

SOUTH DAKOTA DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

**Re: SDCL 62-4-5
DECLARATORY RULING**

This matter comes before Craig Johnson, the Secretary of the South Dakota Department of Labor, having been treated as a petition for declaratory ruling under ARSD 47:01:01:04. The following matter has been addressed to the Secretary for a ruling:

If an employee is on restricted duty work or on a work restriction for a period of seven (7) days with a doctor's statement, and the employer accommodates the employee restrictions with a lower rate of pay job, is the employee entitled to TPD pay?

The petition requires an interpretation of SDCL § 62-4-5:

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.

It will be assumed for the purpose of this ruling that the hypothetical employee is on restricted duty due to an injury that is compensable under the workers' compensation law. As the described employee has also been placed both on restricted duty and a lesser paying job, it will also be assumed that the employee is partially incapable of pursuing his usual line of employment.

This issue has already been addressed by the South Dakota Supreme Court in the matter of Caldwell v. John Morrell & Co., 489 N.W.2d 353 (S.D. 1992). In that case, Caldwell was totally incapacitated from work until returned to light duty, at a lower wage rate than his pre-injury wage due to a wage concession agreement. The Department awarded temporary partial disability benefits under SDCL § 62-4-5 during the period of light duty, was reversed on that issue in Circuit Court, then the claim was appealed to the Supreme Court. The comments of the Supreme Court are worth quoting at length:

... circuit court found that Employee's post-injury wages at Morrell were reduced for economic reasons unrelated to Employee's injury. Employee's pre-injury wage rate of \$ 9.75 an hour was reduced to \$ 8.00 an hour due to an implemented contract offer Morrell made to its Union. Since Employee's post-injury wages at Morrell were the same that he would have received if he had not been injured, circuit court concluded that there was no nexus between Employee's reduced wages at Morrell and his injury. Circuit court went on to say that an award of temporary partial disability benefits to Employee, without any causal connection between Employee's injury and the difference between the pre- and post-injury wages, would bestow upon him a benefit which was not intended by SDCL 62-4-5 ... The statute simply requires an employee to establish that his post-injury earnings, or that average amount he is capable of earning, are less than what his pre-injury average earnings were. As mentioned earlier, Employee has met his burden of proof on this element by showing what his actual average wages were and that he is physically incapable of earning more.

The Caldwell Court went on to reverse the Circuit Court on that issue, finding that Caldwell was entitled to temporary partial disability benefits. Id. In the hypothetical situation, as there was a difference between the employee's pre-injury and post-injury average earnings, temporary partial disability benefits would be owed.

Dated this 2d day of August, 2001.

Craig Johnson
Secretary
South Dakota Department of Labor