



**Workers' Compensation Advisory Council
2008 Annual Report**

This document serves as the report of meetings, discussions, and recommendations of the Workers' Compensation Advisory Council, pursuant to SDCL § 62-2-10. Council members include Lt. Governor Dennis Daugaard (chair), Paul Aylward, Glenn Barber, Guy Bender, Jeff Haase, Connie Halverson, Carol Hinderaker, Chris Lien, and Randy Stainbrook, and nonvoting members Department of Labor (DOL) Secretary Pamela Roberts and Department of Revenue and Regulation Secretary Paul Kinsman. The report is available to any interested person or groups and can be found on the DOL website at www.sdjobs.org.

Overall, South Dakota's workers' compensation system continues to be in good shape. Base premium rates for 2008-09 decreased an average of 0.5% in the voluntary market, with a 15-point "swing" up and down (a maximum increase of 14.5% or decrease of 15.5%.) The involuntary or "assigned-risk" rates increased by an average of 0.6%. These base rates do not factor in "experience-modification" adjustments, which change some individual employers' premium rates based on their injury claims.

Council action for 2008 began with a meeting on May 27, 2008. The Council received the Division of Labor and Management report about the state of the system and 2008 workers' compensation legislation. Discussion items were established and public testimony was received on any items of interest by any person.

On August 21, 2008, the Council received written and oral comments concerning issues that Council members or the public wanted considered for possible recommended 2009 legislation, and took action on most of those issues.

On September 23, 2008, the Council took action on all pending issues not dealt with in the August 21 meeting. A complete transcript for each meeting can be found at www.sdjobs.org. A summary of Council actions at their meetings were as follows:

Issue #1: Required training for insurance representatives.

Summary: The Council was asked to recommend that insurance representatives receive training in South Dakota workers' compensation laws and procedures before handling claims.

Public Testimony: The Pavel family testified and provided written comments concerning their son, who died in a work-related accident. The insurer representative they spoke to at the time of the accident incorrectly told them they would receive reimbursement for travel expenses, and those claims were later rejected. The Pavels recommended training be

mandatory for all insurance representatives. DOL reported the majority of states require adjuster licensure, not training. The National Association of Insurance Commissioners (NAIC) have drafted a Model Act for adjuster licensure which will be considered for adoption this fall.

Council Action: Secretary Roberts MOVED that the Council defer action until 2009 on any proposal until NAIC has voted on its Model Act; Glenn Barber SECONDED. MOTION CARRIED unanimously.

Issue #2: Reimbursement/compensation for nondependent family members.

Summary: The Council was asked to recommend that family members of workers who die or are seriously injured in work accidents, but are nondependent, receive reimbursement of expenses associated with being with the worker during medical treatment, and/or compensation in the case of death.

Public Testimony: The Pavel family provided testimony and written comments. The workers' compensation law does not provide nondependent family members with reimbursement of the expenses of being with a worker or, in the case of death, with compensation for the loss. The Pavels consulted with various attorneys, who said such reimbursement/compensation could only be claimed if the employer had intentionally caused their son's injury. DOL reported Montana is the only state that currently allows the reimbursement of attendance expenses for nondependents. Seven states (Alabama, Hawaii, Kentucky, Maine, Minnesota, Montana, North Dakota, and Tennessee) compensate nondependent family members in the case of death; 43 states do not. Payment to nondependents in those seven states ranges from \$3,000 to \$63,500 when the worker leaves no dependents or others to whom the worker has a duty to support.

Council Action: Paul Aylward MOVED to recommend a NEW SECTION be added providing for a \$7,500 benefit to the claimant's estate. Randy Stainbrook SECONDED. MOTION PASSED with 6 Yea, (Aylward, Halverson, Stainbrook, Haase, Bender, Daugaard), 3 Nay, (Hinderaker, Lien, Barber).

Issue #3: Burial expenses.

Summary: The Council was asked to recommend that the current \$5,000 maximum for burial expenses for workers suffering fatal work accidents be increased.

Public Testimony: The Pavel family testified and provided written comments that the \$5,000 maximum burial expense allowance, which has been in the law since 1996, was not enough to pay for the most basic of burials. (In South Dakota, expenses associated with transportation of the body are fully reimbursed in addition to the burial allowance.) DOL reported that nationwide, maximums range from \$2,000 in Mississippi to "any necessary amount" in Kentucky. Regionally, the reimbursements were: Iowa, \$7,500; Minnesota, \$15,000; Montana, \$4,000; Nebraska, \$6,500; North Dakota, \$6,500; and Wyoming, \$10,000 (expenses associated with transportation of the body are included in

the maximums in these states.) DOL requested the South Dakota Funeral Directors' Association provide current cost information; the costs reported in that survey varied widely.

Council Action: Paul Aylward MOVED to recommend the maximum burial expense allowed in SDCL 62-4-16 be increased from \$5,000 to \$7,500. Glenn Barber SECONDED. MOTION CARRIED unanimously.

Issue #4: Impairment Guides.

Summary: A proposal to change the impairment guides used in permanent disability awards was withdrawn by the proponent Fern Johnson.

Council Action: As the proposal was withdrawn, the Council took no further action.

Issue #5: Term limits for Council members.

Summary: The Council was asked to recommend term limits for its members.

Public Testimony: Fern Johnson recommended specific term limits be imposed for Workers' Compensation Advisory Council members.

Council Action: The Council did not take action to make a recommendation to change the current law.

Issue # 6: Presumption of coverage for firefighters contracting blood-borne diseases.

Summary: The Council was asked to recommend that a presumption be established in the law that full-time firefighters who pass a pre-employment physical, are subsequently exposed to bodily fluids while on duty and found to be infected with blood-borne pathogens such as HIV or hepatitis, were presumed to be infected as a result of their firefighting duties and shall receive benefits.

Public Testimony: Mitch Richter testified in support of establishing the presumption. Rob Senger, an Aberdeen firefighter/EMT, and Tyler McElhaney, a Watertown firefighter/EMT, spoke about the risks for disease exposure from firefighting and emergency management situations. Mike Shaw, representing South Dakota property and casualty insurers; Lynn Job, South Dakota Bureau of Personnel; and Yvonne Taylor, representing the South Dakota Municipal League, testified in opposition, explaining that shifting the burden of proof would be unfair, as employees get the benefit of liberal construction already, and the proposal would inappropriately open the door for presumed coverage in other occupations and conditions.

Council Action: Paul Aylward MOVED that the Council recommend establishing the presumption of coverage. Randy Stainbrook SECONDED. Motion FAILED with 4 Yea

(Aylward, Haase, Stainbrook, Barber) and 5 Nay (Bender, Hinderaker, Halverson, Lien, Daugaard).

Issue #7: Penalty for insurance company for noncompliance.

Summary: The Council was asked to recommend that the penalties for an insurer failing to respond to phone calls or other communications be increased.

Public Testimony: DOL reported that existing law requires insurers to “acknowledge and act within 30 days upon communications with respect to claims arising under insurance policies and to adopt and adhere to reasonable standards for the prompt investigation of such claims.” SDCL §58-33-67(1). The law therefore already establishes a duty to respond, and to promptly investigate a claim. The Pavels testified and provided written comments that existing law would be sufficient to address their concerns in this area, but encouraged DOL to make the public more aware of the rights available under the law. Shaw agreed that existing law provided sufficient protections.

Council Action: Jeff Haase MOVED that the Council not make any recommendations in this area. Connie Halverson SECONDED. MOTION PASSED with 8 Yea, (Halverson, Stainbrook, Haase, Bender, Hinderaker, Lien, Barber, Daugaard), 1 Nay, (Aylward).

Issue #8: Monthly death benefit for dependent children.

Summary: SDCL §62-4-13 provides that if a worker dies on the job and leaves a child under 18-years-old whom the worker has a duty to support, each such child receives \$50 a month until the child is 18-years-old.


Public Testimony: DOL reported that most states (36) do not provide a separate benefit for children. Three states do have a law similar to South Dakota: North Dakota allows \$10 a week for each dependent child, Rhode Island allows \$40 a week for each dependent child, and in Massachusetts, when weekly benefits are below \$150, the weekly death benefit is increased by \$6 a child until \$150 is reached. In seven states (Alaska, Arkansas, Iowa, Kentucky, Pennsylvania, Utah, and Washington), the percentage of the deceased worker’s earnings used for paying weekly benefits increases for each dependent child. In Iowa, the minimum weekly benefit increases from \$140 to \$151 depending on the number of dependents.

Council Action: Paul Aylward MOVED that 62-4-13 be amended to increase \$50 to \$100 a month; MOTION FAILED for lack of a second.

Respectfully submitted on the 24th day of October, 2008, by the Workers' Compensation Advisory Council.

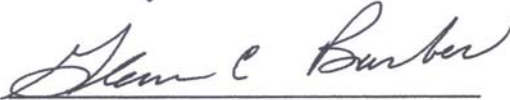
Members:


Dennis Daugaard, Chair



Carol Hinderaker

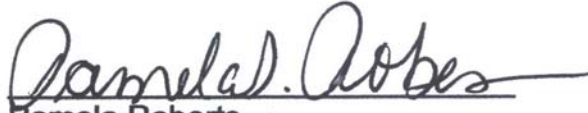

Paul Aylward



Chris Lien

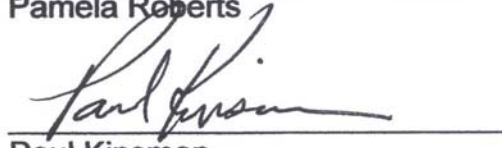

Glenn Barber


Randy Stainbrook


Guy Bender


Pamela Roberts


Jeff Haase


Paul Kinsman


Connie Halverson