

**South Dakota Department of Labor and Regulation
Workers' Compensation Advisory Council
2012 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 Matt Michels (chair), Paul Aylward, Glenn Barber, Guy Bender, Jeff Haase, Connie Halverson, Carol Hinderaker, Chris Lien, and Randy Stainbrook, and nonvoting member Department of Labor and Regulation (DLR) Secretary Pamela Roberts. The report is available to any interested person or groups and can be found on the DLR website at dlr.sd.gov.

The National Council on Compensation Insurance (NCCI) reports the frequency of workers' compensation claims in South Dakota continues to decrease, though that decrease is leveling off. The severity of those claims, particularly the cost of medical treatment, continues to rise. This has been the trend for the past several years and is associated with the increasing age and experience of South Dakota's workforce.

South Dakota's base premium rates for workers' compensation insurance for 2012 – 2013 decreased an average of 0.3 percent in the voluntary market, with a 15-point "swing" up and down (a maximum increase of 14.7 percent or decrease of 15.3 percent). The involuntary or "assigned-risk" rates were increased by 1.8 percent. These base rates do not factor in "experience-modification" adjustments, which change some individual employers' premium rates based on their injury claims. The assigned-risk increase was primarily attributed to the required assessments for the state Subsequent Injury Fund.

Council action for 2012 began with a meeting on June 26, 2012. The Council received the Division of Labor and Management report about the state of the system.

Discussion items were established and public testimony was received on any items of interest by any person.

DLR briefed the Council on fee schedule rule changes which became effective in December, 2011, and a Declaratory Ruling explaining the application of those changes. It also discussed in re Prime Tanning-Hartland, a bankruptcy case affecting self-insurance programs, and Brown v Cassens Transport Company, a federal case which allows Racketeer-Influenced and Corrupt Organizations (RICO) civil claims to be made in connection with workers compensation claims.

The Council held its second meeting on September 6, 2012. Robert Moss from NCCI presented trend and cost data for South Dakota claims. James Marsh from DLR provided a breakdown of categories of medical care and expense and a breakdown of costs associated with various causes of injury, and an overview of each of the issues as the Council considered them.

A summary of Council actions at their meetings follows:

Issue #1: Employee notice periods.

Summary: As in 2011, the Council was asked to recommend amending SDCL 62-7-10, which requires an employee to report a claim in three business days; the proposal would increase the reporting period to seven days.

Public Testimony: Charles Larson of Boyce, Greenfield, Pashby & Welk in Sioux Falls and Michael Simpson of Julius and Simpson in Rapid City testified and presented correspondence on behalf of the State Bar's Workers' Compensation Committee ("the State Bar"). It was asserted that the current notice period is too short, and that seven days is more reasonable without being excessive. This proposal was the result of a compromise among plaintiff and defense counsel on the committee in conjunction with the proposal amending the definition of "medical practitioners" in Issue #2. The State Bar asked the Council to consider its proposals as a package, recommending all or none. Kelly Campbell, representing Property Casualty Insurers, sent correspondence in support of the proposal. Bram Weidenaar of Hoy Trial Lawyers in Sioux Falls also testified in support. Testifying and/or offering correspondence in opposition were Bob O'Connell, Sioux Falls Chamber of Commerce; David Owen, South Dakota Chamber of Commerce; Brad Wilson, Insurance Benefits; Julie Johnson, Absolutely Aberdeen; Lindsey Riter-Rapp, NFIB-SD; Shawn Lyons, South Dakota Retailers Association; Bob Thimjon, Ramkota Companies; and Deb Mortenson, AGC. Francis Toscana, SDML Workers' Compensation Fund, and Matt Parker, Parker Transfer & Storage, provided correspondence in opposition. The opponents asserted that employers' costs would increase, and less prompt reporting does not benefit employees. Robert Moss stated NCCI did an analysis, but was unable to determine the premium cost impact. Any increases or decreases in benefits would be captured in future loss cost filings.

Council Action: Paul Aylward MOVED and Randy Stainbrook SECONDED that the Council recommend changing the notice period from three working days to seven working days; Motion PASSED with 4 Yea (Aylward, Halverson, Stainbrook, Michels) and 2 Nay (Hinderaker, Lien).

Issue #2: Independent medical examinations by out of state practitioners.

Summary: As in 2011, the Council was asked to recommend amending SDCL 62-1-1.1, which defines "medical practitioners." This definition is used in statute SDCL 62-7-1, dealing with independent medical examinations. The proposal would eliminate the requirement that the practitioner be licensed specifically in South Dakota.

Public Testimony: Charles Larson and Michael Simpson testified and presented correspondence for the State Bar in support. Larry Klaahsen, Dakota Truck Underwriters; and Bob Thimjon testified in support. Kelly Campbell submitted

correspondence in support. Defense counsel asserted that independent medical examinations are increasingly difficult to obtain, and practitioners licensed in another state should be able to perform them. This was the other half of the committee compromise considered in Issue #1. Bram Weidenaar, Hoy Trial Lawyers, Sioux Falls, offered testimony and correspondence in opposition; Eric Ollila, South Dakota State Employees Organization testified in opposition, asserting insurers will use out of state doctors who are unqualified, and litigation costs for injured employees will unfairly increase.

Council Action: Carol Hinderaker MOVED and Connie Halverson SECONDED that the Council recommend the “medical practitioner” definition be amended to include physicians not licensed in South Dakota; Motion PASSED with 4 Yea (Hinderaker, Halverson, Lien, Michels) and 2 Nay (Aylward, Stainbrook).

Issue #3: Allowing other insurance to cover claims when workers’ compensation coverage is denied for any reason.

Summary: As in 2011, the Council was asked to recommend amending SDCL 62-1-1.3, which requires other insurance to cover claims when workers’ compensation denies coverage for lack of work-relatedness; the proposal would require other insurance to cover when workers’ compensation denies coverage for any reason.

Public Testimony: Michael Simpson and Charles Larson testified and presented correspondence in support; Randy Moses, DLR, Division of Insurance, testified in support, but suggested the Council recommend the language contained in HB 1054 from the 2012 Legislative Session, as that bill addressed coverage issues the Bar proposal did not. He did not believe the proposal would have a major impact on health insurance claims, as many carriers already handle their claims in the way required by the proposal. Kelly Campbell submitted correspondence in support. It was asserted that employees can be denied insurance coverage for necessary medical treatment under both workers’ compensation and other insurance under the current law, and the proposal would both simplify the rules and ensure employees’ claims would be covered. No opposition was submitted.

Council Action: Randy Stainbrook MOVED and Connie Halverson SECONDED that the Council recommend amending SDCL 62-1-1.3 to reflect as written in HB1054 last year, requiring other insurance to cover claims when workers’ compensation denies coverage for any reason. Motion PASSED unanimously.

Issue #4: Increase current workers’ compensation pay rates.

Summary: An employee’s weekly benefit rate is generally set based on the average earnings received leading up to the date of injury. The rate does not increase unless the employee was injured on or after July 1, 1993, and the employee’s wages substantially

increased after the injury date. The Council has been asked to recommend benefit rates change for more employees whose earnings increase over time.

Public Testimony: Correspondence was received from an employee injured before July 1, 1993 (when the law was amended to allow benefits to increase in some cases.) The employee was anticipating losing time from work, but the benefit rate would remain the same as it was at the time of injury, and the employee argued this was unfair. DLR explained the applicable laws and provided a comparison of other states' laws about the effect of cost of living adjustments on benefit rates. Larry Klaahsen testified in opposition.

Council Action: Motion FAILED due to lack of action.

Issue #5: Amend SDCL 62-4-2 to reduce the seven day waiting period.

Summary: SDCL 62-4-2 requires an employee to be incapacitated from work for seven calendar days before disability benefits are owed, referred to as the "waiting period." When the waiting period is met, the employee is compensated for all lost time back to the date of injury. The Council has been asked to recommend shortening the waiting period to five or fewer days.

Public Testimony: An injured employee testified and provided correspondence that he went too long without receiving disability benefits because he would frequently miss time from work that did not meet the waiting period. This same information was used as the basis for the request in Issue #6. DLR explained the applicable laws. Larry Klaahsen testified in opposition.

Council Action: Motion FAILED due to lack of action.

Issue #6: Amend SDCL 62-4-1.1 to expedite prompt payment of workers' compensation benefits.

Summary: SDCL 62-4-1.1 calls for an insurer to take prompt action on receipt of medical bills. The Council has been asked to recommend insurers be made to act more promptly as to disability payments. SDCL 62-4-10.1 imposes a 10 percent penalty on insurers who do not pay disability benefits within 10 days after they are due.

Public Testimony: An injured employee testified and provided correspondence that asserted his insurer took too long to pay the benefits to which he was entitled. Larry Klaahsen testified in opposition.

Council Action: Motion FAILED due to lack of action.

Issue #7: Amend SDCL 62-1-1.2 to change the Guide to the Evaluation of Permanent Impairment established by the American Medical Association from the 4th edition to the 6th edition.

Summary: SDCL 62-1-1.2 requires permanent impairment (the basis for permanent partial disability benefits) to be measured using the AMA's 4th edition of the Guides to Impairment. The Council has been asked to recommend the 6th edition of the Guides be used.

Public Testimony: Karla Murphy from the South Dakota State Medical Association (SDSMA) submitted correspondence supporting a change to the 6th edition. Matthew Kremke from the American Medical Association (AMA) and Mark East from SDSMA testified in support. Janet Thron from the AMA submitted correspondence in support. DLR provided studies done by NCCI and other states' workers compensation offices, showing an uncertain impact from the change. Supporters asserted the newer guide is easier to use, ratings are more consistent, and impairments are measured more accurately than in the 4th Edition. Rob Moss acknowledged that no cost impact could be determined. No opposition was submitted.

Council Action: Chris Lien MOVED and Carol Hinderaker SECONDED that the Council recommend amending SDCL 62-1-1.2 to change the impairment guide from the AMA 4th edition to the 6th edition. Motion PASSED unanimously.

Respectfully submitted on November 11, 2012, by the Workers' Compensation Advisory Council.