

November 22, 2019

N. Dean Nasser
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204 S. Main Ave.
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LETTER DECISION AND ORDER

William C. Garry
Cadwell, Sanford, Deibert & Garry, LLP
200 E. 10th St., Ste. 200
Sioux Falls, SD 57104-6371

RE: HF No. 67, 2016/17 – David Ham, as Personal Representative of the Estate of Timon Wayne Ham, Deceased, and Natalia Elizabeth Bicker, as Guardian Ad Litem of Eli MacPherson Ham, a minor child v. Osmose Utilities Services, Inc., and National Union Fire Insurance Company of Pittsburgh, PA, a subsidiary or affiliate of AIG Insurance (WC018962552)

Dear Mr. Nasser and Mr. Garry,

The Department of Labor & Regulation (Department) has received Claimant's Motion for Partial Summary Judgment to Determine Weekly Benefit Rate (SDCL 62-4-3) and the response of Employer and Insurer. All submissions have been taken under consideration.

Claimant has moved the Department to determine whether the average weekly wage used to calculate the weekly compensation rate (comp rate) in this matter is \$420.17 per week or \$373.87 per week. The difference rests on whether a crewmember bonus is included in the calculation. As a crewmember, Timon Ham (Decedent) was eligible for a crewmember bonus in addition to regular pay if the crew, as a whole, reached a productivity level which had been set before the work was performed. Decedent was on a two-man crew with Robert Holman. Claimant argues that the crewmember bonus was part of Decedent's expected compensation and, therefore, can be included in his comp rate.

Under SDCL 62-1-1(6), "earnings" is defined as, "the amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was working at the time of the employee's injury. It includes payment for all hours worked, including overtime hours at straight-time pay, and does not include any special expense entailed by the employee by the nature of the employment; wherever allowances of any character made to an employee in lieu of wages are specified as part of the wage contract, the allowances shall be deemed a part of the employee's earnings."

Employer and Insurer argue that crewmember bonuses should be excluded in the calculation because bonuses are not based on the employee's individual performance but that of the entire crew. They further argue that Employer's Employee Handbook (Handbook) states that "bonuses are paid solely at the discretion of the Company" and are "not considered to be earned compensation." Claimant asserts that Decedent was never shown to have received the Handbook or to know of its contents, and Decedent knew that as part of his employment contract he was entitled to and did receive an augmented hourly wage based on his performance and cumulative performance.

Claimant further asserts that the crewmember bonus is non-discretionary, because it is something that an employee can earn and not a gift. Also, Claimant contends, Decedent earned the crewmember bonus as part of the two-man crew, but the actual compensation he received was based solely on the number of hours he individually worked during the applicable pay period. The compensation was paid individually and not to the crew as a whole.

Through a declaratory ruling by Secretary Hultman issued in 2014, the Department defined non-discretionary and discretionary bonuses. Non-discretionary bonuses include seniority pay, longevity pay, and bonuses paid based on the employee having met individual performance goals. Discretionary bonuses include one-time payments to all employees without regard to their performance, the value of Christmas turkeys, signing/hiring bonuses, etc. Secretary Hultman further concluded "... only bonuses received in consideration of work performed should be included in the average weekly wage, while bonuses that are gifts should not be included." (DOL & R, Marcia Hultman, Secretary, Declaratory Ruling November 25, 2014). Therefore, when calculating the average weekly wage, non-discretionary bonuses are included while discretionary bonuses are excluded.

The Department must first decide whether the crewmember bonus is discretionary or nondiscretionary, and then determine whether the bonus is given only to individuals or if all crewmembers received the bonus even if they do not meet individual performance goals. According to the Handbook, the crewmember bonuses are paid at the discretion of the company and are not earned compensation. However, in the Request for Admissions, Employer admitted that if a crew reached set goals of productivity then each employee earned a crewmember bonus. If the employee met the goals, Employer did not have discretion as to whether to give a bonus. Therefore, based upon the facts provided, the crewmember bonus was not given as a gift to all employees, but rather was earned by the employees. While Decedent's receipt of the bonus depended on the outcomes of performance by the two-man crew, the amount he received still was based on his own individual performance.

The Department concludes that the crewmember bonus falls under the category of non-discretionary bonus. The crewmember bonus was not a one-time gift offered to all employees. The bonus was something that a crew could earn by

meeting productivity goals, and that was paid out to an employee based on his or her own individual contributions to meeting those goals. Therefore, the crewmember bonus should be included in the calculation of average weekly wage and compensation rate.

ORDER:

The Department grants Claimant's Motion for Partial Summary Judgment to Determine Weekly Benefit Rate.

The correct compensation rate in this matter is \$420.17.

This letter shall constitute the order in this matter.

Michelle M. Faw
Administrative Law Judge