

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

STEVE BILLMAN

HF No. 150, 2016/17

Claimant,

v.

DECISION

CLARKE MACHINE, INC.,

Employer,

and

SENTRY INSURANCE, a MUTUAL 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 Michelle M. Faw, Administrative Law Judge, on December 7, 2018, in Sioux Falls, South Dakota. Claimant, Steve Billman, was present and represented by Renee Christensen of Johnson & Christensen Law Office, PC. The Employer, Clarke Machine, Inc. and Insurer, Sentry Insurance, a Mutual Company, were represented by Thomas J. Von Wald of Boyce Law Firm, LLP.

Issue:

The issue presented at hearing is Steve Billman's entitlement to permanent total disability benefits.

Background:

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

1. Steve Billman (Claimant or Billman) began working for Clarke Machine, Inc. (Employer or Clarke) in March of 2014. Clarke was insured for workers'

compensation purposes at all times pertinent by Sentry Insurance, a Mutual Company (Insurer). Clarke and Sentry Insurance will be referred to jointly as Employer/Insurer.

2. Billman's job at Clarke required he perform drafting work using the CAD program to look up parts that had been drawn, pull them out of the file, and put them into a cutting program for the plasma cutter, which operated in the shop.
3. On February 6, 2015, Billman was injured when a metal shaving, approximately an inch long, went in through the sole of his shoe and into the joint of his foot. Billman did not feel the initial injury because of lack of feeling in his feet due to his Type 1 diabetes.
4. Billman notified Clarke of the injury on the following Monday. The injury was deemed compensable by Employer/Insurer.
5. Billman was taken by ambulance to Avera McKennan Hospital in Sioux Falls.
6. Billman had surgery to remove the injured leg just below the knee for which he was hospitalized for 2-3 weeks after.
7. Unable to live on his own, Billman went to live with his dad and his sister in Volga, South Dakota.
8. Billman developed a hematoma on the amputation site and a further surgery was required to remove another quarter inch of his bone.
9. Each of Billman's surgeries required a recuperation period during which he was cared for by nurses as he needed assistance in caring for the wound and dressing it. He also had to learn to walk with the use of a prosthetic.
10. Billman did not return to work for Clarke, because there was no work available for him. He also agreed with Clarke that the floors were too uneven, and it was unsafe for him to work there.
11. On June 3, 2016, Dr. Thomas Ripperda assessed Billman with an 80% permanent partial disability as result of the amputation. As a result of the injury, Billman was to be paid \$57,350.40 for his permanent physical impairment at his weekly compensation rate of \$448.05. The benefits would be paid out over 128 weeks which is approximately 2.5 years.

12. On March 13, 2018, vocational expert, Tom Audet conducted a vocational interview of Billman.
13. On May 1, 2017, Billman submitted a Petition for Hearing to the Department of Labor and Regulation (Department) to resolve the issue of whether he is entitled to permanent total disability benefits (PTD).

Additional facts may be developed in the issue analysis below.

Analysis:

In this matter, the Department must establish whether Billman is entitled to permanent total disability benefits. To qualify for PTD, it is Billman's burden to establish a prima facie case that he is obviously unemployable. SDCL 62-4-53 defines permanent total disability as follows:

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.

Billman has asserted that he falls under the odd-lot category for permanent total disability. The South Dakota Supreme Court has recognized at least two avenues by

which a claimant may make the required prima facie showing for inclusion as odd-lot. *Eite v. Rapid City Area Sch. Dist.* 51-4, 2007 SD 95, ¶21, 739 N.W.2d 264, 270-71.

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.

Id. (quoting *Wise*, 2006 SD 80, ¶28, 721 N.W.2d at 471 (citations omitted)).

To establish that Billman is in the odd-lot disability category, he must prove 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." *Fair v. Nash Finch Company*, 2007 SD 16, ¶34, 728 NW .2d 623 (citations omitted.) Sporadic employment resulting in an insubstantial income is defined in SDCL 62-4-52(2) 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. Commission or piece-work pay may or may not be considered sporadic employment depending upon the facts of the individual situation.

Assessing Billman's age, training, experience, and physical condition:

At the time of the hearing, Billman was 62 years old. Billman graduated from Northwest High School in Omaha, Nebraska, where he was an honor roll student. He then went on to attend Iowa Western Community College in Council Bluffs, Iowa, where he graduated with an Associate's degree in Electronic Technology. He also attended Metropolitan Community College, where he completed core requirements for Mechanical Computer Assisted Drafting. Billman achieved a 3.91 GPA at Iowa Western Community College and a 3.98 GPA at Metropolitan Community College. Billman has also obtained a certificate in computer-aided design (CAD) training. Billman applied the CAD training in his employment between 1994 and 2015.

Between 1986 and 1991, Billman worked at Honeywell as a Manufacturing Technician. He was responsible for redesigning components of automated equipment, designing and implementing software, and designing and developing manufacturing cells. Between 1994 and 1997, Billman worked at Memory Control Technology (MCT) as a Mechanical/Design Engineer. During his time at MCT, Billman used AutoCad computer-aided design software. Billman designed railroad crossings for Nortrak in 1991. In 2000, Billman left Nortrak for a Senior Trackwork Designer position at Meridian Rail. At Meridian Rail, Billman designed railroad crossings, layouts, and managing projects for diamond cross tracks. Billman returned to Nortrak in 2004 as a Senior Trackwork Designer. He worked at Nortrak until 2012 when his employment ended due to slowing business.

Billman began working for Clarke Machine in 2014. He was hired as a computer-aided design engineer. His primary duties at Clarke, were designing replacement agricultural machine parts. As the design requirements at Clarke were different from what he had done before, Billman was offered training on the design software at Clarke.

Billman declined the training and learned the software on his own. When the work flow slowed down, Billman was moved from his design position to cutting metal pieces using the plasma cutter. Claimant worked at the plasma cutter for approximately three weeks before sustaining the injury at issue in this matter.

Billman's training and experience show him to be a worthwhile potential employee. While Billman is concerned that his absence from the CAD field has put him behind as the technology has continued to advance, he has shown his ability to adapt and learn this technology without extensive training. There is no evidence to indicate that given the opportunity, Billman would be unable to learn new or updated CAD software as he has done before, or that he would be unable to adapt to an entirely new position and field.

Both Billman's vocational expert, Tom Audet, and Employer/Insurer's vocational expert, Kara Merkwon, have acknowledged that age can affect a person's ability to find work. Both experts testified in person at the hearing. Audet testified that age affects a person's employment because potential employers are less likely to invest the time and energy to train someone closer to retirement age. In this matter, there is no clear evidence that age has prevented Billman from finding employment. However, SDCL 62-4-53 requires age be considered as an element of permanent total disability. Audet opined that due to Billman's age he would have a harder time getting back into the labor force, because he is someone close to retirement age. Audet does not believe that retraining is an option due to Billman's age. A period of retraining would merely result in Billman being closer to retirement age when he attempts to find a new job. The assertions made by both vocational experts that age can negatively affect a person's ability to find work, and Billman's nearness to retirement age make it likely that his age is a detriment to his finding employment.

Billman's physical condition has been assessed by his Doctor, Thomas Ripperda. Ripperda assigned Billman an 80% permanent partial disability rating and the following permanent work restrictions: light duty work only; lifting, no more than 20 pounds; no up and down ladders; no squatting or kneeling; and no balancing with the left leg. In addition to these doctor-assigned restrictions, Billman has testified to having issues with the following: requiring a handrail on stairs; walking slowly; struggling with balance and

uneven surfaces; experiencing pressure on his stump throughout the day; concerns about falling; the bones of his stump rubbing together; sitting for a maximum of one and a half hours at a time; inability to sit more than four or five hours per day; and having four to five days per month where he is unable to wear the prosthetic. Billman testified that to maintain the prosthetic's fit on his stump, Billman must change the liner multiple times a day. Billman must have a secure fit with the prosthetic or he will not have sufficient balance to walk. Billman's assessment of his personal limitations are largely consistent with the limitations placed on him by Dr. Ripperda. Billman's physical condition limits his ability to walk, climb, and balance. The other issues Billman experiences such as the considerations for his stump, and necessity of sitting or standing as needed are consistent with the light duty work requirement.

Billman has been seeing Tyler Clementson, CP, on a regular basis for treatment related to his prosthetic. Clementson has noted that Billman is doing well with this prosthesis, and he has recently characterized Billman's physical capabilities as that of an active adult or athlete with a prosthetic. Billman has acknowledged that he has been able to do maintenance work around his father's house, do occasional wood working projects, go fishing, operate a snowblower, mow his lawn for approximately an hour at a time, take care of dogs, and drive a vehicle.

Billman's work and educational history show him to be an intelligent, highly adaptable individual. His experience and education indicate that he would be a worthwhile employee. Age is a factor in whether someone is able to find employment, and as a man nearing retirement age, Billman is likely to have age related difficulty finding a new position. Audet does not believe that retraining would be beneficial to Billman. However, Billman has showed his ability to quickly learn new subjects in the past. Dr. Ripperda's restrictions and Billman's own experiences with his amputation, require that he be limited to light duty. Billman could work a light duty or sedentary job, with reasonable accommodations, whether in the field of computer-aided design or in another new field. While Billman struggles with his amputation, he has not proven that he is obviously unemployable.

Assessing work available in Billman's community:

To prevail on this issue, under SDCL 62-4-53, Billman must show that he had made a reasonable, good faith job search, but there are no jobs available that meet his restrictions and compensation benefit rate. If Billman's good faith job search does not identify available jobs, Employer/Insurer must show that such a job does exist. Billman lives in Volga, South Dakota and his labor market for purposes of this analysis include a 60-mile radius which includes the South Dakota communities of Madison, Brookings, and Sioux Falls. The compensation rate that a new job must meet for Billman is \$448.05 per week or \$11.20 per hour.

Billman began his work search on March 23, 2018, roughly two years after receiving his work restrictions. Over the course of his search, he applied for twelve positions which included positions in CAD, manufacturing, and dispatching. He was not offered any of the jobs to which he applied.

Vocational expert, Tom Audet met with Billman for the first time on March 13, 2018. Audet is a certified rehabilitation counselor with a degree in vocational rehabilitation and related services from Montana State University. Audet has been a certified rehabilitation counselor since 1989, and he completes approximately 100 hours of continuing education every 5 years to maintain his certification. Audet has provided impartial vocational testimony for the Social Security Administration since 1992. Audet has conducted vocational evaluations, testified at workers' compensation hearings, and performed evaluations on how injuries affect a person's ability to work since 1992.

Audet conducted a vocational interview with Billman where they discussed the injury and the medical treatment Billman received. Audet took a work history and educational background. He also asked Billman about his physical limitations and how long he could sit, stand, lift, and whether he had any problems functionally. Audet reviewed Billman's medical records and the permanent work restrictions provided by Dr. Ripperda. He also reviewed Billman's deposition and Merkwon's expert reports. Audet encouraged Billman to apply for jobs. Audet testified that it would be reasonable for Billman to look outside of the drafting design area. However, Audet opined that Billman had conducted a good faith job search by primarily applying for jobs in the area in which he had experience, and that looking at other employment in which he has no experience would not be helpful considering his age and the necessity for retraining.

When assessing Billman's job search, Audet was not aware that Billman's labor market included the city of Sioux Falls. Therefore, Audet's assessment of Billman's search, and his own inquiries on Billman's behalf are not accurate. As neither Audet, nor Billman, included Sioux Falls in their job search, their searches were improperly limited and do not provide an accurate view of what is available to Billman.

By not including Sioux Falls in his job search, Billman has failed to conduct a reasonable job search, and the results of the search cannot support the conclusion that there is no job available to him that meets his restrictions and compensation.

Employer/Insurer's vocational expert, Kara Merkwan's assessment is necessary to establish whether appropriate jobs are available for Billman.

Merkwan is a vocational rehabilitation consultant certified in South Dakota, Iowa, and Nebraska. She has a B.S. in Social Work, an M.A. in Human Services Counseling, Marriage, & Family Counseling, and an M.S. in Rehabilitation Counseling. Merkwan has opined that Billman has unnecessarily limited himself in his job search and should have expanded the search to other fields. Merkwan also opined that to make Billman's search more appropriate it would have been started earlier. Merkwan's search included both light duty work and sedentary work. Merkwan testified that there is work available that meets Billman's restrictions and compensation rate. Merkwan identified seven jobs that were available in Billman's labor market. Merkwan did not apply the entire list of restrictions assigned by Dr. Ripperda. She included the restriction to light duty work and not lifting more than 20 pounds. The restrictions not included in Merkwan's analysis are no up and down ladders, no squatting or kneeling, and no balancing with the left leg.

Merkwan found a desk receptionist job in Brookings that pays \$12.00 per hour and a CAD drafter position in Sioux Falls that pays between \$16.00 and \$18.00 per hour. The CAD drafter position uses AutoCAD software that Billman has not been trained to use, but Merkwan believes it is appropriate for Billman, considering his intelligence and adaptability. The employer had indicated a willingness to train a prospective employee on the software if needed. Merkwan also recommended open pizza delivery positions. However, the pizza delivery positions would require Billman to be able to perform tasks he has difficulty with such as climbing stairs and balancing. Merkwan found a position available as a dispatcher at J&C Transport, Inc. Audet

testified that he contacted J&C Transport, Inc., and they did not have a position available because of a downturn in business. Merkwan also identified a position at Express Pros in Brookings for a dispatcher that pays \$13.00 per hour.

Billman's intelligence and demonstrated ability to quickly learn new systems and subjects indicate that he would be able to adapt to the sorts of jobs that have been available in his labor market. He is capable of learning and adapting to new CAD software and performing light duty or sedentary work such as dispatching or desk work. The jobs Merkwan found in these fields would meet Billman's compensation rate, and with reasonable accommodations, would be able to adjust to his restrictions.

Conclusion:

Billman has failed to prove that he is obviously unemployable and that there are no suitable jobs available in his labor market. Billman is not entitled to permanent total disability benefits.

Counsel for Employer/Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Claimant shall have an additional twenty (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 16 day of May, 2019.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle Faw
Michelle M. Faw
Administrative Law Judge