SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

TIMOTHY WARREN, **HF No. 44, 2007/08**
Claimant,

v. **DECISION**

ROUNDUP BUILDING CENTER,
Employer,

and

THE HARTFORD,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Belle Fourche, South Dakota. Claimant, Timothy Warren appeared personally and through his attorney of record, Wm. Jason Groves. J.G. Shultz represented Employer, Roundup Building Center and Insurer, The Hartford.

Issues
Nature and Extent of Claimant's Disability- *Whether Claimant was permanently totally disabled under the Odd-Lot doctrine.*

Facts
At the time of the hearing, Timothy Warren (Claimant) was 51 year old. Claimant is a resident of Belle Fourche, South Dakota. Claimant has lived in Belle Fourche for about 30 years. Claimant has four children, one of whom is a minor. Claimant has a GED and is a former member of the South Dakota National Guard.

Claimant's job history includes work as a laborer, fork lift operator, part-time bartender, cook-bartender, construction worker, school bus driver, reserve police officer, garbage truck driver, meat cutter, truck stop attendant, gas station attendant, saw mill worker, and a livestock handler. These jobs are predominantly manual labor positions or driving jobs.

Claimant sustained previous work-related injuries. The first injury was on August 17, 1990. While working for a sanitation company in Spearfish, South Dakota, Claimant injured his hand with a sharp object. The second injury was on January 9, 1997. Claimant suffered a injury to his knee while working for the Belle Fourche Livestock yard, in Belle Fourche, South Dakota. The third work related injury occurred on April 2,

2001. While working in Douglas, Wyoming, Claimant bent over to pick up an object and his back gave out.

Claimant's most recent work related injury occurred on March 11, 2005, while employed for Roundup Building Center (Employer). Claimant was descending a ladder at work, he missed a step, and fell to the floor landing on his buttocks and left side. Claimant went on a break for a short period of time and his pain continued. Employer sent Claimant to Dr. Larson, a chiropractor for his injury. Claimant did not return to work for Employer after this date.

Dr. Larson sent Claimant to Dr. Watt. On April 26, 2005, Dr. Watt ordered an MRI scan and diagnosed degenerative disks at L3-L4 and L4-L5 with disk protrusion. Claimant underwent epidural steroid injections and physical therapy, neither of which provided any substantial relief. Dr. Watt performed a two-level fusion surgery on Claimant's spine at levels L3-4 and L4-5 on June 29, 2005. Following surgery, Claimant continued to have pain and numbness in his legs and low back. Dr. Watt referred Claimant to Dr. Dietrich with Rehab Doctors for assistance in setting work restrictions. Claimant was also referred to PT-OT Professionals Inc. for a functional capacity evaluation (FCE).

Ms. Kathleen Boyle, PT, performed the FCE on January 31, 2006. During the FCE, Claimant reported his pain as 5/10 without the pain level increasing during the day. Ms. Boyle noted that Claimant had the ability to perform most standing, walking, and carrying, but did need assistance to maintain balance. Claimant could not climb stairs without the use of a hand rail. Claimant also needed assistance to help him ambulate to the floor in order to kneel, crawl, and crouch. Ms. Boyle noted that Claimant was able to sit for 60 minute intervals and stand static/dynamically for 55-60 minutes. Claimant had obvious lower extremity weakness and gait difficulties. Ms. Boyle report stated, "Timothy is capable of working an 8 hour day in a Sedentary Work Category at this time. Work which minimizes lifting, carrying and allows for sit to stand as needed, will increase his ability to be physically successful." Ms. Boyle found that Claimant put forth maximum voluntary and full effort when testing.

Dr. Dietrich, a specialist in physical medicine, diagnosed Claimant with lumbar degenerative disk disease, status post-lumbar fusion, and bilateral lower extremity radiculitis. On March 8, 2006, Dr. Dietrich provided Claimant with return to work instructions. Claimant was not allowed to lift more than 20 pounds, and instructed to limit standing and walking to 3-4 hours. Claimant could work in a sedentary type position with frequent position changes. Dr. Dietrich referred to Ms. Boyle's FCE for additional details.

On June 19, 2006, Dr. Watt noted that Claimant was able to perform light to moderate activities and was not prohibited from working a 40-hour week. Because, Claimant had reached maximum medical improvement (MMI) Dr. Watt released Claimant from his care and referred Claimant to Dr. Dietrich for an impairment rating and to determine his ongoing medication needs. On July 17, 2006, Dr. Dietrich assigned an impairment rating of 10% whole person permanent partial impairment, as a direct result of Claimant's back injury.

Currently, Claimant is able to dress himself, cook his own meals, do the dishes, and do his own laundry. Claimant walks everyday to the Social Services office that is located 4-5 blocks from his residence to check job listings. He can stand for 10-20 minutes

without a rest, depending upon the day. He can also sit for 20-40 minutes without changing position. Claimant agrees that he can lift up to 20 pounds from his waist to above shoulder range. Claimant's sleep is disturbed by pain on a regular basis. He reports lying down several times a day to rest and alleviate the pain in his lower back and legs. Claimant has given up recreational activities such as bowling, horseback riding, and motorcycle riding. Since his injury, Claimant continued to pitch horseshoes on a regular basis. Claimant pitched horseshoes in four tournaments in 2005, after receiving his back injury.

Claimant participated in a horseshoe tournament three days before his fusion surgery and again about 60 days after his fusion surgery. Claimant testified that he is unable to bend over and pick up the shoes, but he can throw the shoes which weigh less than 2 pounds each. Claimant participated in tournaments through 2007. Claimant has transportation issues, as he no longer drives a car and has no way of getting to the events. Claimant did not inform Dr. Watt or Dr. Deitrich of his horseshoe pitching activities.

Claimant has not worked since his accident, except for a brief period in August 2007. Claimant's sister was in charge of the cleaning crew for the Glencoe campground outside of Sturgis, South Dakota. Claimant attempted to help her during the 2007 Sturgis Motorcycle Rally. Claimant was unable to tolerate the work due to his physical limitations.

Claimant registered with the Department of Labor (DOL) local office in Spearfish (formerly known as Job Service or the SD Career Center). When Claimant registered, he indicated that he wanted his resume withheld from the website, preventing potential employers from reviewing it. Claimant also listed only his most recent work history and limited his hours of availability. Claimant listed his desired jobs to landscaping and grounds keeping work. Claimant would go to the DOL office frequently and request the job listings. Claimant would research the job further if it appeared to be within his capabilities. At the time of the hearing, Claimant's status with the DOL local office was inactive since February 2008. The listings that Claimant picked up from the local office after that date would not have included a complete job description because he was not active.

In addition to going to the DOL local office, Claimant met with Lori Linco, a rehabilitation counselor with the Department of Human Services. Ms. Linco arranged situational assessments, or trial work activities to observe Claimant in actual work- type situations. Situational assessments were done at Hoseth Auto, AmericInn Lodge & Suites, Belle Fourche Library. These assessments were observed by Ryan Bush, a vocational aid at the Northern Hills Job Shop. Another assessment was done at the Belle Fourche Area Community Center, and observed my Ms. Linco herself. Linco testified in her deposition, "he did an okay job. He did better than actually I expected he would in terms of the customer service and delving into something like typing…he's not a great typist, but he hunts and pecks with the best of them." Ms. Linco noted that he did have problems ambulating, and getting up the stairs. Ms. Linco, Ryan Bush, and Ryan Young, Mr. Bush's successor, continued to work with Claimant offering job development packages and assistance finding a job.

Vocational rehabilitation counselors, Mr. Rick Ostrander and Mr. Thomas Karrow evaluated Claimant and each made a report. Mr. Ostrander reviewed Claimant's medical history, reviewed Claimant's work history and conducted a personal interview. In this case, Mr. Ostrander did not conduct a professional job search. Mr. Ostrander concluded that Claimant was obviously unemployable. Mr. Ostrander testified that he could not identify any appropriate occupations consistent with Claimant's limitations and restrictions within his labor market, nor was he able to identify any appropriate retraining that would allow Claimant to become employable. Mr. Ostrander considered the job search done by Claimant reasonable.

Mr. Karrow completed two evaluations for Claimant. The first evaluation was completed on December 21, 2005, and the second evaluation was completed on July 31, 2008. Mr. Karrow opined in each report that Claimant was employable and given his skills and physical capabilities he was also a candidate for retraining programs. Karrow considered the medical opinions of Dr. Dietrich and Dr. Watt as well as the results of Claimant's FCE when he provided job leads to Claimant.

Mr. Karrow identified several over the road trucking positions, which he felt were within light to medium duty. Mr. Karrow also found employment opportunities available to the Claimant in the Deadwood gaming industry. The casino and hotel positions identified by Mr. Karrow were generally sedentary or light duty. Mr. Karrow continued to supply Claimant with Job leads through his attorney up until the date of hearing. Mr. Karrow further concluded that Claimant would benefit from retraining such as supervised keyboarding classes; computer aided drafting courses, and business management courses.

Claimant's workers' compensation benefit rate $329.41 per week, which is $8.23 per hour based on a 40-hour work week. For purposes of determining the cost of commuting, the State of South Dakota mileage rate is $0.37 per mile for travel.

Other facts will be determined as necessary.

Analysis

Extent and Degree of Claimant's Disability

The issue addressed at hearing is whether Claimant is permanently totally disabled under the odd-lot doctrine and/or SDCL §62-4-53.

Employer/Insurer has admitted that Claimant suffered a work related injury and that he was paid temporary total disability benefits and permanent partial disability benefits. Employer/Insurer has denied that Claimant is entitled to any other workers' compensation benefits.

Claimant alleges that he is permanently and totally disabled under the odd-lot doctrine. The standard for determining whether a claimant qualifies for odd-lot benefits is set forth in SDCL §62-4-53, which provides in part:

> An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision §62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

SDCL §62-4-52(1) defines community as, "the area within sixty road miles of the employee's residence." SDCL §62-4-52(2) defines "sporadic employment resulting in an insubstantial income" 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.

There are two recognized ways that Claimant can make a prima facie showing that he is entitled to benefits under the odd lot doctrine. *Eite v. Rapid City Area Sch. Dist., 2007 SD 95, ¶21, 739 NW2d 264*, 270.

> 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 v. Brooks Const. Ser.*, 2006 SD 80, ¶28, 721 NW2d at 471 (citations omitted)).

Claimant first argues that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category. At the time of the hearing, Claimant was 51 years old; he did not complete high school, but holds a GED, and has a work history consisting of manual labor and hands on type work. Claimant argues that although Dr. Dietrich released him to work, his restrictions coupled with his age, education, and training make it difficult to find work within his restrictions.

Claimant has not met his prima facie burden by showing that he is obviously unemployable. Claimant's physical condition is that he is restricted to sedentary to light duty work. Claimant is not to lift over 20 pounds and alternate sitting, standing and walking. No medical provider has opined that Claimant is physically incapable of working. Claimant also failed to shown that his age, education and training is a barrier to sedentary or light duty work or his ability to be retrained. Claimant holds a GED and has demonstrated that he has the ability to learn new tasks during his situational assessments. Mr. Ostrander even testified that if Claimant was to be offered a position as a hotel clerk, specifically the night shift "that is something that would be reasonable to try".

Claimant also testified that he was in pain that at times can be severe and disabling. Claimant has not met his burden to demonstrate that his pain is so severe, continuous and debilitating that he cannot work. The medical records and testing, along with the expert medical testimony, do not support such a finding. Dr. Dietrich, Dr. Watt, and Ms. Boyle agrees that Claimant is capable of working as long as he stays within his physical restrictions. Additionally Claimant testified that he remains active and takes care of his personal cooking and cleaning, goes on frequent walks and continued to participate in competitive horseshoe throwing even after his work related injury. Based on the evidence presented and the opportunity to observe Claimant at hearing, this trier of fact was not convinced that claimant is in continuous, severe and debilitating pain.

Claimant has failed to demonstrate obvious unemployability. [T]he 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. *Id*. (quoting *Peterson v.Hinky Dinky*, 515 N.W.2d 226, 231 (S.D. 1994). SDCL §62-4-53 requires

Claimant to “introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile.”

Mr. Ostrander considered the job search done by Claimant reasonable, he testified,

> I think that what Mr. Warren has done is extensive, and I think it’s beyond reasonable. I have a hard time categorizing a job search for this man as reasonable when I can’t identify work that he can do.
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> So I can’t identify a labor market where I can say, you know, this job fits within your limitations and your capabilities, it will pay you your benefit rate, you should have gone out and applied at it. I can’t identify one that does.

What Claimant presented as evidence of his job search at hearing is definitely extensive, but sheer volume of job listings is not enough to meet the burden to demonstrate a reasonable effort to find work and the unavailability of suitable employment. “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.” SDCL §62-4-53. In this case, Claimant did pick up available job listings from Job Service in Spearfish or Social Services in Belle Fourche, however, when he was registered with Job Services, he limited the type of work he would find by stating he was interested in landscaping and gardening type jobs, jobs that were clearly not within Claimant’s restrictions. Claimant testified that he did not look for jobs in the newspaper. Claimant testified that he never looked into transportation options to Deadwood to work in the gaming industry. Claimant testified that he didn’t consider working in Deadwood, 27 miles away because many of the jobs there required a gaming license and because he thought he had judgments against him and therefore was not eligible. Claimant failed to even inquire as to the qualifications needed to obtain a gaming license. While Claimant had asked Lori Linco for help with other things such as vehicle repairs to help him search for a job, he did not ask for assistance in obtaining a gaming license, based upon the assumption that he would not be eligible. A search of South Dakota records did not reveal any judgments again Claimant. Additionally, Claimant only followed up on a few job leads sent by Mr. Karrow. The facts in the matter at hand are distinguishable from *Eite* in which the Claimant followed up on every lead and made reasonable efforts to seek employment.

“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.’” Id. (quoting *Sandner v. Minnehaha County*, 2002 SD 123, ¶13, 652 NW2d 778, 783). The facts that are in evidence, would not justify a person of ordinary reason and fairness in concluding that Claimant’s efforts to seek employment were reasonable.

Based on the evidence presented, Claimant has not made a prima facie showing that he is entitled to benefits. Claimant's petition for benefits is hereby denied. The Department entered an Order on Employer/Insurer's Motion for Partial Summary Judgment on August 13, 2008. Claimant has received an over payment of temporary total disability payments, and overpayment of permanent partial disability benefits. Claimant owes Employer/Insurer a total of $4754.06 in overpayments.

Conclusion

Employer/Insurer shall submit proposed 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 ten (10) days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit 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, Employer/ Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 31st day of December, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M. Dockter
Administrative Law Judge