SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

LANNETT M. TAYLOR,
Claimant,
v.

STELLA FOODS,
Employer, and
LIBERTY MUTUAL INSURANCE,
Insurer.

HF 249, 2000/01

DECISION

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Ronald L. Schulz, of Green Schulz, Roby, Oviatt, Cummings & Linngren L.L.P., represents Claimant. R. Alan Peterson, of Lynn, Jackson, Shultz & Lebrun, P.C., represents Employer/Insurer.

Issues

1. Whether Claimant is entitled to vocational rehabilitation benefits.
2. Whether Claimant is permanently and totally disabled.
3. Whether Claimant is entitled to reimbursement of certain medical expenses.

For the reasons set out below, it is my decision that Claimant is not entitled to vocational rehabilitation benefits, and is not permanently and totally disabled. Claimant has not established that the medical expenses in question are causally related to her work injury.

Facts

The parties stipulated to the following:

1. Claimant suffered a work-related injury while working for Employer.
2. Because of her work-related injury, Claimant will be unable to return to the work she was doing prior to this injury.
3. Claimant's weekly compensation rate is $242.63.

Additional facts have been established by the evidence:

Claimant was 47 years of age at the time of the hearing, and has lived in Milbank, South Dakota, for six years. She has a 10th grade education.

In the 1970's and 1980's Claimant did assembly work and worked as a waitress. In the early 1990's, Claimant worked in Arizona providing daily care and housekeeping for the elderly in their homes.

Claimant started work with Employer in 1996. Claimant worked in cheese processing. She

developed work-related bilateral carpal tunnel syndrome while working for Employer, and left that employment on February 12, 1999.

Dr. Vener performed left carpal tunnel release surgery on April 23, 1999, and right carpal tunnel release surgery on October 27, 1999. On January 6, 2000, he assigned impairment ratings of 20% to Claimant's left upper extremity and 10% to her right upper extremity. Claimant was placed on a 25 pound lifting restriction, which remains in effect today.

During the last half of 2000, Claimant worked at St. Williams Home (St. Williams), in Milbank, South Dakota. St. Williams is a care center. Claimant's job duties involved resident care. This employment ended December 31, 2000, when Claimant resigned to attend school.

Bruce Rogers, a rehabilitation consultant, testified for Employer/Insurer. He received a referral on January 24, 2000 to provide vocational services to Claimant.

Rogers's monthly reports track Claimant's progress throughout calendar year 2000.

Rogers's first vocational/placement progress report was dated February 18, 2000. From this report, it appeared to be Claimant's goal to obtain certification as a certified nurses aide (CNA) so that she could work in home health care in South Dakota.

Claimant worked in home health care in the past. In Rogers's March 17, 2000, report he stated, "Ms. Taylor has a strong interest in doing home health care and she would like to become certified to help enhance her employability in that field."

It quickly became apparent that Claimant would need to work at a nursing home to get the required CNA training. About half the certification programs in South Dakota are at nursing homes. These homes put their own employees through the required training.

In Rogers's April 14, 2000, report he noted some resistance on Claimant's part to working in a nursing home, "In South Dakota the only places offering training are nursing homes and Ms. Taylor does not want to work in a nursing home."

In Rogers's May 11, 2000, report, he wrote, "As you will recall, we were trying to access training as a nursing aide but were having difficulty finding a facility that would help train Ms. Taylor without her working there. I've talked to Ms. Taylor, and she has agreed to apply at all the nursing homes in her immediate area with the understanding that she would go to work if offered employment to receive the CNA training."

Rogers's June 13, 2000, report noted the availability of this work, "There are a number of nursing aide positions open in [Claimant's] immediate geographic area[.]"

Rogers's July 11, 2000, report included the following information: Claimant started work at St. Williams on June 28, 2000, as a nursing aide. She would be going through the CNA training to gain her certification. Her starting hourly wage was $6.00, plus benefits. She was working twenty to twenty-five hours per week. She did not want to work more hours because she did not want to impact her husband's social security.

Cindy Bork testified for Employer/Insurer. She is a registered nurse at St. Williams. She helps with the nurses aide training there. She has trained ten or eleven individuals each year for the past eight years, and helped train Claimant.

The training consists of 40 classroom hours and 35 hours in "clinical skills". The clinical skills part of the training is taught through hands-on experience.

Rogers's August 11, 2000, report stated that Claimant continued in her position at St. Williams. She had already received a raise, to $6.65 hourly, and was still limiting her hours to twenty to twenty-five weekly because of her husband's situation. Even with her lifting restrictions, Claimant was able to do the work required. Rogers wrote, "Contacts with Ms. Taylor leaves [sic] me to believe that she is doing quite well and the job is within her ability to perform. They do use lifts quite extensively at the nursing home so she is able to perform her duties without much lifting or physical exertion."

Rogers's September 12, 2000, report stated that Claimant had received her second pay raise in three months, to $6.85 hourly. She continued to work as an uncertified nurses aide, she continued to limit her hours to twenty-five to thirty weekly and she was continuing with her CNA training. "The employer is pleased with Ms. Taylor's job performance and she received an award recently for her good work." In addition to working, Claimant was attending GED classes.

At the time of Rogers's October 13, 2000, report, all Claimant needed to do was take the required examination to become certified as a CNA. She had taken all the required classes and had received the required practical hands-on experience. Bork testified that Claimant had done well on all the pre-tests, and would probably pass the examination. Claimant also testified at the hearing that she thought she could pass the examination. Rogers wrote in his report, "The two objectives Ms. Taylor and I established were to secure employment at a level that would not interfere with her husband's Social Security, and for her to become certified as a nurses aide so she would have more alternatives as far as employment now and in the future."

Rogers's November 14, 2000, report said the CNA certification examination would be given during the first week of December 2000. Rogers wrote, "[S]he is expected to pass." Rogers also noted some apparent problem with Claimant's continued work at the nursing home: "Ms. Taylor's position with the nursing home remains the same. She is working on a part time basis to keep her earnings under a certain amount so her husband's Social Security is unaffected. So far, this is working out for her, although she has expressed the possibility of quitting over several issues including the fact that she has not been certified yet. I have encouraged her to remain at the nursing home so she can achieve certification and she indicates that she probably will."

Claimant was scheduled to take the CNA examination on December 5, 2000. The weather was bad that day. Claimant had a one hour drive from Milbank to the test site in Watertown, but she ended up in the ditch and missed the examination. Shortly after that time, Claimant told Rogers she planned to take the examination on the next available date.

Rogers wrote in his December 14, 2000, report: "I talked with the people who schedule the examination and I also talked with Ms. Taylor's employer to see about her being able to go the next time it is offered. I was advised that no date had been set yet, but her employer would do everything they could to be sure Ms. Taylor gets on the list to take it as soon as possible."

As of the date of the hearing, Claimant still had not taken the CNA examination. Claimant quit her job at the nursing home before she was rescheduled to take the examination. Her last day at St. Williams was December 31, 2000. Claimant admitted that she never returned to St. Williams after that date to request that she be rescheduled to take the test.

Claimant quit her job at St. Williams to enroll in the medical laboratory technician program at Lake Area Technical School in Watertown. Claimant left the medical laboratory technician training at Lake Area after one semester. She then attempted a dental aide program at Lake Area. She admitted that none of her classes went well, and that her physical condition was not the reason she did not do well.

Claimant's brief contends that Claimant quit at St. Williams because the job demands there were beyond her work restrictions. This is not the case.

At the time Claimant resigned her position with St. Williams, the Termination Report, signed by Claimant on January 2, 2001, stated, as her reason for leaving employment: "Lannett's advisor's @ vo-tech in Watertown recommended she not work while going to school. She will begin school in Jan. 01." (underscore in original).

Claimant was able to work as a nurses aide for six months without complaints related to her carpal tunnel syndrome. During this time, she saw a doctor only one time. This was for a problem with her bicep muscle. The bicep condition resolved completely. There is no evidence that the bicep problem was related in any way to her carpal tunnel syndrome.

Claimant has the physical capacity to perform the requirements of a nursing aide. Claimant successfully performed this job for six months with no complaints of problems. Although the CNA job description includes the requirement of occasional lifting above Claimant's 25 pound restriction, the director of nursing at St. Williams indicated these lifting restrictions can be accommodated, and that her nurses assistants at St. Williams do not need to lift more than 25 pounds to perform the job. Rogers also testified, in his experience, the 25-pound lifting restriction is not fatal to job placement.

Claimant's performance evaluations at St. Williams indicate that she was a good worker and met or exceeded her supervisor's expectations in every category in which she was evaluated. As part of her last evaluation before she left St. Williams, Claimant was recommended for another salary increase.

When Claimant left St. Williams, she was recommended highly and considered eligible for rehire.

Claimant remained unemployed as of the date of the hearing.

When Claimant was hired at St. Williams, the written job description required a GED or high school degree. Claimant was hired with less education. She had only a 10th grade education when she was hired. Since that time, the educational requirement has been relaxed to GED "recommended." The evidence established that in practice an applicant with a 10th grade education would be considered for employment at St. Williams.

Whether Claimant is entitled to vocational rehabilitation benefits.

Entitlement to rehabilitation benefits is controlled by SDCL 62-4-5.1, which provides that an employee shall receive his or her compensation rate during the period of time that the he or she is engaged in a program of rehabilitation that is "reasonably necessary to restore the employee to suitable, substantial and gainful employment[.]"

Our Supreme Court has established a five-part test for awarding rehabilitation benefits:

1. The employee must be unable to return to his usual and customary line of employment;
2. Rehabilitation must be necessary to restore the employee to suitable, substantial, and gainful employment;
3. The program of rehabilitation must be a reasonable means of restoring the employee to employment;
4. The employee must file a claim with his employer requesting the benefits; and
5. The employee must actually pursue the reasonable program of rehabilitation.

Sutherland v. Queen of Peace Hospital, 1998 SD 26, ¶ 13, 576 N.W.2d 21 (citations omitted).

The real issue in the present case is whether rehabilitation is reasonably necessary to restore Claimant to "suitable, substantial, and gainful employment."

> "The fundamental purpose of rehabilitation benefits is to insure that an injured worker has an opportunity to develop marketable and transferable skills that enable her to secure suitable, substantial, and gainful employment. **An injured worker cannot insist upon rehabilitation benefits if other suitable employment opportunities exist which do not require training.**"

Sutherland, ¶ 27. (citations and quotations omitted, emphasis added).

William Tucker testified as Claimant's vocational expert. His opined that re-training was not an option because of Claimant's physical condition and her lack of transferable skills. He testified that Claimant was not employable at a substantial wage.

Tucker met with Claimant only one time, for one hour. He admitted he was not familiar with the Milbank area and had not conducted a labor market survey of that geographical area in thirty-five years.

Tucker admitted he had no information on the CNA training program Claimant had pursued at St. Williams or similar training at any place else. He admitted he did not know the

educational demands of such a program and that he knew nothing at all concerning how Claimant had done in any aspect of this training. He had no opinion as to whether she could pass the examination or whether the work would exceed her physical limitations.

Tucker's opinions are rejected. He did not have an adequate foundation for his opinions.

"The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Johnson v. Albertson's*, 2000 SD 47, ¶ 25, 610 N.W.2d 449, 455.

Rogers, on the other hand, is familiar with the Milbank area, and did a labor market survey in conjunction with his placement efforts for Claimant.

Rogers met with Claimant no less than nine times, he was aware of her twenty-five pound lifting limitations, and he had Claimant complete certain vocational testing. Claimant's General Aptitude Test Battery (GATB) scores were on the average to slightly below average levels.

Rogers closed his file after his December 2000 report, and re-opened it in April 2001, after Claimant applied for re-training benefits. Rogers opined that Claimant was employable at the $7 to $9 wage range, and that she could find full time employment in jobs than as a nurses aide.

Rogers's opinions are accepted.

Under SDCL 62-4-55, Employer/Insurer may establish that employment is "suitable, substantial, and gainful" by showing that the employment "returns the employee to no less than eighty-five percent of the employee's prior wage earning capacity[.]"

Claimant admitted that while she was working for St. Williams she chose not to work full-time and that this was for personal reasons not related to her physical condition.

Claimant demonstrated the ability to earn more than eighty-five percent of her compensation rate while at St. Williams. In addition to her base salary, she was paid a differential for night work, holiday work and overtime work. During the weeks of November 16-30, 2000, Claimant was paid for night work, holiday work and overtime work, and averaged $8.48 per hour ($341.45 total wages - 40.25 hrs.). For the two-week period of December 1-14, she averaged $7.20 per hour ($356.37 total wages - 49.5 hours). Claimant could have earned more than her base wage per hour, and limited her hours for reasons not related to her work injury.

Claimant developed marketable and transferable skills working for St. Williams and in her training with St. Williams. Suitable employment opportunities existed for her when she left St. Williams, and they existed at the time of hearing.

Claimant showed the ability to obtain certification as a CNA that would further increase her opportunity for employment.

Employer/Insurer have met their burden that employment is available to Claimant without retraining.

"The program of rehabilitation must be a reasonable means of restoring the employee to employment"; and "The employee must actually pursue the reasonable program of rehabilitation."

Sutherland ¶ 13.

Both vocational experts agreed that Claimant did not have the educational ability to undertake the program she attempted at Lake Area. Claimant confirmed this by not being able to complete the programs she started at Lake Area.

Claimant is not entitled to vocational rehabilitation benefits.

Whether Claimant is permanently and totally disabled.

Claimant argues she is entitled to permanent total disability benefits. At the time of Claimant's injury, SDCL 62-4-53 (1994) defined permanent total disability:

> 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 effort 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.

Claimant has the initial burden to make a prima facie showing of permanent total disability.

> There are two ways for a claimant to make a prima facie showing necessary to fall under the odd-lot category:
>
> First, if the claimant is "obviously unemployable," then the burden of production shifts to the employer to show that some suitable employment within claimant's limitations is actually available in the community. 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 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 regulated to the odd-lot category," then 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. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that "some form of suitable work is regularly and continuously available to the claimant." Even though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

Sandner v. Minnehaha County 2002 SD 123, ¶ 10; 652 NW2d 778 (citing *McClaflin v. John Morrell & Co*., 2001 SD 86, ¶ 8-9, 631 NW2d 180, 183).

Claimant did not establish a prima facie case of permanent total disability. She is not in such severe, continuous and debilitating pain that she cannot work, and she is not obviously unemployable.

Dr. Vener found that Claimant could work within certain lifting restrictions. Claimant demonstrated the ability to work at St. Williams.

Claimant is currently employable as demonstrated by her employment as a nurses aide. Claimant also pursued certification in this area, and established that she could become certified as a CNA. This would enhance her job opportunities.

Rogers also testified that jobs are available in the Milbank area that Claimant could do, and that would pay her more than her compensation rate.

The testimony of the Director of Nursing was that she weekly seeks certified nurses aides to work at the St. Williams Nursing Home, and she has reason to believe that the other nursing homes are regularly hiring as well. Bruce Rogers testified that based upon his knowledge of the Milbank labor market, there are always people looking for certified nurses aides. Even Tucker, Claimant's vocational expert, conceded that these types of jobs are regularly available. The evidence indicates that the wage for certified nursing aides is a minimum of over $7.00 per hour.

Full time work is available. Claimant is capable of performing full-time work, but she previously limited her hours for personal reasons unrelated to her physical condition.

Claimant also failed to present evidence of a reasonable job search. She did not apply for more than four jobs in 1999, and did not have more than five or six job contacts in 2002. She did not apply for any nursing aide position, and at no time returned to St. Williams to seek work, even though Claimant admitted that when she left St. Williams to attend school she was told she could come back.

Although Claimant did not shift the burden of production to Employer/Insurer to show that some form of suitable work is regularly and continuously available to the claimant in the community, Employer/Insurer successfully met this burden of production.

The evidence shows that Claimant should be able to obtain more than sporadic

employment resulting in insubstantial income.

Rogers testified that Claimant was not totally and permanently disabled because there were many jobs open and available within her community that would pay her a suitable wage, in addition to the jobs available to her as a nurses aide, certified or not. Rogers's opinion was based upon a job search he personally conducted and considered Claimant's physical restrictions.

Finally, for the reasons set out above, Claimant would also not meet the ultimate burden of persuasion.

"Although the burden of production may shift to the employer, the ultimate burden of persuasion remains with the claimant." *Sandner,* ¶ 22 (citing *McClaflin*, 2001 SD 86, and *Shepherd v. Moorman Mfg.,* 467 N.W.2d 916, 918 (SD 1991)).

Claimant is not permanently totally disabled.

Whether Claimant is entitled to reimbursement of certain medical expenses.

SDCL 62-4-1 requires Employer to provide necessary, suitable and proper medical care causally related to Claimant's work injury.

Claimant failed to prove that the dates of treatment and related prescriptions in question are causally related to Claimant's work injury.

Claimant has submitted bills for prescription medications with no evidence that these are related to Claimant's work-related carpal tunnel syndrome.

Causation has not been established by the medical records alone.

In *Westergren v. Baptist Hospital of Winner,* our Supreme Court stated:

> Here, the majority of evidence regarding Claimant's injuries was introduced by voluminous stipulated medical records without benefit of interpretation by the doctors who produced these records. By stating that "the testimony of professionals is crucial in establishing this causal relationship" we acknowledged the lack of medical training by lawyers, hearing examiners, and courts to interpret these records. "Expert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person to judge."

1996 S.D. 69, ¶ 31 549 N.W.2d 390, 398.

"Causation must be established to a reasonable degree of medical probability, not just a possibility. . . . When the medical evidence is not conclusive, the claimant has not met the burden of showing causation by a preponderance of the evidence." *Truck Ins. Exch. v. CNA,* 2001 SD 46, 624 NW2d 705.

Claimant is claiming reimbursement for certain prescription purchases and doctor bills.

Claimant directed the Department's attention to Dr. Bjordahl's bills and prescriptions related to his September 11, 2002, and October 3, 2002, clinic notes, and the March 24, 1999, and May 17 and 18, 1999, Northeast Orthopedic notes.

As to the 1999 Northeast Orthopedic notes, Employer/Insurer correctly argue that "There is no treatment and no additional medical restriction related to the carpal tunnel syndrome noted in the medical records after January of 2000."

Dr. Vener's July 1, 2002, stated that he not seen Claimant since May 9, 2001, and could not comment on her current condition.

Additional testing for carpal tunnel syndrome in 2002 was "negative" and demonstrated no recurrent carpal tunnel syndrome.

Dr. Bjordahl's September and October 2002, notes refer to "right wrist pain after ganglion cyst removal."

The ganglion cyst on Claimant's right wrist developed in April 2001, and required surgery in 2002. The medical expenses in connection with Claimant's treatment of this condition are not compensable because this condition was not causally related to Claimant's work injury.

The ganglion cyst developed two years after Taylor had performed any full-duty work for Stella Foods, more than a year since she had performed any work for Stella Foods, and more than a year after Claimant sought any medical treatment for her work-related carpal tunnel syndrome.

When the cyst first developed, Employer/Insurer contacted Dr. Vener, Claimant's treating physician relative to her carpal tunnel syndrome, to ask if the cyst was causally related Claimant's work injury.

Dr. Vener's April 19, 2002, letter states, "The dorsal ganglion cyst on the patient's right wrist is not related to her carpal tunnel syndrome."

Claimant's attorney sought an alternate opinion from Dr. Seeman, the doctor who eventually operated on Claimant's ganglion cyst. Dr. Seeman's opinion was inconclusive.

Dr. Seeman's July 28, 2002, letter stated,

> With respect to your question as to whether or not the ganglion cyst on the dorsum of her wrist was secondary to the carpal tunnel syndrome, I cannot really state that the two are related although the typical cause of a ganglion cyst is repetitive motions of the wrist and irritation in the tendons which would be secondary to her employment.

The medical care and related expenses in question are not causally related to Claimant's work injury.

Counsel for Employer/Insurer shall submit proposed Findings of Fact and Conclusions of

Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Claimant shall have 10 days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections or submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated: October 17, 2003.y

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge