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**LETTER DECISION ON MOTION TO
DETERMINE AVERAGE WEEKLY WAGE**

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RE: HF No. 3, 2020/21 – Yeimi Rubio Blancas v. Jay Kali Hospitality, LLC and Milford Casualty Insurance Company

Greetings:

This letter addresses Yeimi Rubio Blancas's (Blancas) Motion to Determine Average Weekly Wage (AWW) submitted on June 29, 2021. Jay Kali Hospitality, LLC. and Milford Casualty Insurance Company (Employer and Insurer) responded on August 18, 2021. Blancas offered a final response on September 20, 2021.

In 2017, Blancas was hired by Employer to work as a seasonal housekeeper. She returned to work for Employer for both the 2018 and the 2019 seasons. Each season she would work from April 17 to around October 30. While working for Employer, Blancas was paid on a per room basis and would receive a flat payment for each room she cleaned. The room occupancy level would fluctuate with the season, resulting in an increase or decrease of Blancas' average weekly income. On June 11, 2019, Blancas suffered a work-related injury. She slipped when she stepped down from a toilet as she was attempting to change a shower curtain. The fall caused pain in

Blancas's lower back. She took a month off to recover and later returned to the motel working part-time with light duty. Five months after the injury, Employer and Insurer began to pay benefits to Blancas.

Blancas submitted a Petition for Hearing to the Department of Labor & Regulation (Department) on July 13, 2020. In her Motion, Blancas asserts that the benefits paid by Employer and Insurer reflect an inaccurate weekly wage. Therefore, she moves that the Department determine her correct average weekly wage to be \$250.41 pursuant to SDCL 62-4-27 and to order Employer and Insurer to pay her for underpayment from the date of her injury.

In 2017, Blancas's net pay was \$10,917.18 which would result in an AWW of \$213.14. In 2018, Blancas received a dollar per room pay increase. Her net pay that year was \$12,826.16, an AWW of \$250.41. On November 1, 2019, Employer and Insurer paid Blancas an AWW of \$88. Based on her paystubs, she cleaned 112 rooms during June 1, 2019 pay period and worked through June 15, 2019.

Employer and Insurer initially calculated Blancas's AWW through May 30, 2019 as \$88.88. However, they recalculated and concluded the correct AWW was \$112.29, and they compensated Blancas for the underpayment. To determine Blancas's AWW, Employer and Insurer only used her earnings from the beginning of the 2019 season to around the date of the injury. Blancas asserts that this calculation is incorrect, and she asks the Department to find that her AWW is \$250.41, equal to her 2018 rate.

The calculation for AWW of a seasonal employee is provided by SDCL 62-4-27 which states,

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.

Applying the method provided in SDCL 62-4-27, Blancas's AWW would be calculated as follows: Blancas worked 62 days from April 15, 2019 to June 15, 2019. Her gross earnings as of her June 15, 2019 paystub were \$1,960.00. She averaged \$31.61 per day.

$$\$31.61 \times 200 \text{ days} = \$6,322.58.$$

$$\$6,322.58 \text{ divided by } 52 \text{ weeks provides an AWW of } \$121.59.$$

Employer and Insurer assert that as Blancas's average weekly wage is below the state minimum the relevant statute is SDCL 62-4-3, which states:

The amount of temporary total disability compensation paid to an employee for an injury is equal to sixty-six and two-thirds percent of the employee's earnings, but not more than one hundred percent computed to the next higher multiple of one dollar of the average weekly wage in the state as defined in § 62-4-3.1 per week and not less than one-half of the foregoing percentages of the average weekly wage of the state per week. However, if an employee earned less than fifty percent of the maximum allowable amount per week, the amount of compensation may not exceed one hundred percent of the employee's earnings calculated after the earnings have been reduced by any deduction for federal or state taxes, or both, and for the Federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's earnings.

They argue that the correct calculation of Blancas's AWW is, therefore, \$112.29.

$$\$1,810.06 \text{ net wages}/62 \text{ days} = \$29.19 \text{ average daily wage}$$

$$\$29.19 \times 200 \text{ days} = \$5,838.90$$

$$\$5,838.90/52 \text{ weeks} = \text{statutory compensation rate of } \$112.29$$

Blancas argues that calculating her AWW by taking her 2019 net wages and dividing that by the number of days worked in 2019 results in an unjust and unfair

computation that is contrary to South Dakota statute and caselaw. In *Caldwell*, the South Dakota Supreme Court held, “[a]ll of the schedules are based upon the employee’s loss of wage-earning power; that is, what would the employee have expected to earn if he had been victimized by an employment related accident.” *Caldwell*, 489 N.W. 2d 353, 362 (S.D. 1992). Blancas asserts that properly assessing her “wage-earning power” requires calculating her AWW based on her prior year earnings or the 2019 earnings of Employer’s other housekeeper. Blancas urges the Department to look to SDCL 62-4-28 which provides,

As to an employee who earns either no wage or less than the earnings of adult day laborers in the same line of employment in that locality, the average weekly wages shall be reckoned according to the average weekly wages of adults of the same class in the same or, if that is impracticable, then of neighboring employments.

She asserts that \$121.59 is less than the earnings of other housekeepers, and following, SDCL 62-4-28, her correct AWW would be \$241.19. Blancas further argues that the Court has stated, “Seasonal occupations logically are those vocations which cannot, from their very nature, be continuous or carried on throughout the year, but only during fixed portions of it. On the other hand, labor or occupation possible of performance and being carried on at any time of the year, or through the entire twelve months, is certainly not seasonal.” *Nilson v. Clay County*, 534 N.W.2d 598 (S.D. 1995) (citing *American Mut. Ins. Co. v. W.C.A.B.*, 108 Pa.Cmwlth. 345, 530 A.2d 121 (1987)). Blancas asserts that her work as a housekeeper was employment that is typically carried on throughout the year, and therefore, she is not a seasonal worker.

Blancas further argues that SDCL 62-4-27 only applies when a claimant has consistent hourly wages with consistent hours. Blancas hours were dependent on the

occupancy level. Blancas's injury occurred before the busiest time of the year. Blancas offers the South Dakota Supreme Court case *Millage v. Canton Twp.*, 38 N.W.2d 755, 757 (SD 1949). In *Millage*, the employee was employed as a gravel checker at an hourly rate but without a set number of hours per day, and he worked along with gravel loaders and truckers. *Id.* Three days into his employment, the employee was injured and later died as a result. *Id.* The Industrial Commissioner approved an award of compensation and divided the number of hours work in the employee's first three days to determine the average amount of hours for the computation of his average day's earnings. *Id.* at 756-57.

On appeal, the Court stated. "[t]o call those three hours a day, in arriving at an average number of hours per day employed, is obviously unjust." *Id.* at 757. The Court further stated, "We must, therefore, look to the character of the employment, the amount of work actually performed by decedent, and the amount of work for which he was hired." *Id.* at 757. The Court ultimately held that it was "reasonable to expect that had the injury not occurred the employment of decedent would have continued until completion of the work; that the number of hours and days of such employment, therefore, equaled those of the loaders and truckers who hauled the gravel." *Id.*

Blancas argues that her situation is similar to that in *Millage*. Just as the Court found it was unjust to use the three days of employment to calculate Millage's AWW, Blancas argues it is "obviously unjust" to calculate hers using only the first few weeks of employment in 2019. Blancas was hired to work the entire 2019 season, as she had done in 2017 and 2018, and she would have if she had not been injured. Blancas

asserts that an equitable method to determine her AWW would be to use her 2018 net pay.

The Department finds that housekeeping is a vocation that can be continuously carried on through the year. Thus, Blancas was not a seasonal worker when she was injured. SDCL 62-4-25 provides,

[T]he average weekly wages shall, where feasible, be ascertained by computing the total of the employee's earnings during the period the employee worked immediately preceding the employee's injury at the same grade of employment for the employer by whom the employee was employed at the time of the employee's injury, and dividing such total by the number of weeks and fractions thereof that the employee actually worked. However, if such method of computation produces a result that is manifestly unfair and inequitable or if by reason of the shortness of time during which the employee has been in such employment, or the casual nature or terms of the employment, it is impracticable to use such method, then regard shall be had to the average weekly amount which during fifty-two weeks previous to the injury was being earned by a person in the same grade, employed at the same work, by the same employer, or if there is no person so employed, by a person in the same grade, employed in the same class of employment in the same general locality.

Therefore, Blancas's AWW shall be calculated by looking to the AWW of another housekeeper who also worked for Employer at the time of the injury. If the other housekeeper's wage is applied as directed by SDCL 62-4-25, then the AWW would be calculated as follows:

$\$12,614.00 \text{ gross wages} / 52 \text{ weeks} = \242.58 per week

Thus, it is hereby ORDERED that Blancas's Average Weekly Wage is \$242.58.

The Parties will consider this letter to be the Order of the Department.

Sincerely,



Michelle M. Faw
Administrative Law Judge