March 11, 2009

Michael D. Bornitz
Cutler & Donahoe, LLP
100 N. Phillips Ave., 9th Floor
Sioux Falls, SD 57104-6725

Letter Decision and Order

J. G. Schultz
Woods, Fuller, Schultz & Smith, PC
PO Box 5027
Sioux Falls, SD 57117-5027

RE: HF No. 115, 2005/06 – Suzanne Oelkers v. Natural Abundance Food Cooperative and Zurich Insurance Company

Dear Counsel:

This letter addresses the following submissions by the parties:

January 7, 2009	Motion to Amend [Employer/Insurer's] Joint Answer to Petition for Hearing.
January 7, 2009	Amended Joint Answer to Petition for Hearing.
January 19, 2009	[Claimant's] Opposition to Employer and Insurer's Motion to Amend.
January 19, 2009	Affidavit of Michael D. Bornitz in Opposition to Employers and Insurer's Motion to Amend.
January 23, 2009	Affidavit of Cora Ehresmann.
January 27, 2009	Employer and Insurer's Brief in Support of Motion to Amend Joint Answer to Petition for Hearing.
January 27, 2009	Affidavit of J. G. Schultz.

FACTS

The facts of this case as reflected by the above submissions are as follows:

1. On October 14, 2004, Suzanne Oelkers (Claimant) sustained work related injuries in an automobile accident.

2. Claimant was employed as a manager by Natural Abundance Food Cooperative (Employer) at the time of Claimant's accident.

3. At the time of Claimant's accident, Zurich Insurance Company (Insurer) was Employer's workers' compensation insurer.

4. A Calculation of Compensation Rate (form 110) for Claimant was submitted to the Department of Labor (Department) on October 27, 2004. The form 110 indicated that Claimant's average weekly wage was $480.00 and a compensation rate of $320.00 per week. The form 110 was not signed by the employee or employer. It also contained the following disclaimer:

> This document does not constitute an agreement, stipulation, or release. This document does not affect the employee's right to seek benefits, including a change in the rate of compensation, nor does it restrict the employer/insurer's right to deny any claim. This form is meant to lead to an understanding between parties regarding the rate of compensation. No party is required to sign this form in order to make payments or receive payment of benefits.

5. Since October of 2004, Claimant has received temporary total disability benefits from Insurer at the rate of $320.00 per week. Claimant has also been awarded benefits for surgical expenses.

6. In July of 2008, Employer/Insurer informed Claimant that they had discovered an error in the original calculation of Claimant's compensation rate.

7. On January 7, 2009, Employer/Insurer filed a Motion to Amend Joint Answer to Petition for Hearing. Employer/Insurer allege that they mistakenly paid Claimant at the compensation rate of $320.00 per week. They contend that Claimant is only entitled to a compensation rate of $257.00 per week.

MOTION TO AMEND JOINT ANSWER TO PETITION FOR HEARING

Employer/Insurer's Motion to Amend Joint Answer to Petition for Hearing is governed by SDCL 15-6-15(a). That provision states, "a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." "A trial court may permit the amendment of pleadings before, during, and after trial without the adverse party's consent." Burhenn v. Dennis Supply Company, 2004 SD 91, ¶ 20, 685 NW2d 778, 783. citing Dakota Cheese, Inc. v. Ford, 1999 SD 147, ¶24, 603 NW2d 73, 78. "[T]he most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment." Id.

Claimant argues that she will be prejudiced if the Employer/Insurer is allowed to amend their answer. Claimant contends that her accident occurred in 2004 and that she no longer has payroll records to show her proper compensation rate. There is no question that the amendment at this late date may be an inconvenience to the Claimant. However, it does not automatically follow that she will be prejudiced.

First, the general rule is that the claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967). In this instance, Claimant cannot sidestep her burden by failing to maintain payroll records. Claimant should have been aware that she may be called upon to prove entitlement to her compensation during the litigation process.

Second, Claimant should be able to obtain banking records and Internal Revenue Service documents to assist her in rebutting any inaccurate Employer/Insurer contentions. Therefore, Claimant should not be prejudiced by Employer/Insurer's amended answer.

Employer/Insurer's position is further supported by the policy statement made by the South Dakota Supreme Court in Tiensvold v. Universal Transport, Inc., 464 NW2d 820, 825 SD 1991). In that case, the Court adopted the rationale of the Iowa Supreme Court when it stated:

> It is argued that it is unfair to allow the employer to recoup for his own error at the inconvenience to the claimant. We think not. We think the public interest will be better served by encouraging employers to freely pay injured employees without adversary strictness. It is not so unfair to compel the claimant to face at an earlier date the termination he would face later in any event so as not to penalize the employer.

(internal citation omitted). In light of the above analysis, Employer/Insurer are granted leave to amend their joint answer to petition for hearing.

ORDER

For the reasons stated above, Employer/Insurer's Motion to Amend Joint Answer to Petition for Hearing is granted.

Sincerely,

_____
Donald W. Hageman
Administrative Law Judge

DWH/sat