SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MIKE C. PALMER,
Claimant,

HF No. 46, 2005/06

v.

DECISION

ACTION MECHANICAL,
Employer,

and

ACUITY,
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 August 25, 2006, in Spearfish, South Dakota. Claimant, Mike C. Palmer appeared personally and through his counsel, Dave L. Claggett. Jeremy Nauman represented Employer Action Mechanical and Insurer Acuity.

Pursuant to a Prehearing Order entered on August 2, 2006, the sole issue for hearing was whether Claimant is entitled to workers' compensation benefits 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:

Claimant was born on October 4, 1956. He quit school after the Eighth Grade. He earned his GED in 1975, but at the time of his injury had no other education or formal training.

Claimant's employment throughout his life has involved physical labor. He has worked as an apprentice plumber, a construction worker, a concrete helper, and as a building maintenance laborer.

Claimant was employed by Employer as an Apprentice Plumber from April through October of 2001. Claimant's gross average weekly wage at the time of injury was $448.40 per 40-hour week or $11.21 per hour. Claimant's compensation rate was $298.94 per week.

Claimant was injured on August 29, 2001, while working for Employer at Ft. Meade in Sturgis, South Dakota. He injured his neck when a thirty-six inch pipe wrench he was using slipped off a steam trap. Employer had actual knowledge of Claimant's injury.

On October 29, 2001, Claimant sought treatment from Dr. Steven B. Schwartz. Dr. Schwartz determined that Claimant suffered a C5-6 and C6-7 disk herniation and recommended a fusion surgery. At Employer/Insurer's request, Dr. Rand Schleusener performed an Independent Medical Examination on December 6, 2001, to determine the necessity of Dr. Schwartz's recommended treatment. Dr. Schleusener determined that Claimant needed fusion surgery.

On January 29, 2002, Claimant underwent C5-6 and C6-7 anterior cervical discectomy with iliac crest bone graft fusion and anterior cervical plating. He was plated from C5 to C7 and four screws were inserted into the vertebral body at C5 and C7. He was subsequently released for light duty work by Dr. Schwartz on April 2, 2002, with restrictions to include no lifting greater than ten pounds, no repetitive flexion/extension of neck, and no pushing/pulling/twisting. These restrictions precluded Claimant's return to as a plumber.

Claimant received a fifteen percent whole body permanent physical impairment rating and was compensated pursuant to Department of Labor approval of a Memorandum of Payment for Permanent Partial Disability (Form 111). After he reached maximum medical improvement, Claimant searched for work, utilizing the services of South Dakota Job Service (now the South Dakota Career Center) and South Dakota Department of Human Services, South Dakota Vocational Rehabilitation Services (VRS).

Claimant applied for assistance with VRS. On September 9, 2002, Larry Vrooman, a Vocational Rehabilitation Counselor with VRS, determined that Claimant was eligible for VRS services and developed an Individualized Plan for Employment (IPE), documenting the following:

> **Substantial Impediment to Employment:**
>
> [Claimant] experienced a neck injury which ultimately required surgery in January 2002 to repair 2 herniated disks. [Claimant] continues to experience numbness in his arms and shoulders. [Claimant] has been advised by his physician that he cannot continue working in his traditional employment as a plumber due to the need to make frequent neck movements and to perform occasional tasks that exceed his physical limitations. He is currently restricted to light to medium duty work.
>
> **Description of why the individual requires vocational rehabilitation services and how substantial VR services will reduce, eliminate, accommodate or overcome the consumer's substantial impediment to employment:**

> [Claimant] will require assistance in obtaining suitable employment and may require additional training to engage in employment commensurate with his interests, skills and abilities.

Larry Vrooman documented Claimant's desire to obtain apprenticeship employment or on-the-job-training rather than pursuing secondary education of some sort.

Claimant obtained employment through VRS as a janitor with the Spearfish School District in March of 2003, working 35 hours per week at $6.60 per hour. Claimant was terminated from this job in May of 2003 for allegedly falsifying his time card.

On July 18, 2003, Claimant sought treatment from Dr. Schleusener. Dr. Schleusener noted the recurrence left arm pain, numbness and tingling, and shooting pain radiating into Claimant's hands. He noted diminished range of motion in all planes of Claimant's neck and, upon review of the x-rays, noted that the plate had subsided, the superior screws were pulled out of the body at C-5, a nonunion appeared at C6-7, and the fusion construct was shortened significantly. Dr. Schleusener assessed a nonunion and the collapse and anterior subluxation of the plate. Dr. Schleusener noted that Claimant was at risk of esophageal erosion. Dr. Schleusener recommended surgery to repair and replace the failed fusion hardware. On August 22, 2003, Dr. Schleusener issued a light duty work restriction limiting lifting to 10 pounds with office duty only.

VRS records revealed that Claimant continued to explore the possibility of an apprenticeship or on-the-job-training through the summer of 2003. In October of 2003, Vrooman documented that Claimant expressed interest in seeking training as a pastry chef or baker. However, Claimant's work search efforts were reasonably suspended while undergoing treatment for the failed fusion. VRS records showed that Claimant resumed his efforts to find employment on June 30, 2004. VRS ultimately determined that Claimant would need post-secondary training in order to be reasonably employed.

In January of 2004, Dr. Schleusener operated on Claimant and repaired/replaced Claimant's failed fusion. During his six-month recovery, Claimant continued to work with VRS to find employment. Claimant and VRS eventually formulated a plan for Claimant to attend Western Dakota Technical Institute (WDTI) for an Electronics and Computer Technician Program, and started the two-year program on August 19, 2004, as a full-time student. Dr. Schleusener continued Claimant on physical restrictions including "school only – no work currently. No lifting >20 lbs., no overhead work." On April 29, 2005, Claimant signed another Form 111 because Dr. Schleusener increased Claimant's permanent partial impairment to twenty-five percent of the whole person.

Claimant served Employer/Insurer with his Request for Rehabilitation Benefits pursuant to SDCL 62-4-5.1 on October 12, 2005. Claimant enclosed his Certificate of Enrollment at the WDTI with his request. On October 13, 2005, his request for Rehabilitation Benefits was denied based on a September 6, 2005, opinion rendered by Tom Karrow, an independent vocational evaluator, hired by Employer/Insurer.

Claimant graduated from WDTI on May 13, 2006, with an Associates Degree in Applied Science, Electronics, and Computer Technician. Within two weeks of obtaining his Diploma from WDTI, Claimant was hired by a Rapid City employer, earning $10.50 per hour as a Computer Technician. At time of hearing, Claimant was working full time, forty hours per week, commuting from Spearfish, South Dakota.

Rick Ostrander, a vocational rehabilitation counselor, testified on behalf of Claimant that retraining was necessary for Claimant to return to suitable, substantial, and gainful employment. Ostrander met with Claimant personally to obtain firsthand information regarding Claimant's injury and its effect on his functional capacity. Ostrander gathered information regarding Claimant's educational background and work history. Ostrander also reviewed Claimant's medical and vocational records, including records from VRS. Ostrander also reviewed Tom Karrow's evaluations.

Karrow performed a "Vocational Employability Evaluation" on Claimant. Karrow considered the following information:

1. Employer's First Report of Injury dated 8-29-01;
2. Medical reports from Dr. Wayne Anderson;
3. Medical reports from Black Hills Orthopedic & Spine Center;
4. Reports from the South Dakota Department of Human Services, Division of Rehabilitation Services;
5. U.S. Department of Labor Dictionary of Occupation Titles, 4th Edition (updated O*Net 98); and
6. Labor market information for the Spearfish and Rapid City, South Dakota areas.

Karrow identified Claimant's physical restrictions "as of 2-15-05, [Claimant] was given restrictions of maximum lifting of 20 lbs. with no overhead work." Karrow identified Claimant's work history as consisting of "plumbing, construction work, concrete work, and labor work activity."

In his September 6, 2005, report, Karrow opined:

> It is my opinion that there are full-time light duty employment opportunities available for [Claimant] in the area where he resides. This area includes Rapid City, South Dakota, which is within a reasonable driving distance.
>
> It is further my opinion that Mr. Palmer does not require any training in order for him to qualify for the positions I have cited in this report. These job opportunities are entry-level in nature. The customer service-related positions involve entry-level speed and dexterity as far as computer usage is concerned. These skills can be learned within a few weeks if needed.

Karrow performed a Labor Market survey to identify full-time employment in the Spearfish/Rapid City area, including the cities of Sturgis, Lead and Deadwood. Karrow opined:

> Some of the job opportunities that would be suitable for [Claimant] would include[,] but not be limited to[,] customer service clerk, collection clerk, customer service associate, sales clerk, counter clerk, desk clerk, assistant manager retail, telephone answering clerk, and telemarketer. The average hourly wage for the positions cited above that are sedentary to light duty would be approximately $9.00 to $10.00 per hour.

Karrow identified specific employers giving approximate wage rages. Eighty-five percent of Claimant's prior wage earning capacity, $9.53 per hour, falls just above the middle of the wage range for these allegedly suitable job opportunities for Claimant.

On August 4, 2006, Karrow prepared an "Update of Vocational Employability Evaluation of [Claimant] dated 9-6-05," in which he identified several more positions he felt were suitable for Claimant.

Other facts will be developed as necessary.

Analysis

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.

> 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 three requirements of this five-part test. The Department will address each dispute 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.

The parties do not dispute that Claimant is unable to return to the physical labor that he had done all of his working life prior to his neck injury in 2001.

Both Ostrander and Karrow opined that the physical restrictions/limitations placed upon Claimant by Dr. Schleusener precluded his return to plumbing work. Claimant

demonstrated by a preponderance of the evidence that he is unable to return to any of the occupations he had held throughout his working life. Claimant's usual and customary line of employment was heavy manual labor, most recently that of a plumber, and he is unable to return to that 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 must be calculated to determine if his retraining restored him to suitable, substantial, and gainful employment. At the time of injury, Claimant worked 40 hours per week. At $11.21 per hour straight time pay, his earnings were $448.40 per week. Claimant's permanent partial disability pursuant to SDCL 62-4-6 was paid using this figure as his earnings and $298.94 as his weekly workers' compensation rate.

Claimant disputes that his prior wage earning capacity is limited to his work as an apprentice plumber. Claimant alleges that his prior wage earning capacity should include wages he might have earned had he been licensed as a journeyman plumber. However, Claimant had worked only as an apprentice plumber and had not yet met all the qualifications to move up to a journeyman plumber. Claimant had not yet taken the required test to work as a journeyman plumber. He was not licensed as a journeyman plumber. His prior wage earning capacity should not include his potential capacity to meet the requirements to become a journeyman plumber. A retraining award cannot be based upon speculation.

Claimant's prior wage earning capacity is $448.40 per week. Under the second part of the test for retraining benefits, Claimant must demonstrate that without retraining he is unable to earn at least 85% of his prior wage earning capacity. Eighty-five percent of $448.40 equals $381.14 per week, or $9.53 per hour, forty hours a 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, 1997 SD 67, at ¶ 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, 1998 SD 26, ¶ 13.

In support of his prima facie burden, Claimant offered his own testimony, his medical records, the opinions of vocational expert Ostrander, and the records from VRS. Claimant credibly testified that he pursued retraining as a last resort. As early as April of 2002, Employer/Insurer acknowledged awareness that Claimant was unable to return to his usual and customary line of employment. Claimant was left to his own devices to find employment. He went to Job Service and VRS. VRS determined that Claimant had a "substantial impediment" to reemployment and required assistance in finding employment. Ultimately, VRS was unable to find Claimant employment and helped him with retraining plans. Claimant took several tests to determine what program of retraining would best suit his skills, abilities, and aptitudes. Claimant credibly testified that the program at WDTI was the most difficult thing he has ever done. While Claimant may not have performed an exemplary job search, his job search was reasonable considering VRS determination in September of 2002 that he had a substantial impediment to employment and likely would require retraining.

Ostrander testified credibly that based upon Claimant's vocational profile, retraining was necessary for Claimant to return to employment. Ostrander further opined that retraining would be necessary "whether one used his actual earnings at the time of the injury as his pre-injury earning capacity or his capacity for earnings as a plumber." Based upon the testimony and evidence presented, Claimant has met his prima facie burden.

Because Claimant met his initial burden, the burden shifts to Employer/Insurer to show that Claimant would be capable of finding such employment without rehabilitation. Cozine, 454 N.W.2d at 554. "An injured worker cannot insist upon rehabilitation benefits if other suitable employment opportunities exist which do not require training." Sutherland, 1998 SD 26, ¶ 13. In support of its burden, Employer/Insurer offered the opinions of Karrow, an Independent Vocational Evaluator.

Karrow opined that, based upon a Job Analysis, a transferable skills analysis, and a work analysis, "several employment opportunities have been and are currently available to [Claimant]." Karrow's opinion is flawed for several reasons. First, Karrow could not offer sufficient evidence of suitable employment opportunities available to Claimant in April of 2002, when both Claimant and Employer/Insurer were first aware that Claimant would not be able to return to his usual and customary line of employment. Second, Karrow could not offer sufficient evidence of suitable employment opportunities available to Claimant in August of 2004, when Dr. Schleusener released Claimant to work after the second surgery. Third, Karrow's analysis of Claimant's vocational opportunities compared to his skills and abilities was not persuasive. Karrow did not adequately address Claimant's vocational profile. Neither Karrow's testimony nor his

reports explain how an individual such as Claimant, who has worked in construction and heavy labor all of his life, could transition successfully into suitable, substantial, and gainful employment in telephone collections or sales. Although Karrow opined that Claimant has "entry level" skills for employment, he did not fully develop the "entry level" skills for the jobs he identified. Fourth, Karrow failed to demonstrate that the positions he identified were full-time employment. Karrow identified an hourly wage, but failed to show that these positions would pay no less than $381.14 per week. Karrow's opinions simply do not provide a careful, balanced approach to Claimant's complicated situation. The "return to suitable employment" must take into account a likelihood of success in the positions identified by Employer/Insurer.

Karrow's opinions must be compared and balanced against Ostrander's opinions. Ostrander testified:

> Well, I disagree with [Karrow's] conclusions and some of the things he states. There are some things that I don't disagree with. For example, I don't disagree with the fact that [Claimant] could have reasonably gotten a job in Rapid City at eight or 8.50 an hour as an electronics assembler. Yeah, I think he could have done that.
>
> I don't think that meets 85 percent of his pre-injury earning capacity. In fact, most of the jobs that [Karrow] listed in his September 6th report don't even come up to 85 percent of his previous wage and none of them reach 85 percent of [Claimant's] pre-injury earning capacity.
>
> I disagree with [Karrow's] updated April 4th report in a number of places. I'm not sure what he means by some of this, but he makes the statement that the Choices Interest Profile for Mr. Palmer indicates he has interest in occupational areas such as sales, computer, finance, administration, and credit analysis. Actually, it says the opposite. The Choices shows interest in realistic occupations and a low to very low interest in all other areas.
>
> The occupations that Mr. Karrow has referenced there are predominantly conventional and enterprising as we define work. And this is based on basic theory of vocational counseling that's been around for about 60 years. Enterprising and conventional occupations tend to be almost the exact opposite of the characteristics we find in the realistic occupations. So to say that he shows interest in those from his tests is simply not accurate.
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> And then Mr. Karrow lists a number of occupations, most of which I don't think are appropriate for Mr. Palmer in that I don't think he could be hired, has no background, and he doesn't have any transferable skills and he doesn't have the orientation towards it, so it's unlikely he could be hired. It's even more unlikely he'd be successful.

> And even excluding that, the wages here are below 85 percent of his pre-injury earning capacity, and most of these occupations would require travel to either Deadwood or Rapid City, which would result in additional expense.
>
> The only job that [Karrow] identified in August of '06 was that Premier Bankcard -- the only one in Spearfish was that Premier Bankcard, and I've researched and worked with those folks in the past, and they start at 8.25 per hour. I had my office recontact them yesterday just to confirm that, so that job is below 85 percent of even his wage at the time of injury.
>
> So overall, I would disagree with [Karrow's] conclusions that there's no need for retraining to return to full-time work at or above [Claimant's] pre-injury earning capacity, 85 percent of his pre-injury earning capacity.

It should be noted that Ostrander used an incorrect prior wage earning capacity in formulating some of his opinions regarding the suitability of jobs identified by Karrow. Despite Ostrander's use of an incorrect prior wage earning capacity, other aspects of Ostrander's opinions require careful consideration and cannot be overlooked. SDCL 62-4-55 requires "a return to employment." The likelihood of the success of that "return to employment" must be considered. "'The statute requires more than mere restoration to employment. The new employment must be suitable when compared to the employee's former job.'" Kurtenbach, 1997 SD 66, ¶ 15 (citations omitted). Ostrander considered that likelihood of success, using his 26 years of experience in vocation rehabilitation. He opined:

> I think really the key thing is I work with so many individuals like [Claimant] and they really don't have success unless you can keep them in some aspect of employment that's similar to what they've known all their lives.
>
> And what [Claimant's] done is similar in terms of his working with things predominately. It also requires more technical knowledge which, as he indicated in his direct testimony, was very difficult for him, but he did accomplish.

Ostrander correctly pointed out that Karrow's analysis does not take into account Claimant's vocational profile, his age, his work history, his interests, his aptitudes, or the likelihood that Claimant would be successful in the employment recommended by Karrow. Ostrander noted that the O*NET classification of customer service or collections shows that these positions are "semi-skilled." Ostrander opined that the position of customer service representative falls into the industry category of "Financial Institutions" and is defined as skilled work. Claimant has no background, training, or experience in this area and reasonably would not be hired.

Ostrander found that Karrow misread a "Choices Interest Profile." Ostrander found that the Choices test showed Claimant has interest in realistic occupations and a low to very low interest in all other areas, contrary to Karrow's assertion that Claimant showed

interest in occupation areas such as “sales, computer, finance, administration, and credit analyst.” Ostrander further opined:

> The occupations that Mr. Karrow has referenced there are predominantly conventional and enterprising as we define work. And this is based on basic theory of vocational counseling that’s been around for about 60 years. Enterprising and conventional occupations tend to be almost the exact opposite of the characteristics we find in the realistic occupations. So to say that he shows interest in those from his tests is simply not accurate.

Karrow’s opinions that Claimant could work in “conventional or enterprising” occupations are rejected. Based upon Ostrander’s credible testimony and Claimant’s presentation at hearing, Claimant is clearly not suited to these occupations. The occupations suggested by Karrow as suitable for Claimant require different skills and abilities than each of the occupations Claimant engaged in before his injury. Claimant is a fairly well spoken and intelligent individual, but those traits alone do not equate into a successful return to employment in a completely different occupation.

In his September 6, 2005, report, Karrow used $11.21 as Claimant’s prior wage earning capacity and identified the following positions as “suitable”:

1. ASI-GE, Rapid City, customer service representative, wage approximately $9.50 to $10.00 per hour.
2. Premier Bankcard, Spearfish, customer service representative, wage approximately $9.50 to $10.00 per hour.
3. Northern Hills Collections, Spearfish, collection clerk, wage approximately $9.00 per hour.
4. Black Hills Collection Services, Rapid City, collection clerk, wage approximately $9.00 to $9.50 per hour.
5. United States Bank, Rapid City, customer service representative, wage approximately $9.00 per hour.
6. Midcontinent Communications, Rapid City, customer service associate, wage approximately $9.00 to $10.00 per hour.
7. SymCom, Inc., Rapid City, electronics assembler, wage approximately $8.00 to $8.50 per hour.
8. South Dakota One Stop Career Center [sic], Rapid City and Spearfish, collection representative, several available at $9.44 per hour.
9. Midnight Star Casino, Deadwood, cashier change maker, wage approximately $7.50 per hour
10. Midnight Star Casino, Deadwood, blackjack dealer, wage approximately $10.00 to $12.00 per hour
11. Midnight Star Casino, Deadwood, slot technician, wage approximately $9.00 to $10.00 per hour.
12. Greentree Finance, Rapid City, collection clerk, wage approximately $9.50 per hour.

13. Verizon Wireless Communications, Rapid City, customer service representative, wage approximately $9.00 to $9.50 per hour.
14. Heartland America, Rapid City, customer service representative/telemarketer, wage approximately $9.00 to $10.00 per hour.
15. Sanmina-SCI Corporation, Rapid City, electronics assembler, wage approximately $8.50 to $9.00 per hour.

Employer/Insurer's burden is to demonstrate the availability of suitable employment. "Suitable" employment must include a wage not less than 85 percent of Claimant's prior wage earning capacity. Claimant's prior wage earning capacity is $9.53 per hour. Therefore, of these fifteen positions, the following nine do not meet the wage requirement:

1. Northern Hills Collections, Spearfish, collection clerk, wage approximately $9.00 per hour.
2. Black Hills Collection Services, Rapid City, collection clerk, wage approximately $9.00 to $9.50 per hour.
3. United States Bank, Rapid City, customer service representative, wage approximately $9.00 per hour.
4. SymCom, Inc., Rapid City, electronics assembler, wage approximately $8.00 to $8.50 per hour.
5. South Dakota One Stop Career Center [sic], Rapid City and Spearfish, collection representative, several available at $9.44 per hour.
6. Midnight Star Casino, Deadwood, cashier change maker, wage approximately $7.50 per hour
7. Greentree Finance, Rapid City, collection clerk, wage approximately $9.50 per hour.
8. Verizon Wireless Communications, Rapid City, customer service representative, wage approximately $9.00 to $9.50 per hour.
9. Sanmina-SCI Corporation, Rapid City, electronics assembler, wage approximately $8.50 to $9.00 per hour.

None of these meets the $9.53 threshold and all are rejected as offering "suitable" wages for Claimant. Five of the six remaining positions list an approximate wage that is potentially above the $9.53 mark. This does not meet Employer/Insurer's burden. "Suitable" work is work that pays no less than 85 percent of Claimant's prior wage earning capacity. Employer/Insurer did not offer sufficient evidence that these positions will provide Claimant with no less than $9.53 an hour for forty hours per week. To find that these are suitable employment for Claimant would be engaging in speculation that the wages would be no less that 85 percent of Claimant's prior wage earning capacity.

The final position from Karrow's September 6, 2005, report must be analyzed: the blackjack dealer position. Presumably, this position meets Claimant's physical restrictions. A blackjack dealer can expect to make between $10.00 and $12.00 per hour, but must be licensed. Claimant does not have a license to deal blackjack in Deadwood. He considered trying to get a license, but thought that his child support

issues might have prevented him from obtaining a license. Employer/Insurer offered little evidence to show that Claimant could obtain a license or employment as a blackjack dealer. Employer/Insurer failed to demonstrate that the Midnight Star Casino blackjack dealer works full-time, non-seasonal work.

On August 4, 2006, Karrow issued an "update" of his September 6, 2005, report. He used a prior wage earning capacity of both $11.21 per hour and $489 per week. He found the following positions available for Claimant:

1. Premier Bankcard, Spearfish, customer service representative, collections, wage approximately $10.40 to $11.50 per hour, including incentives, bonuses, and differential time.
2. ASI-GE, Rapid City, customer service representative/associates, wage approximately $10.50 to $11.25 per hour, including bonuses, incentives, and pay differential for hours worked.
3. Greentree Finance, Rapid City, collection clerk, customer service associate, wage approximately $10.25 to $11.00 per hour. Average wage approximately $10.62 per hour, including bonuses, incentives, and pay differential for hours worked.
4. Midnight Star Casino, Deadwood, blackjack dealer, wage range on average $10.00 to $12.00 per hour. Average hourly pay with tips approximately $11+ per hour.
5. Heartland American, Rapid City, customer service associates, representatives, telemarketers, wage approximately $10.50 to $11.25 per hour, including incentives, bonuses, and pay differential for hours worked.
6. Mineral Palace Hotel & Casino, Deadwood, blackjack dealer, wage with tips approximately $10.00 to $12.00 per hour.
7. Four Aces Casino, Deadwood, blackjack dealer, hourly wage with tips averages approximately $10.00 to $11.00 per hour, over $12.00 per hour depending upon the hours worked.

There are several problems with this evidence. First, Karrow failed to identify whether these positions were all full-time positions. Claimant's prior wage earning capacity includes full-time work; therefore, suitable employment at or above $9.53 an hour must be full-time. Second, Karrow includes such variables as "incentives, bonuses, and pay differentials" in his descriptions. The Department has no way of determining what wage Claimant would actually be making. To find that these seven positions are suitable employment for Claimant would be engaging in speculation that the wages would be no less than 85 percent of Claimant's prior wage earning capacity. Furthermore, Ostrander testified that the starting wage for Premier Bankcard customer service representatives was $8.25 per hour. This is well below 85 percent of Claimant's prior wage earning capacity.

The only position that might reasonably return Claimant to suitable, substantial, and gainful employment is that of a blackjack dealer in Deadwood, South Dakota. However, Employer/Insurer did not show that these blackjack dealer positions would provide

Claimant with no less than weekly salary of $381.14 per week. Nor did Employer/Insurer demonstrate that these positions are not merely seasonable employment. Furthermore, Karrow included tips as part of the average or approximate wage of a dealer. Once again, the Department is left to speculate as to whether these dealer positions would provide Claimant with suitable, substantial, and gainful employment. Employer/Insurer's burden is to show that these positions actually exist and actually will return Claimant to suitable, substantial and gainful employment. Karrow's evidence falls short of that burden. Karrow's opinions are rejected because they lack adequate foundation. He failed to show by a preponderance of the evidence that the positions he identified would return Claimant to suitable, substantial and gainful employment.

Claimant met his prima facie burden to show that he is unable to find work. Employer/Insurer has failed to meet its burden to show that suitable, substantial, and gainful employment is available to Claimant without retraining. Claimant met his burden by a preponderance of the evidence to show that retraining was necessary to restore him 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 his 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)).

Ostrander's testimony supports a finding that Claimant's program of rehabilitation was a reasonable means of restoring him to employment. Claimant's degree has allowed him to find employment that pays at least 85% of his pre-injury earning capacity. Employer/Insurer offered little evidence to demonstrate that the WDTI program was not a reasonable means of restoring Claimant to employment. Retraining was necessary for restore Claimant to suitable, substantial and gainful employment. Claimant met his burden to show that the WDTI program was a reasonable means of restoring Claimant to employment.

4. Whether Claimant filed a claim with Employer requesting the benefits.

Employer/Insurer did not dispute this factor.

5. Claimant must actually pursue the reasonable program of rehabilitation.

Employer/Insurer do not dispute that Claimant pursued and completed this program.

Claimant has successfully met each factor of the five-part test to qualify for retraining benefits. Employer/Insurer failed to meet its burden to show the availability of suitable, substantial and gainful employment. Claimant presented a credible, persuasive case for his claim and he is entitled to retraining benefits pursuant to SDCL 62-4-5.1 during the course of his studies at WDTI.

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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 16th day of May, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge