January 19, 2011

Wm. Jason Groves
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LETTER DECISION

J. G. Shultz
Woods, Fuller, Shultz & Smith PC
PO Box 5027
Sioux Falls, SD 57117-5027

RE: HF No. 44, 2007/08 – Timothy Warren v. Roundup Building Center and The Hartford

Dear Mr. Groves and Mr. Shultz:

By Order of the Sixth Judicial Circuit, this matter was remanded to the Department of Labor for further proceedings pursuant to SDCL §62-4-53. The issue presently before the Department is whether Employer/Insurer carried its burden of proof, and whether Claimant has met his ultimate burden of persuasion.

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.
>
> 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 S.D. 80* ¶28*, 721 N.W.2d 461*, 471 (citations omitted)).

The Circuit Court determined that Warren had established a prima facie case based on the second avenue of recovery, showing that he made a reasonable effort to find work and was unsuccessful. The burden of production then shifts to the Employer/Insurer to show some form of suitable work is regularly and continuously available to the Claimant.

Employer/Insurer "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).

A functional capacity evaluation (FCE) was done to determine Warren's physical restrictions. The FCE indicated that Warren can sit continuously for 40 to 60 minutes at a time, dynamic/static stand frequently for up to 55-60 minutes at a time, stand/walk frequently for up to 30 minutes or 300 foot increments. Warren is to avoid stooping and can infrequently crouch, crawl, kneel, and climb stairs. He can frequently reach at and above shoulder level and lift up to 20 pounds. Dr. Dietrich returned Warren to work full time and provided restrictions in accordance with the FCE results. Dietrich stated that "sedentary work duties with frequent changes allowed" would be appropriate for Warren. Dr. Watt also returned Warren to work full time doing light duty work. No doctor limited Warren from working full time. It is important to note that Warren did not inform either Dr. Watt or Dr. Dietrich that he continued to participate in horseshoe pitching at a competitive level before and after his back surgery. This information was not taken into account when either doctor returned Warren to work or provided physical restrictions. Upon learning of Warren's horseshoe activities, Dr. Watt stated in a letter, "clearly his horse shoe throwing activity has more than proven that he is able to participate in moderate levels of activity. If his employer has anything along that line, I would be more than happy to clear him for said work."

In support of its burden to show that some form of suitable work was available to claimant, Employer/Insurer provided the testimony of Tom Karrow, a vocational rehabilitation counselor. Karrow evaluated Warren and prepared reports on two occasions. The first evaluation as completed on December 21, 2005 and a second evaluation was completed on July 31, 2008. Karrow opined in each report that Warren was employable and given his skills and physical capabilities, he was also a candidate for retraining. Based on the FCE results and the doctor's recommendations that Warren

was capable of light to moderate activities, Karrow identified several jobs within Warren's restrictions at the time of the hearing that paid wages at or near his workers' compensation rate of $329.41 per week plus mileage of $0.37 per mile to account for a commute within his 3community.

Although the law does not require an employer actually to place a claimant in an open job, an employer must show more than mere possibility of employment. *Capital Motors, LLC v. Schied*, 2003 SD 33 ¶ 12, 660 N.W.2d 242 (citations omitted). At the time of hearing, Karrow had identified three positions at Northern Hills Training Center in Spearfish. The first position was a life skills care worker, a sedentary position that paid between $9.00 and $10.00. A second position was a residential staff supervisor. Karrow toured the facility and had spoken with Dan Cross, the person who runs the Northern Hills facility to ensure that the position was within Warren's physical limitations. Karrow also identified a third position for a direct support supervision position paying $10.00 to $10.50, which was sedentary work.

At the time of the hearing, Karrow also identified positions that were currently open at Premier Bankcard in Spearfish. Karrow had personally spoke to the human resources department and ensured that the position was within Warren's physical limitations. Karrow further opined that Warren was eligible for keyboarding classes that would improve his skills necessary for this position. [1]

Employer/Insurer has met its burden by showing that positions were actually available which were not sporadic employment resulting in an insubstantial income as defined by law. Employer has demonstrated that there were specific positions regularly and continuously available and open in the community in which the Claimant is residing that accommodated all his restrictions and physical limitations.

SDCL § 62-4-53 provides, "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."

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. By doing so, Claimant prevented potential employers from reviewing his resume. Claimant also listed only his most recent work history and limited his hours of availability. Claimant limited 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

[1] While Warren had testified that although he practiced keyboarding on his own, he had never taken a keyboarding class. Despite having no formal training, Lori Linco, a rehabilitation counselor testified that he "hunts and pecks with the best of them." She also indicated that Warren had potential to learn on the job skills.

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.

Warren placed undue limitations on the kind of work that he was willing to accept. "The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible." SDCL§ 62-4-53.

Rick Ostrander, a vocational rehabilitation expert, testified live at hearing on behalf of Claimant. Ostrander testified that Warren's job search efforts were extensive and beyond reasonable. Ostrander further concluded that there wasn't a program of rehabilitation that would restore Warren to the necessary wage requirements. Ostrander testified that any work available would be physically outside of Warren's capabilities. Ostrander testified that he considered Warren's age, educational background, IQ, and occupational orientation when concluding that vocational rehabilitation would be futile.

Warren was 51 years old at the time of hearing. His IQ revealed he was of average intelligence. Warren's reading skills and his learning orientation more suited him to hands on learning. While retraining may be difficult for Warren, it would not be impossible or futile. (see *Wise v. Brooks Const. Ser.,* 2006 S.D. 80, 721 N.W.2d 461). The opinion of Karrow carried greater weight because he conducted a job search specifically for Warren in regard to all his limitations. The Department accepts the testimony and opinions of Karrow as being more persuasive. The testimony of Ostrander that Claimant conducted a good faith work search and that retraining is futile is rejected.

Although the burden of production may shift to the Employer/Insurer, the ultimate burden of persuasion remains with Warren. *Sandner*, 2002 SD 123, ¶ 22, 652 NW2d at 748). Based upon the live testimony at hearing and the evidence presented, Warren has failed to meet his ultimate burden of persuasion to show that he is permanently and totally disabled pursuant to SDCL §62-4-53. His request for permanent total disability benefits must be denied and his petition for hearing dismissed. Pursuant to an earlier Decision issued by the Department, 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 $4,754.06 in overpayments.

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.

Sincerely,

Taya M. Runyan
Administrative Law Judge