

June 23, 2010

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Letter Decision and Order

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Re: HF No. 57, 2006/07 - Teresa Hartman v. SKF Sealing Solutions and Broadspire

Dear Counsel:

Submissions:

This letter addresses the following submissions by the parties;

February 1, 2010 [Claimant's] Petition for Approval of Lump Sum Settlement and Payment of Attorney Fees;

March 2, 2010 Employer and Insurer's Answer to Claimant's Petition for Lump Sum Settlement and Payment of Attorney Fees

Facts:

The facts of this case as reflected by the above submissions and supporting documentation are as follows:

1. Teresa Hartman's (Claimant's) husband has become permanently disabled with Child C Cirrhosis (End Stage Liver Disease) which developed as a result of blood transfusions in 1990. He is currently awaiting a liver transplant.
2. Claimant's husband currently receives medical coverage under the Medicare program. He receives \$1,082.00 per month from Social Security Disability benefits.
3. Claimant was born on June 9, 1961. Judicial notice is taken that Claimant's current remaining life expectancy is 1,695.2 weeks as of June 17, 2010 as calculated by the Department of Labor.

4. Claimant suffered a back injury on April 6, 2004 as an employee of Chicago Rawhide a/k/a SKF Sealing Solutions a/k/a SKF USA Inc. (Employer). Employer was insured by Broadspire (Insurer) at that time.
5. After the April 6, 2004 injury Claimant continued to work on light duty until December 22, 2005.
6. As a result of her work-related injury, Claimant underwent fusion back surgery and suffers from chronic low back pain.
7. Claimant filed for Social Security Disability benefits on February 15, 2006. She was awarded Social Security benefits on September 24, 2007, and currently receives \$862.00 per month.
8. Claimant currently receives medical coverage under the Medicare program for all medical issues not related to the April 6, 2004 injury.
9. Claimant employment with Employer ended on December 22, 2005.
10. Between the April 6, 2004 and December 22, 2005, Employer and Insurer provided Claimant with two weeks vacation pay, four weeks severance pay and \$4,248.00 for short term disability benefits.
11. On June 27, 2006, Employer and Insurer paid Claimant 61 1/3 weeks of permanent partial disability benefits, which amounted to \$20,259.41.
12. The Employer and Insurer initially denied Claimant's permanent total disability claim. The parties through their attorney's negotiated the issue for several months.
13. On August 27, 2009, shortly before a hearing scheduled for this matter, Employer and Insurer informed Claimant that they accepted her claim for permanent total disability Benefits.
14. Employer and Insurer are responsible for the payment of all reasonable and necessary medical expenses associated with Claimant's work-related injury.
15. On September 3, 2009, a draft in the amount of \$43,825.08 was deposited in the account of Claimant's attorney's account by Employer and Insurer for the total past due compensation and interest owed to Claimant.
16. Employer and Insurer commenced weekly permanent total disability benefit payments to Claimant on September 1, 2009.
17. Judicial notice is taken that the Department of Labor's records indicate that the present value of Claimant's future permanent total disability benefits as of June 17, 2010 is \$292,095.50.

18. Claimant and her husband live in Lesterville, South Dakota in a mobile home purchased on contract for deed. They now owe approximately \$22,000.00 on the loan for the mobile home. They pay \$280.00 per month on that loan. Claimant and her husband have monthly living expenses including the mobile home payments of approximately \$1,700.00.
19. As a result of Claimant's husband's medical conditions, they have incurred outstanding medical bills totaling \$11,004.00.
20. Claimant and her husband have borrowed \$15,550.00 from the Brunswick State bank and family members for living expenses and traveling expenses to Mayo Clinic.
21. Claimant and her husband anticipate the need for additional funds in the future in combating her husband's liver disease and travel as a liver becomes available for transplant. They also need to update their automobile.
22. Claimant seeks approval of attorney's fees and the lump sum payment of the entire present value of her future permanent total disability benefits. The lump sum would be used to pay her attorney's fees and other expenses and obligations, and to fund planned investments. Employer and Insurer oppose Claimant's proposed lump sum payment.
23. Claimant agreed to pay her attorney fees, tax and costs which includes 25% of Claimant's future permanent total disability benefits if the case was resolved by settlement of the parties.
24. To date, the parties have not signed a formal settlement memorandum in this case.

Attorney's Fees:

The approval of attorney's fees in workers' compensation cases is governed by SDCL 62-7-36. That statute states:

Except as otherwise provided, fees for legal services under this title shall be subject to approval of the department.

Attorneys' fees may not exceed the percentage of the amount of compensation benefits secured as a result of the attorney's involvement as follows:

- (1) Twenty-five percent of the disputed amount arrived at by settlement of the parties;
- (2) Thirty percent of the disputed amount awarded by the Department of Labor after hearing or through appeal to circuit

court;

- (3) Thirty-five percent of the disputed amount awarded if an appeal is successful to the Supreme Court.

Attorneys' fees and costs may be paid in a lump sum on the present value of the settlement or adjudicated amount.

SDCL 62-7-36.

There is no question that Claimant's attorney provided legal services in this case. The parties negotiated for several months and a hearing date scheduled. While a formal compromise document has not yet been signed, Employer and Insurer have agreed to pay Claimant permanent total disability benefits.

Under these circumstances, the question of compensability of Claimant's permanent total disability benefits for purposes of SDCL 62-7-36 has been resolved or "settled." In addition, the Department of Labor deems the amounts indicated in Facts number 3 and 17 above to be Claimant's "adjudicated" weekly compensation rate, life expectancy and present value of Claimant's future permanent total disability benefits, unless a party provides evidence to the contrary to the Department within the 15 days of receiving this letter. Attorney's fees in the amount of 25% of Claimant's future permanent total disability benefits plus tax and costs is approved.

Lump Sum Payments:

Claimant seeks approval of a lump sum payment of the present value of her future permanent total disability benefits. The South Dakota Supreme Court discussed lump sum payments in workers' compensation cases in Steinmetz v. South Dakota, 2008 SD 87, 756 NW2d 392. In that case the Court stated:

"The allowance of a lump-sum award is the exception and not the general rule." *Id.* ¶11, 609 NW2d at 135 (quoting *Wulff v. Swanson*, 69 SD 539, 543, 12 NW2d 553, 555 (1944)). The rationale behind this policy has been explained in prior cases:

Since compensation is a segment of a total income insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings. If a ... totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum is soon dissipated and the workman is right back where he would have been if workmen's compensation had never existed.

Id. ¶11, 609 NW2d 135 (quoting 8 Larson's Workers' Compensation Law, § 82.71 (1999)).

“The beginning point of any consideration of the justifiability of lump-summing in a particular case is the standard set by the statute.” 8 Larson’s Workers’ Compensation Law, § 132.07[2][a] (2007). SDCL 62-7-6 allows lump sum awards under certain circumstances. It provides:

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. Any compensation due to beneficiaries under § 62-4-12 to 62-4-22, inclusive, may not be paid in a lump sum, except for the remarriage lump sum provided in § 62-4-12.

SDCL 62-7-6 (emphasis added).

Steinmetz v. South Dakota, 2008 SD 87, ¶ 8-9.

SDCL 62-7-6, first requires a showing that a lump sum payment would be in Claimant’s best interest. In this case, Claimant has a number of debts which are problematic because of the uncertainty of her husband’s future medical condition. Payment of these debts would clearly be in her best interest. However, the statute also requires a showing that the lump sum payment is necessary to pay her attorney’s costs and expenses or that Claimant has exceptional financial need that arose as a result of reduced income due to her injury.

The Claimant has shown the necessity to pay her attorney’s fees. However, Claimant has not shown that her financial need arose as a result of her reduced income due to her work injury. This showing is required to justify the lump sum

payment of benefits in excess of her attorney's fees. Evidence suggests that Claimant's current financial circumstances are primarily due to her husband's medical condition.

Order:

Claimant's petition is granted in part and denied in part. Attorney's fees in the amount of 25% of the present value of Claimant's future permanent total disability payments plus tax and costs for legal service provided to Claimant are approved. A lump sum payment of the present value of Claimant's future permanent total disability benefits in an amount equal to Claimant's attorney's fees, tax and costs is approved. A lump sum payment of amounts that exceed Claimant's attorney's fees, tax and costs is denied. This letter shall constitute the order in this matter.

Sincerely,

Donald W. Hageman
Administrative Law Judge