

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

OFFICE OF THE SECRETARY

DECLARATORY RULING

Re: SDCL 62-1-1(6)

This matter comes before Marcia Hultman, the Secretary of the South Dakota Department of Labor & Regulation, as a petition for declaratory ruling pursuant to SDCL 1-26-15 and ARSD 47:01:01:04. The Secretary determined this was a matter of widespread impact. A statewide public hearing was conducted on August 24, 2014 before the Department, Administrative Law Judge(s) Donald Hageman and Catherine Duenwald presiding. The Hearing was also open to public testimony via the Digital Dakota Network at public sites in Aberdeen, Rapid City, and Sioux Falls. Written public comments were also received.

Appearing before the Department were Petitioner, James D. Leach; Respondent, Associated School Boards Workers' Compensation Trust Fund, by and through their attorney of record, Jessica Filler; Respondent, First Dakota Indemnity and Dakota Truck Underwriters, by and through their attorney of record, Michael S. McKnight; and Respondent, South Dakota Retailers, by and through Brad Wilson, vice-president of Insurance Benefits Incorporated.

The Petition for Declaratory Ruling seeks whether bonuses shall be included in the calculation of the average weekly wage or earnings under SDCL 62-1-1(6). The question presented to the Secretary is stated as follows:

Whether both discretionary and nondiscretionary bonuses are considered "earnings," when determining the average weekly wage of employees for purposes of workers' compensation.

The Petition requires an interpretation of SDCL 62-1-1 (6) which defines earnings as:

The amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was engaged at the time of his injury. It includes payment for all hours worked, including overtime hours at straight-time pay, and does not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed by him by the nature of his employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, they shall be deemed a part of his earnings.

When considering what constitutes "earnings" in workers' compensation cases, Professor Larson, the most frequently cited authority on workers' compensation in court decisions, provides:

In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but *anything of value received in consideration for the work*, as for example... bonuses...

5-93 Larson's Workers' Compensation Law §93.01 [2][a] (emphasis added).

South Dakota law is sparse on this issue; therefore, it is helpful to look to other states for guidance. Some jurisdictions have suggested bonuses should be included in the average weekly wage when the bonuses are tied to the employee's work performance, e.g., hours of service, output produced, or profitability or performance of the employer's business as a whole. See, e.g. *Denim Finishers, Inc. v. Baker*, 757 S. W.2d 215, 216 (Ky.Ct.App. (1988) (holding that a bonus based on employee output is included in wage); *Smith v. State of Louisiana, Dept of Highways*, 370 So.2d 1295, 1296-98 (La.Ct.App. (1979) (holding that a year-end bonus based on profitability of the company is included in wage); *Lane v. Enters, Inc. v. Workmen's Comp. Appeal Bd.*, 537 Pa. 426, 644 A.2d 726, 728 (1994) (holding that an annual bonus based on yearly performance is included in wage).

Other decisions have held that, because the average weekly wage calculation is an estimate of an employee's anticipated future earnings in the absence of a work injury, the

determination whether to include a bonus in the average weekly wage should hinge upon whether the bonus is part of the employee's "expected" or contractual compensation. See, e.g. *Simmonds v. Eastman Kodak Co.*, 781 P.2d 140, 142 (Colo.Ct.App. 1989) (holding that an annual bonus is part of expected compensation); *Orlando v. Schiavo Bros., Inc.*, 10 Pa.Cmwlth. 86, 309 A.2d 84, 85-86 (1973) (holding that a bonus is not included in average weekly wage when no contractual terms, express or implied, obligated the employer to pay bonus).

In addition, it is not appropriate for the Department of Labor and Regulation to make a distinction between those bonuses included in the calculation of average weekly wage and those that are not, based on what the employer includes on the employees' W2 form for purposes of paying federal income tax. First, the Internal Revenue's definition of "earned income" differs from SDCL 62-1-1(6). Second, the policies behind those definitions differ. The Internal Revenue Service's definition is written broadly, in part, to prevent the avoidance of taxes by paying bonuses rather than wages to employees. The purpose of the definition in South Dakota's workers' compensation law is to determine the wages that have been "earned" by the employee.

The common thread that runs through Professor Larson's treatise and these cases is that only bonuses received in consideration of work performed should be included in the average weekly wage, while bonuses that are gifts or discretionary should not be included.

In conclusion, it is the position of the Department of Labor and Regulation that nondiscretionary bonuses are included in the calculation of the average weekly wage of employees for purposes of workers compensation. Nondiscretionary bonuses include seniority pay, longevity pay, or bonuses paid based on the claimant's having met individual performance goals. However, discretionary bonuses are not included. Discretionary bonuses include one-time payments to all employees without regard to their performance, the value of Christmas

turkeys, signing/hiring bonuses, and the like; the exception would be if the employee was given the bonus "in lieu of compensation" per SDCL §62-1-1(6).

Dated this 25 day of November, 2014.



Marcia Hultman
Secretary
South Dakota Department of Labor & Regulation