

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT**

TERRY ASMUSSEN,

HF No. 142, 2011/12

Claimant,

v.

DECISION

ASMUSSEN BIN BUILDERS, LLC,

Employer,

and

**FARM BUREAU MUTUAL
INSURANCE COMPANY,**

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This case was heard by Donald W. Hageman, Administrative Law Judge on September 19, 2012. Claimant is represented by Zachary S. Hindman. Mark D. O'Leary represents Employer and Insurer.

Issue:

What is Terry Asmussen's average weekly wage and compensation rate?

Facts:

The following facts are determined by a preponderance of the evidence:

1. Terry Asmussen (Claimant) began working for Asmussen Bin Builders, LLC (Employer), in 2007.
2. The Employer is owned by Richard Asmussen and his brother Paul Asmussen. Richard is Claimant's father.
3. Employer is engaged in the business of building grain bins. This work is performed seasonally. The work season usually begins in mid-May and ends in October or mid-November of each year, depending on the weather. The employees are laid off at the end of each season and re-hired at the beginning of the next season. Some employees return to work the next season, some do not.

4. Claimant worked for Employer during each working season from 2007 through 2010.
5. Employer divides its employees into two crews. One is managed by Richard; the other is managed by an individual named Don.
6. Until a change was made during the 2011 season, members of Don's crew were paid by the hour, while members of Richard's crew were paid a salary.¹ The members of Don's crew were paid on a biweekly basis and the members of Richards's crew were paid at the conclusion of each project.
7. Claimant worked on Richard's crew, during part of the 2007 and 2010 seasons.
8. During the 12-month period immediately preceding Claimant's injury, the employees who worked on Richard's crew for the entire season, had an average daily earnings of \$262.44. During this same time period, Richard's crew worked approximately 94-96 days. During the 2007 and 2010 seasons, Claimant's average was somewhat higher than the average of the other members of Richard's crew. Claimant earned \$16,075 in 60 days while working on Richard's crew in 2010. This results in an average day's earnings of \$267.92.
9. During the 2011 season, the federal Department of Labor (DOL) conducted an audit which was prompted by an overtime complaint which was filed by one or more employees. As a result of the audit, Employer WAS required to pay its employees overtime for the preceding two years and was instructed to begin paying all employees on an hourly basis, except for supervisors and office staff. Consequently, Employer had to change the method of payment for those employees who worked on Richard's crew from salaried to hourly.
10. Claimant began working the 2011 season on June 27, 2011, on Richard's crew. Richard re-hired Claimant several days prior to that starting date. The amount and method of Claimant's wages while working on Richard's crew were not discussed at that the time of his rehiring.
11. Claimant suffered a work-related injury on his first day back to work, on June 27, 2011.
12. The DOL audit was being conducted about the same time that Claimant was re-hired, in June of 2011.

¹ Both parties referred to the pay received by members of Richard's crew as a "salary". However, in reality, the employees were apparently paid by the poundage of steel erected. As a result of this method of pay, there was no consistency between the amounts paid to one employee versus another on a particular project and no consistency between what an employee earned from project to project. There were also no source documents to show how the calculations were made. Even Employer's bookkeeper could not reproduce or explain how the wages were calculated. Apparently, Richard just called after each project and stated what each individual was to be paid.

13. Employer's bookkeeper chose to convert Richard's crew from salaried to hourly effective with the pay period beginning June 27, 2011.
14. In July of 2011, a South Dakota Department of Labor & Regulation (DLR) form 110 was filed with DLR indicating a gross weekly wage of \$1,750.38 for Claimant at the time of his disability. The form indicated a weekly compensation rate of \$630. The document was completed by the Insurer and was signed by the Insurer, the Claimant and Employer's bookkeeper. The Insurer's signature was dated July 20, 2011. The Claimant and bookkeeper signed the form on July 27, 2011.
15. On July 14, 2011, Employer issued a check to Claimant for the time he worked before his work-related injury on June 27, 2011. On the day this check was issued, Richard instructed the bookkeeper that Claimant was to be paid \$15 dollars per hour. The check reflected a wage calculated at \$15 per hour.
16. Additional facts will be discussed in the analysis below.

Observations:

Richard testified at hearing that he intended to pay Claimant \$15 per hour at the time he re-hired him for the 2011 season. However, the Department gives this testimony little or no weight. Despite Richard's denials and evasions during cross-examination, it was obvious from his demeanor that Richard blamed Claimant for the DOL audit, the need to pay back overtime and the required change to his method of paying his crew. Richard's anger was patent enough to cast grave doubts on his credibility. The Department's observations about Richard's feelings toward Claimant were confirmed by the testimony of Employer's bookkeeper, who testified that Richard believed that Claimant was responsible for the complaint filed with the DOL, and Claimant's mother, who testified that Richard told her in October of 2011 that he believed that Claimant was responsible for the audit. Richard told Claimant's mother that he was going to disown Claimant and that Claimant could no longer work for Employer.

It was also clear during her testimony, that the bookkeeper was also angry at Claimant and blamed him for the DOL audit.² While her testimony was more forthcoming than Richard's, it was blatantly slanted against the Claimant and she admitted that she told the Insurer that she wanted to pay Claimant as little as possible.

Analysis:

The parties agree that Employer is engaged in a seasonal business and that SDCL 62-4-27 controls the calculation of Claimant's average weekly wage (AWW) in this case. That provision states:

² It is unclear why the bookkeeper was angry with Claimant. It may be due to company loyalty or more likely due to the fact that the audit created a lot of extra work for her.

As to employees in employments in which it is the custom to operate for a part of the whole number of working days in each year, the average weekly wages shall be ascertained by multiplying the employee's average day's earnings by number of days which it is customary in such employment to operate during a year, but not less than two hundred, and dividing by fifty-two.

SDCL 62-4-27. The mathematical formula this statute set forth to calculate the AWW is as follows: $AWW = \text{Average Day's Earnings (ADE)} \times \text{Number of Days Customarily Worked}$, but not less than $200 / 52$. The Employer customarily works 94 to 96 days per year, which is less than 200 days. Therefore, the formula becomes: $AWW = \text{ADE} \times 200 / 52$.

The rate by which Claimant's disability payments are to be determined "is based on the average weekly wage the employee was earning at the time of his injury." Caldwell v. John Morrell & Co., 489 NW2d 353,364 (SD 1992). Therefore, the first query involved in determining Claimant's average day's earnings is to determine under what method of pay Claimant was to be paid at the time of his injury.

There are a number of factors in this case which point to the fact that Claimant was salaried at the time of his injury. First, as discussed above, the Department finds that Richard's testimony is not credible. \$15 per hour would result in a substantial decrease in pay from Claimant's 2010 salary. Employer suggests that the day's average earnings should be calculated by multiplying \$15 per hour times 11.95 hours per day, which it contends is the average hour worked per day. This results in an average day's earnings of \$179.25.³ This amount is substantially lower than Claimant's average day's earnings while working on Richard's crew in 2010, Claimant earned \$16,075 in 60 days. This results in an average day's earnings of \$267.92. Even if overtime is paid for 3.75 hours of the 11.75 hour average that Employer promotes, the Average Day's Earnings are only \$208.75. There is nothing in the testimony to suggest that Claimant and the others on Richard's crew were to receive a decrease in wages from those earned in 2010. The bookkeeper testified in terms of "changing" or "converting" the method of payment, not amount paid.

Next the bookkeeper testified that the DOL audit was going on about the same time that Claimant was hired, though she did not remember whether the auditor told her to change the method of pay for Richard's crew before or after Claimant's injury. However, she testified that the auditor told her that she needed to make the change during their first meeting and that she thought, "well, I got to change it sometime so I changed it then." This testimony seems to indicate that she was not going to wait to

³ This calculation does not provide for the payment of any overtime. While it is true that one 11.95 hour day does not require the payment of overtime, the term "average day's earnings" suggest that more than one day's earnings should be used to achieve an average. It is clear from the DOL audit that overtime pay was frequently and routinely required to be paid by the business. Therefore it would have been appropriate to factor in overtime into the calculation even if Claimant were being paid an hourly wage at the time of his injury.

change until the beginning of the next project or pay period.⁴ It is also unlikely that she made the change precisely on the day the new pay period began. After all, she testified that the process took time. She testified that she converted Don's crew's from a biweekly to a weekly pay period before changing Richard's crew's method of payment. She also testified that she had to "make" Richard change his method of payment. This had to take a couple of days. Therefore, it is likely that the bookkeeper changed the method of payment sometime during the pay period and made the change retroactive to the beginning of the week. Claimant was injured on the first day of the new pay period. Consequently, the Department concludes that Claimant was salaried at the time of his injury and that the bookkeeper made the change after the injury and made effective retroactively to the first day of the new pay period, June 27, 2011.

Finally, the Department's form 110 that was provided by Insurer indicates a gross weekly wage of a salaried employee, and not an employee making \$15 per hour. Despite the fact that the dollar amount on the document appears to be erroneous, it still comes much closer to average weekly wage of a salaried employee than it does an hourly employee.⁵ The calculation of an hourly employee's average weekly wage is straight forward and not prone to error. On the other hand, the calculation of a salaried employee's average weekly wage in Employer's business is anything but straight forward and an error is quite likely, especially if the Insurer did not fully understand the implications of large amount of information required to make that determination. Consequently, the information provided to Insurer to calculate this figure suggests that Claimant was salaried at the time of his injury.

In addition, it is clear that this information was provided by Employer. The suggestion made by the bookkeeper during the hearing that the information may have come from the Claimant is at a minimum, naive and at the worst, disingenuous.⁶ An Insurer is not going to seek this information from the Claimant rather than the Employer for three basic reasons. First, the Insurer is acting on behalf of the Employer, not the Claimant. Second, the information provided by the Employer is apt to be more accurate and more detailed than any information that the Claimant could provide. Third, Employer's bookkeeper refused to sign the form until Claimant returned the title of a company vehicle that he had been driving. She must have understood what the document contained for her to understand that it could be used as leverage to obtain the vehicle title. The bookkeeper also testified that she did not check the accuracy of the figure document before signing it. It is inconceivable that she would have signed the documents without checking the figure for accuracy if she did not know that she was the source of the information used to calculate the figure.

⁴ At the time the bookkeeper was told to change Richard's crew's method of payment, Don's crew was already being paid an hourly wage. Logic would dictate that the bookkeeper would coordinate Richard's crew's new period with Don's crew's pay period.

⁵ The form 110 indicates an AWW of \$1,750.38. The AWW calculated with Claimant's ADE in 2010 is \$1,030.47. The AWW when calculated as Employer and Insurer suggest is \$689.43.

⁶ However, the Department does believe the Insurer's calculation of Claimant's gross average wages was in error as the Bookkeeper testified because the amount indicated on the form 110 is substantially higher than the amount claimant received on the average in 2010.

This evidence suggests that Richard did not become angry with Claimant until the conclusion of the audit when he learned that he was required to pay back overtime. By this time, the form 110 information had been provided to the Insurer and the pay change had been made.

In light of the reasoning provided above, the Department concludes by a preponderance of the evidence that Claimant was salaried at the time of his injury. The next step then is to calculate Claimant's average day's earnings based upon that salary.

As stated above, there is no evidence that Richard hired Claimant for the 2011 season at a wage lower than he earned in 2010. There is also no evidence that Claimant was hired at a wage higher than he was making in 2010. Claimant testified that Richard told him to ask Don for more money if Claimant happened to go to work for Don's crew but there was no discussion of wages when Claimant was finally hired onto Richard's crew. Therefore, the Department can only conclude that Claimant was hired at the same salary that he was earning while working on Richard's crew during the 2010 season.

During the 2011 season, Claimant worked on 6 projects while on Richard's crew. While working on those projects, he earned a total \$16,075 and worked a total of 60 days. As a result, Claimant's average day's earnings in 2010 were \$267.92. The Department, therefore, finds that Claimant's average day's earnings at the time of his injury were \$267.92. Using the formula provided by SDCL 62-4-27, Claimant's AWW = $\$267.92 \times 200 / 52$ or Claimant's AWW = \$1,030.47.

The compensation rate for disabled persons is determined by multiplying the AWW x 66 2/3 % with the result not to exceed \$630 per week. SDCL 62-4-3; 62-4-7. In this case, the average weekly wage is \$1,030.47. That calculation equals \$686.98. \$686.98 exceeds \$630. Therefore, the calculation results in a compensation rate for Claimant of \$630.

Conclusion:

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if he desires Proposed findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated this 28th day of January, 2013.

/s/ Donald W. hageman
Donald W. Hageman
Administrative Law Judge