**SOUTH DAKOTA DEPARTMENT OF LABOR**
**DIVISION OF LABOR AND MANAGEMENT**

**KEVIN MCKIBBEN,**
**Claimant,**

**HF No. 231, 2004/05**

**v.**

**DECISION**

**HORTON VEHICLE COMPONENTS, INC.,**
**Employer,**

**and**

**AMERICAN HOME ASSURANCE 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. Claimant appeared personally and through his attorney Bram Weidenaar. Patricia A. Meyers represented Employer/Insurer. The sole issue argued by the parties was whether Claimant is entitled to benefits pursuant to SDCL 62-4-5.1.

**Facts:**

1. Claimant suffered an injury on February 14, 2004, while performing his regular duties as a machinist for Employer.
2. Claimant's injury was treated as compensable.
3. Following three surgeries to repair an inguinal hernia and subsequent nerve damage, Claimant entered into a work hardening program in an effort to return to his regular duties. However, due to illness and childcare issues, he was unable to attend several sessions.
4. Employer/Insurer suspended Claimant's benefits and Claimant suffered economic hardship resulting in the loss of his automobile.
5. Dr. Richard Farnham conducted a medical examination pursuant to SDCL 62-7-1. Dr. Farnham opined that Claimant suffered a 15% impairment to his whole person as a result of his injury and subsequent medical treatment.
6. Dr. Farnham recommended a 25-pound lifting restriction on Claimant's physical activity.
7. Following this impairment rating, Claimant attempted to return to work within the physical restrictions as imposed by Dr. Farnham.
8. Claimant returned to work as a beginning machinist, which was light duty.

9. Claimant was required to take frequent breaks due to his pain. Employer/Insurer made accommodations for Claimant. Employer/Insurer provided an area in which Claimant could recline but Claimant chose to recline in his car.
10. After a period of reclining, Claimant returned to work for about an hour before the pain was too great for him to continue working. Claimant would then inform his supervisor and go home for the day.
11. Due to his pain, Claimant was never able to work more than three and one-half hours per day at this accommodated position.
12. Claimant's pain was so severe that he would actually cry because of it.
13. Claimant's testimony regarding his pain was credible.
14. Employer/Insurer made these accommodations for approximately four months. On April 15, 2005, Employer/Insurer changed its policy with respect to Claimant and started requiring a note from a physician for his absences.
15. Claimant was unable to obtain a note from a physician regarding his pain.
16. Claimant's pain was well documented by the medical records and the requirement that he obtain further medical proof of his pain was unreasonable.
17. Claimant's last day of work for Employer/Insurer was April 29, 2005.
18. Claimant's employment was terminated on May 2, 2005.
19. Claimant performed a reasonable job search in or near the Britton, South Dakota area.
20. Claimant applied for Vocational Rehabilitation benefits through the Department of Social Services. He was approved for benefits and thereafter engaged in an internet study course for Computer Assisted Drafting.
21. Other facts will be developed as necessary.

**Analysis:**

**Whether Claimant is entitled to worker's compensation benefits pursuant to SDCL 62-4-5.1.**

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

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.
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> 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 first requirement of this five-part test. Claimant met his burden on the other four parts of the test.

*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. Tom Audet testified on behalf of Claimant. James E. Miller testified on behalf of Employer/Insurer. Each testified as to what is Claimant's "usual and customary line of employment." Tom Audet, a certified rehabilitation counselor, considered Claimant's usual and customary line of employment to be that of a machinist. Audet opined that a machinist is a "skilled occupation. It probably fits into the category of being a skilled trade. And generally the DOT, the Dictionary of Occupational Titles defines as medium work." Audet opined that the physical restrictions/limitations placed upon Claimant by Dr. Farnham and the FCE precluded his return to the machinist trade. Audet opined that the accommodations made by Employer/Insurer in attempting to perform the beginning or basic machinist meet Claimant's physical limitations except that Claimant suffered too much pain while standing to be able to perform the duties required. Audet opined that Claimant was physically unable to return to his usual and customary occupation as a machinist.

Employer/Insurer dispute that Claimant is unable to return to his usual and customary occupation as a machinist. Miller opined that the position in which Employer had placed Claimant met the FCA restrictions and physician imposed restrictions on Claimant's physical activity. Employer/Insurer argues that because Claimant's physician released him to work and Employer/Insurer provided a position within his restrictions, Claimant cannot make a case for rehabilitation benefits. Claimant testified credibly that he was in too much pain to perform his duties. Claimant also testified credibly that his reason for not seeking medical attention each time he left work because of his pain was that he had been told by Dr. Westbrook that there is nothing more that can be done for him.

Employer/Insurer seemed to argue that Claimant's benefits should be precluded due to SDCL 62-4-43, which provides in relevant part:

> If the injured employee unreasonably refuses or neglects to avail himself of medical or surgical treatment, the employer is not liable for an aggravation of such injury due to such refusal and neglect and the department of labor may suspend, reduce or limit the compensation otherwise payable.

The Department does not have sufficient medical evidence necessary to preclude benefits based upon Claimant's alleged refusal to attend physical therapy. The medical evidence does not support a conclusion that Claimant's failure to complete his physical therapy sessions due to personal illness resulted in an aggravation of his condition. Thomas Price, a licensed Psychologist who conducted a personality inventory of Claimant at Employer/Insurer's request, and Dr. Farnham both recommended that Claimant undergo a pain management program, not just work hardening and physical therapy. Employer/Insurer has not provided Claimant with the means to participate in a pain management program.

Claimant testified:

Q: And when you say you didn't know which doctor to go back to, why was that?
A: Well, Doctor Farnham is not my medical doctor. And Heloise Westbrook, Doctor Westbrook, said I don't know what to tell you. We have done everything. I don't know what else there is to do.

There is objective evidence of Claimant's injury and his resultant pain. On March 17, 2005, Claimant's work hardening program was discontinued due to aggravation of Claimant's pain. On March 21, 2005, Dr. Westbrook wrote, "If the patient's pain does not improve despite therapy consideration of a reduced work load or re-training to a job with minimal or no bending may be warranted." Claimant's pain did not improve. Claimant was fired for not obtaining further medical documentation of his pain. Claimant's testimony regarding his pain complaints was credible. Employer/Insurer's argument that Claimant is not in the pain he claims to be in is rejected. Audet's opinions are accepted. Miller's opinions are rejected. The Department finds that Claimant suffers the severe pain that he claims and finds that due to that pain, he 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.*

Audet testified that Claimant has transferable skills as a machinist, packager, laminating machine operator, dining room attendant, and finish carpenter. Audet performed a Labor Market Survey and found that these occupations within the Britton, South Dakota are would pay substantially less than what Claimant was able to earn while working for Employer. Audet's opinion is accepted. The South Dakota Vocational Rehabilitation Services found Claimant eligible for services and recommended he pursue a course of rehabilitation. Rehabilitation is necessary to restore Claimant to suitable, substantial and gainful employment.

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

Claimant seeks rehabilitation benefits while pursuing a degree in Computer Assisted Drafting. Based upon Audet's opinions, Claimant credible testimony, and the fact that the program was recommended for him by the South Dakota Vocational Rehabilitation Services, this program is a reasonable means of restoring him to employment.

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

There is not dispute that Claimant has met this part of the test.

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

There is no dispute that Claimant is actually pursuing the Computer Assisted Drafting program as recommended by South Dakota Division of Vocational Rehabilitation.

Claimant has met the requirements for 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