SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

BOBBY GREENLEE, **HF No. 54, 2001/02**

Claimant, **DECISION**

vs.

CHARLES TRUCKING, INC.,

Employer,

and

UNITRIN INSURANCE,
f/k/a MILWAUKEE INSURANCE CO.,

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. The parties agreed to stipulate to the record and submitted this matter on the medical records and briefs. Rolly Samp represented Bobby Greenlee (Claimant). Lisa Hansen Marso represented Employer/Insurer (Employer). The issue presented is whether Claimant is entitled to additional benefits pursuant to SDCL 62-4-5.

FACTS

The parties submitted the following Stipulated Facts:

1. The parties agree that Claimant was employed at Charles Trucking, Inc. on January 13, 1999.
2. The parties agree that on January 13, 1999 while working for Charles Trucking, Inc. that [Claimant] sustained a work related injury from falling on the ice and fracturing his left ankle.
3. The parties agree that Claimant has been compensated in full for the assigned impairment rating and that all medical bills relating to his work-related injury have been paid.
4. The parties agree that Claimant's worker's compensation weekly rate is $408.00.
5. The parties agree that Exhibit A is a true and correct complete copy of Claimant's medical records for treatment for his January 13, 1999 injury that may be considered by the Department.
6. The parties agree that Exhibit B is a true and correct complete copy of the transcript of the deposition of Claimant that may be considered by the Department.
7. The parties disagree whether any additional temporary disability payments are due and owing. Employer/Self-Insurer [sic] believe all temporary disability payments have been made. Claimant believes he is entitled to up to 85% of his

previous salary so therefore is entitled to $14,716.64 for 2001, $14,722.20 for 2002, and $16,443 for 2003.

8. Claimant is currently employed by School Bus, Inc., working an average of 27.5 hours per week at an hourly rate of $9.40. He is also employed by Sioux Valley Hospital where he occasionally works at a $10.16 per hour rate; while he has not worked yet in 2004, he is scheduled to work on June 26, 2004.

9. Claimant's W-2 wages were in the following amounts for the specified years:

    2003: $16,443 (for School Bus, Inc. and Sioux Valley Hospital)
    2002: $17,272 ($4837 for School Bus, Inc.; $12,007 for City of Sioux Falls bus driving; $428 for Sioux Valley for driving)
    2001: $7,502 ($6685 for School Bus, Inc.; $807 for Sioux Valley for driving)
    2000: $4,075 (for Robert Charles)
    1999: $7,040 (for Robert Charles)
    1998: $36,613 (for Robert Charles)

10. Since the 1999 injury, Claimant has applied for the following jobs:

    City of Sioux Falls: Street Department, Meter Reader, Medical Asst., Mail Room (3 times)
    State of South Dakota: Port of Entry, Medical Aide at the Penitentiary
    Minnehaha County: Juvenile Jail, Jail Guard (3 times)
    McKennan Hospital: Supply Aid, Patient Care Aide, Laundry, Phlebotomist Asst
    Sioux Valley Hospital: Cytology Aid, Physical Therapy Aide (4 times), Dialysis Tech., Parent Aide (2 times), Transporter (2 times), Blood Bank Asst. (4 times), Pharmacy Tech., Patient Support Rep., Lead Information Desk/Valet, Customer Services Rep., Store Room Tech.
    [Miscellaneous]: Fun Shoes at the Empire Mall; TJ Max[x]; Sams; Walmart; Home Depo (any position); Walgreens (any position); Paradise Casino (night clerk); Blockbusters; Eyeworks (optical position); Mahlanders (sales); Twin City Optical (lab technician); Artic Ice (driver); Scheels All Sports (sales); Target (team leader); McGreevy Clinic (lab assistant); Riddles Jewelry (sales); Menards (sales); Good Spirits Liquor (sales); Family Dental Center (dental assist).

In addition to the Stipulated Facts, the Department finds the following facts as established by a preponderance of the evidence. Claimant started working for Employer on a part-time basis in 1993. Claimant drove a truck to and from the post office and the airport. Claimant loaded and unloaded large cages filled with mail bags. Claimant worked full-time for Employer starting in April 1995.

On January 13, 1999, Claimant slipped on some ice while working for Employer and injured his left ankle. Claimant sought medical treatment. X-rays revealed no fracture. Claimant was diagnosed with a possible sprain. A later MRI showed a torn

ligament and Claimant had surgery to repair the ligament in July 1999. By October 1999, Claimant was reporting improvements. During the same time, Claimant's physician, Dr. Frank Alvine, noted that Claimant was doing much better as he had good range of motion, increased endurance, no swelling and no instability. Dr. Alvine indicated the goal was to let Claimant return to work initially on a part-time basis, gradually working up to full time. Claimant participated in a functional capacities evaluation (FCE) in January 2000. The results of the FCE indicated that Claimant was able to work at the medium physical demand level for four hours a day.

In March 2000, Claimant reported discomfort in his ankle. On May 15, 2000, Dr. Richard Marks, an orthopedic surgeon, examined Claimant and recommended that Claimant have additional surgery. In June 2000, Dr. Marks performed an arthroscopic debridement of the anterolateral corner on Claimant's ankle.

In connection with his treatment, Claimant started seeing Dr. Jerry Blow, a physiatrist, in October 2000. Dr. Blow saw Claimant on October 10, 23, November 8, 22, December 11, 28, and January 25, 2001. One of Dr. Blow's goals for Claimant was to return him to sedentary to light duty work. On December 28, 2000, Dr. Blow noted Claimant "may be working at Sioux Valley Hospital as a Cardio-driver, operating a big RV with equipment and staff, 20 hours a week." On January 25, 2001, Dr. Blow noted that Claimant continued to have "[p]ersistant impingement of the left ankle. At this point I am not sure there is anything else we can do that will help Bobby. I feel that he is reaching maximum medical improvement [MMI]." Insurer wrote Dr. Blow and requested information regarding Claimant's status. On March 14, 2001, Dr. Blow opined Claimant had reached MMI on January 25, 2001. In addition, Dr. Blow opined Claimant had a zero percent impairment rating and that Claimant had no permanent work restrictions.

Dr. Stephen Barron, an orthopedic surgeon, performed an independent medical examination of Claimant on February 28, 2001. On March 12, 2001, Dr. Barron, in his report, opined Claimant was at MMI. In addition, Dr. Barron concluded Claimant had no permanent work or activity restrictions and had a no permanent impairment.

Between his two surgeries, Claimant attempted to return to work for Employer. However, Claimant found that he could not physically manage the work because of his ankle. Claimant could not drive a truck with a clutch due to his ankle injury. However, Claimant has been employed since he quit working for Employer. At the time of his deposition in March 2002, Claimant drove a school bus twenty-five to thirty hours per week. In addition, Claimant drove a van for Sioux Valley, working ten to eighteen hours per week. In May 2002, Claimant was driving a dump truck for the City of Sioux Falls, working thirty-eight to forty hour per week and working part-time for Sioux Valley. As the Stipulated Facts indicated, Claimant currently works driving a school bus and driving a van.

In May 2002, Dr. Blow gave Claimant a seven percent impairment rating to the lower extremity. Employer has paid for all of Claimant's medical treatment and for the benefits for the impairment rating. Claimant asserts he is entitled to an additional $45,000 of compensation for 2001-2003 because he earns less now than he did prior to his injury.

ISSUE

WHETHER CLAIMANT IS ENTITLED TO ADDITIONAL BENEFITS PURSUANT TO SDCL 62-4-5?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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 requested benefits under SDCL 62-4-5. This statute pertains to compensation for partial disability. SDCL 62-4-5 states:

> If, after an injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if the employee has been released by the employee's physician from temporary total disability and has not been given a rating to which § 62-4-6 would apply, the employee shall receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3, equal to one-half of the difference between the average amount which the employee earned before the accident, and the average amount which the employee is earning or is able to earn in some suitable employment or business after the accident. If the employee has not received a bona fide job offer that the employee is physically capable of performing, compensation shall be at the rate provided by § 62-4-3. However, in no event may the total calculation be less than the amount the claimant was receiving for temporary total disability, unless the claimant refuses suitable employment.

SDCL 62-1-1(8) defines temporary disability, including total or partial, as "the time beginning on the date of injury, subject to the limitations set forth in § 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first." SDCL 62-1-1(2) states "a loss becomes ascertainable when it becomes apparent that permanent disability and the extent thereof has resulted from an injury and that the injured area will get no better or no worse because of the injury."

In order to receive temporary partial benefits under SDCL 62-4-5, the employee must establish:

1. That he is partially incapacitated from pursuing his usual and customary line of employment due to his work related injury; or
2. That he has been released by his physician from temporary total disability and has not yet been given a permanent partial disability; and
3. That his present *average* earned income or that amount he is capable of earning at some suitable employment or business is less than what his *average* earned income was prior to his disability.

Hendrix v. Graham Tire Co., 520 N.W.2d 876, 881-82 (S.D. 1994). A showing that Claimant is simply making less after the work-related injury is insufficient. Claimant must show that he is unable to pursue his usual and customary line of employment or must be released from temporary total disability but not evaluated yet for an impairment rating. Neither of these conditions applies to the facts of this case.

First, Claimant must establish that he cannot return to his usual and customary line of employment. "A person's usual and customary line of employment may be determined by many factors, such as, the skills or abilities of the person, the length of time the person has spent in the type of work, the proportion of time the person has spent in the type of work when compared to the worker's entire working career, and the duties and responsibilities of the person at the workplace." Sutherland v. Queen of Peace Hosp., 1998 SD 26, ¶ 14.

Claimant's usual and customary line of employment was that of a driver. Claimant has been employed for over ten years as a driver. Claimant drove a truck for Employer. Claimant is currently employed as a driver for School Bus, Inc. and Sioux Valley Hospital. Claimant was also employed for a period of time as a dump truck driver for the City of Sioux Falls. Even though Claimant has an injury to his ankle, he has been able to perform the essential functions of his jobs as a driver. Claimant is not incapacitated from pursuing his usual and customary line of employment.

Second, Claimant has been released by his physician from temporary total disability and has been rated under SDCL 62-4-6. In March, 2001, Dr. Blow opined Claimant was at MMI and did not have any permanent impairment. Dr. Barron similarly opined that Claimant was at MMI and did not have any permanent impairment under SDCL 62-4-6. Claimant's loss became ascertainable once Dr. Blow assigned the zero percent impairment rating on March 14, 2001. As Claimant is not incapacitated from pursuing his usual and customary line of employment and has been given a rating under SDCL 62-4-6, there is no need to address the third part of the Hendrix test. Employer paid all benefits owing to Claimant and no additional compensation is due. Claimant's request for additional benefits under SDCL 62-4-5 is denied.

Claimant argued in his Reply Brief that "he is also entitled to rehabilitation benefits under 62-4-5.1." There are five requirements that must be met before benefits for a program of rehabilitation will be awarded. *See* Kurtenbach v. Frito-Lay, 563 N.W.2d 869, 872-73 (S.D. 1997). Claimant failed to present any evidence concerning his claim for rehabilitation benefits under SDCL 62-4-5.1 and this request is denied. Claimant's petition must be dismissed with prejudice.

Employer shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Claimant shall have ten days from the date of receipt of Employer's proposed Findings and Conclusions to submit objections 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, Employer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 22nd day of February, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge