

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

ANGELA RITTER,

HF No. 174, 2008/09

Claimant,

v.

DECISION

LENNOX SCHOOL DISTRICT,

Employer,

and

**CONTINENTAL WESTERN
INSURANCE,**

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The parties agreed to bifurcate the legal issues involved in this case and present the issue of vocational rehabilitation entitlement to the Department with a stipulated record and without hearing. Donald W. Hageman, Administrative Law Judge has been assigned to this matter. Claimant, Angela Ritter, is represented by Mike C. Fink. Employer, Lennox School District and Insurer, Continental Western Insurance, are represented by J.G. Shultz and Justin G. Smith.

Issue:

This Decision deals with the following legal issue:

Whether Claimant is entitled to vocational rehabilitation services?

Facts:

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

1. On October 22, 2007, Angela Ritter (Claimant) was employed by Lennox School District (Employer) as a custodian.
2. Claimant alleges that she injured her back on October 22, 2007, while performing her duties at work. According to Claimant, she was lifting bags of garbage into a dumpster when she felt a pop in her back.

3. On October 22, 2007, Employer was insured by Continental Western Insurance (Insurer) for purposes of workers' compensation.
4. At the time of the alleged injury, Claimant was working forty hours per week for Employer and earning about \$10.75 per hour.
5. Claimant's employment with Employer ended in May of 2008. At that time, Claimant was only able to work four hours per day with strictly light-duty limitations.
6. Over the last twenty-five years, Claimant has had a variety of jobs including several in the food service industry and as a manager. In particular, Claimant has worked as a manager for multiple restaurants at various times during her employment history. Claimant served as a manager at Hardee's, the Hurley Bar & Grill, and a shoe store.
7. Claimant has spent more time working in the food-service industry than any other vocational area during her employment history. Based on her experience, Claimant has developed transferable skills in the area of food service management.
8. After leaving Employer's job in 2008, Claimant found a new job as the manager of a Hot Stuff Foods Pizza franchise. Claimant began this employment on June 1, 2009, and continues to hold this job to date. The restaurant is located in Centerville, about 20 miles from Claimant's home in Alcester.
9. In her current job, Claimant is responsible for managing a crew of six employees.
10. Claimant's new employer has made allowances for her physical limitations.
11. Since starting her current job, Claimant has received accommodations for her job performance.
12. At the time of her deposition, March 23, 2010, Claimant was working thirty-five hours per week and earning about \$8.00 per hour.
13. On October 21, 2010, Claimant applied for retraining assistance from the South Dakota Division of Vocational Rehabilitation. That agency denied Claimant's application because she had obtained employment compatible with her limitations and restrictions.
14. A labor market survey in the Alcester area found 21 jobs within Claimant's work restrictions for which Claimant was qualified to perform. Some of the jobs were located as far away as Sioux Falls which would be a 30 mile commute.
15. Additional facts may be discussed in the analysis of this decision.

Analysis:

In this case, Claimant seeks vocational rehabilitation services. “An injured employee’s entitlement to rehabilitation benefits is governed by the terms of SDCL 62-4-5.1. The South Dakota Supreme Court has interpreted this statute on several occasions and established a concise five-part test:

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. By Stipulation, the parties have agreed that only the first three elements of this test are at issue here.

To meet the first element of the SDCL 62-4-5.1 test, the “employee must be unable to return to his usual and customary line of employment.” SDCL 62-4-54 describes how to determine the employee’s “usual and customary line of work.” That provision states:

Usual and customary line of employment is to be determined by evaluation of the following factors:

- (1) The skills or abilities of the person;
- (2) The length of time the person spent in the type of work engaged in at the time of the injury;
- (3) The proportion of time the person has spent in the type of work engaged in at the time of injury when compared to the employee's entire working career; and
- (4) The duties and responsibilities of the person at the workplace. It is not limited by the position held at the time of the injury.

SDCL 62-4-54. There is no dispute that Claimant has worked longer in the food industry than any other line of work. She has also held several managerial positions in the food service industry and elsewhere. She has transferable skills in the food service management areas. It seems clear that food service management is Claimant's "usual and customary line of employment." There is also no question that Claimant found employment in this line of work following her injury and is proficient at it.

Claimant has failed to meet the first and most fundamental element of the SDCL 62-4-5.1 test. Therefore, Claimant is not entitled to vocational rehabilitation services. Analysis of the second and third element of the test is not necessary.

Conclusion:

Claimant has failed to meet her burden of showing entitlement to vocational rehabilitation services. Counsel for Employer and Insurer shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Claimant shall have an additional 20 days from the receipt of Employer and Insurer'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 Employer and Insurer shall submit such stipulation together with an Order.

Dated this 27th day of October, 2011.

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