DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

JIMMY HOBBS, **HF No. 169, 2014/15**

Claimant,

v. **DECISION**

T.J. TRUCKING, INC., d/b/a
JOHNSON TRUCKING,

Employer,

and

EMC INSURANCE COAMPANIES,

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 Sarah E. Harris, Administrative Law Judge, on June 7, 2016, in Rapid City, South Dakota. Claimant, Jimmy Hobbs, was present and represented by Jon F. LaFleur of Abourezk, Zephier & LaFleur, P.C. Law Firm. The Employer, T.J. Trucking, Inc., d/b/a Johnson Trucking and Insurer, EMC Insurance Companies, were represented by Thomas J. Von Wald of Boyce Law Firm.

Legal Issue:

The legal issue presented at hearing is stated as follows:

1. Whether the work-related injury from October 4, 2014 is and remains a major contributing cause of Claimant's current condition?
2. Whether Hobbs is permanently and totally disabled due to the work-related injury or condition?
3. Whether Claimant is entitled to future medical benefits related to Claimant's October 4, 2014 work injury?
4. What is the correct weekly benefit rate?

Facts:

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

1. At the time of the hearing Claimant, Jimmy Hobbs, was 64 years old.

2. Claimant graduated from Upton High School in 1969. When Claimant was 14 years old, he suffered a stroke, which caused partial paralysis of his right hand resulting in a permanent loss of dexterity in that hand.

3. Claimant attended a semester of mechanic school at Laramie County Community College in 1970. Claimant received a certificate for a heavy equipment training program in 1972 or 1973 from the same community college.

4. Prior to working for Employer, Claimant's employment consisted primarily of truck driving, which he did for over 20 years. Claimant's job duties as a truck driver sometimes included the loading and unloading of equipment on the truck. Claimant also carried heavy water hoses over his shoulder up 20 foot ladders about six times a day for three to four years.

    a. 2000-2001 – Fischer Sand and Gravel, loader operator, crusher
    b. 2001-2003 – Emulsified Asphalt, Inc., truck driver
    c. 2003-2006 – Croell Redi-mix, truck driver
    d. 2003-2009 – Fransworth Services, truck driver
    e. 2009-2013 – Weeg and Bradford Trucking, truck driver
    f. 2014 (April-October) – TJ Johnson Trucking, truck driver

5. In April 2014, Claimant began working for Employer, TJ Trucking, Inc. d/b/a Johnson Trucking, as a semi-truck driver, hauling gravel to the oilfields.

6. On both October 2, 2014 and October 3, 2014, Claimant helped his brother-in-law build a garage in Upton, Wyoming. As part of building the garage, Claimant helped push up the end walls of the garage. The walls were 24 feet long and 10 feet high and heavy. Four people helped push up the walls.

7. At the time of Claimant's October 4, 2014 work injury he was working for Employer. His earnings from April 20, 2014 to October 4, 2014 totaled $19,213.45 for those 24 weeks.

8. On Saturday, October 4, 2016, Claimant was injured when he slipped and fell off of a semi-truck. On that date, Claimant went to the home of his foreman, Jeff Schiller, to turn in his timecard. While there Schiller asked Claimant for help moving some trailers in the truck yard so he could do some leveling of the yard. Claimant used a handyman jack to lift the tongues of the pup off the ground so that they fit around the panel hook. After the pup was moved, Claimant then jacked the tongues off the panel hook and let them back on the ground. After moving the pups, Schiller began leveling the truck yard with a bobcat. At that time, Claimant decided to do some maintenance to his semi-tractor trailer. Claimant grabbed a jug of airline antifreeze, climbed on the frame of the truck, disconnected the glad hand and filled it with airline antifreeze. Upon turning to set the jug of antifreeze on the glide plate for the fifth wheel, he slipped and fell

backwards off the frame of the semi. When he felt himself starting to fall, to avoid hitting the tag axle, Claimant pushed off to the left. Claimant was knocked unconscious and woke up, lying on his back. Claimant woke up to left shoulder pain. When Claimant was able to get up he walked over to his car. Claimant was sweating and thought he was going to pass out, so he lay down on the ground by his car. Claimant's foreman noticed him shortly thereafter and suggested that he lay there for a while to see if he got better. Claimant laid on the ground for a bit and then decided to call his sister to come get him and take him to the doctor. Claimant asked his foreman how he should handle the doctor's visit and Schiller responded, "[w]hatever."

9. Claimant's sister and her husband, Bill Rainbolt, picked Claimant up and drove him to the emergency room in Gillette, Wyoming. Claimant was examined, an x-ray was taken, and he was put in an arm sling and discharged with pain medication and work restrictions. The restrictions precluded work involving the use of his left hand or arm, no overhead work, and no vertical ladders. Claimant was told follow up with the clinic the following Monday.

10. On Monday October 6, 2014, Claimant went to the walk-in clinic and was told that the Gillette clinic does not handle South Dakota workers' compensation matters.

11. That same day Claimant went to the Spearfish Regional Hospital to be examined at the emergency department.

12. Claimant was referred to Regional Orthopedics in Spearfish, South Dakota, where he was examined for the first time on October 10, 2014.

13. On October 10, 2014, Claimant was examined by Dr. Kipp A. Gould's physician assistant, JoAnn Mills, PA-C, and it was determined that Claimant had an injury to his shoulder. PA Mills noted, "Jimmy is to stay off work until cleared by Regional Orthopedics."

14. In order to better opine on the extent of Claimant's injury, an MRI was ordered. The MRI was taken on October 22, 2014. Dr. Gould, a board-certified general orthopedic surgeon, reviewed the MRI imaging at that time and determined that Claimant had a full thickness rotator cuff tear. Dr. Gould was unable to see any fatty streaking in the muscle bellies on the MRI image, thus he opined that the rotator cuff tear was not chronic. Dr. Gould further noted, the patient had normal function and strength in his left shoulder prior to his fall and after had significant pain/weakness/decreased function. Dr. Gould explained that "fat streaking in the muscle belly indicates muscle atrophy or muscle wasting…You can have disuse for many reasons. In the case of a rotator cuff tendon, though, or rotator cuff injury, that disuse would be because that tendon was torn and hadn't been used because it was torn… The muscle then begins to atrophy to get fat streaking."

15. An appointment for arthroscopic surgery was set for November 25, 2014.

16. Claimant's MRI was reviewed by radiologist Dr. Gary Dunn. Dr. Dunn's report noted, "The acromion is mild type II. There is degenerative change of the AC joint which may have contributed to impingement… a complete rotator cuff tear that may be chronic with significant retraction." Dr. Dunn also suspected partial tears of the superior labrum.

17. Dr. Richard Strand is a board-certified orthopedic surgeon in practice since 1973. Dr. Strand prepared a record review report on November 11, 2014. Dr. Strand examined the same MRI that Dr. Gould and Dr. Dunn had examined. Dr. Strand opined that Claimant had a chronic rotator cuff tear. Dr. Strand opined that Claimant suffered a shoulder contusion as a result of the fall from the semi, but that neither the contusion nor the fall caused the rotator cuff tear. Dr. Strand concluded that the contusion of the shoulder should resolve within two to four weeks following the October 4, 2014 accident.

18. On November 18, 2016, claim representative Fitzgerald doubted whether the question to Dr. Strand had been worded correctly and concluded it needed clarification as to whether his need for surgery is the accident or chronic, since he was pain free prior to the accident.

19. Four days prior to the surgery that was scheduled to take place on November 25, 2014, Insurer denied coverage, thus the surgery was canceled.

20. Nurse care manager, Janel Pattinson and claim representative, Fitzgerald acknowledged receipt of a December 10, 2014 causation letter from Dr. Gould, refuting that the rotator cuff tear was chronic.

21. Pattinson drafted a letter to Dr. Strand requesting that Dr. Strand address Dr. Gould's December 10, 2014 letter which indicated that the rotator cuff tear was not chronic because the MRI shows no fat streaking. The letter to Dr. Strand was sent on January 5, 2015, requesting that he answer whether this was a new tear and not chronic due to the lack of fat streaking in the muscle bellies of the supra infraspinatus.

22. Pattinson after numerous requests did not receive an update from ExamWorks (Dr. Strand's employer) regarding the question posed to Dr. Strand. On April 20, 2015, Insurer authorized Pattinson to close her file for medical case management.

23. On April 14, 2015, Claimant filed a Petition for Hearing.

24. On June 18, 2015, Claimant noticed Dr. Kipp Gould's deposition for July 29, 2015.

25. During his deposition, Dr. Gould testified that Claimant suffered a complete full thickness tear to his left rotator cuff as a result of the work injury on October 4,

2014. Dr. Gould testified that in determining whether the rotator cuff tear was chronic and not repairable or acute and fixable he examined the patient, his history, and looked at the MRI images to see whether or not the muscle belly of the suprinfraspinatus have or do not have fat streaking in them. Dr. Gould stated that Claimant's torn rotator cuff was no longer repairable because of the time elapse since his October 4, 2014 work injury.

26. Employer/Insurer scheduled Claimant for an IME on July 29, 2015, through ExamWorks with Dr. Strand.

27. Following the IME of July 29, 2015, Dr. Strand opined that "the work injury of October 4, 2014, is not a major contributing cause of his current diagnosis; chronic rotator cuff disease, including the left shoulder cuff tear due to the chronic subacromial impingement. It is my opinion that is a pre-existing condition, un-related to the work injury of October 4, 2014." Dr. Strand opined that Claimant would not require further treatment as it relates to the October 4, 2014 work injury and has achieved maximum medical improvement from a contusion or shoulder strain. Dr. Strand opined that Claimant reached maximum medical improvement for the work injury of October 4, 2014 as of six weeks post injury, or as of November 15, 2014 and any ongoing treatment is due to his pre-existing condition.

28. On August 28, 2015, Claimant's vocational rehabilitation expert, Dr. Lynn Meiners, conducted an evaluation of Claimant. Dr. Meiners determined Claimant was no longer able to perform the essential tasks of all previous and related occupations and thus he was not employable. Dr. Meiners' analysis was based on Claimant's medical record as well as her meeting with Claimant. She noted that subjective and self-reported pain is considered as part of her analysis. She also concluded that for reasons of age, work experience, and residual functional capacity, a job search would be futile. Dr. Meiners did indicate that Claimant has a high average verbal intelligence, including good rapport and verbal skills with his coworkers. However, she also found that he was slow and inaccurate when performing manual abilities for sedentary work. Based in part on Claimant's statements that he can only do light duty tasks slowly and that he cannot stretch his arm above his waist, Dr. Meiners concluded that Claimant would only be employable in a part-time sporadic employment that required little upper extremity dexterity or mobility.

29. Dr. Meiners was unable to find any jobs Claimant would be capable of performing on a full time basis and she thus determined that he is not employable and unable to earn substantial, gainful employment. Further, because Dr. Gould took Claimant off work, Dr. Meiners indicated that it would be unethical to represent that Claimant was able to work, because he was not medically cleared for any work. Dr. Meiners never spoke with specific employers about hiring Claimant and she never looked at possible jobs as a taxi driver, even though Claimant had told Dr. Meiners that he was capable of driving a car. Dr. Meiners concluded that for reasons of age, work experience, and residual functional capacities, a job

search would be futile and there is also no reasonable expectation that retraining would remunerate losses.

30. Claimant is able to drive a car and manual transmission pickup. Since Claimant's work injury on October 4, 2014, he has worked sporadically. He worked two or three times for the Chevrolet garage in Newcastle, picking up cars from Gillette that needed to be brought back to Newcastle.

31. On March 17, 2015, Claimant failed his Commercial Driver Fitness Determination and was designated "[u]nsafe to operate a commercial vehicle at this time. Temporary disqualified due to left shoulder limitation."

32. Claimant's only other job search includes visiting the Hop Café in Newcastle, where Claimant asked ranchers and oilfield workers if they had any work that he could do for them. Claimant has not been hired to perform any work from these attempts. Claimant has not attempted to seek work through the Newcastle Job Services.

33. Additional facts will be discussed in the analysis below.

Analysis:

Causation:

The Department's first inquiry is whether Claimant's work injury on October 4, 2014, is a major contributing cause of his current condition. Hobbs, as the claimant, has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry Inc., 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353,358 (SD 1992).

SDCL §62-1-1(7) defines "injury" or "personal injury" as:

> [O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> > (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or

SDCL §62-1-1 (7).

"The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). "A medical

expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted).

First, it is not disputed that Claimant suffered a work injury on October 4, 2014. What is in dispute is the extent and severity of Claimant's injury and any continuing effects that Hobbs suffers. In this case, Dr. Gould has opined that Claimant's October 4, 2014, fall at work is a major contributing cause of his rotator cuff tear and current condition. He opined that the injury was acute rather than chronic. Dr. Strand has opined the work injury of October 4, 2014, was not a major contributing cause of his current diagnosis of chronic rotator cuff disease and that his work injury was resolved as of November 15, 2014. The Department finds Dr. Gould's opinion is the more persuasive.

It is important to note that the expert opinions on causation are all based in part on the same MRI. Dr. Strand contends that Claimant suffered a shoulder contusion as a result of the October 4, 2014, work injury and which resolved by November 15, 2014. Dr. Strand, after looking at the MRI image, contends that neither the contusion nor the fall caused the rotator cuff tear. He contends that the rotator cuff injury was chronic in part due to the significant retraction of the tendon from the bone indicating that the tear had existed for some time. Dr. Strand also mentions the type II acromion as a factor, contending that because the type II has a curve to it, it puts pressure on the suprspinatus tendon and leads to tears. Additionally, Dr. Strand and Dr. Dunn noticed bone spurs on the AC joint, alluding to these also being a factor in the rotator cuff tear. Dr. Strand indicated that these findings are important because they distinguish a chronic rotator cuff tear from an acute injury. Dr. Strand contends that the rotator cuff tear was preexisting. The Department disagrees. As Dr. Gould pointed out, there was no fat streaking shown on the MRI and there was no history of prior left shoulder problems before the October 4, 2014 fall. Dr. Gould explained that retraction is not a factor in determining whether the tear is chronic, "… Retraction has nothing to do with the chronicity or acuteness of the injury. Muscles have tension on them constantly. … If my supraspinatus just spontaneously ruptured, it's going to retract. That's what muscles do. They put tension on tendons and then bones move. Tension has nothing to do with chronicity or acuteness of tendon injury." Dr. Gould also explained that the acromion clavicle (AC) joint is not in the glenohumeral shoulder joint, and therefore, isn't relevant to the rotator cuff tear symptoms in the shoulder joint. Additionally, Dr. Gould explained that the type II acromion was a mild version just as the MRI report noted and was not to the extent necessary to cause problems with impingement.

Possibly the most significant evidence is that Claimant was able to perform all his truck driver duties prior to falling from the semi on October 4, 2014. He did not have a history of left arm pain, weakness or loss of motion before the October 4, 2014 fall. Even on the day of the work injury Claimant was using a handy man jack to help move the trailers around in the truck yard. It wasn't until immediately after Claimant fell from the Semi that he experienced pain, weakness, and decreased function of his left arm. Even Dr. Strand, although reluctantly, agreed that the onset of the symptoms of the left rotator cuff tear was on October 4, 2014.

Prior to the October 4, 2014 work injury Claimant was able to perform his truck driving duties, however, since suffering the rotator cuff tear, he has limitations to both his upper right and left extremities. At this point surgery to fix the rotator cuff tear is no longer an option. Dr. Gould explained that for torn tendons over time the tissue begins to atrophy and become woody, causing it to become immobile. When tendons or soft tissue is freshly torn, the tissue is pliable and you can pull that tendon back over and sew it down to the bone where it originated. When it becomes chronic that is no longer an option. As Dr. Gould noted after 4 to 6 months the tear did become chronic and Claimant's torn cuff could no longer be repaired surgically. Dr. Strand agreed with Dr. Gould's conclusion that Claimant's rotator cuff tear is not repairable and he is left with significant dysfunction.

Claimant has met his burden of showing that his October 4, 2014 work injury is a major contributing cause of his current condition and left shoulder limitations.

Weekly Benefit Rate:

There is a question as to whether Claimant was paid the correct average weekly wage (AWW) amount of $360.94. Claimant was paid temporary total disability (TTD) at the weekly rate of $360.94 for a five week period for the weeks of October 12, 2014 to November 16, 2014. The wage history is from April 20, 2014 to October 4, 2014, representing a total of 24 weeks. Claimant earned total wages for the year, according to Hobbs' 2014 W-2 from Employer of $19,213.45. SDCL §62-4-25 is used to determine the average weekly wage for employment for less than a year preceding the injury. SDCL §62-4-25 provides:

> As to an employee in an employment in which it is the custom to operate throughout the working days of the year, but who is not covered by § 62-4-24, the average weekly wages shall, where feasible, be ascertained by computing the total of the employee's earnings during the period the employee worked immediately preceding the employee's injury at the same grade of employment for the employer by whom the employee was employed at the time of the employee's injury, and dividing such total by the number of weeks and fractions thereof that the employee actually worked. However, if such method of computation produces a result that is manifestly unfair and inequitable or if by reason of the shortness of time during which the employee has been in such employment, or the casual nature or terms of the employment, it is impracticable to use such method, then regard shall be had to the average weekly amount which during fifty-two weeks previous to the injury was being earned by a person in the same grade, employed at the same work, by the same employer, or if there is no person so employed, by a person in the same grade, employed in the same class of employment in the same general locality.

The Department, therefore, finds that Claimant's average weekly wage earned at the time of his injury was $800.56. Using the formula provided by SDCL §62-4-25,

Claimant's AWW = Claimant's total earnings ($19,213.45) x 24 weeks or Claimant's AWW = $800.56.

The compensation rate for temporary total disability is determined by multiplying the AWW x sixty-six and two-thirds percent (66 2/3 %). SDCL §62-4-3. In this case, the average weekly wage is $800.56. That calculation equals $533.71. As such, rather than the weekly workers' compensation rate of $360.94 that was paid for a five week period, Claimant's correct compensation rate is $533.71.

Permanent total disability:

Finally the Department must determine whether Claimant is entitled to permanent total disability benefits (PTD). It is Claimant's initial burden to establish a prima facie case that he is obviously unemployable. SDCL 62-4-53 defines permanent total disability:

> 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 South Dakota Supreme Court has recognized at least two avenues by which a claimant may make the required prima facie showing for inclusion in the "odd-lot" category. 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.
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> 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)).

The test to determine whether a prima facie case has been established is whether there "are facts in evidence which if unanswered would justify persons of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain." Sandner v. Minnehaha County, 2002 SD 123, ¶13, 652 N.W.2d 778, 783. However, the fact that an employee may have suffered a work related injury does not automatically establish entitlement to benefits for his current claimed condition. Darling, 2010 S.D. 4, ¶11, 777 N.W.2d 363, 367.

To establish that Claimant 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." Wagaman v. Sioux Falls Construction, 1998 SD 27, ¶21, 576 N.W.2d 237, 241. Claimant is currently 65 years old. Claimant has a high school education. Beyond high school Claimant completed one semester of mechanical school at Laramie County Community College. Then a few years later got his heavy machinery certification through the same college. Claimant's primary career was driving truck. As part of driving truck, Claimant did general truck maintenance, changed tires, and depending on the truck he may have hauled water hoses or cleaned out the belly-dump or truck bed in preparation for the following day. Since suffering a full thickness tear to his left rotator cuff, Claimant has been taken off work by his treating doctor, cannot pass the commercial driver's license physical exam and has only been able to find sporadic work since October 4, 2014. Claimant is unable to use his left arm for above waist activities and since suffering a stroke at age fourteen he has been unable to use his right hand and arm for fine motor skills. Claimant has been left with significant left upper extremity limitation in addition to his right extremity limitations. It is clear that Claimant cannot return to the work that he was able to perform before the October 4, 2014 injury. However, even with his limitations Claimant has been able to find work (albeit sporadic) and is able to drive a vehicle without issue. Claimant is able to perform some physical activities and is not restricted to any type of mobility assistance device. Claimant also testified that though he has lost dexterity in his right arm he still has normal strength and ability to use that arm. Additionally, Claimant's pain levels are appropriately controlled and he is able to manage his daily activities without help.

Dr. Lynn Meiners, a Vocational Rehabilitation Consultant met with Claimant on August 28, 2015 to conduct an evaluation. She reviewed Claimant's medical records, performed a structured interview, Shipley Institute of Living Scale, Employee Aptitude

survey, and Labor Market Survey / Transferable Skills Analysis. To make her opinion, Dr. Meiners took into consideration, Claimant's post-injury level of employment, his work experience, education and skills, vocational aptitudes and residual functional capacities. Dr. Meiners considered Claimant's physical limitations, which Claimant indicated to be 20 pounds lifting infrequently, up to waist level using both forearms. A pain level of 4 out of 10 when extending his full left arm above waist level, tolerates extended sitting, walks slowly for extended times, and poor memory concentration related to pain. Dr. Meiners also noted he performs very light housekeeping for short periods of time, i.e. sweeping and vacuuming, cleaning one room then rests for an extended time period, and he can operate a riding lawn mower. After considering the combination of physical demands of gainful employment with Claimant's age, training, experience, residual functional capacities, and the work available in his community and expanded trucking area, Dr. Meiners concluded that he is incapable of performing the essential tasks of any sedentary, light, medium, heavy, or very heavy work.

After conducting the evaluation, Dr. Meiners could not identify any transferable skills that Claimant had attained in his previous positions. Although Dr. Meiners did not talk to any specific employers about potential job opportunities and Claimant's only job search, besides his sporadic employment with a Chevrolet dealership in Newcastle, was asking 4 or 5 ranchers and oilfield workers if they had any work they needed done. Dr. Meiners opined that there are no available jobs in Claimant's community or extended work area that he could perform that would allow more than sporadic employment resulting in insubstantial earnings. Dr. Meiners further opined that given Claimant's age, work experience, and residual functional capacities a job search would be futile. Dr. Mieners also opined that there is no reasonable expectation that retraining would remunerate losses. As such, vocational rehabilitation or retraining is not feasible for Claimant given his age, work experience, and residual functional capacities. Claimant physical condition, combined with his mature age and lack of available work with restrictions, establishes that Claimant is unable to secure meaningful employment or at least nothing more than sporadic employment resulting in an insubstantial income.

Dr. Meiners testimony is sufficient to make a prima facie showing that Claimant is "obviously unemployable" because his physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category. Therefore, the burden shifts to the Employer to show that some suitable work is regularly and continuously available to the Claimant. 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)." SDCL 62-4-53. Employer must demonstrate the specific position is "'regularly and continuously available' and 'actually open' in 'the community where the claimant is already residing' for persons with *all* of claimant's limitations." Shepard v. Moorman Mfg., 467 N.W.2d 916, 920 (S.D. 1991). Employer/Insurer has not identified any form of suitable work that is regularly available or presented any witnesses, experts or otherwise to refute the evidence presented by Claimant.

The Department finds that Employer/Insurer have not met their burden of showing that suitable work within Claimant's limitations is actually available in the community.

Claimant has proven obvious unemployability. Claimant's physical condition, combined with his age and lack of available work within his restrictions, establishes that Claimant is unable to secure meaningful employment or at least nothing more than sporadic employment resulting in an insubstantial income.

Conclusion:

Claimant has demonstrated that he is permanently and totally disabled pursuant to SDCL 62-4-53. Claimant's request for permanent total disability benefits is granted and Employer is responsible for payment of permanent total disability benefits to Claimant. Employer/Insurer are responsible for paying temporary total disability benefits in the amount of $533.71 per week from November 16, 2014 to the time of this decision. Employer/Insurer are responsible to pay the difference from $533.71 and 360.94 for the time frame from October 4, 2014 to November 16, 2014. Claimant shall be awarded any outstanding interest that is owed. The Department shall retain jurisdiction as to future medical benefits.

Counsel for Claimant 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. Employer/Insurer 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 23rd day of December, 2016.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge