

April 13, 2009

Jon J. LaFleur
LaFleur, LaFleur & LaFleur PC
706 St. Joseph Street
Rapid City, SD 57701

LETTER DECISION & ORDER

Patricia A. Meyers
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter LLP
PO Box 290
Rapid City, SD 57709

RE: HF No. 64, 2004/05 – Kelly J. Baier v. Dean Kurtz Construction, Inc. and
Bituminous Insurance Companies

Dear Mr. LaFleur and Ms. Meyers:

I am in receipt of Claimant's Petition for Lump Sum Payment of Benefits and Claimant's Application for Taxation of Interest in the above referenced matter.

I have carefully reviewed and considered the following submissions: Claimant's Affidavit in Support of Partial Lump Sum Award in the Amount of \$25,000, Claimant's Brief in Support of Claimant's Application for Taxation of Interest, and the Affidavit of Don Frankenfeld in Support of Application for Taxation of Interest, Employer/Insurer's Response to Claimant's Petition for Lump Sum Benefits and Application for Taxation of Interest and Claimant's Reply Brief in Support of Claimant's Application for Taxation of interest. I will respond to each Motion separately.

Petition for Lump Sum Payment of Benefits

Claimant petitions the Department of Labor for the payment of benefits in a partial lump sum pursuant to SDCL § 62-7-6. Claimant requests a partial lump sum in the amount of \$25,000.00 to pay back family members and friends and to cover needed expenditures for car and dental work. Claimant requests an additional partial lump sum payment to pay attorney's fees, sales tax, and non-taxable costs in the amount of \$130,161.16.

Claimant went through bankruptcy in July of 2008, yet he still wishes to pay back loans from his family members and friends and to expend funds for dental and car repairs. Claimant argues that while he was off work for his bilateral hip replacements, he did not

receive any workers' compensation benefits and therefore he had to borrow money from family and friends and use high interest credit cards and loans. Claimant argues that he has exceptional financial need that arose as a result of reduced income due to his injury and his strong desire to repay friends and family who loaned him money.

SDCL § 62-7-6 allows for lump sum benefits to be paid in certain circumstances. SDCL § 62-7-6 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.

Typically, the South Dakota workers' compensation statutes do not favor lump sum awards. "The allowance of a lump-sum award is the exception and not the general rule." *Stenimetz v. State of South Dakota, DOC Star Academy*, 2008 SD 87, ¶17 (citations omitted). The rationale behind this policy is:

Since compensation is a segment of a total income insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings. If a . . . totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum is soon dissipated and the work[er] is right back where [s]he would have been if [workers'] compensation had never existed.

Id. SDCL § 62-7-6 clearly sets forth the circumstances under which a lump sum award can be made. “[I]n cases involving permanent total disability a claimant must show not only that a lump sum award is in the claimant’s best interest, but that either the claimant has ‘exceptional financial need that arose as a result of reduced income due to the injury’ or that a lump sum award is necessary to pay attorney’s fees, costs and expenses.” *Id.* ¶ 12. “[P]rior [South Dakota Supreme Court] decisions confirm that the primary emphasis must be placed on providing an injured worker with a reliable stream of income to replace lost wages and benefits.” *Id.* ¶ 10 (citations omitted).

Claimant argues that exceptional financial need for the lump sum arose due to reduced income because of the Claimant’s work injury. Claimant went through bankruptcy in 2008 which discharged many of Claimant’s outstanding debts. While admirable to repay loans from family and friends, this is not an exceptional financial need. Claimant will be able to pay off loans to family and friends through the weekly benefits. Claimant is not entitled to a partial lump sum award because he has failed to establish it is in his best interest due to an exceptional financial need.

The Department has calculated the present value of Claimant’s future benefits, as allowed by SDCL § 62-7-6 under ARSD 47:03:01:07, to be \$374,665.71. This represents the present value calculation on the date that Claimant was determined to be entitled to benefits. Pursuant to SDCL § 62-7-36, the Department issued an Order on March 11, 2009, approving Attorney fees, costs and expenses in the amount of \$130,161.16 . 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 is entitled to receive a partial lump sum to pay for his attorney’s fees, costs and expenses. Given this determination, the amount of Claimant’s weekly workers’ compensation benefits shall be reduced by the same percentage that the partial lump sum bears to the total lump sum computation.

Claimant's Application for Taxation of Interest

On November 14, 2007, the Department of Labor issued its decision which entitled Claimant to permanent total disability benefits beginning in June 2007, plus prejudgment interest. On June 27, 2008, the Circuit Court of the Sixth Judicial Circuit affirmed the Department of Labor's decision regarding the last injurious exposure rule and affirmed the Department's decision regarding permanent total disability benefits. On February 4, 2009, the South Dakota Supreme Court affirmed the Department of Labor's decision that Bituminous Insurance Company was liable for Claimant's benefits and the Department's decision awarding permanent total disability benefits.

Claimant is entitled to recover prejudgment interest and post judgment interest pursuant to SDCL §§15-16-3, 54-3-1, 54-3-5.1, and 54-3-6. Claimant is entitled to prejudgment interest for benefits from June 15, 2007 to November 14, 2007, in the amount of \$125.22. Claimant is also entitled to post judgment interest for back benefits from November 14, 2007 to March 4, 2007, in the amount of \$769.19, and post judgment interest on benefits from interest November 14, 2007 to March 4, 2007 in the amount of \$1213.31.

This letter shall serve as the Department's Order.

Sincerely,

Taya M. Dockter
Administrative Law Judge