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November 15th, 2017

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LETTER DECISION AND ORDER

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RE: HF No. 185, 2014/15 – Troy Bangtson v. Charles Baker Trucking LLC and Charles Baker d/b/a Charles Baker Farms and Acuity

Dear Counselors:

This letter addresses the following submissions by the parties:

September 9th, 2016	Employer Charles Baker Trucking/Insurer's Motion for Summary Judgment
	Charles Baker Trucking/Insurer's Brief in Support of Motion for Summary Judgment
	Charles Baker Trucking/Insurer's Statement of Undisputed Material Facts
	Affidavit of Charles Baker
September 9th, 2016	Employer Charles Baker Farm's Motion for Summary Judgment
	Charles Baker Farm's Brief in Support of Motion for Summary Judgment
	Charles Baker Farm's Statement of Undisputed Material Facts

	Affidavit of Charles Baker
September 20th, 2017	Employer/Insurer's Reply Brief in Support of Motion for Summary Judgment
April 24th, 2017	Claimant's Resistance to Motions for Summary Judgment
	Claimant's Brief in Support of Resistance to Motion for Summary Judgment
	Claimant's Statement of Undisputed Material Facts
	Claimant's Response to Charles Baker Trucking's/Insurer's Statement of Undisputed Material Facts
	Claimant's Response to Charles Baker Farm's Statement of Undisputed Material Facts
	Affidavit of Jolene Nasser
June 16th, 2017	Charles Baker Trucking/Insurer's Reply Brief in Support of Motion for Summary Judgment
	Charles Baker Trucking/Insurer's Response to Claimant's Statement of Material Facts
	Affidavit of La Tonya Erickson
June 16th, 2017	Charles Baker Farm's Reply Brief in Support of Motion for Summary Judgment
	Charles Baker Farm's Response to Claimant's Statement of Material Facts
	Supplemental Affidavit of Charles Baker
	Affidavit of Michael J. Schaffer

In addition to the above-referenced documents, a hearing was held on Friday, October 13th, 2017 in Pierre, South Dakota before Joe Thronson, Administrative Law Judge for the Department of Labor and Regulation. Claimant appeared through his counsel, Jolene Nasser, while Charles Baker Trucking/Insurer appeared through its counsel, Mr. Robert Anderson, and Charles Baker Farms appears through its counsel

Mr. Michael Schaffer. As Claimant has also challenged the constitutionality of SDCL 62-3-15, the South Dakota Attorney General's Office appeared through its attorney Ms. Kirsten Jasper.

Issues Presented:

I. Does SDCL 62-3-15 violate the equal protection clause of the United States and South Dakota Constitutions?

II. Did Employer CBF waive its SDCL 62-3-15 exemption under federal law?

III. Was Claimant an agriculture worker exempt under SDCL 62-3-15?

Facts

Charles Baker owns two entities based out of Murdo, South Dakota. The first, Charles Baker Trucking (CBT), is organized as an LLC and engages in over the road trucking. CBT has eight semi-trucks which haul freight throughout the upper Midwest region. In its employ, CBT has several commercially licensed truck drivers who live at various locations throughout the western portion of the state. Each driver is primarily responsible for maintaining his truck, and maintenance was almost always done at a location other than the shop in Murdo. One driver did on occasion conduct light maintenance on his truck at the Murdo location.

Charles Baker also operates a farming operation known here as Charles Baker Farms (CBF). CBF is a sole proprietorship. At the time of this incident, CBF employed three employees jointly with CBT, as well as several workers brought to the United States as seasonal employees under the federal H-2A visa program. These seasonal employees were responsible for planting and harvesting crops. CBT also owns four

semi-trucks which were used exclusively for farm work. None of these trucks were authorized to engage in over the road hauling.

Claimant, Troy Bangston, first met Baker in 2013 when he inquired about a job. Baker hired Claimant to do work for CBF at the shop in Murdo. Claimant's primary responsibilities included keeping the shop clean, changing oil, and greasing farm machinery. Claimant did not drive truck for CBT because he did not have a CDL. Neither did Claimant operate any large farm equipment or engage in any work directly with crops. Though Claimant's duties were almost exclusively working on farm equipment in the Murdo shop, he occasionally transported workers to the farm or did odd jobs there. It was only on rare occasions that Claimant may have done any work on a CBT vehicle and never did so unsupervised.

Claimant was injured on or about March 11th, 2015. Though the exact details are unclear, it appears as though Claimant was attempting to change a tire on a truck owned by CBF when the tire exploded. Claimant suffered numerous injuries including a fractured skull. Claimant filed a claim for worker's compensation on May 8th, 2015. CBF filed a motion for summary judgment arguing that Claimant was an agriculture worker and that SDCL 62-3-15 exempted CBF from providing workers compensation coverage to Claimant. CBT also submitted filed a motion for summary judgement alleging that Claimant was the sole employee of CBF.

Claimant makes several arguments that SDCL 62-3-15 does not bar his recovery under workers compensation. First, Claimant challenges the constitutionality of SDCL 62-3-15 arguing that it violates the equal protection clauses of both the United States

and South Dakota Constitutions. Next, Claimant argues that under federal immigration law, Employer waived its exemption under SCL 62-3-15 by applying for H2-A visas for migrant workers. Finally, Claimant argues that he was not an agriculture worker or alternatively was an employee of both CBT and CBF.

Analysis

I. Does SDCL 62-3-15 violate the equal protection clause of the United States and South Dakota Constitutions?

Claimant argues that SDCL 62-3-15 violates his constitutional right to equal protection. Claimant contends that the exemption of agricultural workers is arbitrary and serves no rational government interest. The Department agreed to hear the constitutional challenge for purposes of making a record for pending challenge in circuit court to the constitutionality of SDCL 62-3-15. However, the Department is without authority to render a statute unconstitutional. *Beville v. S. Dakota Bd. of Regents*, 687 F. Supp. 464, 469 (D.S.D. 1988).

Claimant cites two cases which he contends grants the Department authority to rule on the constitutionality of a statute. First, Claimant argues *Johnson vs. Powder River Transportation*, *Inc.*, 2002 SD 23, implies that administrative agencies have jurisdiction over constitutional challenges to statutes. However, the issue in *Johnson* was whether the Claimant gave the Attorney General's Office proper notice of his appeal of the constitutionality of SDCL 62-4-7. Since it found that Claimant had not, the Court declined to rule on the constitutionality issue. It is noteworthy that the constitutional issue was raised before the Department and the administrative law judge

declined to rule on it. *Johnson vs. Powder River Transportation,* HF No. 172, 1998/99, 2000 WL 365059, at *5 (S.D. Dept. Lab. Mar. 20, 2000).

Next, Claimant cites *Dale v. Bd. of Ed., Lemmon Indep. Sch. Dist. 52-2*, 316 N.W.2d 108, 112 (S.D. 1982), for the postposition that an administrate agency must make findings of fact and conclusions of law on all issues before it before an appeal may be perfected. *Dale* involved a high school teacher whose contract was not renewed by the district. After the circuit court affirmed the decision of the school district, the plaintiff appealed to the Supreme Court. Dale argued that the circuit court had applied the wrong standard under SDCL 1-26-36. The Supreme Court found that SDCL 1-26-36 was inapplicable to a review of a school district's nonrenewal of a teaching contract. Instead, the Court noted these cases were governed by SDCL 13-46-7. The Court explained:

> Although the circuit court's scope of review is limited to the standards enumerated in SDCL 1-26-36, the last paragraph of that statute, excusing the trial court from entering its own findings of fact and conclusions of law, cannot apply to appeals heard pursuant to SDCL 13-46-6 as the school board enters no findings of fact or conclusions of law for the trial court to affirm, modify, or reverse. It therefore remains necessary for the circuit court to enter findings of fact and conclusions of law in cases appealed under SDCL 13-46-6, since we must have the circuit court's findings in order to apply the SDCL 15-6-52(a) clearly erroneous test.

Dale, 316 N.W.2d, at 112.

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.

II. Did Employer CBF waive its SDCL 62-3-15 exemption under federal law?

Claimant asks the Department to rule that Employer CBF waived its agricultural exemption by hiring temporary seasonal migrants under the federal H2-A visa program. 20 CFR 655.100(b). However, nothing in South Dakota's workers compensation scheme provides for a waiver of an agricultural exemption based on federal law. If Claimant has a remedy under federal law, he must pursue it in federal court.[1]

III. Was Claimant an agriculture worker exempt under SDCL 62-3-15?

The Department's authority to grant summary judgment is found in 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.

SDCL 62-3-15 provides an exemption to workers compensation coverage for agriculture workers. The Supreme Court first analyzed whether a claimant is an exempt agricultural worker under SDCL 62-3-15 in *Keil v. Nelson,* 355 N.W.2d 525, 527 (S.D. 1984). In *Keil*, the claimant worked for an employer who was engaged primarily in farming. Claimant was a truck driver and was injured when he fell asleep while driving and was involved in an accident. Employer argued that claimant was exempt under SDCL 62-3-15 because it was primarily engaged in an agriculture endeavor. In considering whether claimant fit into the exemption, the Court explained:

[1] Claimant's citation of two federal cases, Williams v. Usery, 531 F.2d 305 (5th Cir. 1976) and NAACP, Jefferson County v. Donovan, 566 F.Supp. 1202 (D.D.C. 1983), reinforces this conclusion.

> [A]lthough the character of the "employment" of an employee must be determined from the "whole character" of his employment and not upon the particular work he is performing at the time of his injury, nevertheless the coverage of an employee under the Act is dependent upon the character of the work he is hired to perform and not upon the nature and scope of his employer's business.

Keil, 355 N.W.2d, at 527.

The Court found that employer was operating a small trucking business independent from its farm. The Court then opined:

> Ultimately, then, the issue becomes a question of fact. Was appellee hired primarily as a trucker or as a farm laborer? To which area did he devote most of his time? There is direct, conflicting testimony on this issue. The trial court, having viewed the witnesses and observed their testimony, found that appellee was primarily involved in driving an 18-wheeler truck for commercial purposes.

Id.

Several years later, the Court upheld the denial of benefits in *Hofer v. Redstone Feeders, LLC*, 2015 S.D. 75, 870 N.W.2d 663. In reaching the opposite conclusion in *Hofer*, the Court expanded on its original rationale in *Keil:*

> This language simply means that the nature of the employer's business is not dispositive regarding coverage, not that the employer's business is entirely irrelevant to coverage. We think it impossible to examine the overall nature of the employee's work without any regard to the employer's business. The work done by the employee is dependent upon the business of the employer, thus examination of the overall nature of the employee's work requires looking at the nature of the employer's business. The totality of these circumstances must be considered when determining whether a person is an agricultural laborer.

Hofer, at ¶ 20.

In determining whether Claimant in this case was an agriculture worker and therefore within the exemption of SDCL 62-3-15, the Department must consider two factors. First, was Claimant's employer engaged in an agriculture enterprise? Second, what was the primary nature of Claimant's work for his employer?

A. Claimant's Employer

Claimant argues that he was jointly employed by both Charles Baker Trucking and Charles Baker Farms based on several facts. First, Claimant points out that both CBT and CBF shared a common building. Next, Claimant notes that at least three other employees worked for both entities and that Claimant at times worked on vehicles or machinery owned by CBT. Claimant also points out that he received AFLAC benefits through CBT and was provided unemployment coverage though CBF. The Department finds these arguments to be unpersuasive. The weight of the evidence presented shows that Claimant was an employee of CBF.

First, Claimant was paid exclusively by CBF. All of Claimant's W-2's list CBF as Claimant's employer, and Claimant conceded that all of his paychecks were signed by CBF. Second, all employees for CBT, except for the book keeper, LaTonya Erikson, were over the road truck drivers who had a CDL. Since Claimant did not have a CDL, he could not drive a truck for CBT. Additionally, drivers for CBT were responsible for their own maintenance and virtually no maintenance was done at the Murdo shop. Claimant would therefore have had very little opportunity to do any kind of work on a CBT truck.

The mere fact that CBF and CBT share a common location and have some employees in common does not support Claimant's argument because it is clear that Claimant had little to no opportunity to do any work for CBT. The issue of unemployment insurance is also not supportive of Claimant's assertion since the rules for UI coverage are different from those for unemployment coverage. It is entirely conceivable that an employer would be liable for coverage under one and not the other.

Finally, the issue of Claimant's AFLAC benefits through CBT is by itself not persuasive when weighed against the other facts of this case. Unlike the claimant in *Keil*, the Department finds that Claimant was employed solely by CBF, an entity engaged only in farming.

B. Nature of work performed

Although Claimant was employed by CBF exclusively, the Department must also consider the nature of Claimant's duties to determine if the exemption under SDCL 62-3-15 applies. The evidence established that Claimant's primary duties were confined almost exclusively at the shop in Murdo. Claimant was responsible for keeping the shop clean, washing machinery, or performing light maintenance such as oil changes or greasing machinery. Though Claimant clearly performed manual labor for CBF, it acknowledged that Claimant was not engaged in any labor directly tied to the planting or harvesting of crops or maintaining livestock. The question is whether Claimant's nonetheless qualified as "agriculture labor" for purposes of SDCL 62-3-15. In *Hofer*, the Court found was presented with a similar question. It found that the agriculture exemption applied, even though the claimant's main duty was driving a truck.

> Here, Hofer was employed exclusively by Redstone, and given its cattle business, Redstone is exclusively agricultural. Additionally, while Hofer emphasizes that an overwhelming majority of his employment was trucking, the trucking itself was agricultural in nature. He hauled exclusively agricultural commodities—cattle and feed—for an exclusively agricultural employer.

Hofer, at ¶ 21.

The Court thus concluded, "Hofer drove a truck exclusively for Redstone. When looking at all of the facets of his employment and the nature of his employer's business, it is clear that Hofer was an agricultural laborer." *Id*.

The Department finds the Court's analysis in *Hofer* analogous to this case. The work that Claimant performed for CBF was almost exclusively on agricultural equipment for CBF. This labor was an integral part of CBF's agricultural enterprise because regular routine maintenance was necessary to keep CBF's machinery in working order.

ORDER

Employer CBT's motion for summary judgment is GRANTED. Employer CBF's Motion for Summary Judgment is GRANTED. This letter shall constitute the Department's Order in this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge