

South Dakota  
Workers' Compensation Law  
July 1, 2018 – June 30, 2019



Division of Labor & Management  
123 W. Missouri Ave.  
Pierre, SD 57501

605.773.3681

inside cover  
(blank)

# TITLE 62

## WORKERS' COMPENSATION

### Chapter

1. Definitions And General Provisions
2. Administration Of Title
3. Covered Employment And Employer's Responsibility
4. Compensation For Injury Or Death
5. Insurance And Security For Payments
6. Employers' Records And Reports
7. Claims Procedure
8. Occupational Disease Disability
9. Compensation For Permanent Loss Of Hearing

### CHAPTER 1

#### DEFINITIONS AND GENERAL PROVISIONS

### Section

- 62-1-1.** Definition of terms.
- 62-1-1.1.** Medical practitioner defined.
- 62-1-1.2.** "Impairment" defined.
- 62-1-1.3.** Presumption that certain noncompensable injuries are nonwork related -- Coverage under other insurance policy.
- 62-1-2.** "Employer" defined.
- 62-1-3.** "Employee" defined.
- 62-1-4.** Municipal and county officers -- Inclusion within definition of employee.
- 62-1-4.1.** Elementary and secondary students, postsecondary technical institutes not employees -- Exception for work in vocational education.
- 62-1-5.** Fire department, ambulance service and rescue squad volunteers -- Employees of county, municipality, special purpose district, or township -- Imputed wage.
- 62-1-5.1.** Volunteers serving state or political subdivision without pay -- Computing or imputing wage -- Certain persons not deemed volunteers.
- 62-1-5.2.** Requirements for volunteer firefighters to become eligible for workers' compensation -- Amount of benefits -- Limitation on eligibility.
- 62-1-6.** Conservation officers -- Acting as peace officers.
- 62-1-7.** Executive officers as employees of corporations -- Exception as to nonprofit corporations.
- 62-1-8.** Nonprofit corporation complying with title -- Executive officer as employee.
- 62-1-9.** Citation of title.
- 62-1-10.** Owner-operator of certain vehicles as independent contractor.
- 62-1-11.** Requirements for owner-operator of vehicle for certification as independent contractor.
- 62-1-12.** Issuance of certificate of independent contractor status to owner-operator of certain vehicles.
- 62-1-13.** Election of owner-operator of certain vehicles to participate in workers' compensation system as sole proprietor.
- 62-1-14.** Promulgation of rules.
- 62-1-15.** Evidence of injury supported by medical findings.
- 62-1-16.** Employer civilly liable for retaliatory termination of employee -- Burden of proof.
- 62-1-17.** Discrimination in hiring based upon preexisting injury prohibited.

- 62-1-18. Current employer liable for costs and compensation of subsequent compensable injury.
- 62-1-19. Independent contractor affidavit of exempt status--Rebuttable presumption.
- 62-1-20. Contents of affidavit of exempt status.
- 62-1-21. Providing false information on affidavit of exempt status as misdemeanor.
- 62-1-22. Acceptance of affidavit of exempt status not required.
- 62-1-23. Wheeler v. Cinna Bakers LLC regarding aggregation of wages abrogated.
- 62-1-24. Effect of concurrent employment on calculation of earnings for claims before May 6, 2015.
- 62-1-25. Effect of concurrent employment on calculation of average weekly wage for claims after May 5, 2015.

**62-1-1. Definition of terms.** Terms used in this title, unless the context otherwise plainly requires, shall mean:

- (1) "Annual earnings," the average weekly wages, computed as provided in §§ 62-4-24 to 62-4-28, inclusive, multiplied by fifty-two;
- (2) "Ascertainable loss," a loss becomes ascertainable when it becomes apparent that permanent disability and the extent thereof has resulted from an injury and that the injured area will get no better or no worse because of the injury;
- (3) "Average weekly wages," the earnings of the injured employee, computed as provided in §§ 62-4-24 to 62-4-28, inclusive;
- (4) "Department," the Department of Labor and Regulation created by chapter 1-37;
- (5) "Domestic servant," an employee who performs services in or around a home, which pertain to a house, home, household, lawn, garden, or family. The term includes baby sitters but does not include an independent contractor;
- (6) "Earnings," the amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was working at the time of the employee's injury. It includes payment for all hours worked, including overtime hours at straight-time pay, and does not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed by the employee by the nature of the employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, the allowances shall be deemed a part of the employee's earnings;
- (7) "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
  - (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
  - (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment;
  - (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment. The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought;
- (8) "Temporary disability, total or partial," the time beginning on the date of injury, subject to the

limitations set forth in § 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first.

**62-1-1.1. 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.

**62-1-1.2. “Impairment” defined.** For the purposes of this chapter, impairment shall be determined by a medical impairment rating, expressed as a percentage to the affected body part, using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association, sixth edition, July 2009 reprint.

**62-1-1.3. Presumption that certain noncompensable injuries are nonwork related--Coverage under other insurance policy.** If an employer denies coverage of a claim for any reason under this Title or any reason permissible under Title 58, 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.

**62-1-2. “Employer” defined.** As used in this title the term “employer” includes the state and any municipal corporation within the state or any political subdivision of this state, and any individual, firm, association, limited liability company, or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay. Any person performing labor incidental to the person’s own occupation who has elected to proceed under the provisions of § 58-20-3 by purchasing workers’ compensation insurance to cover the person, is deemed to be an employer under this section irrespective of whether the person is using the services of another for pay. If the employer is insured, it shall include the employer’s insurer so far as applicable.

**62-1-3. Employee defined.** As used in this title, the term,employee, means any person, including a minor, in the services of another under any contract of employment, express or implied, (and including as to a deceased employee, the employee’s personal representative, dependents, and other persons to whom compensation may be payable), except:

- (1) Any person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer;
- (2) Any official of the state or of any subdivision of government elected or appointed for a regular term of office or to complete the unexpired portion of any such term. However, the governing body of any subdivision may elect to treat officials of the subdivision as employees for the purposes of this section.

Any employer performing labor incidental to the employer’s occupation who has elected to proceed under the provisions of § 58-20-3 by purchasing workers’ compensation insurance to cover himself or herself, may be deemed to be an employee under this section. However, nothing in this section may be construed as to affect that person’s rights as an employer for purposes of §§ 62-3-1 and 62-3-2.

**62-1-4. Municipal and county officers--Inclusion within definition of employee.** Notwithstanding subdivision 62-1-3(2), county highway superintendents, deputy sheriffs, constables, marshals, policemen, and firemen shall be deemed employees within the meaning of § 62-1-3.

**62-1-4.1. Elementary and secondary students, postsecondary technical institutes not employees--Exception for work in vocational education.** Notwithstanding the provisions of § 62-1-5.1, students of elementary, secondary, and postsecondary technical institutes are not employees within the meaning of this title. However, a school district or postsecondary technical institute, which provides a work experience educational class conducted off the school premises as a part of its vocational education program is the employer of those students who are receiving this training and experience and the students are school employees for the purposes of this title unless they are being paid a cash wage or salary by a private employer, or the person or firm providing the students the work experience elects to include them, by written agreement, in its workers' compensation insurance coverage.

**62-1-5. Fire department, ambulance service, and rescue squad volunteers--Employees of county, municipality, special purpose district, or township--Imputed wage.** All persons providing voluntary service to a fire department, ambulance service, or rescue squad for any county, municipality, special purpose district, or township if regularly organized under the law shall be deemed employees of such county, municipality, special purpose district, or township while in the performance of their duties as members, if recommended by the person in charge to the governing body of such county, municipality, special purpose district, or township for membership and appointed by such governing body, and has not been removed by such governing body as members. For the purpose of computing compensation, the members shall be considered to be earning a wage that would entitle the members to the maximum compensation for death or injury allowable under this title. But in no event may payments to the members exceed the maximum limitations for benefits as set out in this title.

For purposes of determining compensation, any remuneration received by a member who voluntarily serves may not be considered.

**62-1-5.1. Volunteers serving state or political subdivision without pay--Computing or imputing wage--Certain persons not deemed volunteers.** Any volunteer worker rendering services in or for any agency, department, institution, or instrumentality of the state or of any of its political subdivisions, including counties, townships, school districts, or municipalities, whose services have been duly recommended to the officer or governing body responsible for employment of personnel for the respective entity and duly appointed thereto by such officers or governing body, shall for purposes of this title be deemed an employee of the state or the political subdivision, as the case may be. The appointment shall be entered into the official records or minutes of the entity.

In the event of injury or death, for the purposes of computing compensation for volunteer workers other than volunteer firefighters, a volunteer uncompensated worker's employment earnings from all sources during the last six months of employment shall be used. In the event the volunteer uncompensated worker has never been employed, the worker shall be considered to be earning the state minimum wage over a forty-hour week. The worker's average weekly wage shall be calculated by one of the methods in §§ 62-4-25 to 62-4-27, inclusive. In no event may payments to volunteer uncompensated workers exceed the maximum limitations for benefits as set out in this title. No local prisoner, state inmate, or federal inmate providing services to the state or any of its political subdivisions may be considered a volunteer worker under this section.

**62-1-5.2. Requirements for volunteer firefighters to become eligible for workers' compensation--Amount of benefits--Limitation on eligibility.** Any firefighter who is a member of any county, municipal, special purpose district, township, or private nonprofit corporation operating as a fire department that has on file a cooperative fire suppression agreement with the South

Dakota Department of Agriculture, and has been approved by the governing body for assignment to the state, is eligible for workers' compensation benefits from the state if injured during a period of time commencing from the time dispatched by the secretary of agriculture until the time the firefighter returns to the location from which the firefighter was originally dispatched by the secretary of agriculture. In the event of injury or death, the firefighter shall, for the purpose of computing compensation, be considered to be earning a wage that would entitle that person to the maximum compensation for death or injury allowable under this title; but in no event may payments to any firefighter exceed the maximum limitations for benefits as set out in this title.

For purposes of determining compensation any remuneration received by a member who voluntarily serves the department may not be considered. No firefighter under this section may be deemed a state employee for any purpose other than eligibility to receive workers' compensation from the state under this section. No workers' compensation benefits may be provided by the state if the claim arises while dispatched to a wildland fire outside the state, unless the fire is a threat to resources within South Dakota.

**62-1-6. Conservation officers acting as law enforcement officers.** For the purpose of workers' compensation coverage, any conservation officer while performing any act ordinarily considered a law enforcement officer's duty shall be deemed to be acting in the course of the officer's employment.

**62-1-7. Executive officers as employees of corporations--Exception as to nonprofit corporations.** Every duly elected or appointed executive officer of a corporation, other than a charitable, religious, educational, or other nonprofit corporation, shall be an employee of such corporation under this title.

**62-1-8. Nonprofit corporation complying with title--Executive officer as employee.** Notwithstanding any other provision of this title, any charitable, religious, educational, or other nonprofit corporation which has accepted the provisions of this title may cause any duly elected or appointed executive officer to be an employee of such corporation under this title by specifically including such executive officer among those to whom such corporation secures the payment of compensation in accordance with the provisions of §§ 62-5-1 to 62-5-5, inclusive; and such executive officer shall remain an employee of such corporation under this title while the payment of compensation is so secured. With respect to any corporation of the foregoing description that elects to secure compensation by the means specified in § 62-5-2 or 62-5-3, the specific inclusion of such executive officer in its contract of insurance shall be deemed to cause such executive officer to be an employee of such corporation under this title.

**62-1-9. Citation of title.** This title shall be known and cited as the "South Dakota Workers' Compensation Law."

**62-1-10. Owner-operator of certain vehicles as independent contractor.** An owner-operator who, as an individual or partner, or shareholder of a corporate owner-operator, owns a vehicle licensed and registered as a truck, road tractor, or truck tractor by a governmental agency, is an independent contractor while performing services in the operation of the owner-operator's vehicle if the owner-operator has applied for and received a certification of independent contractor status from the Department of Labor and Regulation.

**62-1-11. Requirements for owner-operator of vehicle for certification as independent contractor.** To receive certification as indicated in § 62-1-10, the owner-operator and the carrier shall provide written

documentation that the following are substantially present:

- (1) The owner-operator is responsible for the maintenance of the vehicle;
- (2) The owner-operator is responsible for the vehicle's operating costs, including fuel, repairs, supplies, collision insurance, and personal expenses for the operator while on the road;
- (3) The owner-operator is responsible for supplying the necessary personnel to operate the vehicle, the personnel are considered the owner-operator's employees, and the owner-operator is responsible for providing proof of workers' compensation insurance for the employees;
- (4) The owner-operator's compensation is based on factors related to the work performed, including a percentage of any schedule of rates or lawfully published tariffs, and not on the basis of the hours or time expended;
- (5) The owner-operator determines the details and means of performing the services, in conformance with regulatory requirements, operating procedures of the commercial carrier, and specifications of the shipper; and
- (6) The owner-operator enters into a written contract which specifies the relationship to be that of an independent contractor and not that of an employee.

**62-1-12. Issuance of certificate of independent contractor status to owner-operator of certain vehicles.** Upon submission of the documentation required by § 62-1-11, if the conditions are substantially met, the department shall issue a certificate of independent contractor status to the owner-operator and the carrier within thirty days. The certificate shall be kept with the vehicle. If the conditions are not substantially met, the department shall deny the request for certification within thirty days. If there is no change in the circumstances under which the certification is issued, the certification shall be binding upon the parties on the issue of independent contractor status. The burden to establish a change of circumstances is on the owner-operator.

**62-1-13. Election of owner-operator of certain vehicles to participate in workers' compensation system as sole proprietor.** An owner-operator, as an independent contractor, may elect to participate in this state's workers' compensation system as a sole proprietor. Alternatively, an owner-operator and the motor carrier to whom the owner-operator's vehicle is leased may mutually agree that the owner-operator will be covered under the motor carrier's workers' compensation insurance policy or authorized self-insurance, if the owner-operator agrees to pay the premiums requested by the motor carrier. An agreement by an owner-operator and a motor carrier to include the owner-operator under the motor carrier's workers' compensation coverage does not affect the independent contractor status of the owner-operator. If the owner-operator makes the election as set forth in this paragraph, the owner-operator will be deemed bound by the provisions of this title.

**62-1-14. Promulgation of rules.** The department shall promulgate rules pursuant to chapter 1-26 governing the submission of the documentation required by § 62-1-11 and prescribe the form of the certificate issued pursuant to § 62-1-12.

**62-1-15. Evidence of injury supported by medical findings.** In any proceeding or hearing pursuant to this title, evidence concerning any injury shall be given greater weight if supported by objective medical findings.

**62-1-16. Employer civilly liable for retaliatory termination of employee--Burden of proof.** An employer is civilly liable for wrongful discharge if it terminates an employee in retaliation for filing a lawful workers' compensation claim. The burden of proof is on the employee to prove the dismissal was in retaliation for filing a workers' compensation claim.

**62-1-17. Discrimination in hiring based upon preexisting injury prohibited.** No employer may



discriminate in hiring any prospective employee due to a preexisting injury if the preexisting injury does not affect the prospective employees' ability to perform the work for which the prospective employee is being hired.

**62-1-18. Current employer liable for costs and compensation of subsequent compensable injury.** If an employee who has previously sustained an injury, or suffers from a preexisting condition, receives a subsequent compensable injury, the current employer shall pay all medical and hospital expenses and compensation provided by this title.

**62-1-19. Independent contractor affidavit of exempt status--Rebuttable presumption.** Any independent contractor who is not an employer or a general contractor and is not covered under a workers' compensation insurance policy may sign an affidavit of exempt status under the South Dakota Workers' Compensation Law. Notwithstanding the provisions of § 62-3-10, the affidavit of exempt status creates a rebuttable presumption that the affiant is not an employee for the purposes of the South Dakota Workers' Compensation Act and the person possessing the affidavit is not liable for a workers' compensation claim made by the affiant or any subcontractor of the affiant.

**62-1-20. Contents of affidavit of exempt status.** The affidavit must be on a form prescribed by the director of the Division of Insurance and must be notarized. The director of the Division of Insurance may promulgate rules pursuant to chapter 1-26 to provide definitions, the form and process for filing the affidavit, and documentation required for filing an affidavit of exemption from the South Dakota Workers' Compensation Law.

The affidavit of exempt status shall contain substantially the following:

(1) Statements that the affiant:

- (a) Is not an employee and does not want a workers' compensation insurance policy;
- (b) Has read, signed, and understands the exempt status fact sheet attachment to the affidavit;
- (c) Understands that the affiant will be considered an independent contractor and will not be considered an employee under the South Dakota Workers' Compensation Law;
- (d) Understands that the affiant will not be eligible for compensation under the South Dakota Workers' Compensation Law;
- (e) Understands that the signing of the affidavit creates a rebuttable presumption that the affiant is not an employee for the purpose of the South Dakota Workers' Compensation Act;
- (f) Understands that the signing of the affidavit does not affect the rights or coverage of any employee of the affiant;
- (g) Is not signing the affidavit or providing information as a result of force, threat, coercion, compulsion, or duress; and
- (h) Understands that knowingly providing false information on an affidavit of exempt status under the South Dakota Workers' Compensation Law is a Class 2 misdemeanor; and

(2) An exempt status fact sheet, to be attached to the affidavit, which:

- (a) Delineates the legal requirements recognized in law for determining whether a person is an independent contractor; and
- (b) Contains a statement that the affiant believes they are an independent contractor given the preceding list of legal requirements.

**62-1-21. Providing false information on affidavit of exempt status as misdemeanor.** Any person who solicits or provides false information on an affidavit of exempt status under the South Dakota Workers' Compensation Law with actual knowledge is guilty of a Class 2 misdemeanor.

**62-1-22. Acceptance of affidavit of exempt status not required.** No employer or general contractor is required to accept an affidavit of exempt status as a substitute for a certificate of workers'

compensation coverage.

**62-1-23. Wheeler v. Cinna Bakers LLC regarding aggregation of wages abrogated.** The Legislature finds that the aggregation of wages from concurrent employment was not within the Legislature's intent when it enacted the definition of earnings in subdivision 62-1-1(6). Therefore, the holding in Wheeler v. Cinna Bakers LLC, 2015, 864 N.W. 2d 17, 2015, regarding the aggregation of wages is abrogated.

**62-1-24. Effect of concurrent employment on calculation of earnings for claims before May 6, 2015.** For a workers' compensation claim arising before May 6, 2015, an employee's earnings up to the claimed date of injury are calculated exclusively on the wages earned at the place of employment where the injury occurred.

**62-1-25. Effect of concurrent employment on calculation of average weekly wage for claims after May 5, 2015.** For a workers' compensation claim arising after May 5, 2015, if an employee was working for more than one employer, the employee's earnings used to calculate the employee's average weekly wage in §§ 62-4-24, 62-4-25, or 62-4-26 shall include the amount of compensation for the number of hours commonly regarded as a day's work for each employer in which the person was concurrently employed at the time of the person's injury; however, an employee's earnings from concurrent employment are aggregated only if the injury occurred when the employee was actively working in the concurrent employment and when the injury prevents the employee from performing the employee's duties at the employee's other concurrent employment.

## CHAPTER 2 ADMINISTRATION OF TITLE

### Section

- 62-2-5.** Enforcement of title -- Rules promulgation.
- 62-2-6.** Investigations -- Subpoena of witnesses and records.
- 62-2-10.** Workers' Compensation Advisory Council -- Members -- Compensation Expenses -- Terms -- Quorum -- Duties -- Report.
- 62-2-10.1** Contents of advisory council annual report.
- 62-2-11.** Posting safety information.
- 62-2-12.** Small claims procedure for medical expense claims.
- 62-2-13.** Promulgation of rules regarding small claims procedure.
- 62-2-14.** Initiation of claim.
- 62-2-15.** Notice to party claimed against.
- 62-2-16.** Setoff or counterclaim.
- 62-2-17.** Hearing.
- 62-2-18.** Evidence.
- 62-2-19.** Release and disclosure of medical records.
- 62-2-20.** Appeal.
- 62-2-21.** Representation by counsel or agent—Fee for services.
- 62-2-22.** Findings, conclusions, and decision not admissible as evidence in separate proceeding.

**62-2-5. Enforcement of title--Rules promulgation.** The Department of Labor and Regulation shall carry out and enforce the provisions of this title. The department may promulgate rules pursuant to chapter 1-26 governing procedures in worker's compensation hearings, petitions, interested parties, summary judgments, dismissals, applications in self-insurance, and related procedural matters.

**62-2-6. Investigations--Subpoena of witnesses and records.** The department may subpoena witnesses, administer oaths, and examine such books and records of the parties to a proceeding or investigation as relate to questions in dispute or under investigation. The circuit court may enforce the provisions of this title relating to the attendance and testimony of witnesses and the examination of books and records.

**62-2-10. Workers' Compensation Advisory Council--Members--Compensation Expenses--Terms--Quorum--Duties--Report.**

The Governor shall appoint a State Workers' Compensation Advisory Council, composed of eight members, four representing employees, two of whom shall be from recommendations submitted by the South Dakota Federation of Labor. No employee representative may be a member of a personnel department. Four shall represent employers. The members may not be all of the same political party. Expenses of council members shall be paid by the Department of Labor and Regulation. The length of terms is three years with no more than three expiring each year. Members shall serve until a new appointment is made by the Governor. The secretary of labor and regulation is a nonvoting member. Five voting members of the council are a quorum for meetings. The lieutenant governor shall serve as the chair and has the right to vote. Any recommendations by the advisory council shall be by majority vote.

The council shall aid the Department of Labor and Regulation in reviewing the workers' compensation program as to its content, adequacy, and effectiveness and make recommendations for its improvement. The council shall meet as frequently as necessary but not less than twice each year. The council shall make reports of its meetings that shall include a record of its discussions, including all issues voted upon and the vote count, and its recommendations. The council shall make an annual report to the Governor and Legislature by December thirty-first of each year. The department shall make the reports available to any interested persons or groups.

**62-2-10.1. Contents of advisory council annual report.** The Workers' Compensation Advisory Council shall include in its annual report data about the average amount of disability or fatality benefits paid for a claim over the most recent calendar years, the ratio of disability and fatality benefits to overall benefits paid, and any changes in premium base rates directly attributable to including concurrent earnings in benefits. It shall report to the 2019 Legislature the impact of SL 2016, ch 236.

**62-2-11. Posting safety information.** Employers shall display informational postings promoting safety in the workplace in visible locations throughout the business premises in accordance with rules promulgated by the Department of Labor and Regulation pursuant to chapter 1-26.

**62-2-12. Small claims procedure for medical expense claims.** The department shall establish a small claims procedure for medical expense claims not exceeding eight thousand dollars. The procedure may only be used for a medical expense claim incurred after the department has held a hearing and has adjudicated the underlying injury as compensable or after the department has approved an agreement as to compensation or a memorandum of payment for permanent partial disability.

**62-2-13. Promulgation of rules regarding small claims procedure.** The department shall, by rules promulgated pursuant to chapter 1-26, provide for the manner in which the disputed claims shall be presented and the forms required from the claimant and from employers.

**62-2-14. Initiation of claim.** Any claimant pursuant to §§ 62-2-12 to 62-2-22, inclusive, shall initiate a claim by completing a form provided by the department.

**62-2-15. Notice to party claimed against.** The department shall send notice to the party claimed against by registered or certified mail, return receipt.

**62-2-16. Setoff or counterclaim.** Any party claimed against may assert any setoff or counterclaim that is within the jurisdiction of the department.

**62-2-17. Hearing.** The department shall conduct the hearings in accordance with chapter 1-26. The department shall expedite any hearing to the extent possible.

**62-2-18. Evidence.** Any medical record, correspondence, medical bill, and expert report and correspondence is admissible as evidence. Nothing in §§ 62-2-12 to 62-2-22, inclusive, precludes an employer or insurer from obtaining an examination pursuant to § 62-7-1.

**62-2-19. Release and disclosure of medical records.** Upon the request of any party claimed against, the claimant shall provide an executed medical release in a form prescribed by the department, sufficiently in advance of the hearing to allow the party claimed against to obtain such medical records as it deems appropriate. Any party shall disclose to the other party any medical record that is within the party's possession and is relevant to the claim in dispute.

**62-2-20. Appeal.** Within fifteen days after receiving the decision by the department, any party may appeal the decision to the secretary of labor and regulation. The secretary of labor and regulation may on the secretary's own motion affirm, modify, or set aside any decision on the basis of the evidence previously submitted in the case or the secretary may direct the taking of additional evidence. The secretary shall promptly notify the interested parties of the secretary's findings and decision. Any decision of the secretary is the final decision of the department. Any final decision of the department may be appealed as provided in chapter 1-26.

**62-2-21. Representation by counsel or agent--Fee for services.** Any claimant in any proceeding before the department may be represented by counsel or other duly authorized agent, but no such counsel or agent may either charge or receive for such services more than an amount approved by the department. An employer or insurer, including a corporate employer or insurer, may be represented before the department by counsel, an employee, or a corporate officer.

**62-2-22.** Findings, conclusions, and decision not admissible as evidence in separate proceeding. Any finding of fact, conclusion of law, decision, or final order made in a small claims proceeding may not be used as evidence in any separate or subsequent action or proceeding between anyone in any tribunal, agency, or court of this state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.

### **CHAPTER 3 COVERED EMPLOYMENT AND EMPLOYER'S RESPONSIBILITY**

#### **Section**

- 62-3-1.** Measure of responsibility assumed by employer.
- 62-3-2.** Rights and remedies of employees limited.
- 62-3-3.** Employer and employee bound by provisions of title -- Exceptions.
- 62-3-4.** Employment covered by federal compensation law not subject to title.

- 62-3-5.** Security required for acceptance of title.
- 62-3-5.1.** Notice by corporate officer rejecting coverage -- Withdrawal of rejection.
- 62-3-10.** Liability to subcontractor's employee.
- 62-3-11.** Election to proceed against employer -- Options.
- 62-3-13.** Penalty for failure to perform statutory duty unaffected.
- 62-3-14.** Reciprocity with other states.
- 62-3-15.** Exemption of domestics, agricultural laborers or workfare participants.
- 62-3-16.** Agricultural work not exempt from title -- Liability insurance required.
- 62-3-17.** Voluntary waiver of exemption by insuring liability.
- 62-3-18.** Obligation created by title not waived by contract.

**62-3-1. Measure of responsibility assumed by employer.** The compensation provided by this title is the measure of responsibility which the employer has assumed for injuries to or death of any employee.

**62-3-2. Rights and remedies of employees limited.** The rights and remedies granted to an employee subject to this title, on account of personal injury or death arising out of and in the course of employment, shall exclude all other rights and remedies of the employee, the employee's personal representatives, dependents, or next of kin, on account of such injury or death against the employer or any employee, partner, officer, or director of the employer, except rights and remedies arising from intentional tort.

**62-3-3. Employer and employee bound by provisions of title--Exceptions.** Every employer and employee shall be presumed to have accepted the provisions of this title, and shall be thereby bound, whether injury or death resulting from such injury occurs within this state or elsewhere, except as provided by §§ 62-3-4 to 62-3-5.1, inclusive.

**62-3-4. Employment covered by federal compensation law not subject to title.** Other than chapter 62-6, this title does not apply to any employee engaged in interstate or foreign commerce, or to any such employee's employer, in any case where the laws of the United States provide for compensation, or for liability for injury or death by accident of the employee.

**62-3-5. Security required for acceptance of title.** No employer other than the state, a municipality, or other political subdivision of this state may be deemed to have accepted the provisions of this title unless the employer has complied with the provisions of §§ 62-5-1 to 62-5-5, inclusive.

**62-3-5.1. Notice by corporate officer rejecting coverage--Withdrawal of rejection.** Section 62-3-3 does not apply to an executive officer of a corporation who, at the time of the officer's election or appointment, or more than thirty days prior to the officer's injury or death or, in the case of chapter 62-8, thirty days prior to contracting or incurring any occupational disease, serves upon the corporation, personally or by certified mail, written notice of election to reject the provisions of this title. The rejection may be withdrawn by the officer by serving a written notice in the same manner upon the corporation more than thirty days prior to the officer's injury or death or, in the case of chapter 62-8, thirty days prior to contracting or incurring any occupational disease.

**62-3-10. Liability to subcontractor's employee.** A principal, intermediate, or subcontractor is liable for compensation to any employee injured while in the employ of any subcontractor and engaged upon the subject matter of the contract, to the same extent as the immediate employer. Any principal, intermediate, or subcontractor who pays compensation under the provisions of this section may

recover the amount paid from any person, who, independently of this section, would have been liable to pay compensation to the injured employee. Each claim for compensation under this section shall in the first instance be presented to and instituted against the immediate employer, but such proceeding does not constitute a waiver of the employee's rights to recover compensation under this title from the principal or intermediate contractor. However, the collection of full compensation from one employer bars recovery by the employee against any others. The employee may not collect from all a total compensation in excess of the amount for which any contractor is liable. This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under the contractor's control or management.

**62-3-11. Election to proceed against employer--Options.** Any employee, who is employed by an employer who is deemed not to operate under this title in accordance with § 62-5-7, or the dependents of such deceased employee, may elect to proceed against the employer in any action at law to recover damages for personal injury or death; or may elect to proceed against the employer in circuit court under the provisions of this title, as if the employer had elected to operate thereunder by complying with §§ 62-5-1 to 62-5-5, inclusive. The measure of benefits shall be that provided by § 62-4-1 plus twice the amount of other compensation allowable under this title. However, no employee nor any dependent of the employee may recover from both actions.

**62-3-13. Penalty for failure to perform statutory duty unaffected.** Nothing in this title may be construed to relieve any employer or employee from any penalty imposed for failure or neglect to perform any statutory duty in connection with such employment.

**62-3-14 Reciprocity with other states.** Reciprocity with other states. In any case where another state shall recognize workers' compensation coverage pursuant to the provisions of the South Dakota law as meeting the requirements of workers' compensation coverage under the laws of that state, reciprocity shall be granted worker's compensation coverage pursuant to the foreign law in this state.

**62-3-15. Exemption of domestics, agricultural laborers or workfare participants.** Except as provided in §§ 28-1-59, 62-3-16, and 62-3-17, this title does not apply to:

- (1) Domestic servants unless working for an employer for more than twenty hours in any calendar week and for more than six weeks in any thirteen-week period; or
- (2) Farm or agricultural laborers; or
- (3) Work activity participants.

**62-3-16. Agricultural work subject to title--Liability insurance required.** The provisions of this title, not inconsistent with the provisions of this section, apply to the business of operating threshing machines, grain combines, corn shellers, cornhuskers, shredders, silage cutters, and seed hullers for profit, but do not apply to the operation of any thereof by the owner thereof for the threshing, combining, corn shelling, cornhusking, shredding, silage cutting, or seed hulling of the owner's grain crops, nor to any operations in the nature of exchange of work between farmers, nor to persons who are not generally engaged in the operation of such machines for commercial purposes. Before any person engaging in such business, and being under the provisions of this title, shall operate any such machine, the person shall secure liability under this title as provided in §§ 62-5-1 to 62-5-5, inclusive. Any contract by any such person for threshing or combining of any grain, corn shelling, cornhusking, shredding, silage cutting, and seed hulling by machinery without first having procured and filed such policy or such certificate, is null and void, and no compensation is recoverable under the contract.

**62-3-17. Voluntary waiver of exemption by insuring liability.** As to any employee excepted under § 62-3-15, the employer may place himself or herself under the provisions of this title by voluntarily

insuring his or her liability as provided in §§ 62-5-1 to 62-5-5, inclusive.

**62-3-18. Obligation created by title not waived by contract.** No contract or agreement, express or implied, no rule, regulation, or other device, may in any manner operate to relieve any employer in whole or in part of any obligation created by this title except as provided by this title.

## CHAPTER 4 COMPENSATION FOR INJURY OR DEATH

### Section

- 62-4-1. Medical and hospital expense.
- 62-4-1.1. Employer's duties upon receipt of medical bill
- 62-4-1.2. Fine for noncompliance.
- 62-4-1.3. Release of medical records.
- 62-4-2. Waiting period for temporary disability benefits.
- 62-4-3. Amount of temporary total disability compensation.
- 62-4-3.1. Annual computation of average weekly wage in state -- Period for which applied.
- 62-4-5. Compensation for partial disability.
- 62-4-5.1. Compensation during period of rehabilitation -- Procedure.
- 62-4-6. Additional compensation for specific bodily injuries.
- 62-4-7. Compensation for permanent total disability -- Annual increase.
- 62-4-7.1. Prospective application of benefit increase in § 62-4-7.
- 62-4-8. Death resulting from injury -- Payments to personal representative or beneficiaries of deceased.
- 62-4-8.1. Scholarships provided to certain persons receiving workers' compensation benefits -- Eligibility.
- 62-4-10. Installment payments of compensation.
- 62-4-10.1. Penalty for untimely payment of installments -- Other remedies.
- 62-4-11. Injury to specific body member -- Death before full payment of installments -- Payments to dependents.
- 62-4-12. Injury resulting in death -- Compensation to spouse or children -- Remarriage -- Full-time students.
- 62-4-13. Injury resulting in death -- Additional compensation for child under eighteen.
- 62-4-14. Injury resulting in death -- No surviving spouse or children -- Payment to dependent parent, grandparent, minor brother or sister.
- 62-4-15. Injury resulting in death -- Payments to dependent collateral heirs.
- 62-4-16. Burial and transportation expenses paid when death results from injury.
- 62-4-17. Installment payment of death benefits.
- 62-4-18. Death benefits -- Payment to personal representative or beneficiaries -- Distribution to heirs.
- 62-4-19. Payment of death benefits to personal representative -- Release of employer from obligation.
- 62-4-20. Payment of death benefits to surviving spouse for minor children -- Conservatorship not required.
- 62-4-21. Spouse of deceased employee -- Qualification for benefits.
- 62-4-22. Transfer of surviving spouse's right to compensation to surviving child.
- 62-4-24. Employment for year preceding injury -- Determination of average weekly wage.
- 62-4-25. Employment for less than year preceding injury -- Determination of average weekly wage.
- 62-4-26. Computation of average weekly wage when other methods not feasible.

- 62-4-27. Seasonal employment -- Determination of average weekly wage.
- 62-4-28. Employee earning no wages or less than day laborers -- Computation of average weekly wage.
- 62-4-29. Apportionment of compensation for subsequent injury.
- 62-4-29.1. "Claimant" defined for subsequent injury fund claims.
- 62-4-30. Determination of amount for each installment period.
- 62-4-31. Working week defined.
- 62-4-32. Claims of state employees and workfare participants -- Payment from department funds.
- 62-4-37. Injury or death due to intoxication, willfulness or intention of employee noncompensable.
- 62-4-38. Right of action when third person is liable -- Election by employee -- Offset of recovered damages.
- 62-4-39. Compensation paid by employer -- Reimbursement from damages recovered from third party.
- 62-4-40. Recovery by employer from third party -- Excess held for employee.
- 62-4-41. Priority of rights to compensation.
- 62-4-42. Assignment of payments prohibited -- Certain compensation exempt from claims of creditors.
- 62-4-43. Selection of medical practitioner or surgeon by employee.
- 62-4-44. Report to be submitted to employer and department of labor by treating practitioner or surgeon -- Time limitation.
- 62-4-45. Information about injury to be made available -- Penalty for withholding information.
- 62-4-46. Benefits precluded by intentional or willful false representation of employee's physical condition -- Burden of proof.
- 62-4-47. Written request to stop payments -- Fraud -- Injury outside of employment.
- 62-4-48. Investigation of written request to stop payments.
- 62-4-49. Confidentiality of investigative records -- Release -- Misdemeanor.
- 62-4-50. Immunity for good faith written request of investigation -- False written request as misdemeanor.
- 62-4-51. Fraudulent workers' compensation claims as misdemeanor.
- 62-4-52. Definition of terms.
- 62-4-53. Permanent total disability -- Burden of proof -- Moving expenses paid by employer in certain cases.
- 62-4-54. Determining usual and customary line of employment.
- 62-4-55. Suitable, substantial and gainful employment defined.

**62-4-1. Medical and hospital expense.** The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title. Repair or replacement of damaged prosthetic devices is compensable and is considered a medical service under this section if the devices were damaged or destroyed in a work related accident. Repair or replacement of damaged hearing aids, dentures, prescription eyeglasses, eyeglass frames, or contact lenses is considered a medical service under this section if the hearing aids, dentures, prescription eyeglasses, eyeglass frames, or contact lenses were damaged or destroyed in an accident which also causes another injury which is compensable under this law. The employee shall have the initial selection to secure the employee's own physician, surgeon, or hospital services at the employer's expense. If the employee selects a health care provider located in a community not the home or workplace of the employee, and a health care provider is available to provide the services needed by the employee in the local community or in a closer community, no travel expenses need be paid by the employer or the employer's insurer.



**62-4-1.1.** Employer's duties upon receipt of medical bill. Within thirty days after receiving a properly submitted bill for medical payments, the employer shall:

- (1) Pay the charge or any portion of the bill that is not denied;
- (2) Deny all or a portion of the bill on the basis that the injury is not compensable, or the service or charge is excessive or not medically necessary; or
- (3) Request additional information to determine whether the charge or service is excessive or not medically necessary or whether the injury is compensable.

**62-4-1.2. Fine for noncompliance.** An employer that fails, refuses, or neglects to comply with the provisions of § 62-4-1.1 is subject to a administrative fine of five hundred dollars payable to the Department of Labor and Regulation for each act of noncompliance, unless the employer had good cause for noncompliance. The department may promulgate rules pursuant to chapter 1-26 to establish standards for medical bill submissions pursuant to § 62-4-1.1.

**62-4-1.3. Release of medical records.** Upon the request of an employer, an employee subject to this title shall supply a signed medical release to allow copying of any medical record and report relevant to the employee's claim for workers' compensation. If the employee objects to the relevance of any medical record or report, an administrative law judge within the department shall, upon a showing of good cause for the release of such record or report, approve the release of the medical record or report relevant to the employee's claim, to the employer. The employer shall, upon request, provide a copy of all medical records and reports received, to the employee, without cost to the employee.

**62-4-2. Waiting period for temporary disability benefits.** No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the seven day waiting period is met, benefits shall be computed from the date of the injury.

**62-4-3. Amount of temporary total disability compensation.** The amount of temporary total disability compensation paid to an employee for an injury is equal to sixty-six and two-thirds percent of the employee's earnings, but not more than one hundred percent computed to the next higher multiple of one dollar of the average weekly wage in the state as defined in § 62-4-3.1 per week and not less than one-half of the foregoing percentages of the average weekly wage of the state per week. However, if an employee earned less than fifty percent of the maximum allowable amount per week, the amount of compensation may not exceed one hundred percent of the employee's earnings calculated after the earnings have been reduced by any deduction for federal or state taxes, or both, and for the Federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's earnings.

**62-4-3.1. Annual computation of average weekly wage in state--Period for which applied.** For the purpose of § 62-4-3 the average weekly wage in the state shall be determined by the Department of Labor and Regulation as follows: On or before June first of each year, the total wages reported on contribution reports to the agency administering the Employment Security Act for the preceding calendar year shall be divided by the average monthly number of insured workers (determined by dividing the total insured workers reported for the preceding year by twelve). The average annual wage thus obtained shall be divided by fifty-two and the average weekly wage thus determined rounded to the nearest cent. The average weekly wage so determined shall apply to injuries and disablements in the case of disease which occur within the fiscal year commencing July first following the June first determination and shall be applicable for the full period during which weekly benefits are payable, except as provided in § 62-7-33.

**62-4-5.** Compensation for partial disability. If, after an injury has been sustained, the employee as a

result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if the employee has been released by the employee's physician from temporary total disability and has not been given a rating to which § 62-4-6 would apply, the employee shall receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3, equal to one-half of the difference between the average amount which the employee earned before the accident, and the average amount which the employee is earning or is able to earn in some suitable employment or business after the accident. If the employee has not received a bona fide job offer that the employee is physically capable of performing, compensation shall be at the rate provided by § 62-4-3. However, in no event may the total calculation be less than the amount the claimant was receiving for temporary total disability, unless the claimant refuses suitable employment.

**62-4-5.1. Compensation during period of rehabilitation--Procedure.** If an employee suffers disablement as defined by subdivision 62-8-1(3) or an injury and is unable to return to the employee's usual and customary line of employment, the employee shall receive compensation at the rate provided by § 62-4-3 up to sixty days from the finding of an ascertainable loss if the employee is actively preparing to engage in a program of rehabilitation as shown by a certificate of enrollment. Moreover, once such employee is engaged in a program of rehabilitation which is reasonably necessary to restore the employee to suitable, substantial, and gainful employment, the employee shall receive compensation at the rate provided by § 62-4-3 during the entire period that the employee is engaged in such program. Evidence of suitable, substantial, and gainful employment, as defined by § 62-4-55, shall only be considered to determine the necessity for a claimant to engage in a program of rehabilitation.

The employee shall file a claim with the employee's employer requesting such compensation and the employer shall follow the procedure specified in chapter 62-6 for the reporting of injuries when handling such claim. If the claim is denied, the employee may petition for a hearing before the department.

**62-4-6. Additional compensation for specific bodily injuries.** For injuries in the following schedule, an employee shall receive in addition to compensation provided by §§ 62-4-1, 62-4-3, and 62-4-5.1, compensation for the following further periods, subject to the limitations as to rate and amounts fixed in § 62-4-3, for the specific medical impairment herein mentioned, but may not receive any compensation under any other provisions of this title:

- (1) For the loss of a thumb, or the permanent and complete loss of its use, fifty weeks of compensation;
- (2) For the loss of a first finger, commonly called the index finger, or the permanent and complete loss of its use, thirty-five weeks of compensation;
- (3) For the loss of a second finger, or the permanent and complete loss of its use, thirty weeks of compensation;
- (4) For the loss of a third finger, or the permanent and complete loss of its use, twenty weeks of compensation;
- (5) For the loss of fourth finger, commonly called the little finger, or the permanent and complete loss of its use, fifteen weeks of compensation;
- (6) The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of one-half of such thumb or finger and compensation shall be one-half of the amounts specified; compensation for the loss of less than the first phalange of a thumb or finger shall be in such proportion as the partial loss bears to the loss of the first phalange;
- (7) The loss of more than one phalange, or fraction thereof, shall be considered as the loss of the entire finger or thumb, but in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand;

- (8) For the loss of a great toe, thirty weeks of compensation;
- (9) For the loss of one or more of the toes other than the great toe, ten weeks, and for the additional loss of one or more toes other than the great toe, an additional ten weeks of compensation;
- (10) The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and compensation shall be one-half the amount above specified; compensation for the loss of less than the first phalange of a toe shall be in such proportion as the partial loss bears to the loss of the first phalange;
- (11) The loss of more than one phalange, or fraction thereof, shall be considered as the loss of the entire toe;
- (12) For the loss of a hand, or the permanent and complete loss of its use, one hundred fifty weeks of compensation;
- (13) For the loss of an arm, or the permanent and complete loss of its use, two hundred weeks of compensation;
- (14) Amputation of the arm below the elbow shall be considered the loss of a hand, if enough of the forearm remains to permit the use of an effective artificial member; otherwise it shall be considered as the loss of an arm;
- (15) For the loss of a foot, or the permanent and complete loss of its use, one hundred twenty-five weeks of compensation;
- (16) For the loss of a leg, or the permanent and complete loss of its use, one hundred sixty weeks of compensation;
- (17) Amputation of the leg below the knee shall be considered as the loss of a foot, if enough of the lower leg remains to permit the use of an effective artificial member; otherwise it shall be considered as the loss of a leg;
- (18) For the loss of the sight of an eye, one hundred fifty weeks of compensation;
- (19) For the permanent and complete loss of hearing in one ear, fifty weeks of compensation;
- (20) For the permanent and complete loss of hearing in both ears, one hundred fifty weeks of compensation;
- (21) For permanent partial disability resulting from injury to the back, compensation for that proportion of three hundred twelve weeks which is represented by the percentage that such permanent partial disability bears to the body as a whole;
- (22) In all cases in the above schedule under this section, if the medical impairment is partial and permanent, the compensation shall bear such relation to the maximum amount for complete and permanent loss as defined in this section as the medical impairment bears to the complete loss;
- (23) The loss of both hands or both arms, or both feet, or both legs, or both eyes or of any two thereof, or complete and permanent paralysis, or total and permanent loss of mental faculties, or any other injury which totally incapacitates the employee from working at any occupation which brings him an income, shall constitute total disability, to be compensated according to the compensation fixed by § 62-4-7. These specific cases of total and permanent disability shall not be construed as excluding other cases of total or permanent disability;
- (24) For permanent disfigurement, or permanent disability resulting from injury to any part of the body not hereinbefore listed, compensation for that portion of three hundred twelve weeks which is represented by the percentage that such permanent partial disability or permanent disfigurement bears to the body as a whole.

**62-4-7. Compensation for permanent total disability--Annual increase.** In case of total disability as defined in subdivision 62-4-6(23), compensation shall be paid at the rate provided by § 62-4-3 for life with an annual increase in the amount of the benefit allowance for each year commencing on the July first that is at least twelve months following the date on which the benefit was first payable equal to one hundred percent of the annual percentage change in the consumer price index for urban wage

earners and clerical workers as computed by the United States Department of Labor for the prior calendar year, not to exceed a three percent increase compounded annually.

For injuries occurring on or after July 1, 1993, if an employee is entitled to compensation under this section and is also receiving old-age insurance benefits under section 202 of the Social Security Act (42 U.S.C., § 402), the compensation payable shall be a sum equal to one hundred fifty percent of the compensation payable under § 62-4-7 less the old-age insurance benefit under § 202 of the Social Security Act (42 U.S.C., § 402). However, benefits payable by the employer may not exceed the amount payable pursuant to § 62-4-7. This section does not apply to any person who is entitled to old-age insurance benefits at the time of the injury.

**62-4-7.1. Prospective application of benefit increase** in § 62-4-7. The annual increase in benefit allowance provided by § 62-4-7 also applies to any total disability occurring before July 1, 1989. The annual increase in benefit allowance for such a total disability applies prospectively from July 1, 2000.

**62-4-8. Death resulting from injury--Payments to personal representative or beneficiaries of deceased.** In case death occurs as a result of the injury, then if the employee leaves any spouse, child, parent, grandparent, or lineal heir entitled to compensation under §§ 62-4-12 to 62-4-15, inclusive, the compensation shall be paid at the option of the employer, either to the personal representative or the beneficiaries of the deceased employee and distributed as provided in § 62-4-17. However, in no case may the amount payable under this section be less than five hundred dollars.

**62-4-8.1. Scholarships provided to certain persons receiving workers' compensation benefits--Eligibility.** Scholarships shall be provided for the spouses and dependent children of employees who die as a result of compensable work-related injuries if the dependents are entitled to benefits pursuant to this chapter. Scholarships are payable to accredited postsecondary education institutions in South Dakota on behalf of the dependent students attending the institutions. Eligible dependents may qualify for a maximum of two thousand dollars per year, while attending a postsecondary education institution. No student may receive assistance pursuant to this section for more than five years. The secretary of the Department of Labor and Regulation shall promulgate rules, pursuant to chapter 1-26, to implement this section.

**62-4-10. Installment payments of compensation.** All compensation provided for in §§ 62-4-3 to 62-4-7, inclusive, shall be paid in installments at the same intervals at which the wages or earnings of the employee were paid at the time of the injury. However, if this is not feasible, then the installments shall be paid weekly.

**62-4-10.1. Penalty for untimely payment of installments--Other remedies.** Failure to make any payment of workers' compensation benefits pursuant to § 62-4-10 within ten days of the date on which the payment is due shall result in an automatic penalty equal to ten percent of the unpaid amount. Nothing herein precludes any other remedy available to the claimant.

**62-4-11. Specific bodily injuries--Death before full payment of installments--Payments to dependents.** If an employee receives an injury for which a specific schedule of payments is provided by § 62-4-6; and the employee thereafter dies from causes other than the injury before the full payment of all installments due for the specific injury have been paid to the employee, the employer shall pay the balance due under the specific schedule of payments as provided in § 62-4-6, to the employee's dependents as provided in §§ 62-4-12 to 62-4-22, inclusive.

**62-4-12. Injury resulting in death--Compensation to spouse or children--Remarriage--Full-time**

**students.** The amount of compensation which shall be paid for an injury to the employee resulting in death, if the employee leaves a spouse, child or children, shall be paid at the rate provided by § 62-4-3 for life or until remarriage in the case of a spouse. If the spouse remarries, two years' benefits shall be paid to the spouse in a lump sum. The amount of compensation which shall be paid for an injury to the employee resulting in death, if the employee leaves any children and no spouse, shall be paid at the rate provided by § 62-4-3 until the child is age eighteen or for life in the case of any child who is physically or mentally incapable of self-support or until age twenty-two for any child enrolled as a full-time student in any accredited educational institution. If any child is not in the custody of the surviving spouse, the compensation shall be divided pursuant to the provisions of § 62-4-12.1.

**62-4-12.1. Injury resulting in death--Compensation to spouse or children--Children not in custody of surviving spouse.** The amount of compensation which shall be paid for an injury to the employee resulting in death, if the employee leaves any child who is not in the custody of the surviving spouse, shall be paid at the rate provided by § 62-4-3, with half of the amount being paid to the surviving spouse. The other half shall be paid to the surviving child or in equal shares to the surviving children, until age eighteen, or for life in the case of a child who is physically or mentally incapable of self-support, or until age twenty-two for any child enrolled as a full-time student in any accredited educational institution. When a child is no longer eligible for benefits, his or her share shall be paid to the surviving spouse.

**62-4-13. Injury resulting in death--Additional compensation for child under eighteen.** For an injury to the employee resulting in death, if the employee leaves any child or children under the age of eighteen years whom the employee was under legal obligation to support at the time of the injury, in addition to the sum provided by § 62-4-12, there shall be paid for each of said children, the sum of fifty dollars per month until such child reaches the age of eighteen years.

**62-4-14. Injury resulting in death--No surviving spouse or children--Payment to dependent parent, grandparent, or minor sibling.** The amount of compensation which shall be paid for an injury to the employee resulting in death, if no amount is payable under § 62-4-12, and the employee leaves any parent, grandparent, or minor sibling, who were dependent upon the employee for support at the time of the employee's injury, shall be such a percentage of the sum provided in § 62-4-12 as the average annual contributions which the deceased made to the support of the parent, grandparent, or minor sibling during two years preceding the injury bear to the employee's earnings during the two years.

**62-4-15. Injury resulting in death--Payments to dependent collateral heirs.** The amount of compensation which shall be paid for an injury to the employee resulting in death, if no amount is payable under § 62-4-12 or 62-4-14, and the employee leaves collateral heirs dependent at the time of the injury to the employee upon the employee's earnings, shall be such a percentage of the sum provided in § 62-4-12 as the average annual contributions which the deceased made to the support of the collateral dependent heirs during two years preceding the injury bear to the employee's earnings during the two years.

**62-4-16. Burial and transportation expenses paid when death results from injury.** The employer shall pay the burial expense and the expense of a headstone grave marker for an employee whose death resulted from an injury, in an amount not to exceed the sum of ten thousand dollars. If the death occurred in a foreign state or outside the community where the employee is to be buried, the employer shall also pay the cost of transporting the body of the employee to the community where the employee is to be buried.

**62-4-17. Installment payment of death benefits.** The compensation, except for additional benefits for children under eighteen years of age, provided for in §§ 62-4-12 to 62-4-15, inclusive, to be paid in case injury results in death, shall be paid in installments equal to two-thirds of the average earnings, at the same intervals at which the wages or earnings of the employee were paid, at which time the additional benefits for children under eighteen years of age shall also be paid. However, if this is not feasible, then the installments shall be paid weekly.

**62-4-18. Death benefits--Payment to personal representative or beneficiaries--Distribution to heirs.** The compensation to be paid for injury which results in death, as provided in §§ 62-4-12 to 62-4-22, inclusive, shall be paid at the option of the employer either to the personal representative of the deceased employee or to the employee's beneficiaries, and shall be distributed to the heirs who formed the basis for determining the amount of compensation to be paid by the employer, the distributees' share to be in proportion of their respective dependency at the time of the injury on the earnings of the decedent. In the judgment of the court appointing the personal representative, a child's distributive share may be directed paid to the parent for the support of the child.

**62-4-19. Payment of death benefits to personal representative--Release of employer from obligation.** The payment of compensation by the employer to the personal representative of the deceased employee pursuant to § 62-4-18 shall relieve the employer of all obligation as to the distribution of the compensation. The personal representative shall make payment to the distributees pursuant to the order of the court making the appointment.

**62-4-20. Payment of death benefits to surviving spouse for minor children--Conservatorship not required.** With the consent and approval of the secretary of labor and regulation, an employer may pay to the surviving spouse of a deceased, the compensation payable to the spouse and the minor children of the deceased under §§ 62-4-12 and 62-4-13 without the necessity of the appointment of a conservator for the minor children. The payment of the compensation by the employer shall relieve the employer of all obligation as to the distribution of the compensation so paid. Except in those cases where a lump-sum settlement has been made, approval by the secretary may at any time be revoked or modified for cause.

**62-4-21. Spouse of deceased employee--Qualification for benefits.** No compensation is payable under §§ 62-4-12 to 62-4-22, inclusive, to the surviving spouse of a deceased employee unless that spouse was, at the time of the death, living with the deceased employee, or was then dependent upon the deceased employee for support, or was then living apart from the deceased employee for justifiable cause or because of desertion by the deceased employee.

**62-4-22. Transfer of surviving spouse's right to compensation to surviving child.** If any dependent of a deceased employee dies, the right of the dependent to compensation under §§ 62-4-12 to 62-4-21, inclusive, ceases. However, if the surviving spouse dies or remarries while receiving or entitled to receive such compensation, that compensation shall be payable to any eligible surviving child or children of the deceased employee in accordance with § 62-4-12. Upon remarriage of the surviving spouse, payments to the eligible surviving child or children as provided for in this section may not commence until the expiration of two years from the date of remarriage.

**62-4-24. Employment for year preceding injury--Determination of average weekly wage.** As to an employee in an employment in which it is the custom to operate throughout the working days of the year, and who was in the employment of the same employer in the same grade of employment as at the time of the injury continuously for fifty-two weeks next preceding the injury, except for any temporary loss of time, the average weekly wage shall, where feasible, be computed by dividing by

fifty-two the total earnings of the employee as defined in subdivision 62-1-1(6), during the period of fifty-two weeks. However, if the employee lost more than seven consecutive days during the period of fifty-two weeks, then the division shall be by the number of weeks and fractions thereof that the employee actually worked.

**62-4-25. Employment for less than year preceding injury--Determination of average weekly wage.** As to an employee in an employment in which it is the custom to operate throughout the working days of the year, but who is not covered by § 62-4-24, the average weekly wages shall, where feasible, be ascertained by computing the total of the employee's earnings during the period the employee worked immediately preceding the employee's injury at the same grade of employment for the employer by whom the employee was employed at the time of the employee's injury, and dividing such total by the number of weeks and fractions thereof that the employee actually worked. However, if such method of computation produces a result that is manifestly unfair and inequitable or if by reason of the shortness of time during which the employee has been in such employment, or the casual nature or terms of the employment, it is impracticable to use such method, then regard shall be had to the average weekly amount which during fifty-two weeks previous to the injury was being earned by a person in the same grade, employed at the same work, by the same employer, or if there is no person so employed, by a person in the same grade, employed in the same class of employment in the same general locality.

**62-4-26. Computation of average weekly wage when other methods not feasible.** As to an employee in an employment in which it is the custom to operate throughout the working days of the year and where the situation is such that it is not reasonably feasible to determine the average weekly wages in the manner provided in § 62-4-24 or 62-4-25, the average weekly wages shall be determined by multiplying the employee's average day's earnings by three hundred, and dividing by fifty-two.

**62-4-27. Seasonal employment--Determination of average weekly wage.** As to employees in employments in which it is the custom to operate for a part of the whole number of working days in each year, the average weekly wages shall be ascertained by multiplying the employee's average day's earnings by number of days which it is customary in such employment to operate during a year, but not less than two hundred, and dividing by fifty-two.

**62-4-28. Employee earning no wages or less than day laborers--Computation of average weekly wage.** As to an employee who earns either no wage or less than the earnings of adult day laborers in the same line of employment in that locality, the average weekly wages shall be reckoned according to the average weekly wages of adults of the same class in the same or, if that is impracticable, then of neighboring employments.

**62-4-29. Apportionment of compensation for subsequent injury.** As to an employee who before the accident for which the employee claims compensation was disabled and drawing compensation under the terms of this title, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which the employee may have suffered.

**62-4-29.1. "Claimant" defined for subsequent injury fund claims.** For purposes of subsequent injury fund claims for reimbursement, notwithstanding any other provision of this title, the term, claimant, refers to any person making a claim for reimbursement, including an insurance carrier of an employer, or an employer, if self-insured.

**62-4-30. Determination of amount for each installment period.** To determine the amount of compensation for each installment period, the amount per annum shall be ascertained pursuant to

§§ 62-4-24 to 62-4-29, inclusive, and such amount divided by the number of installment periods per annum.

**62-4-31. Working week defined.** The term, working week, for the purposes of §§ 62-4-24 to 62-4-30, inclusive, means the number of days contemplated by the employment to be worked by the employee during each calendar week.

**62-4-34.7. Administration of fund to continue until all valid claims approved, denied or settled--Claim for injury occurring after July 1, 2001, barred--Disposition of fund balance.** Administration of the subsequent injury fund by the Division of Insurance and reimbursement of complete and valid claims shall continue until approved, denied, or settled. No claim for reimbursement from the subsequent injury fund may be filed based on a subsequent injury that occurs on or after July 1, 2001. Any claim for reimbursement filed as set forth in this section shall be approved or denied by the division pursuant to the requirements of §§ 62-4-34 to 62-4-36.3, inclusive, in effect prior to July 1, 1999. The division shall continue to make any necessary assessments pursuant to the requirements set forth in § 62-4-35 in effect prior to July 1, 1999, until all eligible claims completed as set forth in this section that are approved by the division or determined by the court to be eligible for reimbursement are paid, and until all matters in litigation concerning the subsequent injury fund are resolved. Any claim in matters being litigated concerning the subsequent injury fund is not eligible for interest or costs. Any remaining balance in the fund after all obligations of the fund have been satisfied shall be deposited in the general fund. Priority of payment shall be determined as of the date and time they are determined by the division to be complete and valid. No claim against the subsequent injury fund is vested until it is complete as set forth in this section. Any completed claim regardless of the date of injury or the date of notice of claim is subject to the two-thirds method of reimbursement pursuant to § 62-4-34 in effect prior to July 1, 1999.

**62-4-37. Injury or death due to willful misconduct of employee not compensable.** No compensation may be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute. The burden of proof under this section is on the defendant employer.

**62-4-38. Right of action when third person is liable--Election by employee--Offset of recovered damages.** If an injury for which compensation is payable under this title has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at the employee's option, either claim compensation or proceed at law against such other person to recover damages or proceed against both the employer and such other person. However, in the event the injured employee recovers any like damages from such other person, the recovered damages shall be an offset against any workers' compensation which the employee would otherwise have been entitled to receive.

**62-4-39. Compensation paid by employer--Reimbursement from damages recovered from third party.** If compensation has been awarded and paid under this title and the employee has recovered damages from another person, the employer having paid the compensation may recover from the employee an amount equal to the amount of compensation paid by the employer to the employee, less the necessary and reasonable expense of collecting the same, which expenses may include an attorney's fee not in excess of thirty-five percent of compensation paid, subject to § 62-7-36.

**62-4-40. Recovery by employer from third party--Excess held for employee.** If compensation is awarded under this title, the employer having paid the compensation, or having become liable



therefor may collect in the employer's own name or that of the injured employee, or the employer's personal representative, if deceased, from any other person against whom legal liability for damage exists, the amount of the liability. The employer shall hold for the benefit of the injured employee or the employee's personal representative, if deceased, the amount of damages collected in excess of the amount of compensation paid the employee or the employee's representative, less the proportionate necessary and reasonable expense of collecting the same, which expenses may include an attorney's fee not in excess of thirty-five percent of damages so collected, and shall be subject finally to the approval of the department.

**62-4-41. Priority of rights to compensation.** All rights of compensation granted by this title shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed for any unpaid wages for labor.

**62-4-42. Assignment of payments prohibited--Certain compensation exempt from claims of creditors.** No claim for compensation under this title is assignable, and all compensation and claims therefor are exempt from all claims of creditors except those for child and spousal support obligations.

**62-4-43. Selection of medical practitioner or surgeon by employee.** The employee may make the initial selection of the employee's medical practitioner or surgeon from among all licensed medical practitioners or surgeons in the state. The employee shall, prior to treatment, notify the employer of the choice of medical practitioner or surgeon or as soon as reasonably possible after treatment has been provided. The medical practitioner or surgeon selected may arrange for any consultation, referral, or extraordinary or other specialized medical services as the nature of the injury shall require. The employer is not responsible for medical services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section. If the employee is unable to make the selection, the selection requirements of this section do not apply as long as the inability to make a selection persists. If the injured employee unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment, the employer is not liable for an aggravation of the injury due to the refusal and neglect and the Department of Labor and Regulation may suspend, reduce, or limit the compensation otherwise payable. If the employee desires to change the employee's choice of medical practitioner or surgeon, the employee shall obtain approval in writing from the employer. An employee may seek a second opinion without the employer's approval at the employee's expense.

**62-4-44. Report to be submitted to employer and department by treating practitioner or surgeon--Time limit.** A medical practitioner or surgeon first treating an employee shall furnish a report of the injury and treatment to the employer and the Department of Labor and Regulation within fourteen days following the first treatment. The Department of Labor and Regulation may excuse the failure to furnish the report within fourteen days if it finds it to be in the interest of justice to do so. Thereafter, if the employee needs continued medical care or claims to be disabled from employment, the medical practitioner or surgeon shall provide status reports to the employer and the Department of Labor and Regulation at no less than thirty-day intervals. However, no report is required if the medical practitioner or surgeon has not seen the employee since the practitioner's or surgeon's last report.

**62-4-45. Information about injury to be made available--Penalty for withholding information.** All medical practitioners or surgeons attending injured employees shall comply with the rules promulgated pursuant to chapter 1-26 by the Department of Labor and Regulation and shall make the reports as may be required by it. All medical and hospital information relevant to the particular injury shall, upon demand, be made available to the employer, employee, insurer and the Department of Labor and Regulation. Medical practitioners, surgeons, or hospitals may charge a reasonable fee

for the reproduction of the medical and hospital information. No relevant information developed in connection with treatment or examination for which compensation is sought may be considered a privileged communication for purposes of a workers' compensation claim. If a medical practitioner or surgeon willfully fails to make any report required of the practitioner or surgeon under this section, the Department of Labor and Regulation may order the forfeiture of the practitioner's or surgeon's right to all or part of payment due for services rendered in connection with the particular case.

**62-4-46. Benefits precluded by intentional misrepresentation of employee's physical condition--Burden of proof.** A false representation as to physical condition or health made by an employee in procuring employment shall preclude the awarding of workers' compensation benefits for an otherwise compensable injury if it is shown that the employee intentionally and willfully made a false representation as to the employee's physical condition, the employer substantially and justifiably relied on the false representation in the hiring of the employee, and a causal connection existed between the false representation and the injury. The burden is on the employer to prove each of these elements.

**62-4-47. Written request to stop payments--Fraud--Injury outside of employment.** An employer, an employer's insurer or a fellow employee may submit a written request to the Department of Labor and Regulation to terminate, modify, or temporarily stop payments to a claimant because the requester has reason to believe that a worker's compensation claim has been paid under fraudulent conditions or that the injury did not arise out of or in the course of the employment. The department shall prescribe the form for the written request.

**62-4-48. Investigation of written request to stop payments.** The department shall order an investigation by the insurer, self-insured employer or administrator of a self-insured plan of the facts contained in a written request made pursuant to § 62-4-47. The investigation shall be completed within ninety days after receipt of the order. After a contested case hearing conducted pursuant to chapter 1-26, the department may order that the claimant's payments be continued, modified, or terminated. If the department has reason to believe that criminal insurance fraud has been committed, it shall disclose its information to law enforcement officers and may assist in the criminal investigative process.

**62-4-49. Confidentiality of investigative records--Release--Misdemeanor.** All investigative records and files relating to written requests made pursuant to § 62-4-47 are confidential. No disclosure of any such records, files, or other information may be made except as authorized in this section and § 62-4-48. The names of individuals providing evidence in support of a written request are confidential during the pendency of the request and the investigation. If the records or the testimony of the witness supplying the records are to be admitted at the hearing, the records and the testimony, or both, are discoverable and shall be provided to the claimant and the claimant's attorney. The department may release records, files, or other information to the attorney general, the state's attorney, law enforcement officials, and public officials who require the information in connection with their official duties. A violation of this section is a Class 1 misdemeanor.

**62-4-50. Immunity for good faith written request of investigation--False written request as misdemeanor.** Any person or party participating in good faith in the making of a written request pursuant to § 62-4-47 is immune from any liability, civil or criminal, that might otherwise be incurred or imposed and has the same immunity for participation in any judicial proceeding resulting from the request. Immunity extends in the same manner to public officials or employees involved in the investigation of the facts contained in written requests or to any person who in good faith cooperates with the investigation. A written request made in good faith does not constitute the wrongful failure to

pay a claim or to pay it on time. Any person or party who knowingly makes a false or malicious written request for an investigation, is guilty of a Class 2 misdemeanor.

**62-4-51. Fraudulent workers' compensation claims as misdemeanor.** Any person who knowingly files a fraudulent claim for workers' compensation benefits is guilty of a Class 1 misdemeanor.

**62-4-52. Definition of terms.** Terms used in § 62-4-53 mean:

- (1) "Community," the area within sixty road miles of the employee's residence unless:
  - (a) The employee is physically limited to travel within a lesser distance;
  - (b) Consideration of the wages available within sixty road miles and the cost of commuting to the job site makes it financially infeasible to work within such a distance;
  - (c) An employee has expanded the employee's community by regularly being employed at a distance greater than sixty road miles of the employee's residence, in which case community shall be defined as that distance previously traveled.
- (2) "Sporadic employment resulting in an insubstantial income," employment that does not offer an employee the opportunity to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury. Commission or piece-work pay may or may not be considered sporadic employment depending upon the facts of the individual situation. If a bona fide position is available that has essential functions that the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury the employment is not sporadic. The department shall retain jurisdiction over disputes arising under this provision to ensure that any such position is suitable when compared to the employee's former job and that such employment is regularly and continuously available to the employee.

**62-4-53. Permanent total disability--Burden of proof--Moving expenses paid by employer in certain cases.** An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

If an employee chooses to move to an area to obtain suitable employment that is not available within the employee's community, the employer shall pay moving expenses of household goods not to exceed four weeks of compensation at the rate provided by § 62-4-3.

**62-4-54. Determining usual and customary line of employment.** Usual and customary line of employment is to be determined by evaluation of the following factors:

- (1) The skills or abilities of the person;
- (2) The length of time the person spent in the type of work engaged in at the time of the injury;
- (3) The proportion of time the person has spent in the type of work engaged in at the time of injury

when compared to the employee's entire working career; and

(4) The duties and responsibilities of the person at the workplace. It is not limited by the position held at the time of the injury.

**62-4-55. Suitable, substantial, and gainful employment defined.** Employment is considered suitable, substantial, and gainful if:

(1) It returns the employee to no less than eighty-five percent of the employee's prior wage earning capacity;

(2) or It returns the employee to employment which equals or exceeds the average prevailing wage for the given job classification for the job held by the employee at the time of injury as determined by the Department of Labor and Regulation.

## **CHAPTER 5 INSURANCE AND SECURITY FOR PAYMENTS**

### **Section**

- 62-5-1.** Methods of securing payment of compensation.
- 62-5-2.** Obtaining of workers' compensation insurance.
- 62-5-3.** Reciprocal or interinsurance contracts providing indemnity for loss under workers' compensation law.
- 62-5-4.** Self-insurance by employer -- Approval of department.
- 62-5-5.** Self-insurance by employer -- Annual proof of solvency and financial ability -- Application fee -- Deposit of fees -- Certificate of exemption.
- 62-5-6.** Exemption of political subdivisions from security provisions.
- 62-5-7.** Failure to secure payment as election not to operate under title.
- 62-5-8.** Commission for placing insurance limited.
- 62-5-9.** Issuance of policy to employer -- Certification to department.
- 62-5-10.** Surety for performance required for self-insurers -- Irrevocable trust.
- 62-5-11.** Irrevocable letter of credit defined.
- 62-5-12.** Deposit of surety bonds, letters of credit, etc.
- 62-5-13.** Deposit of certificate of deposit or government securities.
- 62-5-14.** Deposit and withdrawal of cash.
- 62-5-15.** Perfected security interest in deposit -- Release of security interest.
- 62-5-16.** Claims administration contracts.
- 62-5-18.** Reduction of premium where employer selects a policy with a deductible.
- 62-5-19.** Deductible does not affect reporting requirements.
- 62-5-20.** Insurer to pay entire loss -- Employer to reimburse deductible amount.
- 62-5-21.** Provision of medical services and health care.

### **62-5-1. Methods of securing payment of compensation.**

Except as otherwise provided in §§ 62-5-5 and 62-5-6, any employer, coming within the compensation provisions of this title, shall secure the payment of compensation to the employer's employees in one of the ways provided by § 62-5-2 or 62-5-3. If the payment of compensation is so secured, the employer is liable to any employee for injury or death arising out of and in the course of the employment only as specified by this title.

### **62-5-2. Obtaining of workers' compensation insurance.**

An employer may secure the payment of compensation to any employee by insuring and keeping

insured the payment of the compensation with any stock corporation writing workers' compensation insurance or any mutual employer's liability association authorized to transact the business of workers' compensation insurance in this state or in an association authorized to exchange reciprocal or interinsurance contracts by individuals, partnerships, or corporations.

**62-5-3. Reciprocal or interinsurance contracts providing indemnity for loss under workers' compensation law.**

An employer may secure the payment of compensation to any employee by insuring and keeping insured the payment of the compensation in some association organized for the exchange of reciprocal or interinsurance contracts with each other by individuals, partnerships, or corporations of this state for the purpose of providing indemnity among themselves from any loss under the workers' compensation law, if the association is authorized to do the business of entering into reciprocal or interinsurance contracts by the director of the Division of Insurance. Nothing in this section applies to reciprocal or interinsurance exchanges authorized to do business under the provisions of chapter 58-34.

**62-5-5. Self-insurance by employer -- Annual proof of solvency and financial ability -- Application fee -- Deposit of fees -- Certificate of exemption.**

If an employer coming under the provisions of this title annually furnishes satisfactory proof to the Department of Labor and Regulation of the employer's solvency and financial ability to pay the compensation required by this title, the employer is relieved from the provisions of § 62-5-1. Each employer shall submit an application fee not to exceed two thousand five-hundred dollars to the Department of Labor and Regulation at the time proof of solvency is submitted. The Department of Labor and Regulation shall set, by rules promulgated pursuant to chapter 1-26, the amount of the application fee.

All fees paid to the department pursuant to this section shall be deposited with the state treasurer and shall be credited to the Department of Labor and Regulation special revenue fund which is hereby created. The money deposited shall be dedicated and continuously appropriated to the department for purposes of conducting an actuarial review of the applicant's financial condition and automating the administration of the workers' compensation law.

Upon receiving satisfactory proof of financial solvency and surety for performance required by § 62-5-10, the department shall issue a certificate of exemption relieving the employer of the obligation to purchase worker's compensation insurance provided in § § 62-5-2 and 62-5-3. The department may revoke this certificate if the employer fails to comply with the provisions of Titles 58 and 62, or with any rules promulgated by the Department of Labor and Regulation.

**62-5-6. Exemption of political subdivisions from security provisions.**

This state or any municipality or other political subdivision of the state need not furnish any insurance or security as provided by § § 62-5-1 to 62-5-5, inclusive, or 62-5-10 to 62-5-12, inclusive, but may do so if it desires.

**62-5-7. Failure to secure payment as election not to operate under title.**

Any employer other than the state, a municipality, or other political subdivision of this state, who has failed to comply with the provisions of § § 62-5-1 to 62-5-5, inclusive, shall be deemed to have elected not to operate under the provisions of this title.

**62-5-8. Commission for placing insurance limited.**

No insurer of any obligation under this title may by himself, herself, or through another, either directly

or indirectly, charge, accept, or pay as a commission or compensation for placing or renewing any insurance under this title more than fifteen percent of the premium charged.

**62-5-9. Issuance of policy to employer -- Certification to department.**

If any insurance company operating under this chapter issues a policy of workers' compensation insurance to any employer, the company writing the insurance shall file a certificate thereof with the department.

**62-5-10. Surety for performance required for self-insurers -- Irrevocable trust.**

An employer seeking permission to be a self-insurer, or seeking renewal of its permission to be a self-insurer, shall furnish to the department, on a form required by the department, a bond, written by a surety company authorized by the division of insurance to write surety bonds, or cash, or a certificate of deposit, or approved government securities, or an irrevocable letter of credit, or an irrevocable trust, alone or in any combination, in a total amount equal to the greater of:

- (1) Two hundred fifty thousand dollars; or
- (2) Twice the amount of compensation and medical claims paid by the employer during the preceding calendar year; or
- (3) The amount designated by the employer as a reserve for workers' compensation and medical claims.

The irrevocable trust as used in this section must be with a bank or trust company authorized to exercise trust powers under the laws of this state or the United States. The trust shall authorize distribution solely to the department if the employer defaults on its obligations under Title 62, or to the employer if the employer is no longer self-insured under the provisions of Title 62 to the extent the department determines that the security is not necessary, or to the employer if the employer complies with another method authorized by this section.

**62-5-11. Irrevocable letter of credit defined.** As used in § § 62-5-10 to 62-5-16, inclusive, an irrevocable letter of credit shall be accepted only if it is clean, irrevocable, and contains an evergreen clause.

- (1) "Clean" means a letter of credit that is not conditioned on the delivery of any other documents or materials.
- (2) "Irrevocable" means a letter of credit that cannot be modified or revoked without the consent of the beneficiary, once the beneficiary is established.
- (3) "Evergreen clause" means one which specifically states that expiration of a letter of credit will not take place without a sixty-day notice by the issuer. If prior notice of expiration is not given by the issuer, the letter of credit is automatically extended for one year.

A clean irrevocable letter of credit shall be accepted only if it is in the form prescribed by § § 62-5-10 to 62-5-16, inclusive, and is issued by a financial institution that is authorized to engage in banking in any of the fifty states or under the laws of the United States and whose business is substantially confined to banking, and which has a long-term debt rating by a recognized national rating agency of investment grade or better. If no long-term debt rating is available, the financial institution shall have the equivalent investment grade financial characteristics.

**62-5-12. Deposit of surety bonds, letters of credit, etc.**

Surety bonds, irrevocable letters of credit, and documents showing issuance of any irrevocable letter of credit shall be deposited with, and, unless specified by statute, in a form approved by the department.

**62-5-13. Deposit of certificate of deposit or government securities.**

Certificates of deposit or approved government securities shall be deposited on behalf of the department by the self-insured employer with the state treasurer or a financial institution approved by the department. Certificates of deposit or approved government securities shall be accepted by the state treasurer for deposit and shall be withdrawn only upon written order of the secretary of the Department of Labor and Regulation. Interest or gains earned on any certificate security, or deposit shall be paid to the self-insurer at least annually.

**62-5-14. Deposit and withdrawal of cash.**

Cash shall be deposited in a financial institution approved by the department, and in the account assigned to the state treasurer. Cash shall be withdrawn only upon written order of the secretary of the Department of Labor and Regulation.

**62-5-15. Perfected security interest in deposit -- Release of security interest.**

Upon the secretary sending a request to renew, request to post, or request to increase a security deposit to the maximum amount permitted by § § 62-5-10 to 62-5-16, inclusive, a perfected security interest is created in the private self-insured's assets in favor of the secretary to the extent of any then unsecured portion of the self-insured's incurred liabilities for workers' compensation claims. That perfected security interest is transferred to any cash or securities thereafter posted by the private self-insured with the state treasurer or other financial institution and is released only upon either of the following:

- (1) The acceptance by the secretary of a surety bond, certificate of deposit, or irrevocable letter of credit for the full amount of the incurred liabilities for the payment of compensation; or
- (2) The return of cash or securities by the secretary.

The private self-insured employer loses all right and title in and any right to control all assets or obligations posted or placed on deposit as security. In the event of a declaration of bankruptcy or insolvency by a court of competent jurisdiction the secretary may liquidate the deposit for application to the self-insured employer's incurred liability.

**62-5-16. Claims administration contracts.**

The secretary of the Department of Labor and Regulation may contract with any person, firm, or corporation qualified to administer claims of self-insured employers with respect to adjustment, administration, and management of workers' compensation claims for any self-insured employer. Costs of such claims administration shall be paid from the security deposit.

**62-5-18. Reduction of premium where employer selects a policy with a deductible.**

Any employer may agree, as a condition of the employer's contract for the insurance of compensation and benefits as provided in Title 62, to pay an amount specified in the contract per claim toward the total amount of any claim payable under workers' compensation. The amount of premium to be paid by an employer who selects a policy with a deductible shall be reduced based upon a rating schedule or rating plan filed with and approved by the director of insurance. Administration of claims shall remain with the insurer as provided in the terms and conditions of its policy.

**62-5-19. Deductible does not affect reporting requirements.**

The existence of an insurance contract with a deductible or the fact of payment as a result of a deductible does not affect the requirement of an employer to report an injury or death as required in § 62-6-2.

**62-5-20. Insurer to pay entire loss -- Employer to reimburse deductible amount.**

If an insured employer chooses a deductible, the insured employer is liable for the amount of the

deductible paid for each claim of injury suffered by an employee. The insurer shall pay the entire cost of the employee's loss and then seek reimbursement from the insured employer for the amount of the deductible.

**62-5-21. Provision of medical services and health care.**

Any self-insured employer shall provide medical services and health care to injured workers for compensable injuries and diseases under a case management plan that meets the requirements established by rules promulgated by the Department of Labor pursuant to chapter 1-26.

**CHAPTER 6  
EMPLOYERS' RECORDS AND REPORTS**

**Section**

- 62-6-1.** Record of injuries sustained by employees -- Copy to employee -- Failure as misdemeanor.
- 62-6-2.** Employer's report of injury -- Failure to report as misdemeanor.
- 62-6-3.** Insurer to file copy of injury report with department -- Notice of denial of coverage by insurer or employer -- Suspension, revocation or refusal of authority for noncompliance.
- 62-6-4.** Wage records of employees -- Inspection by department, purposes.
- 62-6-5.** Information confidential -- Release to employee or public agency.
- 62-6-6.** Refusal to submit records for inspection -- Penalty.
- 62-6-7.** Demand for employee's work-related records -- Production of records -- Employee waiver of right to privacy.

**62-6-1. Record of injuries sustained by employees--Copy to employee--Failure as misdemeanor.** Every employer coming under the provisions of this title shall keep a record of all injuries, fatal or otherwise, sustained by the employer's employees in the course of their employment. The record shall be completed within seven calendar days, not counting Sundays and legal holidays, after any employer has knowledge of the occurrence of an injury. The record shall be on a form approved by the Department of Labor and Regulation. The employer shall preserve the record for a period of at least four years from the date of injury. The record shall be signed by the employer and a copy given to the injured employee. Any employer who fails to complete or maintain the injury records required by this section is guilty of a Class 2 misdemeanor.

**62-6-2. Employer's report of injury--Failure to report as misdemeanor.** An employer covered by the provisions of this title who has knowledge of an injury that requires medical treatment other than minor first aid or that incapacitates the employee for seven or more calendar days shall file a written report with:

- (1) The Department of Labor and Regulation when the employer is self-insured under § 62-5-5; or
- (2) The employer's insurer when the employer has insured the liability under § 62-5-2 or 62-5-3.

The report shall be filed within seven calendar days, not counting Sundays and legal holidays, after the employer has knowledge of the injury, unless the employer had good cause for failing to file the written report within the seven-day period. The report shall be made on a form approved by the Department of Labor and Regulation. Any employer who fails to file a report as required by this section is guilty of a Class 2 misdemeanor and is subject to an administrative fine of one hundred dollars payable to the Department of Labor and Regulation.

**62-6-3. Insurer to file copy of injury report with department--Notice of denial of coverage by insurer or employer--Suspension, revocation, or refusal of authority for noncompliance.**



The insurer shall file a copy of the report required by § 62-6-2 with the Department of Labor and Regulation within ten days after receipt thereof.

The insurer or, if the employer is self-insured, the employer, shall make an investigation of the claim and shall notify the injured employee and the department, in writing, within twenty days from its receipt of the report, if it denies coverage in whole or in part. This period may be extended not to exceed a total of thirty additional days by the department upon a proper showing that there is insufficient time to investigate the conditions surrounding the happening of the accident or the circumstances of coverage. If the insurer or self-insurer denies coverage in whole or in part, it shall state the reasons therefor and notify the claimant of the right to a hearing under § 62-7-12. The director of the Division of Insurance, or the secretary of labor and regulation if the employer is self-insured, may suspend, revoke, or refuse to renew the certificate of authority, or may suspend or revoke all certificates of authority granted under Title 58 to any company or employer which fails, refuses, or neglects to comply with the provisions of this section. A company or employer which fails, refuses, or neglects to comply with the provisions of this section is also subject to an administrative fine of one hundred dollars payable to the Department of Labor and Regulation for each act of noncompliance, unless the company or employer had good cause for noncompliance.

**62-6-4. Wage records of employees--Inspection by department, purposes.** All books, records, and payrolls of employers coming under this title, showing and in any way referring to the amount of wage expenditure of such employer, shall always be open for inspection by the department or any of its representatives presenting a certificate of authority from the department, for the purpose of ascertaining the correctness of the wage expenditure, the number of employees, and such other information as may be necessary for the uses and purposes of the department in the administration of the provisions of this title.

**62-6-5. Information confidential--Release to employee or public agency.** Information obtained within the contemplation of this title shall be used for no other purpose than for the information of the department or insurance company with reference to the duties imposed upon the department. However, the department may release information to an injured employee or the employee's attorney, to a social security or welfare office having a claim by the employee, or to any state or federal agency which rehabilitates persons with disabilities. The department may issue statistical information if individual claimants are not identified.

**62-6-6. Refusal to submit records for inspection--Penalty.** A refusal on the part of the employer to submit the employer's books, records, or payrolls for the inspection of the department, or its authorized representative presenting written authority from the department, subjects the employer to a penalty of twenty-five dollars for each offense, to be collected by a civil action in the name of the state and paid into the state treasury.

**62-6-7. Demand for employee's work-related records – Production of records – Employee waiver of right to privacy.** An employer which complies with this title shall produce, if demanded by any employer or insurer against whom an injured employee has made a workers' compensation claim, the work-related records referring to its employee available for the fifty-two weeks preceding the employee's claimed dates of injury, such as:

- (1) The weeks in which the employee performed services;
- (2) The earnings the employee received for the services, as defined in subdivision 62-1-1(6);

- (3) Interruptions in employment if the employee was rehired or seasonally employed;
- (4) Changes in the employee's grade of employment;
- (5) The employee's job description; and
- (6) Federal or state tax deductions.

The employer receiving this demand shall produce the employee's work-related records in ten business days, and may charge a fee for the production of the records. The fee for the production of the employee's work-related records may not exceed fifteen dollars.

An employee waives any right to privacy to these work-related records when the employee makes a claim for workers' compensation benefits and the employee consents to the release of these work-related records to the employer or insurer against which the employee is making a claim for workers' compensation benefits.

## CHAPTER 7 CLAIMS PROCEDURE

### Section

- 62-7-1.** Compulsory medical examination of employee at request of employer.
- 62-7-2.** Employee's physician present at examination -- Copy of report to employee not employing physician.
- 62-7-3.** Refusing or obstructing examination -- Suspension of compensation payments.
- 62-7-4.** Critical condition of injured employee -- Duty to summon another surgeon to make examination.
- 62-7-5.** Agreement as to compensation -- Approval by department.
- 62-7-6.** Petition for lump-sum settlement -- Hearing by and order of department -- Beneficiaries excluded -- Partial lump sum payment.
- 62-7-7.** Appointment of conservator or administrator in connection with lump-sum settlement.
- 62-7-8.** Fees for health services -- Approval of department -- Rules for determining excessive fees or services.
- 62-7-8.1.** Ability to pay for health care -- Impermissible basis for higher fees -- Misdemeanor.
- 62-7-10.** Notice to employer of injury -- Condition precedent to compensation.
- 62-7-11.** Notice to employer of injury -- Contents -- Signature -- Manner of service.
- 62-7-12.** Hearing by department -- Failure to reach agreement as to compensation.
- 62-7-12.1.** Hearing officer to be licensed attorney.
- 62-7-12.2.** Informal request for disqualification of hearing examiner.
- 62-7-13.** Hearing by department -- Place of holding -- Decision, filing and service.
- 62-7-14.** Appointment of impartial medical examiner -- Fee.
- 62-7-15.** Hearing by department -- Fees and mileage of witnesses -- Taxation of costs.
- 62-7-16.** Petition for review of decision of department -- Revision or affirmance.
- 62-7-17.** Appeal from decision of department without petition for review.
- 62-7-18.** Decision of department not final until determination of petition for review.
- 62-7-19.** Appeals to circuit court.
- 62-7-30.** Notice or orders -- Method of service.
- 62-7-31.** Judgment taken on award or memorandum of agreement.
- 62-7-32.** Modification or revocation of judgment taken on award or memorandum of agreement.
- 62-7-33.** Review of payment by department.
- 62-7-34.** Notice given by department -- Statutory notice -- Writing required -- Manner of service.
- 62-7-35.** Limitation of action on claim for compensation.

- 62-7-35.1. Time limitation for claiming additional compensation -- Application of limit.
- 62-7-35.2. Application of time limits to mentally ill person.
- 62-7-35.3. Right to compensation barred under certain circumstances.
- 62-7-36. Approval of legal fees -- Amount -- Lump sum payment.
- 62-7-37. Mediation -- Promulgation of rules.
- 62-7-38. Multiple employers or insurers where preexisting injury or cumulative trauma claimed -- Responsibility for payment.
- 62-7-39. Determining partial or permanent total disability compensation.
- 62-7-40. False testimony.
- 62-7-41. Supplemental wage benefit for employee unable to return to usual and customary employment.

**62-7-1. Compulsory medical examination of employee at request of employer.** An employee entitled to receive disability payments shall, if requested by the employer, submit himself or herself at the expense of the employer for examination to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury, and also one week after the first examination, and thereafter at intervals not oftener than once every four weeks. The examination shall be for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this title.

**62-7-2. Employee's physician present at examination--Copy of report to employee not employing physician.** The examination provided by § 62-7-1 shall be made in the presence of a duly qualified medical practitioner or surgeon employed and paid for by the employee, if the employee so desires. If the examination is made by a surgeon engaged by the employer and the injured employee has no surgeon present at the examination, the surgeon making the examination at the instance of the employer shall deliver to the injured employee, upon the employee's request or that of the employee's representative, a statement in writing of the condition and extent of the injury to the same extent that the surgeon reports to the employer.

**62-7-3. Refusing or obstructing examination--Suspension of compensation payments.** If the employee refuses to submit himself or herself to examination pursuant to § 62-7-1 or unnecessarily obstructs the examination, the employee's right to compensation payments shall be temporarily suspended until the examination takes place. No compensation is payable under this title for such period.

**62-7-5. Agreement as to compensation--Approval by department.** If the employer and employee reach an agreement in regard to the compensation under this title, a memorandum of the agreement shall be filed with the department by the employer or employee. Unless the department within twenty days notifies the employer and employee of its disapproval of the agreement by letter sent to their addresses as given in the memorandum filed, the agreement shall stand as approved and is enforceable for all purposes under the provisions of this title.

**62-7-6. Petition for lump-sum settlement--Hearing by and order of department--Beneficiaries excluded--Partial lump sum payment.** An employer or employee who desires to have any unpaid compensation paid in a lump sum may petition the Department of Labor and Regulation asking that the compensation be paid in that manner. If, upon proper notice to interested parties and proper showing before the department, it appears in the best interests of the employee that the compensation be paid in lump sum, the secretary of labor and regulation may order the commutation

of the compensation to an equivalent lump-sum amount. That amount shall equal the total sum of the probable future payments capitalized at their present value on the basis of interest calculated at a rate per year set by the department with annual rests in accordance with rules promulgated pursuant to chapter 1-26. If there is an admission or adjudication of permanent total disability, the secretary may order payment of all or part of the unpaid compensation in a lump sum under the following circumstances:

- (1) If the employee has exceptional financial need that arose as a result of reduced income due to the injury; or
- (2) If necessary to pay the attorney's fees, costs and expenses approved by the department under § 62-7-36.

If a partial lump sum payment is made, the amount of the weekly benefit shall be reduced by the same percentage that the partial lump sum bears to the total lump sum computation. The remaining weekly benefit is subject to the cost of living allowance provided by § 62-4-7. Any compensation due to beneficiaries under §§ 62-4-12 to 62-4-22, inclusive, may not be paid in a lump sum, except for the remarriage lump sum provided in § 62-4-12.

**62-7-7. Appointment of conservator or administrator in connection with lump-sum settlement.**

If necessary, upon proper application being made, a conservator or administrator, as the case may be, may be appointed for any person under disability who may be entitled to any compensation under this title, and an employer bound by the terms of this title and liable to pay such compensation may petition for the appointment of an administrator or conservator, if no legal representative has been appointed or is acting for such party or parties so under disability.

**62-7-8. Fees for health services subject to approval--Excessive fees or services.** Except as otherwise provided, fees for health services, including hospital services, depositions, and reproduction of medical and hospital information, under this title are subject to approval of the department. The department shall, by rule promulgated pursuant to chapter 1-26, establish standards and procedures for determining if charges for health services, including hospital services are excessive and for determining if a provider of health services is performing procedures or providing services at a level or with a frequency that is excessive. The department shall consult with the examining boards of all providers in establishing such standards and procedures. For services rendered by an out-of-state provider, any fee that exceeds the maximum allowed by the fee schedule of the state where service was provided is deemed excessive. No provider of health services, including hospital services, may enforce any judgment against, or collect or attempt to collect from, the employee, the employer, or the employer's insurer any amount in excess of the amount established by the applicable fee schedule or approved under the provisions of this section.

**62-7-8.1. Ability to pay for health care--Impermissible basis for higher fees--Misdemeanor.** No health care provider may charge a higher price for goods, care or services rendered to an injured worker who is eligible for workers' compensation benefits based on the ability of the employer or the insurer to pay for such goods, care or services. A violation of this section is a Class 1 misdemeanor.

**62-7-10. 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 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 period, which determination shall be liberally construed in favor of the employee.

**62-7-12. Failure to reach agreement as to compensation--Hearing by department.** If the employer and injured employee or the employee's representative or dependents fail to reach an agreement in regard to compensation under this title, either party may notify the Department of Labor and Regulation and request a hearing according to rules promulgated pursuant to chapter 1-26 by the secretary of labor and regulation. The department shall fix a time and place for the hearing and shall notify the parties.

**62-7-12.1. Hearing officer to be licensed attorney.** Any employee of the Department of Labor and Regulation who conducts hearings for workers' compensation claims pursuant to the department's authority to conduct such hearing shall be an attorney, licensed to practice law in South Dakota.

**62-7-12.2. Informal request for disqualification of hearing examiner.** In any contested case arising under the provisions of Title 62, any party, in person or by counsel, may informally request the hearing examiner who, in the ordinary course, would hear the contested case, to disqualify himself or herself. The requesting party may, but is not obligated to, state reasons for the request. The informal request may be by letter, by oral communication, or by motion not later than twenty days after notice of the appointment of the hearing examiner to the case. The opposing parties shall be apprised of the request, but may not contest the request. The director of the division shall grant the request and forthwith provide for the appointment of another hearing examiner. Neither party may request disqualification more than once on any case.

**62-7-13. Hearing by department--Place of holding--Decision, filing and service.** The department may make such inquiries and investigations it deems necessary. The hearings of the department shall be in a place which the department determines to be convenient to the parties and to the witnesses. A record of the proceedings at the hearing shall be kept, the expense of the record to be borne by the department. The department shall file its decision, its findings of fact, and conclusions of law and shall serve the same on the parties forthwith by dispatching a copy addressed to each party or the party's attorney by mail, postage paid.

**62-7-14. Appointment of impartial medical examiner--Fee.** The department may appoint a duly qualified and impartial physician to examine the injured employee and make a report. The fee for this service shall be paid by the insurer or self-insured employer, together with traveling expenses, and the amount of such fee shall be subject to approval by the secretary of the department.

**62-7-15. Hearing by department--Fees and mileage of witnesses--Taxation of costs.** The fees and mileage for attending as a witness before the department shall be the same as allowed in circuit court. All costs incurred in the hearing before the department may be taxed against the losing party or an equitable apportionment made thereof by the department according to the facts.

**62-7-16. Petition for review of decision of department--Revision or affirmance.** Any party to proceedings before the department may within ten days after service upon the party of a decision of the department, as provided in § 62-7-13, file with the department a petition for a review of the decision. Upon the filing of the petition the secretary may either deny the petition or direct that further hearing be had or additional evidence received. In the event of the further hearing or of the receipt of additional evidence, the secretary may revise his or her decision in whole or in part or affirm the same. Notice of denial of the petition or any other order thereon shall be given as provided in § 62-7-13.

**62-7-17. Appeal from decision of department without petition for review.** Any party may elect to treat as final the decision of the department made as provided in § 62-7-13 and appeal therefrom without making any petition for review, in which event the decision provided for in § 62-7-13 shall be treated as the final decision of the department and subject to appeal.

**62-7-18. Decision of department not final until determination of petition for review.** If a petition for a review is filed as provided in § 62-7-16, it may not be deemed that the department has made a final decision until there is a final determination on the petition. The final determination shall in that event be deemed the final decision of the department and subject to appeal.

**62-7-19. Appeals to circuit court.** Any employer or employee may appeal to the circuit court pursuant to chapter 1-26 from any final order or decision of the Department of Labor and Regulation which arises under the provisions of this title. Upon any appeal under this section all intermediate orders or decisions affecting substantial rights may be reviewed.

**62-7-30. Notice or orders--Method of service.** All notices or orders provided for in this chapter may be served personally or by registered or certified mail. If served by registered or certified mail, proof by affidavit thereof shall be accompanied by post office return receipt. If, however, any party is represented by an attorney, the service shall be made on the attorney, and may be made either in the manner provided in this section, or in the manner provided by § 15-6-5.

**62-7-31. Judgment taken on memorandum of agreement or portion of order or decision.** Any party in interest may, after expiration of the time for a petition for review or appeal, present a memorandum of agreement, approved by the department, or a certified copy of any portion of an order or decision of the department from which no petition for review or appeal has been filed, together with all papers in connection with the case, to the circuit court for the county in which the injury occurred. Thereupon the court shall render a judgment in accordance with the memorandum of agreement or portion of any order or decision of the department from which no petition for review has been filed, and the court shall notify the parties. The judgment shall have the same effect and in all proceedings in relation thereto be the same as though rendered in an action duly heard and determined by the court except that no appeal may be made on questions of fact.

**62-7-32. Modification or revocation of judgment taken on award or memorandum of agreement.** Upon presentation to the circuit court of a certified copy of the decision of the department ending, diminishing, or increasing any payment to be made under the provisions of this title, the court shall revoke or modify the judgment to conform to such decision.

**62-7-33. Review of payment by department.** Any payment, including medical payments under § 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the Department of Labor and Regulation pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased, or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action. Any case in which there has been a determination of permanent total disability may be reviewed by the department not less than every five years.

**62-7-34. Notice given by department--Statutory notice--Writing required--Manner of service.** Any notice given by the department, or any other notice for which provision is made by this title, shall be in writing, and service thereof, unless otherwise specifically provided, shall be sufficient if by registered or certified mail addressed to the last known address of the person to be served.

**62-7-35. Limitation of action on claim for compensation.** The right to compensation under this title shall be forever barred unless a written petition for hearing pursuant to § 62-7-12 is filed by the claimant with the department within two years after the self-insurer or insurer notifies the claimant and the department, in writing, that it intends to deny coverage in whole or in part under this title. If the denial is in part, the bar shall only apply to such part.

**62-7-35.1. Time limitation for claiming additional compensation--Application of limit.** In any case in which any benefits have been tendered pursuant to this title on account of an injury, any claim for additional compensation shall be barred, unless the claimant files a written petition for hearing pursuant to § 62-7-12 with the department within three years from the date of the last payment of benefits. The provisions of this section do not apply to review and revision of payments or other benefits under § 62-7-33.

**62-7-35.2. Application of time limits to minor or person with mental illness or developmental disability.** The provisions of §§ 62-7-35 and 62-7-35.1 do not apply to a person with a mental illness, a person with a developmental disability, or a minor if the person has no guardian or legal representative. The limitations of §§ 62-7-35 and 62-7-35.1 do apply to the person with a mental illness, person with a developmental disability, or minor from the date of the appointment of a guardian or legal representative for that person, and if no guardian or legal representative has been appointed, to a minor upon obtainment of majority.

**62-7-35.3. Right to compensation barred under certain circumstances.** The right to compensation under this title is forever barred if no medical treatment has been obtained within seven years after the employee files the first report of injury.

**62-7-36. Approval of legal fees--Amount--Lump sum payment.** Except as otherwise provided, fees for legal services under this title shall be subject to approval of the department.

Attorneys' fees may not exceed the percentage of the amount of compensation benefits secured as a result of the attorney's involvement as follows:

- (1) Twenty-five percent of the disputed amount arrived at by settlement of the parties;
- (2) Thirty percent of the disputed amount awarded by the Department of Labor and Regulation after hearing or through appeal to circuit court;
- (3) Thirty-five percent of the disputed amount awarded if an appeal is successful to the Supreme Court.

Attorneys' fees and costs may be paid in a lump sum on the present value of the settlement or adjudicated amount.

**62-7-37. Mediation--Promulgation of rules.** If the employer and injured employee do not agree as to compensability in whole or in part, either party may request the department to conduct a mediation. The mediation shall be in a location convenient to the parties or by telephonic conference and shall be conducted in accordance with rules promulgated by the department pursuant to chapter 1-26.

**62-7-38. Multiple employers or insurers where preexisting injury or cumulative trauma claimed--Responsibility for payment.** In cases where there are multiple employers or insurers, if an employee claims an aggravation of a preexisting injury or if an injury is from cumulative trauma making the exact date of injury undeterminable, the insurer providing coverage to the employer at the time the aggravation or injury is reported shall make immediate payment of the claim until all

employers and insurers agree on responsibility or the matter is appropriately adjudicated by the Department of Labor and Regulation pursuant to this chapter.

**62-7-39. Determining partial or permanent total disability compensation.** An employee, employer, employer's insurer, or self-insured employer shall be permitted to use the results of post-offer base line testing or a functional capacity assessment, as utilized by Guidelines to the Evaluation of Permanent Impairment established by the American Medical Association, sixth edition, July 2009 reprint, performed during the course of employment, or other medical evidence of impairment for the purpose of determining permanent partial or permanent total disability compensation due to an employee.

**62-7-40. False testimony.** In proceedings for workers' compensation benefits brought under this title, if the finder of fact determines that any person testifying in the proceeding has knowingly sworn falsely to any material fact in the proceeding, then the finder of fact may reject all of the testimony of that witness.

**62-7-41. Supplemental wage benefit for employee unable to return to usual and customary employment.** If an employee is not totally disabled but is unable to return to the employee's usual and customary employment, the employer may, in lieu of rehabilitation, require the employee to accept, in addition to an earned income, a supplemental wage benefit to be paid by the employer which, in total with the earned income, equals the workers' compensation benefit rate applicable to the employee at the time of the employee's injury, plus a return to work incentive of twenty percent of the rate otherwise payable to the employee under § 62-4-3, provided the employee is actually offered employment or is employed.

## CHAPTER 8 OCCUPATIONAL DISEASE DISABILITY

### Section

- 62-8-1. Definition of terms.
- 62-8-2. Occupational diseases enumerated.
- 62-8-3. Contracted and incurred defined.
- 62-8-4. Right to compensation -- Applicability of workers' compensation law.
- 62-8-6. Employers and workers subject to chapter -- Security for compensation -- Right to compensation as exclusive remedy.
- 62-8-7. Notice of withdrawal of employer.
- 62-8-8. Election of withdrawn employer to become subject to chapter -- Notice -- Security for compensation.
- 62-8-9. Defenses unavailable to employer rejecting chapter.
- 62-8-10. Conditions of liability -- Hazards particular to trade.
- 62-8-11. Filing time to qualify for disability or death compensation.
- 62-8-12. Conditions of liability -- Burden of proof.
- 62-8-13. Notice of disability required -- Claim for compensation.
- 62-8-14. Silicosis cases -- Period of exposure.
- 62-8-15. Last employer liable -- Amount of compensation -- Notice of disability -- Claim for compensation.
- 62-8-16. Maximum compensation for death or disability.
- 62-8-17. Waiver of disability benefits by working for another.
- 62-8-18. Death in case of silicosis -- Liability of last employer.
- 62-8-19. Disability or death from silicosis with complication of tuberculosis -- Amount of



- compensation.
- 62-8-20. Compensation for partial disability due to silicosis prohibited -- Exceptions.
  - 62-8-21. Dependency arising after disability.
  - 62-8-22. Willful misconduct or self-exposure by employee -- Compensation prohibited.
  - 62-8-23. Willful self-exposure -- Acts constituting.
  - 62-8-24. Waiver of full compensation for aggravation of nondisabling silicosis -- Amount of claim limited.
  - 62-8-25. Contract waiving all claims for compensation for aggravation of nondisabling silicosis.
  - 62-8-26. Voluntary agreement as to waiver -- Finding by department.
  - 62-8-27. Termination of employment because of nondisabling silicosis -- Allowance of compensation.
  - 62-8-28. Petition of employee for examination for silicosis -- Payment of costs -- Findings of department.
  - 62-8-29. Notice of disease or death required for compensation.
  - 62-8-30. Time for notice of incapacity from ionizing radiation.
  - 62-8-31. Persons who may give notice and make claim.
  - 62-8-32. Discontinued payments of compensation -- Claim for further compensation, time for making.
  - 62-8-40.1. Medical panel abolished -- Performance of functions -- Contracts for medical reports.
  - 62-8-41. Autopsy -- Ordering by department.
  - 62-8-42. Autopsy -- Exercise of authority by secretary.
  - 62-8-43. Refusal to permit autopsy -- Suspension of proceedings for compensation.
  - 62-8-44. Modification of award.
  - 62-8-45. Agreements between employer and employee.
  - 62-8-47. Compensation under chapter not additional to workers' compensation.

**62-8-1. Definition of terms.** Terms used in this chapter mean:

- (1) "Compensation," the payments and benefits provided for in the South Dakota workers' compensation law, subject to the conditions and limitations contained in this chapter;
- (2) "Department," the Department of Labor and Regulation of the State of South Dakota;
- (3) "Disablement," the event of an employee's becoming actually and totally incapacitated, because of an occupational disease as defined in this chapter, from performing work in the last occupation in which injuriously exposed to the hazards of such disease. The terms, disability, disabled, total disability, totally disabled, or total disablement are synonymous with disablement;
- (4) "Injurious exposure" and "harmful quantities," that concentration of toxic material which would, independently of any other cause whatsoever (including the previous physical condition of the claimant) produce or cause the disease for which claim is made;
- (5) "Nondisabling silicosis," silicosis demonstrable by X ray examinations of the lungs, which reveal unquestionably the characteristic mottling of silicosis in the lung fields, occurring in an employee after injurious exposure to silicon dioxide for the period provided in § 62-8-14, but not sufficient to disable the employee from performing usual work;
- (6) "Occupational disease," a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment and includes any disease due or attributable to exposure to or contact with any radioactive material by an employee in the course of employment;
- (7) "Silicosis," the characteristic fibrotic condition of the lungs caused by the inhalation of silicon dioxide (SiO<sub>2</sub>) dust.

**62-8-3. Contracted and incurred defined.** The terms, contracted, and incurred, as used in this

chapter when referring to an occupational disease, are the equivalent of the phrase, arising out of and in the course of, as used in the workers' compensation law.

**62-8-4. Right to compensation--Applicability of workers' compensation law.** If an employee of an employer subject to this chapter suffers from an occupational disease as defined in § 62-8-1, and is thereby disabled from performing work in the last occupation in which the employee was injuriously exposed to the hazards of the disease, or dies as a result of the disease, and the disease was due to the nature of an occupation or process in which the employee was employed within the period previous to the employee's disablement limited in this chapter, the employee, or, in case of the employee's death, the employee's dependents, are entitled to compensation as provided in the workers' compensation law, as if the disablement or death were an injury by accident, except as otherwise provided in this chapter. The practice and procedure prescribed in the workers' compensation law shall apply to proceedings for compensation for such diseases, except as in this chapter otherwise provided.

**62-8-6. Employers and workers subject to chapter--Security for compensation--Right to compensation as exclusive remedy.** Every employer of workers subject to the workers' compensation law is subject to the provisions of this chapter and shall secure the payment of compensation in accordance with the provisions of this chapter by any method prescribed by the workers' compensation law at the time in effect in this state. If the foregoing requirement is complied with, the liability of the employer under this chapter is exclusive and in place of any other civil liability, at common law or otherwise to such employee, or to the employee's spouse, children, parents, dependents, next of kin, personal representatives, guardian, conservator, or any others on account of any disease or injury to health, or on account of death from any disease or injury to health in any way contracted, sustained, aggravated, or incurred by the employee in the course of, or because of, or arising out of employment, except only an injury compensable as an injury by accident under the provisions of the workers' compensation law.

**62-8-11. Filing time to qualify for disability or death compensation.** An employer is not liable for compensation or other benefits under the provisions of this chapter for disability or death unless a claim is filed with the Department of Labor and Regulation within two years after the claimant becomes disabled from such disease, or in the case of death from such disease, within two years of the date of such death. However, any prepaid lump sum payments made to the claimant during his lifetime for permanent total disability shall be accredited to the payments made for death benefits.

**62-8-12. Conditions of liability--Burden of proof.** The burden of proof shall be upon the claimant to establish each and every fact under § 62-8-11 by competent medical evidence.

Source: SDC 1939, § 64.0807 (1) as enacted by SL 1947, ch 426; SL 1965, ch 308, § 1.

**62-8-13. Notice of disability required--Claim for compensation.** An employer is not liable for compensation or other benefits under the provisions of this chapter for disability or death unless notice of disability and claim for compensation has been given and made to the employer in writing within the time fixed in §§ 62-8-29 to 62-8-32, inclusive.

**62-8-14. Silicosis cases--Period of exposure.** No claim for disability or death from silicosis may be maintained or prosecuted otherwise than under the provisions of this chapter, or come within the provisions of this chapter, unless the employee has been injuriously exposed to the inhalation of silica dust over a period of not less than two years, and has been in this state, under a contract of employment existing in this state. However, if the employee has been employed by the same employer during the whole of the two-year period, the employee's right to compensation against the employer is not affected by the fact that the employee had been employed during any part of the

period outside of this state.

**62-8-15. Last employer liable--Amount of compensation--Notice of disability--Claim for compensation.** If compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease is liable therefor. The amount of the compensation shall be based upon the average weekly wages (as defined in the workers' compensation law) of the employee when last so injuriously exposed under the employer. The notice of disability and claim for compensation shall be given and made to the employer.

**62-8-16. Maximum compensation for death or disability.** The maximum compensation to be allowed for disability, or death, or both, on account of any occupational disease is the limit fixed in the workers' compensation law.

**62-8-17. Waiver of disability benefits by working for another.** If a totally disabled employee engages in any remunerative work for any other employer, the employee thereby waives disability benefits or compensation under this chapter for the period as the employee is so engaged.

**62-8-18. Death in case of silicosis--Liability of last employer.** In case of silicosis, the only employer liable is the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease during a period of sixty days or more.

**62-8-19. Disability or death from silicosis with complication of tuberculosis.** In case of disability or death from silicosis, complicated with tuberculosis of the lungs, compensation is payable as for uncomplicated silicosis, if the silicosis was an essential factor in causing the disability or death.

**62-8-20. Partial disability due to silicosis not compensable--Exceptions.** Compensation is not payable for partial disability due to silicosis, except as provided in §§ 62-8-24, 62-8-27, and 62-8-28.

**62-8-21. Dependency arising after disability.** No compensation for death from an occupational disease is payable to any person whose relationship to the deceased, which, under the provisions of this chapter would give right to compensation, arose subsequent to the beginning of the first compensable disability, save only to after-born children of a marriage existing at the beginning of the disability.

**62-8-22. Disability or death due to employee's willful misconduct, willful self-exposure, or disobedience not compensable.** Notwithstanding anything contained in this chapter, no employee or dependent of any employee, or personal representative of a deceased employee, or other person is entitled to receive compensation for disability or death from an occupational disease if the disability or death, wholly or in part, was caused by the willful misconduct or willful self-exposure of the employee or by the employee's disobedience to reasonable regulations adopted by the employer, that have been and are kept posted in conspicuous places in and about the premises of the employer, or otherwise brought to the attention of the employee.

**62-8-23. Willful self-exposure--Acts constituting.** As used in § 62-8-22, willful self-exposure shall be conclusively presumed if any of the following occur:

(1) An employee or applicant for employment fails or omits truthfully to state in writing to the best of the employee's knowledge in answer to any inquiry made by the employer, the place, duration, and nature of the employee's previous employment;

- (2) An applicant for employment fails or omits truthfully to state in writing to the best of the applicant's knowledge in answer to any inquiry made by the employer, whether or not the applicant had been previously disabled, laid off, or compensated in damages or otherwise, because of any physical disability;
- (3) An employee or applicant for employment fails or omits truthfully to give in writing to the best of the employee's or applicant's knowledge in answer to any inquiry made by the employer, full information about the previous status of the employee's or applicant's health, previous medical and hospital attention and exposure to tuberculosis;
- (4) An employee or applicant for employment fails or refuses to submit to medical or X ray examination when requested so to do by the employer at the employer's expense;
- (5) An employee willfully fails to use protective and safety devices provided by the employer.

**62-8-24. Waiver of full compensation for aggravation of nondisabling silicosis--Amount of claim limited.** If an employee, though not actually disabled, has nondisabling silicosis, the employee may, subject to the approval of the Department of Labor and Regulation, waive in writing full compensation for any aggravation of the employee's condition that may result from the employee continuing in the hazardous occupation. If the employee later suffers total disablement or death as a result of the disease with which the employee was affected after such a waiver, compensation shall be payable as provided in this chapter. However, the amount of compensation, whether for disability or death or both, may not exceed fifty-two times the maximum weekly benefit rate in effect at the time of total disability or death occurs. A waiver so permitted remains effective, for the trade, occupation, process, or employment for which executed, notwithstanding change of employer. The secretary of labor and regulation may promulgate rules pursuant to chapter 1-26 relative to the form, execution, filing, or registration, and public inspection of waivers or records thereof.

**62-8-25. Contract waiving all claims for compensation for aggravation of nondisabling silicosis.** A worker, seeking employment and having knowledge or being informed that the worker is affected with a nondisabling silicosis, who nevertheless voluntarily prefers to work in an occupation where the worker's disease may become aggravated, may, with the approval of the department, enter into a contract with the worker's prospective employer, waiving all claims for compensation or damages under this chapter or otherwise.

**62-8-26. Voluntary waiver--Finding by department.** Before approving a waiver under § 62-8-24 or 62-8-25, the department shall be satisfied that the worker has voluntarily entered into the agreement to waive compensation, that it is of greater advantage to the worker and the worker's dependents, if any, for the worker to work in an occupation where the worker's disease may become aggravated than to seek other employment, and that the working conditions maintained by the employer are such as to minimize the hazards of silicosis.

**62-8-27. Termination of employment because of nondisabling silicosis--Allowance of compensation.** If an employee working subject to this chapter, who has not previously executed any of the waivers referred to in §§ 62-8-24 to 62-8-26, inclusive, and who would be entitled to compensation under this chapter if disabled, is, because the employee had a nondisabling silicosis, discharged from employment in which the employee is engaged, or if an employee, after an examination as provided in § 62-8-28 and a finding by the medical panel that it is inadvisable for the employee to continue in employment, terminates employment, the department may allow the compensation on account of the discharge or termination of employment as the department deems just, but in no case to exceed one thousand dollars, which payment shall operate as a complete release and discharge of all liability of the employer.

**62-8-28. Petition of employee for examination for silicosis--Payment of costs--Findings of department.** Any employee who in the course of employment has been exposed to the inhalation of silica dust and who wishes to submit to examination by the department to determine whether the employee has silicosis, and the degree thereof, may petition the department for an order directing the examination. The cost of the medical examination shall be borne by the employee making application. The department shall submit copies of the report of the examination to the employer and employee, who shall have opportunity to rebut the same, if the request therefor is made to the department within thirty days from the mailing of the report to the parties. The department shall make its findings as to whether or not it is inadvisable for the employee to continue in employment.

**62-8-29. Notice of disease or death required for compensation.** Unless written notice of an occupational disease is given by the worker to the employer within six months after the employment has ceased in which it is claimed that the disease was contracted, and, in case of death, unless written notice of such death is given within ninety days after the occurrence, all rights to compensation for disability, or death, from an occupational disease are forever barred.

**62-8-30. Time for notice of incapacity from ionizing radiation.** Notwithstanding § 62-8-29, the time for filing notice and claims does not begin to run in cases of incapacity from exposure to ionizing radiation until one year after the date upon which the employee first suffered incapacity and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by the employee's present or prior employment.

**62-8-31. Persons who may give notice and make claim.** Notice and claim under § 62-8-29 may be made by any person claiming to be entitled to compensation or by someone in the person's behalf.

**62-8-32. Time for making claim for further compensation after discontinuance.** If compensation payments have been made and discontinued, and further compensation is claimed, the claim for the further compensation shall be made within one year after the last payment.

**62-8-40.1. Contracts for medical reports.** The Department of Labor and Regulation may contract with licensed physicians for medical reports on controverted medical questions in any case on a claim for compensation for an occupational disease.

**62-8-41. Autopsy ordered by department upon filing of claim.** Upon the filing of a claim for compensation for death from an occupational disease where an autopsy is necessary accurately and scientifically to ascertain and determine the cause of death, the autopsy shall be ordered by the department. The department may designate a duly licensed physician, who is a specialist in such examinations, to perform or attend the autopsy, and to certify the findings thereon. The findings shall be filed with the department and are a public record.

**62-8-42. Autopsy ordered by department where controversy may exist.** The secretary of the Department of Labor and Regulation also may exercise such authority on the secretary's own motion or on application made to the secretary at any time by any party in interest, upon the presentation of facts showing that a controversy may exist in regard to the cause of death or the existence of any occupational disease.

**62-8-43. Refusal to permit autopsy--Suspension of proceedings for compensation.** All proceedings for compensation shall be suspended upon refusal of a claimant or claimants to permit the autopsy when so ordered. No compensation is payable during the continuance of the refusal.

**62-8-44. Modification of award.** An award or denial of award of compensation for an occupational

disease may be reviewed and compensation increased, reduced or terminated where previously awarded, or awarded where previously denied, only upon proof of fraud or of change in the conditions, and then only upon application by a party in interest made not later than one year after the denial or award, or, where compensation has been awarded, after the date when the last payment was made under the award, except in case of silicosis where such time limit shall be two years.

**62-8-45. Agreements between employer and employee.** If the employer and employee reach an agreement in regard to the compensation under this chapter, a memorandum thereof shall be filed with the department by the employer or employee, and unless the department shall, within twenty days, notify the employer and employee of its disapproval of the agreement by registered or certified letter sent to their addresses as given in the memorandum filed, the agreement shall stand as approved and be enforceable for all purposes under the provisions of this chapter.

**62-8-47. Compensation under this chapter not additional to compensation under chapter 62-4.** The compensation provided for under this chapter is not in addition to compensation which may be payable under chapter 62-4, and in all cases where injury results by reason of an accident arising out of or in the course of employment and compensation is payable therefor under said chapter 62-4, no compensation under this chapter is payable.

## CHAPTER 9 COMPENSATION FOR PERMANENT LOSS OF HEARING

### Section

- 62-9-1.** Compensation for permanent occupational hearing loss.
- 62-9-2.** Definition of terms.
- 62-9-3.** Calculation of hearing loss -- What loss is compensable.
- 62-9-4.** Hearing loss to be determined on binaural basis -- How calculated.
- 62-9-5.** Deductions from total average decibel loss.
- 62-9-6.** Amount of compensation payable for total or partial hearing loss.
- 62-9-7.** No benefits for temporary total or partial disability or for tinnitus.
- 62-9-8.** No benefits where employee fails to regularly use employer-provided protection devices.
- 62-9-9.** What employer is liable for compensation -- Duration of exposure required for compensability.
- 62-9-10.** Liability for pre-employment and nonoccupational losses -- Loss prior to July 1, 1974.
- 62-9-11.** Effect of hearing aid use on compensation -- Provision of hearing aid by employer.
- 62-9-12.** Removal from exposure for six-month period prerequisite to filing of claim -- Limitation period applicable to claims -- How claims to be filed.
- 62-9-14.** Compensability of hearing loss caused by explosion or trauma.
- 62-9-15.** Applicability of Title 62.

**62-9-1. Compensation for permanent occupational hearing loss.** Permanent hearing loss caused by exposure to excessive occupational noise shall be compensated according to the terms and conditions of this chapter.

**62-9-2. Definition of terms.** Terms used in this chapter mean:

- (1) "Occupational loss of hearing," a permanent sensorineural loss of hearing caused by prolonged exposure to excessive noise in the working environment;
- (2) "Excessive noise," sound in the working environment capable of producing occupational loss of hearing. Sound of an intensity of less than ninety decibels, "A scale, slow response", is considered

incapable of producing occupational hearing losses as defined in this chapter. Regular exposure to the noise levels set forth below for periods less than those described for such levels does not constitute an exposure to excessive noise:

Noise Levels	Periods
A Scale, Slow Response	
90 DB	8 hours per day
92 DB	6 hours per day
95 DB	4 hours per day
97 DB	3 hours per day
100 DB	2 hours per day
105 DB	1 hour per day
110 DB	30 minutes per day
115 DB	15 minutes per day
Greater than 115 DB	No exposure recommended

**62-9-3. Calculation of hearing loss--What loss is compensable.** The percentage of hearing loss shall be calculated as the average, in decibels, of the thresholds of hearing for the frequencies of five hundred, one thousand, two thousand and three thousand cycles per second. Pure tone air conduction audiometric instruments properly calibrated according to accepted national standards such as American Standards Association, Inc. (ASA), International Standards Organization (ISO), or American National Standards Institute, Inc. (ANSI), shall be used for measuring hearing loss. If the losses of hearing average twenty-five decibels ANSI or less in the four frequencies, such losses of hearing do not constitute any compensable hearing disability. If the losses of hearing average ninety-two decibels ANSI or more in the four frequencies, then the same shall constitute and be total or one hundred percent compensable hearing loss. In measuring hearing impairment, the lowest measured losses in each of the four frequencies shall be added together and divided by four to determine the average decibel loss. For each decibel of loss exceeding twenty-five decibels, an allowance of one and one-half percent shall be made up to the maximum of one hundred percent which is reached at ninety-two decibels.

**62-9-4. Hearing loss to be determined on binaural basis--How calculated.** Permanent partial or permanent total impairment of the hearing from an occupational loss shall be determined on a binaural basis for the purposes of determining the amount of compensation payable under § 62-9-6. To determine the binaural percentage of loss, the percentage of loss as determined in § 62-9-3, if any, in the better ear shall be multiplied by five. The resulting figure shall be added to the percentage of loss determined in the same manner for the poorer ear and that sum shall be divided by six. The resulting quotient percentage shall represent the binaural hearing impairment for which compensation shall be paid according to § 62-9-6.

**62-9-5. Deductions from total average decibel loss.** Before determining the percentage of hearing impairment, in order to allow for the average hearing loss from nonoccupational causes found in the population at any given age, there shall be deducted from the total average decibel loss, one-half decibel for each year of the employee's age over forty-five years at the time of last exposure to occupational noise. Other appropriate deductions established by competent specialist opinion which exceed the foregoing allowance for presbycusis shall also be deducted.

**62-9-6. Amount of compensation payable for total or partial hearing loss.** There shall be payable

for total occupational loss of hearing under this chapter, one hundred fifty weeks of compensation. Partial occupational loss of hearing shall be in the proportion of one hundred fifty weeks as the partial loss bears to the total loss.

**62-9-7. No benefits for temporary total or partial disability or for tinnitus.** No compensation benefits are payable for temporary total or temporary partial disability under this chapter, and there may be no award for tinnitus hereunder.

**62-9-8. No benefits where employee fails to regularly use employer-provided protection devices.** No compensation benefits are payable for occupational loss of hearing caused by excessive noise if the employee fails to regularly use the employer-provided protection device or devices which are capable of preventing loss of hearing from the particular excessive noise where the employee works.

**62-9-9. What employer is liable for compensation--**Duration of exposure required for compensability. The employer liable for the compensation under this chapter is the employer in whose employment the employee was last exposed to excessive noise in this state during a period of ninety working days or parts thereof. No exposure during a period of less than ninety working days or parts thereof may be held to be an injurious exposure.

**62-9-10. Liability for pre-employment and nonoccupational losses--**Loss prior to July 1, 1974. An employer is liable for the entire occupational hearing loss to which his employment has contributed; but, if previous deafness is established by a hearing test or other competent evidence, whether or not the employee was exposed to excessive noise within six months preceding such test, the employer is not liable for previous loss so established, nor is he liable for any loss for which compensation has previously been paid or awarded. The employer is liable only for the difference between the percentage of occupational hearing loss determined as of the date of disability, and the percentage of loss established by pre-employment and audiometric examinations excluding, in any event, hearing losses arising from nonoccupational causes. Hearing loss established by hearing tests or other competent evidence to have occurred prior to July 1, 1974, is not compensable.

**62-9-11. Effect of hearing aid use on compensation--**Provision of hearing aid by employer. No reduction in an award of compensation for occupational hearing loss may be made because the ability of the employee to understand speech is improved by the use of a hearing aid. During the period of exposure to excessive noise without regard to the period of time in a noninjurious environment required before a claim may be filed, the Department of Labor and Regulation may require the employer to provide the employee with necessary hearing aids if the hearing aid will materially improve the employee's ability to understand speech.

**62-9-12. Removal from exposure for six-month period prerequisite to filing of claim--**Limitation period applicable to claims--How claims to be filed. No claim for occupational hearing loss may be filed until the employee has been removed from exposure to excessive noise for at least a period of six months. Removal from exposure occurs when an employee is transferred to a working environment free from excessive noise, or upon separation from employment. Any claim not filed within two years after the employee has been removed from the exposure to excessive noise for the six month period is forever barred. Claims under this chapter shall be filed in the same manner and under the same requirements as claims for compensation for injury or accident.

**62-9-14.** Compensability of hearing loss caused by explosion or trauma. Hearing loss caused by explosion or other trauma is not compensable under this chapter, but the rights to compensation for



such loss shall be determined under the provisions of this title for losses caused by injury or accident.

**62-9-15. Applicability of Title 62.** All provisions of this title apply to compensable occupational hearing losses except to the extent that they are inconsistent with the provisions of this chapter.

## Appendix: Additional Sections

**58-20-14. Cancellation of policy - Notice of intention to cancel - Service on employer.** No workers' compensation policy may be cancelled for nonpayment of premiums unless notice of the cancellation has been sent by mail to the employer at least ten days prior to the date of cancellation. Any policy cancelled for reasons other than nonpayment of premiums is subject to the provisions of §§ 58-33-59 to 58-33-65.1, inclusive. For any cancellation, the insurer shall provide notice to the Department of Labor at the same time notice is provided to the employer. The notice shall be served on the employer by delivering it to the employer or by sending it by mail, by registered or certified letter addressed to the employer at the employer's last known place of residence, but if the employer is a partnership, then such notice may be so given to any one of the partners, and if the employer be a corporation, then the notice may be given to any agent or officer of the corporation upon whom legal process may be served.

**58-20-21. Annual workplace safety review services - Recommendations for improved safety - Increased premiums.** Any insurer writing workers' compensation insurance in this state shall offer to conduct or contract for annual workplace safety review services, including review reports with written recommendations for improved safety procedures, to each of its insureds whose policy premium is five thousand dollars or more, unless the employer has five or fewer employees. No written recommendation prepared by an insurer pursuant to this section is subject to discovery or disclosure under chapter 15-6 or any other provision of law or admissible as evidence in any action of any kind in any court or arbitration forum. However, the recommendation may be disclosed to a subsequent insurer of the employer. Compliance with this section does not constitute an undertaking by an insurer to supplant any responsibility its insured may otherwise have for workplace safety. Any employer subject to this section shall have workplace safety reviews conducted by the employer's insurer at least once every three years. If an insurer makes a written recommendation to correct a safety deficiency pursuant to § 58-20-21, including failure to post safety posters as required by § 62-2-11, and the deficiency has not been corrected at the time of a subsequent safety review, the insured is subject to an appropriate increase in premium as determined by the insurer subject to the approval of the director. The insurer is not responsible for inspecting for compliance with federal or state safety laws or regulations.

**58-20-24. Policy to provide medical services and health care.** Effective January 1, 1995, every policy issued by any corporation, association or organization to assure the payment of compensation under the provisions of the title "Workers' Compensation" shall contain provisions to provide medical services and health care to injured workers for compensable injuries and diseases under a case management plan that meets the requirements established in rules promulgated by the Department of Labor pursuant to chapter 1-26. All policies and plans shall meet the requirements of § 58-17-54. However, the requirements of this section become effective January 1, 1994, for insurers issuing policies pursuant to § 58-20-15.

**58-20-25. Terms as used in §§ 58-20-25 to 58-20-40.** Terms used in §§ 58-20-25 to 58-20-40, inclusive, mean:

- (1) "Administrator," a person, partnership, limited liability company or corporation engaged by a workers' compensation self-insurance association to carry out the policies established by the association and to provide management for the association;
- (2) "Association," a not-for-profit workers' compensation self-insurance association consisting of two or more employers which are electric utilities, or an electric utility trade association, which enter into

agreements to pool their liabilities for workers' compensation benefits in this state;

(3) "Certificate," a workers' compensation self-insurance certificate issued by the department in accordance with §§ 58-20-25 to 58-20-40, inclusive;

(4) "Department," the South Dakota Department of Labor;

(5) "Insolvency," the inability of an association to pay its outstanding lawful obligations as they mature in the regular course of business, as may be shown either by an excess of its required reserves and other liabilities over its assets, or by its not having sufficient assets to reinsure all of its outstanding liabilities after paying all accrued claims owed by it; and

(6) "Workers' compensation liability," liability to which an electric utility company is subject as an employer under the South Dakota workers' compensation law.

**58-20-26. Electric utilities authorized to form self-insurance associations.** Any two or more electric utility employers or their trade associations may form an association for the purpose of providing to members group self-insurance to protect members against losses arising from workers' compensation liability.

**58-20-27. Application for self-insurance association - Form.** An association proposing to self-insure its workers' compensation liability shall apply to the department for the authority to self-insure, using forms available from the department. The application shall include:

(1) The association's name;

(2) The location and mailing address of the association's principal office and where its books and records are kept;

(3) The name and address of each member of the association;

(4) A copy of the bylaws or plan of operation adopted by the association;

(5) Proof of compliance with § 58-20-28;

(6) A sample copy of the agreement between the association and the members securing the payment of each member's workers' compensation liability;

(7) A pro forma financial statement, on a form acceptable to the department, showing the financial ability of the association to pay the workers' compensation liability of its members; and

(8) The required application fee.

**58-20-28. Requirements to obtain self-insurance certificate.** To obtain and maintain its certificate an association shall:

(1) Have sufficient assets, net worth, and liquidity to promptly meet all obligations of the association's members under §§ 58-20-25 to 58-20-40, inclusive, and their workers' compensation liability. In determining whether an association is in sound financial condition, consideration shall be given to the combined net worth of the member companies; the combined long-term and short-term debt to equity ratios of the member companies; other financial data requested by the department or submitted by the group; and the combined workers' compensation experience of the group for the last three years;

(2) Furnish to the department security in the form of a bond, cash, certificate of deposit, government securities, irrevocable letter of credit, irrevocable trust, in any combination, in an amount equal to the greater of:

(a) Two hundred fifty thousand dollars; or

(b) Twenty-five percent of the association's preceding year's gross annual assessments to its members;

(3) Obtain specific and aggregate excess insurance by an insurance company licensed to conduct business in South Dakota; and

(4) Maintain an indemnity agreement jointly and severally binding the association and each member of the association to meet the workers' compensation liability of each member.

**58-20-29. Granting self-insurance application - Revocation.** The department shall grant or deny the association's application to self-insure within sixty days after a complete application has been filed. However, the time may be extended for an additional thirty days upon fifteen days' prior notice to the applicant. The department shall grant a certificate upon a determination that the association has complied with the requirements of §§ 58-20-25 to 58-20-40, inclusive, or the department shall issue an order denying a certificate setting forth the reasons for such refusal. Approval of the certificate shall remain effective until voluntarily terminated by the request of the association pursuant to § 58-20-33 or revoked by order of the department. A certificate may be revoked by the department if the association has failed to comply with §§ 58-20-25 to 58-20-40, inclusive, rules promulgated hereunder, or for a violation of § 58-20-38. If issued by the department, a certificate authorizes the association to provide workers' compensation benefits and establishes compliance by the association's members with § 62-5-1.

**58-20-30. Examination of self-insurance association's activities and records.** The department may examine the affairs, transactions, accounts, records, assets, and liabilities of any association created under §§ 58-20-25 to 58-20-40, inclusive, as deemed reasonably necessary.

**58-20-31. Promulgation of rules governing self-insurance associations.** The department may promulgate rules governing associations pursuant to chapter 1-26 concerning:

- (1) Application, financial, annual reports, or other forms to be created by the department under §§ 58-20-25 to 58-20-40, inclusive;
- (2) Financial requirements of the department for approving and maintaining a certificate;
- (3) Requiring an application fee not to exceed two thousand dollars; and
- (4) Requiring the association to process and act upon claims in accordance with the guidelines applicable for domestic insurance companies.

**58-20-32. Voluntary termination of participation in self-insurance association.** A member may voluntarily terminate its participation in an association by giving written notice to the other members of the association and the department at least ninety days before the desired termination date. The voluntary termination shall be approved by the department if it finds that the terminating member and the remaining members of the association are in good standing and have met all requirements of §§ 58-20-25 to 58-20-40, inclusive.

**58-20-33. Involuntary termination of membership in self-insurance association.** A member may be involuntarily terminated as a member of the association if the department finds, after due notice and hearing, that the member:

- (1) Has failed to pay any contribution or assessment due to the association;
- (2) Has failed to comply with §§ 58-20-25 to 58-20-40, inclusive, or the rules promulgated pursuant to §§ 58-20-25 to 58-20-40, inclusive; or
- (3) Has failed to comply with the bylaws, loss control policies or discharge any other obligation it owes to the association.

A hearing may be initiated by the department on its own initiative or upon the request of the association's board of directors.

**58-20-34. Liability for contractual obligations subsequent to termination in self-insurance association.** Any member who voluntarily terminates its membership in the association, or who is involuntarily terminated as a member of the association, shall nevertheless remain liable subsequent to the date of termination for all contractual obligations it entered into with the association during its membership in the association.

**58-20-35. Annual report of affairs of self-insurance associations.** Each year after an association has been granted a certificate, the association shall file with the department an annual report of its affairs and operations during the last preceding calendar year. The report shall be made in such form and shall contain such information as the department may require in order to protect the public interest and the interests of the members of the association. An association shall provide a copy of its last fiscal year CPA audit of its operations to the department if requested.

**58-20-36. Dissolution of self-insurance association to be approved by department.** No association may be voluntarily dissolved or otherwise cease to function without written approval by the department after the department has determined that all claims and other legal obligations of the association have been paid or that adequate provisions for such payment have been made.

**58-20-37. Deficiency of self-insurance associations made up by members.** If the assets of an association are at any time insufficient to enable the association to discharge its liabilities and obligations, the association's members shall make up the deficiency or the department may order the association to levy an assessment upon its members in an amount necessary to make up the deficiency.

**58-20-38. Revocation of self-insurance association's certificate.** If an association fails to make up a deficiency or to make the required assessment of its members pursuant to § 58-20-37 within thirty days after the department orders it to do so, or if the deficiency is not fully made up within sixty days after the date on which the assessment is made, or within a longer period of time as may be specified by the department, the department shall revoke the association's certificate.

**58-20-39. Self-insurance association not an insurance company.** Notwithstanding any other provision of law to the contrary, any association organized pursuant to §§ 58-20-25 to 58-20-40, inclusive, is not an insurance company or insurer under the laws of this state; any agreement forming an association does not constitute insurance or the conduct of an insurance business; and no association organized pursuant to §§ 58-20-25 to 58-20-40, inclusive, may be a member of the South Dakota Insurance Guaranty Association.

**58-20-40. Proceedings or investigations by department.** The provisions of chapter 1-26 govern all proceedings or investigations of the department pursuant to §§ 58-20-25 to 58-20-40, inclusive.

**28-1-59. Injury, disease, or death of work activity participant - Eligibility for medical and disability benefits.** A recipient of public assistance who incurs permanent partial disability, permanent total disability, death, or disease in the course of participation in a work activity is entitled to the same benefits as are set forth for work related injuries and diseases in Title 62. This provision does not include payment of medical expenses unless those expenses are necessitated by a permanent disability or disease. Eligibility for other public funded medical benefits shall reduce entitlement to medical benefits under this section accordingly. In order to receive the above-referenced disability benefits, a work activity participant must comply with all of the employee notice, reporting, and medical examination requirements set forth in Title 62. The initial report of injury shall be submitted by the work activity participant in writing to the Department of Social Services.

**36-21A-124. Employment status - Independent contractor.** For purposes of determining employment status, any broker, broker associate, and salesperson who is a natural person and licensed under this chapter is engaged in an independently established profession. Any such licensee is an independent contractor if:

(1) The licensed broker with whom the licensee is affiliated does not specify by other than general

policy the time, method, and location of the licensee's services; and

(2) The licensed broker with whom the licensee is affiliated compensates the licensee on the basis of work performed without withholding and remitting federal income and social security taxes; and

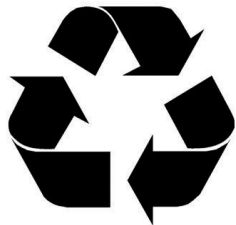
(3) The licensed broker with whom the licensee is affiliated provides only incidental supplies, equipment, and facilities, while the licensee assumes responsibility for vehicular, educational, and other significant professionally related expenses; and

(4) Either party to the relationship may terminate it at will and without liability.



inside back cover  
(blank)





**Printed on Recycled Paper**

2,000 copies of this document were printed by the SD Department of Labor and Regulation at a cost of 30 cents per document

Auxiliary aids and services are available upon request to individuals with disabilities. State and federal laws require the Department of Labor and Regulation to provide services to all qualified persons without regard to race, color, creed, religion, age, sex, ancestry, political affiliation or belief, national origin or disability.