

**To:** Workers' Compensation Advisory Council

**From:** Amber L. Mulder, Director of Labor and Management, South Dakota  
Department of Labor and Regulation

**Date:** July 1, 2020

**Subject:** 2020 Division Report on the State Workers' Compensation System

This report is prepared for submission at the July 1, 2020, meeting of the Workers' Compensation Advisory Council.

Overall, our state's workers' compensation system is functioning well, and competes successfully with neighboring states. Effective July 1, 2020, through June 30, 2021, an overall average decrease of 9.8% was approved for the advisory loss costs in the voluntary market. An overall average rate level decrease of 8.4% was approved in the Assigned Risk Market from the previous year. This is the ninth consecutive decrease for loss costs in the voluntary insurance market. Injury frequency continues to decrease, and medical and indemnity severity increased slightly.

The Department brought no legislation impacting workers' compensation during the 2020 legislative session. However, HB 1142, An Act to include post-traumatic stress disorder as a compensable injury for purposes of workers' compensation would have impacted the program. Under current state law, mental injuries, including PTSD are not compensable injuries for workers' compensation purposes unless there is a physical injury that remains a major contributing cause of the mental injury. HB 1142 would have allowed compensation for PTSD for workers in certain professions and occupations, including firefighters, law enforcement officers, EMTs, etc. when there was no physical injury that caused the PTSD. Similar legislation was brought in at least 16 other states since 2018, but it did not pass in all those states. This bill failed to make it out of the House Commerce and Energy Committee.

The Coronavirus disease 2019 (COVID-19) has had a huge impact on unemployment insurance but has also raised questions as to whether it is compensable under workers' compensation. The answer to that is maybe. To be compensable, the worker must establish COVID-19 is an "occupational disease" which means that exposure to the disease is an essential part of the job (example: doctor or nurse) and not a result of incidental contact from a job that working with the public is expected (example: cashier or waiter). Further, to be eligible for workers' compensation benefits, an employee must be unable to work for at least seven consecutive days. This is the general approach taken by most states on the compensability of COVID-19.

While we have not seen or heard of any potential COVID-19 legislation specific to workers' compensation in South Dakota, some states have enacted legislation or have issued directives to expand workers' compensation coverage for certain workers, such as first responders and frontline health care workers. The National Council on Compensation Insurance (NCCI) provides helpful resources on COVID-19 and is updating legislative activity in the states on a continuing basis. This information can be found at [ncci.com/articles/pages/covid-19.aspx](https://www.ncci.com/articles/pages/covid-19.aspx).

Since our last Council meeting, there have been two South Dakota Supreme Court cases touching on workers' compensation. In *Bonebright v. City of Miller*, the Department awarded benefits to Bonebright's widow after concluding his alleged willful misconduct in not following the City's safety rules for securing trenches was not a proximate cause of his death. The circuit court affirmed, but on the basis that Bonebright did not engage in willful misconduct. Rather, the circuit court found that employer did not demonstrate it kept the safety rule alive through bona fide enforcement. The South Dakota Supreme Court affirmed the circuit court decision.

In *LaPlante v. GGNSC Madison*, the Department granted a motion to dismiss for lack of prosecution pursuant to ARSD 47:03:01:09, which allows for dismissal for want of prosecution if there has been no activity for at least a year. Dismissal under that section is with prejudice. The circuit court affirmed the dismissal, but the South Dakota Supreme Court reversed finding the Department abused its discretion in dismissing the case because its decision was based on the erroneous conclusion that LaPlante's participation in the vocational rehabilitation program was not "activity" under ARSD 47:03:01:09.

The South Dakota Supreme Court in *LaPlante* took issue with the language in ARSD 47:03:01:09 that allows for dismissal with prejudice and stated that under Title 15, governing civil procedure, and specifically SDCL 15-11-11 concerning dismissal actions for want of prosecution that such dismissal actions are extreme remedies and should only be used when there is an unreasonable and unexplained delay. The Court further stated under Title 15, dismissal for lack of prosecution was meant to operate a clerical tool, not a substantive dismissal that forever bars a case, which is what happens when there is a dismissal with prejudice. While not specifically directed by the Court to do so, the Department chose to revise ARSD 47:03:01:09 to more closely mirror what is in SDCL 15-11-11 concerning dismissal for lack of prosecution by providing more specificity regarding what constitutes "activity on the record" and to no longer make dismissals pursuant to that section with prejudice.

Our administrative rules are currently being moved through the process.

Thank you to the Council for this forum.

Amber L. Mulder