

November 27, 2012

David L. Nadolski
Lynn, Jackson, Shultz & Lebrun PC
P.O. Box 2700
Sioux Falls, SD 57101-2700

Amended
Letter Decision and Order

Eric C. Blomfelt
Blomfelt Associates
P.O. Box 122
Central City, CO 80427-0122

RE: HF No. 68, 2009/10 – James E. Comfort v. Hi Qual Manufacturing, USA and Farmers Insurance Group

Dear Mr. Nadolski and Mr. Blomfelt:

Submissions:

This letter addresses the following submissions by the parties:

| | |
|------------------|---|
| October 2, 2012 | Claimant's Motion to Award Cost of Living Increases to Permanent Total Disability Benefits; |
| November 2, 2012 | Insurer/Employer's Response to Claimant's Cost of Living Increases to Total Permanent Total Disability Benefits; and |
| November 5, 2012 | Claimant's Response to Insurer/Employer's Response to Claimant's Motion to Award Cost of Living Increases to Permanent Total Disability Benefits. |

Facts:

The facts of this case are undisputed and can be stated as follows:

1. James E. Comfort (Claimant) was injured in March of 1997 while employed by Hi Qual Manufacturing USA (Employer). Employer and

Farmers Insurance Group (Insurer) accepted responsibility for Claimant's injury and paid him worker's compensation benefits.

2. At the time of his injury, Claimant's compensation rate was determined to be \$225.38 per week.
3. Over the years following his injury, Claimant was able to work but continued to have ongoing problems as a result of his injury. He underwent multiple surgeries and complications.
4. In November 2009, Claimant underwent another operation to treat a complication of his injury. During that surgery, Claimant suffered a stroke, a recognized complication of the procedure.
5. Claimant's treating physician expressed the opinion that the stroke was a result of the original 1997 injury. Employer and Insurer's independent medical examiner concurred with that opinion.
6. Claimant filed a Petition for Hearing with the Department of Labor & Regulation in June 2011 to reopen his case and requested an award of permanent total disability benefits.
7. Employer and Insurer initially denied that Claimant was permanently and totally disabled.
8. Claimant's treating physician and the physician retained by Employer and Insurer to perform an IME both stated that in their opinion, Claimant is permanently and totally disabled.
9. In September 2012, Employer and Insurer conceded that Claimant is entitled to permanent total disability benefits but the parties continue to disagree about the amount of the weekly benefit to which Claimant is entitled.
10. Additional facts may be discussed in the analysis below.

Cost of Living Increases to Permanent Total Disability Benefits:

Claimant contends that he is entitled to annual cost-of-living increases as provided by SDCL 62-4-7 since the date of his original injury in March of 1997. Employer and Insurer argue that Claimant is not entitled to cost of living increases because Claimant is not totally disabled as provided in SDCL 62-4-6(23). The Department rejects both of these arguments.

The Department will address the Employer and Insurer's argument first. SDCL 62-4-7 states in part:

In case of total disability as defined in subdivision 62-4-6 (23), compensation shall be paid at the rate provided by § 62-4-3 for life with an annual increase in the amount of the benefit allowance for each year commencing on the July first that is at least twelve months following the date on which the benefit was first payable equal to one hundred percent of the annual percentage change in the consumer price index for urban wage earners and clerical workers as computed by the United States Department of Labor for the prior calendar year, not to exceed a three percent increase compounded annually.

SDCL 62-4-7. Employer argues that Claimant is not totally disabled because he is capable of some work. SDCL 62-4-6(23) describes total disability as follows:

The loss of both hands or both arms, or both feet, or both legs, or both eyes or of any two thereof, or complete and permanent paralysis, or total and permanent loss of mental faculties, or any other injury which totally incapacitates the employee from working at any occupation which brings him an income, shall constitute total disability, to be compensated according to the compensation fixed by § 62-4-7. These specific cases of total and permanent disability shall not be construed as excluding other cases of total or permanent disability;

SDCL 62-4-6(23) (emphasis added) .

Workers' compensation statutes should be construed liberally in favor of injured employees. Rawls v. Coleman-Frizzell, Inc., 2002 SD 130, ¶ 19, 653 NW2d 247. In addition, the emphasized portion of SDCL 62-4-7, above, indicates that the legislature intended an expansive reading of this provision. Claimant suffered a stroke during surgery in November of 2009. The treating physician and Employer and Insurer's independent examiner both stated that the stroke was a result of the original 1997 injury. Both physicians also opined that Claimant is permanently and totally disabled. Employer and Insurer have conceded that Claimant is totally and permanently disabled and are presently paying him benefits for that condition. Under these circumstances, Claimant is "totally disabled" as provided by SDCL 62-4-6(23) and is entitled to the cost-of-living increases provided by SDCL 62-4-7.

The Department next turns to the Claimant's argument that his cost-of-living increases since the time of his initial injury in 1997. SDCL 62-4-7 states in relevant part that individuals who are totally disabled are entitled to the "annual increase in the amount of the benefit allowance for each year commencing on the July first that is at least twelve months following the date on which the benefit was first payable...." (emphasis added).

Words and phrases in a statute must be given their plain meaning and effect. US West Comm., Inc. v. Pub. Util. Comm., 505 NW2d 115 (S.D. 1993). In this case, "the benefit" as used in SDCL 62-4-7 refers to the permanent total disability benefit. If the legislature had intended it to refer to any other benefit, it would have stated "a benefit" or "any

benefit". Hence, the cost-of-living increase begins the July first that is at least twelve months following the date on which the permanent total disability benefit was first payable.

Claimant was initially injured in 1997. As a result, his rights to workers' compensation benefits vested at that time as did his compensation rate of \$225.38. Sopko v. C&R Transfer, Co., Inc. (Sopko II), 2003 S.D. 69, ¶ 15, 665 N.W.2d 94. However, he did not become totally and permanently disabled until November of 2009 when he suffered a stroke during surgery. Therefore, the benefits becomes payable in November of 2009 at the \$225.38 rate and the first cost-of-living increase came due on July 1, 2011, with annual increases payable thereafter.

Order:

It is therefore ordered that Insurer pay Claimant permanent total disability benefits at the rate of \$225.38 beginning at the time of Claimant's stroke in November of 2009. It is further ordered that Insurer provide annual cost-of-living increases commencing on July 1, 2011. This letter shall constitute the order in this matter.

Sincerely,

Donald W. Hageman
Administrative Law Judge