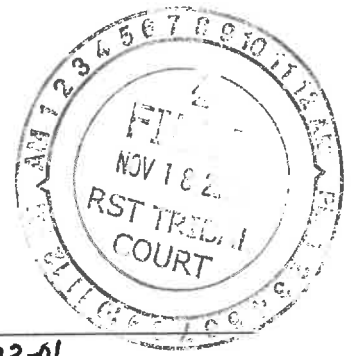


IN THE SUPREME COURT  
OF THE  
ROSEBUD SIOUX TRIBE



NANNETTE ANTOINE,

Case No. CA13-01

Claimant/Appellee

v.  
ROSEBUD SIOUX TRIBE LAW  
ENFORCEMENT SERVICES  
and  
UNITED SIOUX TRIBES  
WORKERS' COMPENSATION TRUST,  
Defendants/Appellants.

MEMORANDUM OPINION  
AND ORDER

Per curiam (Chief Justice Patrick Donovan and Associate Justices Charles Abourezk and Frank Pommersheim)

I. Introduction

Nannette Antoine, Claimant/Appellee, is a 40 year old woman and a member of the Rosebud Sioux Tribe, who was injured while employed by Rosebud Sioux Tribe Law Enforcement Services. Ms. Antoine is a long time resident of the Rosebud Sioux Reservation and is married to Jay Antoine, who is also a member of the Rosebud Sioux Tribe.

In 2004, Ms. Antoine was ultimately determined to be permanently and totally disabled and awarded a weekly benefit of \$240.06. The original present value of the award was \$248,616.59. In addition to the payment of attorney fees of \$66,045.79, there were court ordered partial lump sum payments in the amounts of \$25,000 in 2005, \$62,000 in 2007, and \$18,000 in 2008. None of these awards were appealed.

In 2012, the claimant again filed for a partial lump payment and the Tribal trial court awarded payment of \$26,453 to W & A Contracting for work to be performed on claimant's

home, \$6,384.54 to Brent's Body and Glass for car repairs, \$1,211.26 for back taxes, and \$4,465.00 to Ernst, Fernon and Associates to pay off a loan. The total of this partial lump sum payment was \$28,513.80. The cumulative effect of these partial lump sum awards was to reduce the claimant's most recent weekly benefit from \$110.00 to \$84.79 a week.

A timely notice of appeal was filed by the employer/insurer and oral argument was held before this Court on September 27, 2013.

## II. Issue

The sole issue on appeal is whether the trial court erred as matter of law in approving a partial lump sum payment on the balance of Mr. Nannette Antoine's permanent total disability award.

## III. Discussion

### A. Standard of Review

Under South Dakota law,<sup>1</sup> the standard of review for the award of a lump sum payment of permanent disability benefits has been variously described as a question of law<sup>2</sup> or a mixed question of law and fact.<sup>3</sup> Regardless of the characterization, the appropriate standard of review is *de novo*. The recent decision of the Cheyenne River Sioux Tribal Court of Appeals in the

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<sup>1</sup> Inasmuch as the Rosebud Sioux Tribe has not adopted any workers' compensation law of its own, it (and other tribes in South Dakota) have agreed to use South Dakota Workers' Compensation Law as a participant in United Sioux Tribes Workers' Compensation Trust. Pursuant to participation in United Sioux Tribes Workers' Compensation Trust, South Dakota Workers' Compensation Law, in effect, becomes the Rosebud Sioux Tribe's Workers' Compensation Law. Such participation by the Tribe is, of course, completely voluntary and nothing prevents the Rosebud Sioux Tribe from adopting its own unique Workers' Compensation Law, if it so desires.

<sup>2</sup> See, e.g., *Stuckey v. Sturgis Pizza Ranch*, 793 N.W.2d 378 (2011):

"We thus review the Department's application of the exceptional financial need statement to the facts under the *de novo* standard of review."

*Id.* at 384.

<sup>3</sup> See, e.g., *Steinmetz v. State, DOC Star Academy*, 756 N.W.2d 392 (SD 2008):

The determination of whether a lump sum award of benefits should be granted under SDCL 62-7-6 is a mixed question of law and fact and is freely reviewable on appeal. *Id.* at 395.

workers compensation case of *Pritzkau v. Cheyenne River Sioux Tribe and United Sioux Tribes'* *Workers' Compensation Trust* also adopted the *de novo* standard of review.

B. Question of Law Analysis

The legal standard for the award of a lump sum payment of permanent disability benefits is set out at SDCL § 62-7-6. It provides:

An employer or employee who desires to have any unpaid compensation paid in a lump sum may petition the Department of Labor asking that the compensation be paid in that manner. If, upon proper notice to interested parties and proper showing before the [D]epartment, it appears in the best interests of the employee that the compensation be paid in a lump sum, the [S]ecretary of [L]abor 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 [D]epartment 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 [S]ecretary 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 the reduced income due to the injury; or
- (2) If necessary to pay the attorney's fees, costs and expenses approved by the [D]epartment 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.

This statutory standard has two essential elements. First, it must be in the "best interests of the employee" and second, if it involves permanent total disability, there must be "exceptional financial need that arose as a result of reduced income due to the injury." It is uncontested in the case at bar that the partial lump sum payment is in the best interests of the claimant.

The particular items here are all *one* time expenses. At oral argument, counsel for the Employer/Appellant essentially conceded the validity of lower court's awards for vehicle repair

(\$6,384), back taxes (\$1,211.26), and (one time) loan debt (\$4,465). The Court accepts this informal 'stipulation' and withdraws them from further contention.

The sole item remaining is the award for home completion and repairs in the amount of \$26,453. Although Judge Michaels' made no express findings of fact in her order of December 28, 2012, it's clear from the transcript of the hearing on November 8, 2012 that there was a need to make repairs and convert an unfinished basement into three finished bedrooms for her two adult daughters and members of her extended family. It would appear to be logically inconsistent and culturally insensitive to approve a partial lump sum payment to build a home, but not to complete or repair it.

The commitment to provide shelter for immediate and extended family members is a quintessential Lakota virtue and ought not to be ignored in the calculus of determining 'exceptional financial need.' This is especially true in light of the potential of traditional reciprocity to encourage such family members to pay rent as their circumstances change and improve.

Appellant has failed to demonstrate that Judge Michaels' conclusion involved any mistake of fact or law. The partial lump sum award in this case is not significantly related to mere loss of income, which standing alone is usually *not* sufficient to justify a full or partial lump sum award. In fact, Judge Michael's order makes no reference to the loss of income, but rather focuses on particular (fiscal) debts and liabilities that are holding the claimant and her family hostage in a precarious financial situation that threatens to swamp and drive them under. *See, e.g., Stuckey v. Sturgis Pizza Ranch*, 793 N.W.2d 378 (SD 2011); *Steinmetz v. State DOC Star Academy*, 756 N.W.2d 392 (SD 2008). *See also* the Tribal Court decisions in *Weddell v.*

*Flandreau Santee Sioux Tribe and Tribal Workers' Compensation Trust (2010) and Pritzkau v. Cheyenne River Sioux Tribe and United Sioux Tribal Workers' Compensation Trust (2013).*

In a broader context, it is important to remember that despite the oft repeated mantra that (partial) lump sum payments are not favored, the text of the statute does permit such awards. Such an award cannot and should not be reversed on vague policy grounds that skirt the clear text of the statute. In sum, the partial lump sum award in this case is in the best interests of the claimant and does meet the "exceptional financial need" standard.

IV. Conclusion

For all the above-stated reasons, the trial court's decision to award a partial lump sum payment is affirmed.

IT IS SO ORDERED.

FOR THE COURT



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Associate Justice Frank Pommersheim

Dated this 30<sup>th</sup> day of October, 2013.