SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JOHN HEILMAN, **HF No. 145, 1998/99**

Claimant, **DECISION**

vs.

SIMON-TELELECT,

Employer,

and

CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY,

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 November 26, 2003, in Sioux Falls, South Dakota. John Heilman (Claimant) appeared personally and through his attorney of record, Dennis W. Finch. Steven S. Siegel represented Employer/Insurer (Employer). The sole issue presented is whether Claimant is entitled to benefits for vocational rehabilitation?

FACTS

1. At the time of the hearing, Claimant was fifty years old and lived in Huron.
2. Claimant graduated from Miller High School in 1971. Claimant attended SDSU for one year, but he "didn't do very well that year." Sometime in either 1983 or 1984, Claimant took one course in basic computers at Huron College.
3. After Claimant quit college in 1972, he ended up doing some construction work, putting up pole barns and working at a lumberyard.
4. In the fall of 1972, Claimant began farming a portion of a farm owned by his father. Claimant entered into an arrangement with his father whereby his father bought the farming equipment and Claimant did the farming for room and board, use of a vehicle and some spending money.
5. In 1976, Claimant became a 50-50 partner with his father, but due to his debt situation and a bad drought, Claimant took a job with a combining company. Claimant also worked for Highmore Livestock Exchange driving a truck and for Tri-State Insulation blowing insulation into houses.
6. Claimant began working for Employer in March 1978 as a machinist. Claimant worked for Employer from March 1978 until July 31, 1997.
7. Claimant was terminated on July 31st over a confrontation about whether or not Claimant had attempted to alter his timecard.
8. At the time Claimant was fired, he was a machinist class A and ran a CNC lathe.

9. The parties stipulated that Claimant earned $11.71 per hour and worked forty hours per week.
10. Claimant sustained several injuries while working for Employer.
11. On December 20, 1983, Claimant suffered an injury to his right shoulder while hammering an object. Claimant actually tore his rotator cuff, but was able to continue working for Employer despite this injury.
12. Claimant worked over the next ten years and his shoulder problem gradually worsened.
13. On October 6, 1993, Claimant injured both shoulders while loosening some bolts on a frame. Claimant sought medical treatment from Dr. E. Denise Quinlan and then Dr. William Watson, an orthopedic surgeon.
14. Dr. Watson performed surgery to repair Claimant's right rotator cuff tear on January 19, 1994.
15. Claimant continued to complain of pain in his left shoulder and on August 31, 1994, Dr. Watson performed surgery to repair a left rotator cuff tear.
16. In February 1995, Dr. Watson released Claimant to return to light duty work.
17. Claimant was working half days when on April 19, 1995, he slipped on some ice in Employer's parking lot and fell injuring his left shoulder and left knee.
18. In 1995, Dr. Watson gave a six percent impairment rating to Claimant's right shoulder and a ten percent impairment rating to Claimant's left shoulder.
19. On December 13, 1995, Claimant injured his knees at work. Claimant was working on a sticky mat and twisted to take the chucks off a machine and his left knee "popped" and his right knee became sore.
20. In the fall of 1996, Claimant treated at the Carr Chiropractic Clinic for left knee pain. Claimant was eventually referred to Dr. Paul Reynen, another orthopedic surgeon in the same clinic as Dr. Watson.
21. On January 27, 1997, Dr. Reynen wrote:

> Mr. Heilman has been seen and evaluated by me, intermittently, since 10/9/96 at which time he noted difficulty with the left knee among some other things. He related this to a twisting injury that occurred to him at work. He has been followed intermittently and has made some progress and then has returned with some more symptoms.
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> He was last seen 1/21/97 and he has had a recurrence of his left knee on the lateral aspect. His clinical exam was felt to be consistent with possible meniscal tear vs. chondral surface injury. We discussed ultimately leading to arthroscopy in attempts to try to improve his status.
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> The patient also has a history of some shoulder difficulty. When we try to accommodate his knee problems and try to get him to a sit-down position at work, apparently, the duties that he is doing causes recurrence of his shoulder problems. On the other hand, if he stands and helps his shoulders then his knee is a problem.
> I would suggest that, until we are able to take care of the knee situation if it is indeed fixable, he continue with his sit-down work, but with a work level that does not go above waist height.

22. On February 13, 1997, Dr. Reynen followed-up with another letter:

> Mr. Heilman has been followed up in the office once again in light of his knee and shoulder difficulties. We have discussed at length previously the difficulties that we incur with attempted work modifications and the sitting positions tend to cause more shoulder difficulty with increased motion and the standing positions tends [sic] to create more knee related problems.
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> I think, with these things in mind, I don't see a way that he is going to be able to get through the remaining work career doing what he is doing.
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> I think, in my medical opinion, it would be very beneficial to him and I believe indicated, to seek retraining in a different type of work that would be a little more acceptive [sic] of his physical abilities.

23. Claimant returned to work full time on March 17, 1997, and then he was terminated on July 31, 1997. When Claimant was fired, he was able to perform the necessary functions of his job as a machinist.
24. Despite being able to work full time, Claimant was having problems with his knees and shoulders. Claimant's knee pain increased because he was on his feet at work. Claimant had problems sleeping and "just hurt all the time." Claimant was taking 1000 mg of ibuprofen twice a day. Claimant testified "I liked being a machinist, but I wasn't happy there. I was suffering. That is why I asked to be retrained."
25. Claimant was unemployed for a while after his termination. At some point, Claimant saw an advertisement for a truck driver. Claimant stated, "I tried to work a deal out with him to do our combining at the farm and I would work with him [driving a truck]." Claimant quit this job after a short time because he had difficulty with the mechanical viability of the machines and he had some physical difficulties performing the job.
26. The next fall, Claimant tried to work for Basic Net, an internet service provider. Claimant quit after three months because he did not receive adequate training.
27. Claimant also worked for a mail hauling company for one day. Claimant quit because he could not handle the lifting requirements of the job.
28. Since that time, Claimant has worked only on the family farm, which he now owns in 50-50 partnership with his brother.
29. Claimant and his brother own 1,080 acres, of which, about 470 acres are dedicated to corn and about 35 acres to sunflowers.
30. In the fall prior to the hearing, Claimant did most of the combining, which took about three weeks. Operating the combine is usually "a pretty easy job" for Claimant. However, during the harvest, the corn was so low Claimant had "to use both hands [to steer and adjust the header height], and that just killed [his] left shoulder and [his] back."
31. Claimant also uses the farm for a commercial pheasant hunting operation. Last year, Claimant had two groups of hunters pay to hunt on the farm.
32. Claimant has looked for other employment without success.

33. Claimant went to the South Dakota Division of Vocational Rehabilitation in Huron and was then sent to Brookings for vocational testing. The Division of Vocational Rehabilitation determined Claimant was qualified to be retrained.
34. Claimant was admitted to Huron College. Claimant checked into a four-year business degree with an agriculture emphasis. Claimant's long term goal is to be either an "ag loan officer" in a bank or get a job with the Federal Land Bank or with the Department of Agriculture. Claimant also expressed an interest in working with computers.
35. Claimant did not pursue retraining because of the expenses he would have to incur in order to attend school.
36. On September 27, 2001, Claimant participated in a Functional Capacities Assessment (FCA) at the request of his vocational expert, Rick Ostrander.
37. Joel Anderson conducted the FCA and considered it to be a valid representation of Claimant's present physical capabilities. The FCA showed that Claimant would qualify for a light to medium duty level of employment and that he could work eight hours a day. However, Claimant can stand for only three to four hours during the day, thirty minutes at a time.
38. Dr. David Hoversten, board certified in orthopedics, performed an independent medical examination (IME) of Claimant on September 6, 2002.
39. Dr. Hoversten testified live at the hearing and opined that he would not place any work restrictions on Claimant at the present time.
40. Dr. Hoversten admitted he was not aware that Claimant had undergone an FCA in September 2001 and that an FCA is one helpful means to identify restrictions.
41. At the time of the hearing, Claimant continued to experience similar problems that he had with his knees at the time he was fired. Claimant's right knee hurts all the time. Claimant's left knee does not bother him as much as his right knee. Claimant can walk only about one mile and then he must sit down because his left knee "gets hot and burns." Claimant can tolerate standing as long as he can sit down as needed. Claimant estimated he can stand for two hours at a time, as long as he is not twisting or moving around. Claimant encounters difficulty sleeping and he takes Aleve to counteract the pain.
42. Claimant was a credible witness as the hearing. This is based on his consistent testimony at the hearing, in his medical records and vocational records and based on the ability to observe his demeanor.
43. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT IS ENTITLED TO BENEFITS FOR VOCATIONAL REHABILITATION?

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's entitlement to rehabilitation benefits is governed by SDCL 62-4-5.1. This statute has been interpreted

on numerous occasions by the South Dakota Supreme Court. A five-part test has been established for awarding rehabilitation benefits:

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.

Kurtenbach v. Frito-Lay, 563 N.W.2d 869, 872-73 (S.D. 1997). "The five requirements for rehabilitation benefits must be met before benefits will be awarded for a program of rehabilitation." Id. at 875.

1. Is Claimant able to return to his usual and customary line of employment?

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 machinist. Claimant performed this type of work for over nineteen years. Claimant stopped working for Employer because he was fired. At the time he was fired, Claimant was able to work on a full time basis, performing the essential functions of his job. However, Claimant experienced physical difficulties performing his job duties. One of Claimant's treating physicians, Dr. Reynen, recognized that Claimant's job as a machinist increased his knee problems and that it would be beneficial for Claimant to be retrained.

The FCA showed that Claimant can perform light to medium duty work with specific restrictions on his standing. To the contrary, Dr. Hoversten opined that he would not place any restrictions on Claimant. Dr. Hoversten's opinion is rejected as it lacks foundation. 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. Hoversten's opinion failed to take into account the FCA that Claimant underwent in September 2001. The FCA is a valid representation of Claimant's present physical capabilities.

Ostrander opined that the machinist position is a medium duty job. Ostrander explained the problem with Claimant's former position is that it requires continuous standing throughout the day. Ostrander opined that Claimant cannot return to his job as a machinist because the FCA does not allow Claimant to perform a full range of medium

duty work. Employer's vocational expert, Jim Miller, did not offer an opinion concerning whether Claimant could return to his usual and customary line of employment. Claimant's testimony was credible concerning the problems he experienced while working for Employer. Given the FCA and his physical condition, Claimant established by a preponderance of the evidence that he is unable to return to his usual and customary line of employment.

2. Is rehabilitation necessary to restore Claimant to suitable, substantial and gainful employment?

Employment is considered suitable, substantial and gainful if it returns the injured employee to no less than 85% of the employee's prior wage earning capacity. "Once an employee has made a prima facie showing that [he] is unable to find suitable employment, the employer then has the burden of establishing that the employee would be capable of finding such employment without rehabilitation." Sutherland, 1998 SD 26, ¶ 22. "SDCL 62-4-5.1 requires 'more than restoration to employment, however. "The new employment must be suitable when compared to the employee's former job."'" Id. ¶ 22 (citations omitted).

Ostrander opined that vocational rehabilitation is necessary to restore Claimant to suitable, substantial and gainful employment. Claimant has been unable to secure employment that would pay him 85% of his pre-injury earning capacity. In fact, Ostrander was unable to identify any work that Claimant would be capable of performing that would pay the appropriate rate. Ostrander opined that it would be "almost impossible" for Claimant to find employment that would pay him 85% of his pre-injury wage without retraining. Claimant searched unsuccessfully for employment. Claimant also attempted to work for a couple different employers, but was unable to remain employed due to his physical condition. Claimant is able to do some farming. However, Claimant is unable to earn enough farming for this to be considered suitable, substantial and gainful employment.

Miller opined that Claimant has transferable skills that would allow him to return to work as a machinist and also as a truck driver. Miller testified both of these professions would pay Claimant 85% of his pre-injury wages. Miller opined that retraining is unnecessary to restore Claimant to suitable, substantial and gainful employment. Miller stated "there are jobs in the local market area that [Claimant] is capable of doing given his transferable skills, residual functional capacities, and within 85% of his pre-injury wage." But, Miller was unable to identify any specific position that was open and available in Claimant's community that would pay 85% of Claimant's pre-injury wages. Therefore, Claimant established by a preponderance of the evidence that rehabilitation is necessary to restore him to suitable, substantial and gainful employment.

3. Is the program of rehabilitation a reasonable means of restoring Claimant to employment?

"The purpose of rehabilitation benefits is to restore an injured employee to suitable, substantial and gainful employment." Kurtenbach, 563 N.W.2d at 874. "A program of rehabilitation which does not accomplish this purpose is not reasonable." Id.

"A determination of whether a program of rehabilitation is reasonable necessarily requires an evaluation of the employment prospects for the claimant upon completion of the program." Id. "Employment prospects and the availability of suitable, substantial and gainful employment are evaluated in light of the claimant's community." Id. "An employer cannot rely on employment opportunities which would unreasonably require a claimant to relocate in order to defeat a claim for rehabilitation benefits." Id.

Ostrander opined the vocational testing shows that Claimant has the necessary aptitudes to pursue post secondary training at the college level. Ostrander described the type of program that would be suitable for Claimant:

> I've researched the two-year training programs that are available both at Huron University and Mitchell Technical Institute, which are really the only institutes of higher learning we have within his community. Neither of those are [sic] going to do it for him. The programs at Mitchell Technical Institute, for example, in computer systems technology, they're not getting any placement in the area. Individuals are having to go outside the area, even out of state, to secure employment. We've had a problem with the two-year degrees competing with the four-year degrees. In the Huron community, I think his reasonable likelihood of employment would be something in the business area, something in finance, maybe incorporating computers. Certainly a business program at Huron University with a computer technology/ag emphasis in my opinion stands the best chance.
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> Basically we've got to find work that's going to get him off his feet at least half the day, and to do that, you're generally looking at a four-year degree. To be competitive, given his age and given his community, I think definitely the four-year degree is going to be necessary. I think if we got him a two-year degree, say, in accounting or business, I don't think that would get him to 85 percent to begin with. I think he'd get beat out by people that have a four-year degree.

Miller recognized that "[e]ducation is always beneficial in the long run for anyone that desires to improve his or her skills and open new job opportunities." However, Miller was critical of Claimant's request for retraining because Claimant "does not have a clear goal in mind and has not explored what type of degreed program would be most beneficial to his future." When Miller met with Claimant in October 2002, Miller attempted to explore what type of retraining Claimant intended to pursue. Miller stated:

> Well, essentially I asked John, you know, really, what would you like to do, and his comment was, well, I'd like to do something with computers. So I tried to explore that a little further - - do you want to fix them? Do you want to operate them? Do you want to sell them? You know, what do you want to do? And really, he couldn't come up with anything.

Claimant was admitted to Huron College and has expressed an interest in pursuing a degree in business with an emphasis in agriculture. Claimant stated, "I checked into Huron, and they have a four-year business degree with ag emphasis. And I think that would be a good place for me to start. I don't know if that's the way it would end up, but that is definitely a smart place to start." With this type of education, Claimant thought he

could be a loan officer, or get a job with the Federal Land Bank or with the Department of Agriculture.

Despite Claimant's testimony and Ostrander's opinion that a four-year degree is necessary, no evidence was presented concerning Claimant's employment prospects upon the completion of a four-year degree. No evidence was presented identifying employment opportunities available to Claimant in his community that he would pursue upon graduation. So far, Claimant has expressed an interest in pursuing a four-year degree. However, Claimant's desire is insufficient to meet his burden. Claimant failed to establish that the program of rehabilitation, a four-year degree, is a reasonable means of restoring Claimant to employment.

4. Did Claimant file a claim with Employer requesting rehabilitation benefits?

Employer conceded that Claimant filed a claim requesting rehabilitation benefits. Claimant established by a preponderance of the evidence that he filed a claim with Employer requesting rehabilitation benefits.

5. Did Claimant actually pursue the reasonable program of rehabilitation?

Claimant has not enrolled in any program of rehabilitation due to financial concerns. Claimant has expressed only a desire to pursue a program of rehabilitation. Claimant has done nothing more to be actively preparing to engage in a program of rehabilitation.

As all five requirements must be met before benefits will be awarded, Claimant has failed to establish by a preponderance of the evidence that he is entitled to benefits for vocational rehabilitation. However, this denial of benefits should not be construed as a complete denial of rehabilitation benefits. Claimant is free to propose a different program of rehabilitation. *See* Kurtenbach, 563 N.W.2d at 875.

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 6th day of January, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge