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October 19, 2021

South Dakota Department of Labor and Regulation
Workers' Compensation Division
Amber Mulder, Director

By email only: amber.mulder@state.sd.us

Re: Suggestions for legislative changes

Dear Director Mulder,

I received the Notice for the next WCAC meeting and read the Agenda which was quite general in nature. There are three issues containing significant inequities and inconsistencies in our law that I think the committee would probably like to remedy if drawn to the members' attention and which have been, in my humble opinion, ignored for way too long. I would like to see these matters considered by the Workers' Compensation Advisory Commission when it is convenient for them to do so.

The first issue pertains to the inequity that exists when an old compensable injury's low weekly comp rate serves as the basis for for determining whether the odd-lot worker can earn 2/3 AWW. The current law at this point is clear that the amount of the weekly compensation rate that is determined as of the date of the injury under SDCL 62-6-3 is used to compensate the employee (whether for TTD, TPD, PPI, Voc Rehab, or TTD (subject in the latter benefit to an annual cost of living increase; [SDCL 62-4-52(2)]. The legislature obviously recognizes that wage entitlements years and years down the road from the original injury do not adequately fulfill the purposes of WC law if they have not been adjusted upwards to overcome the devaluation of these date of injury amounts by inflation.

This system seems to work acceptably and within the legislative purpose for injured and disabled workers when there is no dispute over their right to receive the benefit. Unfortunately, in the mid 90s a great deal of WC legislation was passed which also began using the date of injury compensation rates for purposes of determining whether a disabled person's loss of earning capacity was impaired sufficiently to qualify to receive vocational rehabilitation ("VR") [SDCL 62-4-5.1 and SDCL 62-4-52(2)] and Permanent Total Disability (PTD)[SDCL 62-4-53]. It is when the weekly compensation rate at the time of injury (hereinafter, "comp rate") is used to determine whether the worker qualifies for either benefits that the inconsistencies arise.

**62-4-52. Definition of terms.**

Terms used in § 62-4-53 mean:

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(2) "Sporadic employment resulting in an insubstantial income," employment that does not offer an employee the opportunity to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury. Commission or piece-work pay may or may not be considered sporadic employment depending upon the facts of the individual situation. If a bona fide position is available that has essential functions that the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury the employment is not sporadic. The department shall retain jurisdiction over disputes arising under this provision to ensure that any such position is suitable when compared to the employee's former job and that such employment is regularly and continuously available to the employee.

Source: SL 1994, ch 396, § 7; SL 1999, ch 261, § 6.

**62-4-53. Permanent total disability--Burden of proof--Moving expenses paid by employer in certain cases.**

An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of

permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

If an employee chooses to move to an area to obtain suitable employment that is not available within the employee's community, the employer shall pay moving expenses of household goods not to exceed four weeks of compensation at the rate provided by § 62-4-3.

Source: SL 1994, ch 396, § 8; SL 1999, ch 261, § 7.

**62-4-55. Suitable, substantial, and gainful employment defined.**

Employment is considered suitable, substantial, and gainful if:

(1) It returns the employee to no less than eighty-five percent of the employee's prior wage earning capacity; or
(2) It returns the employee to employment which equals or exceeds the average prevailing wage for the given job classification for the job held by the employee at the time of injury as determined by the Department of Labor and Regulation.

Source: SL 1994, ch 396, § 11; SL 2011, ch 1 (Ex. Ord. 11-1), § 33, eff. Apr. 12, 2011.

SDCL 62-4-52 first states: "Terms used in § 62-4-53 mean:" and then it goes on in section 2 to define "Sporadic employment resulting in an insubstantial income" in terms of 2/3 average weekly wage at the time of the injury? Then, we look at SDCL 62-4-53 and we see that it defines "Sporadic employment resulting in an insubstantial income" by referring back to SDCL 62-4-52(2).

Therefore, it is clear that for an injured worker to be permanently totally disabled he/she must show him/herself to be unable to make today the weekly comp rate which was determined at the time of the injury regardless of when the injury results in the PTD. The injustice occurs when we compare a person who who must show they are PTD on the day of his/her injury as compared with a person who must show he/she is PTD from the worsening of his/her injury years later. (See, SDCL 62-7-33). We can illustrate the injustice by hypothesizing the case of a 20 year old worker who became injured and PTD on January 1, 2001 when his weekly comp rate was $350 per week. Now 20 years later, because PTD rates are subject to cost of living increases, he is receiving a weekly WC PTD check (assuming 2% increases per year for inflation) of $520.09 per week.

Now envision that same worker hurt as badly the same day, but who after a year has recovered enough to make his January 1, 2000 comp rate and with admirable motivation to work stays employed for another 19 years such that he is making $520.09 per week, or alternatively $1,000 per week. Unfortunately, on January 1, 2021 his old injury substantially and materially worsened resulting in his becoming PTD. Real life examples include the Sopko case where his old exploding tire brain injury accumulated excessive scar tissue over 20 years resulting in untreatable severe seizures and PTD 20 years later. There are numerous cases where back and neck injuries have worsened with age with pain becoming so intractable and crippling that the worker could no longer tolerate work.

This latter worker will have his/her PTD claim denied because he/she who was making between $520.09 and $1000 per week (or more if he/she increased their station in their profession) can still make $350 per week. This latter worker is simply left unemployed and uncompensated.

If qualifying for PTD is going to remain (irrationally in my humble opinion) tied to the original weekly comp rate, shouldn't there be a mechanism for indexing the value of the original comp rate so as to take into account the true present value of the original comp rate?

Statistical indexes may also be used as a gauge for linking values. The cost-of-living adjustment (COLA) is a statistical measure obtained through analysis of the Consumer Price Index (CPI) that indexes prices to inflation.

https://www.investopedia.com/terms/i/indexing.asp

This use of an artificial standard which has been frozen so as to ignore reality is as wrong in WC as a person's right to vote being tied to the place he/she lived 20 years ago or what their voting status was back then would be. Shouldn't the subsequent substantial and material change in the condition, disability, or need for treatment that has resulted in a PTD be valued as of the time the change in condition happens? A past date of injury comp rate is irrelevant to the determination of whether one is PTD today.

A second area of concern is WC death. Exclusivity should not apply where there are no dependents since there is no quid pro quo.Or, there should be a minimum death benefit where one has no " dependents". I've had 2 cases where all WC had to pay in an Employer-negligently caused death was funeral and burial up to $10k. Perhaps wrongful death (vs PI) should be available where there are no dependents but there are parents/ children, etc. A person's debts ought to be able to be paid at a minimum. Probably 40 years ago wasn't $100k a payout for WC death?

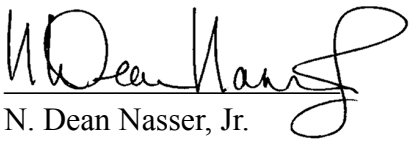
Finally, the part of Sopko 2 that I did not prevail on was that not only is wage determined at the time of injury, but as hard as it is to believe, dependency and dependents are determined at the time of injury also. This could not be more ridiculous. I tried to tell the Supreme Court in oral argument in the Sopko case that it made no sense to determine dependence and dependency as of the date of a 20-year-old injury. It makes no sense to do so when the defendants 20 years ago are no longer dependent 20 years later. Doesn't that negate the benefit in such a case? I posed that Jeff Sopko was married the time of the injury for 6 months to a woman; they had no children; he went back to work 6 months after the injury; his wife divorced him and he shortly thereafter got remarried; 20 years

later became TPD from the 20 year old injury getting worse; and died year later leaving his dependent wife of 20 years and dependent minor children. It made no sense whatsoever to look at who his dependents were 20 years earlier and ignore who his dependents are when he became PTD and died leaving those dependent on him with nothing.

I sincerely hope these issue are deemed worthy of further discussion and hopefully of WCAC's recommendations for legislative correction. Would you please be kind enough to distribute this email to the Workers' Compensation Advisory Commission?

My kindest regards,

NASSER LAW FIRM, P.C.



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