

To: Workers' Compensation Advisory Council

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

Date: July 12, 2021

Subject: 2021 Division Report on the State Workers' Compensation System

This report is prepared for submission at the July 12, 2021, 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, 2021, through June 30, 2022, an overall average decrease of 0.9% was approved for the advisory loss costs in the voluntary market. An overall average rate level decrease of 1.0% was approved in the Assigned Risk Market from the previous year. This is the tenth consecutive decrease for loss costs in the voluntary insurance market. There was a moderate increase in claim frequency for the latest year. The indemnity and medical severity exhibit year-to-year variability, although both indicate slight upward trends when observed over the long-term.

The Department brought no legislation impacting workers' compensation during the 2021 legislative session. HB 1242, An Act impose certain duties on providers of services under a case management plan of a workers' compensation insurance policy and provide a penalty for a violation thereof, would have impacted the program. This legislation would have required providers of services to send correspondence to both employer/insurer as well as the employee, and prohibited misrepresentation of identity, credentials or duties by a provider to an employee under a case management plan. This bill failed to make it out of the House Commerce and Energy Committee.

Many 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. South Dakota enacted HB 1046, An Act to limit liability for certain exposures to COVID-19. Section 6 of the bill created SDCL 21-68-6(3), which states the Act may not be construed to deem COVID-19 an occupational disease. It further states COVID-19 is not an occupational disease under state law.

There have been two South Dakota Supreme Court rulings since we last met in October. In *Billman v. Clarke Machine, Inc. and Sentury Insurance A Mutual Company*, the South Dakota Supreme Court reversed a circuit court ruling that affirmed the Department's finding an employee was not obviously unemployable and he failed to conduct a reasonable job search. In this case, the employee had applied for permanent

total disability benefits after his leg was amputated due to an injury at work in 2015. The Department denied him permanent total disability benefits finding he was not obviously unemployable. The South Dakota Supreme Court found the Department failed to examine the employee's situation in the aggregate by not taking into account his physical condition, along with age, education, ability to be trained and availability of suitable work in his community when determining if he was entitled to permanent total disability benefits.

In *Taylor Hughes v. Dakota Mill and Grain Inc. and Hartford Insurance*, the Supreme Court affirmed a circuit court ruling that reversed the Department's finding that the injury was not compensable. In this case, the employee had a preexisting back condition and suffered a back injury at work, for which workers' compensation was sought. The issue in the case was whether the injury on the job was "a major contributing cause of the disability, impairment or need for treatment" as required by SDCL 62-1-1(7)(b). On causation, the South Dakota Supreme Court stated:

[¶20.] A claimant is not required to prove that his or her work activities are at least 50% attributable to his or her condition in order to show that those activities were a major contributing cause of the condition. A claimant also does not need to show that there was a single cause of injury. Accordingly, a claimant is "not required to prove that his employment was the proximate, direct, or sole cause of his injury." *Smith v. Stan Houston Equip. Co.*, 2013 S.D. 65, ¶ 16, 836 N.W.2d 647, 652. Further, the claimant's work activities do not have to be "the' major contributing cause" of the injury; they only have to be "a' major contributing cause." *Peterson*, 2012 S.D. 52, ¶ 21, 816 N.W.2d at 850 (citation omitted).

Thank you to the Council for this forum.

Amber L. Mulder