

**South Dakota Department of Labor
Workers' Compensation Advisory Council
2005 Annual Report**

This document serves as the report of meetings, discussions and recommendations of the Workers' Compensation Advisory Council, pursuant to SDCL § 62-2-10. Council members include Lt. Governor Daugaard (chair), Paul Aylward, Glenn Barber, Guy Bender, Jeff Haase, Connie Halverson, Carol Hinderaker, Chris Lien, and Randy Stainbrook, and nonvoting members Department of Labor Secretary Pamela Roberts and Department of Revenue and Regulation Secretary Gary Viken. The report is available to any interested person or groups and can be found on the Department of Labor web site.

Overall, South Dakota's workers' compensation system is in good shape. Workers suffered fewer injuries than last year and costs are stable for 2005-06. In addition, workers compensation insurance rates are competitive with neighboring states.

Injury numbers continue to decrease. The Division of Labor and Management received 24,350 first reports of injury for the year ending March 31, 2004. Injuries decreased by 3% to 23,516 for the year ending March 31, 2005. This continues a trend that has gone on for many years. The National Council of Compensation Insurers (NCCI) reported in its April, 2005 Advisory Forum report (Forum) that the frequency of lost-time claims has dropped by 20% since 1995.

NCCI's Forum identified five factors that may play a role in reduced injuries nationwide: global competition, improving technology, legislative reforms, OSHA, and demographics. Of these factors, technology, legislative reforms, and demographics appear to be the most important in South Dakota. Improved technology, when implemented as part of an employer's effort to develop a good safety culture, can reduce injuries dramatically. NCCI suggests legislative reforms nationwide have screened out marginal claims. And as a higher percentage of South Dakota's working population enters its 40s and 50s, the incidence of injuries decreases. NCCI's data suggests that the more experienced the worker, the less frequently the worker is injured.

Premium rates will be relatively stable over the next year. The state Division of Insurance (DOI) has adopted a 1.3% average decrease in base rates for the voluntary market, and a 6.1% average increase for the assigned-risk or involuntary market. About 84% of the market is voluntary and 16% is assigned-risk, so the net effect (a slight decrease for most employers, an increase for a minority) is close to no change. DOI has allowed the "swing limit" to increase from 10% to 15%, meaning that base rates can change from a -16.3% to a +13.7% for the voluntary market, and a -8.9% to a +21.1% for assigned-risk.

The "swing limit" change was made to reduce the number of "bumping" employers. When an employer's workers are in a high-risk classification, a voluntary insurer must charge higher rates to cover the risk. The "swing limit," however, is a cap on how high this increase can go. An employer who has workers in a high-risk class can therefore "bump into" this cap.

A voluntary market insurer, prevented by the cap from charging the premium it thinks is necessary to cover the risk, may choose not to provide coverage, and the “bumping” employer may be forced to get coverage from the assigned-risk carrier. An employer forced into assigned-risk automatically has its rates increased by 15%. DOI concluded that the cap was too low, making the field of “bumping” employers who could be forced into the more expensive assigned-risk coverage too large.

The increase in assigned-risk rates is mostly attributable to necessary assessments by DOI's Subsequent Injury Fund (SIF). Either two or three such assessments will be necessary from July 1, 2005 to June 30, 2006. Each assessment is 4% of the benefits paid out in the preceding year by insurers and self-insured employers. (As an example, DOL records show that almost \$74 million in benefits were paid out by insurers and self-insurers in calendar year 2003, making one assessment almost three million dollars.) Though SIF claims cannot be made for injuries occurring after June 30, 2001, they do not have to be made until they are “ripe.” Claims are “ripe” when the Labor Department has approved an agreement or issued an order confirming that a subsequent injury has occurred. This sometimes occurs years into the future.

The Department of Labor is working to advance the workers' compensation reporting system. These automation changes have been well-received. Since 2003, electronic filing has increased from 15% to 99% for injury reports, and 95% of the monthly payment reports are now reported electronically. DOL made electronic submission mandatory for most reporters on July 1, 2005. A project to develop an employee hearing handbook has begun. This will help claimants unrepresented by attorneys better understand DOL's hearing process. DOL's goal is to have the handbook ready to print by October 1, 2005.

At the Council's request, a working group has been formed to evaluate the need for legislative changes to the permanent partial disability laws. Council member Paul Aylward, James Marsh from DOL, Dennis Finch, a Rapid City attorney who specializes in workers' compensation, Phil DeGreef, a claims adjuster for Berkley Risk Administrators of Pierre, and Deb Mortenson, Executive Director of the state Chiropractors' Association, are members of the group and have participated in two meetings. Dr. Brett Lawlor, MD has also been invited to participate but has been unable to attend the meetings so far. The group has recommended that no action be taken on changing permanent partial disability laws until the 2007 Legislative Session, when the group's work should be complete.

The demographics in South Dakota's workforce help to keep the number of injuries down. However, when injuries happen, they are more severe. NCCI reported in its Forum that severity has steadily increased since 1995, in large part due to rising medical costs (our indemnity claim severity is the lowest of any state in the region.) It is difficult to pinpoint which medical services are driving costs without analyzing a fairly large cross-section of provider billings by individual codes. This would be expensive, and would require payers to produce a great deal of information that they likely do not have.

Overall, the state's workers' compensation system is healthy and headed in the right direction.

DOI noted in its rate filing hearing that the market for workers' compensation policies is "soft" now, meaning that companies are able to get voluntary coverage for employers. DOI and NCCI are optimistic that assigned-risk participation has reached its peak, and should slowly taper off over the next few years. The Small Business and Entrepreneurship Council declared South Dakota fourth in the nation for a favorable workers' compensation environment, above all states but North Dakota, West Virginia and Indiana, and first in its 2004 "Small Business Survival Index."

On May 3, 2005, the Council received the Division of Labor and Management's report about the state of the workers' compensation system, and how the Council's legislative recommendations fared in the 2005 session. Comments were taken concerning issues that Council members or the public wanted considered for possible recommended legislation.

On June 2, 2005, the Council heard the Division of Labor and Management's report on the activities of the permanent partial disability working group, and a presentation by the state Insurance Division's fraud unit. The Council also received public testimony on all items under consideration, and took action on some issues.

On August 18, 2005, the Council took action on any pending issues not dealt with at the June 2 meeting.

Council actions at their meetings were as follows:

Issue #1: Changing the Procedure for Removing a DOL Judge from a Case 62-7-12.2 (SB 15)

Summary: This proposal was recommended by the Council in 2004, and proposed as SB 15 to the 2005 Legislature. Current law gives the parties to a workers' compensation case the right to have one judge hearing the case removed, without giving a reason for the request. The time limit for asking for no-cause removal is twenty days after the party has been notified that the judge was appointed. Where a party submits a motion for a judge to decide, no judge has been assigned to the case, and the motion is ruled on, the party who does not like the result retains the right to remove the judge who ruled on the motion. DOL proposed that once a party has asked a judge to do something for the party, the party can no longer have the judge removed from the case without having a good reason to ask. It passed the Senate, but was defeated in the House Judiciary Committee.

Public Testimony: None.

Council Action: Chair Daugaard MOVED that SB 15 be recommended for reconsideration by the 2006 Legislature. Pamela Roberts explained that DOL would make a procedural change rendering the proposal unnecessary. Chair Daugaard then WITHDREW his motion. No action on this issue was recommended.

Issue #2: Legal Representation and Small Claims.

Summary: A committee of attorneys within the Bar proposed a simplified hearing process for claims involving \$5,000 of medical care or less. The Council considered such a proposal in 2004, but deferred consideration until some language issues could be worked out in the Bar. After amendments were made, the Bar approved the proposal by unanimous vote.

Public Testimony:

Dennis Finch, appearing on behalf of the Bar's workers' compensation committee, testified that attorneys only rarely represent claimants in medical-only cases. A small claims procedure would be sufficiently informal to allow claimants to have their claims heard without necessarily using attorneys. No arguments were presented in opposition.

Council Action: Since the Council did not have the opportunity to review specific language for the proposed State Bar legislation, Glenn Barber MOVED the Council acknowledge the work of the State Bar and endorse the concept of a small claims procedure for worker's compensation medical claims. Randy Stainbrook SECONDED. All in favor by roll call vote. Motion carried unanimously.

Issue #3: Social Security Offset

Summary: Weekly permanent total disability benefits can be reduced when the employee is receiving Social Security retirement benefits. However, the law does not permit DOL to factor in this potential reduction when determining the present value of future permanent total disability payments.

Public Testimony:

John Michaels, with Farmers Insurance Group, testified that it was unfair not to consider the offset. A claimant would be encouraged to have her benefits commuted to a lump sum in all cases, because it could always be shown to be in her best financial interests to do so. Nonetheless, he recommended that no immediate action be taken; permanent total disability data should be tracked to see if the number of lump-sum commutations spikes upward.

Council Action: No action on this issue was recommended.

Issue #4: Choice of Doctor

Summary: An injured employee has the right to choose the doctor with whom he initially treats. He is required to get written approval to change his choice. The law does not require an employee to be made aware of these rules.

Public Testimony: None.

Council Action: Paul Aylward MOVED that employers be required to provide provider choice information. SECONDED by Randy Stainbrook. Motion failed on a roll call vote. 2 Yea (Aylward, Stainbrook) and 5 Nay (Barber, Bender, Daugaard, Halverson, Hinderaker).

Glenn Barber MOVED that the Council recommend the SD DOL prepare and distribute an informational document for employers to provide to their employees notifying them of the law and their right to choice of doctor. This would also serve as a reminder to employers of the law. SECONDED by Carol Hinderaker. 7 Yea and 0 Nay. Motion carried.

Issue #5: Permanent Total Disability/Odd-Lot

Summary: This issue was carried over from 2004. A workers' compensation claimant can receive weekly benefits for life despite being able to earn almost as much as he received in temporary total benefits under the law and the Supreme Court's ruling in Capitol Motors v. Schied.

Public Testimony: None.

Council Action: No action on this issue was recommended.

Issue #6: Notice of Statute of Limitations

Summary: This issue was carried over from 2004. SDCL §62-7-35.1 is a statute of limitations that is triggered when three years pass without the payment of any benefits. The employee is not required to receive notice that this three-year period has begun running.

Public Testimony: Chris Specht, from Avera Presentation Trust, said the current system works, and providing notice of the three-year period would only prompt employees to file excessive petitions for hearing.

Council Action: No action on this issue was recommended.

Respectfully submitted on September 30, 2005, by the Workers' Compensation Advisory Council.

Members:

Dennis Daugaard, Chair

Carol Hinderaker

Paul Aylward

Chris Lien

Glenn Barber

Randy Stainbrook

Guy Bender

Pamela Roberts

Jeff Haase

Gary Viken

Connie Halverson