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

**CYNTHIA CLYDE,**
**Claimant,**

**HF No. 178, 2009/10**

v.

**DECISION**

**HARDEES,**
**Employer,**

**and**

**AMERICAN FAMIY INSURANCE,**
**Insurer,**

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation 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 Rapid City, South Dakota. Claimant, Cynthia Clyde, appeared personally and through her attorney of record, Bradley J. Lee. Jeremy Nauman represented Employer, Hardees and Insurer, American Family Insurance.

**Issues**

1. Nature and Extent of Disability
2. Past Disability Benefits

**Facts**

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

In June of 2007, Cynthia Clyde (Clyde or Claimant) began working as a fast food cook at Hardees, in Belle Fourche, South Dakota. Clyde worked between 35 and 40 hours a week earning $8.30 per hour. On May 19, 2009, while walking into the walk in cooler, she slipped and fell on the ramp. Clyde landed on her right side and the cooler door hit her left elbow.

Clyde took ibuprophen and continued to work her regularly scheduled shift. She returned to work the following day. She was still in pain and found it difficult to complete her assigned duties. When her symptoms failed to improve, Clyde sought treatment with Dr. Douglas Larson, a chiropractor, to treat her elbow, cervical, thoracic and rib pain. Clyde continued to have problems completing her work duties due to pain. Dr. Larson gave her work restrictions, and

eventually she was taken off the work rotation for a period of several weeks. Clyde received workers' compensation benefits from June 25, 2009 until August 31, 2009.

On June 13, 2009, Clyde began treating with Jim Bohl, PAC at Belle Fourche Regional Medical Clinic. He initially focused his treatment on her rib pain, and later her elbow discomfort. Bohl eventually referred Clyde to an orthopedic specialist.

On August 10, 2009, Clyde saw Dr. Wayne Anderson for an independent medical exam (IME) at the request of Employer/Insurer. Dr. Anderson subsequently issued a report. It was his opinion that Clyde's elbow pain was not related to her work related injury. Based on Dr. Anderson's opinion, Employer/Insurer denied further benefits.

Hardee's manager Leslie Barker agreed to create a greeter position that would allow Clyde to return to work within her restrictions. As a greeter, she would be required to work split shifts, seven days a week. Her duties would include greeting customers and having them fill out comment cards. Clyde was not allowed to interact with or take breaks with the other employees. On September 2, 2009, Clyde received a call from Barker indicating that she was unable to justify the greeter position and that Clyde was terminated. Clyde applied for and received unemployment benefits from September 2009 until December of 2010.

Clyde continued to seek treatment including physical therapy and injections from Dr. Eric Sigmond. Clyde was referred to Dr. Richard Little, an orthopedist, for her neck and back pain. Dr. Little ordered an MRI which revealed bulging disc in her neck and upper back. Clyde was then referred to Dr. Peter Vonderau at The Rehab Doctors. Dr. Vonderau noted left-sided neck pain, pain radiation along the posterior aspect of the left upper extremity to the hand, numbness and tingling of the ulnar three digits of the left hand, and based on the MRI, broad based bulging from C4-5 through C6-7. Dr. Vonderau recommended injections and pain medication. Clyde was unable to afford the injections and did not have health insurance. On January 19, 2010, Dr. Little gave Clyde work restrictions of no push, pull, or lift greater than 5 to 10 pounds. She continued to pursue physical therapy, chiropractic adjustments and other conservative treatment including prescription pain medications and a Home TENS unit.

At the request of Employer/Insurer, Dr. Anderson reevaluated Clyde and on April 13, 2011, issued an addendum to his original IME report. Dr. Anderson changed his initial opinion and ultimately determined that the fall at work did cause Clyde's elbow and cervical pain and that Dr. Little's restrictions were reasonable. Based on these new opinions from Dr. Anderson, Insurer accepted the claim as compensable and reimbursed Clyde $11,298.77 for medical expenses and mileage incurred during the denial. Insurer however did not pay any temporary total disability benefits after August of 2009.

After Clyde was able to pay her outstanding medical bills, she resumed treatment with Dr. Vonderau. Dr. Vonderau performed a C7-T1 interlaminar epidural injection on June 23, 2011, however Clyde did not report significant relief from the injection. Dr. Vonderau ordered a MRI and recommended Claimant undergo a functional capacity evaluation (FCE). The FCE took

place on September 14, 2011, at Workwell Systems Inc. After reviewing the FCE results, Dr. Vonderau stated that Clyde had reached maximum medical improvement (MMI) and assigned a 5% whole person impairment rating. He also gave her the following permanent restrictions:

> I recommend permanent restrictions per the functional capacity evaluation, namely, she may lift up to 10 pounds occasionally, 5 pounds frequently, and 2 pounds constantly. She may carry up to 20 pounds occasionally, 10 pounds frequently, and 4 pounds constantly. She is to avoid repetitive bending or twisting of the cervical spine. She may push up to a maximum of 46 pounds and pull up to a maxim of 35 pounds.

While receiving unemployment benefits, Clyde made at least two potential job contacts per week or approximately 150 job contacts in the Belle Fourche area. In January 2011, Clyde put her job search on hold while she recovered from pneumonia and dealt with some flooding issues at her home. She then took several basic computer skills classes and worked with the Job Services in Spearfish to update her resume and become more marketable. In the summer of 2011, Clyde resumed her job search. She worked with the Job Service in Spearfish to find jobs that she felt she was capable of doing and they helped her apply. Clyde had two knee replacement surgeries in early 2012. When she was healed enough to walk, she returned to Job Service and continued her work search.

Jim Miller, a certified vocational rehabilitation counselor, evaluated Clyde and issued a report on July 28, 2011. Miller reviewed Claimant's medical history, work history and educational background and conducted a personal interview. Miller concluded that Clyde would be limited to sedentary type work, with no restrictions on hours. Miller identified her transferable skills and identified at least 9 job openings in the local area market that matched Clyde's transferable skills and residual functional capabilities.[1] He noted that formal retraining beyond basic computer skills and on the job training would not be indicated. In his report he noted that her job search had been minimal and severely restricted by only applying in the Belle Fourche area. It was his opinion, "that Ms. Clyde is not obviously unemployable and she should actively participate in a job search including the surrounding area of Belle Fourche."

William Tysdal, a certified vocational rehabilitation counselor, evaluated Clyde and issued a report on May 14, 2012. Tysdal reviewed Claimant's medical history and records, her work history and her job search following her injury, and various vocational reports and depositions made in conjunction with her workers' compensation case. Tysdal also conducted a personal interview with Clyde. Based on his evaluation and interview, Tysdal concluded that Clyde was unable to perform a full range of sedentary work. He also concluded that based on her work history, Clyde did not have any transferable skills that would transfer to any sedentary occupations. Tysdal reviewed more than 216 entry level jobs, and could identify no jobs that met

[1]Miller testified live at the hearing, he admitted that the jobs he had previously identified, would not be suitable for Clyde and that he had failed to inquire with any of those positions if they would be able to accommodate an employee with restrictions and physical limitations like Clyde.

both the wage requirement and the sedentary level of physical restriction for Clyde. Tysdal opined that Clyde had made a reasonable job search and was not a candidate for retraining. Tysdal further opined,

> It is therefore my opinion that Ms. Clyde's physical condition, in combination with her age (57 years), training, and experience and the type of work available in her community, causes her to be unable to secure anything more than sporadic employment resulting in insubstantial income. There is no work available in her community, either full time or part time which pays wages equivalent to, or greater than, her workers' compensation benefit rate ($299.00/week).

In July of 2012, Clyde was referred by Employer/Insurer to Catalyst Return to Work, a company that assists disabled workers in finding for work at home opportunities. Catalyst arranged for Clyde to interview with All Facilities, Inc. to do telephone survey work. Following an interview process, she was offered the position. The offer indicated that the work is supported employment in that the first 400 to 750 hours is subsidized by the insurance carrier. At All Facilities, Clyde was paid $8.00 per hour for a forty hour week. She was given a headset that connected to her phone and a call list. She was to make calls and ask people to fill out a survey. Clyde was expected to spend approximately 40 minutes of connect time per hour[2]. While working for All Facilities Inc., Clyde experienced increased pain symptoms from doing her work duties.

Because of her increased pain complaints, Clyde returned to Dr. Vonderau on July 18, 2012. Dr. Vonderau increased the dosage of her pain medication, Gabapentin, up to 3600mg per day and noted "If her symptoms do not improve, there is little for me to offer her. She would need to consider finding a different job." Clyde continued working for All Facilities Inc., but due to her increased pain medicine she was often groggy and unable to stay awake to complete her duties. She also continued to have increased pain symptoms. On August 20, 2012, Clyde returned to Dr. Vonderau. He noted, "It seems as though her new job has been irritating for her, although it falls within restrictions. If she cannot tolerate her current job, she may need to consider employment elsewhere." Clyde did not request any work station accommodations from All Facilities. She decided to stop working for All Facilities Inc. and August 20, 2012 was the last day she completed any work duties. Clyde did not submit any other time sheets or make any further contact with All Facilities. On November 1, 2012, All Facilities sent a letter indicating that they considered the position abandoned.

Other facts will be determined as necessary.

[2] All Facilities expected its employees to complete a minimum of two successful survey interviews per hour for 8 hours per day. Based on its experience, All Facilities determined that approximately 16 calls per hour or 40 minutes of connect time should produce those results.

**Analysis**

***Nature & Extend of Disability***

*Whether Claimant is permanently and totally disabled under the odd-lot doctrine and/or SDCL 62-4-53.*

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). In this matter, Clyde alleges that she 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(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 she 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 SD 80, ¶28, 721 NW2d 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 S.D. 123, ¶13, 652 N.W.2d 778, 783(citations omitted).

Clyde argues that her physical condition, coupled with her education, training, and age make it obvious that she is in the odd-lot total disability category. Dr. Vonderau testified via deposition that Clyde's injuries, symptoms and condition are now permanent. Clyde requires assistance from Social Services that provides home health care four days a week. The home health providers do housekeeping, take out the garbage and assist Clyde with her daily activities such as bathing and grooming. She testified that she has difficulties cooking, cleaning, and is unable to care for her pets[3]. Clyde relies on Prairie Hills Transit bus for transportation on longer trips because driving more than short distances increases her pain.

At the time of the hearing, Clyde was 58 years old. She obtained her high school diploma in 1973, and has not taken any college or vocational classes since that time. Clyde was a stay at home mother from 1973 until 1995, raising four sons. Clyde entered the workforce in 1995, when her marriage ended and she needed to support her family. Her work history from 1995-2007 primarily consisted of fast food service and for a brief period, sewing for Black Hills Special Services.

Based on her physical condition, education, training, and age, it is obvious that Clyde is in the odd-lot disability category. Clyde has made a prima facie case that she is entitled to benefits under the odd lot doctrine. As Claimant has made a prima facie case, the burden is shifted to Employer/Insurer to show that some form of suitable work was regularly and continuously available to 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/ Insurer must demonstrate the specific

[3] Since her injury, Clyde has given away her dog and cat as she was unable to care for them.

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 argued at hearing that there were jobs available in Clyde's community, and that her work search had been inadequate, however its own expert, Jim Miller admitted during his testimony that the jobs he had previously identified, would not be suitable for Clyde and that he had failed to inquire with any of those positions if they would be able to accommodate an employee with restrictions and physical limitations like Clyde. Despite Miller's testimony, Employer/Insurer still argue that work is regularly and continuously available to Claimant that fits within her work restrictions and meets or exceeds her workers' compensation rate. Employer/Insurer specifically points to a position at All Facilities, Inc. which is open and currently available. During the hearing testimony, a representative of All Facilities offered to allow Clyde to interview for her former position doing telemarketing. Although they acknowledge that she had difficulties performing her job duties in the past, All Facilities is willing to provide accommodations to assist her.

Claimant argues that the position offered by All Facilities Inc. is falls outside the work restrictions set forth by Dr. Vonderau. Dr. Vonderau testified that Clyde should avoid repetitive bending or twisting of the cervical spine. The position requires Clyde to be on the phone, filling out paperwork or reading from a script for at least 320 minutes in an 8-hour day. Clyde argues that these activities require frequent to constant bending and twisting of the neck. In addition her pain medication makes it difficult for her to complete the job duties, even when within her restrictions, because she is groggy and tired.

Claimant further argues that the position at All Facilities is not a bona fide opportunity, because it is sheltered employment, with wages based on her worker's compensation rate and subsidized by Employer/Insurer. Employer/Insurer paid a weekly fee of $185 to All Facilities, in addition to reimbursing them for 100% of Clyde's wages and all expenses related to her employment during the subsidized period. [4]All Facilities Inc., is a Pennsylvania based company offers return to work opportunities to disabled workers and allows them to earn a wage that is based not the on the type of work, but rather on the individual employee's workers compensation rate. It cannot be said that this type of work is "regularly and continuously available to the employee in the community." There is not case law in South Dakota regarding the issue, but other jurisdictions have addressed similar employment situations, and their analysis provides some guidance. The United States Department of Labor has held that these types of employment relationships can be valid as a retraining or a means to reenter the work force, however as a an employment opportunity as it is being presented in this case, the hearing officer held, "[o]nly a truly benevolent employer would deplete its own coffers to establish its disabled workers in positions with other employers." *In the Matter of: Celestine Hawkins v. Newport News Shipbuilding and Dry Dock Company*, 2001 WL 321199 (DOL Ben. Rev. Db) March 29, 2001. The Department further held, "cloaking Claimant's position at Smart with the indicia of employment does not

[4] Including phone expenses and postage during the subsidized period of employment.

mean that a true employment relationship exists. In this case, Newport News Shipbuilding engineered the process whereby Smart Telecommunications hired Claimant and then agreed to pay Claimant's wages from its own coffers. Therefore, Newport News Shipbuilding is Claimant's true employer and the position at Smart Telecommunications represents sheltered employment." *Id*. In Illinois, the Workers' Compensation Commission reviewed a similar employment offer from the same company involved in the present case, All Facilities Inc. The hearing officer concluded, "the All Facilities job was not a legitimate job offer and was outside Petitioner's restrictions as well, and will consider this matter as is no job offer has been provided." *Carl Hill v. General Electric Company*, 05 WC 16042 (Ill. Indus. Com'n Feb. 5, 2009).

Claimant was able to demonstrate the unavailability of suitable employment by showing that she made reasonable efforts to find work and was unsuccessful. After being terminated from Hardees, Clyde submitted applications and continued to follow up with potential employers on over 150 occasions in the Belle Fourche area for jobs. In a small community with limited number of jobs available, Clyde continued to fill out applications, follow up with potential employers on multiple occasions and made a meaningful attempt to find work. No employers interviewed her and she was not offered a position. Although Clyde worked improve her computer skills and took several computer skills classes and update her resume, but was still unsuccessful in attempting to find work.

The ultimate burden of persuasion remains with the claimant. Clyde has made a prima facie case for benefits and made a reasonable work search in her community. A single offer of employment for a subsidized position does not meet the Employer's burden to show that work is regularly and continuously available to Claimant that fits within her work restrictions and meets or exceeds her workers' compensation rate. Claimant has met her ultimate burden to show that she is entitled to benefits under the odd-lot doctrine and/or SDCL 62-4-53.

***Past Disability***

*Whether Claimant is entitled to past disability benefits.*

Following Employer/Insurer's denial of benefits in August of 2009, Clyde did not receive any disability payments from Insurer until the time of the hearing [5]. Clyde argues that she is entitled to past disability payments plus interest from August 10, 2009.

Employer/Insurer paid disability benefits from June 25, 2009 until August 31, 2009, when her claim was denied. Claimant did not work from August 31, 2009 until July 2012 when she was hired by All Facilities Inc. Employer/Insurer argue that because she collected unemployment insurance benefits during that period of time, she held herself out to be ready, willing and able to work and therefore was not incapacitated and entitled to disability benefits.

[5] Insurer agreed to pay permanent partial disability to Clyde with the understanding that if there was an award for permanent total disability benefits, that payment would be offset.

Professor Larson's treaties on Workers Compensation Law states "total disability in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial." *Larson's Workers' Compensation Law* § 83.01 (2000). SDCL 61-6-2(3) requires that an individual be "able to work and is available for work" to be eligible for unemployment insurance benefits. The fact that an individual is determined to be eligible for unemployment insurance benefits doesn't automatically mean that she cannot be disabled for the purposes of workers' compensation. Claimant is entitled to past disability benefits in this case.

**Conclusion**

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant'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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 8th day of May, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ *Taya M. Runyan*

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Taya M. Runyan
Administrative Law Judge