STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF HUGHES | SIXTH JUDICIAL CIRCUIT

TROY BANGTSON, Employee/Claimant, vs. CHARLES BAKER TRUCKING, LLC, and CHARLES BAKER d/b/a CHARLES BAKER FARMS, Employers/Respondents, and ACUITY, a Mutual Insurance Company, Insurer/Respondent.	32CIV17 - 260 (Appeal from the Dept. of Labor, HF. No. 185, 2014/15) **NOTICE OF ENTRY OF ORDER**

TO: Charles Baker Trucking, LLC, Acuity Mutual Insurance Company and their counsel of record, Rob Anderson; Charles Baker d/b/a/ Charles Baker Farms and its counsel of record, Mike Schaffer; Kirsten E. Jasper of the South Dakota Office of Attorney General's Office; Joe Thronson, Administrative Law Judge, of the South Dakota Department of Labor & Regulation, Labor & Management Division; Tom Hart, Deputy Secretary of the South Dakota Department of Labor & Regulation, Labor & Management Division; Marcia Hultman, Secretary of the South Dakota Department of Labor & Regulation, Labor & Management Division; The above-named Clerk of Court; and

To all others whom this may concern:

PLEASE TAKE NOTICE that the Circuit Court in and for the Sixth Judicial Circuit of South Dakota, Hughes County, and the Honorable Patricia J. DeVaney, Circuit Judge presiding therein, has entered and filed a *Memorandum Decision* and *Order* dated November 29, 2018, true and correct copies of which are attached hereto and incorporated herein by reference.

Dated this the 30th day of November, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served true and correct copies of the foregoing document upon the persons listed below by enclosing said true and correct copies of said document in an envelope securely sealed, postage prepaid, and by depositing same in a recognized repository for United States mail, all on the 30th day of November, 2018, addressed as follows:

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SIXTH JUDICIAL CIRCUIT

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RE: Hughes County Civ. No. 17-260: Troy Bangtson v. Charles Baker Trucking, LLC; Charles Baker d/b/a Charles Baker Farms and Acuity

MEMORANDUM DECISION

Claimant, Troy Bangtson, appeals from the South Dakota Department of Labor's grant of summary judgment in favor of employers, Charles Baker d/b/a Charles Baker Farms and Charles Baker Trucking, LLC, and insurer Acuity, in this workers' compensation case. This Court affirms the Department's determination that Claimant is an agricultural worker exempt under SDCL 62-3-15(2), but remands the case back to the Department for factual determinations as to the issue of whether Claimant was nonetheless entitled to workers' compensation as a corresponding employee of Charles Baker Trucking under the federal H-2A visa program.

FACTUAL AND PROCEDURAL BACKGROUND

Based upon the record before the Court, the following facts are not in dispute. Charles Baker owns and operates a commercial trucking company (Charles Baker Trucking or CBT) and a farming enterprise, which is a sole proprietorship of Charles Baker d/b/a Charles Baker Farms (Charles Baker Farms or CBF). AR at 268; Baker Aff. ¶¶ 1-2. Both businesses share office space on Main Street in Murdo and use this location as a business address. Charles Baker Trucking employs several over the road truckers that live throughout the state of South Dakota. Charles Baker Farms employs several farm workers that live in or around Murdo, South Dakota. Some employees complete tasks for both entities.

Both Charles Baker Farms and Charles Baker Trucking have completed applications for the Federal H-2A Visa Program, which allows for the lawful admission of temporary, nonimmigrant workers (H-2A workers) to perform agricultural labor or services of a temporary or seasonal nature. This program requires employers of H-2A workers to comply with various federal regulations affecting both U.S. domestic workers and H-2A foreign workers.

Troy Bangtson applied for work with Mr. Baker in June of 2013 and was hired to do maintenance work primarily at a shop north of Murdo (the shop). It is undisputed that Claimant spent most of his time completing tasks at the shop. Additionally, while it is undisputed that Claimant performed maintenance on vehicles owned by both Charles Baker Farms and Charles Baker Trucking, the exact proportion of time he spent working on tasks for each entity may be in dispute. However, there is no dispute over the fact that Claimant was only paid by Charles Baker Farms.

Claimant was injured at the shop on March 11, 2015, while working on a truck tire from a semi-truck owned by Charles Baker Farms. In May of 2015, Claimant petitioned the Department of Labor (Department) for workers' compensation benefits for his injury. AR. at 2-6. Following the exchange of written interrogatories and depositions of the parties, Charles Baker Farms filed a motion for summary

judgment, arguing that Claimant was an agricultural laborer and thus exempt from workers' compensation coverage under SDCL 62-3-15(2). Charles Baker Trucking, along with its workers' compensation insurer, Acuity, also filed a motion for summary judgment alleging that Claimant was the sole employee of Charles Baker Farms. The Department heard oral argument from the parties in October of 2017.

In a Letter Decision and Order dated November 15, 2017, the Department granted both motions for summary judgment. Claimant filed an appeal from the Department's Letter Decision and Order with the Sixth Circuit in Hughes County on December 15, 2017.

QUESTIONS PRESENTED

I. **DID THE DEPARTMENT ERR IN HOLDING, AS A MATTER OF LAW, THAT CLAIMANT WAS AN AGRICULTURAL LABORER AND THUS EXEMPT FROM WORKERS' COMPENSATION COVERAGE UNDER SDCL 62-3-15(2)?**

II. **EVEN IF CLAIMANT WAS AN EXEMPT AGRICULTURAL LABORER UNDER SDCL 62-3-15(2), WAS HE, NONETHELESS, ENTITLED TO WORKERS' COMPENSATION COVERAGE BECAUSE HIS EMPLOYER PARTICIPATED IN THE FEDERAL H-2A VISA PROGRAM?**

III. **DOES SDCL 62-3-15 VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES AND SOUTH DAKOTA CONSTITUTIONS?**

STANDARD OF REVIEW

This Court's review of a decision from an administrative agency is governed by SDCL 1-26-36:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;

> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

SDCL 1-26-36. Questions of fact are judged by the clearly erroneous standard while questions of law are fully reviewable [*i.e., de novo*]. *Orth v. Stoebner & Permann. Const., Inc.*, 2006 SD 99, ¶ 27, 724 N.W.2d 586, 592 (*quoting Tischler v. United Parcel Service*, 1996 SD 98, ¶ 23, 552 N.W.2d 597, 602). Moreover, "[m]ixed questions of fact and law are fully reviewable." *Orth*, 2006 SD 99, ¶ 27, 724 N.W.2d at 592 (*quoting Brown v. Douglas Sch. Dist.*, 2002 SD 92, ¶ 9, 650 N.W.2d 264, 268).

The standard of review on a grant or denial of summary judgment is well settled:

> Summary judgment is proper where, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. SDCL 15–6–56(c). [The reviewing court] will affirm only when no genuine issues of material fact exist and the law was applied correctly. *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343. [The court] make[s] all reasonable inferences drawn from the facts in the light most favorable to the non-moving party. *Paradigm Hotel Mortg. Fund v. Sioux Falls Hotel Co., Inc.*, 511 N.W.2d 567, 569 (S.D.1994). In addition, the moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Muhlbauer v. Estate of Olson*, 2011 S.D. 42, ¶ 7, 801 N.W.2d 446, 448.[The reviewing court does] not give any deference to the [underlying decisionmaker's] conclusions of law. *Schafer v. Shopko Stores, Inc.*, 2007 S.D. 116, ¶ 5, 741 N.W.2d 758, 760 (citing *King v. Landguth*, 2007 S.D. 2, ¶ 8, 726 N.W.2d 603, 607).

Hofer v. Redstone Feeders, LLC, 2015 S.D. 75, ¶¶ 10-11, 870 N.W.2d 659, 661. This language is consistent with the standard of review governing administrative appeals in SDCL 1-26-36 as described above.

Although the summary judgment standard requires the Department to view the facts, and inferences from those facts, in the light most favorable to the non-moving party, in this case, the language employed in the Department's decision appears to deviate from that standard. For instance, in its decision and order, after relating facts raised by Claimant, the Department found the Claimant's arguments to be unpersuasive, explaining that "[t]he weight of the evidence presented shows that Claimant was an employee of CBF," and that one of Claimant's arguments to the contrary was "not persuasive when weighed against the other facts of the case." AR at 439-440. Weighing evidence to determine the persuasiveness of a nonmovant's argument is not consistent with viewing the facts in the light most favorable to the nonmoving party. Nonetheless, because a review of an underlying decision to grant summary judgment is de novo, this Court may undertake its own summary judgment analysis based upon the submissions of the parties below.

ANALYSIS

I. DID THE DEPARTMENT ERR IN HOLDING, AS A MATTER OF LAW, THAT CLAIMANT WAS AN AGRICULTURAL LABORER AND THUS EXEMPT FROM WORKERS' COMPENSATION COVERAGE UNDER SDCL 62-3-15(2)?

"In South Dakota, agricultural or farm laborers are exempted from workers' compensation protection by SDCL § 62-3-15(2)." *Hofer v. Redstone*, 2015 S.D. 75, ¶ 13, 870 N.W.2d 662, 662. SDCL 62-3-15 provides:

> Except as provided in §§ 28-1-59, 62-3-16, and 62-3-17, this title does not apply to:
>
> (1) Domestic servants unless working for an employer for more than twenty hours in any calendar week and for more than six weeks in any thirteen-week period; or
>
> (2) Farm or agricultural laborers; or
>
> (3) Work activity participants.

The South Dakota Supreme Court first analyzed whether a claimant was an exempt agricultural worker under SDCL 62-3-15 in *Keil v. Nelson*. 355 N.W.2d 525 (S.D. 1984). In *Keil*, the claimant worked for employers who were primarily engaged in a

farming operation, but also ran a small trucking business. *Id.* at 528. The parties disputed how much time the claimant spent working for each business. *Id,* at 527. The Court determined that this situation constituted a "gray area" for determining the applicability of the workers' compensation statutes, because it involved employers who were "farmers admittedly engaged in some commercial trucking," and an employee who was a "truck driver who admittedly work[ed] at times as a farm laborer." *Id.* In such scenarios, the Court declared that it is the whole character of employment which must be evaluated to determine whether an employee is a farm laborer. "The fact that the employer or employers are engaged in farming does not remove from the coverage of the statute other businesses or occupations carried on by the employer which are otherwise in the coverage of the statute." *Id.* at 527 (citing *Campos v. Tomoi,* 122 N.W.2d 473, 475 (Neb. 1963)).

To address the dilemma of dual employment in both a covered and exempt business, the trial court in *Keil,* had found that workers' compensation attaches whenever the employee is engaged in the covered enterprise. 355 N.W.2d at 527. However, the Supreme Court of South Dakota rejected this approach, holding instead that "[e]mployees and employers do not dart in and out of coverage with every momentary change in activity." *Id.* at 527-28 (quoting *Hawthorne v. Hawthorne,* 167 N.W.2d 564, 567 (1969)). In so holding, the Court noted that "[t]he great majority of decisions . . . attempt to classify the overall nature of the claimant's duties, disregarding temporary departures from that class of duties even if the injury occurred during one of the departures." *Id.* at 528 (quoting 1C Larson, *The Law of Workmen's Compensation* § 53.40 (1982)).

Additionally, the trial court in *Keil* found, and the Supreme Court agreed, that it was the nature of the secondary and separate enterprise that was determinative of the applicability of the workers' compensation statutes to an employee while engaged in the secondary enterprise. *Id.* (citing *Goodson v. L.W. Hult Produce Co.,* 97 Idaho 264, 543 P.2d 167 (1975)). "Ultimately, then, the issue becomes a question of fact," focused on the *primary* reason the employee was hired and to which area the employee devoted *most* of his time. *Keil,* 355 N.W.2d at 528 (emphasis added).

Notably, "when determining whether a workmen's compensation claimant is within the agricultural labor exclusion of the Act, any doubt as to claimant's status in a 'grey' or borderline case will be resolved in favor of compensation coverage and against exclusion as an agricultural laborer." *Keil*, 355 N.W.2d at 528 (internal citation omitted).

While the Court did not offer a definitive standard or threshold for what constitutes "primary" employment, the employee in *Keil* estimated that his time was spent as follows: 75% hauling commercially; 20% hauling for employer's personal use; and 5% farm labor. *Id.* The Court noted that while the claimant's employers disputed this estimate, they provided no evidence to the contrary. *Id.* Ultimately, the Supreme Court in *Keil* affirmed the trial court's finding that the employee was primarily employed by the trucking company and was not exempt from workers' compensation coverage. *Id.*

The second time the Supreme Court analyzed the agricultural exemption was in *Hofer v. Redstone*, where the Court affirmed the trial court's grant of summary judgment, holding that an employee who spends all of his time driving a semi-truck for an agricultural farming operation was a "farm or agricultural laborer" exempt from workers' compensation coverage under SDCL 62-3-15(2). 2015 S.D. 75, ¶ 28, 870 N.W.2d 659, 665. In *Hofer*, the employee claimed that his job duties were similar to those of the truck driver in *Keil*, where the Court found that the employee did not fall under the agricultural laborer exemption. *Id.* at ¶ 7, 870 N.W.2d at 661. The Court in *Keil* relied on the employee's duties, he asserted, and not the nature of the employer's business. *Id.* In response, the Supreme Court distinguished the facts in *Hofer* from those in *Keil* and clarified the holding of the latter. *Id.* at ¶¶ 21-22, 870 N.W.2d at 663-664.

When clarifying the test to determine if an employee falls under the exemption in SDCL 62-3-15(2), the Court in *Hofer* looked to dictionary definitions of "laborer" and "agriculture" that, when read together, defined "farm or agricultural laborer," as "someone who engages in physical labor for a farm or agricultural operation." *Id.* at ¶ 17, 870 N.W.2d. at 663. The definition "focuses not just on the tasks done by the

employee, but also incorporates the nature of the employer's operation as well." *Id.* at ¶ 18, 870 N.W.2d at 663. Thus, in order to determine if someone falls under the exemption in SDCL 62-3-15(2), "the totality of the circumstances must be considered," including both the employee's duties and the nature of the employer's business. *Id.* at ¶ 20, 870 N.W.2d at 663.

The Supreme Court distinguished the situation in *Hofer* by noting that the legal separation of the businesses, which was dispositive in *Keil*, was not at issue in *Hofer,* where the employee only worked for one exclusively agricultural operation. *Id.* at ¶ 21, 870 N.W.2d at 663-664. When looking at the nature of the truck driver's employment, including the fact that the employer was exclusively agricultural, the case did not fall into the "questionable" (gray area) mentioned in *Keil. Id.* at ¶ 22, 870 N.W.2d at 664. Instead, the employee in *Hofer* hauled exclusively agricultural products for an exclusively agricultural employer, so it was unquestionable that he fell under the definition of agricultural laborer under the statute. *Id.*

Reading *Keil* and *Hofer* together, to determine if an employee falls under the farm or agricultural laborer exemption in SDCL 62-3-15(2), a court must consider the totality of the circumstances, which encompasses the whole character of the employment, including: (1) the specific duties of the employee; and (2) the nature of the employer's business. *Hofer*, 2015 S.D. 75 at ¶ 20, 870 N.W.2d at 663. Because workers' compensation laws must be liberally construed, questionable cases of whether an employee is exempt as an agricultural laborer should be resolved against exclusion from coverage. *Id.* at ¶ 22, 870 N.W. 2d at 664 (citing *Keil*, 355 N.W.2d at 528) (other citations omitted).

Here, the Department determined that Claimant was an exempt agricultural worker under South Dakota law and granted summary judgment for Appellees after finding that (1) Charles Baker Farms was Claimant's sole employer; and (2) Claimant's duties were performed almost exclusively for Charles Baker Farms. AR at 440-441. The Department is authorized to grant a motion for summary judgment pursuant to ARSD 47:03:01:08:

> A claimant or an employer or its insurer may, any time after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

When reviewing a grant of summary judgment, the Court will "affirm only when no genuine issues of material fact exist and the law was applied correctly." *Hofer*, 2015 S.D. at ¶ 10, 870 N.W.2d at 661. "We make all reasonable inferences drawn from the facts in the light most favorable to the non-moving party. In addition, the moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Id.* Claimant argues that the Department improperly disposed of genuine issues of material fact relevant to the issue of his employment, as discussed below.

A. Joint Employment Doctrine

Claimant contends that the Department should have applied the joint employment doctrine, in addition to the tests set forth in *Keil* and *Hofer*, when making a determination as to Claimant's employment status. Claimant asserts that summary judgment was inappropriate because genuine issues of material fact exist as to whether Claimant was jointly employed by both Charles Baker Farms and Charles Baker Trucking under this doctrine. Appellant's Brief at 19. According to the claimant, "joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, *both employers are liable for worker's compensation.*" Appellant's Brief at 28 (citing 5 *Larson's Worker's Compensation Law* § 68.01; *Bulgrin v. Madison Gas & Elec. Co.*, 373 N.W.2d 47 (Wis. Ct. App. 1985)) (emphasis added).

The South Dakota Supreme Court has applied the joint employment doctrine in cases where a claimant was working for two different employers. However, neither

of those cases concerned employees who worked for one employer for whom his duties would make him exempt from South Dakota's workers' compensation. *See Gulbrandson v. Town of Midland*, 36 N.W.2d 655 (S.D. 1949) (holding that both the town and county were responsible for workers' compensation benefits after a civilian was killed assisting the town marshal, who also served as the county's deputy sheriff, while he was engaged in duties that benefitted both entities); *see also Carpenter v. Rapid City Red Dogs, LLC*, 2008 S.D. 40, 751 N.W.2d 292 (holding that a professional indoor football player, who was seeking workers' compensation benefits after an injury, was *not* jointly employed by both the team and the indoor football league). However, in *Keil*, where the facts included an employee working for one employer who would be exempt from providing coverage and another employer who would not, the Court chose to quote the language of Professor Larson's treatise, which classified the overall nature of the claimant's duties, disregarding temporary departures, instead of applying the joint employment doctrine. *Compare Keil*, 355 N.W.2d at 527-28 (citing 1C Larson, *The Law of Workmen's Compensation* §53.40 (1982))[1] *with* 5 *Larson's Workers' Compensation Law* § 68.01 (entitled "Joint and Dual Employment Distinguished" and included in the larger "Joint and Dual Employment" chapter).

Logically, applying the test in *Keil*, derived from the language of Larson's treatise relating to alternating farm and nonfarm labor, instead of the joint employment doctrine, makes sense. When an employee performs duties for two businesses, one that would be exempt from providing coverage and one that would not be exempt, it would be difficult to apply the joint employment doctrine, which typically results in *both* employers being held liable. Here, Claimant suggests that, when applying the joint employment doctrine to an exempt agricultural laborer who is jointly employed by a nonexempt employer, the nonexempt employer necessarily assumes *sole* liability for workers' compensation. As Claimant points out, the seemingly unfair concept of forcing one entity to shoulder the entire cost of

[1] The chapters in Larson's treatise appear to have been renumbered, as this language now appears in a different Chapter. *See* 6 *Larson's Workers' Compensation Law* § 75.04 (2018) (entitled "Alternating Farm and Nonfarm Work" which is included in the larger "Farm Labor" chapter).

compensation to the exclusion of another exists under South Dakota's workers' compensation law.[2] However, applying such a concept to the scenario here would not be consistent with either the *joint* liability flowing from the joint employment doctrine, or the case law concerning the application of the agricultural exemption in cases involving exempt and nonexempt duties discussed above, wherein a determination is made as to an employee's *primary* employment.

When the decision in *Keil* was announced, the South Dakota Supreme Court was presumably aware of the joint employment doctrine, having considered the application of this doctrine in *Gulbrandson* over thirty years prior, but chose not to apply it to the agricultural worker scenario. In *Keil*, the Court acknowledged the dual employment scenario presented when a claimant performs tasks for an employer engaged in two separate businesses, but rejected the trial court's application of the dual employment doctrine, which is encompassed in the chapter of Professor Larson's treatise that discusses the differences between joint and dual employment:

> To get around this dilemma of dual employment in both a covered and an exempt business, the trial court found worker's compensation to attach whenever appellee was engaged in the covered enterprise. This cannot be. 'Employees and employers do not dart in and out of coverage with every momentary change in activity.'

Keil, 355 N.W.2d at 527 (quoting *Hawthorne v. Hawthorne*, 184 Neb. 372, 378, 167 N.W.2d 564, 567 (1969) and applying the "Alternating Farm and Nonfarm Work" chapter of Professor Larson's treatise, now numbered 6 *Larson's Workers' Compensation Law* § 75.04 (2018)); *compare* 5 *Larson's Workers' Compensation Law* § 68.06 (2018) (discussing dual employment, which places the cost of compensation on the employer for whom the employee was providing services at the time of the accident). Because Claimant's situation is factually the mirror image of *Keil*, this

[2] During oral argument, Claimant pointed out two examples of when an employer's insurer may be held responsible for a larger bill than they bargained for: (1) if an employee who holds two different jobs is injured at one, the employee's wages are aggregated and the insurer for the job where the injury occurred may be forced to pay out more in wages than what was reflected in the premiums paid for the employee; and 2) under the last injurious exposure rule, an insurance company may be required to pay for the entire cost of compensation for the aggravation of an injury that first occurred during a period of employment with a different employer. *See* SDCL 62-1-25; SDCL 62-6-15.

Court likewise declines to apply the joint employment doctrine here. Consequently, many of the disputed facts that Claimant asserts are material because of their relation to the joint employment doctrine, e.g., whether the Claimant was under simultaneous control of and simultaneously performing services for both employers, and whether there was a clear distinction between the record-keeping of the two businesses; may not be material in the same sense when applying the test set forth in *Keil* and *Hofer* to determine for which employer the Claimant devoted most of his time.

B. Applying the *Keil* and *Hofer* Test to the Facts of this Case

Because the joint employment doctrine is not applicable to this case, the facts Claimant alleges must be applied to the test set forth in *Keil* and clarified in *Hofer*, to determine if there are material facts in dispute as to whether Claimant was a farm laborer exempt from workers' compensation coverage. In evaluating the totality of the circumstances, a court must consider: (1) the specific duties of the employee; and (2) the nature of the employer's business. *Hofer*, 2015 S.D. at ¶ 20, 870 N.W.2d at 663.

In *Hofer*, the employee was a truck driver who hauled exclusively agricultural commodities for one employer, who had an exclusively agricultural operation. *Hofer*, 2015 S.D. at ¶ 21, 870 N.W.2d at 663. While the employee argued that his duties, which included driving a semi-truck, were not agricultural in nature, the Court held that hauling agricultural commodities for an agricultural operation fell under the definition of "farm or agricultural laborer," which includes "someone who engages in physical labor for a farming or agricultural operation." *Id.* at ¶ 26, 870 N.W.2d at 665. Here, Claimant admits that the tasks he performed would be classified as "farm labor," but argues he was primarily hired to work in the shop as a basic mechanic performing general maintenance on trucks and machinery. Appellant's Brief at 31. This is a distinction without a difference. As the Court ruled in *Hofer*, even if Claimant's duties are not directly concerned with the definition of agriculture, including "cultivating soil, harvesting crops, and raising livestock," his duties that relate to maintaining equipment owned by the farm would be considered "engag[ing]

in physical labor for a farm or agricultural operation," putting him squarely under the definition of "farm or agricultural laborer" when performing those tasks. *Hofer*, 2015 S.D. at ¶ 17, 870 N.W.2d at 663. While *Hofer* guides the court in defining what types of tasks fall within SDCL 62-3-15(2), its usefulness largely ends there.

Unlike *Hofer*, the employment structure in *Keil* is more analogous to the facts before this Court. In *Keil*, the employee worked for an employer engaged in two business entities, an agricultural operation and a small trucking company that "was not [an] incidental or necessary adjunct to the farm and ranch operation, but a separate and special business." *Keil*, 355 N.W.2d at 527-528. Here, like in *Keil*, Claimant works for Charles Baker, who is engaged in two distinct business entities, a farming operation and a trucking company. AR at 82; Baker Aff. ¶¶ 1-2. While the amount of overlap between the two businesses is disputed, that fact alone is not material to the test under *Keil* and *Hofer*. Charles Baker owns a trucking company that is not an incidental or necessary adjunct to the farm and ranch operation, but a separate business. Indeed, the trucking company is a registered LLC, engages in commercial trucking for other entities, and owns trucks and trailers that are commercially plated. Appellee CBT & Acuity's Brief at 17-18; *see* Baker Dep. at 31-33, CLMSJ-046.

As in *Keil*, Claimant asserts that there is conflicting testimony before this Court regarding how much time Claimant spent working for each business and for which business he was primarily hired. In *Keil*, the facts were presented at a trial, after which the court held that Keil was primarily employed as a commercial truck driver. *Keil*, 355 N.W.2d at 528. While Keil estimated that he spent 75% of his time driving a commercial truck, 20% of his time hauling for his employer's personal use, and 5% of his time on farm labor, the court noted that his employer offered no evidence to the contrary. *Id.*

Unlike *Keil*, the factual determination regarding Claimant's primary employment is before the Court on a motion for summary judgment. Nonetheless, summary judgment may be appropriate, even when the analysis includes a question of fact, if the facts are undisputed as to which business he devoted most of his time

and for which business Claimant was primarily hired. *See Hofer*, 2015 S.D. at ¶ 28, 870 N.W.2d at 665.

The material facts governing these questions are derived primarily from deposition testimony and interrogatory answers from Charles Baker, Claimant's deposition testimony, and testimony from other employees, some of whom perform tasks for both the farm and trucking companies. There is no dispute over the fact that Claimant did not have a CDL and did not drive any of the CBT semi-trucks. Therefore, if he could be construed to be an employee of Charles Baker Trucking, such employment would be based solely on the tasks Claimant performed in the shop relating to the CBT trucks and trailers.

It is also undisputed that CBT owns eleven semi-trucks and has eight over the road truck drivers. Baker Dep. at 20-22, CLMSJ-096. With the exception of one driver who resides in Murdo, and who, at times, parks and services his truck at the shop, the other seven drivers keep their trucks at their residences and service them on the road. Baker Dep. at 20-22. Baker explained that two of the other trucking semis are kept at the shop as spares in the event that a driver breaks down. *Id.* at 27. When that happens, he (or Cody or Travis, two farm employees who have CDLs) will take the spare truck to get the load, while the truck that broke down would be taken to a repair shop. *Id.* at 27, 34-35. The farm owns four semi-trucks that are not commercially plated, one of which was the truck Claimant was working on when the injury at issue in this case occurred. *Id.* at 26-28. CBT also owns 22 trailers, some of which are occasionally used on the farm to haul from the field to the farm for storage, or to an elevator or grain terminal. CBT's Answers to Claimant's Second Set of Interrogatories, CLMSJ-096. When questioned about whether Claimant worked on CBT trucks, Baker testified that Claimant might have helped change oil, but not by himself. Baker Dep. at 42-43. He further explained that Claimant may have worked on a truck if one of the drivers was in the shop. *Id.* at 43. With regard to how much time Claimant spent working on trucking trucks, Baker responded, "Very little." *Id.*

Travis Saunders, a full-time employee who had worked for Charles Baker Farms for eight years, was the primary farm employee who trained Claimant, a

process which took about a year. Saunders Dep. at 23-24. Travis mainly completed tasks for the farm, such as operating the farm machinery and trucks, planting and harvesting, maintaining farm equipment, and changing oil and greasing the equipment. *Id.* at 7-8. He would only work on the trucking company trucks if somebody came in over the weekend, but he never changed or repaired tires on these trucks. *Id.* at 9. Travis explained that his duties had very little overlap between the farm and trucking business, and that he, like Claimant, was paid only by the farm. *Id.* at 11.[3]

Travis estimated that Claimant spent 95% of his time in the shop. *Id.* at 23. According to Travis, Claimant changed oil only on farm trucks, not the trucking trucks, but he might have rotated tires on trucking trucks. *Id.* at 25. Claimant also kept the shop floor clean and would put tools away. *Id.* at 26. When asked whether the shop was a shared location for both businesses, Travis responded, "very little," referring to the fact that some trucking company trucks are parked there. *Id.* at 21. When asked to further explain this answer about the shop, Travis testified as follows: "It's for the farm, but they park the commercial trucks out there as a place to park them as opposed to parking them at the truck stop or on Main Street. But the shop is made - - is for the farm." *Id.* at 39.

LaTonya Erickson, the office manager for both businesses, likewise testified that the maintenance on the trucking company semi-trucks is seldom done at the shop. Erickson Dep. at 10. She testified that 99% of the time the truck drivers do their own oil changes at truck stops. *Id.* at 10-11. Aside from Claimant, the only other deposition testimony in the record came from Charles Buxcel, who does custom work for Charles Baker Farms, primarily haying and spraying. Buxcel Dep. at 8. He testified that while haying, Claimant has run rakes for him. *Id.* at 9. When asked what he knew about Claimant's duties, Buxcel responded: "Most of the time when I was out there, he was greasing equipment, combines, haying equipment, washing

[3] This may have changed in 2016. According to Charles Baker Trucking's Unemployment Contribution forms, Travis Saunders began receiving payment from the CBT during the third quarter of 2016. Claimant's Ex. X, CLMSJ-307.

them when you get done, if they get dirty. I know he was greasing some trailers, changing some oil, but I do not know what trucks he changed oil on. I think mostly everything I seen was farm." *Id.* at 12.

All of the above testimony clearly presents a consistent characterization of Claimant's work as that of a farm laborer, i.e., one who performed physical labor for the farm operation, who may *on occasion* perform some maintenance on a trucking company truck or trailer. Claimant's testimony as to the nature of the work he performed is consistent with that described by the other witnesses. Bangtson Dep. at 14-17, 35 (working on vehicles and equipment, cleaning the shop and tools, haying, and moving farm equipment when needed). Claimant's testimony diverged from that offered by the other witnesses only with regard to his perception of how his duties related to both the farm and the trucking businesses.

When asked by whom he was employed, the trucking company or the farm operation, Claimant's response was, "I thought it was both since I did maintenance." Bangtson Dep. at 13. But when asked from which entity he got his checks, he stated that he did not remember. *Id.* When questioned more specifically about the equipment he worked on, Claimant stated, "I worked on everything the farm owned, everything the trucking company owned." *Id.* at 16. But when asked to clarify, given his prior answer about only coming into contact with three semis that the trucking company owned, Claimant explained that the only trucking semis he would have worked on were the "ones if he came in trading off, I cleaned those up and they can sell them."[4] *Id.* at 16. When asked what percentage of his time he spent working on trucking company equipment, as opposed to farm equipment or doing farm work, Claimant did not offer a percentage, responding, "I never did a lot of farm work. I mostly did mechanical." *Id.* at 14. Claimant was then asked about the shop being the principal place of operation for the farm, to which Claimant stated, "I thought it was the shop for everything." *Id.* Claimant offered no further specifics as to why he held this belief.

[4] Claimant's prior reference actually pertained to contact with three farm-owned semis. Bangtson Dep. at 14.

Claimant was asked a second time to estimate the breakdown between his work for the two entities. The question referenced the allegation in Claimant's Petition that greater than 75% of his work was as a mechanic, and specifically asked what percentage of that work was for the trucking company. Claimant's response was, "it was split, pretty much a lot of it was split." *Id.* at 29. Claimant was then asked if he agreed that less than five percent of the work he did was for the trucking company, and he responded, "I don't know." *Id.* Finally, when asked whether the various tasks related on page 2 of his Petition could all have related to the farm equipment, Claimant stated, "I did everything to all of it, as far as I know." *Id.* at 40. But when asked if he could remember what he worked on, Claimant answered, "I don't remember what I worked on." *Id.* That exchange was followed by a question as to how he could then say that his work related to both operations, to which Claimant responded, "I don't know." *Id.* at 40.[5]

When responding to a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts, showing that there is a genuine issue for trial." SDCL 15-6-56(e). Here, while Claimant has generally asserted that he was hired for both entities, he has not produced any specific facts to support this assertion. *See Karst v Shur-Co.*, 2016 S.D. 35, ¶ 15, 878 N.W.2d 604, 612 (explaining that "[a] showing is not sufficient unless 'the party challenging summary judgment substantiate[s its] allegations with sufficient probative evidence that would permit a finding in [its] favor on more than mere speculation, conjecture, or fantasy"); *North Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 21, 873 N.W.2d 57, 63 (holding that "[m]ere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment.") (other citations omitted).

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[5] Outside of his deposition testimony, Claimant points to overlap between the two businesses in documentary evidence, particularly an AFLAC insurance policy carried by Charles Baker Trucking, which included Claimant. Appellant's Brief at 22; Claimant's Ex. O, CLMSJ-162. This was explained by the officer manager for the business, in that AFLAC had suggested one policy rather two. AR at 218-19; Erikson Aff. ¶4.

When viewed in a light most favorable to Claimant, the specific evidence in the record to which he points, at best, would support a finding that Claimant performed *some* tasks on CBT trucks or trailers that may *occasionally* be stored or used on the farm. But, like the employers in *Keil*, he has failed to produce any specific evidence (aside from his general assertions) to refute the testimony offered by Appellees, that overall, Claimant did very little work for the trucking operation. Nor has Claimant produced any specific evidence to refute the testimony that the shop, where he spent most of his time, was primarily used for the farm vehicles and equipment, and only occasionally for a CBT truck or trailer. The only reasonable inference this Court can draw from the evidence in the record is that, while he *occasionally* performed tasks benefitting the trucking operation, *most* of Claimant's work was for the farm operation, for which he was *primarily* hired. Counsel for Claimant conceded as much at oral argument, agreeing that she would not say Claimant is primarily a trucking employee, and that most of his tasks were related to the farm.

As the Court held in *Keil*, "[o]ccasional work outside of an employee's principal work did not change the character of employment to that of farm laborer." *Keil*, 355 N.W.2d at 527 (internal citation omitted). The reverse is true here. Therefore, the Court finds no err in the Department's ruling as a matter of law, that Claimant was a farm laborer falling within the exemption of SDCL 62-3-15(2).

II. EVEN IF CLAIMANT WAS AN EXEMPT AGRICULTURAL LABORER UNDER SDCL 62-3-15(2), WAS HE, NONETHELESS, ENTITLED TO WORKERS' COMPENSATION COVERAGE BECAUSE HIS EMPLOYER PARTICIPATED IN THE FEDERAL H-2A VISA PROGRAM?

In its Decision and Order, the Department declined to address whether Charles Baker Farms waived the agricultural exemption by hiring temporary seasonal migrant workers under the federal H-2A Visa Program. AR at 437. However, the Department did note that nothing in South Dakota workers' compensation law provides for a waiver of the agricultural exemption based on federal law, and held

that "[i]f Claimant has a remedy under federal law, he must pursue it in federal court." [6]

In the appellate briefs submitted by both CBF and Claimant, and during oral arguments before this Court, both Claimant and Charles Baker Farms agreed that this Court has jurisdiction over the issue of whether the federal regulations governing the H-2A Visa Program preempt the state law exemption in SDCL 62-3-15(2). Additionally, both parties agreed that the federal regulations preempt state law in certain scenarios, as discussed further below.

A. Overview of the Federal H-2A Visa Program

According to the Department of Labor, Wage and Hour Division's (WHD) Fact Sheet, "[t]he Immigration and Nationality Act authorizes the lawful admission of temporary, nonimmigrant workers (H-2A workers) to perform agricultural labor or services of a temporary or seasonal nature." AR. at 268. In order to participate in this program, prospective employers must comply with a number of requirements under the program. Below is a brief overview of the pertinent regulations.

Before filing an Application of Temporary Employment for H-2A foreign workers, (Form ETA-9142A or H-2A application), an employer interested in hiring H-2A workers is required to submit a "job order," (Form ETA-790 or job order), to the State Workforce Agency (SWA) serving the area of intended employment. 20 C.F.R. § 655.121(a) (2010). The job offer included in the job order "must *offer to U.S. workers no less than the same benefits,* wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers." 20 C.F.R. § 655.122(a) (2010) (emphasis added). Every job order must include the approved wage-rate and the minimum benefits enumerated in 20 C.F.R. § 655.122(d)-(q), including housing, meals, transportation, and *workers' compensation.* 20 C.F.R. § 655.122(c) (2010)

[6] In so holding, the Department referenced two federal cases, neither of which this Court finds to be pertinent to the issues at hand for the reasons set forth on pages of 24-25 of Appellee CBF's Brief. Both sides have agreed that there is no private right of action under the Immigration and Nationality Act for the type of claim being asserted here by Claimant, i.e., workers' compensation benefits afforded to a corresponding employee as delineated under state workers' compensation statutes.

(emphasis added). Once submitted, the SWA attempts to recruit U.S. workers to fill the job positions and the employer may submit an H-2A application. 20 C.F.R. § 655.121(c) (2010); 20 C.F.R. § 655.130 (2010).

In order to approve an application for H-2A workers under the program, the Secretary of Labor must certify, and the employer must prove, that: (1) there are not sufficient U.S. workers to perform the work involved in the petitions, and (2) the employment of an alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. § 1188 (2000); 20 C.F.R. § 655.0 (2010); 20 C.F.R. § 655.103 (2010). Employers fulfill this obligation by accepting referrals from the SWA, advertising the position in a newspaper, contacting formerly employed U.S. workers, and engaging in "other positive recruitment" as defined in the subpart. *See generally* 20 C.F.R. § 655.150 (2010) through 20 C.F.R. § 655.158 (2010) (describing the post-approval process). Additionally, in the H-2A application, the employer must make assurances that he or she will follow the requirements of the H-2A program (Subpart B), which includes continuing to recruit U.S. workers through the SWA and other advertising until 50% of the period of the work contract has passed. 20 C.F.R. § 655.135 (2010).

Once an H-2A application is approved, it may be subject to revocation and/or the employer may be subject to periods of debarment for program violations. 20 C.F.R. § 655.181 (2010); 20 C.F.R. § 655.182 (2010). Violations include, but are not limited to, fraud or misrepresentation in the application process or "failure to pay or provide the required wages, benefits or working conditions to the employer's H-2A workers and/or *workers in corresponding employment.*" *Id.* (emphasis added). Complaints arising under Subpart B must be filed through the Job Service Complaint System or, in some cases, to the Department of Justice. 20 C.F.R. § 655.185 (2010).

B. Requirement to Provide Workers' Compensation

Appellee Charles Baker Farms began employing South African workers through the H-2A program in 2014 (period of employment from 3/15/14-12/15/14) and continued the same in 2015 (period of employment from 3/15/15-12/15/15). Appellee CBF's Brief at 16; Claimant's Ex. Z1(a), CLMSJ-310; Claimant's Ex. Z3(a), CLMSJ-

378. When asked for proof of workers' compensation coverage on the applications submitted for *Charles Baker Farms*, Mr. Baker provided the insurance policy that covers his trucking employees employed by *Charles Baker Trucking*. Appellee CBF's Brief at 16-17; *see also* Claimant's Ex. Z1(b), CLMSJ-352; Claimant's Ex. Z3(b), CLMSJ-425. Charles Baker Trucking also submitted an application for H-2A workers in 2014 (period of employment from 11/1/14-4/1/15). Appellee CBF's Brief at 20; Claimant's Ex. Z2(a), CLMSJ-354.[7]

Mr. Baker was required to provide proof of workers' compensation insurance because that benefit is included in the minimum benefits, wages, and working conditions that must be provided in the job order accompanying an H-2A application. *See* 20 C.F.R. § 655.122(a)-(e) (2010). Specifically, 20 C.F.R. § 655.122(e)(1) provides:

> The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment.[8]

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[7] Proof of workers' compensation insurance was not included in the application packet supplied in Claimant's Ex. Z2(a) for Charles Baker Trucking. However, because proof of workers' compensation is required for the application and Mr. Baker maintained a workers' compensation policy for his trucking company, a fair inference is that he likely offered the same policy as proof for the CBT application, although such documentation is not part of the record currently before this Court. Additionally, Mr. Baker indicated that he had workers' compensation insurance that covered the workers in the application. *See* Claimant's Ex. Z2(a), CLMSJ-360. There is no documentation confirming that the application was withdrawn, so its status is unknown at this point.

[8] Such language evinces an express intent to preempt exemptions for agricultural laborers in State workers' compensation laws for both H-2A and corresponding domestic workers who fall within the specific parameters of these H-2A regulations. *See English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (describing the different types of preemption and explaining that "[c]ongress can define explicitly the extent to which its enactments pre-empt state law"). In the alternative, this language presents a clear scenario of conflict preemption, as it would be impossible to abide by both the State law exemption for agricultural laborers as applied to H-2A and corresponding domestic workers without violating federal law. *Id.*

One of the main purposes of the INA is that "U.S. workers rather than aliens be employed whenever possible," so the subparts relating to temporary employment of foreign workers "shall be construed to effectuate the purpose." 20 C.F.R. § 655.0(a)(3) (2010). "Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of *domestic workers similarly employed* and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers." *Id.* (emphasis added). The wording of the above provisions and the WHD's Fact Sheet shows that H-2A regulations setting minimum wages, benefits, and working conditions apply to both H-2A workers and all U.S. workers, recruited or already employed by the employer, who are in *corresponding employment*. *See* Part 2A, *supra*; AR. 268 (emphasis added). Indeed, "failure to pay or provide the required wages, benefits, or working conditions to the employer's H-2A workers and/or workers in *corresponding employment*" is considered a violation that may subject the employer to disbarment. 20 C.F.R. § 655.182(d)(1)(i) (emphasis added).

"Corresponding employment" is defined as:

> The employment of workers who are not H-2A workers by an employer who has an approved H-2A Application for Temporary Employment Certification in any work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof.

20 C.F.R. § 655.103(b) (2010). Thus, in order to be engaged in corresponding employment and subject to the same minimum benefits, wages, and working conditions required for H-2A workers: (1) there must be an employment relationship between the worker and the employer (employment of workers... by an employer); (2) the employer must have an approved H-2A Application; (3) the work performed must correspond to the work included in the job order or to any agricultural work performed by the H-2A workers; and (4) the work must be performed during the validity period of the job order or an approved extension.

C. Was Claimant in "Corresponding Employment" such that he should have been covered by Workers' Compensation, as required by the H-2A Program?

i. Validity Period

Initially, Appellee Charles Baker Farms agreed that workers' compensation is required for H-2A workers, but seemed to argue that the same is not required for his U.S. workers, or that because he was not aware of that requirement, he could not therefore have voluntarily waived the exemption under SDCL 62-3-15(2). Appellee CBF's Brief at 17, 22. However, during oral arguments, Appellee Charles Baker Farms conceded that workers' compensation is required for both H-2A employees and U.S. domestic workers in corresponding employment *during the validity period of the job order.*

While validity period is not currently defined under the Subpart B, "job order" is defined as:

> The document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its inter- and intra-state job clearance systems based on the employer's Agricultural and Food Processing Clearance Order (Form ETA-790), as submitted to the SWA.

Id.[9] The job order document, itself, does not mention a "validity period," but does include the "anticipated period of employment" and a reference to "dates of need." *See generally* Claimant's Ex. Z1(a); 20 C.F.R. § 655.121 (2010). Additionally, the H-2A application, which is submitted with the job order, includes a space for the "validity period" of the application's certification that matches the "anticipated period of employment" included on the job order. *See* Claimant's Ex. Z2(a), CLMSJ-356. Thus, the regulations under the H-2A program apply to U.S. workers (1) in "corresponding employment" under the definition provided above; (2) during the anticipated period of employment listed on the job order or the validity period/period of intended need on the H-2A application form.

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[9] Appellee CBF referenced a definition for "validity period" in 20 C.F.R. § 655.1310, the text of which has been suspended since June 29, 2009. This statute defined the term as the "time between the beginning and ending dates of certified employment." 20 C.F.R. § 655.1310 (2009).

Claimant was injured on March 11, 2015. AR. at 3. The only H-2A application that would encompass that date is the one for Charles Baker Trucking, with a validity period of 11/1/14-4/1/15. Claimant argues that other validity periods approved for Charles Baker Farms are pertinent to whether coverage exists for Claimant, even though his injury did not occur within these periods. Appellant's Reply at 14-15. Counsel for Claimant asserted during oral argument that working during a validity period in corresponding employment creates an employment contract that continues outside of the validity period. While Claimant is correct in stating that being in corresponding employment during a validity period creates a contract, the use of the word "validity period" in the definition of "corresponding employment" restricts the enforceability of the contract to the validity period only. 20 C.F.R. § 655.122(q) (2010) ("The employer must provide... to a worker in corresponding employment no later than on the day the work commences, a copy of the work contract between the employer and the worker... in the absence of a separate, written work contract... the required terms of the job order and the [H-2A application] will be the work contract."); 20 C.F.R. § 655.103 (2010). Also, as provided in the H-2A application acceptance letter, in accordance with 20 C.F.R. § 655.122(e)(2), to receive labor certification, the employer must submit evidence that he or she has obtained workers' compensation coverage "for the entire period of need for [the employers'] employees." Claimant's Ex. Z1(b), CLMSJ-349. The Claimant did not provide any legal authority holding otherwise, so the language of the rules will control.

This Court thus concludes that the only validity period that is material to determine coverage in this case, is the one approved in Charles Baker Trucking's H-2A Application. If the other factors for "corresponding employment" are satisfied with regard to this application, Claimant may be entitled to workers' compensation as his injury occurred during the validity period of this job order.

ii. Approved Application

With regard to the application for Charles Baker Trucking, Appellee Charles Baker Farms argues that Claimant was not required to be covered by workers' compensation during that period because: (1) no H-2A workers were hired by Charles

Baker Trucking during that period; and (2) the application for Charles Baker Trucking during that period was withdrawn. Appellee CBF's Brief at 20.

First, the regulations do not require an employer to actually hire H-2A workers in order for the mandatory minimum wages, benefits, and working conditions to take effect for employees in corresponding employment. Instead, an employer is required to "offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is *offering, intends to offer, or will provide to H-2A* workers." 20 C.F.R. § 655.122(a) (2010). For a U.S. worker to be in "corresponding employment" the employer need only have "an approved H-2A Application." 20 C.F.R. § 655.103 (2010). Charles Baker Trucking's H-2A application is included in Claimant's Exhibit Z(2), but the exhibit does not include the written acceptance letter that is included with the other two Charles Baker Farm's applications, submitted both before and after Charles Baker Trucking's application. Claimant's Ex. Z1(b), CLMSJ-345; Claimant's Ex. Z3(b), CLMSJ-417. Nonetheless, the documentation does show that Charles Baker Trucking's application was certified. Claimant's Ex. Z2(a), CLMSJ-373. Therefore, while the written notice of acceptance contemplated under 20 C.F.R. § 655.143 is not contained in Claimant's Exhibit Z(2), it would appear that Charles Baker Trucking had an approved application for the validity period of 11/1/14-4/1/15. *See* 20 C.F.R. §655.162 (2010).

While Charles Baker Trucking's H-2A application was presumably approved, Appellees have not submitted documentation showing that it was withdrawn. Mr. Baker provided an affidavit and correspondence from the entity who assisted Mr. Baker with his H-2A applications stating, "*as you can see* we withdrew the application from *Homeland Security*." AR. at 258-261 (emphasis added). However, while this correspondence impliedly refers to supporting documentation, such was not provided, nor did this correspondence include the date of the purported withdrawal.

With an approved application, Charles Baker Trucking would have been required to provide workers' compensation benefits to the employees in corresponding employment. Once an application is withdrawn, "the employer is still obligated to

comply with the terms and conditions of employment contained in the [H-2A Application] with respect to workers *recruited* in connection with that application." 20 C.F.R. § 655.172(b) (2010) (emphasis added). Notably, this regulation does not refer to workers in "corresponding employment" in its directive as to whom employers are still obligated after an application is withdrawn. Therefore, while it does not appear that an employer is obligated to comply with the terms and conditions in the H-2A application with respect to the existing employees in corresponding employment after an application is withdrawn, such workers would nonetheless have been entitled to receive the minimum wages and benefits (including workers' compensation) up to the time of the withdrawal.

While it is undisputed that Claimant's injury fell within the validity period of Charles Baker Trucking's application for H-2A workers, it is not clear from the facts in the record whether it was in fact withdrawn, or if withdrawn, what date the withdrawal occurred. Thus, there are disputed, or at least undetermined material facts concerning the status and timeline of Charles Baker Trucking's H-2 Application which must be determined at the agency level.

iii. Employment Relationship

Appellee Charles Baker Farms also argues that Claimant was not required to be covered by workers' compensation during the validity period of Charles Baker Trucking's H-2A Application because Claimant was never an employee of Charles Baker Trucking. Appellee CBF's Brief at 20. Claimant has consistently argued that he is an employee of both Charles Baker Farms and Charles Baker Trucking. Appellant's Brief at 19. In order to determine if Claimant was an employee of Charles Baker Trucking under the company's H-2A Application, the Court must look to the definitions contained in the regulations governing the H-2A program.

Under 20 C.F.R. § 655.103, an employee is defined as:

> A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the

> instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

An employer is defined as:

> A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:
>
> (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;
>
> (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H–2A worker or a worker in corresponding employment; and
>
> (3) Possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).

Id. Since this issue was not briefed, the question of whether Claimant was an employee of Charles Baker Trucking, for purposes of the H-2A regulations, is a question of fact best left to the agency. Notably, though, because of the structure of Charles Baker Trucking and Charles Baker Farms, with Mr. Baker the as the sole person in charge of hiring, firing, and controlling the manner and means by which work is accomplished, it is entirely possible that Claimant could be an employee of Charles Baker Trucking under the H-2A regulations, even if Claimant is found to be primarily employed by Charles Baker Farms as an agricultural laborer for purposes of the state law exemption. AR. at 83; Baker Aff. ¶¶ 1-2.

Based upon the record before the Court, whether an employment relationship existed between Claimant and Charles Baker Trucking under the federal definitions set forth above is a materially disputed fact. Therefore, this factual issue must also be remanded back to the Department for further determination.[10]

[10] In the event a factual determination is made on remand that Charles Baker Trucking's H-2A application was in fact withdrawn before Claimant's injury, this issue becomes moot.

iv. Work Contained in the Job Order

Claimant argues that he completed tasks included in the job order for Charles Baker Trucking's H-2A Application during the validity period. Appellant's Reply at 12. The job order was seeking employees to "haul agricultural commodities to management locations, storage facilities, and grain elevators until April. *Employees will be required to do routine maintenance and clean equipment after use.*" Claimant's Ex. Z2(a), CLMSJ-357. It is undisputed that Claimant did or likely would have completed some of the work included in the job order. Mr. Baker stated that performing routine maintenance and cleaning equipment were duties that Claimant performed at the shop in Murdo. *See* Baker Dep. at 34-35. The job order lists the address for the shop as the place where the worksite is located. Claimant's Ex. Z2(a), CLMSJ-356. Thus, provided that CBT's application was not withdrawn before Claimant's date of injury and Claimant is found to be an employee of Charles Baker Trucking as defined under the H-2A regulations, Claimant would have been in corresponding employment and entitled to workers' compensation benefits because he completed work included in the job order during the validity period.

v. Did Charles Baker Trucking "Opt In" to the South Dakota Workers' Compensation Act?

The parties agreed at oral argument before this Court that the federal H-2A regulations would preempt the state law exemption in SDCL 62-3-15(2) and require workers' compensation coverage for agricultural workers in corresponding employment *during the validity period* of the H-2A application. By providing assurances that he would provide workers' compensation and offering proof of such a policy as required by the federal rules, Mr. Baker would have placed himself under the provisions of the workers' compensation title pursuant to SDCL 62-3-17, by insuring those employees in corresponding employment, even if those employees are otherwise exempt under SDCL 62-3-15.

D. Conclusion

Disputed issues of material facts exist regarding whether Charles Baker Trucking withdrew his approved H-2A application prior to the time of Claimant's

injury and whether Claimant would have been considered an employee of Charles Baker Trucking under the H-2A regulations. This issue is therefore remanded back to the Department for further findings. If the Department finds that the approved application was not in fact withdrawn prior to Claimant's injury, and that Claimant was considered an employee of Charles Baker Trucking under the H-2A regulations, then Claimant was in corresponding employment and entitled to workers' compensation benefits.[11]

III. DOES SDCL 62-3-15 VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES AND SOUTH DAKOTA CONSTITUTIONS?

The Department declined to rule on the constitutional issue raised by the Claimant, stating as follows: "Since the Department is not able to adjudicate the constitutionality of SDCL 62-3-15, the Circuit Court is authorized by SDCL 1-26-36 to make its own findings on the constitutionality of SDCL 62-3-15 should the need arise in the future." AR. at 436. This Court will thus rule upon this issue, which would have been reviewed de novo in any event.

"In South Dakota, agricultural or farm laborers are exempted from workers' compensation protection by SDCL § 62-3-15(2)." *Hofer v. Redstone*, 2015 S.D. 75, ¶ 13, 870 N.W.2d 662, 662. SDCL 62-3-15 provides:

> Except as provided in §§ 28-1-59, 62-3-16, and 62-3-17, this title does not apply to:
>
> (1) Domestic servants unless working for an employer for more than twenty hours in any calendar week and for more than six weeks in any thirteen-week period; or
> (2) Farm or agricultural laborers; or
> (3) Work activity participants.

Claimant alleges this statute is unconstitutional, on the grounds that it violates the Equal Protection and Due Process Clauses of the State and Federal Constitutions.

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[11] If Claimant qualifies as a corresponding employee under an approved H-2A application, he may have to pursue other remedies pursuant to SDCL 62-3-11 if CBT failed to follow through and insure its corresponding workers by one of the methods provided in SDCL 62-5-1 to 62-5-5. This issue is not currently before this Court.

However, Claimant's Brief and Reply only provide argument under an equal protection analysis, with one lone sentence and citation addressing due process. Appellant's Brief at 51. As the due process issue was not properly noticed in Appellant's Statement of Issues, nor was it properly briefed, this Court deems that issue to be waived. *See Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 42, 915 N.W.2d 707, 719. The Court will thus address only the equal protection issue, which was properly noticed and fully briefed by the parties.

First, it should be noted that, South Dakota, "any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles." *Accounts Mgmt., Inc. v. Williams*, 484 N.W.2d 297, 299 (S.D. 1992) (citations omitted). Further, SDCL 62-3-15 does not encompass a fundamental right, a suspect classification, or an intermediate scrutiny classification, so the rational basis test is applicable. *State v. Geise*, 2002 S.D. 161, ¶ 29, 656 N.W.2d 30, 40.[12]

"The equal protection clauses embodied in the Fourteenth Amendment to the United States Constitution and in Art. VI, § 18 of the South Dakota constitution guarantee equal protection of the law for all citizens of the state." *Id.* at ¶ 30, 656 N.W.2d at 40. In considering a claim that a statute violates equal protection, the South Dakota Supreme Court applies a two-part test: (1) whether the statute establishes arbitrary classifications among citizens; and (2) whether a rational relationship exists between a legitimate legislative purpose and the classification created. *In re Davis*, 2004 S.D. 70, ¶ 5, 681 N.W.2d 452, 454. Further, the legislature does not need to "actually articulate at any time the purposes or rationale supporting its classification." *In re Z.B.*, 2008 S.D. 108, ¶ 9, 757 N.W.2d 595, 600 (citations

[12] In both federal and state equal protection analysis, there are three tests to be applied depending upon the nature of the interest involved. *Geise*, 2002 S.D. 161 at n.4. First, the strict scrutiny test applies only to fundamental rights or suspect classes. *Budahl v. Gordon and David Associates*, 287 N.W.2d 489 (S.D.1980). Second, the intermediate or substantial relation test applies to legitimacy and gender. *See State ex rel Wieber v. Hennings*, 311 N.W.2d 41, 42 (S.D.1981); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Lastly, the rational basis test applies to all other classes. *Eischen v. Minnehaha County*, 363 N.W.2d 199, 201 (S.D.1985) (citations omitted).

omitted). "In an equal protection challenge, '[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it." *Id.* at ¶ 5. "[S]etting classification is for the legislature and [the Court] will not interfere 'unless the classification is clearly arbitrary and unreasonable.'" *Geise*, 2002 S.D. at ¶ 29, 656 N.W.2d at 40.

When applying the first prong, the Court looks to see if SDCL 62-3-15 applies equally to all people. *Geise*, 2002 S.D. at ¶ 31, 656 N.W.2d at 40 (other citations omitted). Claimant argues that SDCL 62-3-15 creates arbitrary sub-sets of agricultural employees that lack a rational relationship to any legitimate legislative purpose. Appellant's Reply at 20. For instance, claimant contends that SDCL 62-3-16, combined with SDCL 62-3-15(2), treats different sub-sets of agricultural employers differently because SDCL 62-3-16 requires insurance coverage for agricultural work involving the operation of threshing machines, grain combines, etc., but the same is not required for other farm or agricultural work under SDCL 62-3-15. Appellant's Brief at 50. Claimant likens this comparison to a New Mexico Supreme Court case that struck down the state's agricultural exemption statute as a violation of the equal protection clause of New Mexico's Constitution. *Id.* at 49 (citing *Rodriguez v. Brand West Dairy, et al.*, 378 P.3d 13 (N.M. 2016)). However, the situation in *Rodriguez* is very distinct from the arguably "arbitrary" examples that the Claimant provided.

In *Rodriguez*, the Court struck down the state's agricultural exemption statute because the state's lower appellate courts had construed the term "farm or ranch laborer" in such a way that it distinguished between agricultural laborers who stack onions in crates inside a shed and those who retrieve the same onions from the field. *Id.*; *see also Holguin v. Billy the Kid Produce, Inc.*, 795 P.2d 92 (N.M.1990). While harvesting honey and maintaining a compost pile were considered farming labor, sorting vegetables was not. *Rodriguez*, 378 P.3d at 22 (other citation omitted). Certainly, separating exempt employees from non-exempt employees by the location where a function is performed, without more, could be construed as an arbitrary distinction. Additionally, because New Mexico has another exemption that applies to

operations employing fewer than three people, thereby exempting 92.5% of farms from coverage, the court deemed the additional agricultural exemption to be so narrow and unnecessary that it amounted to an arbitrary classification. *Id.* at 32.

Conversely, South Dakota's exemption is not so narrow or unnecessary that it can only be construed as a creation of arbitrary sub-sets of classifications. Equal protection of the law requires that the rights of every person must be governed by the same rule of law, *under similar circumstances. Geise*, 2002 S.D. 161 at ¶ 32 (emphasis in the original) (other citations omitted). Equal protection does not require that all persons be dealt with identically, but it does require a distinction to have some relevance to the purpose for which the classification is made. *Id.* Claimant incorrectly argues that the distinctions made in SDCL 62-3-15 and 62-3-16 are arbitrary because there is no rational reason for agricultural workers to be treated differently due to the types of machines they are operating. But, as Appellee CBF points out, SDCL 62-3-16 acts as an exception to the agricultural exemption for commercial harvesting businesses. Appellee CBF's Brief at 12. This exception in SDCL 62-3-16 draws a distinction between employees who are doing work for the employer's personal agricultural operation (or as exchanged labor between farmers) and those who are completing work for others in a commercial business.[13] A rational reason for this division could be the ability of the commercial business to more easily pass the costs of coverage on to its customers. Appellee CBF's Brief at 12.

Additionally, under the second prong of the test, there must be a rational relationship between the reason for the classification and a legitimate state interest.

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[13] SDCL 62-3-16 provides: The provisions of this title, not inconsistent with the provisions of this section, apply to the business of operating threshing machines, grain combines, corn shellers, cornhuskers, shredders, silage cutters, and seed hullers for profit, but do not apply to the operation of any thereof by the owner thereof for the threshing, combining, corn shelling, cornhusking, shredding, silage cutting, or seed hulling of the owner's grain crops, nor to any operations in the nature of exchange of work between farmers, nor to persons who are not generally engaged in the operation of such machines for commercial purposes. Before any person engaging in such business, and being under the provisions of this title, shall operate any such machine, the person shall secure liability under this title as provided in §§ 62-5-1 to 62-5-5, inclusive. Any contract by any such person for threshing or combining of any grain, corn shelling, cornhusking, shredding, silage cutting, and seed hulling by machinery without first having procured and filed such policy or such certificate, is null and void, and no compensation is recoverable under the contract.

Requiring workers' compensation insurance for agricultural workers whose employers are better able to pass the costs of coverage on to its customers, but not for those employers who would have a harder time passing those costs, serves the legitimate interest of protecting the non-commercial part of the agricultural industry. Thus, the South Dakota's workers' compensation classification discussed above, fulfills both prongs of the equal protection analysis under South Dakota Law and does not present the same narrow and arbitrary issues as those in *Rodriguez.*

Claimant also argues that the definition of "farm or agricultural laborer" in SDCL 62-3-15(2), as defined in *Hofer*, creates an arbitrary classification by exempting from coverage workers who engage in physical labor for a farming or agricultural operation, but providing coverage for those who perform administrative tasks for the same operation, i.e., the bookkeeper. Appellant's Brief at 50. First, it is important to note that the South Dakota Supreme Court has not had the occasion to apply the *Hofer* definition to a bookkeeper employed by a farming operation. Second, whether or not a bookkeeper would fall within the exemption in SDCL 62-3-15(2) is not a question currently before this Court. Nonetheless, the Court will address this theoretical argument posed by Claimant.

South Dakota Courts, unlike *Rodriguez*, have not interpreted the agriculture exemption so narrowly as to create subsets of similarly situated employees. In *Rodriguez*, the lower courts defined a "farm or ranch laborer" as someone whose primary responsibilities are performed *on the farming premises* and is an *essential part of the cultivation of the crop. Rodriguez*, 378 P.3d at 22 (emphasis added). This resulted in an arbitrary classification that separated similarly situated employees, who are both engaging in physical labor for the same agricultural enterprise, by the location where the labor was performed. *Id.* (discussing *Holguin v. Billy the Kid Produce, Inc.*, 795 P.2d 92 (N.M.1990), where the New Mexico Court of Appeals held that an employee who harvested onions was exempted from workers' compensation coverage, whereas someone who sacks those same onions in an onion shed was not exempt from coverage). The definition of "farm or agricultural laborer" announced in *Hofer* does not create this type of distinction. Rather, agricultural laborers who

perform physical labor for an agricultural enterprise are exempt, even if the duties are performed off the farm premises (trucking for a farming operation) or do not include cultivating a crop (working with ranch animals). *See generally Hofer,* 2015 S.D. 75, 870 N.W.2d 659. South Dakota courts have not interpreted the statutory exemption for "farm or agricultural laborers" in a way that would create an arbitrary classification among similarly situated employees engaging in physical labor for an agricultural operation. Thus, Claimant's challenge fails under the first prong of the equal protection analysis.

Moreover, even if we presume that a bookkeeper employed by an agricultural employer does not fall within the exemption in SDCL 62-3-15(2) and is therefore covered under the workers' compensation statutes, while an employee who engages in the physical labor for the same agricultural enterprise is not, there are rational explanations for such a distinction that may serve a legitimate purpose. The legislature is not required to treat all employees in the same manner merely because he or she is in the same industry. State's Amicus Brief at 9. Instead, as stated above, equal protection of the law requires that the rights of every person must be governed by the same rule of law, *under similar circumstances. Geise*, 2002 S.D. at ¶ 32, 656 N.W.2d at 41 (emphasis in the original) (other citations omitted). Here, if courts did make a distinction, under the agricultural exemption, between an employee who drives a tractor and a bookkeeper who performs administrative tasks, that distinction may be appropriate since the duties that the employees perform do not cause them to be "similarly situated." Certainly a bookkeeper for a farming operation is more similarly situated to bookkeepers in other industries who are covered by workers' compensation, than to an agricultural laborer who is exempt from coverage. Even though both may be employed by an agricultural employer, they are not necessarily employed under similar circumstances. So long as there is a rational reason to treat them differently that is related to a legitimate purpose, there is no equal protection violation.

Lastly, Claimant argues that "excluding from coverage a subset of workers in one of the most hazardous of all occupations is directly in opposition to the legitimate

state interest of the workers' compensation act." Appellant's Brief at 51. While SDCL 62-3-15(2) may not serve the overall purpose of the workers' compensation act, it may serve as a legitimate cost containment measure for the farming operations that support the agricultural industry in South Dakota. The South Dakota Supreme Court, on several occasions, has recognized the importance of agriculture to the general welfare of the state, which is certainly a legitimate state interest. *Geise*, 2002 S.D. at ¶ 34, 656 N.W.2d at 41. The Supreme Court has indicated its approval of statutes that apply specific restrictions to the agricultural industry and those that give the industry special benefits. *Id.* at ¶ 34-35, 656 N.W.2d at 41-42. The equal protection test requires classifications to have a relevant purpose and a rational relationship to a legitimate state interest. There is no requirement that a classification be drawn to serve *all* legitimate interests.

While the agricultural exemption, as it is written, may not be the most inclusive or best way to address the needs of the public or the agricultural industry, the statute does not have to be perfect. The United States Supreme Court has stated:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'

Dandridge v. Williams, 397 U.S. 471, 485 (1970) (citations omitted). Claimant offers several policy reasons that may support a change to the statute. However, those are arguments are best suited for the legislature, as they do not rise to the level of arbitrariness or illegitimacy that would support a finding of unconstitutionality.[14]

[14] Over thirty appellate courts at both federal and state levels have ruled that agricultural exemptions in workers' compensation statutes do not violate the Equal Protection Clauses of the relevant constitutions. *See* State's Amicus Brief at 7, n. 2 (listing the citations to the referenced cases).

As shown above, the classifications under SDCL 62-3-15(2) were created for relevant reasons that are rationally related to legitimate state interests. Claimant failed to show that there is no reasonable doubt that SDCL 62-3-15 violates fundamental constitutional principles, nor did he negate every conceivable basis which might support the statute. Thus, SDCL 62-3-15 does not violate the Equal Protection Clause of the State or Federal Constitutions.

CONCLUSION

For the foregoing reasons, the Court AFFRIMS the Department's determination that Claimant is an agricultural worker exempt under SDCL 62-3-15(2), but REMANDS the case back to the Department for a determination of whether Claimant was an employee of Charles Baker Trucking under the definitions provided in the federal H-2A regulations and whether Charles Baker Trucking withdrew its H-2A Application before the date on which Claimant sustained his injuries.

Dated this 29th day of November 2018.

BY THE COURT

Patricia DeVaney

Patricia J. DeVaney
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

TROY BANGTSON, Employee/Appellant, vs. CHARLES BAKER TRUCKING, LLC and CHARLES BAKER d/b/a CHARLES BAKER FARMS, Employer(s)/Appellees and ACUITY, a Mutual Insurance Company, Insurer/Appellee	)	32CIV17-260 ORDER

WHEREAS, the Court having entered its Memorandum Decision on November 29, 2018, and having expressly incorporated the same herein, now, therefore, it shall be and hereby is

ORDERED, ADJUDGED, AND DECREED:

The Department's determination that Claimant is an agricultural worker exempt under SDCL 62-3-15(2) is AFFIRMED, but the case is REMANDED back to the Department for factual determinations as to the issue of whether Claimant was nonetheless entitled to workers' compensation as a corresponding employee of Charles Baker Trucking under the federal H-2A visa program.

Dated this 29th day of November, 2018.

BY THE COURT:

Patricia DeVaney

Honorable Patricia J. DeVaney
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy