SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MARK CLARKE, **HF No. 28, 2006/07**

Claimant,

v. **DECISION**

THE CAR CONNECTION,

Employer,

and

AUTO OWNERS 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 April 23, 2009 at 9:00 a.m. MT in Rapid City, South Dakota. Mr. Wm. Jason Groves, of Groves Law Office, represents Claimant, Mark Clarke (Claimant). Mr. Richard L. Russman, of Richardson, Wyly, Wise, Sauck & Hieb, LLP, represents Employer, The Car Connection, and Insurer, Auto Owners Insurance Co. (Employer/Insurer).

Presenting testimony at hearing were witnesses: Claimant, Mark Clarke; Dewey Ertz, Ed.D.; Rick Ostrander; William Tysdal; and Katie Ballard. Depositions presented by the parties in lieu of live testimony were of: Employers Mrs. Penelope Dalton (videotape) and Mr. William Dalton (videotape); Dr. Geoff Luther (videotape); and Dr. Christopher Dietrich.

The issues are:

1) Did Claimant reject a bona fide job offer? SDCL 62-4-5; SDCL 62-4-5.1; SDCL 62-5-52(2).

2) The extent and degree of Claimant's disability? Does Claimant qualify for a finding of permanent total disability status by application of the "odd-lot" doctrine? SDCL 62-4-53.

FACTS

At the time of hearing, Claimant was 46 years of age. He resides in Sturgis, South Dakota. Claimant has no hearing in his left ear and limited hearing in his right ear. Claimant has worn a hearing aid in his right ear for 19 years. Claimant's hearing loss is the result of a hunting accident. Claimant has an eighth grade education. Claimant's past work history includes manual labor jobs, ranch work, metal fabrication (tin ducts), bowling alley pin setter mechanic, custodian, full service gas station attendant, cook and dishwasher, video lottery attendant, Black Hills Gold production worker, owner of "Power Wash," a mobile power wash business (two years), and Rochester Armored Car driver and manager. Claimant closed his Power Wash business when he was severely injured in an auto accident in 1989. During Claimant's 9 ½ year stint with Rochester Armored Car, Claimant initially started as a driver and received numerous promotions until he attained the position of District Manager. Claimant left Rochester Armored Car in 2003 because of an internal theft and due to downsizing.

Claimant was an avid bowler. He was inducted into the South Dakota Bowling Hall of Fame. During his lifetime, he has bowled 13 perfect 300 games. Claimant also enjoyed playing pool, riding motorcycles and golfing in his spare time.

Claimant has a history of alcohol abuse. He has been through in-patient and out-patient treatments for alcoholism. Because of his past issues, Claimant does not want to work in any establishment that sells alcohol. Claimant continues to drink socially. Claimant does not believe he has a problem with alcohol and that he can control his use of alcohol. Claimant has been convicted of Driving Under the Influence (DUI) on three occasions, as well as simple domestic assault and witness tampering (Claimant wrote a letter to his ex-girlfriend regarding the simple assault charge). Claimant has a felony on his criminal record as a result of the third DUI.

Claimant was employed full-time by Employer as an auto detailer. Claimant's job was to wash the inside and outside of vehicles and line the cars up in the sales lot. Claimant also performed light automotive work such as changing tires or brakes. When Employer was absent from the business, Claimant was in charge of the premises. Claimant answered the phone and made sure the other employee knew what to do. Claimant did not sell the vehicles.

On Tuesday, February 7, 2006, Claimant was at work with Employer lifting seats into a van. Claimant reported to work the next day, February 8, with nausea and vomiting, as well as severe back and leg pain. Employer sent Claimant home for the day, as Claimant told Employer that he may have a virus. Claimant was home sick again on Thursday, February 9. Claimant reported to work on Friday, February 10 as well and the symptoms returned when he made attempts to work. Claimant completed a work injury report form on February 10. Claimant noted pain in his lower back and right leg and that he was sick to his stomach.

Claimant's father was a chiropractic physician. Claimant made the choice to see a chiropractor for his symptoms. Claimant saw Dr. Brett Sutton, D.C. on February 11, 2006. Dr. Sutton concluded that Claimant suffered from a left lower quadrant hernia, sprains/strains to the sacroiliac area, and a lumbrosacral injury. Dr. Sutton referred Claimant to Dr. Edward Picardi, M.D., who surgically repaired Claimant's hernia. Dr. Sutton continued to treat Claimant for his back injury.

The nurse case manager, Katie Ballard, referred Claimant to Dr. Jeff Luther for an independent medical exam (IME). Dr. Luther saw Claimant on March 9, 2006 for a medical examination. At that time, Dr. Luther also examined Claimant's full medical history, including his chiropractic records. Dr. Luther determined that although Claimant was still in pain from his hernia surgery, Claimant was also suffering from low back pain consistent with a lumbar injury and a herniated disk. Dr. Luther recommended that Claimant go back to work in a light or sedentary position. Dr. Luther saw Claimant a second time on April 6, 2006. Dr. Luther recommended that Claimant undergo an MRI for his back pain. Dr. Luther also recommended that Claimant go see a rehabilitation specialist, such as Dr. Dietrich with the Rehab Specialists in Rapid City.

Ms. Ballard asked Claimant to see Dr. Dietrich after he had undergone an MRI. Dr. Dietrich read the April 24, 2006 MRI, and diagnosed an L5-S1 central disc protrusion and annular tear, along with right-sided lower lumbar facet pain, and degenerative disc disease. Dr. Dietrich examined Claimant on May 9, 2006. Dr. Dietrich did not take Claimant off work completely. Dr. Dietrich prescribed light-duty work restrictions for Claimant. The work restrictions included a 10-pound maximum lifting limit, limited bending, twisting, turning, squatting, and facet loading. Claimant was told to switch positions every half hour. Claimant was not limited from sitting, standing, or walking.

It is Dr. Dietrich's opinion, within a reasonable degree of medical certainty that Claimant's injuries were caused by the lifting incident on February 7, 2006. Employer is not contesting that Claimant's injuries were caused by a work-related incident on February 7, 2006. Claimant has treated with Dr. Dietrich since May 2006. Claimant has undergone numerous treatments, injections, and therapies to relieve his back symptoms since starting treatment with Dr. Dietrich.

On May 17, 2006, Ms. Ballard received Claimant's work restrictions from Dr. Dietrich. Ms. Ballard told Claimant to give any future work restriction forms to Employer. Ms. Ballard arranged with Employer to have Claimant return to his job with Employer on Thursday, June 1, 2006. Employer knew and understood that Claimant would be on light duty for an eight-hour workday and that his work would be limited to answering the telephone. Employer was willing to accommodate Claimant's restrictions regarding his changing positions every half hour. Ms. Ballard explained to Claimant that Employer was willing to accommodate his restrictions without a change in pay and that he was expected to return to work on June 1.

On May 22, 2006, Claimant wrote a letter to Dr. Dietrich regarding the work restrictions. Claimant did not feel he was able to work due to the pain in his back and lower leg. At

that time, Claimant was attending physical therapy and was in pain after his therapy treatment. Claimant wrote to Dr. Dietrich that he was not going to go back to work, as he felt his health was more important than a job. Claimant also noted in the letter that it likely would be difficult to find a job in the future due to his impairments. Dr. Dietrich did not change the work restrictions and spoke with Claimant about these restrictions on a number of occasions. Dr. Dietrich believes that Claimant needed to return to work.

Claimant received his first of a series of epidural steroid injections on May 31, 2006. Dr. Dietrich continued his recommendation that Claimant return to light duty work with restrictions. Claimant understood that he was to manage at home any minor symptoms that resulted from the injections. Claimant was to use cold packs on the injection site and stay off his feet for at least 24 hours. Claimant was advised to call Dr. Dietrich's office if he experienced any pain, numbness, or redness at the injection site. Claimant testified that he experienced redness at the injection site and numbness in his legs the day after the injection. Claimant did not call Dr. Dietrich's office or leave a message for Dr. Dietrich on June 1. Claimant instead called his physical therapist's office, Mr. Greg Bonar, PT, OCS. Mr. Bonar spoke with Claimant at that time. Claimant told Mr. Bonar that Dr. Dietrich had approved two weeks off work after the injection. Without knowing Dr. Dietrich's actual return to work instructions, Mr. Bonar told Claimant that it was reasonable to manage his symptoms at home with cold packs. Mr. Bonar told Claimant that he should report to therapy the following week.

On June 2, 2006, Claimant telephoned Dr. Dietrich's office and spoke with Deb, Dr. Dietrich's nurse. Claimant informed Deb that Dr. Dietrich had approved Claimant to be off work for 10 days following the injection. Dr. Dietrich did not approve Claimant to take any time off work.

On June 8, 2006, Mr. Bonar, PT, OCS, wrote a letter to Dr. Dietrich explaining Claimant's reluctance to return to work. Mr. Bonar wrote the letter to explain that he had not instructed Claimant to stay home from work. Mr. Bonar explained his inability to prescribe work restrictions to Claimant as well as Ms. Ballard. Mr. Bonar gave his opinion that Claimant was making incorrect inferences about Dr. Dietrich's orders.

Claimant did not return to work on June 1. Claimant did not contact Employer or Ms. Ballard to give a reason why he did not appear at work. Employer discharged Claimant for failing to appear at work. Claimant summarily lost his worker's compensation benefits based upon his failure to return to work for Employer. Claimant did not contact Employer to request his job back. Claimant did not speak with his case manager regarding a possible return to his employment.

On June 15, 2006, Dr. Dietrich noted the following in his clinic notes:

> Mr. Clarke returns today following a caudal epidural steroid injection on 5/31/06. Immediately following his epidural injection he states that he had continued pain. He has been upset about his work restrictions and has had numerous correspondences with clinical assistants at our office, as

> well as ProMotion Physical Therapy and his case manager. There are numerous inconsistencies in statements that he makes, accusatory statements about physicians, therapists and his case manager/employer. Many of these, when confirmed with the said providers, have been found to be untrue. Specifically, he has stated that he could have up to four weeks after his injection to return to work. This was contrary to the work restrictions and was, again, reviewed with Mr. Clarke after his injection on the 31st. He elected to not return to work and, as a result, has lost his Worker's Compensation benefits. He has continued with the medical benefits.
>
> He presents to the clinic today with his father and case manager, Klara Parks. When confronted about the inconsistencies he denies many of the statements that were made or documented by our staff and claims that those are misrepresentations of his comments. …
>
> … Approximately 30-40 minutes of time were spent with Mr. Clarke discussing the previous interactions with office staff, work restrictions and rationale for releasing him to sedentary duties. He is adamantly opposed and he and his father think this was inappropriately handled. They plan on pursuing appeal to the Department of Labor. From my standpoint, I feel that he could certainly return to work in a sedentary capacity. Frequent breaks have been allocated on the work restrictions and I believe this would allow him to transition and alleviate any discomfort that he was accumulating in his back.

Dr. Dietrich recommended Claimant undergo a functional capacity exam (FCE). Claimant performed the FCE on August 15, 2006. The FCE report was completed by Mr. Phil Busching, PT on August 18, 2006. Mr. Busching reported that Claimant self-limited on nine (9) of 21 tasks and fully participated in the other 12 tasks. [1] Claimant reported to Mr. Busching that his low back pain and lower right extremity pain was increasing and that was the reason for his self-limiting. After the FCE was conducted, Claimant experienced a significant flare in symptoms. Dr. Dietrich is of the opinion that this flare was caused in part by the FCE testing. Claimant's self-limitation on the FCE due to increasing pain seems plausible.

Despite the self-limitation, Mr. Busching was of the opinion that Claimant was not able to work at a medium level for an eight-hour workday. Mr. Busching did say that if Claimant found a job that meets his lifting and bending restrictions, Claimant should start at "2-hours per day, increasing his work time as tolerated." After the FCE was completed, Dr. Dietrich changed Claimant's work restrictions to reflect the FCE. On August 21, 2006, Dr. Dietrich reported that Claimant was allowed to work light duty with

[1] According to the report, reasons for self-limitation may be due to one or more several factors. The most common factors are: pain, fear of injury/re-injury, depression, anxiety, lack of familiarity with a safe physical maximum, and lack of motivation to perform maximally secondary to perceived financial gain.

a 30-pound lifting restriction. Claimant should also limit his work to two hours per day for two weeks, four hours per day for two weeks, six hours per day for two weeks, and finally eight hours per day. This is a work hardening type program that Dr. Dietrich believed Claimant could utilize without reinjury or worsening Claimant's symptoms.

On August 21, 2006, Dr. Dietrich gave Claimant a 5% whole person impairment rating based upon the *AMA Guides to Evaluation of Permanent Impairment, 4th Edition*. Claimant's average weekly wage, at the time of his injury, was $274.62 per week, based upon a 40-hour work week. Claimant's workers' compensation weekly benefit amount is $267 per week. The parties have stipulated to these amounts. The current South Dakota minimum wage is $7.25 per hour or $290 per week for a 40-hour work week. Claimant needs to only work 38 hours per week at minimum wage in order to earn his average weekly wage or 37 hours per week at minimum wage in order to earn his workers' compensation rate.

Dr. Dietrich continued to treat Claimant for symptom flares after the impairment rating was given. Claimant continued with physical therapy, medication, and steroid injections. On January 10, 2007, a right L4-5 and L5-S1 lumbar facet rhizotomy was performed on Claimant by Dr. Dietrich. On February 5, 2007, Dr. Dietrich noted that Claimant had reached maximum medical improvement (MMI) as of that date. Claimant's symptoms were significantly reduced after the rhizotomy. Claimant still reported some tenderness and mild symptoms, but overall he had improved and would only return to Dr. Dietrich as needed. Dr. Dietrich maintained Claimant's work restrictions as recommended by the FCE. Claimant suffers from intermittent symptom flares. It is Dr. Dietrich's opinion that Claimant will continue to suffer from intermittent symptom flares.

April 9, 2008, Claimant met with Dr. Luther in Sioux Falls, South Dakota for an IME. Claimant's right leg became numb after driving from Sturgis to Sioux Falls. Dr. Luther recommended Claimant get an updated MRI. Dr. Dietrich ordered the MRI and it was performed on April 16, 2008. The updated MRI, as compared with the MRI taken in April 2006, showed a progression and worsening of the disc protrusion/herniation. Claimant received a number of treatments from Dr. Dietrich following the second MRI. Claimant received some relief following a radiofrequency neural ablation treatment on July 31, 2008. Dr. Dietrich continues to treat Claimant with the same modalities. Dr. Dietrich released Claimant on August 21, 2008 and recommended that Claimant continue independently with his home exercise program.

On September 14, 2006, Dr. Greg Swenson, a licensed psychologist on referral from the South Dakota Vocational Rehabilitation Services, performed a psychological evaluation on Claimant. Dr. Swenson noted that Claimant had a performance IQ of 89, a verbal IQ of 75 and a full scale IQ of 79; the performance IQ is in the low average range with verbal and full scale IQs in the borderline level of intellectual functioning. Dr. Swenson noted that Claimant may be capable of obtaining a general equivalency diploma (GED). Claimant is able to function adequately in a job involving visual or experiential training as his non-verbal learning abilities are stronger.

December 26, 2007, Claimant met with Mr. Rick Ostrander, a vocational rehabilitation specialist, to determine his capacity for employment and earnings. Mr. Ostrander reviewed Claimant's medical records, psychological evaluations, work history and personal history. Mr. Ostrander conducted a transferable skills analysis for Claimant based upon his work history and education. Mr. Ostrander utilized the OASYS software program in formulating his opinion. Local labor market information was taken from information published by the South Dakota Department of Labor as well as labor market surveys conducted previously by Mr. Ostrander's consulting group.

Mr. Ostrander prepared a list of vocationally relevant factors for Claimant to share with employers in order for the employer to know if Claimant can perform the job. The list is as follows: No lifting greater than 30 pounds; no climbing steps or ladders; ability to change positions from sitting to standing to walking every half hour; limit work standing to an occasional basis only; no bending, either while standing, stooping or sitting; no work squatting or crouching; no walking on uneven surfaces; start at two hour shifts and gradually increase every two weeks until he is at eight hour shifts; limited hearing – right ear is 40 percent with a hearing aid, no hearing in left ear; and an eighth grade education.

Mr. Ostrander identified one occupational category that fit Claimant's vocational capabilities and physical limitations and that could be reasonably expected to allow Claimant to earn at least his workers' compensation benefit rate. Mr. Ostrander opined that Claimant could work as a video lottery attendant, a job Claimant has held in the past and for which he has experience. It is Mr. Ostrander's opinion that Claimant may have to commute to Spearfish or Rapid City in order to become employed as there are limited opportunities in the Sturgis community. The cost of commuting may decrease Claimant's chances of earning his workers' compensation rate. Mr. Ostrander is of the opinion that Claimant would not benefit from traditional vocational rehabilitation, due to his hearing disabilities and his limited aptitude for academics.

Mr. Ostrander provided a list of 19 video lottery establishments in Sturgis that Claimant could contact in order to ascertain if there were any job openings. Claimant started a job search and made applications to 18 Sturgis businesses in August 2008 through April 2009. Seven (7) of the businesses were previously identified by Mr. Ostrander as potentially having a job match for Claimant. None of the businesses had any current openings and some only hired seasonal labor. Claimant did not receive any interviews or job offers from this limited job search.

During the hearing on April 23, 2009, Mr. Ostrander observed Claimant's demeanor. Mr. Ostrander noted that Claimant had a hard time understanding the questions posed to him by the attorneys during examination. Claimant then had a difficult time answering the questions that were asked of him. Mr. Ostrander characterized this as a "tracking" problem, as he was not directly answering the questions posed to him. It was Mr. Ostrander's expert opinion, as a professional counselor, that Claimant suffers from a mixed receptive-expressive language disorder. Mr. Ostrander would not characterize Claimant as having a borderline IQ, but rather that Claimant's hearing disabilities give

Claimant problems in understanding people. Claimant misunderstands what people say and then has a difficult time expressing his own opinion. Because of his hearing disabilities, Claimant has a tendency to miscommunicate. It is clear that some of the past miscommunications were intentional on the part of Claimant. The Department does not find the whole of Claimant's testimony to be credible, but also does not reject all of Claimant's testimony.

Mr. Ostrander also is of the opinion that Claimant can learn how to perform certain jobs and can be trained with vocational rehabilitation. Claimant can train for a job through experience or being shown how to perform certain tasks. Claimant likely will not be very well trained if he must read a manual or is not shown how to perform required tasks.

About three or four months after his injury, about May or June of 2006, Claimant moved from his apartment in Rapid City into an assisted living apartment in Sturgis. Claimant's father helped Claimant find a place to live in Sturgis that assisted Claimant with payment of rent. Claimant's parents also lived in Sturgis at that time. About one year prior to his accident, Claimant applied for housing assistance in Rapid City. Claimant made an application and did not get a response from the association or group that assists with low-income housing in Rapid City. Claimant did not check back with the Rapid City group as he had already secured low-income housing in Sturgis.

Claimant applied for vocational rehabilitation (VR) services through the South Dakota Department of Human Services (DHS) on February 28, 2006. On July 5, 2006, DHS found Claimant to be eligible to receive VR services. Among the services made available to Claimant were VR counseling and guidance, job training, job placement and follow along services. DHS was aware of Claimant's disabilities and abilities and anticipated that with the VR services, Claimant could obtain a sedentary job. On February 20, 2008, DHS closed Claimant's VR case at the request of Claimant. Claimant did not take advantage of the VR services offered. DHS attempted to work with Claimant, but Claimant did not return calls to DHS or seek any assistance. Claimant testified that his medical issues interfered with his ability to seek work or receive assistance from DHS. Claimant did not return to DHS when he started his job search in August 2008.

On August 1, 2008 Claimant underwent a psychological evaluation by Psychologist Dr. Dewey Ertz, Ed.D. Claimant took the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), a psychological test. Dr. Ertz met with Claimant and assessed his history and mental status. Dr. Ertz presented his opinion that Claimant suffers from a Depressive Disorder, Not Otherwise Specified; Alcohol Dependence, Sustained Full Remission; and a possible diagnosis of Undifferentiated Somatoform Disorder. It is Dr. Ertz's opinion that Claimant should not be employed at a location that serves alcoholic beverages as Claimant would be at risk of using alcohol to self-medicate his mood and reduce his physical pain. Dr. Ertz was of the opinion that Claimant could not control his alcohol intake. At the time of the evaluation, Dr. Ertz did not know that Claimant continued to drink alcohol (beer) on a social basis.

On December 19, 2008, at the request of Employer/Insurer, Mr. William Tysdal, a vocational rehabilitation consultant, examined Claimant's records and prepared a report regarding Claimant's employability. Claimant, through his counsel, did not allow Mr. Tysdal to interview Claimant although Employer/Insurer had made the request in July 2008. The denial was upheld by the Department on August 8, 2008, as there is no legal requirement that a claimant submit to an interview for vocational purposes.

Mr. Tysdal reviewed Claimant's education and work history, medical history (pre- and post-injury to June 2008), as well as the FCE conducted by Mr. Busching. Mr. Tysdal concluded that Claimant was able to perform light duty work for eight hours per day, with a work hardening program. Mr. Tysdal also concluded that with accommodation, Claimant could likely perform his past jobs of jewelry preparer, bench jeweler, gambling cashier, manager, armored transport services, and automobile salesperson. Mr. Tysdal opined that Claimant voluntarily placed undue limitations on his employability by moving from Rapid City to Sturgis. At the State reimbursement rate of $.37 per mile, Claimant would have to make between $.93 and $2.31 more per hour to cover the cost of commuting from Sturgis to local towns. To earn his weekly benefit amount, with the added cost of commuting, Claimant would need to make $9.56 per hour to work in Rapid City, $8.18 per hour to work in Deadwood, and $8.82 per hour to work in Spearfish.

Mr. Tysdal identified six open jobs with Deadwood casinos that met the wage requirements of a suitable, substantial, and gainful job. Mr. Tysdal also identified a large number of open and continuous positions in Rapid City, most of which were telephone collectors or call center representatives. There were two openings as a stonesetter with a Black Hills gold jewelry manufacturer. The jobs identified in Rapid City, that had a wage listed, paid more than minimum wage. The Labor Market Information from the Department of Labor lists the average wages of the other jobs found by Mr. Tysdal as being more than Claimant's average weekly wage and more than his workers' compensation benefit rate, for a 40-hour work week. Not all the jobs paid the amount required to factor in the cost of commuting to Rapid City.

Mr. Tysdal concluded that Claimant did not require vocational rehabilitation in order to obtain suitable, substantial, and gainful work in his community. However, Mr. Tysdal also opined that Claimant would likely benefit from some short-term training in order to acquire a job or obtain a higher wage.

Since his injury, Claimant has not participated in his usual hobbies. Claimant has attempted to ride his motorcycle and golf, but he experienced severe flares in pain from those activities. Claimant keeps active doing household chores. He also drives his mother and sister to appointments or shopping. Claimant has a handicapped sister who lives in Spearfish. Claimant drives his sister from Spearfish to their mother's house in Sturgis each weekend. Claimant also socializes with friends in Sturgis. Claimant socializes at local bars about once a week.

Further facts will be developed as necessary.

SOUTH DAKOTA STATUTES REFERENCED

SDCL § 62-4-5.

If, after an injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if the employee has been released by the employee's physician from temporary total disability and has not been given a rating to which § 62-4-6 would apply, the employee shall receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3, equal to one-half of the difference between the average amount which the employee earned before the accident, and the average amount which the employee is earning or is able to earn in some suitable employment or business after the accident. If the employee has not received a bona fide job offer that the employee is physically capable of performing, compensation shall be at the rate provided by § 62-4-3. However, in no event may the total calculation be less than the amount the claimant was receiving for temporary total disability, unless the claimant refuses suitable employment.

SDCL § 62-4-5.1.

If an employee suffers disablement as defined by subdivision 62-8-1(3) or an injury and is unable to return to the employee's usual and customary line of employment, the employee shall receive compensation at the rate provided by § 62-4-3 up to sixty days from the finding of an ascertainable loss if the employee is actively preparing to engage in a program of rehabilitation as shown by a certificate of enrollment. Moreover, once such employee is engaged in a program of rehabilitation which is reasonably necessary to restore the employee to suitable, substantial and gainful employment, the employee shall receive compensation at the rate provided by § 62-4-3 during the entire period that the employee is engaged in such program. Evidence of suitable, substantial, and gainful employment, as defined by § 62-4-55, shall only be considered to determine the necessity for a claimant to engage in a program of rehabilitation.

The employee shall file a claim with the employee's employer requesting such compensation and the employer shall follow the procedure specified in chapter 62-6 for the reporting of injuries when handling such claim. If the claim is denied, the employee may petition for a hearing before the department.

SDCL § 62-4-52.

Terms used in § 62-4-53 mean:

(1) "Community," the area within sixty road miles of the employee's residence unless:

(a) The employee is physically limited to travel within a lesser distance;

(b) Consideration of the wages available within sixty road miles and the cost of commuting to the job site makes it financially infeasible to work within such a distance;

(c) An employee has expanded the employee's community by regularly being employed at a distance greater than sixty road miles of the employee's residence, in which case community shall be defined as that distance previously traveled.

(2) "Sporadic employment resulting in an insubstantial income," 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. If a bona fide position is available that has essential functions that the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury the employment is not sporadic. The department shall retain jurisdiction over disputes arising under this provision to ensure that any such position is suitable when compared to the employee's former job and that such employment is regularly and continuously available to the employee.

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.

If an employee chooses to move to an area to obtain suitable employment that is not available within the employee's community, the employer shall pay moving expenses of household goods not to exceed four weeks of compensation at the rate provided by § 62-4-3.

SDCL § 62-4-54.

Usual and customary line of employment is to be determined by evaluation of the following factors:

(1) The skills or abilities of the person;

(2) The length of time the person spent in the type of work engaged in at the time of the injury;
(3) The proportion of time the person has spent in the type of work engaged in at the time of injury when compared to the employee's entire working career; and
(4) The duties and responsibilities of the person at the workplace. It is not limited by the position held at the time of the injury.

SDCL § 62-4-55

Employment is considered suitable, substantial, and gainful if:
(1) It returns the employee to no less than eighty-five percent of the employee's prior wage earning capacity; or
(2) It returns the employee to employment which equals or exceeds the average prevailing wage for the given job classification for the job held by the employee at the time of injury as determined by the Department of Labor.

ANALYSIS

Did Claimant reject a bona fide job offer?

"It is a general rule that worker's compensation statutes should be liberally construed in favor of injured employees. The Workmen's Compensation Act is remedial, and should be liberally construed to effectuate its purpose." *Moody v. L. W. Tyler, Custom Combiners*, 297 NW2d 179 (SD 1980) (internal citations omitted).

Employer knew and understood that Claimant could return to a sedentary position or a light-duty job after being injured. Employer was willing to have Claimant return to work and answer phones for eight hours a day. Employer could accommodate Claimant's work restrictions. Claimant also understood he would be allowed to change position every half hour or whenever necessary. Claimant made it very clear to his medical providers that he had no intention of returning to work while receiving treatment for the back injury. Claimant and his father wrote numerous letters and spoke with Dr. Dietrich, Dr. Luther, Mr. Bonar, and Claimant's case managers about the return to work orders and the restrictions.

The job offer given to Claimant by Employer was likely bona fide and not sporadic in that it met the criteria listed in SDCL § 62-4-52(2). The statute reads in part:

> If a bona fide position is available that has essential functions that the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury the employment is not sporadic.

SDCL § 62-4-52(2). The job was one Claimant had performed in the past, the wages were the same as what Claimant had earned at the time of his injury, and Employer was willing to make any accommodation necessary for Claimant.

The ultimate question is whether Claimant refused the job for valid medical reasons or whether he refused the job for reasons other than valid medical reasons. Claimant and his father (who was a retired chiropractor) were of the opinion that Claimant's back injury prevented Claimant from returning to even sedentary employment. This was the complete opposite opinion of the medical providers who treated Claimant.

The South Dakota Supreme Court has ruled on whether a claimant has a right to temporary partial or total benefits when he refuses a bona fide job offer due to non-medical reasons. They wrote:

> In general, a claimant who refuses favored (light duty) work, due to non-medical reasons, temporarily forfeits his right to compensation benefits. Here, [Claimant] was not offered light duty work because he was out on strike and he was not recalled because of his relatively low seniority status. His strike participation, rather than a medical problem, precluded him from being offered light duty or favored work. Therefore, the hearing examiner's denial of temporary total disability benefits was correct. See, *Jones v. Auto Specialities Mfg. Co.*, 441 NW2d 1 (Mich.App. 1988); *Pique v. General Motors Corporation*, 317 Mich. 311, 26 NW2d 900 (1947).

Beckman v. John Morrell & Co, 462 NW2d 505, 509-510 (SD 1990). The case at hand is not as clear as *Beckman*. Claimant had his own reasons, based upon his medical situation, why he did not want to return to work. Claimant's refusal of the bona fide job offer was based upon medical reasons, but not valid medical reasons. There is no evidence or expert witness report presented which suggests that Claimant could not or should not have returned to work on June 1, 2006.

Claimant refused to follow his doctors' orders regarding return to work. Claimant has not given any objective reasons why his opinion was more correct than his doctors' opinions in regards to the return-to-work status. When viewed on the whole, this situation is not about miscommunication, but about Claimant's unwillingness to trust his doctor and return to work. Claimant's subjective complaints about pain on June 1, after the injection do not eclipse Claimant's adamant objections to working that were made just days prior to the injection.

Claimant rejected a bona fide work offer and his temporary partial benefits were stopped in accordance with SDCL § 62-4-5. Claimant, had he returned to work, would have been eligible for temporary partial benefits from the time of his injury until the time he received his impairment rating. *Id.* Employer has shown that Claimant is not eligible for benefits from the time of his discharge until the time he received his impairment rating on August 21, 2006.

Whether Claimant qualifies for a finding of permanent 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 legal 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.

SDCL §62-4-53.

The Supreme Court has set out two avenues in which a Claimant may 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 is actually available in claimant's community for persons with claimant's limitations. Obvious unemployability may be shown 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 fact 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 relegated to the odd-lot category then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work. Under this test, if the claimant is obviously unemployable, he will not bear the burden of proving that he made reasonable efforts to find employment in the competitive market. Likewise, it is only when the claimant produces substantial evidence that he is not employable in the competitive market that the burden shifts to the employer.

Kassube v. Dakota Logging, 2005 SD 102, ¶34, 705 NW2d 461, 468 (internal citations and quotations omitted). See also *Fair v. Nash Finch Company*, 728 NW2d 623, 623-633 (SD 2007).

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's pain, since his last treatments, comes and goes. After his last treatment with Dr. Dietrich, Claimant reported that he was doing

much better and that his back pain has lessened. Claimant continues to take medication for the pain and he rests his back about twice a day during daytime hours. Claimant keeps active during the day and rests when the pain gets too much. Claimant takes sleeping pills to help him sleep at night. As noted by the Department and other witnesses, Claimant did not show outward signs of pain during the hearing on April 23, 2009. Claimant testified that he was taking pain medication at that time and that he was tired and groggy during the hearing due to the medication. Claimant did not stay for the entire hearing, but left the hearing after presenting his testimony.

If Claimant were to take a job, Claimant's current restrictions limit him from working more than two hours per day for the first two weeks. Dr. Dietrich and Mr. Busching recommended that Claimant undergo a work hardening program. There is a work hardening program that was available to Claimant through the Department of Human Services. Within a couple of months of work hardening, Claimant could potentially be working full-time. Even with the work hardening program, Claimant is limited to working sedentary jobs. Claimant also needs the flexibility of changing positions every half hour, if necessary.

Claimant is 46 years old and has just an eighth grade education. At one time, Claimant attempted to study for a GED, but he never took the exam. Claimant's past training consists of on-the-job training specific to each job that he has held. Claimant has experience in management, working with jewelry production, being a video lottery attendant, metal work, and general labor. Claimant is capable of being trained, despite his communication limitations and his limited education. Claimant has issues with communication because of his hearing disabilities, but Claimant also has a track record of holding jobs that utilize his skills. Claimant's job with Rochester Armored Car lasted nine and one-half years. Although Claimant has some disabilities and his work restrictions are limiting, Claimant is not obviously unemployable.

As Claimant is not obviously unemployable, "the burden remains with [Claimant] to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work." *Id*. at ¶ 34. Claimant moved from Rapid City to Sturgis in order to secure affordable housing. Claimant had made some attempts to secure housing assistance in Rapid City, which proved futile. Claimant's father was able to assist Claimant in securing housing assistance in Sturgis at a facility built for people with disabilities. Sturgis has a smaller employment base than Rapid City. Claimant's move was not a conscious move out of the labor market to avoid work opportunities, but a legitimate move because of housing concerns.

After losing his job with Employer and prior to being completely released by Dr. Dietrich, Claimant did not make a job search. Claimant testified that he believed his medical issues and regular therapies prevented him from searching for work. Claimant had also applied for unemployment benefits, but he did not collect any benefits. Claimant admitted to Dr. Dietrich that finding work would be difficult, considering his disabilities, but that he did not agree with Dr. Dietrich's recommendations that Claimant needed to return to work. Claimant and Dr. Dietrich argued about Claimant's ability to return to

work to the point that Claimant made false statements regarding Dr. Dietrich's orders when speaking with his case manager and his physical therapist.

Claimant qualified for the voc rehab services offered by the Department of Human Services. Claimant refused the services, including work hardening and job search services. Claimant did not return phone calls to DHS and specifically asked that his voc rehab file be closed. Claimant also did not look for work through the local office of the Department of Labor. Claimant had applied for unemployment benefits, but then did not look for work or utilize the programs with the Department of Labor during that time. Claimant did not make any job search even though he was cleared to work with restrictions by all his doctors and therapists.

Claimant began his work search in August 2008 after being released by Dr. Dietrich. Claimant continued to look for work on an intermittent basis through April 2009. Claimant was initially informed by a couple of employers that he needed to reapply at a later time as the work was seasonal (summer work or only during the Sturgis Motorcycle Rally held in early August). Claimant did not reapply at those locations. After the first few months, Claimant limited his work search to only those locations that do not sell alcohol. Although Claimant drives out of town on a regular basis, Claimant did not look for work anywhere but in Sturgis. Claimant did not search for work in Deadwood (10 miles), Spearfish (17 miles), or in Rapid City (25 miles) or any other business located in the Northern Black Hills area.

Claimant put unrealistic limitations on his job search. Mr. Ostrander identified the job of video lottery attendant as work that Claimant could realistically perform within his restrictions and earn over his weekly benefit amount. Claimant is an alcoholic and as Dr. Ertz opined, should probably not be working at local pubs or bars. However, and unbeknownst to Dr. Ertz and Mr. Ostrander, Claimant still frequents these establishments and drinks socially. There is no reason, given the facts at hand, that Claimant can not be employed as a clerk in a video lottery establishment. Furthermore, Claimant has not made reasonable efforts to find employment within the competitive market in his labor market or community as he has not applied for any positions outside of Sturgis.

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. Logically, if an employer asserts that jobs are available to a claimant upon retraining or rehabilitating, then the employer must prove such assertion by establishing that retraining or rehabilitation is a reasonable means of restoring the claimant to suitable employment.

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). The burden has not shifted. Claimant has not met his burden of showing that he is not employable in the competitive market. Claimant has not met his burden of showing that he is permanently and totally disabled.

Counsel for Employer/Insurer 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. Claimant shall have an additional 20 days from the date of receipt of Employer/Insurer'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 Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this 18th day of August, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Catherine Duenwald
Administrative Law Judge