SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JOHN H. HARTER,
Claimant,

HF No. 191, 2002/03

v.

DECISION

STORE SERVICES, INC.,
Employer,

and

FEDERATED INSURANCE,
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 July 7, 2006, in Rapid City, South Dakota. Claimant appeared personally and through his counsel, Dennis Finch. Timothy A. Clausen represented Employer/Insurer.

Issues:

1. Whether Claimant's current condition, disability and need for treatment is compensable under SDCL 62-1-1(7).
2. Whether Claimant is entitled to temporary total disability benefits under SDCL 62-1-1(8) and 62-4-2.
3. Whether Claimant's medical expenses are compensable under SDCL 62-4-1 and 62-4-43.
4. What is Claimant's average weekly wage pursuant to SDCL 62-1-1(1).
5. Whether Claimant is entitled to permanent partial disability benefits pursuant to SDCL 62-4-6.
6. Whether Claimant is entitled to compensation during vocational rehabilitation pursuant to SDCL 62-4-5.1

Facts:

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

1. At the time of hearing, Claimant was 43 years of age and was living near Winner, South Dakota, and self-employed in a farm/ranch operation. Claimant has a high school education, graduating from Colome High School with honors in 1981.

Claimant earned a degree in automotive mechanics from Wyoming Tech in Laramie, Wyoming.

2. The farm/ranch operation is a cow/calf operation with some farming and feed raising for the cattle operation but it is operated by Claimant, his father-in-law, and his father.
3. Claimant worked as an auto mechanic for various employers for approximately 9 years before starting work for Employer.
4. Claimant worked a total of thirteen years for Employer, known as Auto Mate of Winner.
5. On August 17, 1999, Claimant sustained a work-related injury to his low back while lifting an engine starter. The starter weighed approximately 50 to 70 pounds.
6. Claimant previously sustained a low back injury on January 8, 1997. That injury was treated as compensable.
7. Claimant's employment for Store Services ended in May of 2002.
8. Following both his 1997 and 1999 injuries, Dr. Mary Carpenter referred Claimant to Kelly Coleman, a physical therapist in Winner, South Dakota.
9. Ultimately, Claimant was referred to Dr. Bret Lawlor, a Rapid City physiatrist.
10. Dr. Lawlor began treating Claimant on December 1, 1998.
11. Dr. Richard Farnham conducted an independent medical examination pursuant to SDCL 62-7-1 on March 23, 2001. Dr. Farnham issued a report of his findings.
12. On April 19, 2001, Employer/Insurer denied Claimant any further worker's compensation benefits based upon Dr. Farnham's report.
13. Claimant received chiropractic treatment from the Fogel Chiropractic Clinic in Gregory, South Dakota, beginning in December 1999. Claimant continued to receive chiropractic treatments off and on up to the time of hearing.
14. On September 26, 2002, Claimant underwent an IDET procedure performed by Dr. Lawlor.
15. On July 29, 2003, Dr. Lawlor assessed Claimant as having a 5% whole person permanent partial impairment. Employer/Insurer did not compensate Claimant for this rating.
16. In May of 2002, Claimant made application to the South Dakota Division of Rehabilitation Services (SDDRS). SDDRS determined Claimant was eligible for services.
17. Claimant did not follow through with SDDRS plans for rehabilitation because he was waiting for resolution of his worker's compensation claim.
18. Claimant received some unemployment benefits after his employment ended with Store Services.
19. Claimant has continued to work on his family farm/ranch operation. He seeks assistance with any tasks requiring lifting more than 25-30 pounds. When necessary, Claimant uses rest breaks, prescription pain medication, over-the-counter pain medication, and ice packs to alleviate his back pain. This is in addition to twice-weekly visits to Fogel Chiropractic.
20. Other facts will be developed as necessary.

Issue One

Whether Claimant's current condition, disability and need for treatment is compensable under SDCL 62-1-1(7).

Claimant "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "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). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

This case presents multiple causation issues. The causation of Claimant's current condition, his disability and his need for treatment are all in dispute. The need for medical treatment related to his August 17, 1999 will be addressed in Issue Three. The causation of Claimant's disability will be addressed with Issues Two, Five, and Six. The causation of Claimant's current condition will be addressed with Issue Six. Employer/Insurer's argument that Claimant's injury and need for treatment for concerns related his L2-L3 area is addressed below.

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

> [O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
>
> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment.
>
> (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

There is dispute whether Claimant suffered from a preexisting condition, degenerative disc disease at the L2-L3 level of his back, that combined with his injury of August 17,

1999. "While both subsection (b) and subsection (c) deal with preexisting injuries, the distinction turns on what factors set the preexisting injury into motion; if a preexisting condition is the result of an occupational injury then subsection (c) controls, if the preexisting condition developed outside of the occupational setting then subsection (b) controls." Byrum v. Dakota Wellness Foundation, 2002 SD 141, ¶15 (citing Grauel v. South Dakota School of Mines, 2000 SD 145, ¶8, 16-17, 619 N.W.2d 260, 262-265.) Claimant suffered a work-related back injury in 1997. Claimant did not establish that his degenerative disc disease is the result of his 1997 occupational injury. Both Dr. Lawlor and Dr. Farnham opined that Claimant had some level of degenerative disc disease at the L2-L3 level of his back before August of 1999.

Dr. Lawlor attributes his need for treatment at the L2-L3 level to the August 17, 1999, injury, opining that Claimant "may have had previous disc injury that healed and was non-symptomatic" until the injury of August 17, 1999. Based upon Dr. Lawlor's testimony, subsection (b) controls because Claimant's injury of August 17, 1999, combined with this preexisting non-symptomatic degenerative disc disease, which developed outside of the occupational setting and was not the result of an occupational injury. Claimant must establish that his injury of August 17, 1999, is and remains a major contributing cause of his disability, his impairment and his need for treatment.

Dr. Lawlor and Dr. Farnham disagree as to whether the injury of August 17, 1999, affected the L2-L3 level. Dr. Farnham opined that Claimant's injury was a lumbar strain/sprain that did not involve any lumbar discs, only ligaments and muscle. Dr. Lawlor, who treated Claimant, opined that Claimant's August 17, 1999, injury caused the degenerative disc to be symptomatic, basing his opinion, in part, on the history of symptoms Claimant gave him. Dr. Lawlor testified:

Q: And are you relating that L2-3 disc injury to this November of - - this August 17 of 1999 injury, Doctor?
A: Yes.
Q: Have you looked at any prior MRIs to see if there was any prior indication of an L2-3 injury before August 17th of 1999?
A: No.
Q: If there is such evidence of prior injury at L2-L3, would you agree with me that it wouldn't be related to the August 17th of 1999 incident?
MR. FINCH: Objection. Calls for speculation.
A: No, I wouldn't agree.
Q: And why is that?
A: He may have had previous disc injury that healed and was non-symptomatic. Part of my opinion regarding his disc injury has to do with his symptoms that he relates the beginning to - - from the 1999 injury.

Employer/Insurer attempted to discredit Dr. Lawlor's opinions because he had not reviewed Claimant's medical records before the August 17, 1999, injury. Dr. Lawlor testified further:

Q: [Mr. Clausen] asked you about previous records, if you'd had an opportunity to review. I'm going to show you what I'll represent to you is a true and accurate copy from the Mid-west Orthopedic Center in Sioux Falls, Dr. Walter Carlson in 1997, and he make reference to an MRI that was done at that time. Do you see that?
A: Yes.
Q: And does he say that the MRI was normal?
A: Yes.
Q: And also physical therapy records from Kelly Coleman. I'll represent to you that those are a true and accurate copy that started the day after the August 17, 1999 injury and the history that she refers to there is lifting a 70-pound engine starter the day before. Do you see that?
A: Yes.
Q: Is that consistent with the history you obtained and consistent with your findings on exam?
A: Yes.

Dr. Lawlor opined that Claimant's August 17, 1999, injury serves as a major contributing cause of Claimant's low back pain that he treated Claimant for over the course of four years. Dr. Farnham disagreed. Dr. Farnham is not a physiatrist. He did not treat Claimant. Dr. Lawlor's record's clearly show that he had attempted conservative care with Claimant to see if the back condition would improve over time. If the condition did not improve, Dr. Lawlor was prepared to offer Claimant further testing and treatment. Dr. Farnham did not take this into account in his opinion on the causation of Claimant's need for medical treatment.

Dr. Lawlor opined that all of the various procedures performed by or ordered by him from March of 2000 through July 29, 2003 were reasonably necessitated by that August 17, 1999, injury. Based upon Claimant's credible testimony, Dr. Lawlor's testimony, Dr. Lawlor's expertise as a treating physiatrist, and the fact that Dr. Lawlor physically examined, spoke with, and treated Claimant on multiple occasions, and performed or ordered multiple treatments and therapies for Claimant, Dr. Lawlor's opinions on the issue of causation are accepted as more persuasive than those of Dr. Farnham on causation of Claimant's need for medical treatment. Further analysis of the physicians' opinions will be provided in the discussion of Issue Three.

Issue Two

Whether Claimant is entitled to temporary total disability benefits under SDCL 62-1-1(8) and 62-4-2.

SDCL 62-1-1(8) provides the following definition of "temporary disability, total or partial":

> 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 62-4-2 provides:

> No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the seven-day waiting period is met, benefits shall be computed from the date of the injury.

Claimant asserts that he is entitled to receive temporary total disability benefits for the six-month period following the IDET procedure performed by Dr. Lawlor on September 26, 2002. Claimant alleges that he was incapacitated from working during this time due to the procedure. Dr. Lawlor's testimony does not support this argument. He testified that Claimant's physical activity would have been restricted for a month after the procedure. Dr. Lawlor's records and testimony do not support a finding that Claimant was incapacitated for a period of seven consecutive days. Dr. Lawlor's restrictions placed upon Claimant after the IDET procedure do not trigger SDCL 62-4-2. Claimant's request for six months of temporary disability benefits after the IDET procedure is denied.

Issue Three

Whether Claimant's medical expenses are compensable under SDCL 62-4-1 and 62-4-43.

SDCL 62-4-1 provides in relevant part:

> The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members and body aids during the disability or treatment of an employee within the provisions of this title.

SDCL 62-4-43 provides in relevant part:

> The employee may make the initial selection of his medical practitioner or surgeon from among all licensed medical practitioners or surgeons in the state. The employee shall, prior to treatment, notify the employer of his choice of medical practitioner or surgeon or as soon as reasonably possible after treatment has been provided. The medical practitioner or surgeon selected may arrange for any consultation, referral or extraordinary or other specialized medical services as the nature of the injury shall require. The employer is not responsible for medical services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section.

When a disagreement arises as to the treatment rendered, or recommended by the physician to the workers' compensation claimant, it is for the employer to show that the treatment was not necessary or suitable and proper. Engel v. Prostrollo Motors, 656 N.W.2d 299, (S.D. 2003). Employer/Insurer argues that no medical expenses incurred by Claimant after Dr. Farnham's March 23, 2001, determination are compensable. Employer/Insurer rely solely on the opinions of Dr. Farnham that Claimant's injury of August 17, 1999 was a simple sprain/strain, that Claimant had reached maximum medical improvement as of March 23, 2001, and that Claimant's injury required no further medical treatment. Dr. Lawlor opined to a reasonable degree of medical probability that all the various procedures performed by him from March of 2000 through July 29, 2003, were "reasonably necessitated" by the August 17, 1999 injury.

Dr. Lawlor examined Claimant on March 15, 2001. Dr. Lawlor noted in his records:

> Mr. Harter comes in for follow-up today. He had a diagnostic medial branch block. He did have a few hours where he had less of the sharp pains. He continues to have back pain, at times as severe as 5/10. He said that typically 5 days out of the 7 he will have pain at this level. Some days he had pain that is 1/10 or less. He is uncertain what brings on the good days, or what causes the bad days, except that he knows the more active he is, the worse his pain is. He is frustrated, and wondering what treatment options might be appropriate.
>
> On examination today, he continues to have left paraspinous tenderness. He has no redness at the injection site. He had pain with facet loading maneuvers.
>
> [Dr. Lawlor diagnosed] Mechanical low back pain with predominant discogenic vs. facetogenic features.

Dr. Lawlor discussed at length with Claimant what treatment options were available, including a facet rhizotomy. No treatments were scheduled because of the IME scheduled for March 23, 2001. Dr. Farnham examined Claimant on March 23, 2001, and found that Claimant had a normal physical examination and no objective findings to substantiate Claimant's "persistent subjective complaints."

Claimant returned to Dr. Lawlor on February 5, 2002. Dr. Lawlor noted:

> Mr. Harter comes in for follow-up today. He is having continued left-sided back pain. I have seen him in the past for this and performed diagnostic medial branch blocks, which provided him with temporary relief and were diagnostic. He had facet injections in the past, which did give him some relief.
>
> He continues to have pain that is variable from a 1-3/10. He says this pain is too high a level for him to continue on. He has undergone extensive rehab. He has undergone extensive chiropractic treatment.

> He is coming in today wondering whether or not a facet rhizotomy is still an option for him.
>
> On exam today, he has very minimal midline lumbar spine tenderness. He has increased pain with extension. He has increased pain with prone extension and with reverse straight leg raising. He has no swelling or masses.

Dr. Lawlor diagnosed "probable facetogenic pain" and "possible discogenic pain." Ultimately, Claimant chose to undergo a facet rhizotomy on February 21, 2002. On March 19, 2002, Claimant followed up with Dr. Lawlor, who noted that Claimant did not have the relief expected. Dr. Lawlor recommended a discography if Claimant's condition did not improve. The provocative lumbar discography was performed on May 7, 2002. Claimant had a positive discogram at the L2-3 level. On September 26, 2002, Claimant underwent the IDET procedure at the L2-L3 level. On November 11, 2002, Dr. Lawlor examined Claimant and found that he had had a 50% reduction in his pain.

At issue is the medical treatment rendered by Dr. Lawlor from and after March 23, 2001 until July 29, 2003. Dr. Lawlor was the treating physician. His opinions are accepted as more persuasive than Dr. Farnham's. Dr. Farnham performed one examination of Claimant on March 23, 2001. Dr. Farnham opined that there was no objective evidence to substantiate Claimant's subjective complaints of pain. Although, Dr. Farnham considered all of Claimant's medical records, he did not take into consideration Dr. Lawlor's findings on his multiple examinations. Dr. Farnham simply concluded based upon one examination that Claimant was "normal" and would not need any further treatment. Dr. Lawlor considered Claimant's day to day, month-to-month condition, finding that Claimant's symptoms waxed and waned depending upon Claimant's activities. Dr. Lawlor and Claimant proceeded through a conservative course of medical treatment, including physical therapy and strengthening exercises.

Dr. Lawlor's curriculum vitae lists his professional interests as:

> Musculoskeletal rehabilitation.
> Sports, spine, and occupational rehabilitation.
> Treatment of acute and chronic pain.
> Electromyography.
> Diagnostic and therapeutic injections.

Dr. Lawlor has been board certified by the American Board of Physical Medicine and Rehabilitation since 1997 and by the American Board of Pain Medicine since 1999.

In contrast, Dr. Farnham testified that his "specialty" is "occupational medicine and forensic medicine." Dr. Farnham is not board certified in occupational medicine because he could not pass the written portion of the certification examination. Dr. Farnham is "board certified" in forensic medicine, which he described as "that recognized branch of medicine which deals with legal issues." He further explained, "it deals with performing independent medical evaluations and reviewing medical records,

and utilizing an occupational medicine background to determine issues and to generate reports to be used in depositions and arbitrations and personnel [sic] injury cases. So it's dealing with occupational medicine in a legal sense."

Dr. Lawlor's opinions are based upon his many careful examinations of Claimant and his discussions with Claimant regarding Claimant's condition and treatment options. Dr. Lawlor opined within reasonable medical probability that Claimant's August 17, 1999, injury is a major contributing cause for Claimant's need for the treatment he recommended and performed. Dr. Lawlor's opinions are accepted as more persuasive than Dr. Farnham's. The treatments recommended by Dr. Lawlor up to and including the July 29, 2003, office visit are compensable. Employer/Insurer is required to compensate Claimant and/or his personal health insurance company pursuant to SDCL 62-1-1.3.

With regard to the compensability of a 2005 MRI, Dr. Lawlor opined that this test was not related to the August 1999 injury and, therefore, is not compensable.

With regard to the compensability of a "core lumbar strength machine," Dr. Lawlor's testimony does not support a finding that the expense of this machine is compensable pursuant to SDCL 62-4-1. The machine was prescribed in May of 2004, almost a year after Dr. Lawlor had last seen Claimant and declared Claimant to be at maximum medical improvement. Dr. Lawlor testified that he is unaware of medical literature that supports the use of this machine to treat Claimant's type of injury. Dr. Lawlor testified that he is unaware of "any specific advantage of this machine versus a core stabilization program that can be done other ways." Dr. Lawlor had prescribed core stabilization exercise regimen for Claimant that did not involve the use of the machine, but involved exercises that Claimant could do on his own. The expense of the core lumbar strength machine is not compensable.

Claimant's entitlement, if any, to permanent partial disability benefits will be addressed with Issue Five.

Issue Four

What is Claimant's average weekly wage pursuant to SDCL 62-1-1(1).

SDCL 61-1-1(1) provides:

> "Annual earnings," the average weekly wages, computed as provided in §§ 62-4-24 to 62-4-28, inclusive, multiplied by fifty-two.

Based upon the South Dakota Employer's First Report of Injury (First Report), Claimant was hired by Employer on February 5, 1999. The Department finds that as of August 17, 1999, Claimant had worked for his employer for at least the preceding 52 weeks. Claimant worked as an auto parts counterperson, which customarily operates throughout the working days of the year and is not seasonal. The First Report indicates

that Claimant's grade of employment had not changed in the 52 weeks preceding his injury. Therefore, SDCL 62-4-24 applies to calculate of Claimant's average weekly wage. SDCL 62-4-24 provides in pertinent part:

> As to an employee in an employment in which it is the custom to operate throughout the working days of the year, and who was in the employment of the same employer in the same grade of employment as at the time of the injury continuously for fifty-two weeks next preceding the injury, except for any temporary loss of time, the average weekly wage shall, where feasible, be computed by dividing by fifty-two the total earnings of such employee as defined in subdivision 62-1-1(6), during such period of fifty-two weeks.

SDCL 62-1-1(6) provides in pertinent part:

> "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.

Unfortunately, Claimant's wage records from 1998 and 1999 were unavailable from Employer/Insurer at time of hearing. The only evidence of Claimant's earnings were his testimony that he earned $10.00 per hour at the time of his injury and worked an average of 52 hours per week; the First Report, indicating only that Claimant earned $10.00 per hour; and Claimant's Social Security Statement of Earnings through 2004. The Social Security Statement of Earnings indicates that in 1998, Claimant earned a total of $20,742.00 and in 1999, Claimant earned $22,928.00.

Utilizing the statement of earnings and dividing the total 1998 earnings of $20,742.00 by 52 weeks, Claimant earned $399.88 per week in 1998. Eighteen weeks of 1998 earnings equals $7,197.84. Claimant earned $22,928.00 in 1999. Dividing his 1999 earnings by 52 weeks, Claimant earned $440.92 per week. For thirty-four weeks prior to the date of injury, Claimant earned $14,991.28. The total of 52 weeks of earnings prior to Claimant's injury is $22,189.12. By applying SDCL 62-4-24 and dividing $22,189.12 by 52, Claimant's average weekly wage is $426.71. Claimant's weekly worker's compensation benefit is $282.61 per week based upon 66⅔% of the above average weekly wage.

Employer/Insurer argue that SDCL 62-1-1(6) and 62-4-3 require the Department to find that Claimant earned $10.00 per hour and worked 40 hours a week. Employer/Insurer's argument is rejected based upon the evidence available. Claimant's average weekly wage is $426.71, entitling him to a weekly worker's compensation rate of $282.61.

Issue Five

Whether Claimant is entitled to permanent partial disability benefits pursuant to SDCL 62-4-6.

Under SDCL 62-4-6, an employee shall receive compensation for the "specific medical impairment." SDCL 62-1-1.2 provides:

> For the purposes of this chapter, impairment shall be determined by a medical impairment rating, expressed as a percentage to the affected body part, using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, fourth edition, June 1993.

On July 29, 2003, Dr. Lawlor performed an impairment rating an opined that Claimant had a 5% whole body impairment. Dr. Farnham opined in March of 2001, that Claimant had no impairment. Employer/Insurer argue that Dr. Lawlor's impairment rating should be rejected because he based his opinion on "nothing more than an L2-3 abnormality and was rendered without reviewing the prior MRI reports." Regarding the impairment rating, Dr. Lawlor opined that the impairment evaluation and the rating he assessed were the result of the August 17, 1999, injury. Dr. Lawlor, who has performed numerous impairment ratings, testified:

> The impairment rating is done as per the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. The Guides dictate how the impairment rating should be done. Includes a history, physical exam, and review of the medical records, including all relevant imaging studies, and I performed the impairment rating in this manner.

When cross-examined about this impairment rating, Dr. Lawlor explained:

Q: And in the ratings exam you give him a 5 percent impairment pursuant to the Fourth Edition of the Guides?
A: Yes.
Q: And that's because he falls in a DRE Category 2?
A: Yes.
Q: What, about his symptoms, make him fall within that DRE Category 2?
A: Well, on discogram he had evidence of disc injury.
Q: At what levels?
A: At L2-3.
Q: Any other levels?
A: No.
Q: And are you relating that L2-3 disc injury to this November of - - this August 17 of 1999 injury, Doctor?
A: Yes.
Q: Have you looked at any prior MRIs to see if there was any prior indication of an L2-3 injury before August 17th of 1999?
A: No.
Q: If there is such evidence of prior injury at L2-L3, would you agree with me that it wouldn't be related to the August 17th of 1999 incident?
MR. FINCH: Objection. Calls for speculation.

A: No, I wouldn't agree.
Q: And why is that?
A: He may have had previous disc injury that healed and was non-symptomatic. Part of my opinion regarding his disc injury has to do with his symptoms that he relates the beginning to - - from the 1999 injury.

Dr. Farnham opined that Claimant did not suffer any injury to his L2-3 disc on August 17, 1999. He diagnosed Claimant with a lumbosacral sprain/strain that healed over time. He therefore assessed Claimant with a zero percent impairment. Claimant's injury on August 17, 1999, combined with the preexisting L2-3 degenerative disc disease to become symptomatic. Dr. Lawlor treated these symptoms with a lumbar stabilization program. The Department accepts Dr. Lawlor's opinion regarding Claimant's permanent impairment for the same reasons it accepts his opinions regarding the injury suffered by Claimant on August 17, 1999. Claimant is entitled to compensation for a 5% whole person impairment.

Issue Six

Whether Claimant is entitled to compensation during vocational rehabilitation pursuant to SDCL 62-4-5.1.

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.

The South Dakota Supreme Court has established a five-part test regarding 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.

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 requirements of this five-part test and whether Claimant's current condition is causally related to the August 17, 1999, injury. The Department will address each in turn.

1. The employee must be unable to return to his usual and customary line of employment.

SDCL 62-4-54 sets forth the factors to be considered in determining a claimant's "usual and customary line of employment:"

> Usual and customary line of employment is to be determined by evaluation of the following factors:
>
> (1) The skills or abilities of the person;
> (2) The length of time the person spent in the type of work engaged in at the time of the injury;
> (3) The proportion of time the person has spent in the type of work engaged in at the time of injury when compared to the employee's entire working career; and
> (4) The duties and responsibilities of the person at the workplace. It is not limited by the position held at the time of the injury.

Each party hired its own vocational expert. William Peniston testified on behalf of Claimant. Jerry Gravatt testified on behalf of Employer/Insurer. Each testified as to what is Claimant's "usual and customary line of employment." Peniston considered Claimant's usual and customary line of employment to be in auto mechanics. Peniston opined that the physical restrictions/limitations placed upon Claimant by Dr. Lawlor precluded Claimant's return to auto mechanics, either as a hands-on mechanic or as an auto parts technician or a machinist. Peniston considered each of the factors outlined in SDCL 62-4-54. Jerry Gravatt, Employer/Insurer's vocational expert, agreed that Claimant is unable to return to his usual and customary line of employment. Claimant is 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.

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 is $426.71. Eighty-five percent of $426.71 is $362.70 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 he is unable to find suitable employment." Kurtenbach v. Frito-Lay, 563 N.W.2d 869, ¶ 17 (citations omitted). In order to meet the second element of the rehabilitation test, a claimant must show that he is unable to "obtain employment following [his] 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, 576 N.W.2d at 25.

Claimant worked, with physical accommodations, for two and one-half years for Employer after his injury. Claimant's employment as an auto parts technician ended in May of 2002. Claimant underwent the IDET procedure in September of 2002. He testified that he did not recover from that surgery for many months. Claimant did not conduct a job search after the IDET procedure, instead he continued working on his farm/ranch, doing what chores he could manage. Peniston testified that given his labor market research, Claimant would not be able to find work in the Colome/Winner area. Peniston's opinion, in conjunction with Claimant's credible testimony, meets the prima facie test.

Based upon his contacts with various employers in the Winner community, who indicated a willingness to hire Claimant, Gravatt testified that Claimant should be able to find employers in the Winner community who would hire him with his specific limitations. Gravatt failed to inform these employers of Claimant's specific physical limitations as defined by Dr. Lawlor or by Claimant himself. Gravatt did not opine that any of these employers would pay Claimant a wage equaling $362.70 per week. The willingness of the Winner employers to hire Claimant based upon his outstanding reputation alone, without knowledge of his specific physical limitations, does not meet Employer/Insurer burden under Cozine. Employer/Insurer failed to demonstrate that Claimant is capable of finding suitable, substantial and gainful employment.

Claimant has met his burden under the second part of the rehabilitation test.

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 disable 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 v. Midwest Coast Transport, Inc., 454 N.W.2d 548, 554 (S.D. 1990)).

Peniston testified that if Claimant pursued a degree in business management or accounting, the computer systems technology or computer repair work or a telecommunications program, he would allow him to find suitable, substantial, and gainful employment in his labor market. Gravatt testified that retraining is not necessary and gave no opinion on the specific degree programs recommended by Peniston.

Claimant has met his burden under the third part of the rehabilitation test.

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

Claimant has obviously met this part of the rehabilitation test.

5. The employee must actually pursue the reasonable program of rehabilitation.

Claimant has not yet begun a program of retraining and no benefits would be payable until he actually pursues one of the programs of rehabilitation recommended by Peniston.

Claimant has met his burden under the rehabilitation test and is therefore entitled to rehabilitation benefits pursuant to SDCL 62-4-5.1.

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/Insurer 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 12th day of October, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge