

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

**LINDA MUELLENBERG,**

**HF No. 33, 2022/23**

**Claimant,**

**v.**

**DECISION**

**REDFIELD ACE HARDWARE d/b/a  
INVESTMENT ENTERPRISES,**

**Employer,**

**and**

**FIRST DAKOTA INDEMNITY 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 Michelle M. Faw, Administrative Law Judge, on July 10, 2024. Claimant, Linda Muellenberg, was present and represented by Renee and Michael Christensen of Christensen Law. The Employer, Redfield Ace Hardware d/b/a Investment Enterprises, and Insurer, First Dakota Indemnity Company were represented by Charles Larson and Josh Baumgart of Boyce Law Firm.

***Facts:***

1. In 2016, Linda Muellenberg (Muellenberg) began working for Redfield Ace Hardware (Employer) which was insured for workers' compensation purposes by First Dakota Indemnity Company (Insurer).

2. On December 3, 2020, Muellenberg sustained a work-related injury to her left eye when she was struck by the metal end of a bungee cord. She reported the incident to her boss. He took her to the emergency room in Redfield.
3. Due to the work injury, Muellenberg required surgery on her left eye.
4. Muellenberg was released to full duty by Dr. Dustin Dierks.
5. Since she has been released to full-duty work, no permanent work restrictions have been imposed by any medical provider.

The issue before the Department of Labor & Regulation (Department) is whether Muellenberg is permanently and total disabled. SDCL § 62-4-53 provides,

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

Under the odd-lot doctrine, the ultimate burden of persuasion remains with the claimant to make a prima facie showing that his physical impairment, mental capacity, education, training and age place him in the odd-lot category. If the claimant can make this showing, the burden shifts to the employer to show that some suitable work is regularly and continuously available to the claimant.

*McClafin v. John Morrell & Co.*, 2001 S.D. 86, ¶ 7, 631 N.W.2d 180, 183.

The South Dakota Supreme Court (Court) has recognized two avenues by which a claimant may make a prima facie showing under odd-lot. *Id.* First, “A claimant may show ‘obvious unemployability’ by: 1) showing that [her] ‘physical condition, coupled with [her] education, training and age make it obvious that [she] is in the odd-lot total disability category,’ or 2) ‘persuading the trier of fact that [she] is in the kind of continuous, severe and debilitating pain which [she] claims.’” *Id.* at ¶ 8.

Second, if “the claimant's medical impairment is so limited or specialized in nature that [she] 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 [she] has made [ ] ‘reasonable efforts’ to find work” and was unsuccessful. *Id.* 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.’” *Id.* at ¶ 9.

First the Department will consider Muellenberg’s physical condition and whether she has made a prima facie showing of odd-lot eligibility. Muellenberg argues that she is permanently and totally disabled under odd-lot due to her age, training, and the type of work available in her community. She asserts she is unable to get to a place of employment. Muellenberg sent a letter to her treating ophthalmologist, Dr. Alex Ringeisen, which included a list of symptoms she experiences. These symptoms include (1) difficulty judging the distance of people, places and objects causing her to be uncomfortable driving outside of the rural country; (2) trouble clearly seeing when she is looking down table height or kitchen counter height; (3) feeling that she has increased fluid build up in her eye several times a week; (4) difficulty seeing in the center of her vision versus seeing long the outside at times in a circular shape; (5) seeing objects pass by her quickly when she turns her head; and (6) nausea due to an eye pulling pressure sensation causing her to close her eye. Dr. Ringeisen confirmed that her symptoms were related to her work-related traumatic eye injury. At his deposition, Dr. Ringeisen opined that following the recovery period, some people with one good eye feel comfortable driving and others do not. He leaves the choice of whether to drive up

to the discretion of the patient. He confirmed there was no medical reason why she was not able to drive.

Employer and Insurer assert that Muellenberg has failed to prove she is obviously unemployable. They further assert it is against public policy to allow a claimant to rely on their own subjective self-limitations to determine employability. Employer and Insurer have offered the expert opinion of Dr. Douglas Martin. Dr. Martin reviewed Muellenberg's medical records and performed an independent medical examination of Muellenberg on December 12, 2023. His examination found similar symptoms to those identified by Muellenberg and confirmed by Dr. Ringeisen. His test found she had 20/70 for her best uncorrected visual acuity. She also tested positive to abnormal eye position which could result in headaches, double vision, and reading difficulties. Muellenberg struggled with the visual field examination. Dr. Martin opined there was no medical reason why someone with partial vision in one eye cannot drive and noted that he has seen numerous patients who have partial vision in one eye drive both personal and commercial vehicles. He further opined that Muellenberg did not have any work restrictions related to the work injury of December 3, 2020.

The Department relies on expert medical opinion when assessing a claimant's physical condition. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992). Muellenberg suffers from a variety of symptoms due to her work-related injury. These symptoms make her feel uncomfortable driving a vehicle outside of gravel roads in the rural area where she lives. However, neither Dr. Ringeisen nor Dr. Martin have assigned her medical restrictions which would limit her ability to drive. Additionally, she

testified that she is willing to drive herself from her home in Zell, South Dakota to her mother-in-law's home approximately five miles away but would not drive to Redfield which is ten miles away.

Muellenberg has offered the case of *Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, 956 N.W.2d 812. In *Billman*, the Court concluded “[t]he Department must take a holistic approach to a claimant's condition, as each factor affects the severity of the others. The statute explicitly requires the Department to examine the “employee's physical condition, in combination with the employee's age, training, and experience[.]” *Id.* at ¶ 37. *Billman* is distinguishable from Muellenberg's matter as Billman was assigned work restrictions by his medical providers. Therefore, Billman had more than his subjective complaints to prove his physical limitations. Muellenberg does not have such medically assigned restrictions.

While Muellenberg may have symptoms that make her uneasy about driving, her own feelings, without formal restrictions related to her condition, fail to prove she is obviously unemployable. Further, Muellenberg has not claimed she is in continuous, severe, or debilitating pain. Therefore, the Department concludes that Muellenberg is not obviously unemployable under the odd-lot category.

While Muellenberg has failed to meet her prima facie showing for odd-lot disability, to be thorough, the Department will also consider her potential for employment pursuant to SDCL § 62-4-53.

Muellenberg has offered vocational expert Tom Audet. Audet conducted a vocational interview with Muellenberg on October 23, 2023, and he also reviewed her medical records. He then produced a report on January 12, 2024. In his report, Audet noted limitations he believed were established by medical evidence. These limitations

include difficulty with depth perception, dizziness, poor ability to judge distances, limited ability to use computers due to dizziness and headaches, and blurry vision with every blink. He considered the fact Muellenberg lives in Zell and would need to commute to Redfield or another town for employment as a key factor in her employability. Audet researched home-based employment that would not require driving, but all the jobs required use of computers. He concluded that Muellenberg is unemployable due to her vision problems, and her location. He also concluded that retraining would not be feasible as she would have to use computers. At hearing, he opined that based on his education, training, and experience to a reasonable degree of vocational certainty, Muellenberg's inability to drive and her inability to stay on task to complete work assignments due to her need for breaks would keep her from being successfully employed. Audet was asked whether his opinions were based on what Muellenberg feels she is able to do, and he affirmed. He also stated that it was obvious that if there were no restrictions then Muellenberg is employable.

Employer and Insurer have offered the vocational assessment of Chad Kollars. Kollars identified multiple jobs in Redfield that he believed claimant could perform, including work at Subway, Cura, Advantara, and ACE hardware. He contacted the employers and informed them of Muellenberg's limitations. The prospective employers were welcoming of the help and expressed willingness to accommodate individuals with limitations. Kollars' assessment was based on the medical opinions of Muellenberg's treating physicians which indicate Muellenberg could drive and did not have any formal work restrictions. Kollars testified at deposition that he considered Muellenberg's fear of driving and wanting to drive only in rural areas in his assessment. He considered Redfield to be rural.

The Department finds Kollars' assessment more persuasive as, unlike Audet's, it did not rely on Muellenberg's subjective views of her condition. Kollars found jobs within Muellenberg's community as defined by SDCL § 62-4-52<sup>1</sup> which sets a community as "the area within sixty road miles of the employee's residence." There are jobs available ten miles away in Redfield which offer more than sporadic employment resulting in an insubstantial income.

Therefore, for the reasons stated above, the Department finds that Muellenberg is not permanently and total disabled.

Employer and Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision within thirty (30) days from the date of receipt of this Decision. Muellenberg shall have an additional thirty (30) days from the date of receipt of Employer and Insurer proposed Findings and Conclusions to submit objections thereto and/or to submit its 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, Employer and Insurer shall submit such Stipulation along with an Order consistent with this Decision.

Dated this day 13 of January 2025.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION



Michelle M. Faw  
Administrative Law Judge

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<sup>1</sup> SDCL 62-4-52(a) provides an exception to the community definition if "[t]he employee is physically limited to travel within a lesser distance." As stated above, her own subjective opinions are not sufficient to support a conclusion of unemployability, and without formal restriction she has not proved physical limitation.