SOUTH DAKOTA DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

DECLARATORY RULING
Re: SDCL §§ 62-4-2, 62-4-5

This matter comes before Pamela Roberts, the Secretary of the South Dakota Department of Labor, as a petition for declaratory ruling under SDCL 1-26-15 and ARSD 47:01:01:04. The Secretary has determined that this is not a matter of widespread impact, so a public hearing is unnecessary. On June 14, 2005, a hearing was conducted telephonically by James Marsh, Director, Division of Labor and Management, on behalf of the Secretary, with Jeff Shultz of Woods, Fuller, Shultz & Smith PC appearing on behalf of Petitioner.

The Department was asked to assume the following facts: 1) A worker (Worker) had an injury to one hand. 2) The treating physician limited Worker to one-handed duty without any other restrictions. 3) The expected healing period before Worker was likely be authorized to return to full duty is three weeks from the date of injury. 4) The Employer (Employer) has a variety of jobs at its plant requiring varying degrees of physical capabilities. 5) Employer has work available within Worker's restrictions for two hours a day, five days a week. 6) The day after the injury, when the doctor established the restrictions, Employer offered Worker such a two hour a day job.

Petitioner has asked the Department to provide its positions on the following questions: 1) If Worker accepts the one-handed position and works in that capacity for three weeks, can Worker ever meet the waiting period under SDCL § 62-4-2? 2) If Worker refuses the part-time employment, is Worker entitled to temporary disability benefits of any sort?

§ 62-4-2 provides: "No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the

seven day waiting period is met, benefits shall be computed from the date of the injury." The term "incapacitate" has not been defined in our laws. On the other hand, §62-4-5 (quoted below) refers to "partially incapacitated" and §62-4-6(23) refers to "totally incapacitated." It is an old but consistently applied rule that workers' compensation laws are remedial, and should be liberally construed to effectuate their purposes, to aid the injured worker. E.g., Schwan v. Premack, 70 SD 371, 17 NW2d 911 (1945). Where the Legislature had the opportunity to specify that the waiting period applied strictly to the "totally incapacitated" and did not, it is properly concluded that the "partially incapacitated" worker should be included. Those states that have excluded periods of partial incapacitation from the waiting period have done so expressly in their statutes. Larson, Workers' Compensation Law, §80.03(6) (CD-ROM version, November, 2004 release.)

§ 62-4-5 (emphasis added) provides:

> If, after an injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if the employee has been released by the employee's physician from temporary total disability and has not been given a rating to which § 62-4-6 would apply, the employee shall receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3, equal to one-half of the difference between the average amount which the employee earned before the accident, and the average amount which the employee is earning or is able to earn in some suitable employment or business after the accident. If the employee has not received a bona fide job offer that the employee is physically capable of performing, compensation shall be at the rate provided by § 62-4-3. However, in no event may the total calculation be less than the amount the claimant was receiving for temporary total disability, unless the claimant refuses suitable employment.

Under the facts provided by the Petitioner, the offer of part-time employment was likely "bona fide." It was at the same place of business and fit Worker's restrictions. The hours were such that, in combination with § 62-4-5 benefits, the Worker's earnings would likely have been suitable. §62-4-5 specifies that a claimant who refuses suitable

employment may receive less in earnings than his § 62-4-3 temporary total disability rate, but does not specify how much less. The § 62-4-5 formula calls for benefits to be paid based on one-half the difference between pre-injury earnings and the amount "the employee is earning or is able to earn."

In Beckman v. John Morrell & Co., 462 N.W.2d 505 (1990), the Supreme Court held that an employee could be denied temporary disability benefits during a period in which the employee voluntarily withdraws from a labor market (the employee was denied temporary benefits during a strike.) Similarly, in the permanent total disability case of Reede v. State of South Dakota Department of Transportation, 2000 SD 157, ¶ 15, the Court questioned whether the employee "impeded the return to gainful employment" or "planned to retire from the labor market." (The employee had moved from Rapid City to Forsyth, Montana.)

Here, the facts stated to the department reveal an employee who had a suitable job opportunity and rejected it voluntarily. It is antithetical to the purposes of South Dakota's laws to permit such a person to continue to receive benefits under such circumstances.

It is therefore the ruling of the Department of Labor that Worker would meet the waiting period in SDCL § 62-4-2 when she is on medical restrictions and is not earning her pre-injury wages for seven consecutive days. Worker would not be entitled to weekly benefits under SDCL § 62-4-5, because she voluntarily withdrew from or impeded her return to gainful employment.

Dated this _____ day of _____, 2005.

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Pamela S. Roberts
Secretary
South Dakota Department of Labor