SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT
Pierre, South Dakota

DANA K. HEDIN, **HF No. 201, 2009/10**

Claimant,

v. **DECISION ON AVERAGE WEEKLY WAGE**

RCS CONSTRUCTION, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY,

Insurer.

This is a bifurcated workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. The parties have agreed to have this issue determined via submission of stipulated evidence and briefs to the Department. Attorney, Michael M. Hickey represents Claimant, Dana K. Hedin (Claimant). Attorney, Kristi Geisler Holm represents Employer, RCS Construction Inc., and Insurer, New Hampshire Insurance Company (Employer and Insurer).

ISSUES:

What is Claimant's Average Weekly Wage and Workers' Compensation Rate?

FACTS:

Claimant started working for Employer in April 2008. He worked as a finish carpenter for Employer throughout 2008 and into 2009. Although employed as a finish carpenter, Claimant performed many other tasks for Employer such as framing and general laborer work. However, Claimant's training and the job for which he was hired was finish carpentry. Evidence and testimony indicates that this is typically an indoor job and can be performed year-round. Employer, when faced with required lay-offs due to lack of work, discharges employees based upon seniority. Claimant had been with Employer for a little less than one year and was laid off in late January 2009. Employer called Claimant back to work about three months later.

Claimant returned to work for Employer in April 2009 making the same wage as what he made when he started in 2008. The evidence provided by the parties indicates that

Claimant's wages varied. Claimant was making $17 per hour for a number of weeks during the winter months in 2008 and 2009. However, for one week during the winter, Claimant was paid $15 per hour.

Further facts will be set out in the Analysis below.

ANALYSIS:

In cases such as this, the words of the South Dakota Supreme Court give guidance to the Department's decision:

> When interpreting the law of worker's compensation, three principles are considered. First, proceedings under the Worker's Compensation Law are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions. Second, we must assume that the legislature meant what the statute says and therefore give its words and phrases a plain meaning and effect. And finally, all ambiguity should be liberally construed in favor of injured employees.

Nilson v. Clay County, 534 N.W.2d 598, 601 (S.D. 1995) (internal quotes and citations omitted).

South Dakota code sets out a number of ways in which a claimant's average weekly wage may be calculated. The first method is set out in SDCL §62-4-24. That statute is for those employees who have been continuously employed for fifty-two weeks prior to the injury. Although there was a break of 12.6 weeks, Claimant was expecting to return to work for Employer when work became available. Claimant did not work for anyone else during that period of time between January 17 and April 20, 2009. Claimant's employment with Employer was continuous. This is the section that most fits Claimant's employment with Employer. This is the section that was used by Employer and Insurer to make their initial calculation of average weekly wage. Employer and Insurer used SDCL 62-4-24 for the initial calculation of Claimant's Average Weekly Wage and Workers' Compensation weekly benefit amount.

The statute reads:

> As to an employee in an employment in which it is the custom to operate throughout the working days of the year, and who was in the employment of the same employer in the same grade of employment as at the time of the injury continuously for fifty-two weeks next preceding the injury, except for any temporary loss of time, the average weekly wage shall, where feasible, be computed by dividing by fifty-two the total earnings of the employee as defined in subdivision 62-1-1(6), during the period of fifty-two weeks. However, if the employee lost more than seven consecutive days during the period of fifty-two weeks, then the division shall be by the number of weeks and fractions thereof that the employee actually worked.

SDCL §62-4-24. The next statute for calculating average weekly wage is SDCL §62-4-25 which is for employment of less than a year preceding injury. Claimant worked for Employer for more than one year. This statute does not apply in this case.

The next type of calculation is found at SDCL §62-4-26 which is a computation of average weekly wage that does not fit either -24 or -25 and the average day's earnings are multiplied by 300 and divided by 52. Section 62-4-27 is the calculation for seasonal employment, and §62-4-28 is for employees that earn no wages or less than an adult day laborer.

Employer and Insurer urges the Department to use §62-4-27 to calculate Claimant's average weekly wage. That section reads:

> As to employees in employments in which it is the custom to operate for a part of the whole number of working days in each year, the average weekly wages shall be ascertained by multiplying the employee's average day's earnings by number of days which it is customary in such employment to operate during a year, but not less than two hundred, and dividing by fifty-two.

SDCL §62-4-27. According to Kay Hagemann, a former employee of Employer who was the office person for Employer when Claimant was injured, Employer's business is that of general construction contractors. Her deposition testimony indicates that Employer operates throughout the year performing road work, utility work, constructing new commercial buildings as well as refurbishing commercial buildings.

The South Dakota Supreme Court, in *Nilson v. Clay County*, 534 N.W.2d 598 (S.D. 1995), addressed the determination of "seasonal employment" by following the reasoning from courts in Nebraska and Pennsylvania.

> "Seasonal employment" refers to those occupations which can be carried on only at certain or fairly definite seasons or portions of the year, and does not include such occupations as may be carried on throughout the entire year.
>
> Seasonal occupations logically are those vocations which cannot, from their very nature, be continuous or carried on throughout the year, but only during fixed portions of it. On the other hand, labor or occupation possible of performance and being carried on at any time of the year, or through the entire twelve months, is certainly not seasonal.

See *Nilson v. Clay County* at 601.

It is clear that Employer is a year-round employer and not a seasonal employer. They build and refurbish commercial buildings, as well as other types of construction. Claimant's job for Employer was that of an inside finish carpenter. Claimant typically worked inside installing trim such as doors, moldings, and other finish carpentry work. This type of work can and is performed year round by Employer. It is of a continuous nature and performed throughout the entire twelve-months. It is not dependent upon the seasons or the weather.

Just because Employer did not have enough work for Claimant to perform year round, does not mean that the occupation and the job was not of a continuous nature.

Claimant's average weekly wage is calculated by using SDCL §62-4-24. The calculation is set out in the steps below:

1. During Claimant's most recent 52-week tenure with Employer, Claimant worked for 39.3 of the 52 weeks and was on lay-off for 12.6 weeks.

2. Claimant worked for Employer from April 28, 2008 to October 21, 2008 at a rate of $15 per hour.

3. Claimant was paid $17 per hour for most weeks starting the week of October 28, 2008.

4. Employer paid Claimant a wage based upon the different work he was doing for Employer.

5. Pay records indicate that Claimant, during the week of January 6, 2009, earned an average of over $18.175 per hour for the regular 40 hours. During that same week, the pay records indicate his overtime wage was calculated at $17 per hour. That high regular wage for that week shows that at some time during that week, Claimant was likely making about $19 per hour for some work hours, but only worked for $17 per hour for the projects in which he put in overtime hours.

6. During the pay period of November 25, 2008 Claimant was working for $15 per hour.

7. Claimant was laid off by Employer for 12.6 weeks starting January 17, 2009 through April 20, 2009.

8. He returned to work on April 21, 2009 with a wage of $15 per hour. He remained at that wage through August 31, 2009, the date of his injury.

9. During his most recent 52 week-tenure with Employer, Claimant worked 55 hours of overtime at $15 per hour straight time and 56.5 hours at $17 per hour straight time. Claimant's total overtime earnings, figured at straight time wages was $1785.50.

10. Claimant earned regular wages of $23,071.50 during his most recent 52-weeks of employment with Employer.

11. The overtime wages plus the regular wages equals $24,857. This amount divided by the 39.3 weeks in which he worked equals $632.49 or his average weekly wage.

12. The average weekly wage multiplied by sixty-six and two-thirds percent equals $421.66. This is Claimant's weekly benefit amount.

Employer and Insurer's initial calculation was incorrect in two ways. Employer, when transposing the weekly wages into an Excel spread sheet that calculates an average weekly wage, made an error and entered $380 for the regular wages in a week where Claimant made $680, as shown by the payroll exhibit. Employer also did not count the .3 week in January just before he was laid off. The statute requires that all weeks and fractions of weeks worked in the 52 weeks prior to the injury, be used in the calculation.

As this is a bifurcated hearing, the Department retains jurisdiction upon all outstanding issues in this matter.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer and Insurer shall have fifteen (15) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law, and if they do so, Claimant shall submit such stipulation along with an Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 4th day of April, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

Catherine Duenwald
Administrative Law Judge