DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

JOHN MCCOY, **HF No. 27, 2015/16**

Claimant,

v. **DECISION**

GEBHARD TRUCKING, INC.,

Employer,

and

PROTECTIVE INSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Sarah E. Harris, Administrative Law Judge, on May 4, 2016, in Rapid City, South Dakota. Claimant, John McCoy, was present and represented by Jon F. LaFleur. The Employer, Gebhard Trucking, Inc. and Insurer, Protective Insurance Company, were represented by Thomas J. Von Wald.

Legal Issue:

The legal issue presented at hearing is stated as follows:

Whether McCoy is entitled to permanent total disability benefits?

Facts:

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

1. At the time of the hearing Claimant, John McCoy, was 52 years old.

2. Claimant grew up on a small ranch near Martin, South Dakota and graduated from Bennett County High School in 1981.

3. After high school, Claimant worked for Bair Ford in Martin, South Dakota from 1982 through 1993. While at Bair Ford, Claimant worked as a car cleaner, parts

department manager, and service department manager. Claimant received training in mechanics and service advising.

4. From 1993 through 2010, Claimant had several different jobs ranging from vehicle repair/service manager, to hospital maintenance manager to construction services.

5. From 1998 through 2007, Claimant worked at McKie Ford in Rapid City, South Dakota as the service manager and service advisor. While at McKie Ford, Claimant received service advisor training that involved taking online classes at night. As a service advisor, Claimant spent approximately five hours of his day working on the computer or talking on the phone.

6. In November of 2010, Claimant started working for Employer as a FedEx Ground driver. His job duties while working for Employer included loading trucks, delivering packages and receiving packages in various communities in the Rapid City area. Packages would range anywhere from an envelope weighing a pound up to 150 pounds. Claimant worked full time for Employer until January 6, 2014.

7. On January 6, 2014, Claimant was injured at work when he slipped on some ice and fell on his back. Claimant was able to finish working that day but later experienced continued pain and numbness.

8. Claimant initially treated at Regional Urgent Care on January 7, 2014 for numbness in both hands and back pain.

9. Claimant was only able to go back to work for a short time following his injury, until Dr. Wogu took him off any kind of work on January 20, 2014.

10. On January 15, 2014, Claimant had an MRI of the cervical spine showing:

    a. Large right posterior disc-osteophyte at C4-5 causes severe ventrolateral spinal canal stenosis and mild right ventral cord flattening. There is also severe right neural foraminal stenosis at this level.
    b. Moderate to severe bilateral neural foraminal stenosis at C5-6 and moderate right neural foraminal stenosis at C6-7.

11. Regional Urgent Care referred Claimant to Dr. Wogu for a neurosurgical consult. Claimant saw Dr. Wogu on January 20, 2014. Dr. Wogu suggested an anterior cervical C4-5 and C5-6 discectomy, fusion and plating.

12. Claimant's surgery was delayed when a heart condition was found at the pre-surgery physical. After Claimant was cleared for surgery by the heart doctor a second surgery date was set in April 2014.

13. Before Claimant had surgery, Dr. Wogu decided to depart Rapid City and Claimant was then referred to neurosurgeon, Dr. Jonathon Wilson of the Black Hills Neurosurgery & Spine Firm.

14. After examining Claimant on April 25, 2014, Dr. Wilson felt that Claimant's symptoms were not definitive for a neurologic etiology and prescribed physical therapy before considering any further surgical intervention.

15. Claimant underwent physical therapy from May 21, 2014 through July 7, 2014 at ProMotion Physical Therapy.

16. On June 18, 2014, Dr. Wilson referred Claimant to the Rehab Doctors in addition to continuation of the physical therapy.

17. Claimant started treating with Dr. Peter Vonderau a board certified physiatrist on July 17, 2014. Dr. Vonderau treated Claimant with C7-T1 interlaminar epidural steroid injections. The injections did not give Claimant much relief.

18. Dr. Vonderau recommended another trial of physical therapy at the PT Center. Shortly after an initial evaluation at the Physical Therapy Center, the therapy was canceled when the workers' compensation insurer would not approve the treatment.

19. Following the injections, Claimant decided to get a different doctor surgical opinion given the fact that he had two different recommendations regarding surgery.

20. Claimant saw Dr. Schleusener of Black Hills Orthopedics on October 1, 2014 for a surgical consult. Dr. Scheusener did not feel Claimant was a surgical candidate and sent him back to Dr. Vonderau for continued care.

21. Besides the epidural steroid injection Dr. Vonderau has prescribed Flexeril, Gabapentin, Lyrica and Cymbalta medications to help control the pain. Claimant did not receive significant relief, but the Cymbalta helps some with Claimant's ability to sleep. The Cymbalta can only be taken once daily and Claimant takes it at night for the sleep benefit.

22. On October 23, 2014, Dr. Vonderau placed Claimant at maximum medical improvement, calculated a 1% whole person impairment rating for Claimant and suggested that a Functional Capacity Evaluation be performed.

23. The Functional Capacity Evaluation (FCE) took place on December 30, 2014.

24. The evaluation report reflected that Claimant put forth maximum voluntary effort, noted by computer analysis of the test scores, along with repeat testing through-out the evaluation. The evaluation noted balance problems, increased pain and

slowing when attempting to walk the equivalent of a city block. Claimant is unable to stoop/bend, squat, crouch or ladder climb. Crawling and kneeling are rarely tolerated (approximately 0 to 5 minutes per day). Stair climbing, overhead reaching, forward reaching, balancing, push/pulling, lifting are tolerated infrequently (approximately 6 to 25 minutes per day). Sitting is tolerated occasionally with frequent changes in positioning constantly observed during testing. Claimant is able to frequently push/pull 10 lbs. and infrequently push/pull 15 lbs. Claimant is able to safely lift and carry 14 lbs. 50 feet, 10 lbs. 100 feet, and 0 lbs. 300 feet on an infrequent basis. Claimant poorly tolerates lifting due to limited upper extremity mobility, weakness in his upper extremities and upper back and pain. Claimant functions within the Sedentary Category of Work established by the US Department of Labor and coincides with the guidelines set forth by Align Networks with an 8 hour work day.

25. On January 21, 2015, Dr. Vonderau recommended permanent restrictions per the FCE. Namely, Claimant may lift up to 11.5 pounds occasionally, 5 pounds frequently, and 2 pounds constantly. Claimant may carry up to 14 pounds occasionally, 7 pounds frequently, and 3 pounds constantly. Claimant may push up to a maximum of 10 pounds and pull up to a maximum of 15 pounds. Claimant may stand or walk on a frequent basis; he may sit occasionally and is to limit bending or twisting to less than 10 times per hour.

26. Claimant received total temporary disability (TTD) and permanent partial disability (PPD) payments until February 3, 2015 and no further benefits have been paid.

27. Claimant conducted a job search after it was determined that his permanent restrictions would not allow him to return to his job with FedEx. He reviewed job listings with the State and used online resources such as Monster Job Services and Job Diagnostics. Claimant also met with a job search counselor lined up through State Vocational Rehabilitation over a three month period.

28. Claimant was only offered one interview and at that interview determined the job required standing all day which was beyond his medical limitations.

29. Claimant requested that Dr. Lynn Meiners, a Licensed Professional Counselor, conduct an evaluation to determine Claimant's employability and the feasibility of retraining. Dr. Meiners has a Ph.D in Psychology with twenty years of experience as a rehabilitation counselor and extensive education in rehabilitation testing and conducting batteries of testing to determine what disabled persons might be able to do.

30. After reviewing Claimant's medical records and the FCE, Dr. Meiners met with Claimant on April 29, 2016, to determine his residual functional capacity. Dr. Meiners also did vocational testing on Claimant which consisted of ability and aptitude testing.

31. Dr. Meiners rendered the opinion that Claimant was not employable. Stating during the hearing, “there are no available jobs, given his post-injury profile, that he could perform on a consistent basis that would lead to him earning as great as his workers’ compensation rate” “there’s no reasonable expectation from a rehabilitation standpoint that retraining would lead to employment.”

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

Analysis:

In this case, the Department must determine whether McCoy is entitled to permanent total disability benefits (PTD). SDCL 62-4-53 defines permanent total disability:

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

The South Dakota Supreme Court has recognized at least two avenues by which a claimant may make the required prima facie showing for inclusion in the “odd-lot” category. Eite v. Rapid City Area Sch. Dist. 51-4, 2007 SD 95, ¶21, 739 N.W.2d 264, 270-71.

> First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment within claimant’s limitations is actually available in the community. A claimant may show obvious unemployability by: 1) showing that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category, or 2) persuading the trier of fact that he is in the kind of continuous severe and debilitating pain which he claims.

> Second, if the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or regulated to the odd-lot category, then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has made reasonable efforts to find work and was unsuccessful. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant. Even though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

Id. (quoting Wise, 2006 SD 80, ¶28, 721 N.W.2d at 471 (citations omitted)).

The test to determine whether a prima facie case has been established is whether there "are facts in evidence which if unanswered would justify persons of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain." Sandner v. Minnehaha County, 2002 SD 123, ¶13, 652 N.W.2d 778, 783. It is not disputed that Claimant suffered a work injury. At dispute are the continuing effects from the work injury which led to the work restrictions. The FCE restrictions are based on Claimant's pain and reduced physical movements. Employer and Insurer argue that the cause of Claimant's pain and reduced physical movement were initially unknown. Dr. Vonderau then later diagnosed Claimant's pain as a combination of myofascial pain and nerve irritation in the neck and that these issues were permanent and caused by the January 6, 2014 injury. Employer and Insurer argue that Dr. Vonderau stated that Claimant's pain was a result of nerve irritation from a disc bulging at several levels or his disc osteophytes, and thus not related to the work injury.

However, Dr. Vonderau stated that there could have been more than one component to Claimant's pain. Dr. Vonderau felt the January 6, 2014 work injury was the major contributing cause of Claimant's myofascial pain and nerve irritation because Claimant was not having any problems before the injury and had symptoms afterward. Dr. Vonderau stated that, Claimant was not having symptoms prior to the fall at work, "and then he developed symptoms that were persistent and consistent throughout the time [Dr. Vonderau] saw him. He had degenerative changes in his neck and you know certainly in a fall, when you already have stenosis in your neck, can cause dynamic irritation or compression of the nerves and, therefore, the symptoms he was describing." Employer and Insurer has not offered any evidence on medical causation, as such, the Department accepts Dr. Vonderau's opinion that the January 6, 2014 fall at work was a major contributing cause of the myofascial pain and nerve irritation in the neck.

To establish that Claimant is in the odd-lot disability category, Claimant must prove that "[his] physical condition, in combination with [his] age, training, and experience, and the type of work available in [his] community, causes [him] to be unable to secure anything more than sporadic employment resulting in insubstantial income." Wagaman v. Sioux Falls Construction, 1998 SD 27, ¶21, 576 N.W.2d 237, 241. Claimant is currently 53 years old. Claimant has a high school education. The only education beyond high school was the training through Ford to keep certified as a

mechanic and service advisor. Claimant has experience in the managerial field as a hospital maintenance manager, mill foreman, service manager and service advisor. Along with these duties Claimant also has experience in the customer service field on both computers and talking on the phone.

Claimant has proven by a preponderance of the evidence that he is obviously unemployable. To that end, Claimant's evidence of obvious unemployability includes testimony from her medical expert and the vocational expert. Dr. Vonderau used the recommendations in the FCE to set permanent restrictions for Claimant. He can lift up to 11.5 pounds occasionally, 5 pounds frequently, and 2 pounds constantly. He can carry up to 14 pounds occasionally, 7 pounds frequently, and 3 pounds constantly. He can push up to a maximum of 10 pounds and pull up to a maximum of 15 pounds. He can stand or walk on a frequent basis, sit occasionally and is to limit bending or twisting to less than 10 times per hour. The FCE indicated Claimant can static stand infrequently and sitting is tolerated occasionally with frequent changes in positioning consistently. During the hearing, this was evident by Claimants needed to stand up and adjust his position several times.

Dr. Lynn Meiners opined that because Claimant's capacities to reach, lift, sit, stand or walk are below minimum requirements of consistent sedentary or light jobs, it is not realistic to believe that based on the degree of his work limitations, Claimant will find employment that would accommodate his restrictions. Dr. Meiners is of the opinion that due to the severity of Claimant's pain and limitations, his age and employment related experience and skills, that Claimant is obviously unemployable. As a qualified vocational rehabilitation specialist, Dr. Meiners studies the labor market and how residual functional capacities allow placement in that labor market. Dr. Meiners looked at jobs primarily through South Dakota Department of Labor's available jobs to analyze and identify what type of jobs Claimant could do post injury. A combination of age, education, residual functional capacity, past work history, abilities, aptitudes and the totality of the vocational analysis lead to the opinion that there are not any feasible jobs that Claimant could consistently perform that would allow him to earn as great as his workers' compensation rate. Dr. Meiners believes that for reasons of age, pain limitations and work limitations established by the FCE and treating physician, additional job searches would be futile. She has stated that "there's no reasonable expectation from a rehabilitation standpoint that retraining would lead to employment." Dr. Meiners explained that Claimant's age and trouble with reading comprehension being in the 15 percentile would not make him a candidate for a four-year or graduate college program which would lead to jobs that are primarily intellectual cognitive to avoid the physical demands. She also explained that if Claimant could complete a vocational school program, it would not lead to full-time employment because there is no employment that could be identified which Claimant could do on a consistent basis.

Taking his work restrictions into consideration, Claimant has made an attempt to secure other employment by reviewed job listings with the State and using online resources such as Monster Job Services and Job Diagnostics. Claimant also met with a job search counselor lined up through State Vocational Rehabilitation for over a three

month period. During Claimant's job search he applied for fourteen jobs and of those jobs received only one interview at which he discovered that the duties were far beyond his limitations. Dr. Meiners testified the job search was reasonable and that further job search would be futile.

Dr. Meiners testimony is sufficient to make a prima facie showing that Claimant is "obviously unemployable" because his physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category. Therefore, the burden shifts to the Employer to show that some suitable work is regularly and continuously available to the Claimant. Employer "may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2)." SDCL 62-4-53. Employer must demonstrate the specific position is "'regularly and continuously available' and 'actually open' in 'the community where the claimant is already residing' for persons with *all* of claimant's limitations." Shepard v. Moorman Mfg., 467 N.W.2d 916, 920 (S.D. 1991). Employer/Insurer has not identified any form of suitable work that is regularly available or presented any witnesses, experts or otherwise to refute the evidence presented by Claimant.

Claimant has proven he is obviously unemployable. Even if he was not obviously unemployable, he made a reasonable effort to find work and was unsuccessful; as such a prima facie case has also been made through the second avenue of recovery. Either way, Claimant has made a prima facie showing, the burden the shifted to Employer to show some form of suitable work was available for Claimant. Employer did not present any evidence that any suitable job was regularly and continually available in Claimant's community. The Department finds that Employer/Insurer have not met their burden of showing that suitable work within claimant's limitations is actually available in the community. Claimant has proven obvious unemployability. Claimant's physical condition, combined with his age and lack of available work with restrictions, establishes that Claimant is unable to secure meaningful employment or at least nothing more than sporadic employment resulting in an insubstantial income.

Conclusion:

Claimant has demonstrated that he is permanently and totally disabled pursuant to SDCL 62-4-53. Claimant's request for permanent total disability benefits is granted and Employer is responsible for payment of permanent total disability benefits to Claimant. Claimant shall be awarded any outstanding interest that is owed. The Department shall retain jurisdiction as to medical benefits.

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer/Insurer shall have an additional twenty (20) days from the date of receipt of Claimant's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they

do so, Claimant shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 18th day of November, 2016.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

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