

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

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**DECLARATORY RULING**

**RE: 62-4-34**

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A Declaratory Ruling has been requested from the Department, pursuant to ARSD 47:01:01:04. A telephone hearing was held January 12, 1996, with Peter Pagones, Aberdeen, South Dakota, Michael McKnight, Boyce, Murphy, McDowell, and Greenfield, Sioux Falls, South Dakota, and James Marsh, Director of the Division of Labor and Management, South Dakota Labor Department, on the line. Director Marsh conducted the hearing on behalf of Craig Johnson, Secretary of the Labor Department.

The entirety of the information contained in the Department's file was considered in making the declaratory ruling. The Department will assume the facts specified in the petition to be true for the purpose of the ruling. On April 26, 1995, Gilbert Blue, Claimant, was injured in a work-related incident to his right upper extremity (arm). Claimant had previously sustained an injury to his right upper extremity. American States Insurance, Insurer, asked a neurologist to assign an impairment rating, noting that "the impairment rating to the right upper extremity should include the permanency sustained as a result of the April 26, 1995 work injury only". Dr. Malek

assigned a 10 percent impairment to that injury, noting that "it is difficult to determine what (Claimant's) total impairment rating would be based on his overall condition, but ... it would be greater than the 10 percent assigned as a result of the April 26, 1995 injury." It will be assumed that Claimant was not drawing workers' compensation benefits from the injury preceding April 26, 1995 at any time relevant to the ruling.

Claimant asserts that, under SDCL 62-4-34, Insurer should be responsible for the entirety of Claimant's permanent disability. That statute provides as follows:

If an employee who has previously sustained an injury, or suffers from a preexisting condition, receives a subsequent compensable injury resulting in additional permanent partial or permanent total disability so that the degree or percentage of disability caused by the combination of the subsequent injury and the preexisting injury or condition is substantially greater than that which resulted from the last injury, considered alone, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer shall pay all ... compensation provided by this title.

This statute is part of the body of statutes which deals with the Subsequent Injury Fund. The Subsequent Injury Fund encourages employers to hire workers with preexisting injuries, by reimbursing employers for benefits paid to employees who suffer disabilities that would not have occurred or would not have been as serious if the employee had no preexisting physical impairment when hired. Sioux Falls School District v. South Dakota Subsequent Injury Fund, 504 N.W.2d 107 (S.D. 1993). The

insurer must initially pay the claim, then seek reimbursement, for the system to work properly.

Given the facts as Claimant describes them, he had an injury predating April 26, 1995. He suffered a subsequent injury for which Insurer would be responsible. As Claimant has not received workers' compensation benefits for the previous injury, it would not be possible to apportion the effect of the injuries per SDCL 62-4-29. He could, rather, be able to rely on the "last injurious exposure rule" to receive compensation for his "combined disability." Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992).

However, it is unknown from the facts described here, whether his previous injury combined in any way with his subsequent injury, or whether his subsequent injury was made "substantially greater" because of his previous injury. Dr. Malek only says that his current impairment is more than 10 percent. SDCL 62-4-34 could not be applied to require Insurer to pay benefits based on the combined disabilities unless these facts are determinable. It is ruled that SDCL 62-4-34 could be applied if such facts could be ascertained, but not based on the facts currently before the Department.

Dated this 13<sup>th</sup> day of February, 1996.

SOUTH DAKOTA DEPARTMENT OF LABOR

  
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Craig W. Johnson, Secretary