

**South Dakota Department of Labor
Workers' Compensation Advisory Council
2006 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 continues to be in good shape. Base premium rates increased modestly for 2006-07, going up an average of 4.3% for the voluntary market and 2% for the assigned-risk pool. The "swing limit" is 15%, meaning the voluntary base rate change can increase no more than 19.3% or decrease as much as -10.7%.

On May 23, 2006, the Council received the Division of Labor and Management's report about 2006 legislation impacting the workers' compensation system. James Manning from South Dakota State University's Engineering Extension gave a presentation on OSHA. James Marsh gave an update on the Department of Labor Workgroup studying changes to the AMA's impairment manual. Comments were taken at a public hearing concerning issues that Council members or the public wanted considered for possible recommended legislation.

On August 1, 2006, the Council held a public hearing and took action on all pending issues as follows:

Issue #1: State OSHA Office

Summary: The US Occupational Safety and Health Administration (OSHA) regulates workplace safety as to private employers. Council member Paul Aylward proposed that the state establish an office with powers similar to OSHA's to regulate state and local government workplaces.

Public Testimony: Council member Aylward noted that 22 states have state OSHA plans, and four cover only public employees. If the State plan is approved by OSHA, the federal government will pay up to 50% of the operating cost of the agency. He suggested South Dakota implement a State OSHA office because some government workplaces have unsafe conditions, and some employees are intimidated into working unsafely. Fern Johnson, representing the South Dakota Injured Workers' Coalition, proposed that a state OSHA office be opened regulating both public and private employers. Joe O'Dell, Safety Coordinator for the South Dakota Department of Transportation, outlined the process DOT has used since 2000 to reduce the number and severity of workplace accidents. He testified a State OSHA office is not necessary. State Risk Manager Craig Ambach from

the South Dakota Office of Risk Management testified in opposition to the proposal because all state agencies have designated loss-control committees which report regularly to his office. They already follow OSHA safety standards as their guide. Dennis Rounds, Executive Director of the South Dakota Office of Risk Management and the PEPL Fund, testified in opposition to a state OSHA office as duplicative and unnecessary.

Council Action The Council took no action on this issue. Paul Aylward will do further research on other alternatives.

Issue #2: Bifurcation in the Hearing Process.

Summary: On behalf of Farmers Insurance, Mike Mores and Derek Sprague presented a proposal to change the bifurcation process in the Workers' Compensation hearing process (SDCL 62-7-12.3).

Public Testimony: Fern Johnson with the SD Injured Workers Coalition testified that the Coalition does not support the Farmer Insurance amendment to 62-7-12.3 bifurcated hearings proposal as written, as the language was too tight. Mike Shaw, Counsel for Property Casualty Insurers of America (PCI), testified that his client, PCI, has reservations regarding the proposed change to the bifurcated hearings process.

Council Action: No action was recommended by the Council.

Issue #3: Modifying the Approval Process for PPD Agreements.

Summary: On behalf of Farmers Insurance, Mike Mores and Derek Sprague presented a proposal to modify the approval process for permanent partial disability agreements. (SDCL 62-4-6.1)

Public Testimony: Johnson testified in opposition to the proposed change to 62-4.6.1 approval of payment of benefits.

Council Action: No action was recommended by the Council.

Issue #4: Medical Providers Who Do Not Submit Timely Reports.

Summary: On behalf of Farmers Insurance, Mike Mores and Derek Sprague presented a proposal requiring providers to provide medical records within specific time frames (SDCL 62-4-45).

Public Testimony: Johnson testified in opposition to the proposed amendment to 62-4-45 on providing medical information. Linda Wolden, from the Alaris Group, testified in support of legislation regarding the release of medical records. Wolden testified at times she has to wait over 30 days to receive the records. Shaw testified that he thought there was already a criminal provision for failing to provide medical records so the amendment to 62-4-45 was not necessary.

Council Action: No action was recommended by the Council.

Issue #5: Penalty for Failing to File Reports.

Summary: Fern Johnson proposed to establish a penalty of \$500 per incident for an insurer's failure to provide reports required by DOL.

Public Testimony: Johnson spoke in support of the proposal, and Chamberlain sent written comments in support. Mike Shaw, speaking on behalf of Property Casualty Insurers Association of America (PCI), opposed the proposal, saying that it gave no discretion to DOL to review the underlying circumstances in determining whether a penalty should be imposed or to make the amount of the fine proportionate to the reporting violation. Shaw also argued that it would be inappropriate for the two-year statute of limitations to be tolled strictly based on untimely reporting from an employer or insurer to DOL. Randy Moses, Assistant Director of the South Dakota Division of Insurance, testified that the insurance code already establishes sufficient time frames and penalties for insurers. Steve Schneider, writing on behalf of the American Insurance Association, opposed the proposal because it would discourage economic development, and the proponents have not provided any examples of conduct that would justify the need for a change. Elizabeth Benning, writing for the South Dakota Municipal League Workers' Compensation Fund, and Bob Wilcox, writing for the South Dakota Association of County Commissioners, opposed the proposal.

Issue #6: Electronic monitoring.

Summary: Johnson proposed to require DOL to electronically monitor all claim information it receives for compliance with the law's reporting and payment requirements. DOL would be required to make an annual report available to the public of all injury reports, payments and entities that are not complying with such requirements.

Public Testimony: Johnson spoke in support of the proposal, and Chamberlain sent written comments in support. Shaw opposed the proposal, saying that making such reports public would violate the privacy of employees, and could be used competitively by an employer or insurer to unfairly and wrongfully hurt other employers and insurers. Moses spoke in opposition to the proposal and Schneider, Benning and Wilcox sent written comments in opposition to the proposal.

Issue #7: Claims handling requirements and penalties.

Summary: Johnson proposed to require self-insurers and insurers to explain in layman's language the reasons for a benefit denial and provide a reference to the basis used. They would be required to review all information submitted by a claimant, and penalized \$500 a day until they "fully comply." They would be required to identify medical or vocational experts they sought out during the investigation of the claim; medical consultants would be prohibited from being "subordinates" of the self-insurer or insurer. Medical benefits would have to be paid or denied in 30 days after they were billed, with the only basis for a

denial being that the bill was not work-related, was over the fee schedule maximum, that the right billing form was not used, or that documentation for the care was insufficient. Providers would be required to send itemized billings and records and reports in support of the billing, and could not collect from the employee on the billings until such information was provided.

Public Testimony: Johnson spoke in support of the proposal, and Chamberlain set written comments in support. Shaw opposed the proposal, saying that “subordinate” is not adequately defined, that the proposed penalty does not leave DOL sufficient discretion to reduce or not impose it, that the list of grounds for denial is too limited (it does not include fraudulent conduct, for example) and that the proposal is too vaguely worded. Claims practices laws give great power to a bureaucracy, and are time-consuming and expensive to comply with, so the standards of conduct in them should be straightforward and unambiguous. Moses spoke in opposition to the proposals and Schneider, Benning and Wilcox sent written comments in opposition to the proposal.

Issue # 8: Prohibited claim practices

Summary: Johnson proposed to establish varying penalties for specified claim practices. The penalties ranged from written warnings to a maximum \$10,000 fine and 5 years in prison, with monetary penalties, typically in the amount of \$3,000 per violation, for at least four violations. The conduct included not replying to a claimant’s written communications, not paying or denying a claim in 20 days, not paying medical bills in 45 days, denying a claim without investigation, not timely paying benefits more than three times in a twelve-month period, not responding to DOL’s written communications, not paying benefits in conformity with a DOL order in 45 days (unless appealed), threatening to delay a payment if the claimant gets an attorney involved, altering documents, making false statements on documents, and “harassing” or “stalking” a claimant, defined as “conduct which intentionally frightens, threatens, oppresses, persecutes or intimidates.” It is not necessary under part of the proposal to prove an intent to cause these feelings. It also includes such things as “pursuing” someone by “technological means,” returning to anyone’s property without permission, or intentionally impersonating someone. The state Insurance Division can be called upon to revoke an insurer’s certification if enough instances of prohibited conduct occur. Violations of these laws could also be used in other civil actions outside the workers’ compensation/claims practices arena.

Public Testimony: Johnson spoke in support of the proposal, and Chamberlain sent written comments in support. Shaw opposed the proposal, saying that it might substantially erode the exclusive remedy principle at the core of workers’ compensation law; that the definition of stalking, being based on a claimant’s subjective feelings, is vague and subject to abusive interpretation; that some of the acts are punishable as felonies, which is disproportionate punishment for such conduct; that multiple violations are punishable if they are merely alleged, which is unfair; and that no right of appeal is identified, which encourages abuse. Mores observed that individual criminal liability can be assessed against an insurer’s employees, which has never been done before and is inappropriate. Moses testified that the “prohibited conduct” in the proposal is too

subjective, similar conduct is already regulated by the Insurance Division, and the standards in the proposal would cause many insurers to not write workers' compensation policies in the state. Schneider, Benning and Wilcox sent written comments in opposition to the proposal.

Issue # 9: Benefit penalty.

Summary: Johnson proposed to empower state courts to impose a 30% benefit penalty against an insurer/self-insurer if a hearing reveals that they filed an action or raised a defense that was frivolous or for the purpose of intentional delay, unreasonably/vexatiously denied payments of benefits, neglected/refused to pay benefits, intentionally underpaid benefits, frivolously denied a claim, or unreasonably/vexatiously stopped paying benefits without providing a reasonable basis for the stoppage. A 25% penalty, with interest, would also be imposed for inexcusable delay. The state Insurance Division could examine an insurer's records for evidence of unreasonableness, and revoke an insurer's license for failure to cooperate.

Public Testimony: Johnson spoke in support of the proposal, and Chamberlain sent written comments in support. Shaw opposed the proposal, saying it was subject to abuse by regulators. Moses testified that the Insurance Division already has the power to do the things called for in the proposal. Schneider, Benning and Wilcox sent written comments in opposition to the proposal.

Council Action: Glenn Barber MOVED that the Council go on record opposing the Johnson/Chamberlain proposals. SECONDED by Guy Bender. 8 Yea and 0 Nay. Motion carried.

Issue # 10: Circuit Court judgment process.

Summary: Johnson proposed to allow claimants to go directly to Circuit Court in cases where an insurer/self-insurer in "default" more than 30 days in paying benefits, where a judgment would be entered unless stayed by appeal.

Public Testimony: Johnson spoke in support of the proposal, and Chamberlain sent written comments in support. Shaw opposed the proposal, saying that it did not excuse delayed payments for good cause; it creates a legal process that makes inroads into the exclusive remedy concept at the heart of workers' compensation law, and undermines DOL's and the Insurance Division's regulatory oversight. Moses spoke in opposition to the proposal and Schneider, Benning and Wilcox sent written comments in opposition to the proposal.

Issue # 11: Attorney's Fee Penalty

Summary: Johnson proposed to have DOL award attorney's fees when an insurer/self-insurer refuses to pay benefits DOL awarded or neglects to pay medical costs for more than thirty days after an injury, or more than ten days after they receive a notice of

obligation to pay medicals and a hearing is held. Fees would also be awarded if the insurer/self-insurer seeks secretarial review or a circuit court appeal and loses.

Public Testimony: Johnson spoke in support of the proposal, and Chamberlain sent written comments in support. Shaw opposed the proposal, saying that the amount of such fees is not limited, in contradiction to other workers' compensation laws limiting fees; that there is no good cause excuse for non-payment; that the fee is not deducted from the final award, unlike other states with roughly similar provisions, nor is it limited to a percentage of disputed amounts as under current law. Moses spoke in opposition to the proposal and Schneider, Benning and Wilcox sent written comments in opposition to the proposal.

Issue # 12: The effect of medical corrections on PPD awards.

Summary: Johnson proposed to require evaluations of permanent impairment/permanent disability to be made without consideration of amelioration of the claimant's condition by prosthetics, medications or therapy.

Public Testimony: Johnson spoke in support of the proposal, and Chamberlain sent written comments in support. Shaw opposed the proposal, saying that this is not good public policy; premium rates would necessarily go up, and insurers/self-insurers would not be credited in the permanent disability benefit schedule for mitigating the effects of injuries. Moses spoke in opposition to the proposals and Schneider, Benning and Wilcox sent written comments in opposition to the proposal.

Council Action: Council member Glenn Barber MOVED that the Council go on record as opposing all eight of the proposed Johnson bills because they would impose a severe cost increase on employers in South Dakota and may reduce the number of insurance companies interested in doing business in South Dakota or those that stay would have to increase their costs to stay in business here. Guy Bender SECONDED.

Mr. Lien MOVED to amend the motion to state that the Council opposes the eight proposals in their current form as presented to the Council. Carol Hinderaker SECONDED. Roll call carried unanimously on a roll call vote. Motion carried.

Respectfully submitted on _____ 2006, 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