SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT

DAVID McCORMICK, **HF No. 60, 2010/11**

Claimant,

v. **DECISION ON AVERAGE WEEKLY WAGE**

PAT MEIER TRUCKING, INC.,

Employer,

and

ACUITY INSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This case was bifurcated and the issue of Claimant's average weekly wage (AWW) was submitted to the Department upon the submissions of the parties. Claimant is represented by James D. Leach. Charles A. Larson represents Employer and Insurer.

Issue:

Whether it was manifestly unfair and inequitable to base Claimant's average weekly wage upon the 13 days that he worked for Employer immediately before his work-related injury?

Facts:

The facts as based upon the submissions of the parties are as follows:

1. Pat Meier Trucking, Inc. (Employer) is a trucking company whose business is mostly dump truck hauls. It hauls concrete, asphalt, dirt, sand, and gravel. It has both private individuals and corporate clients.

2. Employer is owned by Pat and Greg Meier.

3. Most of Employer's employees are truck drivers, but there are also mechanics, shop workers, and some employees who do a combination of driving truck and shop work.

4. Employer works on some jobs that are certified under the Davis-Bacon wage scale. The Davis-Bacon act requires contractors working on federal contracts and most federally assisted contracts over $2,000 to pay truck drivers a minimum hourly rate. That rate was $14.57 in South Dakota in 2009. Employer paid its truck drivers $14.57 per hour on certified jobs.

5. In 2009, most of Employer's truck drivers earned $13.00 per hour on non-certified jobs. There were two truck drivers who earned more than $13.00 an hour, one of them was a long time employee and the other drove a special truck. Drivers were typically eligible for a raise after two years of employment.

6. Most of the jobs Employer performed in 2008 and 2009 were non-certified jobs.

7. Employer's business is not steady year round. Employer operates from approximately April through Thanksgiving each year. There is usually not much work available during the winter months. Most of Employer's drivers collect unemployment insurance benefits during the winter.

8. Even during the operating season, Employer's work varies. The number of hours that the truck drivers work depends on weather, the amount of work available, and the economy. There are days when all the trucks are used, and some days when only a few trucks are needed. On slow days, Employer tries to distribute the hours evenly so everyone gets at least some hours of work during the week.

9. David McCormick (Claimant) began working for Employer in August of 2009. He was hired as a truck driver because Employer needed help on the Plankinton job. Greg Meier knew Claimant from the 1980's when they both drove for Universal Transport.

10. Claimant and Employer did not have an in-depth conversation regarding Claimant's terms of employment before Claimant was hired. Greg Meier did explain that Claimant's wage would be certified on the Plankinton job, but there was no discussion about the hourly wage on non-certified jobs.

11. At the time he was hired, Claimant believed that he was hired full time and thought he may work into the winter. He was also familiar with the Davis-Bacon wage scale and understood that he would work non-certified jobs at a different wage rate from certified jobs.

12. After he was hired, Claimant was assigned to the Plankinton job.

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

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

15. Prior to his accident, Claimant worked for Employer 11 work days, or portions thereof, over a 13 day period during three separate calendar weeks. 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 elsewhere.

16. Claimant never questioned the .5 hours that he was paid $13.00 per hour.

17. 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.

18. Claimant was a good driver, and all Claimant had to do to stay on with Employer after the Plankinton job was talk to Greg Meier, had he not been injured.

19. Claimant worked longer days on the Plankinton job than were worked on Employer's typical jobs because it was out of town and work was dictated by the foreman on site. Truck drivers who worked for Employer ultimately averaged less than 40 hours a week while employed by Employer.

20. Almost all of the work Claimant did for Employer was certified work. This was not representative of the work he would have performed for Employer had he worked for Employer longer.

21. The fifty-two week period prior to Claimant's injury commenced September 7, 2008 and ended August 29, 2009.

22. During the fifty-two weeks prior to Claimant's injury, Employer employed six truck drivers including Claimant at the same grade. In addition to claimant, those truck drivers were Andrew Goeden, John Nehls, Julius (Marvin) Kammerer, Mark Stover and Craig Olderbak.

23. Andrew Goeden worked 15 weeks for Employer during the fifty-two week period prior to Claimant's injury. During that time he earned $7,293.24 for an average weekly wage of $485.55.

24. John Nehls worked 27 weeks for Employer during the fifty-two week period prior to Claimant's injury. During that time he earned $12,009.88 for an average weekly wage of $444.81

25. Marvin Kammerer worked 14 weeks for Employer during the fifty-two week period prior to Claimant's injury. During that time he earned $3,532.48 for an average weekly wage of $294.39.

26. Mark Stover worked 5.1 weeks for Employer during the fifty-two week period prior to Claimant's injury. During that time he earned $1,453.75 for an average weekly wage of $285.05.

27. Craig Olderbak worked 26 weeks for Employer during the fifty-two week period prior to Claimant's injury. During that time he earned $16,306.34 for an average weekly wage of $627.17.

28. Claimant proposes that his average weekly wage be calculated as follows:

> Claimant worked 92.75 hours from August 18 to August 31, 2009. (25.25 hours from August 18 to August 22, plus 56.50 hours from August 24 to August 28, plus 11 hours on August 31.) He was paid $14.57 per hour for 92.25 hours and $13.00 per hour for .5 hours. Multiplying 92.25 hours times $14.57 per hour is $1,344.08. Multiplying .5 hours times $13.00 per hour is $6.50. The total of $1,344.08 + $6.50 is $1,350.58. From August 18 to 31 (the day immediately preceding his injury) equals 13 days, which is 1.857 weeks. Claimant's average weekly wage is $1,350.58 divided by 1.857 for an average weekly wage of $727.29.

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

Analysis:

The parties agree that SDCL 62-4-25 is the applicable statute for determining Claimant's AWW. This statute reads as follows:

> 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 parties disagree whether the predominant formula set out in this statute applies in this case. Employer and Insurer maintain that it would be "manifestly unfair and inequitable" and "impracticable" to use Claimant's short work history to determine his AWW and benefit rate as calculated by the predominant formula. Consequently, an alternative method of calculating the AWW should be used.

It should first be noted that SDCL 62-4-25 looks to the earnings during the year prior to Claimant's injury to base the AWW, not the earnings that may have been earned after the injury. It is also apparent that calculating Claimant's AWW by using the statute's predominant formula is "feasible" based on the fact that Claimant has made that calculation.

Nevertheless, due to the short period of time that Claimant worked for Employer and the nature of the project that he worked, Claimant worked more hours at a higher rate of pay when averaged than his colleagues did during the year prior to Claimant's injury and his AWW is not representative of the actual pay he would have earned had he worked for Employer for the entire year before his injury.

Due to this distortion, Claimant's AWW for the 11 days that he worked would equal $727.29 if calculated by the predominant formula in SDCL 62-4-25. This is a significantly higher AWW than that of Employer's other truck drivers during the fifty-two week period prior to Claimant's injury. Their AWW ranged from $285.05 to $627.17 per week. Claimant's AWW would be more than $100.00 per week more than the highest paid of Employer's other drivers and more than $300.00 per week more than the average of all the other drivers. Under these circumstances, it would be manifestly unfair and inequitable to use the AWW proposed by Claimant.

In such cases, SDCL 62-4-25 dictates that, "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". In this case, Craig Olderbak is such a person.

Greg Meier testified that Claimant was a good driver. As such, it is reasonable to expect that he could have had earning at the top of the other driver's AWW range. This conclusion is supported by the high earnings Claimant made during the time he was employed. Olderbak has the highest AWW of the other truck drivers at $627.17. Consequently, Claimant's AWW for purposes of this case shall be $627.17.

Conclusion:

It is manifestly unfair and inequitable in this case to use the AWW as calculated by the predominant formula in SDCL 62-4-25. Consequently, Claimant's AWW should be based on a person in the same grade, employed at the same work, by the same employer which is $627.17.

Employer and Insurer shall submit Proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days after receiving this Decision. Claimant shall have an additional 20 days from the date of receipt of Employer and Insurer's Proposed Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer and Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this _23rd__day of July, 2011.

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