

August 13, 2015

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Letter Decision

Rebecca L. Mann
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RE: HF No. 69, 2013/14 – Eagleton v. Accurpress America Inc. and Auto-Owners Insurance

Dear Mr. Leach and Ms. Mann:

Submissions

This letter addresses the following submissions by the parties:

July 2, 2015	Claimant's Motion and Order for Partial Lump Sum Distribution;
July 27, 2015	Employer/Insurer's Objection to Claimant's Motion and Order for Partial Lump Sum distribution; Affidavit of Rebecca L. Mann;
July 28, 2015	Second Affidavit of Rebecca Mann;
July 29, 2015	Reply Brief in Support of Claimant's Motion and Order for Partial Lump Sum Distribution – and Revised Proposed Order; and
July 30, 2015	Letter from James D. Leach.

Facts:

The facts of this case as reflected by the submissions are as follows:

1. The above named parties agreed to arbitrate the matter with Rob Anderson serving as arbitrator.
2. Rob Anderson is an attorney engaged in private practice in South Dakota.
3. On June 30, 2014, the Department signed an order which stated in part: "The Department will enter Mr. Anderson's final written decision and order as the final written decision and order of the Department."
4. The arbitration was conducted as a hearing. Testimony was taken and exhibits were submitted. A transcript of the proceedings was taken and the parties submitted post-hearing briefs.
5. The arbitration hearing was conducted in much the same manner as the Department conducts hearings.
6. The arbitrator found that Claimant was entitled to past and future disability benefits.
7. The present value of Claimant's future workers' compensation benefits is \$273,596.42 as of June 10, 2015 which was the date the Department made the present value calculation.
8. Claimant is entitled to total past-due benefits prior to June 10, 2015 in the amount of \$30,499.13. This amount will be paid in a lump sum payment.
9. Claimant's benefit rate is \$376.58 per week.
10. Claimant is entitled to interest on the past-due benefits at the statutory rate of 10% over the period of 1.55 years.
11. Claimant filed a Motion for Partial Lump Sum Distribution to pay his attorney's fees.
12. Claimant's attorney is entitled to costs in the amount of \$6,376.11 and the appropriate sales tax.
13. Claimant has less than \$3,000 in savings and cannot pay his attorney's fees, costs and sales tax without a partial lump sum payment.

Analysis:

Best Interest:

Employer and Insurer argue that Claimant has failed to show that it is in his best interest to receive a partial lump sum payment to pay his attorney's fees. The

Department disagrees. Claimant has less than \$3,000 in savings and cannot afford to pay his attorney's fees without a partial lump sum distribution.

In Enger v. FMC, 2000 S.D. 48, ¶ 29, 609 N.W.2d 132 the South Dakota Supreme Court Stated:

[T]he purpose of a partial lump sum for attorney fees is to assure that claimants will be able to employ competent legal representation to secure all compensation to which they are legally entitled. This purpose is certainly advanced by allowing claimants such as Enger, who are financially unable to pay their attorney fees, to pay this debt in a lump sum.

Id. In this case as it was in Enger, it is in Claimant best interest to pay a "just and due debt." Id. at ¶ 25.

Fee Rate:

Claimant's attorney has requested the approval of 30% fee rate. Employer and Insurer contend that the rate should be 25%. Attorney's fees in South Dakota workers' compensation cases are governed by SDCL 62-7-36. That statute states:

Except as otherwise provided, fees for legal services under this title shall be subject to approval of the department. Attorneys' fees may not exceed the percentage of the amount of compensation benefits secured as a result of the attorney's involvement as follows:

- (1) Twenty-five percent of the disputed amount arrived at by settlement of the parties;
- (2) Thirty percent of the disputed amount awarded by the Department of Labor and Regulation after hearing or through appeal to circuit court;
- (3) Thirty-five percent of the disputed amount awarded if an appeal is successful to the Supreme Court.

Attorneys' fees and costs may be paid in a lump sum on the present value of the settlement or adjudicated amount.

SDCL 62-7-36.

This provision provides for a 25% fee rate when "the disputed amount [is] arrived at by settlement of the parties". The disputed amount in this case was not arrived at by settlement. It was arrived at by an arbitrator following an arbitration hearing. A 30% fee rate is provided when "the disputed amount [is] awarded by

the Department of Labor and Regulation after hearing. In this case, the disputed amount was awarded by the Department when it adopted “Mr. Anderson’s final written decision and order as the final written decision and order of the Department” as required by the Department’s June 30, 2014 order. This requirement was solemnized in an order by the Department on July 6, 2015, following the arbitration hearing. As such, the Claimant’s attorney is entitled to the 30% fee rate.

This outcome is consistent with the implication of the statute that a higher fee rate is justified because of the additional work entails when the case goes to hearing.

Employer and Insurer’s position is based on some language contained in the Department’s order of July 6, 2015. That order states in part: “Based on the order approving the stipulation entered June 30, 2014, and the arbitrator’s findings of fact and conclusions of law, it is hereby ORDERED that the arbitrator’s findings of fact and conclusions of law are entered as an Agreement as to Compensation pursuant to SDCL 62-7-5”.

As stated before, there was no “settlement” of the “disputed amount” in this case as provided by SDCL 62-7-36. The agreement spoken of in the Department’s July 6th order refers to the stipulation between the parties which accompanied the order signed by the Department on June 30, 2014. That agreement was that the parties would arbitrate the matter, with Rob Anderson acting as arbitrator.

Attorney’s Fees Paid from Future Benefits:

Claimant asks that all his attorney’s fees be paid out of his future benefits. Employer and Insurer argue that only the fees for the future benefits should be paid out of the future benefits and that the attorney’s fees for the past due amounts be paid out of the lump sum payment for past due benefits. While Claimant is correct that the statute does not prohibit the lump sum payment of all the attorney’s fees from the future benefits. Nevertheless, the Department agrees with Employer and Insurer’s position.

The South Dakota Supreme Court stated in Stuckey v. Sturgis Pizza Ranch, 2011 S.D. 1, 793 N.W.2d 378

South Dakota’s workers’ compensation statutes do not favor lump sum awards. After all, the primary emphasis must be providing an injured employee with a reliable stream of income to replace lost wages.

Id. (citations omitted). In Enger, 2000 S.D. 48 at ¶ 1, the Court quotes Professor Larson work which states:

Since compensation is a segment of a total income insurance system, it ordinarily does its share of the job only if it can be depended on to supply

periodic income benefits replacing a portion of lost earnings. If a ... totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum is soon dissipated and the workman is right back where he would have been if workmen's compensation had never existed.

8 Larson's Worker's Compensation Law, § 82.71 (1999).

Claimant will be able to pay the attorney's fees for the past due benefits when he is paid those benefits in lump sum. To pay these fees out of the future benefits would only reduce those periodic benefits which are intended to replace his "lost wages" in the future. Consequently, Claimant shall only receive a lump sum payment for those fees associated with the future benefits plus costs and sales tax. Attorney's fees associated with the past-due benefits shall be paid out of the lump sum payment of those benefits to the Claimant.

Conclusion:

Accordingly, Claimant's Motion and Order for Partial Lump Sum Distribution is granted in part. Claimant shall provide an Order for the Department's signature containing the calculation of the amount of the partial lump sum distribution, using the criteria set forth above.

Sincerely,

Donald W. Hageman
Administrative Law Judge