

May 4, 2007

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Comet H. Haraldson
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Sioux Falls, SD 57117-5027

RE: HF No. 177, 2005/06 – Irene Homan v. Wal-Mart and American Home Assurance Co.

Dear Mr. Simpson and Mr. Haraldson:

I am in receipt of Claimant's Motion to Compel Payment of Impairment Rating and For Penalty Pursuant to SDCL 62-4-10.1 and Employer/Insurer response thereto. First, Employer/Insurer has agreed to pay 6.5% impairment to the foot as soon as possible. The Department will assume that will be done.

Claimant alleges in her Petition for Hearing, received by the Department on May 16, 2006:

On June 27, 2004, Claimant injured her left ankle while working at Wal-Mart. Claimant subsequently developed reflex sympathetic dystrophy in her left lower extremity. Claimant has received a significant amount of medical treatment for her RSD including physical therapy, medications, an MRI, two bone scans, a radiofrequency ablation treatment, and a nerve block. All treatment was deemed compensable by Employer/Insurer until an "independent medical evaluation" performed by Dr. Cederberg on April 24, 2006. Thereafter, Employer/Insurer has denied payment for a spinal cord stimulator recommended by treating physician Dr. Frost and other workers' compensation benefits.

On June 2, 2006, Employer/Insurer specifically denied this allegation in its Joint Answer.

On November 9, 2006, Employer/Insurer identified Dr. Cederberg as an expert witness. On January 22, 2007, Dr. Cederberg's deposition was taken and he opined that 6.5% of Claimant's 13% left foot impairment was due to the work-related injury. Thereafter, Claimant made demand for payment of this 6.5% left foot impairment. Employer/Insurer has now agreed that it will be paid as soon as possible.

Claimant alleges that she is owed \$1,998.75 in permanent partial disability for the 6.5% impairment to her left foot and that a ten percent penalty must be assessed under SDCL 62-4-10.1, which provides:

Failure to make any payment of worker's compensation benefits pursuant to § 62-4-10 within ten days of the date on which the payment is due shall result in an automatic penalty equal to ten percent of the unpaid amount. Nothing herein precludes any other remedy available to the claimant.

SDCL 62-4-10 provides:

All compensation provided for in §§ 62-4-3 to 62-4-7, inclusive, shall be paid in installments at the same intervals at which the wages or earnings of the employee were paid at the time of the injury, or if this shall not be feasible, then the installments shall be paid weekly.

The work-related nature/causation of Claimant's condition has been denied by Employer/Insurer from the beginning of this litigation. On April 2, 2007, Employer/Insurer admitted that at a minimum, Claimant is owed for a 6.5% impairment and indicated that payment would be made as soon as possible. Given the issues raised in this litigation and the circumstances surrounding the impairment rating, the impairment rating was not "due" until April 2, 2007. Because the Department has no indication as to if and when the impairment rating was paid, no penalty can be calculated and therefore, no penalty will be assessed at this time.

Sincerely,

Heather E. Covey
Administrative Law Judge