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LETTER DECISION & ORDER

R. Alan Peterson  
Lynn, Jackson, Shultz & Lebrun PC  
P.O. Box 2700  
Sioux Falls, SD 57101-2700

RE: HF No. 66, 2011/12 – Christopher Wieber v. Morton Buildings, Inc. and American Zurich Insurance Company

Dear Mr. McCahren and Mr. Peterson:

The issue of Claimant's workers' compensation rate has been submitted to the Department for calculation. I have carefully considered the parties previous arguments regarding calculation of Claimant's workers' compensation rate and the stipulation submitted by counsel detailing Claimant's wage history prior to his work related injury.

Employer/Insurer contends that the appropriate workers' compensation rate is \$367.40, calculated by his wages in the 50 weeks prior to the injury, using his actual hours at straight time, and excluding overtime multipliers, expense reimbursements, and crew bonuses.

Claimant argues that his yearly earnings for 2010, divided by 52 establishes a workers' compensation rate of \$583.93. In his calculation of wages, Claimant includes bad weather pay, crew bonus, holiday pay, meal/motel reimbursement, miscellaneous payments, personal time, profit sharing, regular pay, show up OT, show up time, training bonus and vacation time.

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.

The Department has previously held that vacation, sick leave, holiday pay etc. do not constitute earnings. 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, holiday leave, bonuses and reimbursements 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.

In the case at hand, the crew bonus is not to be included in the calculation of average weekly wage as it is not based on the employee's individual performance. Likewise the profit sharing contribution is not based on performance and not considered earnings. Motel and meal reimbursement is per diem and not considered earnings. Bad Weather pay is considered paid leave, the pay is to be excluded and the hours for which such pay was received are excluded as well. Without any explanation as to what comprises misc. pay, it will be liberally construed in favor of the claimant and included in the determination.

Based upon Claimant's wage information, Claimant's annual wage including regular hours worked and overtime at straight pay, misc. pay and show up pay, excluding paid leave,<sup>1</sup> is \$27,463.41. The annual wage is to be divided by 48.4 weeks<sup>2</sup> making the average weekly wage \$567.43 with a workers' compensation rate of \$378.29<sup>3</sup>. This letter shall serve as the Department's Order.

Sincerely,



Taya M. Runyan  
Administrative Law Judge

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<sup>1</sup> Bad weather and holiday pay

<sup>2</sup> 52 weeks – (144 hrs holiday and bad weather pay divided by 40 hours = 3.6 weeks) = 48.4 weeks.

<sup>3</sup> \$27,463.41/48.4= \$567.43 (AWW) X 2/3 = \$378.29 (WC rate)