

May 21, 2024

Neil Derry
4821 S. Equity Dr.
Sioux Falls, SD 57106

Letter Decision on Motion for Default Judgment

Thomas J. Von Wald
Boyce Law Firm, L.L.P.
P.O. Box 5015
Sioux Falls, SD 57117-5015

RE: HF No 46, 2023/24- Josten Concrete Products Co., Inc., and Acuity, a Mutual Insurance Company v. Neil Derry

Greetings:

This letter decision addresses Josten Concrete Products Co., Inc., and Acuity, a Mutual Insurance Company's (Employer and Insurer) Motion for Default Judgment in the above-referenced matter. Neil Derry (Derry) was given until May 1, 2024, to submit his resistance to the Motion. He has not responded.

Employer and Insurer submitted a petition to the Department of Labor & Regulation (Department) on November 29, 2023, seeking discontinuation of payment pursuant to SDCL § 62-7-33. As Derry has not responded to the Petition, Employer and Insurer have moved for default judgment pursuant to ARSD 47:03:01:02.01, SDCL § 62-2-5, and SDCL 1-26.

The South Dakota Supreme Court has held that "proceeding's under Work[er's] Compensation Law . . . are purely statutory, and the rights of the parties and the manner of

procedure under the law must be determined by its provisions.” *Martin v Am. Colloid Co.*, 2011 S.D. 57, ¶ 12, 804 N.W.2d 65, 68. Citing *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 364 (S.D.1992). The Department was given the authority to promulgate rules regarding Title 62 pursuant to SDCL§ 62-2-5. One such rule, ARSD 47:03:01:02.01, provides

The division shall mail notice of the filing of a petition for hearing to all parties. Any adverse party has 30 days after the date of the mailing of the notice to file a response. The response shall be in writing and need follow no specific form. The response shall state clearly and concisely an admission or denial as to each allegation contained in the petition for hearing.

Authority to sanction failure to respond is provided by ARSD 47:03:01:05.02 which states, “If any party fails to comply with the provisions of this chapter, the Division of Labor and Management may impose sanctions upon such party pursuant to SDCL § 15-6-37(b). However, attorney fees may be imposed only for a violation of a discovery order.” This rule specifically provides that sanctions may be imposed pursuant to SDCL § 15-6-37(b) which does not refer to granting default as a sanction.

Additionally, in support of their Motion, Employer and Insure have cited to ARSD 47:03:01:26, which states, “If the defendant fails to appear at the time and place specified for the hearing, the department is satisfied that proper notice has been given, and the petitioner makes the minimum showing to support its claims, the department may enter a default order against the defendant.” However, this language refers specifically to a party’s failure to appear at a hearing. Therefore, it does not provide the Department with authority to grant default for failure to respond to a petition.

For the reasons stated above, the Department concludes that it lacks the authority to grant default in this matter. Therefore, Employer and Insurer's Motion for Default Judgment is DENIED.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge

MMF/das