SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

VICTOR L. HUTTO, **HF No. 48, 1998/99**
Claimant,

v. **DECISION**

CITY OF RAPID CITY,
Employer/Self-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 October 2, 2003, in Rapid City, South Dakota. Claimant, Victor L. Hutto, (hereafter Claimant), appeared personally and through his counsel, Jeffrey P. Maks. Frank Driscoll represented Employer/Self-Insurer City of Rapid City (hereafter Employer).

Issues:

1. **Is Claimant's wrist condition causally related to a work injury in the spring of 1987 and his subsequent employment activities?**
2. **Is Claimant permanently and totally disabled under the "odd-lot doctrine?"**

Facts:

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

Having observed Claimant's demeanor and listened to his testimony during the hearing, the Department finds Claimant's testimony credible. Claimant's testimony is accepted in its entirety.

At the time of hearing, Claimant was 67 years of age and had resided in Edgemont, South Dakota since April of 1997. Claimant was born in Gaston, South Carolina and raised primarily in the little town of Pelion, South Carolina. Claimant's father was a farmer and his mother worked outside the home in a shirt factory. Claimant did not graduate from high school after he dropped out of school while in the tenth grade in approximately 1953. Claimant subsequently joined the United States Air Force in 1954 and was honorably discharged in 1959. While in the service, Claimant was introduced to the Black Hills of South Dakota when he was stationed at Ellsworth Air Force Base outside of Rapid City, South Dakota from 1956 to 1959.

Upon discharge from the military, Claimant went to work. Claimant worked for several years with Rand's Construction of Rapid City as a laborer and truck driver. Claimant

next went to work for Homestake Mining Company in the early 1960's where he worked as a laborer and underground miner. He worked with Anaconda Mining outside of Butte, Montana, as an underground contract miner from approximately 1964 through 1969. He left Anaconda when the mine shut down due to a strike.

Claimant returned to Rapid City and was self-employed operating Lee's Backhoe Service. Claimant occasionally had one or two hired men, but mostly worked alone. Claimant mainly engaged in general excavation work, including putting in water and sewer lines and digging ditches. Claimant closed the business in 1976 because it failed financially.

In the late 1970's, Claimant went to work off and on for Sheesley's Plumbing and Heating of Sioux Falls and Rapid City. For Sheesley's, Claimant worked as a laborer, laid pipe and operated a backhoe. In approximately 1980, Claimant sustained a work-related back injury while attempting to lift a 30-gallon drum that was approximately two-thirds full of gravel. Claimant immediately felt a stinging and burning sensation in his neck and as he put it, it was subsequently determined that he had busted some vertebrae. Claimant was evaluated and treated by Rapid City orthopedic surgeon Dale Berkebile, M.D. and eventually referred to Rapid City neurosurgeon Edward James, M.D. for surgery. In 1981, Dr. James performed a cervical body fusion at the C5-6 level.

Claimant did return to work for Sheesley's, but enrolled in a vocational retraining program in Mitchell, South Dakota, to become a baker. Claimant did not complete the program because of an extended illness. Claimant returned to Rapid City and became self-employed performing a number of different jobs or types of work including carpentry, cement finishing and manual labor. Claimant continued to be self-employed until he was hired by Employer in 1985.

Employer initially hired Claimant on a full-time, temporary basis to work in its sanitation department pitching garbage. Employer hired Claimant on a full-time, permanent basis on May 14, 1986. Claimant started as a Maintenance Worker I, working in Employer's street department.

Claimant's work involved physical and heavy labor entailing everything from pick and shovel work to running equipment. Physical tasks required Claimant to work on his knees, occasionally on his back, and the extensive use of his upper extremities. Claimant did well with Employer and consistently received pay raises, commendations, and favorable performance evaluations. Despite the physical and heavy nature of the work, Claimant enjoyed his work with Employer.

In the spring of 1987, a work incident and injury occurred. Claimant and a co-worker, Gary Bingham, were instructed to move a D-6 caterpillar to the street department shop for maintenance and because the load limits on the roads required that the caterpillar be moved to the shop. Claimant and Mr. Bingham were in the process of loading the

caterpillar onto trailer when the incident occurred. Employer does not dispute that this incident occurred.

The D-6 caterpillar that Claimant and Mr. Bingham moved was an older diesel bulldozer without any electric starter. When this older heavy equipment was manufactured, an electric starter did not have enough power or create enough compression to start up the diesel engine. A smaller gasoline engine, referred to as a pony engine, was typically used to start the diesel motor with the benefit of a clutch. The gasoline powered pony engine had to be started with a hand crank to build a sufficient level of compression to get the gas motor and then eventually the diesel engine running. In the process of cranking or wrenching the hand crank, if a sufficient level of compression is not built up, the compression can be blown out or lost, and the hand crank can kick back and violently strike the operator. As Claimant was wrenching the hand crank, the compression somehow blew and the hand crank kicked back and struck Claimant on the wrist. Claimant, in candor, could not recall whether the hand crank struck the wrist or hyper-extended the wrist as it kicked back. Claimant knows the crank of the pony engine hit his wrist on the kick back because he felt an immediate, sharp and acute pain directly at the point of the right wrist. Claimant felt the pain precisely on the wrist. Claimant's wrist swelled immediately.

It was stipulated that Mr. Bingham observed Claimant being able to do nothing but hold onto his wrist after the incident. Seeing Claimant's acute pain, Mr. Bingham suggested to Claimant that he see a doctor. Claimant responded that he was not going to be a "candy ass." Claimant did not feel that his arm was broken because he could still use it. Claimant did not seek medical attention. He continued to work. As the day progressed, Claimant's pain subsided. Throughout the week, Claimant's wrist improved and he eventually forgot about the injury. In the following months, Claimant's wrist would "act up" on occasion, but the pain did not preclude him from working.

Even though he did not seek medical attention, Claimant brought the incident to the attention of Emil Arguello, his supervisor. Claimant expressed his safety concerns with Arguello. Claimant was aware of fellow employees being hit with a hand crank. The incident eventually became the subject of discussion at one of the department safety meetings.

In the years after the incident, Claimant was promoted to Street Maintenance Worker II, which entailed more responsibility and a little more of a leadership or supervisory role for Claimant. Despite these increased responsibilities, Claimant continued to perform the physically demanding tasks that were an inherent part of his employment. Indeed, as Claimant put it, "if you're leading a crew, then you have got to work as hard as they do, in order to get them to work . . .. " Claimant's work continued to require the extensive use of his upper extremities with virtually anything that needed to be done. Whether it was repairing potholes, sealing cracks in the streets, running heavy equipment, shoveling or raking, Claimant used his hands and upper extremities all the time to get the job done.

Gradually, Claimant began to experience very specific problems and complaints with his right wrist. Through the years Claimant continued to work, he developed a sharp pain in his wrist at each attempt to bend it or use it. Claimant's wrist pain eventually prevented him from working. In approximately December of 1995 or January of 1996, Claimant was compelled to take a leave of absence as he went through medical treatment and evaluation.

As a veteran, Claimant received his medical care through the Fort Meade Veterans Administration Medical Center (the VA). Claimant's VA medical records reflect specific complaints pertaining to the right wrist in approximately 1995. The VA records also reflect that throughout the course of Claimant's continued evaluation and treatment for the wrist, a number of alternative diagnoses were entertained, which included everything from carpel tunnel, cervical spinal stenosis to severe arthritis of the right wrist.

On May 2, 1996, finally as the result of an orthopedic consultation through the VA, Claimant was advised that there had been a complete loss of articular cartilage at the point of the right wrist. Claimant was advised that his right wrist now presented with a severe form of arthritis and that the only possible treatment option for relief of his severe right wrist pain would entail surgery in the form of a wrist fusion. Claimant's primary healthcare provider, Ron Johnson, P.A., recommended against the fusion because the angle of the fusion, as it was being proposed, would render Claimant unable to use his right arm and hand at all.

In July of 1996, having exhausted all unpaid leave or similar benefits, Employer terminated Claimant's employment. Claimant's termination was extensively documented. Employer had no employment available that would accommodate Claimant's limited use of his hand. Claimant was eventually awarded "Social Security Disability" benefits. Dr. Johnson limited Claimant to lifting or holding nothing greater than ten pounds. Claimant has not worked since his termination.

At the time of his termination, Claimant filled out a First Report of Injury Form. The Report indicates that Claimant felt that his problems might have been the result of cumulative trauma. Claimant did not have medical documentation for this claim.

Given his limited income, Claimant felt that he needed to move from Rapid City to somewhere that would be cheaper. Claimant researched and looked at a number of communities in the Rapid City and Black Hills area including Black Hawk, Meade County, Hermosa, Fairburn and Buffalo Gap. Of all of these smaller communities, the cheapest place that he could find in the area was Edgemont, South Dakota. Claimant owned his own mobile home, or was making payments on it, and was able to find two separate lots in Edgemont that met his needs. Because of the lower cost, Claimant bought the lots and moved his trailer there. Claimant felt that he needed to relocate to Edgemont for financial reasons. He moved in April 1997 and has been there ever since.

Claimant admitted that after his termination from Employer and while in the process of applying for Social Security and medical disability benefits, he did not look for work at all. Claimant did not feel that he could work with his wrist condition.

In October of 1998, Dr. Dale Anderson performed a surgical fusion using an iliac bone graft to fuse Claimant's wrist in a neutral position. As part of his pre-surgery evaluation, Dr. Anderson asked about and Claimant denied any significant injuries to his extremities. The surgery alleviated Claimant's wrist pain, but left the wrist immobile. Claimant cannot move his wrist forward, back, or side to side.

Claimant did not recall the incident with the pony engine crank until after Dr. Anderson had completed his treatment. During his treatment of Claimant, Dr. Anderson told Claimant that trauma must have caused the damage to his wrist. Claimant eventually remembered the hand crank episode. Claimant could recall no other injury to his right wrist. Claimant's medical records reveal no other significant injury to his right wrist.

Dr. Anderson opined that the work-related hand crank incident served as a major contributing cause of Claimant's underlying right wrist condition. He based his opinion on his experience and his extensive knowledge of orthopedics. Dr. Anderson opined that at some point, Claimant had to have sustained a ligamentous disruption to cause the condition he observed in Claimant's wrist. Dr. Anderson explained:

> Well, the injury that will disrupt the ligaments is a sudden event that is of significance, or it is not a minor type of an injury to disrupt the ligaments, but the wear of the cartilage in the wrist occurs over time, and so even though the ligaments have been torn, the results of the torn ligaments usually takes a period of five or more years to develop before the cartilage is worn out and the wrist becomes symptomatic.

Dr. Anderson, based upon his examination of Claimant, including seeing Claimant's wrist bones, ligaments and tendons during surgery, concluded that Claimant suffered an injury to his wrist ligaments that caused his wrist to be twisted into an abnormal position, causing the articular cartilage to be worn away. When presented with the details of the incident, Dr. Anderson opined within a reasonable degree of medical probability, that the pony engine crank incident is a major contributing cause of Claimant's right wrist condition that he observed, diagnosed, and treated. Dr. Anderson's opinion is based upon Claimant's assertion that the pony engine crank incident is the only injury to his right wrist that he remembers. Claimant's testimony regarding the incident is credible.

Dr. Anderson opined that Claimant's activities as a laborer contributed to "the process of wear and tear in the wrist joint because of the abnormal position of the wrist bones" caused by the injury in the spring of 1987. Dr. Anderson opined that some trauma had to have occurred to cause Claimant's arthritis. When presented with the undisputed facts of the pony engine crank incident, Dr. Anderson opined that the incident caused or contributed to Claimant's condition.

Dr. Richard Farnham conducted an independent medical evaluation (IME) of Claimant on October 16, 2001. Dr. Farnham opined that Claimant's wrist condition is not related to his work-related injury or his workplace activities, but is related to the presence of a "rheumatoid variant" called "positive HLAB-27 [sic], human lymphocytic antigen" in Claimant's blood. Dr. Anderson disagreed because HLA B27:

> [I]s a specific antigen and it's an antigen for an autoimmune disease and it's an inflammatory arthritis that is primarily ankylosing spondylitis, so it makes the vertebrae of the spine fuse together, so it's not primarily an extremity problem or wrist problem. And [Claimant] had evidence of a ligamentous disruption that resulted in arthritis. He did not have a spontaneous fusion or stiffness of his wrist as a result of an inflammatory arthritis, so that's why I would disagree with [Dr. Farnham's] statement.

Dr. Anderson disagreed that the presence of the antigen "is not the primary reason why Claimant needed surgery or complained of pain."

Claimant's wrist condition causes him significant limitation. He cannot bend the wrist at all, in any direction. Everything, from combing his hair to lacing his shoes is difficult for Claimant and takes three to four times as long as it did before his symptoms presented. Claimant's grip strength, finger dexterity, and lifting ability are all diminished.

Claimant did not look for work after the fusion because he felt that his limited education precluded employment. Claimant looked for work in the southern Black Hills area with the assistance of vocational rehabilitation counselor/specialist, William Peniston. Peniston performed a vocational evaluation to determine Claimant's employability. Peniston conducted his research based upon the limitations set forth in Claimant's medical records and the deposition testimony of Dr. Anderson and Dr. Farnham. Peniston concluded that Claimant conducted a reasonable job search under the circumstances, had no transferable skills, was "obviously unemployable," and was unable to benefit from retraining.

Claimant met with caseworker Jim Davis at the South Dakota Job Service in Hot Springs. Job Service provided no job leads for Claimant. Claimant provided a letter and resume to ten motels and hotels in Edgemont and Hot Springs. Claimant was contacted by only two prospective employers with an indication that only temporary and seasonal positions, such as that of a dishwasher, were available. Peniston, relying upon his research specific to Claimant and his professional experience with the vocational opportunities in the Southern Black Hills region, confirmed that Claimant is not capable of obtaining anything other than sporadic employment with an insubstantial income. Claimant's job search was reasonable under the circumstances.

Jerry Gravatt performed vocational services for Employer. He conducted a job availability assessment, but did not present evidence of specific positions open and available at time of hearing that would accommodate Claimant's limitations. Gravatt did not provide job placement services.

Other facts will be developed as necessary.

Issue One

Is Claimant's wrist condition causally related to a work injury in the spring of 1987 and his subsequent employment activities?

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 193, 195 (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 "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. The statutes in effect at the date of injury apply to the rights of all parties in any claim for workers' compensation benefits. Helms v. Lynn's Inc., 542 N.W.2d 764 (S.D. 1996). Claimant was injured in the spring of 1987. "The causation requirement requires [Claimant] to show his employment was 'contributing factor' to [his current condition.]" Gilchrist v. Trail King Indus., 2000 SD 68, ¶ 18.

Claimant's injury involves a complicated series of events affecting ligaments, tendons, the many bones of the human wrist, and an understanding of specific antigens and rheumatoid variants. "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).

In Westergren v. Baptist Hospital of Winner, the Supreme Court explained the role of the medical expert in workers' compensation proceedings:

> Here, the majority of evidence regarding Claimant's injuries was introduced by voluminous stipulated medical records without benefit of interpretation by the doctors who produced these records. By stating, "the testimony of professional is crucial in establishing this causal relationship" we acknowledged the lack of medical training by lawyers, hearing examiners, and courts to interpret these records. "Expert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person to judge."

1996 S.D. 69, ¶ 31, 549 N.W.2d 390, 398 (citations omitted).

Claimant presented the expert testimony of Dr. Anderson. Dr. Anderson opined that the incident in the spring of 1987, involving the crank of a pony engine striking Claimant in the wrist, is a major contributing cause of Claimant's wrist pain, need for a fusion, and resultant limitations of wrist movement. Employer challenged the opinions of Dr.

Anderson with those of Dr. Farnham. Dr. Farnham opined that Claimant's problems were related to a "rheumatoid variant" in Claimant's blood. Dr. Anderson disagreed with Dr. Farnham's assessment because Dr. Anderson found that the evidence of an injury to Claimant's wrist ligaments was not caused by the "rheumatoid variant," but were caused by a traumatic incident. The traumatic incident is undisputed. Claimant's testimony is credible.

Dr. Farnham also opined that the pony engine crank could not have caused the ligament disruption because he did not think that the injury was severe enough to cause a ligamentous disruption. Claimant's testimony that the pony engine crank incident was the only injury that he suffered to his right wrist is credible. Dr. Anderson opined that such an incident was a major contributing cause of the ligamentous disruption. This opinion more than meets the "contributing factor" standard. Dr. Anderson's opinions are accepted. Furthermore, Dr. Farnham was never asked whether the pony engine incident was a "contributing factor" to Claimant's wrist condition, disability and need for treatment. Dr. Farnham was asked whether it was "a major contributing cause," which is the incorrect causation standard for a 1987 injury.

Dr. Farnham's opinions are rejected. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 N.W.2d 396, 398 (S.D. 1988). Dr. Anderson actually observed the damage in Claimant's wrist. Dr. Farnham did not. Dr. Anderson is a board certified hand and upper extremity orthopedic specialist. Dr. Farnham is not. Dr. Anderson's opinions are based upon his actual observations of Claimant and the facts of this specific incident, which are credible or undisputed. Dr. Farnham's opinions are not as complete as Dr. Anderson's, lack the foundation of Dr. Anderson's opinions, and are based upon speculation. Dr. Anderson has better expert qualifications to render an opinion in this matter.

Through his credible testimony, Dr. Anderson's opinions, and the medical records, along with the stipulation of the parties regarding the injury, Claimant has met his burden to demonstrate by a preponderance of the evidence that he suffered a compensable injury in the spring of 1987 and that that injury is a contributing factor to his current wrist condition. Moreover, Claimant has met the higher standard now adopted in matters of causation of workers' compensation injuries of "a major contributing cause." Claimant's right wrist injury and subsequent employment activities are a contributing cause to his current condition. Claimant's wrist condition is compensable under the South Dakota Workers' Compensation Law.

Issue Two

Is Claimant permanently and totally disabled under the "odd-lot doctrine?"

Claimant asserts that he is entitled to permanent total disability benefits. The claimant must meet the following test to establish that he or she is permanently and totally disabled:

> [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.

Tiensvold v. Universal Transp., Inc., 464 N.W.2d 820, 822 (S.D. 1991). Claimant has the initial burden to make a prima facie showing that she is in the odd-lot category. Id. 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. Peterson v. Hinky Dinky, 515 N.W.2d 226, 231 (S.D. 1994). The court stated:

> 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 fact 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 relegated to the odd-lot category,' then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made 'reasonable efforts' to find work." The burden will only shift to the employer in this second situation when the claimant produces substantial evidence that he is not employable in the competitive market. Thus, if the claimant is "obviously unemployable," he does not have to prove that he made reasonable efforts to find employment in the competitive market.

Id. at 231-32 (citations omitted). If a claimant makes one of these prima facie showings, then the burden of production shifts to the employer to show that some suitable employment is actually available in claimant's community for a person with claimant's limitations. Shepherd v. Moorman Mfg., 467 N.W.2d 916, 918 (S.D. 1991). However, the ultimate burden of persuasion remains with Claimant.

Before Claimant's burden of persuasion is met, Claimant must make a prima facie case of permanent total disability.

> 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).

Threshold issue:

The appropriate test for permanent total disability having been established, the issue of Claimant's relocation must first be addressed. Employer asserts that Claimant's move to Edgemont, South Dakota was for avoiding available employment. The evidence is to the contrary. At the time of his move from Rapid City to Edgemont, Employer fired Claimant because he could no longer physically perform his regular duties and because his physical limitations could not be accommodated. Claimant was receiving disability payments from the Social Security Administration and medical disability payments from the South Dakota Retirement System. The medical records document that Claimant was unable to use his right wrist without significant pain. Claimant's testimony that he moved to Edgemont for financial reasons is credible and unrefuted. Employer's expert could not opine that the move was anything but financially justified. Claimant's vocational expert opined that the move was reasonable. Claimant's move to Edgemont was done in good faith and not for improper motives. *See* Reede v. State of South Dakota Dept. of Transportation, 620 N.W.2d 372, 376 (S.D. 2000). Claimant's community for purposes of a permanent total disability analysis is the Southern Black Hills area surrounding Edgemont, South Dakota.

Permanent Total Disability:

Claimant has met his prima facie burden of showing that he is entitled to permanent total disability benefits. At the time of hearing, Claimant was sixty-seven years of age with a limited formal educational background consisting of a GED obtained in 1955. Claimant has a thirty-five year history of heavy to very heavy work in the fields of mining, construction, heavy equipment operations and manual labor. Claimant presents with a number of physical limitations that arise not only from his right wrist condition, but as well a pre-existing cervical condition, which restrict Claimant to a limited range of light duty work. Based upon these restrictions and Dr. Anderson's testimony regarding those limitations, Claimant cannot return to any of the types of jobs he has held in the past. Dr. Anderson signed a document for other insurance purposes stating that Claimant is unable to return to his regular occupation. Peniston found that the nature of Claimant's limitations, his age, his unemployment since 1996, and his lack of transferable skills render Claimant obviously unemployable.

The testimony of Claimant and Claimant's vocational expert establishes that Claimant has very few transferable work skills and that Claimant's community is primarily agricultural and tourist based. Peniston explained that such a community offers seasonal work that would not be suitable, substantial, and gainful employment for Claimant.

Claimant's age of 67 precludes retraining. Peniston offered the requisite expert opinion that retraining is futile. Employer did not demonstrate that a specific, viable program of retraining would return Claimant to substantial, suitable, and gainful employment.

Claimant's job search was reasonable. He contacted and registered with the local Job Service. Claimant sent appropriate resumes. Claimant did nothing to "sabotage" his job search. Peniston testified that he anticipated any job search efforts undertaken by Claimant would be futile and that he believed that Claimant's job search efforts were reasonable under the circumstances.

Claimant has met his prima facie burden to demonstrate that he is permanently totally disabled. His wrist condition, which is that of an immobile right wrist, and resultant limitations combined with his age of 67, his lack of formal education and transferable skills establish his prima facie burden that he is obviously unemployable.

Claimant having met his initial burden, Employer must meet its burden to demonstrate that suitable employment is actually available in Claimant's community for a person with Claimant's limitations. In support of this burden, Employer presented the testimony of Jerry Gravatt. Gravatt's opinions fail to meet Employer's burden. Although Gravatt opined that he found 360 jobs available in the Rapid City community and 116 in the Southern Black Hills community, Gravatt did not establish that these positions were actually open to a person with Claimant's limitations. Gravatt's opinions regarding jobs in the Rapid City area are rejected because Claimant's community is that of the Edgemont community and surrounding area.

Employer failed to demonstrate that any employers were contacted and specifically apprised of Claimants abilities and limitations. Gravatt's opinions that Claimant could continue with most duties required by his customary occupation are rejected as contrary to Dr. Anderson's opinions. Gravatt testified to no position actually open and available at the time of hearing that would meet Claimant's limitations. Claimant is restricted to limited light duty employment. Gravatt's opinions do not sustain Employer's burden to demonstrate that suitable employment is actually available in Claimant's community for a person with Claimant's limitations.

Claimant has sustained his ultimate burden of persuasion. His testimony was credible. Dr. Anderson's testimony has been accepted. Dr. Farnham's opinions are rejected. Peniston's testimony was credible and his opinions are accepted.

For the record, the parties did not dispute Claimant's inability to work at the time Employer fired him in July of 1996. Every movement of Claimant's wrist caused him severe pain. Employer offered no evidence that Claimant could have worked during this period. Based upon the above compensability decision and lack of evidence to the contrary, Claimant is at a minimum entitled to permanent total disability benefits from his termination until he reached maximum medical improvement after his wrist fusion, which will be considered February 1, 1999. On that date, Dr. Anderson opined that the typical recovery period for a wrist fusion is four months and that Claimant was permanently unable to return to his usual occupation.

Claimant suffered a compensable right wrist injury in the spring of 1987. The subsequent disability, impairment, and need for treatment are compensable. Claimant

is found to be permanently totally disabled from the date of his termination from employment with Employer.

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 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 17th day of May, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge