

December 20, 2012

Michael M. Hickey
Bangs, McCullen, Butler, Foye & Simmons LLP
P.O. Box 2670
Rapid City, SD 57709-2670

LETTER ORDER

Heather Lammers Bogard
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter LLP
PO Box 290
Rapid City, SD 57709

RE: HF No. 172, 2007/08 – William Roth v. Pennington County Weed & Pest Control
and SDML Workers' Compensation Fund

Dear Mr. Hickey and Ms. Bogard:

A hearing was held on December 19, 2012, in Rapid City South Dakota to determine if Claimant, William Roth, was eligible for a partial lump sum payment pursuant to SDCL 62-7-6. The Department heard the testimony of Mr. Roth and his wife, Mary Ann Roth. Claimant has requested a partial lump sum in the amount of \$10,000.

SDCL 62-7-6 provides in relevant part,

An employer or employee who desires to have any unpaid compensation paid in a lump sum may petition the Department of Labor asking that the compensation be paid in that manner. If, upon proper notice to interested parties and proper showing before the department, it appears in the best interests of the employee that the compensation be paid in lump sum, the secretary of labor may order the commutation of the compensation to an equivalent lump-sum amount. That amount shall equal the total sum of the probable future payments capitalized at their present value on the basis of interest calculated at a rate per year set by the department with annual rests in accordance with rules promulgated pursuant to chapter 1-26. If there is an admission or adjudication of permanent total disability, the secretary may order payment of all or part of the unpaid compensation in a lump sum under the following circumstances:

- (1) If the employee has exceptional financial need that arose as a result of reduced income due to the injury; or
- (2) If necessary to pay the attorney's fees, costs and expenses approved by the department under § 62-7-36.

If a partial lump sum payment is made, the amount of the weekly benefit shall be reduced by the same percentage that the partial lump sum bears to the total lump sum computation. The remaining weekly benefit is subject to the cost of living allowance provided by § 62-4-7.

The general rule in South Dakota does not favor total lump sum awards. "The allowance of a lump-sum award is the exception and not the general rule." *Enger v. FMC*, 2000 SD 48, ¶11, 609 NW2d 132 (Citing *Wulff v. Swanson*, 69 S.D. 539, 543, 12 N.W.2d 553, 555).

Despite this general rule against lump sum awards, Professor Larson points out that the remedy can work in certain circumstances,

The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purpose of the Act will best be served by a lump sum award.

Id. Citing 8 *Larson's Worker's Compensation Law*, § 82.71 (1999).

Our statute authorizing a lump-sum payment clearly sets out the circumstances under which such a payment can be made. First, it must be in the best interests of the employee. Our prior decisions confirm that the primary emphasis must be placed on providing an injured worker with a reliable stream of income to replace lost wages and benefits. Second, in the case of a worker who has been permanently and totally disabled ... a lump sum may be ordered if the worker has an exceptional financial need that arose as a result of reduced income due to the injury.

Steinmetz v. South Dakota, 2008 SD 87, ¶10, 756 NW2d 392.

The South Dakota Supreme Court has identified four factors for defining these 'best interests:'

1. Age, education, mental and physical condition, and actual life expectancy.
2. Family circumstances, living arrangements, and responsibilities to dependents.
3. Financial condition, including all sources of income, debts and living expenses.
4. Reasonableness of plan for investing the lump sum proceeds and ability to manage invested funds or arrangement for management by others."

Id. at ¶11. In this case, Mr. Roth is 79 years old with a life expectancy of 7.9 years. He has a high school education and as a result of his work related injuries, he is totally and

permanently disabled and confined to a wheel chair. Mr. Roth lives with his wife, Mary Ann who does not work outside the home. Mr. Roth currently receives workers compensation benefits in the amount of \$1,191.60 per month. The Roth's also receive income from Social Security and an annuity for a combined monthly income of \$2802.48.

The Roth's monthly expenses amount to \$2552.63. This includes nearly \$800 in monthly payments to a debt consolidation plan to pay credit card debt incurred at the time of Mr. Roth's injury and medical bills related to both Bill and Mary Ann. The proposed partial lump sum payment in the amount of \$10,000 would be used to pay the consolidated credit card debt and real estate taxes. Payment of this debt would result in reduced monthly expenses of 1757.53. Even with the slight reduction in Mr. Roth's workers' compensation benefit¹, this would allow for money to be put in savings each month and have available for unexpected expenses. A partial lump sum would be in Claimant's best interest and provide for a reliable stream of monthly income for Mr. Roth and his family.

In addition to being in the Claimant's best interest, SDCL 62-7-6 requires a showing of "exceptional financial need that arose as a result of reduced income due to the injury". The Roth's incurred debt at the time of his work related injury. Prior to his injury they had been able to live comfortably on his wage, however due to his injury and overwhelming nature and extent of his injury and reduced income, they were unable to keep up with their bills.

Upon consideration of the testimony at hearing and the evidence resented, the Department finds that a partial lump sum payment is in Claimant best interest and the exceptional financial need arose as a result of reduced income due to the injury. Such an award is in the spirit of the workers' compensation laws of South Dakota to provide Claimant with a steady and reliable stream of income. Claimant's Request for partial lump sum payment in the amount of \$10,000 is hereby granted. The amount of the weekly benefit shall be reduced by the same percentage that the partial lump sum bears to the total lump sum computation. The remaining weekly benefit is subject to the cost of living allowance provided by § 62-4-7. This letter shall serve as the Department's Order.

Sincerely,

/s/ Taya M Runyan

Taya M. Runyan
Administrative Law Judge

¹ The partial lump sum requested represents approximately 9.68% of the total lump sum computation. Roth's weekly workers' compensation benefit would be reduced by approximately \$28.77, or \$115.08 monthly.