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RE: HF No 116, 2019/20 - Daniel Helfrich v. Bergstrom Automotive and Sentry Insurance and Family Auto Care, Inc and Risk Administration Services

Greetings:

This letter addresses Daniel Helfrich's (Helfrich) Motion for Determination of Average Weekly Wage (AWW). All submissions have been considered. The issue raised by the motion is whether Temporary Partial Disability (TPD) benefits from a previous work injury constitute earnings pursuant to SDCL § 62-1-1.

On May 11, 2018, Helfrich sustained a work-related injury while working for Bergstrom Automotive (Bergstrom). For that injury, his Temporary Total Disability (TTD) compensation rate based on his gross average weekly wage of \$1,153.84 was

calculated to be \$796.14. Once he returned to part-time duty, he received \$595.02 in TPD benefits. Around this time, Bergstrom was sold to Family Auto Care, Inc. (Family Auto).

On November 6, 2019, while receiving TPD benefits and working part-time for Family auto, Helfrich was involved in an automobile accident. He was receiving \$595.00 per week in TPD benefits and a wage of \$250.00 per week from Family Auto.

On May 19, 2022, Helfrich underwent shoulder surgery related to the second work injury and was restricted to light duty with no use of his right arm. As his current employer, HCR Family, Inc., was unable to accommodate his restrictions, RAS began paying TTD benefits. RAS calculated his benefit rate based on his earnings at the time of the second injury to be \$183.78 per week.

Helfrich has moved the Department of Labor & Regulation to determine his AWW using his compensation rate at the time of his injury. He asserts that SDCL § 62-4-24 applies because he was working in the same grade of employment for at least one year preceding his injuries. He further asserts that the calculation pursuant to SDCL § 62-1-1(6) must be made using the earnings prior to his injury. He was working the same position at the time of his second injury and had an established TTD rate of \$746.14.

"Earnings," the amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was working at the time of the employee's injury. It includes payment for all hours worked, including overtime hours at straight-time pay, and does not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed by the employee by the nature of the employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, the allowances

shall be deemed a part of the employee's earnings;
SDCL § 62-1-1(6)

Helfrich argues that the TPD benefits should be included in the calculation because they constituted part of his wage. RAS responds that the rate calculation must be based upon his earnings at the date of his second injury, and the definition of “earnings” provided by SDCL § 62-1-1(6) does not include a reference to indemnity benefits.

The South Dakota Supreme Court (Court) has held that “proceedings under Work[er’s] Compensation Law . . . are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions.” *Martin v Am. Colloid Co.*, 2011 S.D. 57, ¶ 12, 804 N.W.2d 65, 68. (Citing *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 364 (S.D.1992)). SDCL § 62-4-24 provides

As to an employee in an employment in which it is the custom to operate throughout the working days of the year, and who was in the employment of the same employer in the same grade of employment as at the time of the injury continuously for fifty-two weeks next preceding the injury, except for any temporary loss of time, the average weekly wage shall, where feasible, be computed by dividing by fifty-two the total earnings of the employee as defined in subdivision 62-1-1(6), during the period of fifty-two weeks. However, if the employee lost more than seven consecutive days during the period of fifty-two weeks, then the division shall be by the number of weeks and fractions thereof that the employee actually worked.

Thus the Department must determine Helfrich’s AWW based on his earnings pursuant to SDCL § 62-1-1(6) and SDCL § 62-4-24. The Court has held that a compensation rate “is based on the average weekly wage the employee was earning at the time of his injury.” *Caldwell* at 364. The definition of earnings provided by statute does not include indemnity benefits, therefore, at the time of the second injury for which RAS is

compensating Helfrich, he was earning \$250 per week resulting in a benefit rate of \$183.78.

ORDER

It is hereby ORDERED that Helfrich's Average Weekly Wage in regard to the injury on November 6, 2019, is determined to be \$183.78.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge

MMF/das