SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

THOMAS TUTTLE, **HF No. 126, 2009/10**

Claimant,

v. **DECISION**

DEWITT BUILDERS INC.,

Employer,

and

MIDWEST FAMILY MUTUAL INSURANCE CO.,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held in this matter on October 22, 2010 at 9:00 am MT in Rapid City, South Dakota. Attorney, Mr. James D. Leach represents Claimant, Thomas Tuttle (Claimant). Attorney, Mr. Daniel Ashmore represents Employer, DeWitt Builders Inc., and Insurer, Midwest Family Mutual Insurance Co. (Employer and Insurer).

ISSUE:

The issue before the Department in this matter is whether Claimant is permanently and totally disabled as defined in SDCL §62-4-53 and related statutes?

FACTS:

Claimant is a 44-year old carpenter and log cutter. Claimant did not graduate from high school or obtain his GED (general equivalency diploma). After moving to Rapid City, Claimant worked as a general laborer. When he first moved to Rapid City, Claimant did not have one specific employer, but hired out as a day laborer. In 1997, Claimant started working for Employer as a carpenter and chain saw carver. Claimant does not have a driver's license. While employed by Employer, Claimant learned how to run a Bobcat tractor. In March 2009, Claimant earned an average weekly wage of $555.11.

Claimant suffered a work-related back injury on March 10, 2009, while employed by Employer. Claimant had a number of prior work-related back injuries while employed by Employer. He had always returned to work after treating for these injuries. The dates of the prior injuries are April 8, 1999; July 16, 2002; April 25, 2006; and September 7, 2007. In between those dates, and prior to March 10, 2009, Claimant treated regularly with a chiropractor. Many of the chiropractor notes indicate that Claimant's aches and pains stemmed from his work for Employer.

On March 10, 2009, Claimant injured his back at work while lifting boxes of floor tile. The chiropractor, Dr. Chad Swenson, D.C., completed a Workers' Compensation injury report. Claimant's back pain was much more severe with this injury than with the previous general aches and pains. Dr. Swenson took Claimant off work on March 16 and referred Claimant for an MRI. The MRI, taken on March 17, showed a herniated disc at spinal level L4-L5. This type of herniation affected Claimant's lower extremities as well. Dr. Swenson referred Claimant to the Rapid City Spine Center for a neurosurgical consult.

Neurosurgeon, Dr. Stuart Rice, MD, saw Claimant on March 25, 2009, and recommended a lumbar microdiskectomy on the left at L4-L5. A second opinion was requested by Employer and Insurer and neurosurgeon, Dr. James Nabwangu, MD was consulted. Dr. Nabwangu agreed that Claimant needed the surgery and stated that "the patient obviously requires spinal radicular decompression and it is unlikely that further conservative management will make any difference." On April 2, 2009, Dr. Rice performed a left L4-L5 microdiskectomy on Claimant.

Claimant participated in physical therapy after his surgery. On April 28, 2009, Dr. Rice released Claimant to return to his regular work duties on May 12, 2009. Dr. Rice did not believe that light duty work was necessary. After three weeks, Claimant still suffered from serious back pain. The nurse case manager scheduled Claimant to see Dr. Vonderau, a board-certified physiatrist with the Rehab Doctors.

Dr. Vonderau ordered a 10-pound lifting restriction and physical therapy. Claimant was treated with steroid injections, different pain medications, and underwent a repeat MRI. Claimant continued to have significant low back and leg pain. Employer was unable to accommodate the 10-pound lifting restriction. Claimant was anxious to get back to work, but Employer could not accommodate Claimant's restrictions due to the nature of the business.

On October 9, 2009, Dr. Vonderau sent Tuttle for a functional capacities evaluation which was completed by Phil Busching, M.P.T., D.P.T, on October 28, 2009. Claimant performed 21 tasks and self-limited on 5 tasks. The self-limitation was due to low back pain and ankle pain. Dr. Busching is of the opinion that Claimant appeared to give full effort during the testing process. Dr. Busching concluded that Claimant could not sustain a medium level of work for an 8 hour day, as defined by the U.S. Department of Labor in the Dictionary of Occupational Titles.

On November 3, 2009, Dr. Vonderau, after reviewing the FCE, assigned a 10% permanent impairment rating to Claimant, and prescribed permanent work restrictions. The work restrictions are that Claimant "may lift, push or pull up to 35 pounds on an occasional basis (up to 33% of the time). He may bend stoop, squat, or climb stairs occasionally (up to 33% of the time). He may sit or stand frequently (up to 66% of the time). He is to avoid kneeling."

The FCE was reviewed by Grant Shumaker, MD, as part of the IME requested by Employer and Insurer. Dr. Shumaker was in agreement with Dr. Vonderau's assessment of the FCE and the permanent restrictions.

Greg Swenson, Ph.D., a Rapid City psychologist, administered intelligence and achievements tests to Claimant. These tests are used to assess Claimant's ability to find suitable employment. The testing showed Claimant's IQ is 82 and his General Ability Index is 80, which is "low-average general intelligence." Claimant's Verbal Comprehension Index is 68 which "indicates [Claimant] has difficulty with tasks requiring comprehension of verbal material." However, he tested at 100, an average score, for the Processing Speed Index, which indicates that Claimant has an average ability to process simple visual association tasks. Claimant tested at a low average range for his Working Memory Index, which indicates his ability to retain numbers while performing additional operations. Claimant also has an average ability to comprehend visual material and use it to perform visual construction operations, understand concepts, or manipulate visual-spatial relationships.

Dr. Swenson also administered the Wechsler Memory Scale-IV, and the Wechsler Individual Achievement Test-II. Claimant scored lower than average, and lower than Dr. Swenson expected, on both of these tests. Dr. Swenson attributes the low scores to Claimant's low verbal learning abilities. Claimant's visual test scores were higher than his verbal test scores. Dr. Swenson diagnosed receptive-expressive language disorder, DSM-IV 315.31, and mathematics disorder, DSM-IV 315.1. These mental disorders are taken from the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, published by the American Psychiatric Association.

On January 15, 2010, Claimant took a Test of Adult Basic Education at the Rapid City Career Learning Center. Claimant scored at the 5.2 grade level in reading, the 4.2 grade level in math, and the 3.9 grade level overall. He retook the test on February 12, but his scores remained about the same with his overall grade level moving to 4.1.

In March 2010, Claimant began studying for his General Equivalency Exam (GED). Claimant must attain a 10th grade level in all subjects before taking the GED test. Claimant attended the Career Learning Center for approximately 100 hours between March 16 and October 1, 2010. During that time, Claimant concentrated on improving his math skills. Claimant retook the math subtest on July 14 and improved his score to the 5.9 grade level. On September 30, 2010, Claimant retook the math test and scored a 330. Claimant needs to score a 500 or at the 10th grade level before he is able to take the math portion of the GED test.

Claimant began his job search on January 5, 2010 by visiting the Rapid City Office of the South Dakota Department of Labor and meeting with an employment specialist. From April 13 to May 24, 2010, Claimant visited the Department of Labor (fka Job Service) 6 times. He also made direct contact with employers 24 times. From June 8 to July 2, Claimant visited 15 employers. During the month of July, Claimant became depressed and did not make any job contacts. From July 29 to July 31, he went to 15 employers. From August 12 to August 30, Claimant went to 27 employers. From September 2 to 29, he again visited Job Service and went to 54 employers. From October 1 to 19, he visited 47 employers. In total, Claimant made 199 job contacts either directly or through Job Service.

Claimant completed 65 written job applications. Claimant had assistance from his daughter and his attorney's legal assistant to complete these applications, either on paper or on-line. Claimant could not apply for a job at Walgreen's, as he needed to complete the on-line application in-person at the local store and Claimant could not figure out how to complete the application.

Claimant was offered two interviews during his job search. The first was for a part-time weekend concessions worker at the Rapid City Civic Center for $7.25 per hour. Claimant turned down the job offer with the Civic Center as the pay was too low and he wanted to be home with his small children and grandchildren on the weekends. Claimant's workers' compensation weekly benefit rate is $370.08 per week or 66 and two-third's percent of Claimant's average weekly wage. Claimant would need to work 40 hours at $9.25 per hour to make his weekly benefit rate. The part-time nature of the concession job would not have guaranteed 40 hours per week.

The second job was with Rushmore Shadows Resort. This employer required Claimant to have a driver's license as the jobsite is located outside of Rapid City. The employer wanted Claimant to be able to get to work without relying upon public transportation. Claimant has never attempted to take a driving test as he could not remember the contents of the driving manual. Claimant's wife has always driven him. Claimant has driven for short distances around town a few times per year. During the last year, Claimant testified he drove two times, once to the store and once to his brother's house (5 blocks away). Claimant has never looked into the different methods of studying for or taking a driving test, or even if there are different methods.

Claimant met with Rick Ostrander, a vocational expert who was hired by Claimant to review his medical and vocational testing records. Claimant provided Ostrander with a copy of the Job Order Index from Job Service for April 19 and May 3, 2010. Ostrander could not identify any jobs that were open and available and suitable for Claimant that would allow Claimant to earn his weekly workers' compensation rate of $370 per week.

Employer and Insurer's vocational expert, Jim Miller, reported that there were 10 jobs in the Rapid City area that were continuously open and available and that paid at least $370 per week. These jobs are explained further in the analysis below. Mr. Miller did

not contact any of these jobs and did not know whether they had lifting requirements or if Claimant's physical restrictions prevented Claimant from holding the job.

Further facts are included in the analysis below.

ANALYSIS:

Whether Claimant qualifies for a finding of permanently total disability status by application of the "odd-lot" doctrine?

Claimant makes the argument that he is permanently and totally disabled and is eligible to receive benefits under the "odd-lot" doctrine. The criterion for finding a status of permanent total disability is described in SDCL §62-4-53:

> 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.

SDCL §62-4-53.

The Supreme Court has set out that the Claimant has two avenues to make the required prima facie showing for inclusion in 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.

Eite v. Rapid City Area Sch. Dist., 2007 S.D. 95, ¶21, 739 N.W.2d 264, 270-271 (citing *Wise v. Brooks Const. Services*, 2006 S.D. 80, ¶28, 721 N.W.2d 461, 471 (quoting *Sadner v. Minnehaha County*, 2002 S.D. 123, ¶10, 652 N.W.2d 778, 783) (emphasis in original).

The facts of each case determine whether there is sufficient evidence to support the Department's findings that the claimant was permanently and totally disabled under the odd-lot doctrine. *Kassube* at ¶35.

Claimant does not make the argument that he is obviously unemployable or that he cannot work by virtue of the first test. He does argue that suitable employment is not available to him as he had made reasonable efforts to find work and was unsuccessful.

Was Claimant's work search reasonable and is suitable work available?

In this case, the burden remains on Claimant to show that his disability is so specialized in nature that suitable work is unavailable to him, despite reasonable efforts to find work. The Supreme Court has ruled that "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 claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made 'reasonable efforts' to find work." *Peterson v. Hinky-Dinky*, 515 NW2d 226, 232 (SD 1994).

"South Dakota has generally applied a reasonableness standard when analyzing the job search of an odd-lot claimant. When determining if a claimant qualifies for odd-lot classification, courts have considered the age, training, and experience of the person seeking classification. South Dakota courts have also considered the intent of the claimant, to the extent that he or she must show some motivation to become re-employed." *Johnson v. Powder River Transportation*, 2002 SD 23, ¶15, 640 NW2d 739 (SD 2002) (internal citations omitted).

In this case, and similar to *Johnson*, Claimant's work search was valid and honest. The nurse case manager and the physical therapist working with Claimant, both reported that Claimant was anxious to get back to work and that Claimant was highly motivated to work. Claimant presented credible testimony during hearing, regarding his attempts to find employment. Claimant's job search from mid-April, 2010 to the date of hearing was extensive.

Claimant's work for Employer was during daytime hours, Monday through Saturday. Claimant did not have shift work or work nights. Therefore, on most of his job applications, Claimant limited the hours that he was available to work. Claimant listed that he could work Monday through Friday from 8 am to 5 pm. He told many potential employers that he could not work weekends, nights, or holidays.

Claimant was eventually offered a job with the Rapid City Civic Center for $7.25 per hour, part-time on the evenings or weekends when an event was at the Civic Center. Claimant turned down the job offer as the job did not guarantee full time work, during weekdays, for his average weekly wage of $9.25 or more per hour. The job offered by the Civic Center did not guarantee any number of hours and the wage was below Claimant's average weekly wage for workers' compensation. The job, by its own description, was sporadic and did not guarantee anything but an insubstantial wage. See SDCL § 62-4-52(2).

Employer and Insurer have not argued that Claimant refused to search for work or has unreasonably declined work offers. *Johnson* at ¶18. However, Employer and Insurer do point out the fact that some of Claimant's limitations are self-created. When asked by counsel during hearing, why he did not take the job with the Civic Center, Claimant credibly responded that he did not take the job because it would have required him to work on the weekends. Claimant was used to having his weekends available for family commitments. By his choice, Claimant substantially increased his chances of not finding employment by limiting the days and hours in which he can work. Considering the number of jobs available in the current job market, it would almost be unreasonable not to apply for any shift that is available. However, the written applications only comprise 65 of the 199 job contacts made by Claimant. Of those 65 applications, Claimant was able to give his work hour preference on 45 of those applications. Claimant was still unable to secure a job without putting a limitation on the hours he will work.

Despite his self-limited hours on part of the job contacts, Claimant has made a prima facie case that he is unemployable. The vast majority of Claimant's job search was reasonable. He has produced substantial evidence that he is not employable in the current competitive market due to his disability combined with his age, lack of education, and lack of training and transferable skills.

Do job opportunities exist for Claimant in the Rapid City job market without rehabilitation?

The Supreme Court set out the parties' burdens of proof in the *Spitzack* case. They wrote:

> We held that under the odd-lot test for determining total disability, once an employee has made a prima facie showing that suitable employment is unavailable, the employer then has the burden of establishing that the employee would be capable of finding such employment without rehabilitation. Once a claimant establishes inability to find suitable employment, the employer is left to show that job opportunities exist in the competitive market.

Spitzack at 77 (internal citations omitted). See also *Baier v. Dean Kurtz Construction, Inc.*, 2009 SD 7, 761 NW2d 601; and *Capital Motors, LLC v. Schied*, 2003 SD 33, 660 NW2d 242.

"The burden will only shift to the employer in this second alternative when the claimant produces substantial evidence that he is not employable in the competitive market. Then the employer must show that some form of suitable work is regularly and continuously available to the claimant." *Shepard v. Moorman Mfg*., 467 N.W.2d 916, 918 (SD 1991). "While it is not required that an employer actually place a claimant in an open job position, more than mere possibility of employment must be shown; the employer must establish that there are positions actually open and available. *Spitzack* at 76. (citing *Rank v. Lindblom*, 459 N.W.2d 247, 249 (S.D. 1990)).

Employer and Insurer's vocational expert, Mr. Jim Miller, outlined 10 different jobs that were open and available on July 15, 2010, for which he believed Claimant would be qualified. Mr. Miller identified jobs that he believed are regularly and continuously available to Claimant, whether or not he obtains a GED or a driver's license.

Claimant looked into the jobs listed on Mr. Miller's report by going to the local DOL office. A representative at the local DOL informed Claimant that 5 of the 10 jobs had been closed for a significant period of time and were not taking applications and were not continuously open. Despite having applied for some of these jobs in the past, Claimant made further attempts to apply for each of the 10 listed jobs. Because he does not have a GED or high school diploma, Claimant was told he was not qualified to work at the: Credit Collections Bureau, Black Hills Workshop (community living instructor), Black Hills Workshop (home manager), and ASI (customer service representative). Claimant had previously applied for and was denied a job with Rushmore Shadows Resort as he does not have driver's license. Claimant inquired about the job of jewelry production worker, advertised through the One Stop Career Center (SD DOL). This job was no longer open and there was no employer listed with this job opening. Claimant made applications for the remaining four jobs: Community Alternatives of the Black Hills (residential manager), Heartland America (inbound customer service representative), Kwik Lube (pit tech), and Dakota Panel (production line operators and utility). The jobs

with Community Alternatives of the Black Hills, Kwik Lube, and Dakota Panel were closed and the businesses were no longer hiring. Claimant received notice from Heartland America that they would call Claimant if he was needed. Mr. Miller did not contact Heartland America to inquire whether they will hire someone with Claimant's disabilities and a lack of a high school education or GED. There was no specific job offer from Heartland America.

Claimant's expert, Mr. Ostrander, reviewed possible job leads sent to him by Claimant, up until the most recent written opinion on September 29, 2010. Mr. Ostrander reviewed each of the jobs listed by Mr. Miller as open and continuous. He continued his opinion by looking at each job opening suggested by Mr. Miller. Mr. Ostrander contacted the jobs he did not have details on regarding physical requirements or starting wages. Mr. Ostrander noted that the job with Heartland America started at $8 per hour (below Claimant's work comp rate) and required good reading and writing skills to input information into a computer. In summary, his opinion was that none of the employers had open positions consistent with Claimant's physical limitations, vocational qualifications, and that would pay him with workers' compensation benefit rate.

At hearing, Employer and Insurer presented one more potentially open and continuous job, that of a janitor with the Rapid City School District. Employer and Insurer did not contact this employer and inquire as to whether they would be able to accommodate for Claimant's disabilities. There is no indication of the physical requirements of the job of janitor. As the SD Supreme Court wrote, "An expert's listing of jobs that focuses on a claimant's capabilities to the exclusion of his limitations is insufficient as a matter of law." *Eite v. Rapid City Area Sch. Dist.*, 2007 S.D. 95, ¶28, 739 N.W.2d 264, 273. The claimant in the cited case was a janitor with the Rapid City School District who sustained a back injury while at work and was limited from working as a janitor because he could no longer lift anything over 20 pounds and was limited to performing light duty work. Id. at ¶8.

Employer and Insurer have not rebutted Claimant's prima facie case and have not shown that without rehabilitation or retraining jobs are continuously open and available for Claimant in Rapid City.

Is rehabilitation or retraining reasonable for Claimant?

> With only sporadic employment available, the issue became whether [Claimant] could be retrained or rehabilitated to become employable. See *Spitzack*, 532 N.W.2d at 76. The burden is on the employer to establish that retraining is reasonable. See Id.

Baier at ¶33, 610.

The evidence shows, and Claimant does not dispute, that suitable jobs may be available to Claimant, if he was able to attain his GED and driver's license. Claimant is currently attempting to rehabilitate and train by seeking his GED. Claimant has not

made any attempts to obtain a driver's license. Retraining is a reasonable way for Claimant to find another job, but it may not be feasible given Claimant's limitations.

Under SDCL 62-4-53, Claimant must make a showing, by expert opinion, that he is unable to benefit from vocational rehabilitation or that the same is not feasible. Based upon Claimant's diagnosed language disorder, and mathematics disorder, Claimant's ability to improve his scores to enable him to take the GED test is highly reduced. The rate of progress Claimant has shown in his studies, and because of his language and mathematics disorders, it could be many years before he is able to take the GED test, if ever.

Mr. Rick Ostrander, a Vocational Rehabilitation Consultant hired to evaluate Claimant, reviewed Claimant's full record. Mr. Ostrander has spent almost 30 years in South Dakota, studying the job opportunities at any given time, and consulting with individuals, companies, and government agencies regarding rehabilitation and training and the corresponding vocational opportunities. Mr. Ostrander met with Claimant in February 2010. To make his opinion, Mr. Ostrander took into consideration Claimant's physical limitations, including Claimant's limitations on standing for periods of time over 20 minutes or sitting for longer than an hour without taking breaks or changing positions, and the FCE by Dr. Vonderau which put Claimant at a medium level of work with additional restrictions. After reviewing the record and making his calculations based upon his years of collected data, Mr. Ostrander could not identify any transferable skills that Claimant had attained in his previous positions. Claimant is basically an unskilled laborer with physical limitations and Mr. Ostrander took that into consideration when looking for a job for Claimant. Mr. Ostrander could not identify any employment for which he could expect to make at least his work comp rate of $370 per week.

Mr. Ostrander is of the opinion that vocational rehabilitation or retraining is not feasible for Claimant given his limited educational background, severe academic deficits and learning disorders. He went on to opine that Claimant is not likely to complete any sort of training that will improve his chances of being reemployed at a job that will pay above the minimum. Claimant, through his experts, has shown that retraining is not feasible.

In conclusion, Claimant has shown that due to the nature of his disability, combined with his age, education, and training, he falls into the odd-lot doctrine of permanent total disability as suitable work is unavailable to Claimant in the competitive market. Claimant made reasonable efforts to find employment and retraining is not feasible for Claimant given his learning disabilities. Employer and Insurer have not met their burden of showing ongoing suitable employment is available in this competitive market for which Claimant is capable of performing, without retraining or vocational rehabilitation.

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision within 20 days of the receipt of this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of

Law. If they do so, counsel for Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated this 24th day of February, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR

_____s/Catherine Duenwald/_____
Catherine Duenwald
Administrative Law Judge