SOUTH DAKOTA DEPARTMENT OF LABOR
PAMELA S. ROBERTS, SECRETARY

October 22, 2007

The Honorable Governor M. Michael Rounds
State of South Dakota
500 East Capitol
Pierre SD 57501

The Honorable Senator Bob Gray
President Pro Tempore of the Senate
500 East Capitol
Pierre SD 57501

The Honorable Representative Thomas Deadrick
House Speaker of the House of Representatives
500 East Capitol
Pierre, SD 57501

Re: 2007 Report of the Workers' Compensation Advisory Council

Gentlemen:

Enclosed please find the 2007 Report of the Workers' Compensation Advisory Council required by SDCL § 62-2-10. A copy is posted at sdjobs.org, as well as minutes, agendas and other information on the Workers' Compensation Advisory Council.

Sincerely,

Pamela S. Roberts

Pamela S. Roberts
Secretary

Cc: Lt. Governor Dennis Daugaard
Legislators
Workers' Compensation Advisory Council

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South Dakota Department of Labor
Workers' Compensation Advisory Council
2007 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 Dennis 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 Paul Kinsman. The report is available to any interested person or groups and can be found on the Department of Labor website at www.sdjobs.org.

Overall, South Dakota's workers' compensation system continues to be in good shape. Base premium rates for 2007-08 will decrease an average of 1% in the voluntary market, with a 15-point "swing" up and down (a maximum increase of 14% or decrease of 16%). The involuntary or "assigned-risk" rates will increase by an average of 4.9%. Pool employers will also be impacted by a change in the "assigned-risk differential," the automatic rate increase assessed to employers who move into the pool. This differential is to increase from 14.7% to 20%, meaning a pool employer would pay a minimum of 20% more than a voluntary-market employer, all other things being equal. These base rates do not factor in "experience-modification" adjustments, which change some individual employers' premium rates based on their injury claims.

Council action for 2007 began with a meeting on May 30, 2007. The Council received the Department of Labor report about the state of the system and 2007 workers' compensation legislation. Discussion items were established and public testimony was received on any items of interest concerning South Dakota's workers' compensation system by any person.

On July 31, 2007, the Council received written and oral comments concerning twelve issues that Council members or the public wanted considered for possible recommended 2008 legislation, and took action on most of those issues.

On August 27, 2007, the Council took action on all pending issues not dealt with in the July 31 meeting. A complete transcript of all discussion, as well as draft legislation which was acted upon at Council meetings, can be found at www.sdjobs.org. A summary of Council actions at their meetings were as follows:

Issue #1: Causation; "contributing factor" vs "a major contributing cause" (Orth case) – SDCL 62-1-1(7) amendment.

Summary: In the Supreme Court case of Orth v. Stoebner and Permann Construction Co., it was ruled that when work is a "contributing factor" to an employee's injury, the employer is liable for that injury. DOL recommended that SDCL 62-1-1(7) be amended to clarify that work must be a "major contributing cause" of an injury for the employer to be

liable. It was also recommended that SDCL 62-1-1(7)(c) be amended so that the "major contributing cause" standard would continue not to apply in cases of successive work-related injuries.

Public Testimony: DOL testified that in 1995, when the Legislature changed the injury definition, the consensus of all the involved parties was that "a major contributing cause" would be the standard both for work injuries and the conditions resulting from them. The law has been interpreted that way since 1995 until the recent Supreme Court case. This proposal would return the system to the previously established policy. Those testifying in support of the proposed change were Mike Shaw (Shaw), an attorney from May, Adam, Gerdes and Thompson Law Firm in Pierre on behalf of the American Insurance Association and Sue Simons (Simons), an attorney from Davenport, Evans, Hurwitz and Smith Law Firm in Sioux Falls. Dennis Finch (Finch), an attorney from Finch, Bettmann, Maks and Hogue Law Firm in Rapid City and chair of the Workers' Compensation Committee of the South Dakota Trial Lawyers Association, offered written comments in opposition and Rex Hagg (Hagg), an attorney from Whiting, Hagg, and Hagg in Rapid City and Fern Stanton-Johnson (Johnson), representing the Injured Workers' Coalition, testified in opposition to the recommendation. Jon LaFleur (LaFleur), an attorney from LaFleur, LaFleur and LaFleur Law Office in Rapid City offered written comments in opposition.

Council Action: Carol Hinderaker MOVED that the Council adopt the recommendation of DOL in issue 1 as written. Chairman Daugaard SECONDED. MOTION CARRIED with 6 Yea (Halverson, Lien, Haase, Hinderaker, Barber, Daugaard) and 2 Nay, (Aylward, Stainbrook).

Issue #2: Payment pursuant to fee schedule (Wise case) – SDCL 62-1-1.3 amendment.

Summary: In the Supreme Court case of Wise v. Brooks Construction Services, it was ruled if an employer or insurer denied benefits, and was subsequently found to be responsible for the claim, it would not be able to apply the medical fee schedule to reduce reimbursements to a provider. DOL recommended SDCL 62-1-1.3 be amended so an insurer be able to apply the fee schedule or a network discount under those circumstances. The Division of Insurance also recommended an amendment to establish that a "health insurer's" (which by definition includes private disability insurers) recovery be limited to the fee schedule or network discount, and to simplify the recovery process for health insurers.

Public Testimony: DOL testified that standard practice before Wise was for employers and insurers, who were held responsible for benefits, to reimburse medical providers at the fee schedule amount, and the Wise rule unfairly punishes parties who, with a reasonable basis for doing so, deny benefits. Shaw and Simons testified that Wise changed established procedure, was unfair, and allows for a claimant or the claimant's attorney to receive the provider's reimbursement. They also testified that when payments are ordered, they should be made directly to the provider. Randy Moses (Moses), from

the South Dakota Division of Insurance, proposed an amendment to Issue 2 because a growing number of health insurers (a term which includes private disability insurers) are refusing to write policies in South Dakota. The concern of those insurers is that when a compensation insurer is ultimately held responsible for a claim, the health insurer has difficulty recovering what is paid. The amendment was designed to make that recovery process simpler. The amendment in its final form was supported by Shaw and Simons. Cheryl Chamberlain (Chamberlain), representing the Injured Workers' Coalition (Chamberlain) testified in opposition to Issue 2. Russell Janklow (Janklow), an attorney with the Johnson, Heidepriem, Janklow, Abdallah & Johnson firm in Sioux Falls, and Finch offered written comments in opposition.

Council Action: Carol Hinderaker MOVED that the Council adopt the recommendation of DOL in issue 2 as amended. SECONDED by Chairman Daugaard. MOTION FAILED with 3 Yea (Hinderaker, Lien, Daugaard) and 3 Nay (Aylward, Halverson, Stainbrook).

Issue #3: "Medical findings" vs. "Medical expert opinion" – SDCL 62-1-15 amendment.

Summary: In the Orth case noted above, the court relied on a physician's brief response in a letter to support the injured employee's position that his injury was work-related. DOL recommended SDCL 62-1-15 be amended so objective medical findings have greater weight in determining whether injuries are work-related, as is the current procedure for medical conditions.

Public Testimony: DOL testified in support of the proposal explaining objective medical findings should be given more weight than more subjective ones in the evaluation of injuries. Hagg testified the change might cause more depositions to be taken, but DOL disagreed, saying the trend will be for more medical depositions to be taken regardless of whether SDCL 62-1-15 is amended or not.

Council Action: Carol Hinderaker MOVED that the Council recommend the words "or condition" be added to SDCL 62-1-15. Glen Barber SECONDED. MOTION PASSED with 6 Yea (Halverson, Lien, Haase, Hinderaker, Barber, Daugaard) and 2 Nay (Aylward, Stainbrook).

Issue #4: Employee Misconduct (Vansteenwyk case) – SDCL 62-4-37 amendment.

Summary: In the Supreme Court case of Vansteenwyk v. Baumgartner Trees and Landscaping, it was ruled that an employer had not met its burden under SDCL 62-4-37 to establish marijuana use had impaired its employee at the time of his injury and the use was a proximate cause of the employee's injury. Benefits were awarded. DOL recommended SDCL 62-4-37 be amended so in cases where the employee has been found to have used illegal drugs or exceeded the legal limit for alcohol intoxication at the time of the injury, the burden be placed on the employee to establish that this use or intoxication did not cause the injury. The burden would remain with the employer in other misconduct cases.

Public Testimony: DOL testified that public policy should discourage workplace drug or alcohol use by placing the burden on an employee to prove the use did not cause a worker's injury. Simons testified in support, adding that the proposed approach is consistent with the law in other states. Chamberlain testified in opposition, and Finch, Janklow and La Fleur offered written comments in opposition.

Council Action: Paul Aylward MOVED that the Council reject the recommendation of DOL in issue 4. Randy Stainbrook SECONDED. MOTION FAILED with 2 Yea (Aylward, Stainbrook) and 4 Nay (Daugaard, Halverson, Hinderaker, and Lien). Chris Lien MOVED that the Council adopt the recommendation. Carol Hinderaker SECONDED. MOTION CARRIED with 4 Yea (Daugaard, Halverson, Hinderaker, Lien) and 2 Nay (Aylward, Stainbrook).

Issue # 5: Employer notice and "actual knowledge" (Orth case) – SDCL 62-7-10 amendment.

Summary: An employee can satisfy the statutory requirement he give timely notice of his injury to his employer by establishing that the employer had "actual knowledge" of the injury. In the Orth case noted above, the Supreme Court ruled the employee could show "actual knowledge" by demonstrating a reasonably conscientious manager would suspect the possibility of a workers' compensation claim being made, and would be moved to make further inquiry or investigation. DOL recommended SDCL 62-7-10 be amended so "actual knowledge" by an employer is limited to what is actually provided to an employer, not what might be inferred or suspected.

Public Testimony: DOL testified that in 1995, when the Legislature changed several workers compensation laws, the consensus of the involved parties was that notice to the employer be required. The law has been interpreted that way since 1995 until the recent Supreme Court case. DOL testified the Orth ruling does not advance the goal of prompt reporting of claims, a key to controlling costs and limiting the severity of injuries. Shaw testified in support of the proposal as did Simons who added that placing the duty on employers to investigate merely suspected claims exposes them to liability under federal and state employment discrimination laws. Johnson and Hagg opposed the proposal. Language in the proposal requiring the employer know "that said injury was work-related" was considered impractical, and stricken from the proposal.

Council Action: Chairman Daugaard MOVED to strike the words "and that said injury was work-related" add the words, "without the need of inquiry". Chris Lien SECONDED. MOTION CARRIED unanimously. Chairman Daugaard further MOVED to recommend issue 5 as amended. Chris Lien SECONDED. MOTION CARRIED with 6 Yea (Barber, Daugaard, Haase, Halverson, Hinderaker, Lien) and 2 Nay (Aylward, Stainbrook).

Issue #6: Medical releases – Chapter 62-4 new section.

Summary: Current law provides there is no physician-patient privilege as to medical records relevant to a workers' compensation claim. DOL proposed a new section of law to require an employee claiming benefits to sign a release as to those relevant records, if asked.

Public Testimony: DOL testified insurers are having difficulty getting relevant medical records, which slows down the process of paying benefits. Most medical records are protected by extensive federal privacy laws, and many providers are concerned about exposing themselves to liability for giving information without a release. Hagg requested the proposal be amended to permit the employee to also get copies of medical records. Larry Klaahsen (Klaahsen), of Dakota Truck Underwriters, and Simons suggested the employee copies be limited to instances in which the employee requests the copies. Shaw suggested the employee bear the cost of the additional copies. Mary Merritt (Merrit), of the South Dakota Association of Managed Care Organizations, opposed the proposal, asserting it would create ethical problems for MCO nurses, and allowing employers to have these records might lead to violations of privacy. DOL explained "employer" is a term of art in workers' compensation, referring to employers, insurers, and their agents so the Merritt concerns would not be a problem.

Council Action: Chris Lien MOVED that the Council recommend a NEW SECTION be added to Chapter 62-4 regarding medical records which includes the DOL language and suggested amendments. SECONDED by Chairman Daugaard. MOTION PASSED unanimously.

Issue #7: Permanent total disability (Schied case) – SDCL 62-4 amendments.

Summary: In the Supreme Court case of Schied v. Capital Motors, it was ruled an employee was entitled to permanent total disability benefits under SDCL 62-4-53 and 62-4-52(2) (often referred to as the "Odd-Lot" provisions) because his earnings from his full-time job were less than what he was receiving for weekly disability benefits. DOL recommended a new section be added to chapter 62-4 to permit an offset from permanent total disability benefits in "Odd-Lot" cases for two-thirds of earnings the employee receives. (This provision was introduced as SB 129 in the 2004 Legislature and FAILED to pass.)

Public Testimony: DOL testified that under present law, an employee is allowed to receive the wages from a suitable job plus full workers compensation benefits, and that an offset for a percent of current wages would be appropriate. Mike Mores (Mores), of Farmers Insurance, offered written comments in support. Simons testified in support and suggested the Schied rule encourages employers to reduce wages rather than risk being liable for permanent total disability benefits. Johnson opposed the proposal. Hagg also opposed and testified Schied situations are unusual, the language in the proposal allowing an offset based on wages the employee "is capable of earning" promotes litigation, and high-wage earners, whose benefits are capped under current law, would be unfairly

compensated with an offset. Finch and LaFleur made similar observations in opposition in their written comments. The proponents made proposals for language changes, having to do with distinguishing "Odd-Lots" from permanent total disability cases that are not "Odd-Lots," and changing the offset formula being proposed. Secretary Roberts and DOL requested the proposal be withdrawn based on the public testimony and on the need for substantial language amendments to Issue 7 as drafted.

Council Action: The proposal was withdrawn by DOL with consensus of the Council.

Issue #8: Various issues.

Summary: Johnson presented a package bill intended to establish new requirements for insurers and other payers of workers' compensation benefits. These requirements would change the claims handling and investigation process, the manner in which payers communicate with employees and providers, establish a list of prohibited claims practices, and promote the prompt payment of medical benefits. The enforcement mechanism would be a set of penalties and fines imposed by DOL, the Division of Insurance, and in some cases the courts.

Public Testimony: Johnson testified she had spoken to injured employees whose medical bills and claims were delayed, and to medical providers who had trouble getting paid by workers' compensation payers. She provided a DVD to council members with recorded comments about the experiences of various individuals. Shaw testified in opposition to the package stating most of the proposal is identical to bills offered to and rejected by the 2007 Council and the 2007 Legislature, the proposal would make the system more adversarial which will harm employees, the proposal would chill the insurance market and drive away many carriers from providing coverage in South Dakota, and the penalties enumerated in the bill are too harsh in relation to the conduct identified. Simons expressed general opposition to the bill on behalf of Dakota Truck Underwriters. David Owen (Owen), from the South Dakota Chamber of Commerce, spoke in opposition to drastically amending current law which was established as a compromise between workers and employers. Chairman Daugaard had significant problems with the wording of the bill, finding many drafting errors which he felt would make the bill inappropriate to recommend.

Council Action: Paul Aylward MOVED to recommend that the Council support the proposal for the next legislative session. Randy Stainbrook SECONDED. MOTION FAILED with 2 Yea (Aylward, Stainbrook) and 6 Nay (Barber, Daugaard, Haase, Halverson, Hinderaker, Lien).

Issue #9: Delays – Approval of Permanent Benefit Filings – SDCL 62-4 new section.

Summary: DOL is charged with approving agreements concerning workers' compensation benefits. Under its procedures, when a permanent partial disability memorandum (Form 111) is received which is only signed by the insurer/self-insurer, DOL reviews it to see if the amounts are calculated correctly. If the amounts are correct, DOL sends a letter saying the insurer/self-insurer is free to pay the amounts specified in the form. Because the employee has not signed the Form 111, however, it cannot be approved as an "agreement" under SDCL 62-7-5. Mores (Farmers Insurance) proposed DOL approve such an insurer filing as if it were a signed agreement.

Public Testimony: Farmers Insurance was unable to attend the hearing but supported the proposal through written comments. There was no other proponent or opponent testimony.

Council Action: Carol Hinderaker MOVED to defer action on the issue until a representative from Farmers Insurance is available to further explain their proposal. Glenn Barber SECONDED. MOTION PASSED unanimously.

Issue #10: Penalty for failure to provide medical reports – SDCL 62-4-45 amendment.

Summary: On behalf of Farmers Insurance, Mores presented a proposal requiring providers to provide medical records within specific time frames. Mores later requested the proposal be withdrawn, and the Council concurred.

Issue #11: Delays – requiring prompt payment of medical bills – SDCL 62-4 new section.

Summary: This proposal was considered duplicative and combined with Issue #12.

Issue #12: Increasing penalties for late reporting – SDCL 62-6-2 amendment.

Summary: Under current law, an employer can be fined $100 for failing to timely file a first report of injury. (It is also a misdemeanor.) An insurer/self-insurer can also be fined $100 for failing to timely file the report, or for failing to timely investigate a claim. DOL recommended these fines be increased to $500. Because there is no requirement for timely payment of medical benefits; DOL also proposed a medical bill properly submitted to a payer be paid, denied, or further investigated within 30 days.

Public Testimony: DOL testified concerns have been raised about delays in processing claims and paying benefits. The proposal is intended to make the enforcement of existing law more effective. Johnson supported the proposal. Shaw testified insurers who refuse to follow the law should be punished, but those who make honest mistakes should be given fair consideration.

Council Action: Through consensus, the Council added a fine provision for the medical payment section of the proposal and amended the language of the proposal. Glenn Barber MOVED to recommend the proposal as amended. Randy Stainbrook SECONDED. MOTION PASSED with 6 Yea (Aylward, Barber, Daugaard, Haase, Halvorson, Stainbrook) and 2 Nay (Hinderaker, Lien).

Respectfully submitted on the 15th day of October, 2007, 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

Paul Kinsman

Connie Halverson