SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

SHELLIE HOLVIG
Claimant,

HF No. 130, 2004/05

v.

DECISION

RENT A CENTER, INC.,
Employer,

and

SPECIALTY RISK SERVICES,
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 September 28, 2005, in Rapid City, South Dakota. Claimant Shellie Holvig appeared personally and through her counsel, Frank Driscoll. J. G. Shultz represented Employer Rent A Center, Inc., and Insurer Specialty Risk Services.

After a Telephonic Prehearing Conference held on September 12, 2005, the Department entered a Prehearing Order listing the issue to be presented at hearing as:

> Is Claimant entitled to rehabilitation benefits pursuant to SDCL 62-4-5.1?

All other issues were preserved by Order for Bifurcation of Rehabilitation Issue dated July 5, 2005.

Claimant testified and presented the testimony of Jerry Gravatt, a vocational specialist. Employer/Insurer presented the testimony of James Carroll, a vocational rehabilitation consultant. The Department received Hearing Exhibits 1-10. No affidavits or deposition transcripts were offered into evidence.

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

1. Claimant was born on July 1, 1969, in Sioux Falls, South Dakota.
2. Claimant earned her high school diploma in 1994.
3. Claimant's work history prior to working for Employer consisted of a series of seventeen different jobs during a span of eighteen years.
4. These seventeen different positions included, among others, laundry worker, grocery bagger and stocker, pet groomer, animal control officer, sales, collections, and jewelry waxer, manufacturer and sizer.

5. Claimant began working for Employer in 2000 as an Account Manager/Deliveries. Claimant's position with Employer involved collections work and deliveries. Her duties included keeping customers' payments on track on a weekly and daily basis. Collections work was part of her duties the entire time she worked for Employer.
6. Claimant left Employer for eight months and then returned to work for Employer as a Credit I/O (inside/outside) Assistant Manager/Deliveries and Sales I/O Assistant. Claimant's duties also included making deliveries and helping to load and unload delivery trucks on a "pretty much daily" basis.
7. Claimant typically made collections calls in the morning and late afternoon and evening, after deliveries were done.
8. Claimant suffered a work-related injury to her back on July 16, 2003, while she and a co-worker were unloading a sofa sleeper from a company truck.
9. Claimant sought and received medical treatment. Employer/Insurer treated the injury as a compensable workers' compensation injury.
10. Claimant underwent a Functional Capacity Evaluation in January of 2004, which showed her capable of medium work with self-limiting of 4 out of 21 tasks.
11. On January 29, 2004, Dr. Brett Lawlor, a physiatrist, concluded that Claimant reached maximum medical improvement and rated Claimant as having a 5% whole person impairment rating.
12. Dr. Lawlor identified Claimant's permanent physical restrictions as a result of her back injury. Based upon Dr. Lawlor's analysis of Claimant's physical condition, Claimant is capable of working at a medium level of work with some modification to include: maximum lifting is 25 pounds, push/pull 50 pounds, rarely work bent over sitting, occasionally work with her arms overhead, kneeling, squatting, repetitive squatting and crawling.
13. Claimant finished working for Employer in September of 2003 because she could not lift the required 75 pounds.
14. Claimant conducted no job search whatsoever in Rapid City, South Dakota.
15. Claimant applied for admittance to a bachelor degree program at the Art Institute of Phoenix, in Phoenix, Arizona. Claimant was accepted into this program on October 27, 2003.
16. Claimant moved to Phoenix on February 10, 2004, in order to attend the Art Institute of Phoenix.
17. Claimant began attending classes at the Art Institute of Phoenix on July 12, 2004.
18. Claimant is pursuing a bachelor's degree in graphic design. The degree program is scheduled to take her three calendar years.
19. Claimant submitted her claim for rehabilitation benefits to Insurer on July 26, 2004.
20. In April or May 2004, Claimant applied for employment with OSI Collection Services in Phoenix, Arizona.
21. Claimant received the job and earned $9.50 per hour working 40 hours per week performing telephone collections, a position very similar to her collections work for Employer.

22. After working at OSI, Claimant worked in telephone collections at Merchant Financial earning $13.00 per hour.
23. At the time of hearing, Claimant was working at her third telephone collections position in Phoenix with Allied International Credit earning $11.00 per hour.
24. At the time of her injury, Claimant earned $10.00 per hour working a 40-hour workweek. She also worked a mandatory ten hours per week of overtime earning time-and-a-half or $15.00 per hour.
25. Other facts will be developed as necessary.

ANALYSIS:

An injured employee's entitlement to rehabilitation benefits is governed by SDCL 62-4-5.1, which 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.

Based upon this statute, the South Dakota Supreme Court has established a five-part test for an award of rehabilitation benefits:

1. The employee must be unable to return to [her] 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 Hospital, 1998 SD 26, ¶ 13 (citations omitted).

Claimant must meet all five of these requirements before receiving rehabilitation benefits. The parties dispute whether Claimant has met the first four requirements of this five-part test. While Claimant's usual and customary line of employment is disputed because of her varied employment experience, the Department finds that part 2 is the linchpin of Claimant's claim.

Rehabilitation must be necessary to restore the employee to suitable, substantial, and gainful employment.

SDCL 62-4-55 sets for the following definition for "suitable, substantial, and gainful employment:"

> Employment is considered suitable, substantial, and gainful if:
> (1) It returns the employee to no less than eighty-five percent of the employee's prior wage earning capacity; or
> (2) It returns the employee to employment which equals or exceeds the average prevailing wage for the given job classification for the job held by the employee at the time of injury as determined by the Department of Labor.

Claimant's prior wage earning capacity must be calculated. Gravatt and Carroll took into account Claimant's wage earning capacity at Employer. No evidence was offered as to the amount Claimant was able to earn in other jobs.[1] At the time of her injury,

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[1] Gravatt's report reveals that Claimant held the following positions, as described by the Dictionary of Occupation Titles, 4th Edition, published by the United States Department of Labor:

- 241.357-101 – Collection Clerk (clerical) alternate titles: delinquent-account clerk; past-due accounts clerk.
- 169.167-086 – Manager, Credit and Collection (any industry).
- 185.167-046 – Manager, Retail Store (retail trade) alternate titles: store manager.
- 906.683-022 – Truck Driver, Light (any industry)
- 249.362-026 – Order Clerk (clerical) alternate titles: customer-order clerk; order filler; order taker.
- 290.477-014 – Sales Clerk (retail trade)
- 270.357-034 – Salesperson, Household appliances (retail trade).
- 379.673-010 – Dog Catcher (government ser.) alternate titles: dog warden.
- 379.263-010 – Animal Treatment Investigator (nonprofit org.) alternate titles: animal control officer.
- 249.367-101 – Animal Shelter Clerk (nonprofit org.)
- 379.362-018 – Telecommunicator (government ser.) alternate titles: dispatcher.
- 774.382-101 – Pottery Machine Operator (pottery & porc.) alternate titles: jigger operator; pot maker.
- 740.684-022 – Painter, Brush (any industry) alternate titles: painter, hand.
- 297.354-010 – Demonstrator (retail trade; wholesale tr.)
- 418.677-010 – Dog Bather (personal ser.)
- 418.674-010 – Dog Groomer (personal ser.) alternate titles: dog beautician; dog-hair clipper.
- 359.667-010 – Chaperon (personal ser.)
- 735.381-010 – Bench Hand (jewelry-silver) alternate titles: bench worker.
- 412.674-010 – Animal Keeper (amuse. & rec.) alternate titles: animal caretaker.
- 159.224-010 – Animal Trainer (amuse. & rec.)

Claimant worked a mandatory fifty (50) hours per week at $10.00 per hour for the first forty (40) hours and $15.00 per hour for the ten (10) overtime hours. Claimant's gross weekly wages were $550.00. However, Claimant's overtime hours at Employer's must be calculated according to statute. SDCL 62-1-1(6) provides:

> "Earnings," the amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was engaged at the time of his injury. It includes payment for all hours worked, including overtime hours at straight-time pay, and does not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed by him by the nature of his employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, they shall be deemed a part of his earnings[.]

(Emphasis added). At $10.00 per hour at straight time pay, Claimant's earned $500.00 per fifty (50) hour work week. Claimant's prior wage earning capacity is $500.00 per week. Eighty-five percent of $500.00 is $425.00. Claimant must demonstrate that without retraining she is unable to earn $425.00 per week.

"[B]efore the burden of establishing the existence of suitable employment shifts to the employer, the employee must make a prima facie showing that [s]he is unable to find suitable employment." Kurtenbach v. Frito-Lay, 563 N.W.2d 869 (S.D. 1997). In order to meet the second element of the rehabilitation test, a claimant must show that she is unable to "obtain employment following her injury." Cozine v. Midwest Coast Transport, Inc., 454 N.W.2d 548, 554 (S.D. 1990). Once the claimant has made such a showing, the burden shifts to the employer to show that claimant would be capable of finding such employment without rehabilitation. Id. "An injured worker cannot insist upon rehabilitation benefits if other suitable employment opportunities exist which do not require training." Sutherland, 1998 SD 26, ¶ 13.

Claimant did not attempt to find a job before she applied to the Art Institute of Phoenix in October of 2003. She did not conduct a reasonable job search in Rapid City. Dr. Lawlor gave her permanent restrictions in January of 2004, yet the first job application made by Claimant after leaving Employer was in April or May of 2004, when she applied at OSI in Phoenix, Arizona. Claimant was not scheduled to begin classes until July of 2004, but did not try to find any employment, assuming that no jobs were available for her given her restrictions. Claimant failed to make a prima facie showing that she is unable to find suitable employment in her Rapid City community.

- 920.687-014 – Bagger (retail trade) alternate titles: grocery packer.
- 299.367-014 – Stock Clerk (retail trade) alternate titles: stock clerk, self-service store.
- 920.587.018 – Packager, Hand (any industry) alternate titles: hand packager.
- 079.361-014 – Veterinary Technician (medical ser.) alternate titles: animal health technician; animal technician, veterinary assistant.
- 361.685-018 – Laundry Worker II (any industry).

In addition, Claimant is currently working full-time and earning $440.00 per week. $440.00 is more than $425.00, which is eighty-five (85) percent of her prior wage earning capacity. Even without retraining, Claimant is making at least 85% of her prior wage earning capacity. Therefore, Claimant has failed to show that she requires retraining to return her to "no less than eighty-five percent of her prior wage earning capacity."

Although the burden does not shift to Employer/Insurer to show that suitable employment is available to Claimant without rehabilitation, Employer/Insurer presented evidence that meets its burden. Carroll testified that jobs are and have been regularly and continuously available in Rapid City that are within Claimant's physical restrictions at which she could earn at least 85% of her pre-injury wage. In addition to other positions documented in his report, Carroll identified Green Tree and Conseco as Rapid City employers continuously hiring for telephone collections positions. Based upon his expertise and the thoroughness and persuasiveness of his report and his credible testimony, Carroll's opinions are accepted. Claimant has failed to demonstrate that rehabilitation is necessary to restore her to suitable, substantial, and gainful employment.

3. The program of rehabilitation must be a reasonable means of restoring the employee to employment.

A claimant bears the burden of establishing the reasonableness of her rehabilitation program. Chiolis v. Lage Development Co., 512 N.W.2d 158, 161 (S.D. 1994). In considering an appropriate rehabilitation program, the Department "must not lose sight of the fact that the employer has a stake in the case" and "the employer is required to 'underwrite' the expenses of rehabilitation." Id.

> The kind of rehabilitation program contemplated by § SDCL 62-4-5.1 is that which enables the disabled employee to find suitable and gainful employment not to elevate his station in life. An injured worker cannot insist upon a college education if other suitable employment opportunities exist that do not require college training.

Id. at 160 (quoting Barkdull v. Homestake Mining Co., 411 N.W.2d 408, 410 (S.D. 1987)). It is a claimant's right to seek a college education, but an employer cannot be compelled to pay for such a program if it is not necessary. Id. at 161 (citing Cozine, 454 N.W.2d at 554).

It will take Claimant three years to receive her graphic design degree, but she is asking for only two years of rehabilitation benefits. Relevant case law from South Dakota demonstrates that Claimant's request for 2 years of retraining benefits, for a three-year course of retraining, does not meet the policy requirement of a valid claim. In Chiolis, a former carpenter requested compensation for only two of his four years of college required to obtain an engineering degree from the South Dakota School of Mines & Technology. 512 N.W.2d at 160. The Supreme Court found that Chiolis' argument that

he was entitled to two years of rehabilitation benefits for his college education was directly contrary to the express construction of SDCL § 62-4-5.1. The Court noted that the statute addresses a "program of rehabilitation" as opposed to a "period of rehabilitation." Id.

The Chiolis Court also found that rather than retraining Chiolis for suitable and gainful employment, the college program expanded his occupational horizons and elevated his station in life. Id. at 161. The Court denied rehabilitation benefits finding that Chiolis had not met his burden of proving that a four-year college degree was a reasonable means of restoring him to suitable and gainful employment. Id. at 162.

A similar result has been reached in several other South Dakota cases. See Kurtenbach, 563 N.W.2d at 869 (the Court found a five and one-half year metallurgical engineering specialty program was not reasonable and improperly elevated claimant's station in life at the expense of the employer); Cozine, 454 N.W.2d at 548 (the Court found the hearing examiner was not clearly erroneous in concluding a four-year college program was not reasonably necessary for claimant's rehabilitation); Barkdull v. Homestake Mining Co., 411 N.W.2d 408 (S.D. 1987) (the Court found suitable employment existed for claimant even without a college education).

Claimant has chosen to pursue a bachelor's degree in graphic design. Gravatt testified that a two-year program in graphic design would be enough to return Claimant to her pre-injury earning level. Gravatt compared Claimant's current bachelor's degree program with a two-year vocational program through Western Dakota Technical Institute. Based upon the vocational evidence, a bachelor's degree is an unreasonable means of returning Claimant to suitable, substantial, and gainful employment, even if retraining were necessary.

Claimant's college degree is an unnecessary and unreasonable means of rehabilitation. Unfortunately, Claimant has also failed to demonstrate that a bachelor's degree in graphic design would restore her to suitable, substantial, and gainful employment in her community. In order to determine whether a program of rehabilitation benefits is reasonable, it is necessary to evaluate the employment available to the claimant upon completion of the program. Kurtenbach, 563 N.W.2d at 875. A claimant, however, is not entitled to use job opportunities outside her community to establish the reasonableness of a rehabilitation program. Id. A claimant's willingness to relocate to a new community does not change this. Id. Claimant's community at the time of her injury was Rapid City. Both vocational experts analyzed Claimant's employment opportunities in Rapid City, referencing West River and statewide positions. Any jobs located outside of Rapid City, however, are irrelevant in analyzing the reasonableness of Claimant's rehabilitation program in that they are located outside of her community.

The vocational evidence presented at hearing shows that even after completing her degree program, jobs in the graphic design field are not readily available in Claimant's community and she may be unable to find such employment. Her expert could not identify any positions that would return her to suitable, substantial, and gainful

employment in her community. The vocational evidence shows that the entry-level positions for a person with a degree in graphic design would likely *not* pay at least 85% of her pre-injury earnings. In summary, Claimant's four-year degree in graphic design is not a reasonable means of returning her to employment.

4. The employee must file a claim with his employer requesting the benefits.

Dr. Lawlor declared Claimant at maximum medical improvement, released her to work with permanent restrictions, and gave her a 5% whole body impairment on January 29, 2004. On February 10, 2004, Claimant moved to Phoenix, Arizona. Claimant did not file her request for rehabilitation benefits until July 26, 2004. This request was submitted after Claimant moved to Phoenix, Arizona and two weeks after she began attending classes at the Art Institute of Arizona. Claimant had been accepted by the Art Institute of Phoenix in October of 2003, some 39 weeks before she made her claim for benefits.

In her hearing testimony, Claimant alleged that she did not look for work in Rapid City after ending her employment with Employer because she did not know what her permanent restrictions would be. Even after she knew these permanent restrictions, Claimant did not look for work and despite knowing that she wanted retraining, she waited until she was hundreds of miles away from Rapid City and was attending classes to make her claim. These acts deprived Employer/Insurer of a reasonable opportunity to evaluate her vocational situation properly and demonstrate the necessity of element four of the retraining test. Claimant's assertion that Employer/Insurer must pay rehabilitation benefits because it took too long to deny her claim is without merit. "A claimant may enroll in a rehabilitation program without the consent of the employer, but he does so at his own risk; that is, rehabilitation benefits will not be guaranteed for a particular program simply because the program is one a claimant wishes to pursue." Kurtenbach, 563 N.W.2d at 875. Claimant had decided long before the denial to assume financial responsibility for her bachelor's degree in graphic design. There is no evidence that Employer/Insurer led Claimant to believe that she would receive benefits for a program of rehabilitation and she took no actions to her detriment based on any alleged failure of Employer/Insurer to deny her claim.

Claimant's failure to make her claim before she began her classes created some of the problems predicted by the Chiolis Court. Both Claimant and Employer/Insurer were denied the opportunity of a complete and thorough vocational assessment of Claimant's employment opportunities in the Rapid City area. Claimant's chosen field will likely earn her less than her preinjury wage. Claimant chose to pursue a graphic design degree because of her love of art, not any documented vocational need. It may very well be impossible to predict what a retraining request in February of 2004 might have done for this claimant. Had Claimant had the benefit of the expertise that Gravatt or Carroll offer injured workers, she may well have pursued a different course and demonstrated a reasonable and necessary course of retraining.

Claimant failed to demonstrate by a preponderance of the evidence that she is entitled to rehabilitation benefits and her claim for such benefits must fail.

Employer/Insurer 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. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer'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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 10th day of May, 2007, in Pierre, South Dakota.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge