March 21, 2011

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Letter Decision and Order

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RE: HF No. 60, 2010/11 – David McCormick v. Pat Meier Trucking, Inc. and Acuity Insurance Company

Dear Mr. Leach and Mr. Larson:

Submissions:

This letter addresses the following submissions by the parties to the Department of Labor:

February 7, 2011	[Claimant's] Motion for Partial Summary Judgment Re: Average Weekly Wage;
	[Claimant's] Brief in Support of Motion for Partial Summary Judgment Re: Average Weekly Wage;
	Affidavit of James D. Leach in Support of Motion for Partial Summary Judgment Re: Average Weekly Wage;
February 17, 2011	Employer and Insurer's Motion to Bifurcate AWW and Benefit Rate;
	Employer and Insurer's Brief in Support of Motion to Bifurcate AWW and Benefit Rate;
	Employer and Insurer's Brief Resisting Claimant's Motion for Partial Summary Judgment;

	Affidavit of Charles A. Larson in Support of Brief Resisting Claimant's Motion for Partial Summary Judgment;
	Affidavit of Pat Meier in Support of Brief Resisting Claimant's Motion for Partial Summary Judgment;
February 24, 2011	[Claimant's] Reply Brief in Support of Motion for Partial Summary Judgment Re: Average Weekly Wage;
	Depositions of Pat Meier and Greg Meier;
	[Claimant's] Opposition to Motion to Bifurcate;
	Affidavit of David McCormick Re: Opposition to Motion to Bifurcate;
March 3, 2011	Employer and Insurer's Reply Brief in Support of Motion to Bifurcate AWW and Benefit Rate Issue;
	Affidavit of Charles A. Larson - Bifurcation Reply Brief; and
March 4, 2011	Claimant's Surreply Brief in Opposition to Motion to Bifurcate.

Facts:

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

1. David McCormick (Claimant) was hired by Pat Meier Trucking, Inc. (Employer) in August of 2009 to work as a truck driver.

2. Claimant was initially assigned by Employer to the "Plankinton job".

3. The "Plankinton job" was a certified project with the state. State and federal regulations require contractors working on certified projects to pay their workers a prescribed hourly wage, which in this case was higher than Employer's regular hourly rate.

4. Employer paid Claimant $14.57 per hour for time worked on the Plankinton job. Employer paid Claimant $13.00 per hour for time worked on non-certified jobs.

5. On September 1, 2009, Claimant was injured in a work-related accident when the truck he was driving was struck by another truck.

6. At the time of Claimant's September 1, 2009, accident Employer was insured by Acuity Insurance Company (Insurer) for worker's compensation purposes.

7. Claimant worked for Employer 11 work days, or portions thereof, during three separate calendar weeks, prior to his accident. For that time, Employer paid

Claimant a total of $1,344.08. Employer paid Claimant $14.57 per hour for 92.25 hours that Claimant worked on the Plankinton job and $13.00 per hour for .5 hours that he worked on other jobs.

8. Claimant worked the following hours for Employer: Tuesday, August 18, 2009 – 4 hrs.; Wednesday, August 19, 2009 – 5 hrs. 30 min.; Friday, August 21, 2009 – 6 hrs.; Saturday, August 22, 2009 – 9 hrs. 45 min.; Monday, August 24, 2009 – 9 hrs. 15 min.; Tuesday, August 25, 2009 -11 hrs. 45 min.; Wednesday, August 26, 2009 - 12 hrs. 15 min.; Thursday, August 27, 2009 – 11 hrs. 45 min.; Friday, August 28, 2009 – 11 hrs. 30 min.; Monday, August 31, 2009 – 11 hrs.; Tuesday, September 1, 2009 – 2 hrs. 15min.

9. Pat Meier, co-owner of Employer's business stated in an affidavit that the majority of jobs that Employer performs are not certified. Consequently, if Claimant had continued to work for Employer the majority of his hours would have been paid at the $13.00 per hour rate. She also stated that most of the truckers working for the business average less than 40 hours per week.

10. Additional facts may be discussed in the analysis below.

Motion for Summary Judgment:

Claimant filed a Motion for Summary Judgment Re: Average Weekly Wage. ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment. That regulation provides:

> A claimant or an employer or its insurer may, any time 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 on 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.

ARSD 47:03:01:08. The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. Railsback v. Mid-Century Ins. Co., 2005 SD 64, ¶6, 680 N.W.2d 652, 654.

Claimant argues that his average weekly wage should be calculated using the predominate formula set forth in SDCL 62-4-25. Employer and Insurer argue that SDCL 62-4-25 controls. However, they contend that issues of fact exist and that they can present evidence at hearing that will demonstrate that this case falls within an exception to that formula. SDCL 62-4-25 states:

> 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 the employee's earnings during the period the employee worked immediately preceding the employee's injury at the same grade of employment for the employer

> by whom the employee was employed at the time of the employee's injury, and dividing such total by the number of weeks and fractions thereof that the employee actually worked. However, if such method of computation produces a result that is manifestly unfair and inequitable or if 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.

SDCL 62-4-25.

The Employ and Insurer argue that calculating Claimant's average weekly wage as advocated by Claimant would be "manifestly unfair and inequitable" and "impracticable". They argue that Claimant's hourly rate and number of hours worked were significantly higher during the brief time that he was employed by Employer than they would have been had he worked for a longer period of time.

During the time Claimant worked for Employer no pattern can be established regarding either the number of hours per day worked or the number of days per week worked. Claimant hours per day ranged from 4 to more than 12. He worked four days one week including Saturday and five days the next excluding Saturday.

Employer and Insurer have presented evidence by affidavit that the majority of Employer's jobs are not certified. Consequently, Claimant would have worked more hours at $13.00 per hour than $14.57. They also presented evidence that most of its truck driver's average less than 40 hours per week. When this evidence is viewed in the light most favorable to the Employer and Insurer, a reasonable inference can be drawn that the average weekly wage as calculated by the formula would be manifestly unfair and inequitable. Consequently, issues of material fact exist and Claimant's Motion for Summary Judgment must be denied.

Claimant argues that this ruling will ultimately lead to the average wage in the class of workers being used whenever a Claimant's average wage when calculated by the formula exceeds the average wage of the class. The Department disagrees. The standard is, not whether the calculated wage is higher than the average wage of the class. More is required for the exception to apply than the calculated wage to be higher than the average wage of the class; it is whether use of the calculated wage is manifestly unfair or inequitable. There must be a showing that the calculated wage was significantly higher than the range of wages in the class before it could be judged manifestly unfair.

Motion to Bifurcate:

Employer and Insurer have filed a Motion to Bifurcate asking that the average weekly wage and compensation rate be determined before litigating the other legal issues. They contend that one of the central issues in this case is whether Claimant is permanently and totally disabled and that an important part of the analysis of that issue involves the determination whether any work is available in the community at or above Claimant's

compensation rate. They argue that it would be difficult for their vocational expert to prepare a report on that issue without knowing Claimant's average weekly wage and compensation rate.

Employer and Insurer's request is reasonable under these circumstances. Bifurcation of this issue will eliminate confusion; conserve the experts, time and expense.

Order:

In accordance with the discussion above, Claimant's Motion for Summary Judgment Re: Average Weekly Wage is denied. Employer and Insurer's Motion to Bifurcate AWW and Benefit Rate is granted. This letter shall constitute the Department's Order in this matter

Sincerely,

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge