

July 22, 2011

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P.O. Box 8025
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LETTER DECISION & ORDER

William P. Fuller
Fuller & Sabers LLP
7521 S. Louise Ave.
Sioux Falls, SD 57108

RE: HF No. 56, 2010/11 – Douglas Burke v. Dacotah Cement-GCC Dacotah, Inc. and Zurich and Travelers Indemnity Company of America

Dear Ms. Julius and Mr. Fuller:

The parties agreed to submit the issue of Claimant's average weekly wage and the appropriate workers' compensation rate to the Department of Labor and Regulation on Briefs. The following submissions have been considered:

- Claimant's Brief Re: Average Weekly Wage and Workers' Compensation Rate, Affidavit of Douglas Burke, Affidavit of Margo Julius
- Employer and Insurer's Brief in Support of Excluding Sick Leave and Vacation Pay from Claimant's Average Weekly Wage
- Claimant's Reply Brief Re: Average Weekly Wage and Workers' Compensation Rate
- Employer and Insurer's Response to Claimant's Brief Re: Average Weekly Wage and Workers' Compensation Rate

The parties have been unable to agree as to the appropriate average weekly wage and workers' compensation rate for Douglas Burke's compensable injury on December 28, 2009.

Claimant argues that payment for sick leave, holiday pay, birthday pay and vacation pay are specified as part of Claimant's wage contract and therefore under SDCL §62-1-1(6) must be deemed as part of his earnings. SDCL§ 62-1-1(6) defines earnings as,

[T]he amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was engaged at the time of his 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 him by the nature of his employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, they shall be deemed a part of his earnings.

Claimant argues that this case is distinguishable from other cases where the Department has previously held that vacation, sick leave and holiday pay do not constitute earnings because there is a specific wage contract in this case. Claimant asserts that sick leave, vacation, holiday and birthday pay actually taken and paid in the year before his injury are part of his contemplated work week under his employment contract and therefore should be considered earnings.

Claimant calculated an annual wage of \$47,449.18 including regular hours, overtime at straight pay along with vacation, sick leave, holiday and birthday pay. Dividing the annual earnings by 52 weeks, Claimant argues that his average weekly wage is \$912.48 which entitled him to a workers' compensation rate of \$608.32.

Employer/Insurer argues that sick leave, holidays, and vacation pay should be excluded from the calculation of Claimant's average weekly wage for the purposes of arriving at the workers' compensation rate. Employer/Insurer cites SDCL §58-20-3.1 which provides that "premiums for workers' compensation insurance may not be based on wages paid to employees while they are on vacation, holidays, or sick leave." Employer/Insurer argue that if an insurer is prohibited from including vacation and sick leave in establishing its premiums, it should not be required to pay weekly benefits calculated by including those same amounts.

Employer/Insurer calculated an annual wage of \$38,381.46 including regular hours and overtime at straight pay. Employer/Insurer did not include vacation, sick leave, holiday or birthday pay in the calculation of annual earnings. Dividing the annual earnings by 52 weeks, Employer Insurer argue that Claimant's average weekly wage is \$738.11, which would entitle Claimant to a workers' compensation rate of \$492.10

Benefits from paid time off should not be calculated as earnings for workers' compensation purposes, and the weeks in which such benefits were received should be ignored. The number of hours actually worked and the corresponding wages are used to determine the average weekly wage. Time spent on vacation, sick leave and holiday leave do not represent hours worked, and as such should not be factored into the

workers' compensation rate. When determining a Claimant's average weekly wage, the entire objective is to arrive at as fair an estimate as possible of claimant's future earning capacity. Larson's Workers' Compensation (2000), §93.01.

Based upon Claimant's wage information, Claimant's annual wage including regular hours worked and overtime at straight pay, excluding vacation, sick leave, holiday and birthday pay, is \$38,381.46. The annual wage is to be divided by 42.275 weeks¹ making the average weekly wage \$907.90 with a workers' compensation rate of \$605.27. Employer/Insurer is ordered to calculate and pay arrearages under the appropriate workers' compensation rate. This letter shall serve as the Department's Order.

Sincerely,

/s/ Taya M Runyan

Taya M. Runyan
Administrative Law Judge

¹ 52 weeks – (389 hours holiday, sick leave, birthday, vacation divided by 40 hours or 9.725 weeks) = 42.275 weeks.
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