

November 19, 2004

The Honorable Governor M. Michael Rounds
State of South Dakota
500 East Capitol Avenue
Pierre, SD 57501

The Honorable Senator Arnold Brown
President Pro Tempore of the Senate
500 East Capitol Avenue
Pierre, SD 57501

The Honorable Representative Matthew Michels
House Speaker of the House of Representatives
500 East Capitol Avenue
Pierre, SD 57501

**Re: 2004 REPORT OF THE WORKERS' COMPENSATION ADVISORY
COUNCIL**

This report is intended to serve as the annual report to the Governor and the Legislature about the activities of the Governor's Workers' Compensation Advisory Council for 2004, pursuant to SDCL § 62-2-10. Council members include Lt. Governor Daugaard (chair), Paul Aylward, Glenn Barber, Guy Bender, Jeff Haase, Connie Halverson, Carol Hinderaker, Chris Lien, and Randy Stainbrook. Cabinet Secretary Pamela Roberts attended as a nonvoting representative of the South Dakota Department of Labor (DOL), and Cabinet Secretary Gary Viken attended as a nonvoting representative of the South Dakota Department of Revenue and Regulation.

On June 7, the Council held an organizational meeting where members learned about the Worker's Compensation system in South Dakota. The rate filing for the '04-'05 year (a two percent base rate decrease for the voluntary market and a 6 ½ percent base rate increase for the assigned risk market, with a ten-point swing limit for each) was discussed and introductory information was provided about issues Council members or the public wanted considered for possible recommended legislation.

At their August 23 meeting, the Council added items recommended by the Department of Labor and the Division of Insurance. The Council also held a public hearing and began taking public testimony on discussion items outlined at the June 7 meeting.

On October 14, the Council completed public testimony on items under discussion. The Insurance Division withdrew its suggestion for rate and filing waivers.

On November 1, the Council took action on the pending discussion items. A summary of testimony and comments along with final action by the Council follows on each of the items.

Issue #1: Changing the Procedure for Removing a DOL Judge from a Case 62-7-12.2

Summary: Current law gives the parties to a workers' compensation case the right to have one judge hearing the case removed, without giving a reason for the request. The time limit for asking for no-cause removal is twenty days after the party has been notified that the judge was appointed. When a party submits a motion for a judge to decide, no judge has been assigned to the case, and the motion is ruled on, the party who does not like the result retains the right to remove the judge who ruled on the motion. DOL proposed that once a party has asked a judge to do something for the party, the party can no longer have the judge removed from the case without having a good reason to ask.

Public Testimony:

Arguments Presented in Support:

- a. "Judge-shopping," in which the parties see how the judge might rule, then kick the judge off the case if the ruling is adverse, will be reduced.
- b. The proposal mimics the law followed routinely in Circuit Court.

No arguments were presented in opposition.

Council Action: Pam Roberts MOVED that the Workers' Compensation Advisory Council support Department of Labor legislation to change the procedure for removing a DOL Judge from a case as outlined in SDCL 62-7-12.2. Glenn Barber SECONDED. Motion carried unanimously on a roll call vote.

Issue #2: Clarify Statutes of Limitations 62-7-35 and 62-7.35.1

Summary: SDCL62-7-35 requires a claimant to file a "written request for hearing" within two years after the claimant receives a written denial of benefits. §62-7-35.1 says benefits are barred unless a "claim" is filed within three years from the date of the last payment of benefits. DOL proposes to change both these references to a "written petition for hearing."

Public Testimony:

Arguments Presented in Support:

An increasing number of unrepresented claimants are requesting hearings on their workers' compensation claims. It would be in their interest and DOL's to clearly establish what is required to request a hearing. DOL has rules defining what a "petition for hearing" is, so there can be little doubt.

No arguments were presented in opposition.

Council Action: Pam Roberts MOVED that the Workers' Compensation Advisory Council support Department of Labor legislation to clarify statutes of limitations outlined in SDCL 62-7-35 and SDCL 62-7-35.1. Carol Hinderaker SECONDED. Motion carried unanimously on a roll call vote.

Issue #3: Require Notice to Employee on Doctor Choice

Summary: Current law calls for an injured employee to have first choice of physician, but not to be able to change that choice without written consent from the employer. An employee may also "acquiesce" in the employer's choice of physician. The employer has no duty to inform an employee of his or her rights under these laws; there is no prohibition against an employer saying that an employee has to see the doctor the employer chooses, even though the law does not require that. Our courts have not spoken as to whether an employee can "acquiesce" to treatment under these circumstances, but it is DOL's opinion that this can happen. Council Member Paul Aylward proposed that an employer be required to inform employees of their right to see a physician of their choice.

During Council discussion of these proposals, it was further suggested that the impairment guide for determining permanent partial disability be changed from the 4th to the 5th Edition of the AMA Guides.

Public Testimony: The public testimony discussion strayed almost immediately into one about second opinions and independent medical examinations. The issue of how and when an employee should be examined is different from who is authorized to provide treatment. For the purpose of the summary, the discussion and arguments will be divided along those lines.

Arguments Presented in Support of requiring employer notice:

a. There are employers who mislead employees into believing they have to see the "company doctor" to get treatment for a work injury. This subverts the purposes of the choice law.

b. Many South Dakota employees these days do not speak or understand English very well, and they need to have their rights explained to them.

Arguments presented in opposition:

Notice requirements could be onerous for small employers.

Arguments presented in support of changing from the 4th to the 5th Edition of the AMA Guides:

The 5th Edition is the most current guide, and the one doctors use most often.

Arguments in opposition:
Such a change may raise premium costs.

Council Action: Dennis Daugaard MOVED that the Workers' Compensation Advisory Council suggest legislation that would change to the fifth edition of the AMA guides as apposed to the fourth edition. Connie Halverson SECONDED. Motion carried unanimously on a roll call vote.

Paul Aylward MOVED that the Workers' Compensation Advisory Council suggest legislation that would require employers to notify employees of their right to initial selection of doctor. Randy Stainbrook SECONDED. Motion failed on a roll call vote. 2 Yea (Aylward, Stainbrook), 7 Nay. Council will revisit this issue next year.

Paul Aylward MOVED that the Workers' Compensation Advisory Council recommend the Governor and Legislature re-establish a panel of doctors who would be available for second opinions or impairment rating examinations. The parties would use the panel opinions to determine the necessity of care or the amount of the impairment. Randy Stainbrook SECONDED. Substitute motion made by Pam Roberts that the Workers' Compensation Advisory Council defer further action on the doctors panel proposal until the 2005 meetings of the Workers' Compensation Advisory Council to allow the opportunity for public testimony on this new issue. Guy Bender SECONDED. Motion carried on a roll call vote. 8 Yea, 1 Nay (Aylward).

Issue #4: Compensation for Time Spent at Doctor Appointments

Summary: When a claimant is completely released to work and loses work time to go to the doctor, that time is not compensated through the workers' compensation system. When the claimant has been partially released to work, the time is only compensated when the claimant is eligible for temporary partial disability benefits. The proposal is to pay benefits to a claimant for doctor appointments regardless of the circumstances.

Public Testimony:

Arguments Presented in Support:

The claimant is losing time from work due to an injury. It is fair that there be compensation for the time.

Arguments Presented in Opposition:

This would not be fair if the claimant chose a doctor farther away than necessary for treatment.

Council Action: Paul Aylward MOVED that the Workers' Compensation Advisory Council support legislation to entitle an employee or injured worker to benefits when they are required to attend rehabilitation or doctor's appointments arising from a work related injury. Randy Stainbrook SECONDED. Motion failed on a roll call vote. 3 Yea (Aylward, Stainbrook, Halverson), 6 Nay.

Issue # 5: Offset for Wages in Cases of Odd-Lot Disability

Summary: This proposal was introduced in the 2004 Legislature as SB 129. A workers' compensation claimant can receive weekly benefits for life if unable to earn as much as he received in temporary total benefits. The following offset formula was proposed: claimant's weekly comp rate – (weekly post-injury earnings x 2/3) = weekly benefit. There would be no offset in cases where the claimant had suffered severe injuries (loss of both legs, for example.)

Public Testimony:

Arguments Presented in Support:

- a. It is not fair for claimants to receive a combination of weekly benefits and earnings that would make their post-injury income higher than before they were injured.
- b. A partial offset would discourage claimants, otherwise able to work in some capacity, from obtaining secret employment and defrauding the system.
- c. Another offset proposal, introduced in the 2004 Legislature as HB 1265, is too complicated, and does not fix the problems in current law as well as this one.
- d. Premiums have or will soon go up because of the current rule.
- e. The parties will have more flexibility in negotiating settlements for Odd-Lot cases; the all-or-nothing proposition in current law leads to litigation.

Arguments Presented in Opposition

- a. Compromise language was developed in legislative lobbyists' sidebars during the 2004 session (this language was not provided to the Council.) The compromise should be considered as an alternative.
- b. The permanent total disability benefit does not fully compensate high-wage earners, and an offset would increase the difference between pre-injury and post-injury income.
- c. A vocational expert opinion would be required, which would increase both litigation and the costs associated with it.
- d. A claimant would be required to prove a disability case twice: once to establish Odd-Lot status, and again to determine what offset if any would be appropriate. This is unfair and unduly expensive.
- e. A claimant does not get to factor in earnings in other jobs when the benefit rate is calculated, but outside earnings would be used for the offset, and this is unfair.

Council Action: Randy Stainbrook MOVED that the Workers' Compensation Advisory Council recommend there be no changes made to present law to provide an offset for wages in cases of Odd-Lot Disability. Paul Aylward SECONDED. Motion carried unanimously on a roll call vote.

Issue #6: Periodic Review

Summary: A permanent total disability claim can be reopened, but in no less than five years, and a claimant's physical condition has to substantially change in that time for a reopening.

Alternative proposals were made to change the process. 1) Allow changes in the claimant's earning capacity to be considered. 2) Mandatory reviews of all permanent total disability cases every five years. 3) for DOL to retain continuing jurisdiction over Odd-Lot claims, so that showing a physical change in condition is no longer necessary.

Public Testimony

Arguments Presented in Support of the Alternatives:

- a. It is impossible to reopen Odd-Lot claims, because their physical condition does not change after they become Odd-Lots. A claimant with increased earnings, however, may no longer meet the tests for an Odd-Lot.
- b. Since DOL has the right to retain continuing jurisdiction over an Odd-Lot case where the claimant's welfare is involved, it would be fair to extend that same right for the employer's benefit.
- c. Mandatory reviews would not pose an undue burden on DOL.

Arguments Presented in Opposition:

- a. Comp benefit rates are fixed as of the date of injury, but wages inflate over time. Reopening an Odd-Lot because those inflated wages catch up with a claimant's benefit rate would not be fair.
- b. A work comp review would be protracted and expensive.
- c. Allowing liberal reopening only allows an employer to retry an Odd-Lot case after losing it. If reopens are to be allowed, the standard for denying benefits should be raised, or a minimum time should pass, say three years.
- d. Mandatory reviews would be a ponderous administrative burden for DOL.

Council Action: Paul Aylward MOVED that the Workers' Compensation Advisory Council recommend there be no changes made to present law as it concerns to Periodic Review. Pam Roberts SECONDED. Motion carried unanimously on a roll call vote. Council will revisit this issue next year.

Issue #7: Lump Sum Attorney's Fees in Total Disability Cases

Summary: The current law allows a partial lump sum commutation of benefits for the claimant's attorney's fees. It has been proposed that, for all cases of permanent total disability a lump sum for fees be limited to whatever fees have been incurred up to the date when permanent total disability status has been established, plus a lump sum based on the applicable percentage of five years' worth of future benefits. Every five years after that, a new lump sum can be commuted for the attorney's fees portion.

Public Testimony:

Arguments Presented in Support:

- a. An attorney should not receive fees based on a percentage of the lifetime benefits a claimant could receive, because there is no guarantee the claimant will receive benefits for life. The attorney would then have been overcompensated, and that could not be recouped.
- b. Limiting fees would be consistent with what neighboring states do. In those states, capping fees has not reduced access to attorneys.

Arguments Presented in Opposition:

- a. Further limiting fees will have a chilling effect on attorneys representing claimants.
- b. For the claimant who outlives DOL's projected life expectancy, a fee based on it favors employers.
- c. A claimant's attorney often is involved with the client over many years. Attorneys tend not to charge claimants when they return with problems, and this practice would necessarily stop.

Council Action: Gary Viken MOVED that the Workers' Compensation Advisory Council recommend that no change to present law be made regarding determination of lump sum attorney fees in total disability cases. Connie Halverson SECONDED. Motion carried unanimously on a roll call vote.

Issue #8: Legal Representation and Small Claims.

Summary: A committee of attorneys within the State Bar proposed a simplified hearing process for claims involving \$5,000 of medical care or less.

Public Testimony:

Arguments Presented in Support:

Attorneys only rarely represent claimants in medical-only cases. A small claims procedure would allow claimants to have their claims heard.

Arguments Presented in Opposition:

- a. The proposal should be limited to cases where the compensability of the claim is not disputed. Even then, sorting out which cases should be subjected to the small claims procedure would be difficult.
- b. An insurer should only have to release records and reports relevant to the claim in dispute.
- c. It would be impractical to have a hearing every time a medical bill is denied.
- d. Medical testimony would not be taken at these hearings, and records alone do not inform the department of the issues involved.
- e. Mediation is already available for small claims, and is effective, so no alternative process is necessary.

Council Action: Pam Roberts MOVED that the Workers' Compensation Advisory Council send a letter to Tom Barnett, Executive Director of the South Dakota Bar Association, asking the State Bar to review and revise legislation suggested by a State Bar subcommittee which would establish a small claims procedure for certain worker's compensation cases. The State Bar is also asked to return a more final proposal to the 2005 Workers' Compensation Advisory Council with a recommendation from the full Bar. Chris Lien SECONDED. Motion carried unanimously on a roll call vote.

Issue #9: Social Security Offset

Summary: Weekly permanent total disability benefits can be reduced when the employee is receiving Social Security retirement benefits. However, the law does not permit DOL to factor in this potential reduction when determining the present value of future permanent total disability payments. It has been proposed that the Social Security reduction be considered in lump-sum calculations.

Public Testimony:

Arguments Presented in Support:

Odd-Lot lump sums are virtually automatic, since the offset is not figured into the amount of the lump sum, but is for installments.

Arguments Presented in Opposition:

The Council has not had the opportunity to hear opposing arguments on this concept.

Council Action: Gary Viken MOVED that the Workers' Compensation Advisory Council defer action on the Social Security offset proposal until the 2005 meetings of the Workers' compensation Advisory Council. Pam Roberts SECONDED. Motion carried unanimously on a roll call vote.

Annual Data

The Department of Labor received 24,429 injury reports during 2003, compared with an adjusted figure of 26,850 for 2002, representing a 9 % decrease.

The covered labor force (non-farm wage and salary employment) for 2003 was an average of 378,200 employees, compared with an adjusted average of 377,300 for 2002. Combining injury data with labor force data, a maximum of 6.4 % of workers were injured in 2003, compared with 7.1 % in 2002, a 9.9 % change.

Appendix A, attached to this report, consists of three tables showing injuries reported by body part injured, cause of injury, and the industry in which the injuries occurred. An increase occurred in total reports by body part injured from 2002 to 2003, but this is largely attributable to an expansion of the categories of body parts used in the table. For example, the 2002 report listed "Index finger at metacarpal bone," and the 2003 report adds "Index finger at distal joint," "Index finger at middle joint," and "Index finger at proximal joint." (These changes have been made at the behest of our users, whose data needs are becoming more sophisticated with time.)

Appendix B is four tables which show 2003 benefit costs by body part injured and cause of injury. The tables show disability and fatality payments, then all other costs (medicals, insurer legal fees, etc.; that table is identified as "excluding disability and fatality payments.")

Appendix C is a table of medical costs, comparing trends by category for the years 2002 to 2003 and 1998 to 2003.

Appendix D shows permanent total disability payments made during the years 1997 to 2004. The number of occurrences and amount of payments made are for the calendar, not the injury years identified. The 2003 figure, for example, represents PTD payments made for all PTD claims in any year, rather than PTDs which occurred in 2003.

The report is generated as a first step in exploring the dimensions of the PTD issue discussed at length in Council meetings.

Respectfully submitted,

James Marsh

cc: Lt. Governor Dennis Daugaard
Pamela S. Roberts
Workers' Compensation Advisory Council