

SOUTH DAKOTA DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY


in re § 64.0101 and .0103 (1962)

HF No. 332, 1996/97

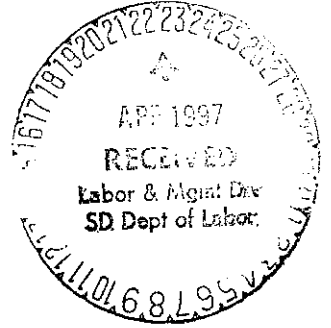
DECLARATORY RULING

This matter comes before Craig Johnson, the Secretary of the South Dakota Department of Labor, having been treated as a petition for declaratory ruling under ARSD 47:01:01:04. The matter was taken on written submissions by James E. Marsh, Director of the Division of Labor and Management, South Dakota Department of Labor, on behalf of the Secretary, and the ruling here is issued on Secretary Johnson's behalf. Petitioner, Homestake Mining Company, has prepared documents entitled "Petition for Declaratory Judgment" and "Memorandum in Support of Petition for Declaratory Judgment", with exhibits; the Department adopts these as the record and ruling in this matter, attaching them for edification.

Dated this 2d day of June, 1997.


James E. Marsh, Division Director,
on behalf of Craig Johnson,
Secretary
South Dakota Department of Labor

STATE OF SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
WORKERS' COMPENSATION



IN THE MATTER OF A
WORKER INJURED IN 1962,

vs.

HOMESTAKE MINING COMPANY,

Employer/Self Insurer.

HF No.

**PETITION FOR DECLARATORY
JUDGMENT**

Homestake Mining Company, employer and self-insurer (employer), through Daniel E. Ashmore, Gunderson, Palmer, Goodsell & Nelson, LLP, its attorney, seeks a declaratory ruling from the Department of Labor (department) under § SDCL 1-26-15, as follows:


1. Employer was insured under the workers' compensation laws of the state of South Dakota in 1962 and has been continuously insured since 1962.
2. Employer paid benefits to injured workers under the worker's compensation laws of the state of South Dakota in 1962 and has paid benefits to injured workers since 1962, to the present.
3. The amount and nature of benefits paid by employer to injured workers in 1962 and to the present has been and is now based upon the worker's compensation statutes in effect at the time a worker was injured.
4. This petition is brought for the purpose of obtaining a declaratory ruling from the department setting forth the maximum amount an employer would be obligated to pay to a worker who suffered a totally disabling work-related injury in 1962.
5. Employer's memorandum in support of this petition is attached as **Exhibit A**.

WHEREFORE, employer requests that the department enter a ruling declaring the maximum amount an employer would be obligated to pay to a worker who suffered a totally disabling work-related injury in 1962 and further delineating the types of benefits payable and maximum amounts payable for each type of benefit.

Dated the 21st day of April, 1997.

GUNDERSON, PALMER, GOODSSELL
& NELSON, LLP

BY 


Daniel E. Ashmore
Attorney for Employer
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078

STATE OF SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
WORKERS' COMPENSATION



IN THE MATTER OF A)
WORKER INJURED IN 1962,)

HF No.)

vs.)

EXHIBIT A)

HOMESTAKE MINING COMPANY,)

MEMORANDUM IN SUPPORT OF
PETITION FOR DECLARATORY
JUDGMENT

Employer/Self Insurer.)

Homestake Mining Company, employer and self-insurer (employer) states as follows in support of its petition for declaratory judgment:

An injured worker is entitled to those benefits which were due to him as of the date of injury, not some future date, and thus an employer has no obligation to an injured worker beyond what existed as of the date of injury. Thus a worker who sustained a totally disabling injury in 1962 would be entitled to only the benefits provided under the workers' compensation laws of the state of South Dakota in effect in 1962.

Rights and obligations of an interested party under the Workmen's Compensation Law become vested at the date of a compensable accident, unless death results. Until such time as an accident occurs the legislature may change the scale of weekly or other benefits, but to make such a change after the accident occurs would impair the obligations of contracts.

Salmon v. Denhart Elevators, 30 NW2d 644 (SD 1948) (see attached Exhibit 1).

In Salmon, the claimant wanted an increase in medical payments allowed by amendment to the medical payment statute subsequent to his injury. The court found the amendment increasing the benefit could only be applied prospectively because it created a duty of payment that employers and insurers had not been obligated to pay for previously.

The Salmon case has been consistently relied upon by the department in determining that the law in effect at the time of the injury must be applied, and not a subsequently enacted law. See, for example, Appletoft v. Concord Nursing Home, HF #64, 1981/82; Hansen v. St. Luke's Hospital, HF #93, 1987/88; Wendel v. Domestic Seed & Supply, HF #208, 1989/90; Dorris v. Commercial Asphalt, HF #179, 1989/90; Christenson v. Matthews, HF #92, 1990/91; Stark v. Munce Bros., HF #237, 1990/91; Carmody v. Waterbed Liquidation Center, HF #105, 1990/91; Scheurenbrand v. Martin & Associates, HF #110, 1985/86; and Berberich v. John Morrell, HF #138, 1992/93.

The obligation of an employer under the workers' compensation statutes in effect in 1962 is set forth by Title 64, Workmen's Compensation, of the 1939 codified law, as supplemented by the 1960 Supplement (superseding the 1952 Supplement).

The law in effect in 1962 provided for payment of medical and hospital expense by the employer for a period of not longer than 20 weeks. The maximum amount to be paid for hospital services was Seven Hundred Dollars (\$700), and the maximum amount to be paid for medical and surgical services was Three Hundred Dollars (\$300), for a total of One Thousand Dollars (\$1,000). The Commissioner could order a maximum of an additional \$1000 to be paid upon proof of necessity. See section 64.0101 included in the 1960 Supplement attached as **Exhibit 2.**

The 1962 law also provided that in cases of permanent total disability, the employer had to pay a maximum of \$35 per week for 300 weeks, and after that a maximum of \$15 per week for life. The maximum that an employer was obligated to pay a permanently, totally disabled worker was \$12,000. See section 64.0403 in the 1962 Supplement attached as **Exhibit 2**.

The current workers' compensation statutes provide much higher and more liberal benefit rates to an injured worker. However, the current statutes may not be applied retroactively. The South Dakota Supreme Court has consistently held that retroactive legislation is not favored, and a legislative act will not operate retroactively, unless the act clearly expresses such an intent. "A legislative act will not operate retroactively unless the act clearly expresses an intent to so operate." West v. John Morrell & Co., 460 NW 2d 297 (SD 1990). Our current workers' compensation statutes governing benefit rates do not express an intent to operate retroactively.

Changes in the law may not be applied retroactively if to do so would create substantial inequitable results. "When retroactive application of a decision could produce substantial inequitable results, justification exists for holding the decision nonretroactive." Vogt v. Billion, 405 N.W.2d 635 (S.D. 1987, citing Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct 349, 30 L.Ed.2d 296 (1971) and Fisher v. Sears, Roebuck & Co., 214 N.W.2d 85 (SD 1974).

If retroactive application of changes in benefit rates were allowed, great injustice and hardship on employers and insurers would result. Insurers have been able to provide insurance to employers for the benefit of injured workers by setting rates based upon benefits payable at a certain time. Retroactive application would require employers and insurers to have unlimited pools of money reserved for future claims of injured workers who might seek increases in

benefits whenever benefit amounts are statutorily changed. Of course, in addition to claims for increased benefit rates, substantial claims for interest on past due increases could be made.

Benefit rates are set to correspond to the time period in which the worker was injured, and administratively, that is the only way the system would work. Administrative chaos would be created if workers were allowed to petition for increased benefits every time benefit rates are statutorily increased. The burden on the insurer and employer, as well as the Department of Labor, would be tremendous. Old cases would have to be reopened or reconstructed. There would be difficulty in even locating old files, particularly in cases where insurers have changed. The department would be so overwhelmed with these prior claims, it would be unable to deal with current claims.

Employer respectfully submits that there is ample precedent for the department to issue a declaratory ruling setting forth the following:

1. The maximum medical benefit to which a permanently, totally disabled worker injured in 1962 is entitled is One Thousand Dollars (\$1,000), except that the Commissioner may award an additional One Thousand Dollars (\$1,000) upon proof of necessity furnished by the injured worker.
2. The maximum permanent total disability benefit to which a permanently, totally disabled worker injured in 1962 is entitled is Twelve Thousand Dollars (\$12,000).

3. Upon the payment of the sum of \$1,000 in medical benefits (or the sum of \$2,000 if the Commissioner awards an additional \$1,000 upon proof of necessity furnished by the injured worker) and payment of the sum of \$12,000 for permanent total disability benefits, an employer has no further obligation to a permanently, totally disabled worker injured in 1962.

Dated the 21st day of April, 1997.

GUNDERSON, PALMER, GOODSSELL
& NELSON, LLP

BY 

Daniel E. Ashmore
Attorney for Employer/Insurer
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078

In re ENGBRETSON'S ESTATE.

GRAFF v. ENGBRETSON et al.

ENGBRETSON et al. v. GRAFF.

Nos. 8892, 8893.

Supreme Court of South Dakota.

Jan. 22, 1948.

Executors and administrators \S 506(3)

Evidence sustained allowance of items in administrator's final account as modified on appeal by circuit court.

Appeal from Circuit Court, Minnehaha County; Lucius J. Wall, Judge.

Proceeding in the matter of the estate of Lars Engebretson, deceased, wherein A. N. Graff, as administrator, filed final account, contested by Martin Engebretson and another. From the determination of the county court, the administrator and contestants appealed. From a judgment of the circuit court modifying the determination of the county court, all parties appeal.

Affirmed.

T. R. Johnson and Danforth & Danforth, all of Sioux Falls, for A. N. Graff.

James O. Berdahl, of Sioux Falls, for Martin Engebretson and Ingebor Marie Hill.

PER CURIAM.

A. M. Graff filed on May 2, 1945, his final account as administrator of the estate of Lars Engebretson, deceased. Martin Engebretson and Ingebor Marie Hill appeared in county court and contested the allowance of items in the account. From the determination of the county court they appealed to the circuit court. The administrator also appealed. The circuit court made findings of fact and conclusions at law and entered judgment modifying the determination of the county court. The parties have appealed from such portions of the judgment of the circuit court as are adverse to them. The assignments of error relate to the sufficiency of the evidence to support certain findings of fact. It would serve no useful purpose to detail the evidence. We have carefully examined the record and conclude that there is ample evidence to sustain the findings of the trial court.

The judgment is affirmed without costs.

SALMON v. DENHART ELEVATORS et al.

Nos. 8944, 8963.

Supreme Court of South Dakota.

Jan. 30, 1948.

1. Workmen's compensation \S 1131, 2073

Agreement entered into between employer, insurer and employee determining that relation of employer and employee existed, that employee was injured in the course of his employment, that annual wage was \$900, fixing weekly compensation at \$9.51, and that employee was entitled to receive compensation during period of total incapacity, filed with and approved by Industrial Commissioner was a final determination as to all matters embraced in the agreement with force and effect of an award and not subject to review three years after filing. SDC 64.0101 et seq.

2. Workmen's compensation \S 2073

Agreement between employer, insurer and employee filed and approved with Industrial Commission and having the force and effect of an award did not preclude a proceeding for review of the award 3½ years later with respect to compensation agreed on for temporary total incapacity, since duration of temporary total incapacity was not ascertainable when the original award was made, and was dependent upon subsequent conditions and was therefore reviewable under the compensation law. SDC 64.0609.

3. Workmen's compensation \S 1939

Sufficiency of evidence before Industrial Commissioner is not subject to review by an appellate court where there is any reasonable or substantial evidence tending to establish the findings of the Commissioner. SDC 64.0101 et seq.

4. Workmen's compensation \S 1657

In compensation proceeding, evidence sustained finding of "temporary incapacity" where employee with leg injury was unable to do much work, hired men to operate his truck for him and required the assistance of his daughter to perform services for which he was paid. SDC 64.0101 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Temporary Incapacity".

5. Workmen's compensation \S

Under compensation law that an employee shall receive compensation during period of total incapacity, compensation for period for specific loss of use of a leg, compensation for "temporary incapacity" continues under some provision of the law until complete recovery or when a specific period becomes ascertainable. SDC 64.0403(4).

6. Workmen's compensation \S

Under compensation law due to permanent and complete loss of use of a leg is ascertained it becomes apparent that disability has resulted from the injury the injured member will get no worse because of the injury interval during which compensation for temporary incapacity continues until employee is restored so far as permanent character of his injury is concerned. SDC 64.0403(4).

7. Workmen's compensation \S

Under compensation law employee is restored so far as permanent character of his injuries will permit compensation for temporary incapacity ceases and it is incumbent upon the Commissioner to fix extent of disability according to statute that its jurisdiction has been exercised for purpose of determining the amount of compensation. SDC 64.0403(4).

8. Workmen's compensation \S

In compensation proceeding for "temporary incapacity" properly allowed under evidence showed an area on injured leg healed and possibly contained loose bone delaying healing. SDC 64.0403(4).

9. Workmen's compensation \S

Under compensation law that, except in cases of disability, payments shall be made for a period of more than six months after accident, and that all partial permanent injury shall be paid in installments at the same time.

the cause to the Industrial Commissioner. SDC 64.0701.

Appeal from Circuit Court, Beadle County; Boyd M. Benson, Judge.

Proceeding under the Workmen's Compensation Law by Leo P. Salmon, claimant, opposed by Denhart Elevators, employer, and South Dakota Employers Protective Association, insurer. From a judgment of the circuit court for claimant on employer's and insurer's appeals from an adverse decision of the Industrial Commission, claimant, employer and insurer appeal.

Reversed and remanded with directions.

Caldwell & Burns, of Sioux Falls, for appellants.

Royhl & Longstaff, of Huron, for cross-appellant.

SICKEL, Judge.

This is a proceeding brought for the recovery of workmen's compensation. Leo P. Salmon is the employee, Denhart Elevators is the employer, and South Dakota Employers Protective Association is the insurer. The employee injured his left knee in the course of his employment on July 21, 1941. About ten days after the injury he was sent by the insurer to Doctor Shirley for medical treatment, and remained under the Doctor's care until he was discharged as cured October 20, 1941. Sometime after that date the employee, employer and the insurer entered into an agreement as to compensation, which agreement provided that the employee should receive compensation at the rate of \$9.51 per week, based upon an average annual wage of \$900, beginning September 19, 1941, and continuing until terminated in accordance with the Workmen's Compensation Law. This agreement was filed with the Industrial Commissioner January 7, 1942 and was approved by him on January 15, 1942. The employee also signed a final receipt and release on November 26, 1941 for the sum of \$41.20 previously paid, but this instrument was set aside by the circuit court in a separate action, on the ground of mistake. On September 26, 1945 the employee petitioned the Indus-

trial Commissioner for a review of payments to be made to him under the Workmen's Compensation Law. The petition was heard pursuant to notice on February 15, 1946. The Industrial Commissioner increased the payments for total incapacity, made an allowance for partial and permanent loss of the use of the injured leg, and awarded additional sums for medical and surgical services and hospital services.

Petition for review of the decision of the Commissioner was filed and denied. Then the employer and insurer appealed to the circuit court. The circuit court reduced the award for temporary incapacity, increased the payments for partial and permanent loss of the use of the leg, and approved the awards for medical and surgical services and hospital services. Upon these findings the court made conclusions of law and entered judgment for recovery of compensation and interest \$2,434.26, and for medical and surgical services and hospital services \$377.50. The employer and insurer appealed from that part of the decision which increased the compensation for temporary incapacity, partial and permanent disability, and from the allowance for medical and surgical services, and the employee appealed from that part of the decision which reduced the compensation for temporary incapacity, and which fixed the weekly compensation at \$9.51 per week.

[1] The employee contends that his weekly compensation should have been \$13.20, instead of \$9.51 as found by the Commissioner and the court. The agreement as to compensation entered into between the employer, insurer and employee determined that the relation of employer and employee existed; that the employee was injured in the course of his employment; that the annual wage was \$900 and fixed the weekly compensation at \$9.51; that the employee is entitled to receive compensation during the period of total incapacity. *Middleton v. City of Watertown*, 70 S.D. —, 16 N.W.2d 39. The agreement was filed and approved by the Industrial Commissioner, and it has the force and effect of an award. *Bailey v. Hess*, 55 S.D. 602, 227 N.W. 69; *Chittenden v. Jarvis*, 68 S.D. 5, 297 N.W. 787. The award is a final determination as to all the above matters

which are embraced including the weekly compensation to those matters is not.

[2] The Industrial Commission found that the employee was as a result of the injury in 1941, and until the circuit court decision on February 15, 1946 a total of three hundred thirty-four weeks he awarded compensation for such incapacity of time. The circuit court found such incapacity did not extend from October 20, 1941 to October 20, 1945, and a total of one hundred twelve weeks for such incapacity of time. The duration of temporary incapacity was a matter not ascertainable from the evidence. It was dependent upon subsequent medical evidence. It was therefore reversed. *Vodopich v. Jarvis*, 43 S.D. 540, 180 N.W. 2d 1, 180 N.W. 2d 1, *supra*; *Middleton v. Jarvis*, *supra*.

[3, 4] The employee contends that the evidence of incapacity sustains the finding of the Industrial Commissioner. The rule is that the evidence before the Commissioner, * * * viewed, by an appellate court, is any reasonable or probable view tending to establish the commission. *Day v. Co.*, 43 S.D. 65, 177 N.W. 2d 1, *supra*; *Mer v. Quiett*, S.D., evidence shows that the employee was one month after being discharged by Doctor Shirley on October 1, 1943 was the employee returned from hospital and again placed himself to work. Between those times the employee was unable to work and hired men to operate his truck about \$70 a month in compensation. He went to Washington for five months. While there he received \$1,200, \$700 of which was for the use of his truck and for services which he received from the assistance of his

sioner for a review of pay made to him under the Workmen's Compensation Law. The petition pursuant to notice on February 15, 1946, the Industrial Commissioner in awarding payments for total incapacity, allowance for partial and permanent use of the injured leg, and additional sums for medical services and hospital services. A review of the decision of the Commissioner was filed and denied. The employer and insurer appealed to the circuit court. The circuit court ruled for temporary incapacity, payments for partial and permanent use of the leg, and awards for medical and surgical and hospital services. Upon review the court made conclusions and rendered judgment for recovery of interest \$2,434.26, and for medical and surgical services and hospital services \$377.50. The employer and insurer appealed from that part of the decision which increased the compensation for temporary incapacity, partial and permanent use of the leg, and from the allowance for medical and surgical services, and the award from that part of the decision which reduced the compensation for temporary incapacity, and which fixed compensation at \$9.51 per week. The employee contends that his compensation should have been fixed at \$9.51 as found by the Industrial Commissioner and the court. The agreement entered into between the employer, insurer and employee at the relation of employer and employee existed; that the employee in the course of his employment received an annual wage was \$900 and his compensation at \$9.51; that he is entitled to receive compensation for the period of total incapacity. *City of Watertown*, 70 S.D. 2d 39. The agreement was approved by the Industrial Commissioner and it has the force and effect of a final award. *Bailey v. Hess*, 55 S.D. 602, *Chittenden v. Jarvis*, 68 S.D. 87. The award is a final decision to all the above matters

which are embraced in the agreement, including the weekly compensation, and as to those matters is not subject to review.

[2] The Industrial Commissioner found that the employee was totally incapacitated as a result of the injury, from July 21, 1941, and until the date of the hearing February 15, 1946 a period of two hundred thirty-four weeks and three days, and he awarded compensation for that period of time. The circuit court decided that such incapacity did not exist from November 20, 1941 to October 1, 1943, nor after August 1, 1945, and allowed compensation for such incapacity for a period of one hundred twelve weeks and three days. The duration of temporary total incapacity was a matter not ascertainable when the award was made. It was a matter which was dependent upon subsequent conditions and it was therefore reviewable under SDC 64.0609. *Vodopich v. Trojan Mining Co.*, 43 S.D. 540, 180 N.W. 965; *Chittenden v. Jarvis*, supra; *Middleton v. City of Watertown*, supra.

[3,4] The employee contends that the evidence of incapacity is sufficient to sustain the finding of the Industrial Commissioner. The rule is that "The sufficiency of the evidence before the industrial commissioner, * * * is not subject to review, by an appellate court, where there is any reasonable or substantial evidence tending to establish the findings of the commission." *Day v. Sioux Falls Fruit Co.*, 43 S.D. 65, 177 N.W. 816, 818; *Kammer v. Quiett*, S.D., 19 N.W.2d 561. The evidence shows that November 20, 1941 was one month after the employee had been discharged by Doctor Shirley. October 1, 1943 was the time when the employee returned from Washington and again placed himself in the care of physicians. Between those two dates the employee was unable to do much work. He hired men to operate the truck and made about \$70 a month in that way. Then he went to Washington where he spent about five months. While there he made about \$1,200, \$700 of which came from the rental of his truck and \$500 of which came from services which he performed with the assistance of his daughter. From a

careful reading of the record on this subject we conclude that the evidence is sufficient to support the decision of the Commissioner allowing compensation for temporary incapacity from November 20, 1941 to October 1, 1943.

[5-8] The next question relates to termination of the period of temporary incapacity. The Workmen's Compensation Law provides that the employee "shall receive in addition to compensation during the period of temporary total incapacity for work * * * compensation for a further period * * * for the specific loss herein mentioned" including the permanent and complete or partial loss of the use of a leg. SDC 64.0403(4). Under this statute compensation for temporary incapacity continues until terminated under some provision of the law. It is terminated by complete recovery, or when a specific loss becomes ascertainable. *Poast v. Omaha Merchants' Express & Transfer Co.*, 107 Neb. 516, 186 N.W. 540; *Addison v. W. E. Wood Co.*, 207 Mich. 319, 174 N.W. 149, cf. *Middleton v. City of Watertown*, 70 S.D. —, 16 N.W.2d 39. Such loss is ascertainable when it becomes apparent that permanent disability has resulted from the injury and that the injured member will get no better or no worse because of the injury. The interval during which compensation is paid for temporary incapacity continues "until the employee is restored so far as the permanent character of his injuries will permit." *Knobbe v. Davis*, 208 Wis. 185, 242 N.W. 501, 503. When that stage has been reached the right to compensation for temporary incapacity ceases and it is incumbent upon the Industrial Commissioner to fix the extent of permanent disability according to the workmen's compensation statute, provided, of course, that his jurisdiction has been invoked for the purpose of determining this question. An X-ray was made on February 12, 1946, three days before the hearing before the Industrial Commissioner which, according to Doctor Shirley, showed an area which "is not as well healed and is the spot where future trouble may appear. It is not definitely certain that there is a loose piece of bone in here, but

there is suspicion, that is, within the healing process there may be a loose piece of bone that simply may be delaying healing." At the hearing Doctor Shirley further testified that the loss of the use of the leg "is something probably a little more than fifty per cent, if we knew it was going to stay as it is, that's a thing that we fear." According to this evidence the healing period had not terminated before the hearing, and therefore the decision of the Commissioner allowing compensation for temporary incapacity to the date of the hearing was supported by substantial evidence.

[9] The Industrial Commissioner found that the employee is entitled to compensation for fifty per cent partial permanent loss of the use of his leg and that as a result he is entitled to an award of the weekly compensation for eighty weeks. On appeal the circuit court increased the amount of the partial permanent loss to ninety per cent, and the compensation therefor to one hundred forty-four weeks. This decision of the circuit court is assigned as error by the employer and insurer. SDC 64.0403 (8) requires that "All compensation provided for in this section shall be paid in installments." The contract as to compensation establishes weekly intervals for such installments. According to the Industrial Commissioner's award payments for partial permanent disability begin February 15, 1946 and end six years from the date of the accident, SDC 64.0403(7), which is July 21, 1947. The maximum amount of compensation which may be recovered for permanent disability under the facts in this case is, therefore, less than the eighty weeks allowed by the Commissioner.

[10, 11] On July 21, 1941 when the injury occurred the statute allowed a maximum of \$100 for medical and surgical services. This allowance was increased to \$200 by Ch. 314, S.L. of 1943. In this instance the Commissioner allowed the sum of \$200 for medical and surgical services and this allowance was affirmed by the circuit court. The employer and insurer say that their obligation to pay for such services is limited by the statute which was in effect when the injury occurred. Rights and obligations of an interested

party under the Workmen's Compensation Law become vested at the date of a compensable accident, unless death results. Until such time as an accident occurs the legislature may change the scale of weekly or other benefits, but to make such a change after the accident occurs would impair the obligations of contracts. *Warner v. Zaiser*, 184 Minn. 598, 239 N.W. 761; *Gauthier v. Penobscot Chemical Fiber Co.*, 120 Me. 73, 113 A. 28. The allowance for medical and surgical services in this case is, therefore, limited to \$100 by the provisions of SDC 64.0401, as amended by Ch. 297, S.L. of 1939.

[12, 13] The circuit court made findings of fact and conclusions of law, and entered judgment thereon for the amount which it was found the employee was entitled to recover, and the employer and insurer contend that this procedure was contrary to the statute. SDC 64.0701 provides that "Upon the trial of any such appeal the Court may remand the case to the Industrial Commissioner for such action as the Court in its order may require or may enter judgment for or against any party, which judgment shall have the same force and effect as other judgments of such Court." In reviewing proceedings under this statute the circuit court's jurisdiction is limited to questions of law, including the sufficiency of the evidence to support the findings of the Industrial Commissioner. The circuit court may affirm the decision of the Commissioner, reverse it, or affirm in part and reverse in part. *Lang v. Jordan Stone Co.*, 61 S.D. 330, 249 N.W. 314; *Montange v. C. A. Wagner Construction Co.*, 66 S.D. 48, 278 N.W. 176; *Wilhelm v. Narregang-Hart Co.*, 66 S.D. 155, 279 N.W. 549. Therefore, the judgment of the circuit court is reversed and the cause is remanded to the circuit court with directions to remand the cause to the Industrial Commissioner for further proceedings consistent with the conclusions herein expressed.

No costs to be taxed in this court.

ROBERTS, P. J., and RUDOLPH and SMITH, JJ., concur.

HAYES, J., concurs in the result.

149 Neb. 131

GLISSMANN v. BAUERM
(two cases).

Nos. 32280, 322

Supreme Court of N

Jan. 9, 1948

1. Judgment \Rightarrow 720, 725(1)

Any right, fact, or directly adjudicated on, or involved in, the determination before a competent court is judgment or decree is rendered is conclusively settled by therein and cannot again between the parties and priv of whether claim or dema subject matter of the two s or not.

2. Judgment \Rightarrow 16

If district court after judgment on a subject wit jurisdiction but not properly judgment is a nullity.

3. Judgment \Rightarrow 16

Where a district court, assumes to readjudicate ma there is already a valid, bin clusive judgment or decree, readjudication is a nullity.

4. Appeal and error \Rightarrow 1182

The Supreme Court's affirming a district court's ac district court, over objectio readjudicate matters on wh already a valid, binding, a judgment or decree, is a nul

5. Appeal and error \Rightarrow 1182,

Where Supreme Court's nothing for later determinat court except determination which had been received by and directed that judgment for such amounts, but distric mand allowed filing of new pl of which was to allow reliti, adjudication of matters alre district court's judgment was so also was Supreme Court's affirming the district court's ju

30 N.W.2d—41½

1960 SUPPLEMENT

TITLE 64

WORKMEN'S COMPENSATION

Cross-reference: § 31.3320 relating to authority of insurance companies to write workmen's compensation insurance on employers and executives.

CHAPTER 64.01

SCOPE AND EFFECT OF LAW

64.0102 Definitions. Terms used in this title, unless the context otherwise plainly requires, shall mean:

- 1st para, of subsec. (2)(B) Am by adding new sent. Ch. 262-6(2)*
- (1) "Employer", shall include the state and any municipal corporation within the state or any political subdivision of this state, and any individual, firm, association, or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay. If the employer is insured, it shall include his insurer so far as applicable;
 - (2) "Employee", every person, including a minor, in the services of another under any contract of employment, express or implied, (and including as to a deceased employee, his personal representative, dependents, and other persons to whom compensation may be payable), except:
 - (a) One whose employment is not in the usual course of the trade, business, occupation, or profession of the employer;
 - (b) Any official of the state or of any subdivision of government elected or appointed for a regular term of office or to complete the unexpired portion of any such term, provided that the governing bodies of the various subdivisions may elect to treat officials of the subdivisions as employees for the purposes of this subsection; but county highway superintendents, deputy sheriffs, constables, marshals, policemen, and firemen shall be deemed employees within the meaning of this section; also volunteer firemen of any fire department of any municipality or township if regularly organized under the law shall be deemed employees of such municipality or township while in the performance of their duties as members of such department, if duly recommended by the fire chief of such department to the governing body of such municipality or township for membership in such department, and duly appointed thereto by such governing body, and not thereafter duly removed by such governing body as members of such department; and for the purpose of computing compensation, the wage of such volunteer fireman is fixed at sixty dollars per week. But in no event shall payments to volunteer firemen exceed the maximum limitations for benefits as set out in this chapter, or acts amendatory thereof.

Every duly elected or appointed executive officer of a corporation, other than a charitable, religious, educational, or other nonprofit corporation, shall be an employee of such corporation under this title.

Notwithstanding any other provision of this title, any charitable, religious, educational or other nonprofit corporation which has accepted the provisions of this title may cause any duly elected or appointed executive officer to be an employee of such corporation under this title by specifically including such executive officer among those to whom such corporation secures the payment of compensation in accordance with the provisions of section 64.0106; and such executive officer shall remain an employee of such corporation under this title while the payment of compensation is so secured. With respect to any corporation of the foregoing description that elects to secure compensation by the means specified in subdivision (1) or subdivision (2) of SDC 64.0106, the specific inclusion of such executive officer in its contract of insurance shall be deemed to cause such executive officer to be an employee of such corporation under this title.

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- (3) "Average weekly wages", the earnings of the injured employee, computed as provided in section 64.0404;
- (4) "Injury" or "personal injury", only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form except as it shall result from the injury;
- (5) "Earnings", the amount of compensation for the number of hours commonly regarded as a days work for the employment in which the employee was engaged at the time of his injury and shall exclude overtime earnings, and shall not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed by him by the nature of his employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, they shall be deemed a part of his earnings;
- (6) "Commissioner", the Industrial Commissioner of the state of South Dakota;
- (7) "Annual earnings", the average weekly wages, computed as provided in SDC 64.0404, multiplied by fifty-two.

Source: § 1, Ch. 313, 1943; § 1, Ch. 441, 1949; § 1, Ch. 467, 1951; Ch. 493 and Ch. 495, 1957 and Ch. 454, 1959 as to subsection (2) (b).

Note: Above sources refer only to sub §§ (2) (a) and (2) (b) but entire section is shown for convenience.

64.0106 Liability of employer; how secured.

- (4) Whenever an employer coming under the provisions of this title annually furnishes satisfactory proof to the Commissioner of Insurance, and the Commissioner, of such employer's solvency and financial ability to pay the compensation required by this title and to make such payments to the parties when entitled thereto, he shall be relieved from the provisions of this section, and it shall be considered satisfactory proof of the employer's solvency and financial ability to pay the compensation required by this title and satisfactory security therefor, when the employer shall show that he is a member of an association as provided for in this section and shall submit a financial statement showing such association to be in a solvent condition;

Source: § 1, Ch. 371, 1941.

Note: There is shown above only that sub § of SDC 64.0106 which was specifically amended by subsequent legislative action.

64.0107 Payment of state claims. Claims of employees of the state arising under this title against the state shall be paid out of funds of the office of the Commissioner appropriated for that purpose, and such claims shall be paid on warrants of the State Auditor issued upon vouchers approved by the Commissioner. This section shall not apply to the employees of the state who are or may hereafter be employed by the State Highway Department, the State Cement Commission, or the Rural Credit Board, and the boards and commissions in charge of said enterprises shall pay such claims from funds available for the maintenance of said departments, or may procure insurance as provided in SDC 1960 Supp. 64.0106.

In case of injury to any such employee, and if payments for medical and hospital services have been made in the maximum amounts provided in SDC 1960 Supp. 64.0401, and it appears possible that an operation would relieve the injured employee of permanent disability and the employer of the burden of permanent disability payments, the state, State Highway Commission, State Cement Commission, and Rural Credit Board may expend an additional amount not exceeding five hundred dollars for medical and hospital service for such employee.

Source: § 1, Ch. 351, 1945.

64.0112 Permanent total incapacity due partly to prior injury; second injury fund. If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, from any cause or origin and irrespective of compensability, becomes permanently and totally incapacitated through the loss or loss of use of another member or organ, the employer shall be liable only for the compensation payable for such second injury. Provided, however, that in addition to such compensation and after the completion of the payments therefor, the employee shall be paid the remainder of the compensation that would be due for permanent total incapacity, out of a special fund known as the "Second Injury Fund" and created for such purpose in the following manner:

WORKMEN'S COMPENSATION

In case of the death of an employee under this section, where there is no person entitled to compensation, the employer, or if insured, his insurance carrier shall pay to the Industrial Commissioner of the state of South Dakota the sum of five hundred dollars to be deposited with the State Treasurer for the benefit of said fund, the Industrial Commissioner to direct the distribution thereof. The insurance carrier of every employer, or every employer, if self-insured, shall also pay annually on or before March thirty-first to the Industrial Commissioner an amount equal to one-half of one per centum of all workmen's compensation paid to claimants during the calendar year next preceding the due date of such payments, which shall also be deposited with the State Treasurer for the benefit of the second injury fund. When the total amount of all such payments into the fund, together with the accumulated interest thereon, equals, or exceeds ten thousand dollars, in excess of existing liabilities, no further payments shall be required to be made to said fund; but whenever thereafter, the amount of such fund shall be reduced below five thousand dollars by reason of payments from such fund, then payments to such fund shall be resumed forthwith, and shall continue until such fund, together with accumulated interest thereon, shall again amount to ten thousand dollars.

Source: § 1, Ch. 423, 1947.

64.0113 Reciprocity with other states. In any case where another state shall recognize workmen's compensation coverage pursuant to the provisions of the South Dakota law as meeting the requirements of workmen's compensation coverage under the laws of that state, reciprocity shall be granted workmen's compensation coverage pursuant to the foreign law in this state.

Source: § 1, Ch. 466, 1951.

CHAPTER 64.04

PAYMENT OF COMPENSATION

64.0401 Medical and hospital expense. The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care, including medical and surgical supplies, apparatus, artificial members and body aids during the disability or treatment of an employee within the provisions of this title, and shall furnish such care for a period of not longer than twenty weeks, not to exceed the amount, however, of seven hundred dollars for hospital services, which shall include any item for artificial members and body aids or other suitable or proper care, and not to exceed the amount of three hundred dollars for medical and surgical services, a total of one thousand dollars. The employee may elect to secure his own physician, surgeon or hospital services at his own expense.

The Commissioner may upon application and reasonable proof being furnished, the necessity therefor, allow and order additional medical, surgical and hospital services, but not to exceed an aggregate cost of one thousand dollars in addition to the amounts hereinbefore allowed.

Source: Ch. 297, 1939; § 1, Ch. 314, 1943; § 1, Ch. 442, 1949; § 1, Ch. 468, 1951; Ch. 455, 1959.

64.0402 Compensation for death; how computed; to whom paid; exceptions. (1) If the employee leaves any widow, child, or children whom he was under legal obligation to support at the time of his injury, a sum equal to five times the annual earnings of the employee, but not less in any event than three thousand dollars, and not more in any event than nine thousand dollars, provided that if the employee leaves any child or children under the age of eighteen years whom he was under legal obligation to support at the time of his injury, in addition to said sum there shall be paid for each of said children, not exceeding five in number, the sum of twelve and one-half dollars per month until such child reaches the age of eighteen years, provided, that the total compensation payments made hereunder shall not in any case exceed the sum of eleven thousand dollars. Any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amount payable on death.

(2) If no amount is payable under subsection (1) of this section, and the employee leaves any parent, grandparent, minor brothers, or minor sisters, who were dependent upon him for support at the time of his injury, such a

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percentage of the sum provided in subsection (1) of this section as the average annual contributions which the deceased made to the support of such parent, grandparent, minor brothers or minor sisters during two years preceding the injury bear to his earnings during such two years.

(3) If no amount is payable under subsections (1) or (2) of this section, and the employee leaves collateral heirs dependent at the time of the injury to the employee upon his earnings, such a percentage of the sum provided in subsection (1) of this section as the average annual contributions which the deceased made to the support of such collateral dependent heirs during two years preceding the injury bear to his earnings during such two years;

(4) If no amount is payable under subsections (1), (2) and (3) of this section a sum not to exceed three hundred dollars for burial expense;

(5) All compensation, except for burial expenses and additional benefits for children under eighteen years of age, provided for in this section to be paid in case injury results in death, shall be paid in installments equal to two-thirds of the average earnings, at the same intervals at which the wages or earnings of the employee were paid, at which time the additional benefits for children under eighteen years of age shall also be paid; or if this shall not be feasible, then the installments shall be paid weekly. Such compensation, except such additional benefits to minor children, may be paid in a lump sum upon petition as provided in section 64.0510.

(6) The compensation to be paid for injury which results in death, as provided in this section, shall be paid at the option of the employer either to the personal representative of the deceased employee or to his beneficiaries, and shall be distributed to the heirs who formed the basis for determining the amount of compensation to be paid by the employer, the distributees' share to be in proportion of their respective dependency at the time of the injury on the earnings of the decedent. In the judgment of the court appointing the personal representative, a child's distributive share may be directed paid to the parent for the support of the child. The payment of compensation by the employer to the personal representative of the deceased employee shall relieve him of all obligation as to the distribution of such compensation and payment by the personal representative to the distributees shall be made pursuant to the order of the court making the appointment. With the consent and approval of the Commissioner, the employer may pay to the surviving widow of a deceased, the compensation payable to such widow and the minor children of the deceased without the necessity of the appointment of a guardian for such minor children, and the payment of such compensation by the employer shall relieve him of all obligation as to the distribution of such compensation so paid. Except in those cases where a lump sum settlement has been made, such approval by the Commissioner may at any time be revoked or modified for cause;

(7) No compensation shall be payable under this section to a widow unless she was living with her deceased husband at the time of his death, or was then dependent upon him for support. Should any dependent of a deceased employee die, the right of such dependent to compensation under this section ceases. In case of remarriage of a widow where there are dependent children of the employee, the unpaid balance of compensation which would otherwise become due her, shall be paid to such children;

(8) No compensation shall be payable under this title to a widow or dependent unless such widow or dependent was a resident of the United States at the time of the death of the deceased.

Source: § 1, Ch. 315, 1943; § 1, Ch. 352, 1945; § 1, Ch. 424, 1947; Ch. 485, 1953; Ch. 438, 1955; Ch. 456, 1959.

Note: Amendment of sub § (3) by § 1, Ch. 353, 1945 is deemed superseded by sub § (3) as shown.

64.0403 Compensation for injury, how computed and paid. The amount of compensation which shall be paid to the employee for an injury not resulting in death shall be:

(1) Except as otherwise provided in this subdivision, no compensation shall be paid for an injury which does not incapacitate the employee for a period of at least seven days from earning full wages. If such incapacity extends beyond the seven days, compensation shall begin on the eighth day after the injury except that if such disability continues for six weeks or longer

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WORKMEN'S COMPENSATION

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such compensation shall be computed from the date of the injury. Such compensation shall be equal to fifty-five per cent of the employee's earnings, but not to exceed thirty-five dollars a week and not less than fifteen dollars a week, except when the amount earned is less than fifteen dollars a week, in which case the amount of compensation shall be the average weekly wage earned.

Source: § 1, Ch. 297, 1939; § 2, Ch. 424, 1947; § 1, Ch. 443, 1949; § 1, Ch. 486, 1953; § 1, Ch. 494, 1957; Ch. 457, 1959.

Note: Enrolled bill shows per cent as "fifty-five-five".

- (4) (f) The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one-half of such thumb or finger and compensation shall be one-half of the amounts specified; compensation for the loss of less than the first phalange of a thumb or finger shall be in such proportion as the partial loss bears to the loss of the first phalange;

Source: § 1, Ch. 354, 1945.

- (4) (j) The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and compensation shall be one-half the amount above specified; compensation for the loss of less than the first phalange of a toe shall be in such proportion as the partial loss bears to the loss of the first phalange;

Source: § 1, Ch. 354, 1945.

- (4) (r) For the loss of the sight of an eye, fifty-five per centum of the average weekly wage during one hundred fifty weeks.

Source: § 3, Ch. 424, 1947.

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Ch. 347, Laws of
'67, Ch. 269, P. 35
'68 S.L.

- (5) In case of complete disability which renders the employee wholly and permanently incapable of work, compensation shall be paid equal to fifty-five per cent of his earnings but not less than fifteen dollars nor more than thirty-five dollars per week, commencing on the day after the injury and continuing for three hundred weeks and thereafter compensation shall be paid equal to thirty per cent of his earnings, but not less than twelve dollars nor more than fifteen dollars per week for life; provided, that the maximum amount of compensation to be paid under this section shall not in any case exceed the sum of twelve thousand dollars.

Source: § 4, Ch. 424, 1947; Ch. 486, 1953; Ch. 494, 1957; Ch. 457, 1959.

Note: The "fifty-five" per cent shown in sub § (5) above appears in the enrolled bill as "fifty-five-five". There is shown above only those sub §§ and subdivisions of sub §§ of SDC 64.0403 which were specifically amended by subsequent legislative action.

64.0403-1 Payment of benefits to deceased's dependents. In any case where an employee receives an injury for which a specific schedule of payments is provided by subsection (4) of SDC 64.0403, as amended; and the employee thereafter dies from causes other than the injury before the full payment of all installments due for said specific injury have been paid to the employee, the employer shall pay the balance due under the specific schedule of payments as provided in subsection (4) of SDC 64.0403, as amended, to said employee's dependents as provided in SDC 1960 Supp. 64.0402.

Source: Ch. 497, 1957.

CHAPTER 64.05

ADMINISTRATION OF LAW

64.0501 Industrial Commissioner; appointment; duties; rules; powers; witness fees.

Cross-reference: Ch. 17.10, relating to duties of Deputy Industrial Commissioner in Division of Labor.

64.0502 Oath of office; bond; seal. The Commissioner shall before entering upon his duties, take and subscribe the constitutional oath of office and give a bond to the state of South Dakota in the penal sum of ten thousand dollars, to be approved by the Governor, for the faithful discharge of his official duties, which oath and bond shall be filed with the Secretary of State, the premium on such bond to be paid by the state. He shall be paid his actual and necessary expenses

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when away from his office in the discharge of his official duties. The office of the Industrial Commissioner shall be at the state capitol and he shall be provided with suitable office rooms, furniture, fixtures, supplies, and equipment and clerical assistance necessary for the proper discharge of his duties. He shall be provided with a seal upon which shall be inscribed the words "South Dakota Industrial Commissioner."

Source: § 1, Ch. 425, 1947.

Effective date February 8, 1947.

64.0510 Lump sum settlement. Any employer, employee, or beneficiary who shall desire to have compensation, or any unpaid part thereof, paid in a lump sum may petition the Commissioner, asking that such compensation be so paid, and if, upon proper notice to the interested parties and a proper showing made before such Commissioner, it appears to the best interests of the employee that such compensation be so paid, the Commissioner may order the commutation of the compensation to an equivalent lump sum, which commutation shall be an amount which will equal the total sum of the probable future payments capitalized at their present value upon the basis of interest calculated at three per cent per annum with annual rests. In cases indicating complete disability no petition for commutation to a lump sum basis shall be entertained by the Commissioner until after the expiration of six months from the date of the injury, and where necessary, upon proper application being made, a guardian or administrator, as the case may be, may be appointed for any person under disability who may be entitled to any such compensation, and an employer bound by the terms of this title and liable to pay such compensation may petition for the appointment of an administrator or guardian, where no legal representative has been appointed or is acting for such party or parties so under disability.

Source: § 1, Ch. 355, 1945; § 1, Ch. 469, 1951.

CHAPTER 64.08

SOUTH DAKOTA OCCUPATIONAL DISEASE DISABILITY LAW

Note: The source of all of the following sections contained in this chapter is Ch. 426, 1947, unless otherwise indicated.

64.0801 Designation of title. This chapter may be cited and shall be known as the "South Dakota Occupational Disease Disability Law."

64.0802 Right to compensation; applicability of Workmen's Compensation Law. Where an employee of an employer subject to this chapter suffers from an occupational disease as defined in section 64.0804, and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement limited in this chapter, the employee, or, in case of his death, his dependents, shall be entitled to compensation as provided in the Workmen's Compensation Law, as if such disablement or death were an injury by accident, except as otherwise provided in this chapter; and the practice and procedure prescribed in the Workmen's Compensation Law shall apply to proceedings for compensation for such diseases, except as in this chapter otherwise provided.

64.0803 Security for compensation; compensation remedy exclusive. Every employer of workmen subject to the Workmen's Compensation Law shall be subject to the provisions of this chapter, except where rejected as provided in this section, and shall secure the payment of compensation in accordance with the provisions of this chapter by any method prescribed by the Workmen's Compensation Law at the time in effect in this state. Where the foregoing requirement is complied with, the liability of the employer under this chapter shall be exclusive, and shall be in place of any and all other civil liability whatsoever, at common law or other wise to such employee, or to his spouse, children, parents, dependents, next of kin, personal representatives, guardian, or any others on account of any disease or injury to health, or on account of death from any disease or injury to health in any way contracted, sustained, aggravated, or incurred by such employee in the course of, or because of, or arising out of his employment, except only an injury compensable as an injury by accident under the provisions of the Workmen's Compensation Law.

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Any employer subject to the provisions of this chapter may withdraw from its provisions and reject the same upon the first day of any month, provided said employer files written notice with the Commissioner of his intention to withdraw from and reject such chapter, not less than thirty days prior to the first day of the month in which he desires such withdrawal to become effective; and provided further that such withdrawing employer shall post in conspicuous places in his several places of employment written or printed notices to the effect that on and after the first day of the month in which such withdrawal shall become effective, said employer will not be subject to the provisions of the South Dakota Occupational Disease Disability Law, which notices shall be posted at least thirty days prior to the date of such withdrawal and shall be kept continuously posted thereafter in sufficient places frequented by his employees to reasonably notify such employees of such withdrawal.

Any employer having withdrawn from the provisions of, or having rejected this chapter, may thereafter at any time elect to become subject to this chapter and shall become subject thereto by filing and posting notice thereof in the same manner as hereinbefore provided for, and upon the securing of his liability by any method prescribed by the Workmen's Compensation Law.

No employer who rejects the provisions of this chapter shall, in any action at law to recover damages for disability or death resulting from an occupational disease contracted by an employee, be permitted to defend any such action upon either of the following grounds:

- (1) That the employee was negligent.
- (2) That the employee had assumed the risk of the injury.

64.0804 Definitions. Wherever used in this chapter.

- (1) "Commissioner" means the Industrial Commissioner of the state of South Dakota.
- (2) "Disablement" means the event of an employee's becoming actually and totally incapacitated, because of an occupational disease as defined in this chapter, from performing his work in the last occupation in which injuriously exposed to the hazards of such disease. "Disability", "disabled", "total disability", "totally disabled" or "total disablement" shall be synonymous with "disablement."
- (3) "Compensation" means the payments and benefits provided for in the South Dakota Workmen's Compensation Law, subject to the conditions and limitations contained in this chapter.
- (4) "Occupational Disease" means only the diseases enumerated and specified in section 64.0805 of this chapter.
- (5) "Silicosis" means the characteristic fibrotic condition of the lungs caused by the inhalation of silicon dioxide (SiO_2) dust.
- (6) "Non-disablement Silicosis" means silicosis demonstrable by X-ray examinations of the lungs, which reveal unquestionably the characteristic mottling of silicosis in the lung fields, occurring in an employee after injurious exposure to silicon dioxide for the period provided in section 64.0808, but not sufficient to disable such employee from performing his usual work.
- (7) "Injurious exposure" and "Harmful quantities" where used in this chapter shall be construed as synonymous terms and shall mean that concentration of toxic material which would, independently of any other cause whatsoever (including the previous physical condition of the claimant) produce or cause the disease for which claim is made.

64.0805 Occupational diseases enumerated. For the purposes of this chapter only the diseases enumerated in this section shall be deemed to be occupational diseases:

- (1) Anthrax.
- (2) Poisoning by acetaldehyde or its compounds.
- (3) Poisoning by acetanilide or its compounds.
- (4) Poisoning by cyanogen and its compounds.
- (5) Poisoning by chlorine and its compounds.
- (6) Poisoning by arsenic or its compounds.
- (7) Poisoning by antimony or its compounds.
- (8) Poisoning by cadmium or its compounds.
- (9) Poisoning by lead or its compounds.
- (10) Poisoning by manganese or its compounds.
- (11) Poisoning by mercury or its compounds.

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- (15) Poisoning by phosphorous or its compounds.
- (16) Poisoning by hydrogen sulphide or carbon by-sulphide.
- (17) Chrome ulceration and poisoning.
- (18) Poisoning by toxic halogenated hydrocarbons.
- (19) Poisoning benzol or its derivatives, including toluol, xylol, and the nitro, nitroso, and amino derivatives of these substances.
- (20) Methanol poisoning.
- (21) Ulceration of the skin or destruction of tissue due to the prolonged exposure to roentgen rays or radium emanations.
- (22) Silicosis.
- (23) Brucellosis.
- (24) Tularemia.
- (25) Tuberculosis resulting from the care of inmates in state institutions by state employees.

No diseases or aggravation thereof, except those in this section defined, shall be deemed occupational diseases and compensable as such.

The terms "contracted" and "incurred," as used in this chapter when referring to an occupational disease, shall be deemed the equivalent of the phrase "arising out of and in the course of," as used in the Workmen's Compensation Law.

Source: § 1, Ch. 426, 1947; § 1, Ch. 444, 1949.

64.0806 Law not retroactive. The provisions of this chapter shall apply only to cases of occupational disease in which the last injurious exposure in an occupation subject to the hazards of such disease occurred on or after the date on which this chapter shall have taken effect.

64.0807 Conditions of liability. An employer shall not be liable for compensation or other benefits under the provisions of this chapter for disability or death resulting from the diseases specified in section 64.0805, unless:

- (1) Such disease shall be due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment, and is actually incurred in his employment and unless disablement or death results within two years in case of silicosis, or one year in case of any other occupational disease, after the last injurious exposure to such disease in such employment, or, except in those cases where death results during a period of continuous total disability from such disease, commencing within the period above limited, for which compensation has been paid or awarded or claim made as provided in this chapter, and in such cases compensation shall be paid if such death results within five years after such last exposure, provided, however, that the payments made to the claimant during his lifetime for permanent total disability shall be accredited to the payments made for death benefits. The burden of proof shall be upon the claimant to establish each and every such fact by competent medical evidence.
- (2) Notice of disability and claim for compensation has been given and made to the employer in writing within the time fixed by section 64.0818 of this chapter.

64.0808 Period of exposure in silicosis case. No claim for disability or death from silicosis shall be maintained or prosecuted otherwise than under the provisions of this chapter, or come within the provisions of this chapter, unless during the ten years immediately preceding the date of disablement the employee has been injuriously exposed to the inhalation of silica dust over a period of not less than five years, the last two years of which shall have been in this state, under a contract of employment existing in this state, provided, however, that if the employee shall have been employed by the same employer during the whole of such five-year period, his right to compensation against such employer shall not be affected by the fact that he had been employed during any part of such period outside of this state.

64.0809 Last employer liable; amount of compensation. Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease shall be liable therefor; the amount of the compensation shall be based upon the average weekly wages (as defined in the Workmen's Compensation Law) of the employee

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when last so injuriously exposed under such employer; and the notice of disability and claim for compensation shall be given and made to such employer; provided, however, that the maximum compensation to be allowed for disability, or death, or both, on account of any occupational disease which occurs during the first calendar month in which this law becomes effective shall not exceed two thousand five hundred dollars, if during the second calendar month shall not exceed two thousand six hundred dollars, and thereafter the maximum compensation to be allowed shall increase at the rate of one hundred dollars each calendar month, such progressive increase in limits to continue until the limit fixed in the Workmen's Compensation Law is reached; and provided further than any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amount payable on death, and that in the event a totally disabled employee shall engage in any remunerative work for any other employer, he shall thereby waive disability benefits or compensation hereunder for such period as he is so engaged; and provided further that in case of silicosis, the only employer liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of sixty days or more after the effective date of this chapter.

64.0810 Compensation for total disability from complicated silicosis. In case of disability or death from silicosis, complicated with tuberculosis of the lungs, compensation shall be payable as for uncomplicated silicosis, provided, however, that the silicosis was an essential factor in causing such disability or death.

64.0811 No compensation for partial disability from silicosis. Compensation shall not be payable for partial disability due to silicosis, except as provided in sections 64.0814 and 64.0817 herein.

64.0812 Determination of dependency. No compensation for death from an occupational disease shall be payable to any person whose relationship to the deceased, which, under the provisions of this chapter would give right to compensation, arose subsequent to the beginning of the first compensable disability, save only to after-born children of a marriage existing at the beginning of such disability.

64.0813 Employee's willful misconduct or willful self-exposure. Notwithstanding anything herein contained, no employee or dependent of any employee, or personal representative of a deceased employee, or other person shall be entitled to receive compensation for disability or death from an occupational disease when such disability or death, wholly or in part, was caused by the willful misconduct of willful self-exposure of such employee or by his disobedience to such reasonable rules and regulations as may be adopted by the employer, and which rules and regulations have been and are kept posted in conspicuous places in and about the premises of the employer, or otherwise brought to the attention of such employee. As used in this section, willful self-exposure shall be conclusively presumed where any of the following occur:

- (1) An employee or applicant for employment shall fail or omit truthfully to state in writing to the best of his knowledge in answer to any inquiry made by the employer, the place, duration and nature of his previous employment.
- (2) An applicant for employment shall fail or omit truthfully to state in writing to the best of his knowledge in answer to any inquiry made by the employer, whether or not he had been previously disabled, laid off, or compensated in damages or otherwise, because of any physical disability.
- (3) An employee or applicant for employment shall fail or omit truthfully to give in writing to the best of his knowledge in answer to any inquiry made by the employer, full information about the previous status of his health, previous medical and hospital attention and exposure to tuberculosis.
- (4) An employee or applicant for employment shall fail or refuse to submit to medical or X-ray examination when requested so to do by the employer at the employer's expense.
- (5) An employee shall willfully fail to use protective and safety devices provided by the employer.

64.0814 Non-disabling silicosis: employee's waiver; limitation on amount of claim. Where an employee, though not actually disabled, is found to be suffering from non-disabling silicosis, he may, subject to the approval of the Commissioner, be permitted to waive in writing full compensation for any aggravation of his condition that may result from his continuing in his hazardous occupation.

In the event the employee shall be paid less than the amount of compensation payable or shall be permitted to waive compensation, the Commissioner shall execute the order therefor.

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In the event of total disablement or death as a result of the disease with which the employee was so affected, after such a waiver, compensation shall nevertheless be payable as herein elsewhere provided, but in no case, whether for disability or death or both, to exceed two thousand dollars in the aggregate. A waiver so permitted shall remain effective, for the trade, occupation, process, or employment for which executed, notwithstanding a change or changes of employer. The Commissioner shall make reasonable rules and regulations relative to the form, execution, filing, or registration, and public inspection of waivers or records thereof.

64.0815 Non-disabling silicosis: voluntary workman may waive claim. A workman, seeking employment and having knowledge or being informed that he is affected with a non-disabling silicosis, who nevertheless voluntarily prefers to work in an occupation where his disease may become aggravated, may, with the approval of the Commissioner, enter into a contract with his prospective employer, waiving all claims for compensation or damages under this chapter or otherwise.

64.0816 Entering agreement voluntarily. Before approving a waiver under section 64.0814 or section 64.0815, the Commissioner shall be satisfied that the workman has voluntarily entered into said agreement to waive compensation; that it is of greater advantage to the workman and his dependents, if any, for him to work in an occupation where his disease may become aggravated than to seek other employment, and that the working conditions maintained by the employer are such as to minimize the hazards of silicosis.

64.0817 Non-disabling silicosis; compensation upon severance from employment.

(1) When an employee working subject to this chapter, who has not previously executed any of the waivers referred to in sections 64.0814, 64.0815, and 64.0816, and who would be entitled to compensation under this law if disabled, is, because he had a non-disabling silicosis, discharged from employment in which he is engaged, or when such an employee, after an examination as provided in subsection (2) and a finding by the medical panel that it is inadvisable for him to continue in his employment, terminates his employment, the Commissioner may allow such compensation on account of such discharge or termination of employment as he may deem just, out in no case to exceed one thousand dollars, which payment shall operate as a complete release and discharge of any and all liability of the employer.

(2) Any employee who in the course of his employment has been exposed to the inhalation of silica dust and who wishes to submit to examination by the medical panel to determine whether such employee has silicosis, and the degree thereof, may petition the Commissioner for an order directing such examination. The cost of such medical examination shall be borne by the employee making application. The results of such examination shall be submitted by the medical panel to the Commissioner, who shall submit copies of such reports to the employer and employee, who shall have opportunity to rebut the same, provided request therefor is made to the Commissioner within thirty days from the mailing of such report to the parties. The Commissioner shall make his findings as to whether or not it is inadvisable for the employee to continue in his employment.

64.0818 Notice of contraction of disease and claim for compensation. Unless written notice of an occupational disease shall be given by the workman to the employer within six months after the employment has ceased in which it is claimed the disease was contracted, and, in case of death, unless written notice of such death shall be given within ninety days after the occurrence, and, unless claim for disability, or death, shall be made within one year after the disablement or death, respectively, all rights to compensation for disability, or death, from an occupational disease shall be forever barred. Such notice and claim may be made by any person claiming to be entitled to compensation or by some one in his behalf. Where compensation payments have been made and discontinued, and further compensation is claimed, the claim for such further compensation shall be made within one year after the last payment.

64.0819 Medical panel. A medical panel shall be appointed by the Governor from a list of nine names submitted by the council of the South Dakota State Medical Association, to determine controverted medical questions in any case on a claim for compensation for an occupational disease. The panel shall consist of

three members who shall be licensed physicians in good professional standing with reasonable experience, one of whom shall have had reasonable experience in the diagnosis, treatment and care of silicosis, one of whom shall be an expert Roentgenologist, and the other of whom shall have had at least five years experience in the practice of his profession. The term of office of a member of such panel shall be six years, except the members of the first panel, one of whom shall be appointed to serve until July 1, 1949, one to serve until July 1, 1951, and one to serve until July 1, 1953. A vacancy on the panel occurring other than by expiration of term, shall be filled by appointment for the unexpired term. The members of the panel shall be entitled to compensation for their services when actually engaged, at the rate of twenty-five dollars per day, in addition to necessary travel and subsistence expenses incurred, to be paid upon an itemized statement verified by oath.

64.0820 Reference to medical panel of controverted medical questions; hearing on medical questions; findings. If on a claim for compensation for an occupational disease any medical question shall be in controversy, the Commissioner shall refer such question or questions to the medical panel for investigation and report. The medical panel thereupon shall notify the claimant or claimants and the employer to appear before it at a time and place stated in the notice, and shall examine the employee if living, and may examine the body of the employee if deceased. If the employee be living, he shall appear before the medical panel at the time and place specified, then and thereafter to submit to such examinations, including clinical and X-ray examinations, as the medical panel may require. The claimant and the employer or his surety shall each be entitled, at his own expense, to have present at all examinations conducted by the medical panel, a physician admitted to practice medicine in the state who shall be given every reasonable facility for participating in every such examination. If a physician admitted to practice medicine in the state shall certify that the employee is physically unable to appear at the time and place designated by the medical panel, such panel shall, on notice to the parties, change the place and time of examination to such other place and time as may reasonably facilitate the examination of the employee. Proceedings shall be suspended and no compensation shall be payable for any period during which the employee may refuse to submit to such examination.

No award shall be made in any such case until the medical panel shall have duly investigated the case and made its report with respect to all medical questions at issue. The date of disablement, if in dispute, shall be deemed a medical question.

64.0821 Report of medical panel. The medical panel shall, as soon as practicable after it has completed its consideration of the case, report in writing its findings and conclusions on every medical question in controversy. If the date of disablement is controverted and cannot be exactly fixed scientifically, the medical panel shall fix the most probable date, having regard to all the circumstances of the case. The medical panel shall also include in its report a statement indicating the physician or physicians, if any, who appeared before it, and what, if any, medical reports and X-rays were considered by it. The medical panel shall file its findings and report with the Commissioner, who shall send a certified copy thereof to the claimant or claimants and to the employer and his surety, if any. The employer shall be entitled to examine any X-rays considered by the medical panel.

64.0822 Award; review of medical findings. The decision or award of the Commissioner in the case shall conform to the findings and conclusions in such report insofar as restricted to medical questions; provided, however, that any such findings and conclusions may be set aside, reversed, or modified by the Commissioner upon a review of the award or decision, in case such a review is had as provided in section 64.0607 of the Workmen's Compensation Law. Upon such review, no finding or conclusion of the medical panel upon a medical question shall be set aside, reversed, or modified unless proved to be manifestly erroneous or unreasonable, or due to fraud, undue influence, inadvertence, or mistake of fact or law. But with the consent of the medical panel, its report in any case may, upon review, be remanded to it for reconsideration. Every decision by the Commissioner that affirms, sets aside, reverses, or modifies a finding or conclusion by the medical panel shall be subject to review by the courts, upon appeal as in other compensation cases.

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64.0823 Post mortem examinations. Upon the filing of a claim for compensation for death from an occupational disease where an autopsy is necessary accurately and scientifically to ascertain and determine the cause of death, such autopsy shall be ordered by the Commissioner or the medical panel. The medical panel may designate a duly licensed physician, who is a specialist in such examinations, to perform or attend such autopsy, and to certify his findings thereon. Such findings shall be filed with the medical panel and shall be a public record. The Industrial Commissioner also may exercise such authority on his own motion or on application made to him at any time by any party in interest, upon the presentation of facts showing that a controversy may exist in regard to the cause of death or the existence of any occupational disease. All proceedings for compensation shall be suspended upon refusal of a claimant or claimants to permit such autopsy when so ordered, and no compensation shall be payable during the continuance of such refusal.

64.0824 Modification of award. An award or denial of award of compensation for an occupational disease may be reviewed and compensation increased, reduced or terminated where previously awarded, or awarded where previously denied, only upon proof of fraud or of change in the conditions, and then only upon application by a party in interest made not later than one year after the denial or award, or, where compensation has been awarded, after the date when the last payment was made under the award, except in case of silicosis where such time limit shall be two years.

64.0825 Agreements between employer and employee. If the employer and employee reach an agreement in regard to the compensation under this chapter, a memorandum thereof shall be filed with the Commissioner by the employer or employee, and unless the Commissioner shall, within twenty days, notify the employer and employee of his disapproval of the agreement by registered letter sent to their addresses as given in the memorandum filed, the agreement shall stand as approved and be enforceable for all purposes under the provisions of this chapter.

64.0826 Retroactiveness. Nothing in this law shall create any liability on the part of any employer where disability or death occurred prior to the date on which this law becomes effective.

64.0827 No rights hereunder where compensation is paid under Workmen's Compensation Law. The compensation provided for under this chapter is not in addition to compensation which may be payable under SDC 64.04, as amended, and in all cases where injury results by reason of an accident arising out of or in the course of employment and compensation is payable therefor under said chapter 64.04, no compensation under this chapter shall be payable.