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Mr. Thomas C. Barnett, Jr.
Secretary/Treasurer
State Bar of South Dakota
222 E. Capitol Ave.
Pierre, SD 57501-2596

Re: 2011 Worker's Compensation Committee Report

Dear Mr. Barnett:

Please consider this letter the 2011 Workers' Compensation Committee Report.

The Workers' Compensation Committee met telephonically several times. The Committee proposes three pieces of legislation to be submitted to the membership at the annual meeting. All proposals received unanimous approval from the fourteen members of the Committee.

Proposal one: Amend SDCL § 62-7-10 (the notice statute) by changing the three business day written notice requirement to seven business days. The primary reason for this change was the belief that the current notice provision is too strict, acts as a trap for unwary but legitimate claimants, and is "out of step" with legislation in other states, which often give workers 30 days or more to file a workers' compensation claim. The original proposal was for a 30 day notice rule and the seven business day proposal was a compromise which was linked to proposal number two which was put forward by defense lawyers.

Proposal two amends SDCL § 62-1-1.1, which defines a "medical practitioner". Under SDCL § 62-7-1, an insurer can require an employee to submit himself or herself at the expense of the employer for an examination by a "duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient to the employee." This is what is commonly referred to

as the "independent medical examiner" statute. SDCL § 62-7-1 refers to "medical practitioner" which is defined by SDCL § 62-1-1.1 as "a health care provider licensed and practicing within the scope of his profession under Title 36." Title 36 has been interpreted by the Department of Labor as requiring that a "medical practitioner" be licensed in South Dakota. Defense lawyers proposed amending SDCL § 62-1-1.1 to eliminate the words "under Title 36" which would allow independent medical examiners to perform examinations in South Dakota cases even thought they are not licensed in our state. The consensus of the Committee that out of state IME's are needed in some circumstances and that generally the law should not discriminate against doctors who are licensed in other states.

Proposal three changes SDCL § 62-1-1.3 which states that a work injury is presumed to be non-work related for other insurance purposes (i.e. health insurance) if the claim is denied under SDCL § 62-1-1(7)(a)(b) or (c) (causation). In practice, if a workers' compensation claim is denied due to notice or not arising out of employment, then the injured worker potentially can be denied workers' compensation coverage and medical insurance as SDCL § 62-1-1.3 can be interpreted to not apply in that instance. The proposal would change this statute to read that a work injury is presumed to be non-work related for insurance purposes if the claim is denied for any reason. This would allow injured workers who have their workers' compensation claims denied to receive health insurance coverage for their medical bills so they can get adequate medical treatment.

Here are the three changes in final bill form:

FOR AN ACT ENTITLED an ACT to revise various workers' compensation provisions: Be it enacted by the Legislature of the State of South Dakota:

1. That § 62-7-10 be amended to read as follows:

> Notice to employer of injury--Condition precedent to compensation. An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than ~~three business days~~ seven business days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:

(1) The employer or the employer's representative had actual knowledge of the injury; or

(2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the ~~three business day~~ seven business day period, which determination shall be liberally construed in favor of the employee.

2. That § 62-1-1.1 be amended to read as follows:

Medical practitioner defined. For purposes of this title only, a health care provider licensed and practicing within the scope of his profession ~~under Title 36~~ is a medical practitioner.

3. That § 62-1-1.3 be amended to read as follows:

Presumption that certain noncompensable injuries are nonwork related--Coverage under other insurance policy. If an employer denies coverage of a claim ~~on the basis that the injury is not compensable under this title due to the provisions of subsection 62-1-1(7)(a), (b), or (c)~~ for any reason, such injury is presumed to be nonwork related for other insurance purposes, and any other insurer covering bodily injury or disease of the injured employee shall pay according to the policy provisions. If coverage is denied by an insurer without a full explanation of the basis in the insurance policy in relation to the facts or applicable law for denial, the director of the Division of Insurance may determine such denial to be an unfair practice under chapter 58-33. If it is later determined that the injury is compensable under this title, the employer shall immediately reimburse the parties not liable for all payments made, including interest at the category B rate specified in § 54-3-16.

I am sending a copy of this report to President of the State Bar Richard Casey, President-Elect Patrick Goetzinger and all members of the Committee.

Respectfully submitted,

Michael J. Simpson

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MJS/rjk

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