

May 11, 2020

Margo Tschetter Julius
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1600 Mountain View Rd #110
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LETTER DECISION AND ORDER

Rebecca L. Mann
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RE: HF No. 8, 2017/18 – James Berkley v. Smith Trucking, Inc. and Cottingham & Butler Claims Services.

Dear Ms. Tschetter Julius and Ms. Mann:

This letter addresses the following submissions by the parties:

February 10, 2020	Employer/Insurer's Motion to Allow Reimbursement of Overpayment Affidavit of Laura Fuentes
March 9, 2020	Claimant's Response to Employer/Insurer's Motion
March 29, 2020	Employer/Insurer's Reply to Claimant's Response

QUESTION PRESENTED: MAY EMPLOYER/INSURER RECOUP TEMPORARY BENEFITS PAID TO CLAIMANT IN ERROR?

FACTS

Claimant suffered a work-related injury on or about May 16, 2016.

Employer/Insurer initially treated Claimant's injury as compensable and began paying Claimant temporary total benefits. Employer/Insurer submitted a form 110, the form used by the Department of Labor and Regulation (Department) to calculate a claimant's weekly temporary total disability (TTD) benefit. Upon review of the form 110, Department employee Bonnie Ackerman informed Employer/Insurer that it had incorrectly calculated Claimant's average weekly wage (AWW) as \$1197.00. Claimant's correct AWW was \$1170.00. Despite Ackerman's note, Employer/Insurer did not correct Claimant's AWW in its calculation. However, this mistake did not change Claimant's weekly benefit because regardless of the AWW used to calculate his TTD benefits, Claimant was entitled to receive a weekly benefit of \$733.00.¹

Beginning around November 26, 2017, Claimant returned to part-time work. Claimant's benefit was then changed from TTD benefits to temporary partial disability benefits (TPD). Under the formula for calculating TPD benefits, a difference in Claimant's AWW did result in different weekly benefits.² Employer/Insurer again

¹ The calculation of temporary total benefits is found at SDCL 62-4-3, which provides: "The amount of temporary total disability compensation paid to an employee for an injury is equal to sixty-six and two-thirds percent of the employee's earnings, but not more than one hundred percent computed to the next higher multiple of one dollar of the average weekly wage in the state as defined in § 62-4-3.1 per week and not less than one-half of the foregoing percentages of the average weekly wage of the state per week. However, if an employee earned less than fifty percent of the maximum allowable amount per week, the amount of compensation may not exceed one hundred percent of the employee's earnings calculated after the earnings have been reduced by any deduction for federal or state taxes, or both, and for the Federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's earnings."

² The computation of average weekly wage is found at SDCL 62-4-3.1, which provides: "Annual computation of average weekly wage in state--Period for which applied. For the purpose of § 62-4-3 the average weekly wage in the state shall be determined by the Department of Labor and Regulation as follows: On or before June first of each year, the total wages reported on contribution reports to the agency administering the Employment Security Act for the preceding calendar year shall be divided by the average monthly number of insured workers (determined by dividing the total insured workers reported for the preceding year by twelve). The average annual wage thus obtained shall be divided by

incorrectly used \$1197.00 as Claimant's AWW when it calculated Claimant's weekly TPD benefits. The result was that by June 2018, when Insurer reviewed Claimant's benefits, it discovered its mistake, Insurer had overpaid Claimant by \$4012.04 and now seeks to recover that amount from Claimant.

ANALYSIS

Employer/Insurer acknowledges that it made an error in calculating Claimant's TPD benefit. However, it contends that this error was made in good faith and it is therefore entitled to seek reimbursement. To support its argument, Claimant cites *Tiensvold v. Universal Transp., Inc.*, 464 N.W. 2d 820 (S.D. 1991), a case in which an insurer sought reimbursement of benefits paid to the claimant in error. In *Tiensvold*, the Department initially denied insurer's request to recoup an overpayment, as did the circuit court on appeal. However, the Supreme Court reversed the circuit court noting, "[w]e base our holding upon the general premise that an employer is entitled, upon the award of compensation being made at it, to credit or reimbursement for any payments which may have already been made to the worker in advance by way of compensation for the injury in question." *Id.* at 825 (citing 82 Am.Jur.2d, Workmen's Compensation § 365).

Under *Tiensvold*, an insurer who pays benefits in error is entitled to reimbursement, so long as the payment was made in good faith, even though Employer/Insurer was put on notice that it had calculated Claimant's AWW incorrectly and failed to fix its mistake for over a year, *Tiensvold* requires that Employer/Insurer be

fifty-two and the average weekly wage thus determined rounded to the nearest cent. The average weekly wage so determined shall apply to injuries and disablements in the case of disease which occur within the fiscal year commencing July first following the June first determination and shall be applicable for the full period during which weekly benefits are payable, except as provided in § 62-7-33."

allowed to recoup this overpayment. “Any statutory interpretation which would penalize an employer who voluntarily makes weekly payments to an injured employee in excess of his ultimate liability would certainly discourage voluntary payment by employers and would therefore constitute a disservice to injured workers generally. *Tiensvold*, 464 N.W. 2d at 825 (quoting *Western Casualty and Surety Company v. Adkins*, 619 S.W.2d 502, 504 (Ky.App.1981). Several Department decisions have affirmed this position. See *Gwen's Rest. & Union Ins. Co.*, No. HF No. 129, 1993/94, 1996 WL 225787 (S.D. Dept. Lab. Feb. 1, 1996), *John Morrell & Co., Employer/self-Insurer*, No. HF No. 138, 1984/85, 1991 WL 525015 (S.D. Dept. Lab. Aug. 23, 1991); *Re: Aaron Caudill v. Mct Transportation LLC & Dakota Truck Underwriters*, No. HF No. 9, 2011/12, 2013 WL 2732932, (S.D. Dept. Lab. Feb. 15, 2013); *Dennis Gifford, Claimant*, No. HF No. 153 and 154, 2000/01, 2002 WL 32151856, (S.D. Dept. Lab. Dec. 27, 2002); *Russell J. Edwards vs. Cmi Load King*, No. 304, 1996/97, 2002 WL 553583, (S.D. Dept. Lab. Feb. 1, 2002).

Claimant asserts that the Department is bound by an e-mail from Bonnie Ackerman in which Ackerman informed it that the Department would not enforce a reimbursement. The Department has previously stated that ALJ's are not bound by ex-parte correspondence with Department employees. *William May v. Spearfish Pellet Co., LLC, and Western National Mutual Insurance Co.*, HF No. 49, 2018/19 (S.D. Dep't of Labor, September 30, 2019). Even if the Department was inclined to bind itself to Ackerman's e-mail, to do so would be in contravention of *Tiensvold*.

Claimant also argues that forcing him to repay approximately \$4,000 in benefits would result in an undue hardship. While this may be the case, our Supreme Court has

nonetheless ruled that an employer/insurer is entitled to reimbursement of an overpayment even when doing so would cause financial difficulty for a claimant:

It is argued that it is unfair to allow the employer to recoup for his own error at the inconvenience to the claimant. *We think not. We think the public interest will be better served by encouraging employers to freely pay injured employees without adversary strictness.* It is not so unfair to compel the claimant to face at an earlier date the termination he would face later in any event so as not to penalize the employer.

Id. (quoting *Wilson Food Corp. v. Cherry*, 315 N.W.2d 756, 758 (Iowa 1982)).

CONCLUSION AND ORDER

Employer/Insurer's Motion to Allow Reimbursement of an Overpayment is hereby GRANTED. This letter shall constitute the Department's order in this matter.

Sincerely,

Joe Thronson
Administrative Law Judge