

December 12, 2007

LETTER DECISION

James D. Leach
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Naomi R. Cromwell
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RE: HF No. 146, 2002/03 – Bernard M. Eite v. Rapid City Area School Dist. 51-4 and Associated School Boards of South Dakota Worker's Compensation Trust Fund

Dear Mr. Leach and Ms. Cromwell:

The Department is in receipt of Claimant's Motion for Order for Payment of Past-Due Benefits, Approval of Attorney's Fee and Partial Lump Sum Distribution, with attachments and Claimant's Amended Motion for Order for Payment of Past-Due Benefits, Approval of Attorney's Fee and Partial Lump Sum Distribution, with attachments. The Department is also in receipt of Employer/Provider's Response to Amended Motion for Order for Payment of Past-Due Benefits, Approval of Attorney's Fee and Partial Lump Sum Distribution. The Department has also received Claimant's Reply Brief in Support of Amended Motion for Order for Payment of Past-Due Benefits, Approval of Attorney's Fee and Partial Lump Sum Distribution, along with the Affidavit of Bernard M. Eite.

Claimant and his attorney move for an order for payment of past-due benefits, approval of attorney's fee, and a partial lump sum distribution to pay attorney's fee and sales tax. Employer/Provider object, arguing that Claimant has not made the proper showing for a partial lump sum distribution for attorney fees, that Department should not use economist Don Frankenfeld's figures for calculation of the partial lump sum, if awarded, and for the proper commutation of future benefit payments, and that Claimant has not made the proper showing that his attorney fees are reasonable.

SDCL 62-7-6 governs these issues. The statute provides:

An employer or employee who desires to have any unpaid compensation paid in a lump sum may petition the Department of Labor asking that the compensation be paid in that manner. If, upon proper notice to interested parties and proper showing before the department, it appears in the best interests of the employee that the compensation be paid in lump sum, the secretary of labor may order the commutation of the compensation to an equivalent lump-sum amount. That amount shall equal the total sum of the probable future payments capitalized at their present value on the basis of interest calculated at a rate per year set by the department with annual rests in accordance with rules promulgated pursuant to chapter 1-26. If there is an admission or adjudication of permanent total disability, the secretary may order payment of all or part of the unpaid compensation in a lump sum under the following circumstances:

- (1) If the employee has exceptional financial need that arose as a result of reduced income due to the injury; or
- (2) If necessary to pay the attorney's fees, costs and expenses approved by the department under § 62-7-36.

If a partial lump sum payment is made, the amount of the weekly benefit shall be reduced by the same percentage that the partial lump sum bears to the total lump sum computation. The remaining weekly benefit is subject to the cost of living allowance provided by § 62-4-7. Any compensation due to beneficiaries under §§ 62-4-12 to 62-4-22, inclusive, may not be paid in a lump sum, except for the remarriage lump sum provided in § 62-4-12.

The following facts are undisputed:

1. Claimant's current weekly compensation benefit is \$339.60.
2. Claimant's original weekly compensation benefit was \$305.28.
3. Employer/Provider's last payment of weekly compensation benefits to Claimant was on December 20, 2002.
4. Claimant is entitled to interest at 10% on past due benefits.
5. Claimant is permanently totally disabled as of December 20, 2002.
6. Claimant is owed past due benefits from and after December 20, 2002.

The parties have been given proper notice of Claimant's desire to have his past due benefits paid in a lump sum. Claimant has made the proper showing that payment of the past due benefits in a lump sum is in his best interest. Don Frankenfeld's calculations have been provided to the Department on behalf of Claimant. Employer/Provider has shown no reason why the Department should not accept Mr. Frankenfeld's calculations of past due benefits, other than to assert that the Department

should do the calculations without benefits of expert opinion. The Department has reviewed Mr. Frankenfeld's calculations and finds no reason to reject them and hereby accepts his calculations.

Claimant seeks payment of his past due benefits and interest for the purpose of paying his attorney's fees, costs, and expenses. Claimant's attorney has asked that attorney's fees, costs and expenses in the amount of \$118,530.42 be approved pursuant to SDCL 62-7-36. SDCL 62-7-36 provides:

Except as otherwise provided, fees for legal services under this Title shall be subject to approval of the department.

Attorneys' fees may not exceed the percentage of the amount of compensation benefits secured as a result of the attorney's involvement as follows:

- (1) Twenty-five percent of the disputed amount arrived at by settlement of the parties;
- (2) Thirty percent of the disputed amount awarded by the department of labor after hearing or through appeal to circuit court;
- (3) Thirty-five percent of the disputed amount awarded if an appeal is successful to the Supreme Court.

Attorneys' fees and costs may be paid in a lump sum on the present value of the settlement or adjudicated amount.

Claimant successfully appealed this matter to Supreme Court, allowing the Department to consider a maximum amount for attorney's fees of 35 percent of the disputed amount. Claimant's attorney has asked for approval of 30% of \$317,625.47, representing \$98,186.53 in past due benefits and interest and a present value of future benefits calculated at \$219,438.94. The total sought by Claimant's attorney is \$118,530.43.

The request amount of \$118,530.43 includes \$17,525.54 in expenses. The Department hereby finds that \$17,525.54 is a reasonable amount of expenses for this matter, given the extensive litigation involved, including three days of hearing testimony and multiple written prehearing motions.

The Department has no opinion on the calculation of sales tax as that calculation is up to the sales tax license holder to justify to the South Dakota Department of Revenue, if necessary.

The remainder of the figure, \$98,186.53, represents the amount Claimant's attorney has asked the Department to approve. SDCL 62-7-36 allows the Department discretion in awarding attorney's fees. The Department hereby approves these attorney's fees.

Claimant's Motion for Approval of Attorney's Fees is granted.

Employer/Provider shall pay Claimant \$98,186.53 in past due benefits and interest in a lump sum in order to pay his attorney's fees, costs and expenses.

The amount outstanding on the award of attorney fees, after the past due benefits are paid in a lump sum, is \$20,343.90. Claimant moves the Department for a partial lump sum award on his future benefits.

SDCL 62-7-6 provides in relevant part:

If there is an admission or adjudication of permanent total disability, the secretary may order payment of all or part of the unpaid compensation in a lump sum under the following circumstances:

- (1) If the employee has exceptional financial need that arose as a result of reduced income due to the injury; or
- (2) If necessary to pay the attorney's fees, costs and expenses approved by the department under § 62-7-36.

Claimant has been adjudicated permanently totally disabled. Claimant provided his affidavit that demonstrates that he has exceptional financial need that arose as a result of reduced income due to the injury. Claimant has not worked or received any worker's compensation benefits since December 20, 2002. Claimant has also demonstrated that a partial lump sum is "necessary to pay [his] attorney's fees, costs and expenses." The Department has approved \$118,530.43 in attorney's fees, costs and expenses. The Department hereby approves a partial lump sum, out of Claimant's future benefits, in the amount of \$20,343.90.

SDCL 62-7-6 also provides the following regarding the commutation of future benefits:

If a partial lump sum payment is made, the amount of the weekly benefit shall be reduced by the same percentage that the partial lump sum bears to the total lump sum computation. The remaining weekly benefit is subject to the cost of living allowance provided by § 62-4-7.

Dividing the partial lump sum request of \$20,343.90 by the present value of future benefits of \$219,438.94¹ shows that a partial lump sum of \$20,343.90 would equal 9.27087% of the total lump sum of future benefits. Claimant's weekly worker's compensation benefit of \$339.60 shall be reduced by 9.27087% or \$31.48 to \$308.12 per week. Claimant is entitled to future cost of living increases as provided by SDCL 62-4-7.

¹ This figure was calculated by the Department of Labor pursuant to ARSD 47:03:01:07.

Claimant is entitled to receive from Employer/Provider payment in the amount of \$37,829.79 (\$118,530.43 minus \$80,700.64² = \$37,829.79).

Claimant shall provide the Department with an Order consistent with this decision for the Department's approval.

Sincerely,

Heather E. Covey
Administrative Law Judge

² Employer/Provider has presented Claimant and his attorney with partial payment in the amount of \$80,700.64.