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RE: HF No. 32, 2003/04 – Larson v. Contractors Insulation & Drywall Supply

Dear Counsel:

I am in receipt of Claimant's Motion for Partial Summary Judgment and Employer/Insurer's response thereto.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> A claimant or an employer or its insurer may, anytime 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 of 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.

Claimant moves for a partial summary judgment on the issue of his correct weekly workers' compensation rate. Claimant urges that the Department find that Claimant is entitled to $234.00 per week pursuant to a calculation of his average weekly wage under SDCL § 62-4-26. Employer/Insurer urge the Department to calculate Claimant's average weekly wage using the definition of working week in SDCL § 62-4-31.

There are no genuine issues of material fact. Claimant Christopher Larson was hired by Employer in December of 2001 for two separate temporary job assignments, stocking sheetrock at Forest Products in Rapid City, South Dakota, and stocking ceiling tile at the AmericInn job site in Deadwood, South Dakota. Larson was injured at the AmericInn job site on December 21, 2001. The two jobs for which Larson was employed were completed.

Larson's first day of employment was Wednesday, December 12, 2001, when he worked 7 hours stocking sheet rock. He next worked on December 17, 2001, for 7.25 hours, on December 19, 2001, for 7.5 hours, and on December 22, 2001, for 4 hours, stocking ceiling tile. Over a period of two working weeks, Larson worked a total of 25.75 hours. Any other hours Larson might have worked in the absence of his injury are irrelevant to the calculation of temporary total disability benefits under the South Dakota Workers' Compensation Law.

SDCL § 62-4-3 governs the workers compensation rate for payment of benefits for lost wages:

> The amount of temporary total disability compensation paid to an employee for an injury is equal to sixty-six and two-thirds percent of the employee's earnings, but not more than one hundred percent computed to the next higher multiple of one dollar of the average weekly wage in the state as defined in § 62-4-3.1 per week and not less than one-half of the foregoing percentages of the average weekly wage of the state per week. However, if an employee earned less than fifty percent of the maximum allowable amount per week, the amount of compensation may not exceed one hundred percent of the employee's earnings calculated after the earnings have been reduced by any deduction for federal or state taxes, or both, and for the Federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's earnings.

The statutes in effect at the date of injury apply to the rights of all parties in any claim for workers' compensation benefits. Helms v. Lynn's Inc., 542 N.W.2d 764 (S.D. 1996). In December of 2001, the maximum allowable amount per week was $468.00 and fifty percent of that, the minimum, was $234.00.

There are four basic methods for determining a claimant's average weekly wage. The first method is found at SDCL § 62-4-24. The calculation provided by SDCL § 62-4-24 covers situations where a claimant had been in the same grade of employment for the same employer as he was at the time of injury, continuously for 52 weeks next preceding the injury. Obviously, Claimant in this matter had not worked 52 continuous weeks for Employer before his injury. SDCL § 62-4-24 is not applicable.

The second method can be found at SDCL § 62-4-25 and provides in relevant part:

> As to an employee in an employment in which it is the custom to operate throughout the working days of the year, but who is not covered by § 62-4-24, the average weekly wages shall, where feasible, be ascertained by computing the total of his earnings during the period he worked immediately preceding his injury at the same grade of employment for the employer by whom he was employed at the time of his injury, and dividing such total by the number of weeks and fractions thereof that he actually worked[.]

Employer operates throughout the working days of the year. Claimant is not covered by SDCL § 62-4-24. Claimant's "total earnings during the period he worked immediately preceding his injury at the same grade of employment for the employer by whom he was employed at the time of his injury" amount to $181.28. The next step is where the dispute arises, ascertaining "the number of weeks and fractions thereof that he actually worked". Claimant urges the Department to find that SDCL § 62-4-25 is not applicable because Claimant "never worked a full week." Employer/Insurer directs the Department's attention to SDCL § 62-4-31, which provides:

> A working week, for the purposes of §§ 62-4-24 to 62-4-30, inclusive, shall be deemed to be the number of days contemplated by the employment to be worked by the employee during each calendar week.

The record reflects that Claimant was hired for a job that was to continue until finished. Claimant's employment "contemplated" that he was to continue until finished. Claimant's employment lasted seven hours the first week and 18.75 hours the second. Contrary to Claimant's arguments, Claimant worked the full week contemplated by his employment. SDCL § 62-4-25 applies.

Continuing the analysis under SDCL § 62-4-25, dividing $181.28 "by the number of weeks or fractions thereof that he actually worked," which is two, gives $90.64 for an "average weekly wage."

Claimant argues that an exception to SDCL § 62-4-25 applies. That exception states:

> except that where such method of computation produces a result that is manifestly unfair and inequitable, or where by reason of the shortness of time during which the employee has been in such employment, or the casual nature or terms of the employment, it is impracticable to use such method, then regard shall be had to the average weekly amount which during fifty-two weeks previous to the injury was being earned by a person in the same grade, employed at the same work, by the same employer, or if there is no person so employed, by a person in the same grade, employed in the same class of employment in the same general locality.

The small amount of the average earnings is therefore not "manifestly unfair and inequitable." SDCL § 62-4-3 contemplates a situation where a claimant does not earn even the minimum amount, allowing the benefit rate to be the injured worker's net

wages. Claimant accepted employment that contemplated something far less than full-time, permanent employment. Furthermore, it could be considered unjust and inequitable to require Employer/Insurer to provide Claimant workers' compensation benefits almost three times what he was able to earn in his non-injured state.

The shortness of time during which Claimant worked for Employer does not make a calculation under SDCL § 62-4-25 "not practical." Claimant accepted employment that contemplated a short, as needed term of employment. Nothing about the "nature" of the employment makes the calculation "not practical." Claimant was paid for the work he performed and he was not promised further employment. The calculation is practical and the small amount of the average weekly wage is not "not practical."

SDCL § 62-4-26 contemplates a calculation "where the situation is such that it is not reasonably feasible to determine the average weekly wages in the manner provided in § 62-4-24 or 62-4-25." It is feasible to use SDCL § 62-4-25.

Neither Claimant nor Employer argue that SDCL § 62-4-27 is applicable. The Department finds that it is not applicable because it relates to employment "in which it is the custom to operate for a part of the whole number of working days in each year." Claimant's employment has no customary number of days other than the work continues until it is finished. SDCL § 62-4-27 is impractical and not feasible given the facts of this matter.

Claimant's average weekly wage is $90.64. Claimant earned "less than fifty percent of the maximum allowable amount per week" which at the time of his injury was $234.00. SDCL § 62-4-3 requires that in such a situation, a claimant's compensation "may not exceed one hundred percent of the employee's earnings calculated after the earnings have been reduced by any deduction for federal or states taxes, or both, and for the Federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's earnings." Therefore, Claimant's compensation rate is his "net" wage for the time he worked for Employer. The Department's records do not include wage records sufficient for an exact calculation of his weekly benefit. If the parties cannot agree on an amount, Employer/Insurer are directed pursuant to SDCL § 62-6-4 to provide the Department and Claimant the wage records necessary for the calculation of Claimant's "net" wage.

Once the additional records are received, the parties may submit additional argument if deemed necessary by counsel.

Sincerely,

Heather E. Covey
Administrative Law Judge