

To: Workers' Compensation Advisory Council

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

Date: August 17, 2023

Subject: 2023 Division Report on the State Workers' Compensation System

This report is prepared for submission at the August 17, 2023, 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, 2023, through June 30, 2024, an overall average decrease of 6.7% was approved for the advisory loss costs in the voluntary market. This is the 12th consecutive decrease for loss costs in the voluntary insurance market. An overall average rate level decrease of 9.3% was approved in the Assigned Risk Market.

Indemnity and medical costs per case exhibit year-to-year variability. Lost time-claim frequency values continue to show a long-term pattern of decline.

The Department brought no legislation impacting workers' compensation during the 2023 legislative session.

HB 1085, An Act to require a case management service provider to disclose communications to an employee, would have impacted the program. This legislation would have required case management providers to notify claimants/employees of their right to be present during any discussions between the case management provider and medical provider regarding their case management plan. The case management provider would have also been required to provide copies of any written correspondence that pertained to compensability, causation, or entitlement to benefits to the claimant/employee. The House Commerce and Energy Committee deferred to the 41st legislative day 11-2.

Although it would not have directly impacted this program, SB 178 An Act to create provisions for the protection of warehouse distribution center employees, concerned workers' compensation, and worker safety. The Senate Commerce and Energy Committee deferred to the 41st legislative day 5-4.

Two South Dakota Supreme Court rulings have been issued since we last met.

In *Hussein v. Showplace Wood Products Inc., and Dakota Truck Underwriters*, the South Dakota Supreme Court affirmed the circuit court's dismissal of Hussein's appeal because Hussein failed to serve his notice of appeal on the Department within 30 days after the administrative law judge's (ALJ) decision was issued. In the underlying matter, the ALJ granted the employer and insurer's motion for summary judgment against Hussein because the Department found no genuine issue of material fact existed because "without a medical expert to testify regarding the relationship between the medical evidence and his physical state, Hussein cannot prove that the work-injury is a major contributing cause of his current condition."

In *News America Marketing and Farmington Casualty Company v. Schoon*, the South Dakota Supreme Court affirmed the Department. In this case, Schoon injured her shoulder and neck while working for Employer, News America Marketing. Employer and Insurer, Farmington Casualty Co. initially paid benefits to Schoon but denied her later claim for surgery and additional benefits. In this case, Schoon's preexisting medical history involved three injuries to her neck and right shoulder areas. Schoon presented expert medical opinions from three of her treating physicians at the hearing. The ALJ issued a decision approving Schoon's request for benefits, awarding her permanent partial disability benefits, medical expenses, and prejudgment interest. Employer/Insurer appealed.

The three issues on appeal were:

1. Whether the circuit court erred by affirming the Department's holding that Claimant's work injury was and remained a major contributing cause of her impairment and need for treatment.
2. Whether the circuit court erred in affirming the Department's finding of an adequate foundation for Dr. Dietrich's opinion.
3. Whether the circuit court erred by finding the opinions of Drs. Dietrich, Wilson, and Lawlor were more persuasive than that of Dr. Nipper.

Thank you to the Council for this forum.

Amber L. Mulder