SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JOHN SWOPE, **HF No. 90, 2003/04**

Claimant, **DECISION**

v.

BILL BUUS CONSTRUCTION, INC.,

Employer,

and

ACUITY 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 January 19 and 20, 2006, in Sioux Falls, South Dakota. John Swope (Claimant) appeared personally and through his attorney of record, R. Alan Peterson. J. G. Shultz represented Employer and Insurer (Employer). Kristi Geisler Holm represented Henry Carlson Companies (HCC) and St. Paul Companies (St. Paul). The issues presented at hearing included causation, willful misconduct and odd-lot.

After the hearing, Claimant and HCC and St. Paul entered into a Compromise Agreement as to Compensation and Release and Order of Approval and Judgment of Dismissal. The Department approved the Compromise Agreement and any and all claims by Claimant against HCC and St. Paul were dismissed on the merits with prejudice and the caption was amended accordingly.

FACTS

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

1. At the time of the hearing, Claimant was thirty-eight years old.
2. According to testing done by Elwin Unruh, a licensed psychologist, in November 2003, Claimant has a full scale IQ score of 79. Testing also showed that Claimant reads at the middle fourth grade level, his math skills are at the low sixth grade level and his writing skills are at the low third grade level. According to the testing, Claimant "is functioning at about the 12 ½ to 13 year age range."
3. Claimant has difficulty reading. Claimant does not read books or newspapers and does not learn by reading. Claimant is not comfortable reading.
4. Claimant has poor math skills. Claimant is unable to maintain a checking account.
5. Claimant has difficulty writing and has "a problem with putting things on paper."

6. Claimant is deaf in his left ear.
7. Claimant is left hand dominant.
8. Claimant was born and raised in Pennsylvania and attended schools in the Hermitage School District.
9. During elementary school, Claimant was placed in Special Education and he remained in a Special Education program until he graduated in 1987.
10. As part of the Special Education program in high school, Claimant participated in Occupational Education, which was designed to train him for manual labor jobs. Claimant was placed in a job at Wendy's, primarily in food preparation. Claimant worked at Wendy's for four years.
11. During his employment, Claimant's supervisors repeatedly attempted to train him to work the counter taking orders and operating the cash register. However, Claimant was unable to operate the cash register unsupervised due to his intellectual limitations. Claimant could not make change accurately and could not grasp how to run the cash register.
12. Claimant was eventually discharged from Wendy's when new owners required all employees to be able to perform all duties, including working the counter and operating the cash register.
13. After graduation, Claimant attempted to enlist in the army, but was unable to pass the entrance exam.
14. Claimant received no further educational or vocational training.
15. Over the years, Claimant obtained employment in a variety of unskilled, labor-intensive jobs. For example, Claimant has worked as a machine operator, coil winder, dish washer, emergency order-filler, laborer/pipe threader, production worker, and carpenter/laborer. All of these jobs required Claimant to use his hands and back rather than his intellect. Claimant never rose above the entry-level in these jobs.
16. Claimant primarily worked as a carpenter's helper or laborer and he never acquired the skills or status of a skilled carpenter.
17. Claimant was never given a supervisory position and he always worked under the supervision of another.
18. During the 1980s and 1990s, Claimant suffered from serious emotional and psychological problems and abused alcohol and drugs. Claimant experienced significant difficulties maintaining his life.
19. Claimant had frequent admissions to hospitals for his emotional and psychological problems, including at the McKennan Hospital Acute Care Mental Health Unit and the Human Services Center in Yankton. Claimant also had encounters with the law, including arrests for at least five DUI charges.
20. Despite these considerable difficulties, Claimant maintained steady employment performing unskilled manual labor jobs.
21. In the late 1990s, Claimant became involved in Alcoholics Anonymous (AA) and Narcotics Anonymous (NA). At the time of the hearing, Claimant had been sober for six years. Claimant continues to be involved in AA and NA by attending meetings and sponsoring other program participants.
22. Claimant worked for HCC on two separate occasions as a general laborer. During the course of his second employment, Claimant worked for HCC for two years from 2000 to May 10, 2002.

23. On July 21, 2000, Claimant injured his left middle and ring fingers in the course and scope of his employment with HCC.
24. On July 25, 2000, Claimant sought treatment for left hand pain at the Sioux River Community Health Center. Dr. Mary Olmscheid noted that Claimant's pain had been present for the past five weeks. Claimant had a popping sensation in the joints of his left 3rd and 4th fingers. Dr. Olmscheid originally thought Claimant had a fractured 3rd metacarpal in his left hand. Claimant was referred to an orthopedic surgeon for possible surgical intervention.
25. On August 9, 2000, Claimant sought medical treatment from Dr. Robert Van Demark, Jr., an orthopedic surgeon.
26. Dr. Van Demark previously treated Claimant for a right hand injury in 1994 incurred working for John Morrell & Company. Dr. Van Demark confirmed the right hand injury in 1994 did not involve Claimant's "fingers in any way."
27. In August 2000, Dr. Van Demark noted Claimant's left hand was swollen over the left middle finger A1 pulley level and that he had active triggering. Dr. Van Demark diagnosed Claimant with tenosynovitis of the left middle finger A1 pulley level and injected his left middle finger.
28. Tenosynovitis is also called tendonitis or trigger finger. Tenosynovitis occurs when "the tendon gets caught in what's called a pulley, which is a band of tissue that goes around the tendon. They also will have what's called triggering of the finger or the finger catches, where the finger cannot have a normal range of motion. So it's basically pain and decrease of motion."
29. Symptoms of trigger finger include:

> [P]ain and a funny clicking sensation when the finger or thumb is bent. Pain usually occurs when the finger or thumb is bent and straightened. Tenderness usually occurs over the area of the nodule – at the bottom of the finger or thumb. The clicking sensation occurs when the nodule moves through the tunnel formed by the pulley ligaments. With the finger straight, the nodule is at the far edge of the surrounding ligament. When the finger is flexed, the nodule passes under the ligament and causes the clicking sensation. If the nodule becomes too large it may pass under the ligament, but becomes stuck at the near edge. The nodule cannot move back through the tunnel, and the finger is locked in the flexed trigger position.

30. Claimant continued to experience problems with his left middle finger and also developed problems with his left ring finger, including pain and catching.
31. Dr. Van Demark performed release surgery of Claimant's left middle finger and ring finger on January 26, 2001.
32. Dr. Van Demark opined that Claimant's employment with HCC was a major contributing cause of the injuries to his left middle finger and ring finger.
33. St. Paul paid Claimant workers' compensation benefits based on the injury to his left middle finger and ring finger.
34. On May 31, 2001, Dr. Van Demark noted that Claimant had pain in his right middle finger with swelling, but no triggering. Dr. Van Demark prescribed Vioxx as an anti-inflammatory.

35. On September 11, 2001, Dr. Van Demark opined Claimant was at maximum medical improvement (MMI) and that he had a sixteen percent impairment of his left middle finger and a twenty-two percent impairment of his left ring finger.
36. Once Dr. Van Demark determined Claimant was at MMI, Claimant did not seek any additional medical treatment for his fingers until June 2003. Claimant did not experience any new problems with his fingers until June 2003.
37. Claimant neither had any further problems nor received any further treatment for his right middle finger until September 11, 2003.
38. Claimant continued working in the construction industry as a carpenter's helper/laborer.
39. In May 2003, Claimant started working for Employer as a carpenter's assistant performing heavy manual labor.
40. Claimant's employer and owner, Bill Buus, did not have any problems with Claimant's job performance.
41. Claimant injured his left index finger and little finger in June 2003 when his hand was slammed between two walls.
42. Claimant's supervisor was present at the job site and had personal knowledge of the injury.
43. Buus received notice of Claimant's injury from his supervisor within three days of the incident. Buus did not dispute Claimant was injured in the manner he claimed.
44. Claimant continued to work for Employer after the June 2003 injury.
45. Claimant's left hand pain continued to increase and he again sought medical treatment from Dr. Van Demark on July 10, 2003. Claimant complained of pain in his left hand and catching in his left little finger for the past month.
46. Dr. Van Demark noted Claimant had pain at the base of the left little finger with a painful A1 nodule and some triggering. Dr. Van Demark diagnosed Claimant with tenosynovitis of the left little finger and injected the same finger.
47. Claimant continued to experience pain and problems with his left hand. Claimant compensated for the injury to his dominant left hand by performing his job duties with his right hand. Claimant then developed similar pain and problems with his right hand.
48. On September 11, 2003, Claimant saw Dr. Van Demark complaining that both hands would lock up on occasion and that he was unable to use his hands. Dr. Van Demark noted that Claimant's strength and tone were decreased and that he had nodules on all flexor tendons in both hands.
49. Dr. Van Demark diagnosed Claimant with tenosynovitis of both hands.
50. During this appointment, Dr. Van Demark discussed with Claimant about his job future and advised Claimant that he may want to think about another occupation due to tenosynovitis in both hands.
51. Claimant was unable to continue working for Employer due to the condition of his hands. Claimant's last day working for Employer was September 20, 2003.
52. On September 23, 2003, Dr. Van Demark noted that Claimant's left index finger was catching with more pain and swelling. Dr. Van Demark injected the left index finger and took Claimant off work. Dr. Van Demark reiterated that Claimant should think about a different occupation.

53. Claimant's condition did not change and Dr. Van Demark performed release surgery of Claimant's left index finger and little finger on October 10, 2003.
54. On November 3, 2003, Dr. Van Demark noted that Claimant had triggering of his right hand, which began after his left hand surgery.
55. Claimant continued to have triggering in his right ring finger and little finger.
56. On November 10, 2003, Dr. Van Demark diagnosed Claimant with tenosynovitis of the right ring finger and little finger. Dr. Van Demark injected these two fingers and stated, "I think one could make the case that this [triggering] is work related since it began after his left hand surgery."
57. Claimant then experienced triggering of his right middle finger.
58. On November 20, 2003, Dr. Van Demark recommended Claimant undergo a Functional Capacity Evaluation (FCE) to determine what kind of work Claimant could perform with tenosynovitis of both hands.
59. Claimant participated in the FCE on December 5, 2003. The FCE, which was determined to be valid, indicated Claimant could work at the medium physical demand level for an eight hour day. However, the FCE results recommended that Claimant not perform "repetitive hand tasks especially gripping and pinching."
60. On December 10, 2003, Dr. Van Demark noted Claimant had persistent triggering of his right middle finger and ring finger. Dr. Van Demark released Claimant to return to work according to the FCE guidelines.
61. Claimant conducted a job search, but was unable to secure employment.
62. On January 13, 2004, Claimant returned to see Dr. Van Demark with increased pain in the middle, ring and little fingers. Dr. Van Demark also noted that Claimant had triggering in all fingers. Dr. Van Demark recommended surgical release of the right middle, ring and little fingers.
63. On February 9, 2004, Dr. Van Demark performed release surgery of Claimant's right middle, ring and little fingers.
64. On March 18, 2004, Dr. Van Demark released Claimant to return to work according to the 2003 FCE guidelines.
65. On April 1, 2004, Dr. Stephen Kazi, board certified in orthopedic surgery and neurological surgery of the spine, performed an independent medical examination (IME) of Claimant. Dr. Kazi reviewed Claimant's medical records and performed a physical examination. Dr. Kazi diagnosed Claimant with a "[h]istory of stenosing tendovaginitis of multiple digits of both hands status post surgical procedures with a good result."
66. Based upon his findings, Dr. Kazi concluded Claimant had an underlying rheumatic condition and that "the underlying rheumatic condition was the substantial contributing factor" of Claimant's condition. Dr. Kazi further opined that Claimant's work activities for Employer did not constitute a major contributing cause of his disability, impairment or need for treatment.
67. Claimant did not receive any workers' compensation benefits from Employer, with the exception of payment for Dr. Van Demark's initial visit.
68. While Claimant was off work, he received unemployment insurance benefits for a period of time.
69. Claimant wanted and attempted to return to work.
70. Claimant is unqualified to do anything other than manual unskilled labor.

71. In late 2003 and early 2004, Claimant conducted a thorough job search by looking through some want ads, using the internet, and personally contacting various employers.
72. Claimant registered at Job Service, now known as the South Dakota Career Center.
73. Claimant met with a tutor through the Literacy Council in attempt to improve his reading skills; however, he showed little improvement.
74. Claimant was unsuccessful with his job search.
75. Claimant was referred to the South Dakota Department of Vocational Rehabilitation (DVR). DVR provides assistance to individuals with disabilities to find gainful employment.
76. DVR has three criteria that a person must meet in order to become a client: 1) there must be a documented disability; 2) the documented disability must cause a problem with obtaining or maintaining employment and 3) there must be viable options for the individual.
77. Claimant satisfied DVR's criteria and Gail Nagelhout, a rehabilitation counselor, was assigned to assist Claimant with his return to work efforts.
78. Claimant utilized DVR's services from December 2003 through June 2004.
79. Nagelhout initially referred Claimant to Elwin Unruh for IQ testing because he was interested in retraining. Again, testing showed Claimant has an IQ of 79. Based on his extremely low IQ and achievement scores, DVR would not support Claimant with retraining efforts. As Nagelhout stated, "we generally look for scores maybe, we would hope, around 100, maybe look at the 90s, [to] give them a chance."
80. Through DVR, Claimant took a computer class, but he was unable to improve his skills of typing six to eight words per minute.
81. Claimant continued to work with Nagelhout through May 2004, but she was unable to find an employment placement for Claimant.
82. Claimant's unemployment benefits eventually ran out and he experienced dire financial circumstances. Claimant resorted to receiving food at the Banquet or, on some occasions, by digging through dumpsters. Claimant also relied upon the goodwill of his landlord, Fr. Robert Taylor, for a place to live when he could not afford to pay rent.
83. In May 2004, Claimant decided to find a job in the construction industry in order to make money to live and eat. Claimant chose to look for a manual labor job in the construction industry as this was the only type of work he could perform and the only type of job he could obtain.
84. During 2004, Claimant worked for four different construction companies for brief periods of time as a construction laborer.
85. Nagelhout closed her file in June 2004 after Claimant returned to construction work. Nagelhout informed Claimant that he had the right to reapply for services.
86. Claimant worked for various contractors only for two or three weeks at a time. Once Claimant started using his hands on a regular basis, his pain increased. Claimant iced his hands every morning and evening in order to continue working. Claimant's pain increased with activity and decreased with rest. After two or three weeks, Claimant would be forced to quit working when he could no longer tolerate the pain in his hands.

87. On August 31, 2004, Claimant returned to see Dr. Van Demark due to triggering in his right middle finger and ring finger. Dr. Van Demark diagnosed Claimant with recurrent tenosynovitis in his right middle and ring fingers. Dr. Van Demark injected both fingers and gave Claimant a night splint to wear. Once again, Dr. Van Demark discussed with Claimant that he should consider a different line of work.
88. On November 10, 2004, Claimant returned for a recheck of both hands. Claimant had persistent triggering of his right middle finger and ring finger. Dr. Van Demark also found a mass in Claimant's left ring finger at the distal palmar crease with tenderness. Dr. Van Demark was unsure if the mass was a ganglion cyst or ulnar fibromatosis. Dr. Van Demark concluded Claimant had persistent tenosynovitis of both hands. Dr. Van Demark stated, "I think his major problem now is his continued construction work."
89. Dr. Van Demark did not recommend further surgery.
90. Dr. Van Demark opined Claimant's brief return to work in the construction industry did not cause any further damage to his condition and did not increase his disability.
91. Claimant stopped working due to the condition of his hands and has been unemployed since November 2004.
92. On February 2, 2005, Claimant underwent a second FCE, which was valid.
93. The FCE indicated that Claimant was able to work at the medium physical demand level for an eight hour day. However, the FCE restricted Claimant's fine hand coordination to simple grasping with no repetitive gripping or pinching.
94. Testing for maximum grip and pinch strength placed Claimant in the "very poor" percentile. The results of the Purdue Pegboard Assembly Test indicated Claimant had "poor fine motor skills and is not qualified for Assembly Tasks of pieces in the 1 - 4 mm. range." Claimant also tested "very poor" in the static strength testing, occasional material handling, hand grip and pinch grip.
95. During the testing, Claimant reported triggering and catching in his fingers, increased pain with gripping in specific handles/slots of boxes and left middle finger and ring finger numbness in tips.
96. On February 9, 2005, Dr. Van Demark signed off on the FCE results. Dr. Van Demark agreed with the 2005 FCE work restrictions for Claimant and that the restrictions "can be used for the return to work process."
97. On April 26, 2005, Claimant returned to see Dr. Van Demark for an impairment rating. Dr. Van Demark noted Claimant had intermittent triggering of his right middle and ring finger and triggering of his left little finger. Claimant also had pain in his right ring finger.
98. Dr. Van Demark described Claimant's condition as follows:

> Left hand-(index and little finger) was associated with his working at Bill Buus Construction when his hand was slammed into the wall.
>
> Right hand (middle, ring and little fingers)-was related to his overuse of his right hand due to surgery done on his left hand. Left hand surgery (index and little finger) was done on 10-10-03 and associated with Bill Buus Construction.

Left middle and ring finger relate to his Henry Carlson employment, July 2000.

99. Dr. Van Demark opined Claimant was at MMI and that he had a six percent impairment of each hand.
100. On February 25, 2005, James Carroll, a vocational rehabilitation consultant, interviewed Claimant as part of his process for completing a vocational assessment. Carroll also reviewed Claimant's education, vocational and medical background.
101. Carroll completed a transferable skills analysis using Claimant's work history and physical limitations as outlined by the 2005 FCE. Due to Claimant's physical condition, Carroll found Claimant's access to the labor market had been reduced to only four occupations, none of which were available in the South Dakota labor market.
102. Carroll prepared a report on March 23, 2005, and was unable to identify any occupation that Claimant could perform on a consistent basis.
103. Carroll also opined Claimant is not a candidate for retraining and that he is unemployable in the Sioux Falls labor market.
104. Based upon Carroll's testimony and report and the 2005 FCE, Claimant is precluded from returning to any occupation from his work history due to his inability to perform repetitive gripping and pinching and given that he is limited to simple grasping.
105. On May 27, 2005, Claimant met with Tom Karrow, Employer's vocational rehabilitation expert. Karrow was asked to investigate employment opportunities available for Claimant in the Sioux Falls job market.
106. Karrow opined there is some form of suitable work regularly and continuously available for Claimant in the Sioux Falls labor market.
107. Claimant would like to be employed so long as the job complies with the 2005 FCE restrictions.
108. Claimant received additional vocational assistance from DVR from August 2005 through September 26, 2005. Claimant originally reapplied for services from DVR on January 18, 2005. However, Claimant could not utilize the services until August 2005 due to an ankle injury not related to this claim.
109. Nagelhout again assisted Claimant with return to work efforts.
110. Nagelhout met with Claimant on August 31, 2005, to discuss a job search. They discussed Claimant's limitations and the 2005 FCE. Nagelhout noted, "[Claimant] feels that he [sic] the [2005 FCE] restricts him a lot and he is nervous to try activities with his hands. He has been told to follow the [2005 FCE] but does not really understand just what it is he is not to do." Nagelhout decided to hold off on a job search in order to try a situational assessment.
111. Nagelhout and a job developer recommended a situational at Krispy Kreme Doughnuts packing doughnuts. Claimant was concerned that the job exceeded his 2005 FCE restrictions as he was to avoid repetitive grasping and pinching.
112. Claimant toured the Krispy Kreme facility on September 26, 2005, but he decided he could not do the job because there was too much gripping, grasping and pinching involved with the work activities.

113. Claimant did not think he could handle the job because of the repetitive work.
114. Claimant continued to search for employment within his restrictions, but has been unsuccessful in his efforts.
115. Claimant testified he submitted an application at the Burger King on West 12th Street in Sioux the night before the hearing. Claimant gave the application to one of the employee's because "[t]he manager wasn't available." Jennifer Krejci, the first assistant for Burger King on West 12th Street, is in charge of all the hiring for this particular Burger King. Krejci testified she reviewed her application file dating back to February 2005 and could not locate any application for Claimant.
116. Claimant's idea of completing an application does not necessarily mean filling out a written application form. Claimant also used the term application to mean that he would call a potential employer and inquire about a job opening.
117. Claimant's bilateral hand condition has affected his daily activities. His fingers get tight and catch on a daily basis. Claimant avoids a variety of activities due to the pain in his hands and fingers.
118. Claimant experiences some level of pain on a daily basis, more in the mornings and evenings. Claimant's pain escalates with increased activity.
119. Employer spent a significant amount of time at hearing attacking Claimant's credibility. Employer focused a great deal on inconsistencies in Claimant's medical records prior to 2000. These attacks are unpersuasive. The evidence established Claimant suffered from serious mental and emotional problems prior to 1999. After Claimant joined AA and NA, he seemed to take control of his life until he was injured in 2003. Dr. Van Demark opined there is no doubt Claimant has suffered these injuries to his hands. The medical evidence supports that Claimant has experienced significant injuries to his fingers and hands and suffers from pain.
120. Claimant is an unsophisticated individual. At the hearing Claimant attempted to answer all questions posed and was not evasive and answered to the best of his ability. It is true there were some inconsistencies in Claimant's testimony. However, given Claimant's intellectual capacity, these inconsistencies do not warrant finding Claimant unbelievable. Claimant was a credible witness at the hearing. This is based on the totality of the evidence presented and based on the opportunity to observe his demeanor at the hearing.
121. There is no dispute that Claimant suffered injuries to his fingers and hands. Claimant's testimony concerning the pain he experiences in his fingers was uncontroverted and was credible.
122. Other facts will be developed as necessary.

ISSUE I

WHETHER CLAIMANT'S EMPLOYMENT RELATED ACTIVITIES FOR EMPLOYER WERE A MAJOR CONTRIBUTING CAUSE OF THE INJURIES TO HIS LEFT INDEX AND LITTLE FINGERS AND HIS RIGHT MIDDLE, RING AND LITTLE FINGERS?

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). Under SDCL 62-1-1(7), Claimant must establish he suffered an injury arising out of and in the course of his employment, and, by medical evidence, establish that his employment or employment related activities were a major contributing cause of his condition. "'Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained.'" Wise v. Brooks Constr. Serv., 2006 SD 80, ¶ 17 (citations omitted). "'The claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability.'" Id. (citations omitted). "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). "The evidence necessary to support an award must not be speculative, but rather must 'be precise and well supported.'" Horn v. Dakota Pork, 2006 SD 5, ¶ 14 (citation omitted). Claimant "must introduce medical evidence sufficient to establish causation by a preponderance of the evidence." Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

There is no dispute that Claimant sustained injuries to his left middle and ring finger while working for HCC in July 2000. The dispute here involves causation as to Claimant's left index and little fingers and his right middle, ring and little fingers. Claimant sustained injuries to his left index and little finger in the course and scope of his employment with Employer. Claimant's left hand was slammed between two walls. After the incident, Claimant sought treatment from Dr. Van Demark for these two fingers. Claimant also developed problems with his right hand and fingers due to overuse and was diagnosed with tenosynovitis of both hands.

Dr. Van Demark's testimony was presented through his deposition. Dr. Van Demark is a board certified orthopedic surgeon with over twenty years of experience and is also certified for and specializes in surgery of the hand. Dr. Van Demark has been Claimant's treating physician for his hands since he injured his right hand in 1994. Dr. Van Demark was the only physician who had the opportunity to examine and treat Claimant on numerous occasions. Dr. Van Demark was also familiar with Claimant's job duties while working for Employer.

Dr. Van Demark acknowledged that Claimant had a predisposition to tenosynovitis. However, it is well established that an employer takes an employee as he finds him. *See* Cantalope v. Veterans of Foreign Wars Club ("VFW") of Eureka, South Dakota, 2004 SD 4, ¶ 9. Even though Claimant had a predisposition for tenosynovitis, Dr. Van Demark opined that Claimant's work activities for Employer in June 2003 were a major contributing factor of his injuries to his left index finger and little finger and need for treatment. Dr. Van Demark opined Claimant's work for Employer was a major contributing cause of the injuries to his right hand. Dr. Van Demark testified, "I think his work at Bill Buus was a major contributing factor to cause his trigger fingers." Dr. Van Demark opined that Claimant's work for HCC was not a major contributing cause of the treatment provided for his right ring finger. Dr. Van Demark opined Claimant's work restrictions set forth in the 2005 FCE resulted following Claimant's work injuries with Employer.

Employer presented the opinions of Dr. Kazi through his affidavit and attached medical records. Dr. Kazi performed an IME of Claimant on April 1, 2004, which lasted

fifty-two minutes. Dr. Kazi's specialty is orthopedic surgery and surgery of the spine. Dr. Kazi does not specialize in surgery of the hand. Dr. Kazi reviewed Claimant's medical records and performed a physical examination. Claimant informed Dr. Kazi that his carpentry work "included using nailers, stapler, hammers, drills, forklifts, saws, etc."

Dr. Kazi stated:

> The involvement of multiple fingers such as in this case indicates a more systemic and undefined rheumatic process or predisposition, which is certainly not work-related. However, the condition can be aggravated by mechanical trauma such as repetitive forceful gripping or repetitive digital flexion . . . The rheumatic process is therefore more likely to be the cause when the disease is generalized such as in this case.

Dr. Kazi opined "[u]pon reviewing [Claimant's] medical records, it is apparent that not all procedures were necessitated by work-related exacerbations. The predisposition in this case is clear and represents a rheumatic process rather than trauma." Dr. Kazi opined Claimant's "conditions are causally related to preexisting factors as discussed. In my opinion, the underlying rheumatic condition was the substantial contributing factor." Dr. Kazi opined:

> With regard to the employment at Bill Buus Construction starting in May of 2003, it is my opinion that the condition preexisted the date of employment. It is also my opinion that work with Bill Buus Construction may have temporarily exacerbated the chronic underlying condition, but was not a substantial contributing factor to the need for surgery. In my opinion, the surgical procedures would have been necessitated by the underlying chronic condition regardless of the work situation. The right hand became symptomatic when Mr. Swope was undergoing surgery for the left hand and not actually working. The subsequent need for the surgical procedure on the right hand was clearly not related to any work activities.

Finally, Dr. Kazi opined "that the work activities at Bill Buus Construction did not constitute a major contributing cause of the disability, impairment, or need for treatment of the diagnosed condition."

Dr. Van Demark was familiar with Dr. Kazi's report and opinions. While Dr. Van Demark agreed that rheumatoid arthritis can cause triggering, he disagreed with Dr. Kazi's opinion that Claimant has an underlying rheumatic condition. Dr. Van Demark explained, "[h]e's never been tested for rheumatoid arthritis. He clinically does not have rheumatoid arthritis and it's, I think, kind of a bizarre statement personally. It's like saying that just because you have carpal tunnel you must be pregnant."

Dr. R. Blake Curd conducted a medical records review of Claimant's records on November 22, 2005. Dr. Curd did not conduct a physical examination of Claimant. Dr. Curd is a board certified orthopedic surgeon. Dr. Curd also participated in a fellowship in hand surgery in order "to gain additional training in care of the upper extremity above and . . . beyond normal orthopedic surgical residency."

Dr. Curd's opinions were presented through his deposition testimony. Based upon his review of Claimant's medical records, Dr. Kazi's report, Dr. Van Demark's

deposition and Claimant's deposition, Dr. Curd opined Claimant's injury with HCC does not remain a major contributing cause of the treatment Claimant received for his left hand and right hand after June 2003. Dr. Curd recognized that following the July 2000 injury with HCC, Claimant was released to return to work with no permanent restrictions. Dr. Curd opined that Claimant's work for Employer independently contributed to his need for medical treatment beginning in June 2003, including the treatment associated with Claimant's right hand and right middle finger.

Dr. Curd opined:

> Mr. Swope's employment with Bill Buus Construction, contributed independently to the disability assigned to him, including the limitations upon his ability to work as set forth in the 2005 February FCE as a result of the treatment he received for his left and right hands and finger beginning in June 2003.

Dr. Curd agreed that Claimant had a genetic predisposition for the development of stenosing tenosynovitis. But, Dr. Curd disagreed with Dr. Kazi and opined that Claimant does not suffer from an undiagnosed rheumatologic condition. Claimant had no clinical evidence for a rheumatologic diagnosis with the exception of the onset of stenosing tenosynovitis of multiple digits. Dr. Curd explained the "vast majority of people that get trigger finger and/or carpal tunnel do not have a rheumatologic diagnosis." Dr. Curd explained:

> I have seen stenosing tenosynovitis in multiple digits occur in many men in the heavy construction industry. It is believed that triggering fingers/stenosing tenosynovitis can occur as the result of local mechanical trauma and repetitive forceful gripping, which would increase pressure at the site of the pulley system and lead to the hypertrophy that we often see when surgery is performed for triggering digits.

As for Claimant's right hand, Dr. Curd agreed that it "is certainly possible that Mr. Swope's condition on the right hand developed out of use of the right hand and compensation for the temporarily disabled left hand following his surgical procedure." Claimant complained to Dr. Van Demark that he had triggering in his right middle finger one day after his left hand surgery. Dr. Curd was asked if this meant that the triggering in Claimant's right hand was likely caused by some underlying genetic predisposition. Dr. Curd agreed that taking Claimant's underlying genetic predisposition into account was important, but not the only consideration. Dr. Curd testified:

> I think it's likely he would have developed triggering digits in his right hand at some point, regardless of his occupational environment or lack thereof. It's also possible that whatever he was doing with his hand prior to the triggering starting contributed to an acceleration of the symptoms presenting themselves.

Dr. Curd opined that "[t]rigger digits normally start with discomfort before they're actually triggering." This is exactly what happened with Claimant's condition. Dr. Van Demark noted on September 11, 2003, that Claimant experienced pain in both hands and

diagnosed Claimant with tenosynovitis of both hands. Claimant was still working for Employer during this time. Dr. Curd explained:

> So if, for instance, he was engaged in an occupation and in the performance of that duty he was having some kind of symptom in that area, that could be the first indication he was developing a trigger digit. So I think it's quite possible both things are required for him to present with this set of symptoms at that specific time.

In addition, Dr. Curd acknowledged that compensating for pain in one hand can increase the process for developing symptoms in the other hand. Dr. Curd opined:

> Can increased activity in the other hand speed up the process in that hand that would potentially eventually develop trigger digits later? Yes, it certainly can. It can bring the symptoms to a boiling point or head sooner than they might have otherwise occurred if you had not been favoring that side.

Dr. Curd testified:

> Q: Before he ended his employment with Bill Buus, there was documentation that both hands had been locking up on occasion, that the patient described he was unable to use both hands, that there was a diagnosis of nodules on the flexor tendons of both hands, and a diagnosis of tenosynovitis in both hands.
>
> Would that be the kind of symptomatology and diagnosis you would expect to have seen demonstrating a problem with the right hand?
>
> . . . .
>
> A: Those are certainly all consistent with the stenosing tenosynovitis trigger fingers. Yes is the answer.

Dr. Kazi, Dr. Curd and Dr. Van Demark were aware of Claimant's condition and need for treatment. However, the opinions expressed by Dr. Van Demark and Dr. Curd are more persuasive and are entitled to more weight than those opinions expressed by Dr. Kazi. SDCL 62-1-15 states, "[i]n any proceeding or hearing pursuant to this title, evidence concerning any injury shall be given greater weight if supported by objective medical findings." Dr. Van Demark and Dr. Curd found no medical findings to support Dr. Kazi's opinions. Dr. Kazi's opinions are rejected. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "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). The credible medical evidence established Claimant did not have an underlying rheumatic condition that caused his tenosynovitis.

Dr. Van Demark and Dr. Curd's opinions are supported by the objective medical findings. Dr. Van Demark's opinions and Dr. Curd's opinions are well thought out, well-founded, logical and are accepted. With the opinions of Dr. Van Demark, Dr. Curd and the medical evidence, Claimant demonstrated causation by a preponderance of the

evidence. Dr. Kazi's opinions, even if accepted, are insufficient to discredit Dr. Van Demark's and Dr. Curd's credible and persuasive opinions.

Claimant established by a preponderance of the evidence that his left index and little fingers and right middle, ring and little fingers were injured while employed by Employer. Claimant's work for Employer was a major contributing cause of the tenosynovitis of both of Claimant's hands. Employer is responsible for workers' compensation benefits associated with Claimant's tenosynovitis of both hands. Claimant's request for workers' compensation benefits is granted, including the medical expenses as set forth in Exhibit 10. Any claims that Employer may have against HCC and St. Paul are dismissed with prejudice.

ISSUE II

WHETHER SDCL 62-4-37 BARS CLAIMANT'S CLAIM FOR BENEFITS?

Employer argued Claimant willfully engaged in heavy construction work in 2004 after he was advised by Dr. Van Demark not to do so and his condition deteriorated as a result. Employer argued Claimant's misconduct bars recovery under SDCL 62-4-37. This statute provides:

> No compensation shall be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute. The burden of proof under this section shall be on the defendant employer.

"Under this statute, the employer has the burden of proving not only that the employee committed 'willful misconduct,' but also that the alleged injury was 'due to' such willful misconduct." Wells v. Howe Heating & Plumbing, Inc., 2004 SD 37, ¶ 10. The phrase "due to" refers to proximate cause. Id. "Therefore, in order to prevail, an employer must first show that the employee's 'willful misconduct' was a proximate cause of the injury." Id. "A proximate cause is a cause that produces a result in a natural and probable sequence and without which the result would not have occurred." Id. (citations omitted).

The South Dakota Supreme Court defined willful misconduct as:

> "[S]omething more than ordinary negligence but less than deliberate or intentional conduct. Conduct is gross, willful, wanton, or reckless when a person acts or fails to act, with a conscious realization that injury is a **probable,** as distinguished from a **possible** (ordinary negligence), result of such conduct."

Fenner v. Trimac Transp., Inc., 1996 SD 121, ¶ 9 (citations omitted). In Fenner, the Court denied a claimant's request for workers' compensation benefits because he "intentionally and deliberately disregarded his physical limitations and his physician's order with respect to his back injury." Id. at ¶ 15. The Court stated:

> If the particular disability suffered prevents the worker from performing his job, and that worker has been informed by his doctor that he must change jobs to

> "forestall future physical difficulties," workers' compensation benefits will not be awarded for the subsequent injury caused by the worker's willful disregard for his physical limitations and his doctor's orders.

Id. at ¶ 17.

On at least four separate occasions, Dr. Van Demark suggested to Claimant that he needed to "think about doing something different" and that "he should probably get out of the construction business" due to the conditions of his hands. Dr. Van Demark recognized that Claimant's condition would not improve if he continued to work in the construction industry. Claimant's attempts to become reemployed in late 2003 and early 2004 failed. Despite Dr. Van Demark's remarks, Claimant decided to find a job in the construction field as it was the only type of employment available to him. Claimant knew Dr. Van Demark would not approve of his working in the construction industry, but he decided to secure such employment due to his dire financial condition.

Claimant's work in 2004 does not constitute willful misconduct. Claimant did not suffer new injuries during the short period of time he performed temporary construction work in 2004. It is true that Claimant experienced an increase in his symptoms. However, Claimant's disability did not increase and the medical evidence does not support a finding that he suffered an aggravation of his condition. The medical evidence presented was insufficient to support a finding that the construction work in 2004 contributed to Claimant's final disability.

Dr. Van Demark was aware Claimant performed construction work in 2004 that caused an increase of pain in his fingers and hands. Dr. Van Demark did not believe those temporary jobs caused any further damage to Claimant's condition. Dr. Van Demark testified:

> Q: [D]id those subsequent employments independently result in any increase in Mr. Swope's permanent impairment?
> A: I don't know.
> . . . .
> Q: I'm going to ask you to review the records and particularly Exhibit 8, and if you'd go ahead and I'd direct your attention to the May through September of 2004 time, which is the time where I believe he relates that he did some additional work.
> A: No. I think he's about the same.
> Q: Let me ask more specifically, did Mr. Swope develop any new symptomology at that time?
> A: No.
> Q: And did you provide any different treatment than the treatment you had already been providing?
> A: No.

Dr. Curd agreed with Dr. Van Demark that Claimant's temporary work activities in 2004 "was contributing to his symptom level." But, Dr. Curd opined that the 2004 construction work did not increase Claimant's impairment rating.

Claimant's "conduct does 'not compare to the deliberate actions required under the statute. . . . It is only in those instances that constitute serious, deliberate, and

intentional misconduct, that the bar to benefits provided by SDCL 62-4-37 should be applied.'" Cantalope, 2004 SD 4, ¶ 9 (citing Phillips v. John Morrell & Co., 484 N.W.2d 527, 532 (S.D. 1992)). The medical evidence does not support a finding that Claimant's brief employment in the construction industry in 2004 caused him additional damage.

Employer failed to demonstrate that Claimant suffered from a subsequent injury caused by his temporary construction work in 2004. Employer failed to satisfy its burden under SDCL 62-4-37. Claimant's conduct in finding temporary employment in the construction industry in 2004 does not amount to willful misconduct. Claimant's request for workers' compensation benefits is not barred by SDCL 62-4-37.

ISSUE III

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

Claimant argued that he is permanently and totally disabled under the odd-lot doctrine. SDCL 62-4-53 describes the criteria for obtaining permanent total disability benefits under the odd-lot doctrine:

> 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.

Claimant has two avenues to make the required prima facie showing for inclusion in 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 is actually available in claimant's community for persons with claimant's limitations. Obvious unemployability may be shown 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. Under this test, if the claimant is obviously unemployable, he will not bear the burden of proving that he made reasonable efforts to find employment in the competitive market. Likewise, it is only when the claimant produces substantial evidence that he is not employable in the competitive market that the burden shifts to the employer.

Fair v. Nash Finch Co., 2007 SD 16, ¶ 19 (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 a number of factors weighing against him that significantly limit his employability. Claimant has limited intellectual capacity, with an IQ of 79 and reading and math skills equivalent to the third or fourth grade level. Claimant has limited education and his high school experience was focused on teaching him to "do the ugliest jobs" that people do not want to do. Claimant received no formal training. Claimant is deaf in his left ear. Claimant is a recovering alcoholic. Claimant has never performed anything other than unskilled manual labor. Claimant is unable to work unsupervised. And now, Claimant has limited use of his hands and fingers due to work-related injuries sustained while working for Employer.

Claimant cannot return to his former employment as a construction laborer because of the bilateral hand condition. The 2005 FCE showed that Claimant can return to work at the medium physical demand level. However, the 2005 FCE significantly limited Claimant's ability to use his hands during the work day. The FCE restricted Claimant's fine hand coordination to simple grasping with no repetitive gripping or pinching. Dr. Van Demark agreed that Claimant could return to work within the restrictions set forth in the 2005 FCE.

Carroll, a vocational rehabilitation consultant with over twenty years of experience, reviewed Claimant's educational, vocational and medical history. Carroll used the 2005 FCE when considering Claimant's work restrictions. Carroll recognized that the "most significant issue" concerning Claimant's return to work was that 2005 FCE limited Claimant's fine hand coordination to simple grasping only with no repetitive gripping or pinching. Also, Claimant was restricted in terms of fine hand work to occasional use only, meaning that he can only perform fine hand work zero to two and a half hours in a day's time. Claimant cannot perform work tasks that involve frequent or constant hand work either with his hands or fingers because of the pinching or gripping required. Claimant is precluded from forceful gripping, which includes such activities hanging onto a broom, using a vacuum cleaner, using a paint brush, using a drill, and hanging onto a hammer.

In order to perform his vocational analysis, Carroll utilized the Oasys Job Match System, which is a computer program based upon the Dictionary of Occupational Titles (DOT). Carroll entered Claimant's 2005 FCE restrictions into the computer program along with his work history. Carroll determined that Claimant is limited to medium duty work with occasional handling and fingering. According to the DOT, handling is defined as "seizing, holding, grasping, turning, or otherwise working with hands or fingers." Fingering is defined as "picking, pinching or otherwise working primarily with the fingers rather than the whole hand or arms as in handling."

The Oasys program sorts through over 12,000 occupations. Carroll explained:

> Well, again, based upon the limitations that you are putting in as per the FCE, it goes through and sorts those jobs and gives you a list of transferable skills that may go into other occupations, and then it gives you at the end a list of occupations an individual should be capable of performing based upon their past work history and their physical capabilities.

Carroll entered the appropriate information pertaining to Claimant's work history and physical limitations into the Oasys program. Jobs that required occasional handling and fingering were considered for Claimant. However, jobs with frequent or constant handling and fingering were ruled out because these jobs exceeded Claimant's 2005 FCE restrictions. Using this analysis, Carroll identified only four occupations that would be suitable for Claimant, including paraffin-plant sweater, sandfill operator, coremaker, and laminating-machine operator. These four occupations are not available in the South Dakota labor market.

Carroll noted that his use of the Oasys program did not take into account Claimant's intellectual limitations. Carroll acknowledged that Claimant was in Special Education throughout most of his schooling and that he has difficulty reading, writing and completing math. Carroll confirmed with Larry Bortz, Claimant's Special Education teacher in Pennsylvania, that Claimant was unable to learn how to operate a cash register during his employment at Wendy's. Claimant either gave out too much change or did not take enough money from the customers.

Carroll was unable to identify any occupation that Claimant could perform on a consistent basis due to his bilateral hand condition. Carroll opined:

> Therefore, in completing a transferable skill analysis utilizing Mr. Swope's work history, and physical limitations as outlined by the [2005] FCE, Mr. Swope's access to the labor market was reduced to 4 occupations, none of which were identified as being available in the South Dakota labor market. Even considering unskilled/semi-skilled employment, no occupations were identified as being available in the South Dakota labor market that could be performed by Mr. Swope.

Carroll recognized that no medical provided had opined that Claimant could not return to work. But, when looking at Claimant's situation from a vocational standpoint, Claimant is permanently and totally disabled. Carroll explained, "[h]e can look for work, but I'm saying the chances of him identifying work that will be within his restrictions and his capabilities, I don't think he is going to find anything." Carroll did not make any job referrals for Claimant because he did not believe there were any positions open and available in the Sioux Falls job market that met all of Claimant's limitations.

Carroll also did not dispute that Claimant qualified for the medium level work duty according to the FCE:

> In terms of picking up weight, he can pick up weight. I'm not disputing that. And he can pick up what is identified in the [2005] FCE which puts him in the medium category of employment. What I'm talking about is how he uses his hands. And when you do not have the intellectual capacity to do desk jockey jobs or public contact jobs, retail sales jobs, that don't require a lot of usage of the hands necessarily, you are forced into construction, production type jobs. And that is where John falls short in terms of utilizing his hands.

Carroll agreed that the FCE in and of itself does not make Claimant obviously unemployable. But, Claimant is unemployable due to a combination of factors. Carroll explained:

> If - - if John had and IQ of 100 or 120 and had this [2005] FCE, there are jobs he could be doing because he would be using his head rather than his hands. But when you have an IQ score that is his level and the inabilities he has, all of a sudden you are looking at a very limited job range, and those jobs then are precluded by the [2005] FCE.

Carroll concluded, "[t]he only thing I would say is I think in John's situation a combination of all the factors we have talked about today makes him permanently, totally disabled."

Carroll opined Claimant was not a candidate for a retraining program. This opinion is consistent with DVR's conclusion and also given that Claimant was unable to succeed at any of his own attempts to improve his reading and computer skills. Ultimately, Carroll opined Claimant was permanently and totally disabled based upon Claimant's physical condition, age, training, experience and type of work available in Claimant's community. Carroll conducted a comprehensive investigation concerning Claimant's employability. Carroll utilized the 2005 FCE and all of Claimant's limitations when conducting his vocational analysis. Carroll thoroughly explained his opinions and they were well-founded. Carroll's testimony was credible.

Based on Claimant's credible testimony, his permanent physical restrictions and on Carroll's credible testimony, Claimant established that he is obviously unemployable due to his physical condition, coupled with his age, training and experience and the type of work available in his community. Claimant's physical condition coupled with his age, training and experience and the type of work available in his community causes him to be unable to be employed in anything other than sporadic employment resulting in an insubstantial income. Because Claimant is obviously unemployable, he does not have to demonstrate "that he made reasonable efforts to find employment in the competitive market." Fair, 2007 SD 16, ¶ 19.

Claimant established a prima facie showing that he is permanently and totally disabled under the odd-lot doctrine. The burden of production now 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 vocational testimony from Tom Karrow, a vocational rehabilitation consultant with over twenty years of experience. Karrow reviewed Claimant's medical records and vocational records and interviewed Claimant. Karrow described his investigation process:

> Well, I went out to the labor market. I make phone calls first, make contact with employers that I feel - - I felt at that point were - - that were hiring, that had jobs that would allow Mr. Swoop [sic] to use a skill level that he had previously and his education, and do entry level jobs. So I mean explain to employers the person's - - Mr. Swoop's [sic] limitations, whether or not they are willing to accommodate if they needed that, whether or not they are taking applications, what the job pays, and proceed to develop job leads and send those to Mr. Swoop [sic].

Once Karrow identified a potential position, he sent the job lead to Claimant's attorney. Karrow then followed up with potential employers and learned that Claimant had not submitted an application for any of the positions Karrow identified. However, Claimant contacted some employers, either in-person or by telephone. Claimant asked about possible openings and about weight restrictions. For example, Claimant stopped at the Mint Casino in September 2005, inquiring about any job openings. Claimant learned there were no openings at the time. Karrow was critical because Claimant did not complete an application for "future employment." Karrow admitted it was not unreasonable for Claimant to make telephone inquires of the weight restrictions of jobs before deciding to apply. Karrow also acknowledged it was not unreasonable for Claimant not to apply for jobs outside of his physical restrictions.

Karrow opined there is some form of suitable work regularly and continuously available for Claimant in the Sioux Falls labor market. If the job was in the medium category in terms of weight lifting requirements, Karrow identified the job as being within Claimant's capabilities, irrespective of the restrictions on the use of the hands. Karrow disagreed with Carroll's position that any job requiring more than minimal use of the hands would be unacceptable. Karrow noted, "I observed Mr. Swoop [sic] writing like he is doing now, notes to his attorney, three pages at one time, 44 minutes this morning. I mean he put the pen down just a few times." Karrow was asked about his observation. Karrow stated, "[f]rom what I have seen today, as far as I'm concerned, the FCE is either incorrect about his finger dexterity, or he has had a pretty good improvement." Contrary to Karrow's observations, Claimant did not write continuously during the hearing. An example of the notes Claimant took during the hearing was admitted into evidence as Exhibit 29. This document is illegible, nonsensical and certainly contrary to the valid 2005 FCE. More importantly, Karrow is not medically trained and cannot opine on Claimant's physical condition. The 2005 FCE was valid, and accepted by Dr. Van Demark, and no medical evidence was presented to discredit Claimant's physical limitations.

Karrow discussed Claimant's limitations with various employers as "[t]hat he has upper extremity limitations, that he is restricted to light to medium duty work, limited education." Karrow described a typical example of the type of contact he made with an employer. This example pertained to information about Claimant he provided to the manager of Super 8 for a desk clerk position:

> Q: And would you have discussed Mr. Swope's finger issues at that time with the employer?
>
> A: I would have discussed, yes, his limitations to his upper extremities, not able to do assembly work, looking for a job for him that would involve a variety of job duties, that he wouldn't be doing computer work all the time, no very heavy laundry work, no taking air conditioners out of windows. That happens sometimes as desk clerks. Can't do that. Beds upstairs, can't do that. Whatever. These are heavy - - no - - some of them sweeping the parking lot, can't do that constantly.
>
> Q: So are you telling the Department you had that conversation specifically concerning John Swope before the August 3rd letter?

A: In some way, shape or form. I mean not maybe exactly all those words, but, yes, with all those employers.

. . . .

Q: I don't see anywhere in here that it talks about any limitations of gripping or pinching or repetitive use for anything other than simple grasping.

A: That's correct.

Q: Did you make any recommendation of that type?

A: Not - - no, not in my letter to them, no.

Karrow contacted various employers, but did not discuss positions open and available that would meet all of Claimant's specific limitations. Even though Karrow mispronounced Claimant's name during most his direct examination, he admitted he would spell Claimant's name when discussing his restrictions with various employers.

After listening to Claimant's testimony, Karrow identified two specific employers with jobs available that required less use of the hands. Karrow testified:

> For example, today, looking at the newspaper, looking - - checking the current availability of employment, have you had a chance to figure out whether there is anything that you think Mr. Swope could successfully apply for in the way of employment today?
>
> A: Yes, sir.
>
> Q: Tell me what that would be.
>
> A: Well, after listening to testimony yesterday, what I did was I - - I tried to identify jobs and even lower physically demanding for Mr. Swoop [sic] than what the medical record actually states he can do. I found two employers that are ready and willing to take Mr. Swoop's [sic] application. They have jobs available.
>
> Q: Who are those employers?
>
> A: Wal-Mart, two locations, and Kmart, two locations in Sioux Falls.

Wall-Mart and Kmart have full-time self-checkout/security clerk positions available paying a starting wage between $7.25 and $7.75 per hour. Before the hearing, Claimant actually attempted to submit an application on-line at Wal-Mart. It took Claimant two or more hours to go through the application process because of his inability to understand how to use the computer. Claimant did not know if his on-line application was accepted.

Karrow opined there is some form of suitable work regularly and continuously open and available to Claimant in the Sioux Falls labor market. Karrow testified:

> For the case - - this particular issue, I would go with the jobs at Wal-Mart and Kmart that I mentioned this morning, meaning very little if any hand usage during the day, only because those are the jobs I feel are the least physically demanding that you just stand and watch somebody. He could also work at Burger King, McDonald's. He said he applied recently at those places, although I have not - - that's - - I found out he hasn't done that. He could do other jobs that - - hardly any use of hands. Alarm signal operator, telemetry technician at a

> hospital, just watching heart monitors, scans, the videos. And you push a button if somebody is having a problem. That is all you do. That's all you do.

Karrow also thought Claimant could work as a desk clerk because "I've seen him write a lot more than desk clerks write." Karrow opined Claimant was not obviously unemployable because:

> [H]e hasn't completed an adequate job search, hasn't applied for work, hasn't tried jobs that have been recommended to him. Many employers will - - if they need to, if there is a necessity, try to accommodate somebody that has certain capabilities. They can basically do the job if certain things can be accommodating. There is [sic] a lot of employers that are willing to do that in Sioux Falls.

Karrow did not identify positions within Claimant's limitations, according to the 2005 FCE. Karrow was able to identify a variety of positions that were open and available in the Sioux Falls area. However, most of the positions were outside of Claimant's physical and intellectual capabilities.

Unlike Carroll, Karrow's vocational opinions and investigation were flawed. For example, Karrow opined Claimant could work as a building maintenance supervisor, machine operator, production worker, motel desk clerk, casino attendant, car detailer and as a telemetry technician. Karrow was even asked, "You want Mr. Swope to watch your heart monitor, Mr. Karrow?" He responded, "Sure." Karrow's testimony was disingenuous. Karrow's opinions ignored the credible medical evidence, including the valid 2005 FCE. More importantly, Karrow disregarded all of Claimant's physical and intellectual limitations. In conjunction, Karrow did not conduct a job search using all of Claimant's limitations. Karrow's opinions are without adequate foundation and not credible. Karrow's entire testimony is rejected.

Employer also relied upon testimony presented by Gayla Stewart, the vocational expert for HCC and St. Paul. Stewart's testimony is also rejected because she utilized the incorrect premise that Claimant "could do frequent – frequent hand usage." Every job that Stewart identified as being available to Claimant required at least frequent hand use. These positions exceeded Claimant's physical limitations as identified by the 2005 FCE.

Employer failed to demonstrate there were specific positions open and available within Claimant's community that would meet all his limitations and pay him a suitable wage. Even though Employer failed to satisfy its burden of production, the ultimate burden of persuasion remains with Claimant.

Employer's attacks on Claimant's credibility were not persuasive. There is no dispute that Claimant suffered the injuries to his hands and fingers. Any of Claimant's emotional and psychological problems, including trouble with the law, have little bearing on the events concerning his work-related injuries. Claimant suffered serious injuries to his fingers. It is true that in most instances, these injuries would not make a person permanently disabled. Unfortunately, due to Claimant's intellectual and educational limitations, he is unable to perform anything but manual labor. Now with the injuries to his hands and fingers, Claimant's ability to perform manual labor has been nearly eliminated. As Carroll credibly testified, there are no identifiable positions that Claimant

is able to perform. At the hearing, Nagelhout confirmed that Claimant was still eligible for services from DVR, but she had been unable to find Claimant suitable employment and she had no further placement ideas for him.

Claimant credibly testified that he wants to return to work. Claimant attempted to find employment, but was unsuccessful in his efforts. The only jobs Claimant could obtain were in the construction industry performing manual labor. This work increased his pain level and forced Claimant to quit after a few weeks. Claimant has been unable to work since November 2004. Employer was critical of Claimant's efforts to find work. As previously stated, Claimant did not have to demonstrate that he made reasonable efforts to find employment in his community. Even so, Claimant conducted a reasonable job search. Claimant submitted both applications and contacted various employers. In many cases, Claimant learned that no jobs were available, that the employer was not hiring or that the physical restrictions exceeded his capabilities and work restrictions.

Carroll's opinions support that Claimant is permanently and totally disabled. Carroll analyzed a number of the positions identified by Karrow as suitable employment for Claimant. Carroll opined Claimant would be unable to perform other duties in a fast food operation:

> Well, again, in terms of grilling, making fries, making burgers, again, the gripping that is required either to use spatulas or deep fat fryers, I believe would exceed his functional limitations because he would be doing that gripping or grasping or pinching on more than an occasional basis in an eight-hour day.

Carroll opined Claimant would be unable to work in a casino:

> Well, I have issues with that on several levels. One, that John is an alcoholic. I don't think it's a conducive place for him to work. The other thing, again, I don't see him making change correctly. I don't see him - - he mentioned lifting kegs. You wouldn't be doing that on a repetitive basis, but that in and of itself would exceed his limitations. Just the fact of gripping and grasping bottles, glasses, that type of thing would - - I believe is beyond his physical limitations.

Carroll opined Claimant would be unable to work at a hotel or motel. Claimant could not perform the duties of a night auditor because he does not have the intellectual capacity. Carroll explained, "[Claimant] does not have the capacity, not only in reading and math, to do that type of work. I think that is way beyond him in terms of his capacity. And that would be the first thing. The other thing would be transferable skills. John has never worked in a public position working with the general public. And I don't think that is an appropriate position for him." Carroll opined maintenance or light duty work was unsuitable for Claimant:

> Again, because of the mops, brooms, vacuums, doing painting, utilizing a power drill, that type of thing, I think all those things are well beyond his physical capabilities as per the FCE. The other thing is that building maintenance a lot of times - - and I did contact the Holiday Inn City Centre for one of the positions that Mr. Karrow identified. They said that position is pretty much unsupervised. They

have to be a self-starter and be able to know what needs to be done and get it done in a timely fashion.

Carroll opined Claimant would be unable to perform the duties of a car detailer because it would involve repetitive gripping during the course of an entire work day. Even though Karrow's opinions were rejected, Claimant demonstrated through Carroll's credible testimony that the positions identified by Karrow were unsuitable for Claimant. Again, Carroll's testimony was credible. Carroll performed a thorough and well-reasoned approach to investigating Claimant's employability. Carroll's conclusion that Claimant is permanently and totally disabled is fully supported by the record.

After consideration of all the testimony, Claimant is permanently and totally disabled pursuant to SDCL 62-4-53. Claimant demonstrated that he is obviously unemployable due to his physical condition, coupled with his age, training and experience and the type of work available in his community. Claimant satisfied his burden of persuasion to establish that he is permanently and totally disabled under the odd-lot doctrine. Claimant's request for permanent total disability benefits is granted and Employer is responsible for payment of permanent total disability benefits to Claimant. Claimant has been permanently and totally disabled since November 2004, when he was forced to quit working due to the conditions of his hands and fingers. Claimant has been unable to secure continuous and suitable employment since that time. Finally, Claimant's request for attorney's fees is premature and must be addressed at a later date.

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 proposed 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 26th day of February, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge