that Salway is not pulling his weight. Salway does not believe he is treated special by Employer.
12. Salway currently performs the same duties he did before the injury and his duties are no different than any other “packer, mover, driver” employed by Employer.
13. Since his injury, Salway must take care to “plant” his right foot when lifting heavy objects particularly when moving objects up and down steps. He also has trouble with walk boards. His efficiency and productivity has declined since his injury, but he has developed some “work arounds” that assist him to perform his duties as a mover.
14. The job duties of a “Furniture-Mover Driver” DOT# 904.363-010 are as follows:
 1. Drives van to loading point and consults householder on furniture to be moved.
 2. Gives directions to VAN-DRIVER HELPER (motor trans.) in moving articles to van.

3. Wraps furniture with blankets to prevent damage.
4. Wraps dishes and fragile items in packing paper and packs them into containers.
5. Loads truck, using dollies and handtruck, distributing weight evenly, forming compact load, and utilizing space.
6. Drives van to destination and unloads cargo.
7. Obtains customer's signature or collects payment for services.

Salway is presently capable of performing all of these tasks.

15. Salway stated at the hearing that the only reason he initiated this case was because he believed that someday he would develop arthritis in his right ankle.

16. Additional facts may be discussed in the analysis below.

Analysis:

Favored Work:

Salway contends that he is receiving “favored work”. “The ‘favored work’ doctrine, a judicial creation and term of art, imposes limits on claimants so as to ‘allow an employer to reduce or completely eliminate compensation payments by providing work within the injured employee’s physical capacity.’” McClaflin v. John Morrell & Co., 2001 S.D. 86, 14, n. 5, 631 N.W.2d 180, 184 (quoting Pulver v. Dundee Cement Co., 515 N.W.2d 728, 736 (Mich. 1994)). There is no specific definition of “favored work” in South Dakota workers’ compensation jurisprudence, but it is generally referred to as “light duty”. See, Jackson v. Lee’s Travelers Lodge, 1997 S.D. 63, 27, 563 N.W.2d 858, 864; Beckman v. John Morrell & Co., 462 N.W.2d 505, 509-10 (S.D. 1990).

In this case, Salway was placed at MMI with no impairment rating and released back to work with no restrictions on February 18, 2014. He returned to the same position that he has been doing for the past 20 years. When no packing jobs are available, he goes on moving jobs. His boss sends him on 2-man moving jobs, jobs with 1,500-2,000 pounds total freight, once a week and he gets the job done. Since his injury, Salway can lift and carry 75-80 pounds on a flat surface. He can move furniture up and down stairs by himself with the use of a cart. He can move furniture up and down stairs with another person. Salway can also “chain” boxes.

Salway is not performing “light duty” or “favored work”. He holds the same position he did prior to his injury, and is performing the same duties. While Salway performs his work at a somewhat slower pace than he did prior to his injury, he does still perform them. Likewise, the fact that Salway needs to be careful how he plants his foot, does lead to the conclusion that he is performing “favored work”.

Rich Ostrander, a vocational expert, offered a report which stated that Salway was performing favored work. The Department rejects his report because the report was based on misinformation. Ostrander’s report indicates that Salway limits his lifting and carrying to 35-40 pounds and is no longer able to go up and down stairs while carrying a 50-70 pound object with

another person. Salway admitted at the hearing that this is not true. He carries up to 80 pounds by himself on flat surfaces and moves furniture up and down stairs with a cart or another person.

Retaining Jurisdiction:

Salway argues that the Department should retain jurisdiction in this matter because this case is on point with McClaflin, 2001 S.D. 86. The Department disagrees; that case is distinguishable from this one. In McClaflin, the claimant was not placed in the same position after his injury that he held prior to his injury. His prior position exceeded his work limitations. Before his injury, he ran saws and cut meat and after his injury he worked in the knife room, trash collection, equipment cleaning and the coat room. He also had permanent restrictions from his doctor as a result of two FCAs.

In this case, Salway is employed in the same position he held before his injury and completing the same duties. He has no restrictions or limitations. Jurisdiction of this case should not be retained by the Department simply because the Claimant is worried that he may someday develop arthritis in his injured ankle. His claim should be dismissed.

Conclusion:

Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Salway shall have an additional 20 days from the date of receipt of Employer and Insurer's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Employer and Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this 7th day of July, 2015.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge