

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

TIMOTHY HALSTEAD,

HF No. 118, 2011/12

Claimant,

v.

DECISION

**J & R WELL DRILLING
SERVICE, LLC,**

Employer,

and

ZURICH NORTH AMERICA,

Insurer.

Background:

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 Department conducted a hearing on August 9, 2013, and issued a Decision on December 20, 2013. The Department made two rulings: (1) Timothy Halstead (Halstead) was not entitled to odd-lot benefits because he was capable of being rehabilitated; and (2) Halstead was not entitled to receive rehabilitation benefits for a four-year degree in petroleum engineering. Halstead appealed the Department's decision arguing that the ALJ should have evaluated three other four-year degree programs that were mentioned by Halstead's vocational expert, William Peniston (Peniston) during a pre-hearing deposition. Those four-year degree programs included accounting, environmental engineering, and history education. During the hearing, James Carroll (Carroll), a vocational expert hired by J&R Well Drilling Service, LLC (J&R), and Zurich North American (Zurich) testified that several two-year programs would restore Halstead to suitable, substantial and gainful employment.

Circuit Court Judge Mark Barnett remanded the case for further consideration. Judge Barnett instructions included, "[i]f ALJ Hageman considers any of the two-year or online programs to be a reasonable means of restoring Claimant to suitable, substantial and gainful employment, then no four-year programs would be necessary." "Without any statutory guidance or instructive case law, this Court cannot require ALJ Hageman to confine his consideration of retraining alternatives to only those available in Laramie." "Location of prospective employment opportunities after retraining is a factor for determining reasonableness, but not the location of retraining programs."

After the remand, additional evidence was taken by the Department in a hearing on July 15, 2015. Donald W. Hageman, Administrative Law Judge presided. Halstead was

represented by James G. Sword. J&R and Zurich were represented by William P. Fuller.

Issues:

This Decision deals with the following legal issue:

1. Whether one of the two-year programs which James Carroll testified about would be a reasonable means of restoring Halstead to suitable, substantial and gainful employment.
2. If not, whether one of the four year degree programs testified about by William Peniston would do so.

Facts:

The following facts are found by a preponderance of the evidence:

1. At all times relevant for this case, Halstead worked for J&R who was insured by Zurich for workers' compensation purposes.
2. On December 5, 2006, Halstead was injured on the job.
3. Halstead is restricted to a sedentary physical demand level B.
4. Halstead cannot return to his usual and customary employment as an oil field worker/derrick hand due to his work related injury.
5. At the time of his injury, Halstead's average weekly wage was \$797, which is nearly \$41,500 per year. 85% of \$41,500 is \$35,275.
6. Halstead currently resides in Laramie, Wyoming.
7. At the time of the first hearing, Halstead was maintaining a 2.8 to 3.0 GPA in a petroleum engineering program.
8. At the time of the first hearing, Halstead was working part-time in a deli.
9. Peniston, Halstead's vocational expert, gave Halstead a vocation test which identified Halstead's vocational interests. That test showed that Halstead had an interest and aptitude in computer programming, engineering, mathematics, math or science teaching. Mr. Peniston also identified several four-year degree programs for which Halstead had an aptitude. Those included accounting, environmental engineering and education-history (history teacher).
10. Peniston never looked at any alternative rehabilitation programs that did not involve obtaining a four-year degree.

11. During the first hearing, Carroll identified several two-year programs in various sedentary occupational fields. Carroll explained that Halstead could receive an associate degree in accounting, business administration, drafting, computer aided design, computer information systems, computer networking administration, computer web design, engineering technology/drafting, business administration and business management.
12. Peniston, Halstead's expert testified during a pre-hearing deposition that "if there were a computer program, programming program available in Laramie that would return [Halstead] to his pre-injury wage or 85 percent of it, [he] would certainly be in favor of that for retraining."
13. In the second hearing, Carroll testified that a two-year associate's degree in computers, accounting, or business administration would qualify Halstead for a job at the Wyoming Department of Family Services in Cheyenne, Wyoming, as a benefits and eligibility specialist (\$35,000-\$44,000). A two-year degree in accounting would qualify Halstead for a job at the Wyoming Department of State Parks and Cultural Resources in Cheyenne as an accounting technician (\$32,300- \$40,400). A two-year degree in a computer related field would qualify Halstead for a job at the University of Wyoming in Laramie as a computer support specialist (\$45,000) or a law enforcement dispatcher for the City of Laramie (\$35,000- \$47,000). A two-year accounting degree would qualify Halstead for an opening at Express Employment Professionals in Cheyenne as a full-charge bookkeeper (\$38,000- \$45,000). Similarly, a two-year degree in either computers, accounting, or business administration would allow Halstead to apply for the risk management specialist position at the Warren Federal Credit Union in Cheyenne (\$36,920- \$55,390). Carroll finished his testimony by clarifying that "if you have the associate's degree and have been working while you are attending school like I was advocating, you may start "at the top end of [the salary's] range."
14. Carroll testified that Cheyenne was within 60 miles of the Laramie community or within a reasonable work search area.
15. Carroll's analysis was based on the Wyoming Department of Labor's data for the wages being paid in the state of Wyoming for those occupations, supported by actual job openings within 60 miles of Halstead's residence.
16. Carroll also testified that two-year associate degrees were available in Laramie in accounting, business and finance and computer information systems. A two-year certificate was available in a number of computer related fields in Laramie or online.
17. Additional facts may be discussed in the analysis below.

Analysis:

Judge Barnett's remand order indicated that the two-year vocational rehabilitation programs must be evaluated first. Entitlement to rehabilitation benefits is governed by SDCL 62-4-5.1. That provision provides:

If an employee suffers disablement as defined by subdivision 62-8-1(3) or an injury and is unable to return to the employee's usual and customary line of employment, the employee shall receive compensation at the rate provided by § 62-4-3 up to sixty days from the finding of an ascertainable loss if the employee is actively preparing to engage in a program of rehabilitation as shown by a certificate of enrollment. Moreover, once such employee is engaged in a program of rehabilitation which is reasonably necessary to restore the employee to suitable, substantial, and gainful employment, the employee shall receive compensation at the rate provided by § 62-4-3 during the entire period that the employee is engaged in such program. Evidence of suitable, substantial, and gainful employment, as defined by § 62-4-55, shall only be considered to determine the necessity for a claimant to engage in a program of rehabilitation.

The employee shall file a claim with the employee's employer requesting such compensation and the employer shall follow the procedure specified in chapter 62-6 for the reporting of injuries when handling such claim. If the claim is denied, the employee may petition for a hearing before the department.

SDCL 62-4-5.1.

The South Dakota Supreme Court has interpreted this statute on several occasions and established a five-part test for evaluating a program:

1. The employee must be unable to return to his usual and customary line of employment;
2. Rehabilitation must be necessary to restore the employee to suitable, substantial, and gainful employment;
3. The program of rehabilitation must be a reasonable means of restoring the employee to employment;
4. The employee must file a claim with his employer requesting the benefits;
and,
5. The employee must actually pursue the reasonable program of rehabilitation.

Sutherland v. Queen of Peace Hosp., 1998 S.D. 26, ¶ 13, 576 N.W.2d 21, 25. To recover benefits, Claimant must prove all of the elements by a preponderance of the evidence. See McKibben v. Horton Vehicle Components, Inc., 2009 S.D. 47, ¶ 12, 767 N.W.2d 890, 895.

The primary focus here, per Judge Barnett's remand order, is sections 2 and 3 of the test. Where one of these two-year rehabilitation programs would restore Halstead to suitable, substantial, and gainful employment and whether those programs are a reasonable means of restoring Halstead to employment.

SDCL 62-4-55 (1) defines "suitable, substantial, and gainful employment" as employment that:

- (1) returns the employee to no less than eighty-five percent of the employee's prior wage earning capacity;

SDCL 62-4-55 (1).

85% of Halstead's prior earnings is \$35,250. An associate's degree in accounting would place Halstead's earning well above that amount, \$38,000- \$45,000. A two-year degree in a computer related field would qualify Halstead for a job earning \$45,000. A two-year degree in computer science, accounting, or business administration would qualify Halstead for a risk management specialist position earning \$36,920- \$55,390. There is no question that a two-year degree in accounting or one of the computer fields would restore Halstead to suitable, substantial, and gainful employment.

A two-year degree in accounting or one of the computer fields is also a reasonable means of restoring Halstead to employment. They are fields within his aptitude and interest. His scores in school indicate that he is intellectually capable of completing those programs. And, those programs are available in his community of Laramie and jobs are available within his community once the programs are completed. SDCL 62-4-52 defines "Community" as, "the area within sixty road miles of the employee's residence" and is a reasonable work search area in Wyoming which has a relatively sparse population.

Due to the determination above, there is no need to evaluate any of the four-year programs.

Conclusion:

A two-year degree in accounting or one of the computer fields would be a reasonable means of restoring Halstead to suitable, substantial and gainful employment. Counsel for J&R and Zurich shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision and, if desired, Proposed Finding of Fact and Conclusions of Law, within 20 days of the receipt of this Decision. Counsel for Halstead shall have an additional 20 days from the receipt of J&R and Zurich's Findings of Fact and Conclusions of Law to submit Objections/Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Counsel for J&R and Zurich shall submit such stipulation together with an Order.

Dated this 19th day of November, 2015.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge