

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

LANCE WELLMAN,
Claimant,

HF No. 47, 2005/06

v.

DECISION

SCHAD EXCAVATION, L.L.C.,
Employer,

and

**GENERAL CASUALTY CO. OF
WISCONSIN,**
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. Claimant is represented by Frank Driscoll. Employer Schad Excavation, L.L.C. and Insurer General Casualty Co. of Wisconsin are represented by Michael S. McKnight.

Issues:

1. Is Claimant entitled to temporary partial disability benefits from late May of 2005 to early November of 2005?
2. Is Claimant entitled to any further temporary total disability benefits?

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

Lance Wellman (Claimant) began working for Employer on April 28, 2005, at \$15.00 per hour. Cody Schad, Employer's superintendent of the excavating crew at the time, interviewed and hired Claimant. Claimant was hired to operate excavation equipment and other machinery. Claimant understood that he would be paid only for hours worked, with no pay for days when inclement weather prohibited excavation.

On May 3, 2005, Claimant broke the fibula in his left leg while digging in a trench for a sewer line. Claimant received medical treatment from Dr. Fromm. Dr. Fromm took Claimant off work until May 23, 2005. Claimant's benefit rate was \$400.00 per week. He was paid temporary total disability benefits from May 4, 2005 to May 31, 2005.

Jenna Tomasko, Insurer's representative, called Claimant on May 23, 2005, to notify him that he had been released to return to work to run hand-operated equipment. Claimant's mother answered the telephone and spoke with Ms. Tomasko. Claimant's mother misunderstood Ms. Tomasko's message for Claimant regarding his release to return to work. Claimant's mother mistakenly told him he had *not* been released to return to work.

Employer had work available for Claimant beginning on May 23, 2005. After Mr. Schad contacted Claimant regarding his return to work, Claimant returned to work Wednesday, June 1, 2005.

Mr. Schad terminated Claimant's employment with Employer on June 20, 2005, for attendance issues. Claimant either failed to show up or left early without permission on nine of the possible fourteen workdays between June 1 and June 20, 2005. The other five workdays were excused absences due to court appearances or weather conditions. Claimant worked seventeen hours the week ending June 5, 2005; twelve hours the week ending June 12, 2005; and fifteen hours the week ending June 19, 2005. During these weeks, Claimant earned \$225.00, \$180.00, and \$225.00.

Claimant admitted that he did not look for work following his termination. He did not register with any employment agencies and did not look for work in any "way, shape, or form." However, Claimant, who has a personally owned track-hoe, did do three jobs for which he received \$300.00 apiece.

Claimant's leg injury is compensable. He received medical care and was paid temporary total disability benefits until he was released back to work. On November 7, 2005, Claimant was seen by Dr. Cederberg, who assessed Claimant as being at maximum medical improvement and having a permanent partial impairment.

Claimant acknowledges he was paid all temporary total disability (TTD) and permanent partial disability (PPD) benefits that were due and owing. The dispute is whether any temporary partial disability (TPD) benefits are owed Claimant.

Issue One

Is Claimant entitled to temporary partial disability benefits from late May 2005 to early November 2005?

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992).

The applicable statute in this matter is SDCL 62-4-5, which 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.

Claimant's treating physician released Claimant from temporary total disability on May 23, 2005. Claimant was not given a rating pursuant to SDCL 62-4-6 until November 6, 2005. Claimant returned to work for Employer on June 1, 2005. He worked until June 20, 2005, when Employer terminated his employment due to his chronic absenteeism. Claimant now argues that he is entitled to temporary partial disability benefits because he has not earned anything and is not able to earn any amount. Claimant argues that Employer is responsible for temporary partial disability payments no matter the reason why Claimant has earned no income between his termination and his impairment rating. Claimant incorrectly interprets SDCL 62-4-5.

From and after June 1, 2005, Employer had suitable work available for Claimant, as evidenced by the wages Claimant admits he earned. Claimant was able to earn his preinjury wage per hour. If he put forth the effort, he could have earned his preinjury wage. Schad's testimony that work was available within Claimant's restrictions was credible. The evidence does not support Claimant's argument that work was not available. Claimant testified that prior to his employment, he had operated his own construction business and knows how the nature of the business. Claimant testified he knew how Employer's business operated and that he could have contacted Schad to get further work assignments, but he chose to leave work early.

Claimant's argument that he has no burden whatsoever except to show a lack of income between June 20, 2005 and November 5, 2005, is rejected. SDCL 62-4-5 calls for analysis of what a claimant "is earning or is able to earn," thus allowing for this very situation. Claimant had been released to work, with restrictions. Employer/Insurer had suitable work available. Claimant was "able to earn" an income between June 20, 2005 and November 5, 2005, but chose not to. Claimant was physically able to do the work Employer had available. Claimant is not entitled to temporary partial disability.

Issue Two

Is Claimant entitled to any further temporary total disability benefits?

Claimant concedes that he has been paid all temporary total disability benefits to which he may have been entitled.

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 3rd day of January, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge