May 20, 2008

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LETTER DECISION

James D. Leach
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RE: HF No. 105, 2007/08- David Colhoff v. O'Brien Construction and Acuity

Dear Mr. Larson and Mr. Leach:

By stipulation, the parties agreed to submit this matter to the Department by simultaneous briefs and responses. I am in receipt of Claimant's Brief, Employer/Insurer's Brief Regarding Whether Claimant is Entitled to Twice the Compensation, Claimant's Reply Brief, and Employer/Insurer's Brief in Reply to Claimant's Brief.

The parties stipulate that Claimant sustained an injury arising out of and in the course of his employment with Lloyd Terkildsen and Terkildsen Construction (Terkildsen). At the time of the Claimant's injury, Terkildsen was a subcontractor for O'Brien Construction (O'Brien). Terkildsen did not have workers compensation insurance. O'Brien had workers' compensation insurance through Acuity and pursuant to SDCL 62-3-10, was responsible to the same extent as Terkildsen. O'Brien is currently paying benefits to Claimant in the amount of $286 per week.

Claimant sought to recover against Terkildsen in circuit court under SDCL 62-3-11 which states:

> Any employee, who is employed by an employer who is deemed not to operate under this title in accordance with § 62-5-7, or the dependents of such deceased employee, may elect to proceed against the employer in any action at law to recover damages for personal injury or death; or may elect to proceed against the employer in circuit court under the provisions of this title, as if the employer had elected to operate there under by complying with §§ 62-5-1 to 62-5-5, inclusive, and the measure of benefits shall be that provided by § 62-4-1 plus

> twice the amount of other compensation allowable under this title; provided that such employee or his dependents shall not recover from both actions.

The measure of benefits recoverable from Terkildsen under SDCL 62-3-11, including benefits under SDCL 62-4-1 plus twice the amount of other compensation, would be $572 per week. The parties now dispute the amount of compensation benefits that O'Brien and Acuity are required to pay to Claimant.

Pursuant to SDCL 62-3-10, a principle is liable for compensation to an employee "to the same extent as the immediate employer." Claimant therefore concludes that O'Brien, the general contractor, would be liable to Claimant to the same extent that Terkildsen was liable under SDCL 62-3-11. Claimant asks the Department to employ a plain meaning interpretation of SDCL 62-3-10 and hold O'Brien liable "to the same extent as the immediate employer," namely for medical expenses and double compensation benefits. Claimant argues that the statute does not contain an exception when the immediate employer is uninsured.

Employer/Insurer argues that SDCL 62-3-11 does not apply in this matter, because O'Brien had workers' compensation insurance and has been providing benefits to Claimant under SDCL 62-3-10. Employer/Insurer claims that O'Brien is considered a statutory employer who steps into the shoes of the immediate employer to provide coverage. *Metzger v. J.F. Brunken & Son, Inc.*, 84 SD 168,169 NW2d 261(1969). Employer/Insurer also argues that Claimant would receive a windfall if he were able to recover double compensation benefits from O'Brien.

The purpose of SDCL 62-3-11 is to encourage all employers to obtain workers' compensation coverage for their employees. Double compensation benefits allowed under SDCL 62-3-11 are punitive in nature and provide a remedy in circuit court when the claimant is not covered by any workers' compensation. In this case although the subcontractor, Terkildsen, did not have workers' compensation insurance, his employees were covered through the general contractor, O'Brien, pursuant to SDCL 62-3-10.

SDCL 62-3-10 states in part:

> A principal, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any one of his subcontractors and engaged upon the subject matter of the contract, to the same extent as the immediate employer.

This statute protects a class of employees by providing workers' compensation coverage in certain circumstances. The employees of subcontractors are assured coverage by either the subcontractor or the general contractor.

"The overall purpose…is to compensate an employee and dependents for the loss of income-earning ability where the loss is caused by injury." *Nilson v. Clay County*, 95 SDO 378, ¶18, 534 NW2d 598, 602 (SD 1995). O'Brien has been paying Claimant compensation for his loss of earning ability caused by his injury. Claimant has a work related injury and is entitled to compensation; however Claimant should not receive a windfall. *Id.*at ¶ 19.

Because O'Brien is considered the employer and is covered by workers' compensation and deemed to be operating under Title 62, SDCL 62-3-11 is not applicable in this matter. Claimant is not entitled to twice the compensation allowable under the South Dakota Workers' Compensation Law. The compensation rate that O'Brien is required to pay Claimant is $286 per week. Employer/Insurer shall submit an Order consistent with this decision.

Sincerely,

Taya M. Dockter
Administrative Law Judge