

December 17, 2014

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Letter Decision and Order

Heather Lammers Bogard
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RE: HF No. 156, 2013/14 – Spence Walker v. Hills Material Company and Liberty Mutual Insurance Co.

Dear Mr. Leach and Ms. Bogard:

Submissions

This letter addresses the following submissions by the parties:

October 7, 2014	[Claimant's] Motion for Partial Summary Judgment re: Average Weekly Wage; Affidavit of James D. Leach in Support of Motion for Partial Summary Judgment;
November 12, 2014	Employer/Insurer's Resistance to Claimant's Motion for Partial Summary Judgment; Affidavit of Heather Lammers Bogard in Support of Employer/Insurer's Resistance to Claimant's Motion for Partial Summary Judgment;
November 25, 2014	[Claimant's] Reply Brief in Support of Motion for Summary Judgment Re: Average Weekly Wage.

Facts:

When construed in the light most favorable to the non-moving party, the facts of this case are as follows:

1. Spence Walker (Walker) was employed by Hills Materials Company (Hills) as an Equipment Operator in 2011. Walker remained classified as an Equipment Operator for the duration of his employment with Hills.

2. Walker's job description states:

The Equipment Operator is responsible for operating a variety of equipment for groundwork and construction purposes. The career field for "Equipment Operator" includes, but may not be limited to, the following positions: Equipment Operator (Grade and Pave Crew), Heavy Equipment Operator, Roller Operator (Self-Propelled, Asphalt, Other than Asphalt), Motor Grader Operator (Rough Grade), Concrete Grinder/Milling Machine Operator, Backhoe Operator, Bobcat Operator, Bulldozer/Push Dozer Operator, Concrete Finishing Machine Operator, Asphalt Paver Machine Operator, or Flaherty Operator.

3. Hills' Equipment Operators worked throughout the year.
4. Walker's supervisor wrote: "Spencer is the best trackhoe operator I've seen in 31 years. Very safety conscience [sic], outstanding operator and gets things done."
5. On June 28, 2012, Hills raised his wage from \$17.00 per hour to \$20.00 per hour. The wage change was approved by the Operations Manager at Hills, Robert Hengen.
6. Typical wages for equipment operators at Hills start around \$15 to \$16 per hour. It was unusual to raise a trackhoe operator to \$20 per hour so soon after Walker began at Hills. Hengen explained: "we wanted to keep him working for Hills. We didn't want to lose him, because he had kind of made the comment that, you know, he was looking for more money."
7. Walker alleges that he suffered a work-related injury in October of 2012.

Summary Judgment:

Claimant filed a Motion for Partial Summary Judgment. ARSD 47:03:01:08 governs the Department of Labor & Regulation's authority to grant summary judgment in workers' compensation cases. That regulation states:

A claimant or an employer or its insurer may, any time after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

ARSD 47:03:01:08.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. Railsback v. Mid-Century Ins. Co., 2005 SD 64, ¶ 6, 680 N.W.2d 652, 654. “A trial court may grant summary judgment only when there are no genuine issues of material fact.” Estate of Williams v. Vandenberg, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987)). “In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist.” Estate of Williams, 2000 SD 155 at ¶ 7, (citing, Ruane v. Murray, 380 NW2d 362 (S.D.1986)). “Summary judgment is not the proper method to dispose of factual questions.” Stern Oil Co., Inc. v. Brown, 2012 SD 56, ¶ 9, 817 N.W.2d 395, 399 (quoting Boziad v. City of Brookings, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268).

In this case, the Department finds no genuine issues of material fact.

Average Weekly Wage:

Walker argues that his average weekly wage should not be calculated pursuant SDCL 62-4-24. That statute states:

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.

SDCL 62-4-24.

Walker asserts that his raise on June 28, 2012, constitutes a change of grade. Therefore, he contends that he had not worked in the same “grade of

employment” continuously for fifty-two weeks prior to his injury. The Department disagrees.

Walker’s argument would have been plausible had the phrase in question been “pay grade” or simply, “grade”. However, the phrase is “grade of employment”. This phrase suggests that a change of grade must be within the hierarchy of the business, rather than the employee’s status within each job classification. In essence, that the focus be on the employment, not the employee.

Here, Walker’s employment did not change. He remained an equipment operator. A position he held during his entire tenure of employment with Hills. He did not receive a promotion. He was not made a supervisor. Nor did he receive any additional responsibilities. All of which would evidence a change in his grade of employment.

An employee’s wage is largely dictated by market forces, his skill sets and seniority. These factors exist within but are distinct from the employment structure.

Order

It is hereby, Ordered that Walker’s Motion for Partial Summary Judgment is denied. Walker failed to show he is entitled to a judgment as a matter of law. The Employer and Insurer shall have 30 days beyond the date of this decision to provide their disclosure of experts and reports. This letter shall constitute the order in this matter.

Sincerely,

 /s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge