

February 12, 2014

David L. Nadolski
Lynn, Jackson, Shultz & Lebrun PC
P.O. Box 2700
Sioux Falls, SD 57101-2700

Letter Decision and Order

Eric C. Blomfelt
Blomfelt & Associates
5221 Cornerstone Dr.
Fort Collins, CO 80528-3076

RE: HF No. 68, 2009/10 – James D. Comfort v. Hi Qual Manufacturing, USA and Farmers Insurance Group

Dear Mr. Nadolski and Mr. Blomfelt:

Submissions:

Claimant filed a Motion to Have Future Permanent Total Disability Payments Made in Lump Sum dated June 25, 2013. Employer and Insurer filed a response to Claimant's motion dated July 26, 2013. Claimant filed a reply to Employer and Insurer's response dated August 5, 2013.

Facts:

The facts of this case are as follows:

1. James D. Comfort (Claimant) was injured in March of 1997 while employed by Hi Qual Manufacturing USA (Employer). Employer and Farmers Insurance Group (Insurer) accepted responsibility for Claimant's injury and paid him worker's compensation benefits.
2. At the time of his injury, Claimant's compensation rate was determined to be \$225.38 per week.
3. After an extensive rehabilitation, Claimant was unable to return to his former employment.

4. In 2003, Claimant and some partners purchased a grocery store in Chamberlain, SD.
5. In 2003, Claimant began managing the grocery store.
6. Claimant bought out his partners in 2005 and continued to own the store to this date.
7. Since Claimant's injury in 1997, he has had ongoing medical problem arising as a result of his work-related injury.
8. Claimant was initially active in the store's daily operation. He performed physical tasks such as unloading trucks and moving stock within the store, as well as performing managerial duties.
9. In November 2009, Claimant underwent another operation to treat a complication arising from his injury. During that surgery, Claimant suffered a stroke, which was a recognized risk of the procedure.
10. Claimant's treating physician expressed the opinion that the stroke was a result of the original 1997 injury. Employer and Insurer's independent medical examiner concurred with that opinion.
11. There is no dispute that Claimant is permanently and totally disabled and that he is entitled to permanent total disability (PTD) benefits from Insurer.
12. As a result of his stroke, Claimant is currently unable to contribute much to the operation of the grocery store and Claimant's wife is managing the business.
13. Claimant borrowed money to purchase the grocery store. He has also borrowed money to make some changes to his house to accommodate his disability.
14. Claimant's grocery business has been consistently profitable since 2009. Gross income for the business in 2010, was \$5.4 million, with net income of \$186,677. In 2011 the gross income increased to \$5.6 million and the net income similarly increased to \$220,057. In 2012, the gross income was \$5.7 million, and the net income was \$191,867.
15. Additional facts may be discussed in the analysis below.

Lump Sum Payment:

The sole question to be answered here is where Claimant should receive a lump sum payment of his future PTD benefits. SDCL 62-7-6 states the following:

An employer or employee who desires to have any unpaid compensation paid in a lump sum may petition the Department of Labor and Regulation asking that the compensation be paid in that manner. If, upon proper notice to interested parties and proper showing before the department, it appears in the best interests of the employee that the compensation be paid in lump sum, the secretary of labor and regulation may order the commutation of the compensation to an equivalent lump-sum amount. That amount shall equal the total sum of the probable future payments capitalized at their present value on the basis of interest calculated at a rate per year set by the department with annual rests in accordance with rules promulgated pursuant to chapter 1-26. If there is an admission or adjudication of permanent total disability, the secretary may order payment of all or part of the unpaid compensation in a lump sum under the following circumstances:

- (1) If the employee has exceptional financial need that arose as a result of reduced income due to the injury; or
- (2) If necessary to pay the attorney's fees, costs and expenses approved by the department under § 62-7-36.

If a partial lump sum payment is made, the amount of the weekly benefit shall be reduced by the same percentage that the partial lump sum bears to the total lump sum computation. The remaining weekly benefit is subject to the cost of living allowance provided by § 62-4-7. Any compensation due to beneficiaries under §§ 62-4-12 to 62-4-22, inclusive, may not be paid in a lump sum, except for the remarriage lump sum provided in § 62-4-12.

SDCL 62-7-6.

The South Dakota Supreme Court stated in Steinmetz v. South Dakota, 2008 S.D. 87, 756 N.W.2d 392:

"Our statute authorizing a lump-sum payment clearly sets out the circumstances under which such a payment can be made." Thomas, 511 N.W.2d at 580. "First, it must be in the 'best interests of the employee.'" Id. "Our prior decisions confirm that the primary emphasis must be placed on providing an injured worker with a reliable stream of income to replace lost wages and benefits." Id. See also Caldwell v. John Morrell & Co., 489 N.W.2d 353 (S.D. 1992); Wulff, 69 S.D. 539, 12 N.W.2d at 553. "Second, in the case of a worker who has been permanently and totally disabled ... a lump sum may be ordered if the worker has an 'exceptional financial need that arose as a result of reduced income due to the

injury." Thomas, 511 N.W.2d at 580 (quoting SDCL 62-7-6(1)). "Third, a lump sum may be ordered, in the case of a pennant total disability, when necessary to pay the attorney's fees, costs and expenses." Id. (citing SDCL 62-7-6(2); SDCL 62-7-36).

Id. at ¶ 10.

In order for Claimant to qualify for a lump sum payment of all future benefits, Claimant must show: 1) that it is in his best interest to do so, 2) that he has an exceptional financial need, and 3) that his exceptional financial need arose as a result of reduced income due to the injury.

The Department is convinced that it would be in Claimant's best interest to receive his benefits in a lump sum. His income stream in the future appears to be fairly stable and a reduction of his present business and personal debt would undoubtedly save him some interest in the future.

However, he has not shown an exceptional financial need. His grocery business appears to be doing well. His household income over the last three years is nearly \$200,000 per year. There is no suggestion that Claimant is having any difficulty making the payments on his outstanding business and personal loans. Indeed, Claimant is planning to exercise his option to purchase the building in which his business is located and add a liquor business to the premises.

In addition, Claimant has not shown that he has had a reduction in income due to his injury. To Claimant's credit, his income since his initial injury appears to have increased dramatically. While it is arguable that the business has had to hire more help since Claimant's stroke due to his inability to work as he did before. There has been no showing that the extra labor hired to perform this work has placed the business in exceptional financial need.

As a consequence of the above analysis, The Department finds that Claimant is not entitled to a lump sum payment all of his future benefits. However, he has also requested a partial lump sum payment to pay his attorney fees. So we now turn to that issue.

SDCL 62-7-6 specifically provides for a lump sum payment to pay attorney's fees. As noted in Stuckey v. Sturgis Pizza Ranch, 2001 S.D. 1, 793 N.W.2d 378, it is in the employee's best interest to "ensure that injured employees will be able "to employ competent legal representation to secure all compensation to which they are legally entitled." Therefore, the Department finds that a lump sum payment of future benefits to pay attorney's fees in this case are appropriate.

Order:

In accordance with the analysis above, it is ordered that Claimant's Motion for Lump Sum Payment is granted in part and denied in part. Insurer shall make a lump sum payment to Claimant in an amount equal to his attorney's fees, in this matter, plus tax and costs, from Claimant's future PTD benefits. This letter shall constitute the order in this matter

Sincerely,

Donald W. Hageman
Donald W. Hageman
Administrative Law Judge