SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

VERNON SATTLER,
Claimant,

HF No. 65, 2004/05

v.

DECISION

JAMES UTNE d/b/a UTNE CONSTRUCTION,
Employer,

and

HIGHLANDS INSURANCE GROUP,
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 on March 1, 2006, in Watertown, South Dakota. Claimant, Vernon Sattler, appeared personally and through his counsel, Ronald L. Schulz. Lisa Hansen Marso represented Employer, James Utne d/b/a Utne Construction, and Insurer, Highlands Insurance Group (Employer/Insurer). Testimony on behalf of Claimant was presented by Claimant, his son, Mike Sattler, and vocational rehabilitation counselor Rick Ostrander. Employer/Insurer called rehabilitation consultant James Carroll. The following were marked as Exhibits and were admitted into evidence:

EXHIBIT #1 Claimant's Medical Records (One 3-ring binder);
EXHIBIT #2 CV of Rick Ostrander;
EXHIBIT #3 Report of Rick Ostrander;
EXHIBIT #4 CV of James Carroll;
EXHIBIT #5 Report of James Carroll – December 9, 2005;
EXHIBIT #6 February 7, 2006 Supplemental Report of James Carroll; and
EXHIBIT #7 Claimant's Answers to Interrogatories.

Also admitted into evidence were the Affidavits of Dr. Michael Vener, Dr. Thomas Ripperda, and the deposition of Claimant.

The Department took official notice of the First Report of Injury filed with the Department of Labor. The parties stipulated that Claimant's weekly compensation rate pursuant to SDCL 62-4-3 is $266.66.

On February 6, 2006, the Department conducted a telephonic prehearing conference pursuant to ARSD 47:03:01:11, 47:03:01:13, and 47:03:01:14. On that same day, the

Department entered a Prehearing Order pursuant to ARSD 47:03:01:15, which provided that the sole issue to be presented at hearing was to be:

> Whether Claimant is permanently, totally disabled under the odd-lot doctrine.

Summary of the evidence:

Claimant's Claim and Petition for Hearing was filed with the South Dakota Department of Labor on or about October 7, 2004. Employer/Insurer filed its Answer on or about November 10, 2004 and in its answer admitted:

1. That Claimant was in the employment of Employer on or about January 10, 2001;
2. That during the course of employment with Employer that Claimant sustained a crush injury to his lower extremities resulting in a right tibial plateau fracture and a left ankle fracture;
3. That sufficient notice was given;
4. That Claimant was under the Provisions of the South Dakota Workers' Compensation Law;
5. That Claimant was paid for his 20% impairment rating and medical expenses; and
6. That restrictions were imposed by Claimant's treating doctors and Claimant was discharged from his employment on or about December 1, 2002.

Claimant's date of birth is March 15, 1948. At the time of the hearing, he was 57 years of age. Claimant is divorced and lives alone in an apartment in Watertown, South Dakota. Claimant has an eighth grade education. He has difficulty reading and writing. Claimant never served in the military and never attempted to obtain his GED.

Claimant's employment history consists of carpentry work, farm work, press machine operator, self-employed farmer, and manual labor. Claimant began working for Employer as a construction laborer on September 21, 1998.

On January 10, 2001, Claimant sustained a crush injury to his lower extremities when a concrete or cinderblock basement wall fell on him. Claimant sought immediate medical care at Prairie Lakes Hospital in Watertown, South Dakota. Dr. Vener examined Claimant and after several diagnostic tests, diagnosed Claimant with a "type one open comminuted lateral tibial plateau fracture." The radiology report of Z.L. Hendricks, M.D., described the fracture as a "comminuted depressed fracture of the lateral two-thirds of the tibial plateau with associated fracture and angulation of the proximal shaft of the fibula." Dr. Hendricks also examined the CT results and further described Claimant's tibial injury as a "Hohl type III split depressed fracture of the lateral aspect of the tibial plateau. There is gas within the hematoma about the fracture site indicating the compound nature of the fracture." According to Dr. Vener's records, Claimant's injury was serious, required immediate surgical intervention, and carried a risk of infection that

could threaten the limb. Dr. Vener's records also show that Claimant received permanent damage. Dr. Vener wrote in his examination notes that Claimant "is at a high risk for arthritis down the road and his knee will never be the same."

On January 10, 2001, Dr. Vener performed emergency surgery on Claimant's right lower leg, during which Dr. Vener confirmed that Claimant suffered a "serious degloving injury that extended all the way up to the knee. I could place my hand beneath the skin. The fat had been completely torn loose from the underlying fascia." In addition to performing an open reduction internal fixation of the fracture and irrigation and debridement of skin and subcutaneous fat, Dr. Vener reattached Claimant's meniscus to his tibia. Claimant was kept in the hospital with a drain in the degloved region and on antibiotics.

On January 12, 2001, Claimant's medical providers discovered Claimant had suffered a fracture in his left ankle as well. Dr. Hendricks found Claimant to have a "transversely oriented minimally displaced fracture at the distal fibular tip approximately a cm below the level of the [tibial] plafond."

Dr. Vener discharged Claimant from inpatient care on January 15, 2001. Claimant was given Vicodin for pain. He was referred for physical therapy at Prairie Lakes Hospital in its Outpatient Rehab Center. Claimant underwent physical therapy until April of 2001. On several occasions early in his course of physical therapy, Claimant complained of swelling in his lower extremities with weight bearing and dependent positioning. Later in the course of physical therapy, Claimant complained of edema that did not go away. Joel Lapka, PT, noted on March 29, 2001, that Dr. Vener "states the swelling throughout [Claimant's] lower extremity is a normal consequence of [Claimant's] injury." On April 21, 2001, Lapka noted "[p]ersistent chronic edema throughout [Claimant's] bilateral lower extremities, particularly on the right."

On May 30, 2001, Claimant returned to Dr. Vener for a recheck. Dr. Vener noted that Claimant had been "working a couple of hours each day and is still having difficulty. He has burning type dysesthetic pain in his leg below the knee with activities." Dr. Vener found Claimant to be doing well except for "[c]hronic dysesthetic type pain likely related to his crushing injury." Dr. Vener referred Claimant to Dr. Donald Frisco for another opinion. Dr. Frisco examined Claimant on June 19, 2001. He opined that Claimant suffered from "dysesthesia and hyperesthesia" due to his crush injury and "right lower extremity neuropathic pain secondary to crush injury" and "right lower extremity edema secondary to crush injury." Dr. Frisco prescribed Neurontin and physical therapy for aggressive range of motion and strengthening. On August 7, 2001, Dr. Frisco noted that Claimant continued to have chronic leg pain and suggested that Claimant undergo a Functional Capacity Evaluation to determine permanent restrictions.

On September 21, 2001, Dr. Frisco opined that Claimant's permanent restrictions should be as follows:

> Lift floor to waist 15 pounds, waist to eye level 50 pounds, two handed carry 70 pounds, one handed carry 36 pounds, pushed 67.5 pounds and pulling 60 pounds. Frequently during his day he can sit, work arms overhead-standing, work bent over-standing/stooping, walk, repetitive trunk rotations-standing, repetitive trunk rotation-sitting. Constantly he can stand, work arms overhead-supine. Occasionally during a workday he can work bent over-sitting, work squatting/crouching, climb stairs, climb a ladder. He is to never crawl, repetitive squat, or work kneeling. His balance is inadequate for walking on beams or scaffolds. His balance is adequate for work on a ladder or walking on even surfaces.

Claimant continued to treat with Dr. Frisco and continued to have chronic pain in both lower extremities, including his right knee. On January 21, 2002, Claimant underwent diagnostic arthroscopy with chondroplasty of the medial femoral condyle and hardware removal of the right tibia. The surgery did not relieve Claimant's right knee pain. Dr. Vener prescribed and performed injections to Claimant's right knee.

On September 11, 2002, Dr. Vener noted that Claimant was working full-time but continued to have pain with activity. Claimant was using a knee brace at that time. Dr. Vener assessed Claimant at maximum medical improvement and assigned a 20% impairment to the right lower extremity.

Claimant began treatment with Dr. Jerry Blow, a Sioux Falls physiatrist, on April 15, 2002. Dr. Blow found persistent bilateral lower extremity pain and recommended pool therapy and medication.

Throughout 2002 and 2003, Claimant continued to suffer bilateral lower leg pain, lower leg swelling, and right knee pain. Claimant's medical providers conducted back studies, vascular studies and nerve conduction studies in an effort to find the source of Claimant's lower leg pain.

Claimant continued working part-time within his restrictions for Employer. He was discharged by Employer on or about December 1, 2002. Claimant drew unemployment until April of 2003, when he was notified that his benefits had expired and Employer would not be recalling him to work. Claimant has not worked since that time.

On January 24, 2004, Claimant was evaluated by Dr. Mark Fox, an orthopedic surgeon, who opined that Claimant had spinal stenosis, but that it was not the cause of his leg pain. Dr. Fox recommended an EMG study to determine if Claimant's back was the source of his lower extremity pain.

Dr. Frisco interpreted a nerve conduction study performed on Claimant in February of 2004. Dr. Frisco found the study to be "abnormal" and found electrodiagnostic evidence of the following:

1. Distal motor and sensory polyneuropathy with both axonal and demyelinating features. There is chronic and inactive denervation/reinnervation bilaterally but only in the lower extremities.
2. Superimposed, bilateral peroneal nerve entrapment at the knees with chronic and inactive denervation/reinnervation. The denervation/reinnervation is worse in the peroneal distribution compared to the tibial distribution most likely from the combination of neuropathy and nerve entrapment/double crunch [sic] phenomenon.
3. No evidence of lumbosacral radiculopathy.

On April 29, 2004, Dr. James W. Labesky, M.D., performed a complete physical on Claimant at Employer/Insurer's request. Dr. Labesky found Claimant to be suffering from neuropathic pain secondary to Claimant's injury, and degenerative arthritis in the right knee, "likely secondary" to the work injury. Dr. Labesky further opined, "I have no doubt that [Claimant's] pain is related to the injury that he sustained in January 2001." Dr. Labesky prescribed Vioxx or Tylenol for Claimant's symptoms.

On June 23, 2005, Claimant was seen by Dr. Thomas Ripperda, rehabilitation specialist, who found Claimant to have:

1. Traumatic injury to the bilateral lower extremities with right tibial plateau fracture as well as fibular fracture and a left distal fibular tip fracture.
2. Degloving injury of the right lower extremity.
3. Evidence of motor greater than sensory, primarily axonal peripheral neuropathy.
4. Neuropathic pain.
5. Left lower extremity edema per history.

Dr. Ripperda also opined on Claimant work restrictions:

> In regards to return to work, the patient did have a functional capacity evaluation which suggested essentially medium duty work classification and also had a physical residual functional capacity assessment, for I believe Social Security, which outlines essentially a light duty functional ability. I do feel the patient should be able to perform work activities. Based on the functional capacity evaluation, I do feel that the patient should be able to lift 15 pounds from floor to waist, up to 50 pounds from waist to eye level. I would not recommend that he carry more than 50 pounds, and he should only be carrying this for very short distances. Push/pull force of 50 pounds should be appropriate based on the functional capacity evaluation. He can perform standing and walking activities on a frequent basis but allow [sic] to have frequent rest breaks. The patient should be able to perform walking or standing activities for approximately four hours in an eight-hour day. He should be able to perform stair climbing on an occasional basis. I would not recommend ladder climbing. He should be able to perform sitting activities for at least 6 to 8 hours during an 8-hour day.

Regarding Claimant's future medical care, Dr. Ripperda opined:

> The patient has some ongoing symptoms of burning in bilateral lower extremities. I do feel that many of these remaining symptoms are likely related to a potentially worsening peripheral neuropathy and it may be beneficial for the patient to be evaluated by a neurologist with special interest in peripheral neuropathies to help potentially further evaluate causes for the worsening of findings on the EMG.

The medical evidence establishes Claimant's current condition:

1. Claimant is in continuous pain, with constant burning sensation in his lower legs;
2. Claimant's pain interferes with his sleeping;
3. Claimant is unable to stand or sit or lay down for any significant period of time without aggravation of his symptoms requiring that he change positions frequently;
4. Claimant has difficulty driving for any significant period of time; and
5. Claimant must elevate his feet every day to reduce the swelling in his lower extremities.

Vocational evidence:

Richard B. Ostrander, a vocational rehabilitation counselor hired by Claimant, testified as a vocational expert. Mr. Ostrander conducted a structured interview of Claimant. He gathered information about Claimant's educational background, skills, and work history. Mr. Ostrander also reviewed Claimant's medical records. He researched approximately 700 employers for work suitable for Claimant. He testified:

> Well, I researched approximately 700 employers, and typically, an individual with [Claimant's] educational background and work history may have in a labor market of this size access to 1,000 to 2,000 different jobs, laboring jobs, physical jobs, things similar to what he's done. But when taking into account his medical restrictions from Dr. Ripperda, essentially, we're left with work that's going to give him the opportunity to sit down at least half the time.
>
> From a practical standpoint, we just don't find any medium or heavy-duty jobs that would work. We're looking at light to sedentary. He doesn't have any transferable skills to those jobs so now we're looking at unskilled or entry-level light and sedentary work.
>
> The only thing I was able to identify potentially were production jobs. I did identify three types or broad classifications based on O*NET categories of production jobs that might - - I use the word "might" - - fit within his capabilities.

After identifying these jobs, Mr. Ostrander conducted a labor market survey of Claimant's community. Mr. Ostrander made direct telephone contact with employers

and was "unable to identify any employers that had work that fit within [Claimant's] qualifications and his medical restrictions." He explained:

> The only [position] that I could find that didn't require a GED or a high school diploma which would have work at or above his worker's compensation benefit rate didn't have any openings and it was only on a temporary basis, and that was OEM Worldwide. No one else had work either that was within his physical capabilities, within his academic qualifications, or at or above his work comp benefit rate.

Mr. Ostrander opined:

> [Claimant] is not employable. The only work that I could find is in the electronics assembly, temporary positions or positions paying less than his benefit rate, and even if there were positions open on a full-time basis that he could apply for, he doesn't have any chance of being hired. He doesn't have any of the worker traits they look for. He has no experience.
> . . .
> So we have a 57-year-old disabled individual with an eighth grade education who is functionally illiterate with no experience competing for these jobs, so even if they were open, he would have no chance of securing employment. But I couldn't even find any regular availability of full-time work - - permanent full-time work at or above his work comp benefit rate.

Mr. Ostrander performed academic achievement testing, which revealed:

> His reading and spelling are severely deficient, at the second grade level. He's functionally illiterate. Arithmetic is at the fourth percentile, or the sixth grade level. Essentially he's capable of doing simple addition, subtraction, and one- and two digit multiplication or division, very poor with fractions, decimals, or anything beyond that..

Mr. Ostrander further opined that there was "no chance" that Claimant could "even get a GED." He explained:

> [G]iven [Claimant's] very limited educational background and achievement level at age 57, I don't think that there's any chance that he could even get a GED. I considered sending him back to school for that, but he's functioning at the second grade level. The GED was rewritten in 2001, I believe, and about 25 percent of high school graduates can't pass it. It's become much more stringent.
>
> The fact that he hasn't been able to advance beyond the second grade throughout his entire adult life being exposed to situations where that would be a useful skill is indicative that he's not going to be successful at it.

Mr. Ostrander summarized his opinions:

> [Claimant] is a 57-year-old man who was involved in a work related injury which has resulted in significant functional limitations which interfere with his capacity for work. As a result of those limitations, he has been unable to return to his former employment and no work can be identified within his community that would fit within all of his limitations, as well as his vocational capabilities. It is noted that many employers indicated their employees would have to have a GED or high school diploma. Other employers indicated that they would have to have good basic math skills. [Claimant] shows severely deficient academic skills in reading, spelling and math. If he were to attempt training to secure a GED, it is likely that this would take an extended period of time. Therefore it is this rehabilitation counselor's opinion that [Claimant] is not reasonably employable within his labor market at or above his worker's compensation benefit rate.

James V. Carroll, a vocational rehabilitation counselor, testified on behalf of Employer/Insurer. Mr. Carroll reviewed Claimant's medical records, the First Report of Injury, Claimant's deposition, and Mr. Ostrander's report. Mr. Carroll used the following work restrictions:

> For purposes of this Vocational Assessment, work related restrictions as outlined by Dr. Ripperda will be utilized, as there [sic] are by far, the most current. This includes lifting floor to waist of 15 lbs., waist to eye level of 50 lbs., push/pull of 50 lbs., a carrying of 50 lbs. for short distances, standing and walking on a frequent basis, four hours in an eight-hour day, and a sitting tolerance of six to eight hours in an eight hour day.

Mr. Carroll identified three employers in Claimant's community "that would offer employment compatible with [Claimant]'s educational/vocational background, and be within his physical capabilities as identified by Dr. Ripperda." The openings included:

> OEM Worldwide was again contacted, with Lori stating that they are hiring on an ongoing basis for positions at OEM Worldwide. She indicated they have an applicant pool of approximately 30 individuals, and have been hiring from this applicant pool. Positions are predominantly [s]edentary with minimal, if any, lifting required. Salary starts at $7.25 per hour for the day shift, and $7.50 per hour for the night shift.
>
> Newava Technology just hired in the latter part of January, two individuals for entry level Electronic Assembly. Positions were [s]edentary in nature, with no lifting in excess of [l]ight [d]uty limitations. Salary levels start, dependent upon experience, with individuals coming in at a salary level of $6.00 to $6.50 +, dependent upon experience, with raises after 90 days, and again after one year's time. While Newava just recently hired in the latter part of January two individuals, they anticipate additional openings in the future.

> In addition, I note that Technical Ordinance, in Clear Lake, South Dakota, has positions compatible with [Claimant]'s physical capabilities, as does Daktronics in Brookings, but I note that both these facilities require completion of a GED or high school diploma. Both these facilities have positions that are well within Mr. Sattler's physical capabilities, and pay a salary level of approximately $8.00 to $10.00 per hour +, but again require completion of a GED or high school diploma.

Mr. Carroll opined that "employment opportunities are available to [Claimant] in the Watertown labor market that are within his physical capabilities, and pay a salary level equal to or exceeding his Worker's Compensation Benefit Rate."

At hearing, Claimant testified that he was discouraged from looking for work because he felt that he could no longer handle working given his physical condition. Claimant testified that he contacted two people and asked them for work, but was not hired. Claimant contacted OEM Worldwide but they did not hire him. He apparently contacted Newava but was confused about where to make his application.

Analysis

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

Claimant asserts that he is entitled to permanent total disability benefits. At the time of Claimant's injury, SDCL 62-4-53 (1994) defined permanent total disability in relevant 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 claimant in the community. 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.

A recent Supreme Court opinion further defined the burdens of proof:

> To qualify for odd-lot worker's compensation benefits, a claimant must show that he or she suffers a temporary or permanent "total disability." Our definition of "total disability" has been stated thusly:
>
> > A person is totally disabled if 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.
>
> 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.
>
> We have recognized two avenues in which a claimant may pursue in making out the prima facie showing necessary to fall under the odd-lot category. 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.

McClaflin v. John Morrell & Co., 2001 SD 86, ¶ 7 (citations omitted).

> A recognized test of a prima facie case is this: "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" 9 Wigmore, Evidence, (3rd {*506} Ed.) § 2494; see Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585, 72 A.L.R. 7.

Northwest Realty Co. v. Perez, 81 S.D. 500, 505, 137 N.W.2d 345, 348 (S.D. 1965).

Based upon his testimony at hearing, the medical records, and the credible expert opinion evidence of Rick Ostrander, Claimant met his prima facie burden to show that he is obviously employable under the first prong of the "obvious unemployability" test in that his "physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category". Claimant's physical condition and his restrictions render him unable to return to his usual occupation of construction laborer. The evidence presented by Claimant through his vocational expert demonstrates that Claimant's lack of education and training hinder his ability to find work and reduce his options for finding employment within his community. Mr. Ostrander's testimony, coupled with the medical evidence, establishes that Claimant's physical condition and restrictions further limit Claimant's options for suitable employment in his community. Claimant's physical condition, combined with his lack of education and training and his relatively advanced age, meet his prima facie burden to demonstrate "obvious unemployability".

Therefore, the burden shifts to Employer/Insurer "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). SDCL 62-4-52(2) provides:

> "Sporadic employment resulting in an insubstantial income," 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. Commission or piecework pay may or may not be considered sporadic employment depending upon the facts of the individual situation. If a bona fide position is available that has essential functions that the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury the employment is not sporadic. The department shall retain jurisdiction over disputes arising under this provision to ensure that any such position is suitable when compared to the employee's former job and that such employment is regularly and continuously available to the employee.

Employer/Insurer has failed to meet its burden. The positions identified by Mr. Carroll included electronic assembler positions at Newava, EMPI, OEM Worldwide, Technical Ordinance, and Daktronics. None of the positions identified by Mr. Carroll satisfy Employer/Insurer's burden. First, the wages for the positions at Newava do not equal or exceed Claimant's workers' compensation benefit rate. Mr. Ostrander found that Newava "never start[s] anyone higher than $6 per hour." Second, the positions at Technical Ordinance, Daktronics, and EMPI require all employees have a GED or high school diploma. Claimant does not have a GED or high school diploma. Third, OEM Worldwide hires employees on a temporary basis, they had no openings at the time of

hearing, and there is no guarantee that temporary employees could "advance to full-time." Furthermore, Ostrander found that OEM Worldwide has "been shipping their positions overseas." Fourth, the evidence demonstrates that the openings at Newava and OEM Worldwide are at best "periodically" open, not "regularly and continuously open and available." Employer/Insurer failed to identify suitable work, regularly and continuously available to Claimant in his community. Employer/Insurer has failed to meet its burden under 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." Id. Claimant has met his burden of persuasion. Claimant's testimony is accepted as credible. Employer/Insurer's attempts at hearing to diminish Claimant's credibility do not persuade the trier of fact that Claimant was deceitful in his testimony, his communications with counsel, or the vocational experts, and in obtaining and following through with his medical treatment. Claimant's son's testimony is accepted as credible.

Mr. Ostrander's opinions are well reasoned, have sufficient foundation, and are persuasive. Mr. Ostrander conducted a thorough vocational evaluation and determined that Claimant is not employable. He identified the electronics assembly industry as potential employment for Claimant, but opined that given Claimant's lack of experience in the field, he "doesn't have a chance of being hired. He doesn't have any of the worker traits they look for. He has no experience." Claimant's physical condition, combined with his age, his lack of education and training, along with his physical restrictions and Mr. Ostrander's unquestionable vocational expertise support a finding that a job search would be futile.

Mr. Ostrander's opinions support a finding that Claimant is unable to benefit from vocational rehabilitation and that it is not feasible. Mr. Carroll's assertion that if Claimant could show an attempt to get a GED, he would be hired is rejected. Mr. Ostrander credibly opined that retraining is not feasible, and his opinions are accepted.

Mr. Carroll's testimony and opinions in his reports that purport to offer opinions regarding the causation of Claimant's condition and/or symptoms and Claimant's alleged non-compliance with medical treatment are disregarded by the Department as lacking in foundation, as pure speculation, and as opinions and evidence irrelevant to the issue as it is stated in the Notice of Hearing and Prehearing Order.

Based upon his credible testimony, the evidence and opinions offered by Mr. Ostrander, and the medical evidence, Claimant has met his burden of production and his burden of persuasion to show that he is "obviously unemployable" and entitled to permanent total disability benefits. Employer/Insurer failed to demonstrate that "some form of suitable work is regularly and continuously available" to Claimant in his community. Claimant met his burden to show that a work search would be futile. Claimant also met his burden to show that he is unable to benefit from vocational rehabilitation and that it is not feasible. Claimant is permanently and totally disabled under the odd-lot doctrine.

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 to submit objections thereto or to submit proposed Findings and Conclusions. 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 29th day of August, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

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Heather E. Covey
Administrative Law Judge