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

CHRISTOPHER DAVIS,
Claimant,

HF No. 93, 2008/09

v.

DECISION

DR. PEPPER SNAPPLE GROUP, INC.,
Employer,

and

INSURANCE COMPNAY OF THE STATE OF PENNSYLVANIA,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation 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 August 22, 2012, in Sioux Falls, South Dakota. Claimant, Christopher Davis, appeared personally and through his counsel, A. Russell Janklow. Richard L. Travis represented Employer, Dr. Pepper Snapple Group, Inc., and Insurer, Insurance Company of the State of Pennsylvania.

Issue:
Whether Claimant is permanently and totally disabled or whether he is a candidate for retraining benefits.

Facts:
Christopher Davis (Claimant or Davis) started working for Dr. Pepper Snapple Group, Inc. (Employer or Dr. Pepper), in 1994. On October 13, 2008, Davis injured his back while working within the course of his employment at Dr. Pepper. At the time of his injury, Davis was working as a route supervisor. Davis had surgery in November 2008, and a lumbar fusion in July 2012.

Davis is currently being treated by Dr. John Hansen at Sanford Clinic Pain Center. Dr. Hansen assigned the following work restrictions for Davis:

> You need a mixture of activities including sit, stand, walk with an ability to combine these so it works for you. No prolonged sitting or standing. You need to be able to lie down for 40 minutes in the morning and the afternoon. Independent stretching needs to occur midday as well as the beginning and end of the day. Access to cold packs when sitting or lying needs to be throughout the day. No lifting except up to 5 pounds infrequently. No bending.

Davis testified that he continues to have good days and bad days. He currently takes Cymbalta to treat his pain and depression as well as extended release morphine and hydrocodone for breakthrough pain.

On March 5, 2012, Davis saw Dr. Thomas Ripperda, a physiatrist at Avera Rehabilitation Associates, for an independent medical evaluation (IME) at the request of Employer/Insurer. Dr. Ripperda opined that Davis had reached maximum medical improvement (MMI) and assigned a 10% whole person impairment rating. Dr. Ripperda further concluded,

> Based on his current symptom complaints and the amount of activity that he is doing daily, Mr. Davis certainly could be involved in a light duty position with maximum lift of 20 pounds that would occur occasionally and a more frequent lift of 10 pounds. I would limit bending to occasionally. He should be allowed to sit and stand periodically during the workday including as he is in a seated position he should be allowed to stand and reposition at least every hour. If he is standing or walking he should be allowed to sit and/or take a short micro rest break for approximately one to two minutes every 30 minutes.
>
> Those above restrictions are very conservative. From a fusion standpoint, a solid-appearing fusion, he should be considered appropriate for up to a medium duty position; however, given his ongoing symptom complaints and the necessity for chronic opioid pain medications, a light duty position should be tolerable for him including the ability to reposition intermittently with micro breaks.

Employer and its insurance provider, Insurance Company of the State of Pennsylvania (Insurer) have paid Claimant's medical bills and temporary total disability benefits related to his work related injury. The parties agree that Davis is unable to return to his usual and customary line of employment. The parties disagree whether he is permanently disabled or if he would be a candidate for retraining to return to employment with a wage level equal to or greater than 85 percent of his pre-injury wage.

Davis pursued higher education several times over the last twenty years. After graduating high school in 1992, Davis attended Northern Illinois University (NIU) for one academic year. Davis essentially failed out, receiving 4Ds and 5Fs and withdrawing from one other class. Davis testified that he received a letter from the school stating that he was "not NIU material because of his grades." Davis then enrolled in the College of Lake County the following year. He had hoped that he could improve his grades at the local community college before returning to university. At the College of Lake County, Davis again struggled with his grades receiving 1C, 3Ds, 1F and withdrew from 4 classes.

In 2006, prior to his injury, Davis enrolled at Dakota State University to pursue a computer science degree. Davis received 1B, 3Cs and withdrew from 3 classes, before he stopped going to school. After his injury, Davis decided that he was still interested in

pursuing a computer science degree and enrolled in Southeast Technical Institute in the spring of 2010. Davis attempted several classes on campus his first semester, but withdrew because he had difficulties making it to class, carrying the books, walking the stairs, concentrating, etc. The next semester Davis attempted online classes, he received 1A, 1B, and 2Ds. In the spring 2011 semester, Davis received 3Fs and 1D. By this time Davis had accumulated over $10,000 in student loan debt and decided to stop pursuing his computer science degree.

Additional Facts will be determined as necessary.

Analysis

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 (SD 1992); *Phillips v. John Morrell & Co.,* 484 NW2d 527, 530 (SD 1992); *King v. Johnson Bros. Constr. Co.,* 155 NW2d 183, 185 (SD 1967). The claimant must prove the essential facts by a preponderance of the evidence. *Caldwell v. John Morrell & Co.*, 489 NW2d 353, 358 (SD 1992).

The standard for determining whether a claimant qualifies for odd-lot benefits is set forth in SDCL 62-4-53, which 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.

The parties agree that claimant can't return to usual and customary employment. Employer/Insurer admits that without retraining, Davis is unemployable; therefore the only issue is whether Davis could be retrained or rehabilitated to become employable. The burden is on the Employer/Insurer to show that retraining is reasonable. *Baier v. Dean Kurtz Construction, Inc.*, 2009 SD 7, ¶33, 761 NW2d 601. See also *Spitzack v. Berg Corporation*, 532 NW2d 72, 76 (SD 1995).

Employer/Insurer argues that a reasonable plan of rehabilitation is appropriate and therefore, Davis is not entitled to permanent total disability benefits. Employer/Insurer relied on the opinions of Dr. Ripperda, who opinied that Davis was capable of light to medium duty work. Dr. Ripperda testified live at hearing as to the difference between his restrictions and those of Dr. Hansen,

> Q: What exceptions - - or what basis for your difference of opinion comparing your work restrictions with those of Doctor Hansen?
>
> A: There's two factors I base my opinion on. One is the intervention he had from a surgical standpoint. Most surgical fusions, as long as they are solid, should actually allow somebody to work up to a medium duty position. Given Mr. Davis' ongoing symptoms and the difficulties he has had through time, I would recommend a more conservative approach and doing more of a light duty type of activity limitations. Also upon obtaining a history from Mr. Davis and getting an idea of what he does on a daily basis with doing laundry, some light housekeeping work, a variety of those activities, including getting groceries - - one gallon of milk weighs approximately eight pounds, which would automatically go above Doctor Hansen's guideline restrictions, in which case in my opinion, based on the stability of his back and based on the fusion that he had to his back, that doing a light duty position would not lead to any increase harm or any increase in symptomatology to his lumbar spine.
> …
> Q: Doctor Hansen references in his restrictions the necessity to take two 40 minutes naps each day. Do you agree with that component of Doctor Hansen's restrictions?
> A: I do not.
> Q: Why not?
> A: I don't see anything from review of the medical literature or the information I obtained from reviewing the medical records from Mr. Davis that would require that type of restricted activity level.

Dr. Ripperda further testified that Davis would be a candidate for retraining from a medical standpoint. He testified,

> Based the type of injury he had, the stability of the medications he's been on for many months prior to my independent medical evaluation, given the residual exam findings that - - that he had had, there should be no reason why he could not be incorporated into an academic program for retraining.

Dr. Ripperda's testified that his restrictions are "based off of the foundation of his medical backgrounds and literature based on his specialty."

Employer/Insurer also relied on the testimony of vocational expert, James Carroll. Carroll opined that retraining is reasonable and that there are jobs that exist that would be available to claimant if he were to complete training in the field of computer science.

Carroll testified that based on placement statistics from Southeast Technical Institute, graduating in the field of computer science would allow Davis to return to a salary level comparable to what he was earning with Dr. Pepper. Carroll further felt that the field of computer science would have jobs that would fall within Davis' restrictions, as it is a sedentary field.

Based on a personal interview, a review of Davis' medical records, employment history and educational history, Carroll concluded that Davis was a viable candidate for retraining. Carroll relied on the restrictions and opinions of Dr. Ripperda, when he recommended that Davis could attend school on either a part time or full time basis. When asked about Davis' pain condition and use of pain medication, Carroll testified,

> I'm not discounting that Mr. Davis has a pain condition. I do not think that it's severe enough to the point that he would not be capable of attending a retraining program on at least a part-time basis.
> …
> Well again, I go back to what Doctor Ripperda just testified to; that he did not believe the level of medication that Mr. Davis was currently taking - - he said it's been stable. It's been stable for a period of several months. Again, that has been my understanding in doing these types of cases over the years as a vocational rehabilitation consultant that people build up a level that they can tolerate in terms of medication. And I do not see that being a precluding factor from him attempting to return to school.

When asked about Davis' previous academic performance, Carroll testified,

> Q: I mean you've looked at this exhibit now, and you have seen what his academic performance has been based upon the transcript. Do you still feel that he is a viable candidate for vocational retraining?
>
> A: I do.
>
> Q: And on what basis do you express that opinion?
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> A: Well, I express it on the basis of just one term that he completed. Principles of accounting, he obtained a B. Intro to business he obtained an A. He did poorly in the other two classes. But just on that basis alone, it shows that he is at least capable of passing the courses and learning some new knowledge.
> Q: The following semester his academic- - the semester following the semester you just reviewed, he did not do well academically, did he?
>
> A: No, he did not.
>
> Q: So, again, how does that mesh with your opinion, Jim that he is an eligible or viable candidate for retraining?

> A: Well, it jibes in the sense that I'm looking at the medical records. I'm seeing a continuing progression of improvement. I think with time, this - - this last semester that he did poorly it appears to be the spring term of 2011, which would be a year and a half ago. Again, I'm seeing a progression, a continuation of progress in the medical records, more stabilization of the medications that he is on. I think if he were to go back and continue school or re-enter school, he would have at least a 50/50 chance of getting through the program.

Pursuant to SDCL 62-4-53, the Claimant must show that he is unable to benefit from vocational rehabilitation and that the same is not feasible. Davis argues that retraining is neither reasonable nor feasible in this case, as evidenced by his physical condition and his multiple failed attempts, both before and after his injury, to pursue a college education. Davis contends that due to his physical condition, restrictions, and prior attempts at schooling, rehabilitation or retraining would not be feasible.

Davis relies on the expert vocational testimony of Rick Ostrander, a vocational rehabilitation expert with over 25 years of experience. Ostrander reviewed Claimant's medical records, education and work history, met with Claimant and prepared a report. Ostrander concluded that "as a result of [Davis'] limitations his is unable to return to his past work and likewise no work can be identified for which he would have the necessary physical ability. Additionally, vocational rehabilitation would not be feasible in this matter."

Ostrander testified live at hearing that rehabilitation would be difficult for Davis for three reasons, his pain, the medications that affect his concentration and memory and his physical restrictions as set forth by Dr. Hansen. Furthermore, Ostrander testified that even if Davis were able to complete a degree program, he would not have the ability to be at the workplace on a consistent basis.

Mr. Ostrander's opinion is consistent with the medical records, the restrictions and recommendations of Davis's treating physician, his past academic performance and physical limitations. The Department finds the opinion of Ostrander more persuasive than Carroll's opinion. Carroll's opinions are largely based on the restrictions set forth in in Dr. Ripperda's IME. The Department rejects the opinions of Dr. Ripperda as his restriction and opinions are not based on the Davis specific situation, but rather what his pain and level of work should be based on the literature and Dr. Ripperda's other patients. The Department accepts the restrictions and opinions of Dr. Hansen as more credible than Dr. Ripperda. Dr. Hansen, as the treating physician with a long standing history of treating Davis is in a better position to set restrictions for claimant based on his specific situation and condition.

The evidence shows that there may be jobs available in the computer science field if Davis were to complete a degree program; however retraining is not feasible given Claimants limitations. While clearly motivated, as evidenced by his continued effort to pursue higher education, the Department finds that it is unlikely claimant would be able to successfully complete a retraining program, and even if he were able to, it is unlikely

that he could maintain suitable and substantial employment at or above his workers compensation rate given his restrictions. Claimant has met his burden to show that he is unable to benefit from vocational rehabilitation and that the same is not feasible

Conclusion

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within fifteen (15) 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 to submit objections thereto 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 31st day of December, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR

/s/ *Taya M. Runyan*

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Taya M. Runyan
Administrative Law Judge