SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DANNY D. WISE, **HF No. 89, 2002/03**

Claimant, **DECISION**

vs.

BROOKS CONSTRUCTION SERVICES,

Employer,

and

ACUITY 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 August 12, 2004, in Sioux Falls, South Dakota. Danny D. Wise (Claimant) appeared personally and through his attorney of record, Bram Weidenaar. J. G. Shultz represented Employer/Insurer (Employer). The issues presented included causation as to Claimant's low back injury and extent and degree of disability.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence:

At the time of the hearing, Claimant was 48 years old and lived in Sioux Falls. Claimant graduated from high school in 1974 and has no other formal education. While in high school, Claimant received low average grades.

In 1974, Claimant began working for Employer. Claimant worked for Employer for over twenty-seven years as a concrete laborer and foreman. Claimant's last day working for Employer was December 6, 2001. Claimant was earning $18.50 per hour and his workers' compensation rate was $468 per week.

Claimant suffered several work-related injuries during his employment with Employer, including no fewer than three separate injuries to his back, a knee injury and a neck injury. Claimant treated with Dr. David Hoversten, an orthopedic surgeon, for these various injuries. Dr. Hoversten performed surgery on Claimant's back in 1990, 1995 and 1998, including a fusion at L5-S1.

This matter involved two separate injuries. The first injury occurred on July 5, 2001, when Claimant suffered a work-related injury to his neck. Claimant was struck on the head while attempting to move a 55 gallon drum of cement cure. Claimant sought medical treatment at the Sioux Valley Emergency Room and then with Dr. Donn Fahrendorf, his chiropractor. Dr. Fahrendorf provided chiropractic treatment to Claimant from July 11, 2001, until December 10, 2001. Claimant's neck condition continued to

worsen. Claimant returned to see Dr. Hoversten on January 3, 2002, for increasing pain in his neck. Dr. Hoversten ordered an MRI, which showed a disc rupture at C5-6. Dr. Hoversten referred Claimant to Dr. Wilson Asfora, neurosurgeon.

Dr. Asfora first examined Claimant on March 19, 2002. Dr. Asfora diagnosed Claimant with a central disc herniation at C5-6 associated with severe cord compression. On May 9, 2002, Dr. Asfora performed an anterior cervical discectomy with cord decompression with fusion at C5-6. On August 14, 2002, Dr. Asfora stated, "I have allowed this patient to resume all of his previous physical activities and work duties without restriction." Insurer accepted this claim and paid all benefits related to the cervical injury, including permanent partial disability benefits for a 15% impairment rating assigned by Dr. John Dowdle.

The second injury involves an injury to Claimant's low back. While Claimant was still treating for his work-related neck condition, Claimant returned to work for Employer. On December 5, 2001, Claimant suffered an injury to his low back. Claimant slipped on a muddy ramp and as he grabbed a co-worker to catch his balance, he hyper-extended his back. Employer has disputed that this injury is a compensable, work-related injury. At the time of the December 5th injury, Claimant was the supervisor on the job site at the Primrose Apartment Complex. After the incident, Claimant left the job site without notifying Mr. Brooks, one of the owners of Brooks Construction. Mr. Brooks called Claimant that night to find out what happened. The next day, Claimant was terminated from his employment with Employer. Claimant completed a First Report of Injury on December 6, 2001.

On December 13, 2001, Claimant sought medical treatment for his back with Dr. Hoversten. Claimant complained of "a sudden onset of some pain in his back with radiation into his left leg" after he "stepped in the mud and hyperextended his back." Dr. Hoversten ordered x-rays, which showed "solid fusion at L5-S1, and it shows what appears to be mild narrowing of the disc at L4-5, a little bit maybe at L3-4." Dr. Hoversten diagnosed Claimant with an acute back strain with sciatica, probably without disc rupture. Dr. Hoversten prescribed medication and ordered Claimant off work "for a week or so."

Claimant returned to see Dr. Hoversten on December 20, 2001. Claimant continued to experience pain in the L4-5 region of his low back. Dr. Hoversten noted "[t]his does appear to have the appearance of a significant disc strain." Dr. Hoversten ordered an MRI and that Claimant remain off work. The MRI showed "L3-4 has substantial narrowing of the disc, and we have moderate to moderately severe spinal stenosis, lateral recess type, at 3-4. The 2-3 has degenerative disc change but no stenosis. We do have a right-sided disc bulge at 2-3 with mild pressure on the nerve root to the right." Dr. Hoversten stated that Claimant's "symptoms, his pain, and his problems almost certainly are coming from the L3-4 central stenosis. This, of course, is related to narrowing of the disc, arthritis of the facets, and then bruising or injury with lifting and twisting." Dr. Hoversten recommended a decompressive laminectomy at L3-4. However, before this surgery was performed, Claimant sought further treatment for his cervical condition from Dr. Hoversten and Dr. Asfora.

On January 22, 2002, Dr. Hoversten responded to a letter from Insurer asking if Claimant's "alleged slipping in the mud is the major contributing factor behind his current need for treatment and surgery at L3-4?" Dr. Hoversten wrote, "No. Major cause is chronic degeneration with stenosis at L3-4. Injury was an acute aggravation."

On January 24, 2002, Insurer denied Claimant's workers' compensation claim for the December 5th low back injury.

Claimant returned to see Dr. Hoversten on September 3, 2002, with increasing numbness in his feet and weakness in his legs. Once again, Dr. Hoversten recommended surgery. On September 22, 2002, Dr. Hoversten performed a decompressive laminectomy at L3-4. Claimant was ordered to remain off work for several months after the surgery.

On November 14, 2002, Claimant returned to see Dr. Hoversten, who noted that Claimant had reached the point where he is able to work full time. Dr. Hoversten stated, "[w]e will have him return to work at this point with a maximum weight of 25 pounds on a permanent basis." Dr. Hoversten also noted:

> We discussed the reason for this recent surgery. At the time of surgery, it was found that he had a fracture of the inferior facet on the left at the L3-4 level. This was felt to be a major contributing factor to the need for that surgery. In review of the history, it was found that in May of 1999 when he was hit with a 2x12 board, x-rays were obtained which showed this fracture of the L3-4 facet. We pulled films from a year before and that fracture was there as well. It appears that this is a work injury or an injury which occurred sometime before mid-1998 and that it is very likely due to a work injury at his job. It is my opinion that this stenosis is not the typical old-age stenosis but is an injury stenosis due to facet fracture, and for that reason work comp should be responsible for that coverage.

Even though Claimant was released to return to work in November 2002, Claimant did not start looking for work because he began having more trouble with his neck. Claimant returned to see Dr. Asfora, who prescribed physical therapy until February 2003.

On January 16, 2003, Dr. Hoversten saw Claimant for another follow-up visit. Dr. Hoversten noted that Claimant was doing much better, but he still had backaches. Dr. Hoversten stated that at "this point in time, he can return to a light work capacity, up to 20 to 25 pounds of maximum lifting and occasional bending and twisting allowed. He does not need medicines."

On March 6, 2003, Dr. Hoversten opined Claimant had reached maximum medical improvement. Dr. Hoversten stated that Claimant "does have an additional small permanent partial impairment of his back from this new condition. I would return him to work with 25 pounds maximum lifting and avoiding frequent twisting and bending on a permanent basis as he is 47 years of age." Claimant has not received any medical treatment for either his neck or back condition since March 2003.

After Claimant's employment with Employer was terminated in December 2001, Claimant attempted to return to work. In August 2002, Claimant worked for Jans Corporation for three days as a laborer. However, Claimant quit because he could not handle the construction work as the work was outside his physical restrictions. Shortly thereafter, Claimant was employed by Jay McDonald Construction as a cut man for a siding crew. Claimant quit after six weeks as the construction work available was beyond his physical restrictions.

In April 2003, Claimant conducted a more extensive job search by looking through want ads in the newspaper and job listings at the Career Center. Claimant also

contacted the Division of Vocational Rehabilitation through the Career Center and was appointed a vocational rehabilitation counselor. Claimant was also referred to the Volunteers of America program, which provided training in order to facilitate Claimant finding a job.

Claimant participated in a functional capacities evaluation (FCE) on October 9, 2003, conducted by Joan Hanson. In her report, Hanson noted the FCE was a valid representation of Claimant's present physical capabilities. Hanson stated that Claimant "was nice to work with during the assessment. He seemed to put forth a good effort without complaining." The FCE showed that Claimant could work eight hours a day with workday tolerance recommendations as follows:

Sit	4 hours	45 minute durations
Stand	6 hours	60 minute durations
Walk	6 hours	frequent, long distances.

The FCE also indicated that Claimant could lift 30.2 pounds above his shoulders, 34.6 pounds from desk to chair level and 30.2 pounds from chair to floor. Hanson noted that Claimant was able to lift more than he predicted he would be able to lift. The FCE demonstrated that Claimant is capable of performing light to light-to-medium level work.

Through Volunteers of America, Claimant obtained a job at Austad's Golf in Sioux Falls and began working on April 5, 2004. Claimant prepares and packs orders to be shipped. Claimant works approximately twenty-two to twenty-five hours per week. Claimant's job was supposed to be a temporary position, but as of the hearing, Claimant had worked at Austad's for over nineteen weeks. Claimant currently earns $7.00 an hour, a wage far less than his workers' compensation rate.

Claimant testified that he experiences pain on a daily basis. Claimant has pain usually in his low back and left buttock. If Claimant sleeps on his back, his legs will go numb. Claimant's pain increases with activity and he will take Advil, use a heating pad and "live with it." After a day working at Austad's, Claimant will go home and "usually take a shower and then sit on the heating pad for 15 minutes or so. It usually calms down." Claimant must change his positions, from either standing or sitting, to cope with his pain. Claimant was a credible witness at the hearing. This is based on consistent testimony and on the ability to observe his demeanor at the hearing. Other facts will be developed as necessary.

ISSUE I

WHETHER CLAIMANT'S DECEMBER 5, 2001, INJURY IS AND REMAINS A MAJOR CONTRIBUTING CAUSE OF THE DISABILITY, IMPAIRMENT OR NEED FOR TREATMENT?

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 "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "The medical evidence must indicate more than a possibility that the

incident caused the disability." Maroney v. Aman, 565 N.W.2d 70, 74 (S.D. 1997). Claimant's burden is not met when the probabilities are equal. Hanten v. Palace Builders, Inc., 558 N.W.2d 76 (S.D. 1997). SDCL 62-1-1 states, in part:

> (7) "Injury" or "personal injury," only 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.

"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).

Claimant offered Dr. Hoversten's opinions through his deposition taken on July 28, 2003. Dr. Hoversten treated Claimant for more than thirteen years and treated Claimant for all of his work-related injuries, including all of his prior back injuries. In January 2002, Dr. Hoversten initially opined that a major cause of Claimant's back pain after the December 5th incident was the chronic degeneration with stenosis at L3-4. Based on this opinion, Insurer denied responsibility for Claimant's low back injury.

In November 2002, Dr. Hoversten changed his earlier opinion and concluded that "this stenosis is not the typical old-age stenosis but is an injury stenosis due to facet fracture, and for that reason work comp should be responsible for that coverage." Dr. Hoversten explained why he changed his opinion:

> During surgery we found a fracture of the inferior facet on the right at L3-4. This had been there for some time. I don't know how long. I went back and looked on my x-rays, and it has been there at least two to three years. When it's a fracture with instability from the fracture, it makes it an injury-based problem.
>
> True, there's degeneration associated with it, but based upon finding of fracture of the facet, I changed my mind that it wasn't strictly degenerative.

Dr. Hoversten reviewed Claimant's x-rays taken throughout the course of his treatment. Dr. Hoversten saw a fracture of the facet on x-rays taken in 1997, 1998 and in 1999.

This means, according to Dr. Hoversten, some type of trauma occurred before July 31, 1997, resulting in the fracture found on the x-rays.

Dr. Hoversten was further asked about his opinion stated in his medical note from November 14, 2002:

Q: You indicate in this note that, "This is not typical of old age stenosis, but an injury stenosis due to facet fracture." Am I getting that right?
A: Yes.
Q: You go on to say, "and for that reason work comp should be responsible for that coverage."
A: That's not a fully correct statement. What it should be is that this in an injury, rather than an old age deterioration, and that if there is an injury at work that would have caused the facet fracture, then that should be responsible. I did not word it correctly.
Q: Is that an opinion you can give to a reasonable degree of medical probability at this point in time?
A: If we can find somewhere or another where this facet was fractured in some work incident, yes. If it's in a car accident or if it's in some accident at home, then I would say no. Whatever it was that injured this facet I think is what led to the early on stenosis, the instability, and the need for the surgery, which we did in 2002.
Q: Is that an opinion you can give to a reasonable degree of medical probability?
A: Yes.

Dr. Hoversten was fully aware of the mechanics of Claimant's back injury on December 5, 2001. Dr. Hoversten noted that it had been about two years between treatments for Claimant's his low back, as his last visit was on August 10, 1999. At that time, Claimant was not complaining of any radicular symptoms in his lower extremities. Dr. Hoversten testified:

Q: It appears that after the mechanism of injury there's onset of new symptoms, because he obviously wasn't a surgical candidate prior to that mechanism of injury, was he?
A: No, he wasn't.
Q: So can you explain for us the relationship between the prior facet fracture and whatever he may have done when he slipped in the mud?
A: Well, with the facet fracture, there's some increased instability. <u>There's some buildup of spur and extra swelling around the area of fracture, and an extension would cause the pushing into the nerve root of this extra material.</u> So originally I viewed it as an aggravation of the problem.
Q: <u>And that would be related to the work injury</u>, that aggravation was a mechanism that - - <u>the work related injury was a mechanism of the aggravation, was it not?</u>
A: <u>Yes.</u> That was - - you know, he was doing pretty good for a couple years, and then this happens. Then it makes it worse. Originally I thought it was just a stenosis thing, and it was only after I did surgery and found the

fracture of the facet with the extra swelling, I said, "Hey, something else is behind this."

(emphasis added). Dr. Hoversten was further questioned:

Q: Okay. Just so I'm clear, I'm looking again at your November 14, 2002, note where you indicated that because the facet fracture was there, you concluded there was an injury stenosis due to the facet fracture, and that for that reason worker's compensation should be responsible for that coverage.

My understanding is that that last portion about worker's compensation being responsible is something you're not willing to say anymore.

A: Well, the original belief on my part was that it was a wear and tear degenerative process leading to the stenosis. When it became evident to me that it was more complicated than that, that it had a facet fracture and that an injury played a substantial part, I'm aware that work comp does not cover degenerative processes.

Since there was a fracture with an injury to the area, it is possible that it would cover. It could come from a car wreck. It could come from an injury at home. It could not be workman's comp at all, and I stated before that I misstated in my statement saying the work comp should be responsible. I feel there's an injury that's behind this.

Q: And we just don't know where or when that occurred.

A: And I don't know when that happened.

Finally, Dr. Hoversten testified:

Q: We've got two time lines here going, don't we, Doctor? We have the facet fracture time line, as to when that actually occurred, until you discovered it in the surgery in 2002. Then when he became symptomatic after the fall in the mud. Right?

A: Well, clearly that fall in the mud was an aggravation that led to more radiculopathy and the need to do more surgery, whereas before there was no need to do the surgery.

(emphasis added). Employer did not present any additional medical evidence or opinions from any other provider.

Claimant argued SDCL 62-1-1(7)(c) controls the analysis of whether Claimant's 2001 back injury is compensable. In contrast, Employer argued the opinions expressed by Dr. Hoversten did not rise to the level necessary to establish a causal relationship between Claimant's December 5, 2001, injury and his need for surgery under either of the standards for compensability of injuries involving preexisting conditions as set forth in SDCL 62-1-1(7).

The South Dakota Supreme Court stated, "[w]hile 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. It is true that Dr. Hoversten could not identify when or from what Claimant's preexisting condition developed. Therefore, subsection (c) is not the appropriate standard to use and subsection (b) controls.

Employer's argument that Dr. Hoversten's opinions lack foundation and are speculative is rejected. To the contrary, Dr. Hoversten's opinions are well-founded and rise to the level necessary to establish a causal relationship between Claimant's December 5th work injury and his need for treatment and surgery. First, Dr. Hoversten was Claimant's treating physician for over thirteen years. Dr. Hoversten was very familiar with Claimant's medical and work history. Further, Dr. Hoversten had the opportunity to observe Claimant's back condition as he performed all of the back surgeries, including the operation in September 2002.

Although Dr. Hoversten did not specifically state that Claimant's employment related injury is and remains a major contributing cause of his disability, impairment or need for treatment, such opinion can be gleaned from the totality of Dr. Hoversten's testimony. "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). For example, Dr. Hoversten opined that "this stenosis is not the typical old-age stenosis but is an injury stenosis due to facet fracture[.]" Dr. Hoversten then stated that a fracture with instability from the fracture makes it an injury-based problem. Finally, Dr. Hoversten stated, "with the facet fracture, there's some increased instability. There's some buildup of spur and extra swelling around the area of fracture, and an extension would cause the pushing into the nerve root of this extra material."

Based upon Dr. Hoversten's testimony, Claimant has not only met his burden, but exceeded his burden of proof. Claimant established by a preponderance of the evidence that his work related injury is and remains a major contributing cause of his disability, impairment or need for treatment. Claimant is entitled to payment for reasonable and necessary medical expenses. Claimant is also entitled to payment for temporary total disability benefits in the amount of $9,408.00.

ISSUE II

WHETHER CLAIMANT IS PERMANENTLY TOTALLY DISABLED PURSUANT TO SDCL 62-4-53?

Claimant argued that he is permanently and totally disabled under the odd-lot doctrine. At the time of Claimant's injury, permanent total disability was statutorily defined by SDCL 62-4-53. This statute states:

> An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant

> in the community. An employee shall introduce evidence of a reasonable, good faith work search unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

The South Dakota Supreme Court has recognized at least two avenues by which a claimant may make the required prima facie showing for inclusion in the odd-lot category. Peterson v. Hinky Dinky, 515 N.W.2d 226, 231 (S.D. 1994). The Court stated:

> A claimant may show "obvious unemployability" by: (1) showing that his "physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category," or (2) persuading the trier of fact that he is in fact in the kind of continuous, severe and debilitating pain which he claims. Second, if "'the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated to the odd-lot category,' then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made 'reasonable efforts' to find work." The burden will only shift to the employer in this second situation when the claimant produces substantial evidence that he is not employable in the competitive market. Thus, if the claimant is "obviously unemployable," he does not have to prove that he made reasonable efforts to find employment in the competitive market.

Id. at 231-32 (citations omitted). Even though the burden of production may shift to Employer, the ultimate burden of persuasion remains with Claimant. Shepard v. Moorman Mfg., 467 N.W.2d 916, 918 (S.D. 1991).

Claimant has not met his prima facie burden to show he is obviously unemployable. In fact, Claimant did not argue that he is obviously unemployable. At the time of the hearing, Claimant was working twenty-two to twenty-five hours per week at Austad's as a packing clerk. The FCE demonstrated that Claimant is able to work at the light to light to medium duty level for eight hours per day. Thomas Audet, Claimant's vocational expert and a certified vocational rehabilitation consultant, opined that Claimant was not obviously unemployable and that there was no doubt that Claimant could return to work full-time. Claimant admitted that no medical provider has told him that he cannot safely return to work within the restrictions set forth in the FCE.

In addition, Claimant did not argue or demonstrate that his pain is so severe, continuous and debilitating that he cannot work. Again, the FCE and the vocational testimony showed that Claimant is able to return, at a minimum, to light duty work. Claimant's credible testimony demonstrated that he experiences some pain on a daily basis, but Claimant's pain is not so severe, continuous or debilitating as to make him unable to work. Therefore, Claimant's physical condition, along with his education, training, and age do not make it "obvious" that he is unemployable.

As Claimant failed to demonstrate that he is obviously unemployable or relegated to the odd-lot category, "the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has made 'reasonable efforts' to find work" and was unsuccessful. Peterson, 515 N.W.2d at 231. SDCL 62-4-53 requires Claimant to "introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile."

Claimant presented Audet's testimony to show that a good faith work search would be futile. Audet interviewed and met with Claimant several times, reviewed Claimant's medical records and functional limitations and was familiar with Claimant's education and work history. Audet was aware that Claimant participated in the FCE in October 2003. Audet opined the FCE showed that Claimant could work eight hours per day performing light to light to medium duty work with various restrictions on standing and walking. Audet also performed a transferable skills analysis and conducted labor market research.

Using all this information, along with Claimant's physical limitations defined by the FCE, Audet found that Claimant would be qualified for some entry level, light duty jobs. These jobs included positions as security guards, bartenders, cashiers, counter and rental clerks, electrical assemblers and parking lot and self-service station attendants. However, the starting wages for these positions were $6 to $8 per hour. Based on a forty hour work week, Claimant could earn, at most, $320 per week. This is well below Claimant's workers' compensation rate of $468 per week.

Audet did not specifically opine that a job search by Claimant would be futile. However, based upon his vocational evaluation, Audet credibly opined "I think it's obvious that [Claimant] is not going to find work that's going to pay him at his workers' compensation rate." Audet further testified:

> He basically has worked with various agencies, including Voc Rehab, the Job Service. He's been placed in a job, and that's the result of all those efforts. He's got a job, and that's the result of all those efforts. He's got a job that pays him around $7 per hour. All my previous research for the types of occupations that fits his functional capacities that he's probably going to be qualified for, he's not going to earn at his workers' compensation rate.

Even though Audet opined there are no jobs available that would pay at least his workers' compensation rate, Claimant performed a reasonable job search. Claimant registered at the Career Center, met with a representative from Vocational Rehabilitation and utilized the Volunteers of America program to learn skills needed to reenter the job market. Through his efforts, Claimant was eventually able to find employment at Austad's. Claimant even tried to work in two other jobs before he was hired by Austad's. In addition, Audet opined Claimant made a good faith job search, despite the fact there are no jobs available that would meet his workers' compensation rate.

Based on the foregoing, Claimant established a prima facie showing that he is permanently and totally disabled because a good faith work search would be futile. Claimant is unable to obtain anything more than sporadic employment resulting in insubstantial income. Therefore, the burden of production shifts to Employer to show that some form of suitable employment is regularly and continuously available to

Claimant within his community. "Employer must have demonstrated the existence of 'specific' positions 'regularly and continuously available' and 'actually open' in 'the community where the claimant is already residing' for persons with *all* of claimant's limitations." Shepard, 467 N.W.2d at 920.

Employer presented testimony from its vocational expert, Tom Karrow, a vocational consultant with over twenty years of experience. Karrow opined Claimant is not permanently totally disabled because there are positions open and available within Claimant's community that would pay him a suitable wage.

Karrow identified Claimant's employment history to include cement finishing supervisor, construction worker, cement finisher and laborer. Karrow testified that cement finishing supervisor positions are considered to be light duty and that there were such positions available in Claimant's community. Karrow stated:

> Well, there's construction companies and concrete companies in Sioux Falls that use cement finishing supervisors, and there's some that vend it out to other contractors that just do the concrete work. The larger companies will have the ability to hire somebody to do just concrete supervisory work and/or be willing to accommodate somebody that has light duty capabilities if they're as trained and well knowledged [sic] like Mr. Wise is in cement finishing.

Karrow opined that Claimant is employable even with the restrictions due to his low back condition. Karrow testified:

> Well, with the low back limitation which is light duty, it actually falls between light and medium duty. The limitations we're working with now, he would qualify for the light duty position as a cement finisher supervisor and like positions that would not be specifically cement finishing supervisory work but other jobs that are in the community that would take advantage of his skill level and be light duty.

When Karrow wrote his initial report on April 23, 2004, he identified several different employers that had positions occasionally available as cement finishing supervisors including Sioux Falls Construction, Gil Haugan Construction, Sweetman Construction, Ronning Companies, Beckman Construction and Beck & Hofer Construction. These positions paid approximately $12 to $15 per hour. Later, Karrow identified six specific job positions that were available in Claimant's community that were within Claimant's limitations and paid wages above his workers' compensation rate. These positions included the following:

1) Cement Finishing Supervisor, Sioux Falls Construction with wage rate of approximately $10 to $14 per hour;
2) Construction Foreman or Concrete Finisher Supervisor, position listed at the Career Center with wage rate of approximately $10 to $15 per hour;
3) Construction Concrete Foreman, Beck & Hofer Construction with wage rate of approximately $12 to $14 per hour;
4) Concrete Finishing Supervisor, Naatjes Concrete, Inc. with wage rate of approximately $12 to $13 per hour;

5) Concrete Foreman, position listed at the Career Center with wage rate of approximately $12 to $14 per hour; and
6) Construction Concrete Foreman, T & R Contracting, Inc. with wage rate of approximately $12 to $14 per hour.

Karrow provided these job leads to Claimant, but Claimant did not apply for any of these positions. Claimant did not contact any of the prospective employers because he already has a job. Claimant also was not interested in the positions because he "was more concerned with [his] back than going out and finding a higher paying job." Audet disputed that Claimant would be able to return to work as a concrete finishing supervisor.

Based upon Karrow's testimony, Employer demonstrated that there were specific positions open and available within Claimant's community that would pay him a suitable wage. Even though Employer has satisfied its burden of production, the ultimate burden of persuasion remains with Claimant.

SDCL 62-4-3 requires Claimant "to introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible." No such evidence exists in this case. Audet testified that Claimant would need some "academic upgrading" or remedial education before attending any type of postsecondary education. Audet stated that retraining may be difficult for Claimant, but Audet did not testify that retraining was not feasible. Audet admitted that Claimant could compete in a vocational technical program with "some real remedial academic upgrading[.]" Audet admitted that if Claimant had the remedial course work and completed a vocational retraining program, his worth in the labor market increased and better paying jobs would be available for Claimant. Audet testified:

Q: If he had the course work and the vocational retraining, would it enhance his earning capacity in his community's labor market?
A: I think that he will then be qualified for occupations that will pay him at a higher rate.

Audet conceded that if Claimant applied, he could get accepted into a vocational retraining program, such as one offered by Southeast Technical Institute (STI).

Karrow opined that Claimant would benefit from a retraining program. Karrow, who is certified by the South Dakota Department of Vocational Rehabilitation in situational job placement and assessment, is very familiar with vocational retraining programs, including ones at STI. Karrow recognized that Claimant had average aptitude for general learning ability. Karrow testified this would not hinder Claimant in his pursuit of a retraining program. Karrow stated that STI has an excellent placement program and that the school strives to reduce obstacles to help a student succeed.

Karrow reported that STI has technical programs available that have a 100% placement that would offer Claimant a reasonable means to restore him to suitable, substantial and gainful employment. In fact, Karrow worked with DiAnn Kothe, the nontraditional student advisor at STI, regarding Claimant's complete employment, educational and physical limitations background. Karrow and Kothe identified five possible retraining programs available for Claimant that met his physical limitations and

also paid wages much higher than his workers' compensation rate. These programs included:

> Cardiac ultrasound with a salary of $41,000 per year;
> Computer servicing with a salary of $30,160 per year;
> Laser/electro optics worker with a salary of $34,000 per year;
> Nuclear medicine with a salary of $46,000 per year; and
> Vascular ultrasound with a salary of $39,800 per year.

Karrow opined that if Claimant utilized the course work available at STI with remediation, his employability and earning capacity in his community would be enhanced and it would allow him to be more easily accommodated in the labor market.

Claimant has not participated in any kind of retraining program because he does not consider himself "a school kind of person" and he did not qualify for educational funding assistance through the Division of Vocational Rehabilitation. However, Claimant's rationale is insufficient to demonstrate that vocational retraining would not be feasible as an option to return Claimant to full-time employment within his restrictions and at his workers' compensation rate.

The evidence presented from Karrow established that Claimant would benefit from vocational retraining and that it would be feasible despite Claimant's reluctance to attend such a program. With vocational retraining, Claimant's earning capacity would be enhanced and it would allow him to find full-time employment paying well over his workers' compensation rate. Therefore, Claimant failed in his burden of persuasion to establish that he is permanently totally disabled as he would benefit from vocational retraining. Claimant's request for permanent total disability benefits is denied. The Department shall retain jurisdiction over the issue of vocational retraining.

ISSUE III

> WHETHER CLAIMANT'S MEDICAL BILLS SHOULD BE PAID DIRECTLY TO THE MEDICAL PROVIDERS OR DIRECTLY TO CLAIMANT'S COUNSEL?

Claimant's December 5, 2001, back injury has been determined to be compensable. Therefore, SDCL 62-4-1 provides that 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." Except as otherwise provided, SDCL 62-7-8 gives the Department authority to establish standards and procedures for the payment of health services, also known as the fee schedule.

SDCL 62-1-1.3 provides, in part:

> If an employer denies coverage of a claim on the basis that the injury is not compensable under this title due to the provisions of subsection 62-1-1(7)(a), (b), or (c), such injury is presumed to be nonwork related for other insurance purposes, and any other insure covering bodily injury or disease of the injured

> employee shall pay according to the policy provisions. . . . If it is later determined that the injury is compensable under this title, the employer shall immediately reimburse the parties not liable for all payments made, including interest at the category B rate specified in § 54-3-16.

Employer argued that it should be allowed to pay the medical bills using the fee schedule directly to the individual medical providers. However, relying upon SDCL 62-1-1.3, the fee schedule is not applicable to this situation.

SDCL 62-4-1 is silent on how Claimant's medical expenses should be paid. The South Dakota recently held that "[t]he Department did not err in requiring [Employer and Insurer] to pay for [Claimant's] medical care through his counsel." Lagge v. Corsica Co-op, 2004 SD 32, ¶38. As the Court stated, "payment through a claimant's attorney is commonly done and is contemplated by statute." Id. Based on the foregoing, Employer shall pay any disputed medical bills directly to Claimant's counsel.

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

Dated this 9th day of May, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge