

## SOUTH DAKOTA

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### 1. Citation for the state's workers' compensation statute

South Dakota Codified Laws ("SDCL"), Title 62.

### SCOPE OF COMPENSABILITY

#### 2. Who are covered "employees" for purposes of workers' compensation?

Generally, an employee is every person, including a minor, in the services of another under any contract of employment, express or implied with exceptions for elected officers of state or subdivision of government unless the governing body elects to treat these officials as employees, domestic servants working less than 20 hours in any calendar week and for more than six weeks in any thirteen week period and farm or agricultural laborers or workfare participants. Additionally country high superintendents, deputy sheriffs, constables, marshals, policemen, and firemen are all deemed employees. Other specific employees with varying degrees of coverage include vocational students, volunteers of the state or its subdivisions, volunteer firemen, conservation officers, and officers of corporations. Each can be considered an employee if certain statutory requirements are met. SDCL §§ 62-1-3, 62-1-4, 62-1-4.1, 62-1-5, 62-1-5.1, 62-1-6, 62-1-7, 62-1-8, 62-3-15.

A person who offers services voluntarily and gratuitously is acting outside the course of his employment, and injuries sustained in the course of such activity are not compensable. *Woodcock v. City of Lake Preston*, 2005 SD 95, 704 N.W.2d 32.

#### 3. Identify and describe any "statutory employer" provision.

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. SDCL § 62-1-2. A principal, intermediate, or subcontractor is liable for compensation for any employee of one of its subcontractors to the same extent as the immediate employer. If a principal or intermediate contractor carries workers' compensation insurance for employees of subcontractors and, if the employee collects benefits from one of the employers, the employee is barred from recovering benefits from any other employers along the chain. SDCL § 62-3-10. The employers are further exempt from civil suit brought by that employee. See *Metzger v. J.F. Brunten & Son, Inc.*, 84 S.D. 168, 169, 177 N.W.2d 261 (1969).

4. What types of injuries are covered and what is the standard of proof for each:

A. Traumatic or "single occurrence".

South Dakota has eliminated the "by accident" requirement. The standard for injuries occurring prior to July 1, 1995, is whether the employment was a "contributing factor" to the condition or injury. *Zacher v. Homestake Mining Co.*, 514 N.W.2d 394, 395 (S.D. 1994); *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 358 (S.D. 1992). Evidence of an unusual exertion was not required. *Kirnan v. Dakota Midland Hospital*, 331 N.W.2d 72, 74 (S.D. 1983).

South Dakota has a three pronged definition of injury: An injury is compensable when it is established by medical evidence that (1) the employment or employment related activities are a "major contributing cause" of the condition complained of; or (2) 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; or (3) if the injury combines with a preexisting work related compensable injury, disability or need for treatment, the subsequent injury is compensable if the subsequent employment or employment related activities contributed independently to the disability, impairment, or need for treatment. SDCL § 62-1-1(7)(a)(b)(c); *Grauel v. South Dakota School of Mines & Technology*, 2000 SD 145; *Byrum v. Dakota Wellness Foundation*, 2002 SD 141, 654 NW2d 215. Required proof is by a preponderance of the evidence. *Gordon v. St. Mary's Health Care Center*, 617 N.W.2d 151 (S.D. 2000).

B. Occupational disease (including respiratory and repetitive use).

Repetitive use is not considered an occupational disease but an injury. *Arends v. Dakotah Cement*, 2002 S.D. 57, 645 NW2d 583. Occupational disease requires proof of total incapacity from performing work in the last occupation where the individual was injuriously exposed to the hazards of the disease. SDCL § 62-8-1(3), (6); *Sauer v. Tiffany Laundry & Dry Cleaners*, 2001 S.D. 24, 622 N.W.2d 741,743. To be an occupational disease the injury must be caused by a distinctive feature of the claimant's occupation, not by an environmental condition of the claimant's work place. *Sauder v. Parkview Care Center*, 2007 S.D. 103, 740 N.W.2d 878, 885.

For purposes of worker's compensation, an injury, rather than occupational disease may occur when a pre-existing disease makes an employee more susceptible to a work related injury. *St. Luke's Midland Regional Medical Care v. Kennedy*, 2002 S.D. 137, ¶ 17, 653 N.W.2d 880, 884-885. Unless a condition is intrinsic to an occupation, a worker's compensation claimant does not suffer

from an occupational disease. SDCL § 62-8-1(6). Occupational disease must be attributable to conditions particular to an occupation rather than conditions coincidental to a work place. *Id.*

“Those seeking compensation for an occupational disease must prove: (1) they suffer from an occupational disease as defined by SDCL 62-8-1(6); (2) they are disabled from performing work in the last occupation in which they were injuriously to the hazard of such disease; and (3) the disease is ‘due to the nature of [the] occupation or process’ in which they were employed before their disablement.” *Sauer v. Tiffany Laundry and Dry Cleaners*, 2001 SD 24, ¶ 9, 622 N.W.2d 741, 744.

#### 5. What, if any, injuries or claims are excluded?

Mental disabilities arising from emotional, mental or nonphysical stress or stimuli are not compensable. SDCL § 62-1-1(7)(c); *Lather v. Huron College*, 413 N.W.2d 369 (S.D. 1987). Injury is defined as only injury arising out of and in the course of the employment, and does not include a disease in any form except as it shall result from the injury. SDCL § 62-1-1(7). 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. *Id.* at (c). See answer 9 for defenses.

South Dakota worker’s compensation law is remedial in nature and construed liberally to effectuate its purpose. *Lather v. Huron College*, 413 N.W.2d 369, 371 (SD 1987). Worker’s compensation is not intended to be health, accident, and old age insurance and spread general protection over risk, to all and arising out of and in the course of employment. *Id.* Only injuries arising out of and in the course of employment are compensable. *Id.*

#### 6. What psychiatric claims or treatments are compensable?

Mental disabilities arising from emotional, mental or nonphysical stress or stimuli are not compensable. SDCL § 62-1-1(7); *Lather v. Huron College*, 413 N.W.2d 369 (S.D. 1987). Psychiatric claims resulting from physical injury are compensable. *Everingim v. Good Samaritan Center*, 1996 SD 104, 522 N.W.2d 837, 838. As of July 1, 1999, mental injuries are 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. SDCL 62-1-1(7).

Mental and emotional claims that are a result of occurrences that are not within the scope of the stress or strain of daily living are compensable. *Everingim v. Good Samaritan Center*, 1996 SD 104, 522 N.W.2d 837, 842. When there has been a physical accident or trauma, and Claimant’s disability is increased or prolonged by traumatic neurosis, conversion hysteria, or hysterical

paralysis, it is now uniformly held that the full disability including the effects of the neurosis is compensable. *Gilchrist v. Trail King Industries, Inc.*, 2000 SD 68, 612 N.W.2d 1, 6.

South Dakota recognizes compensability for both mental-physical and physical-mental injuries but does not allow compensation for injuries in the mental-mental category. *Benson v. Goble*, 1999 SD 38, 593 N.W.2d 402, 405. To be included in the physical-mental category there must have been a physical touching sufficient to become a physical trauma which caused the mental injury. It is not necessary that an organic injury resulted in order to find a compensable injury.

#### **7. What are the applicable statutes of limitations?**

For an injury, two years from the date the employer/insurer notifies the employee and the South Dakota Department of Labor, in writing, of the denial of a claim, in whole or in part. SDCL § 62-7-35. The right to compensation is also barred if no medical treatment has been obtained within seven years after the employee files the first report of injury. SDCL § 62-7-35.3. For an occupational disease, a claim must be filed with the South Dakota Department of Labor within two years from date of disability or death (SDCL § 62-8-11), and with the employer within 6 months after ceasing employment. §§ 62-8-13, 62-8-29 to 32. In any case in which benefits have been paid but no written denial issued, any claim for additional benefits must be filed within three years from the date of last payment of benefits. SDCL § 62-7-35.1.

#### **8. What are the reporting and notice requirements for those alleging an injury?**

An employee must provide written notice of an injury within three business days. Failure to give notice within that time prohibits a claim unless the employee 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 injury and the employee had good cause for failing to give written notice within the three business days, which determination shall be liberally construed in favor of the employee. SDCL § 62-7-10; *Gordon v. St. Mary's Healthcare Center*, 2000 SD 130, 617 N.W.2d 151, 157.

For an occupational disease, written notice of a claim must be provided within six months after the employment ceased in which it is claimed that the disease was contracted. SDCL § 62-8-29. Written notice is required of an occupational disease. Actual or constructive notice is not sufficient for occupational disease. *Heupel v. Imprimis Technology, Inc.*, 473 N.W.2d 464 (S.D. 1991).

#### **9. Describe available defenses based on employee's conduct:**

**A. Self-inflicted injury.**

No compensation is 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, willful failure or refusal to use a safety appliance furnished by the employer, or perform a duty required by statute. SDCL § 62-4-37. The burden of proof is on the employer to prove such conduct was the proximate cause of the injury. *Driscoll v. Great Plains Marketing Corp.*, 322 N.W.2d 478, 479 (S.D. 1982).

"A four-part test is used to determine whether an employee's violation of workplace safety rules constitutes willful misconduct.... The four-part test requires that:

- 1) the employee must have actual knowledge of the rule or appliance and its purpose;
- 2) the employee must have an actual understanding of the danger involved in the violation of the rule or failure to use the appliance;
- 3) the role or use of the appliance must be kept alive by bona fide enforcement by the employer; and,
- 4) the employee had no valid excuse for violating the rule or failing to use the appliance."

*Holscher v. Valley Queen Cheese Factory*, 2006 SD 35, 713 N.W.2d 555, 568-569.

**B. Willful misconduct, "horseplay," etc.**

See answer 9A regarding willful misconduct. Horseplay requires a four factor analysis: (1) extent and seriousness of the deviation; (2) completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty); (3) extent to which the practice of horseplay had become an accepted part of the employment; and (4) extent to which the nature of the employment may be expected to include some such horseplay. *Phillips v. John Morrell & Company*, 484 N.W.2d 527, 530 (S.D. 1992).

**C. Injuries involving drugs and/or alcohol.**

Employer must prove that the use of illegal drugs or alcohol was a substantial factor in causing the accident or injury. *Goebel v. Warner Transportation*, 2000 SD 79, 612 N.W.2d 18, 22.

**10. What, if any, penalties or remedies are available in claims involving fraud?**

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

An employer, insurer or fellow employee may submit a written request to the Department of Labor to terminate, modify or temporarily stop payments to a claimant because they have reason to believe the claim has been paid under fraudulent conditions or that the injury did not arise out of or in the course of employment. Upon receipt of the request, the Department shall order an investigation by the insurer, which is to be completed within ninety days after receipt of the order. After a contested case hearing conducted pursuant to S.D. Codified Laws chapter 1-26, the Department may order the claimant's payments continued, modified, or terminated. If the Department has reason to believe criminal insurance fraud has been committed, it shall disclose its information to law enforcement. SDCL §§ 62-4-47, 62-4-48.

Additionally, in worker's compensation proceedings if the trier of fact believes any person testifying has knowingly sworn falsely to any material fact, the finder of fact may reject all of the testimony of that witness. SDCL § 62-7-40.

**11. Is there any defense for falsification of employment records regarding medical history?**

A false representation as to physical condition or health made by an employee in procuring employment precludes benefits for an otherwise compensable injury if it is shown that the employee intentionally and willfully made such a representation, the employer substantially and justifiably relied on it in hiring the employee, and a causal relationship existed between the representation and the injury. The burden is on the employer to prove each element. SDCL § 62-4-46.

**12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?**

Generally, yes if on the employer's premises. *Bender v. Dakota Resorts Management Group, Inc.*, 2005 SD 81, ¶ 14, 700 N.W.2d 739, 744. If off the employer's premises, factors to be considered include whether attendance is mandatory and what type of benefit the employer derives other than general employee morale.

**13. Are injuries by co-employees compensable?**

Generally, yes, assuming the injury arose out of and in the course of employment.

**14. Are acts by third parties unrelated to work but committed on the premises, compensable (e.g. "irate paramour" claims)?**

Generally, when an injury occurs as the result of a private and personal matter in which the employment contributed nothing to the episode, the injury is noncompensable. Mere presence at one's place of employment, isolating one from one's family members and thus increasing the chances of injury does not constitute 'contribution' such to make the injury compensable. *Voeller v. HSBC Card Services, Inc.*, 2013 S.D. 50, ¶¶ 16, 21, 834 N.W.2d 839, 847-848. The injury may be compensable if employment contributed to assault. *Id.* An employer is considered to contribute to the assault when the employment engendered, exacerbated or facilitated the assault. *Id.*

## BENEFITS

**15. What criterion is used for calculating the average weekly wage?**

The method of calculation varies according to type of work and length of employment. Generally, total earnings divided by 52, or total earnings divided by the number of weeks actually worked unless such calculation produces an unfair or inequitable result, then the average amount earned by employees in similar grade or occupation divided by 52. If neither of the above applies, multiply average day's earnings by 300 and divide by 52. For seasonal employees: multiply average day's earnings by the number of days it is customary to work, but not less than 200, and then divide by 52. SDCL §§ 62-4-24 through 62-4-28.

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. SDCL § 62-1-24. For claims arising after May 6, 2015 the average weekly wage is calculated by using 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 injury. SDCL § 62-1-25. Aggregation of wages is only permitted, however, where the employee was actively engaged in the concurrent employment and the injury affects the employee's job duties at the concurrent employment. *Id.*

**16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?**

Sixty-six and two-thirds percent of the employee's earnings, but not more than the state maximum. If sixty-six and two-thirds percent is less than the state minimum, the minimum is paid. If the entire wage is less than the state minimum, the amount of compensation is the average weekly wage of the employee, less deductions for federal or state taxes or both, and for the FICA made from such employee's total wages received during the period of calculation of the employee's earnings. State maximums and minimums are revised each July 1 and are effective July 1 to June 30. SDCL § 62-4-3.

**17. How long does the employer/insurer have to begin temporary benefits from the date disability begins?**

No compensation is due until the employee has been incapacitated for a period of at least seven consecutive days. If the incapacity extends beyond seven consecutive days, compensation is computed from the date of injury. SDCL 62-4-2. Failure to pay within 10 days on which payment is due shall result in an automatic penalty equal to 10 percent of the unpaid compensation. SDCL § 62-4-10.1.

**18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out \_\_\_\_\_ day(s) before recovering benefits for the first \_\_\_\_\_ days)?**

See No. 17. The employee must be incapacitated for a period of seven consecutive days. If the waiting period is met, benefits are paid from the date of the injury. SDCL § 62-4-2.

**19. What is the standard/procedure for terminating temporary benefits?**

Temporary benefits are paid until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first. SDCL § 62-1-1(8). 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. SDCL § 62-1-1(2). Generally speaking, entitlement to temporary benefits ceases when an impairment rating is given or when an employee returns to his usual and customary employment. At that time, the employee may be entitled to permanent partial disability benefits.

No specific form or request or permission is needed to terminate temporary disability benefits.

Temporary partial disability benefits are calculated as follows: If, after an injury, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if released by a physician from temporary total disability and not yet been given an impairment rating, the employee shall receive compensation, subject to the maximum compensation rate, equal to one-half the difference between the average amount earned before the accident, and the average amount earned 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 temporary total disability rate. However, in no event may the total amount received be less than the amount the employee was receiving for temporary total disability, unless the claimant refuses suitable employment. SDCL § 62-4-5.

**20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?**

No. See Answer 19, in which procedure for computing permanent partial disability is explained. SDCL §§ 62-4-6(24) and 62-1-1.2 do not provide that temporary total disability be credited toward amount to be paid for permanent partial disability. See *Cantalope v. Veterans of Foreign Wars Club of Eureka*, 2004 S.D. 4, 674 N.W.2d 329.

**21. What disfigurement benefits are available and how are they calculated?**

Benefits are payable equal to that portion of 312 weeks which is represented by the percentage such permanent disfigurement bears to the body as a whole. SDCL § 62-4-6(24). However, benefits are not payable for both disfigurement and a medical impairment rating to the same body part, only the medical impairment rating is paid.

**22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?**

Permanent partial disability benefits vary in accord with the date of injury. However, every calculation includes consideration of an impairment rating. Impairment is determined by a medical impairment rating using the Guides to the Evaluation of Permanent Impairment established by the American Medical Association. SDCL 62-1-1.2. The specific edition of the Guides to be used is stated in SDCL 62-1-1.2 and periodically changes when new additions are generated. However, as benefits in South Dakota are determined as of the date of injury, the applicable edition of the AMA Guides may not be the most recent version.

**A. How many weeks are available for scheduled members/parts, and the standard for recovery?**

<u>Body Part</u>	<u>Number of Weeks</u>
Loss of Thumb	50
First Finger (Index)	35
Second Finger (Middle)	30
Third Finger (Ring)	20
Fourth Finger (Little)	15
Great Toe	30
<b><u>Other Toes</u></b>	<b><u>10</u></b>
Hand	150
Arm	200

(If arm is amputated below elbow, but a prosthesis can be utilized, then considered loss of a hand.)

Foot	125
Leg	160

(If amputation is below the knee, but a prosthesis can be utilized, then considered loss of a foot.)

Eye	150
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One Ear	50
Both Ears	150
Back	312

Where the loss of use is partial and permanent, the compensation shall bear such relation to the maximum amount for complete and permanent loss of use as the partial loss of use bears to the complete loss of use. SDCL § 62-4-6.

**B. Number of weeks for "whole person" and standard for recovery.**

For permanent disfigurement or disability resulting from injury to any part of the body not listed, compensation for that portion of 312 weeks which is represented by the percentage that such permanent partial disability or permanent disfigurement bears to the body as a whole. SDCL § 62-4-6.

**23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?**

Five requirements must be met for rehabilitation benefits: (1) the employee must be unable to return to the usual and customary line of employment; (2) rehabilitation must be necessary to restore the employee to suitable, substantial and gainful employment; (3) the program of rehabilitation must be a reasonable means of restoring the employee to employment; (4) the employee must file a claim requesting the benefits; and (5) the employee must actually pursue the reasonable program of rehabilitation. SDCL § 62-4-5.1; *Cozine v. Midwest Coast Transport Inc.*, 454 N.W.2d 548 (S.D. 1990). Benefits are paid at the temporary total rate during the program of rehabilitation and for up to sixty days prior to actually becoming involved in a program if and when the employee is actively preparing to engage in a program as shown by a certificate of enrollment. SDCL § 62-4-5.1. Certain relevant terms, such as "usual and customary line of employment" and "suitable, substantial and gainful employment" have been defined by statute. See SDCL §§ 62-4-54, 62-4-55.

**24. How are permanent total disability benefits calculated, including the minimum and maximum rates?**

An employee is considered permanently and totally disabled, by statute and without regard for the physical ability to return to work, for 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. SDCL § 62-4-6(23).

An employee also may be permanently and totally disabled under the “odd-lot doctrine” if his physical condition, in combination with his age, training, and experience, and the type of work available in the community, cause him to be unable to secure anything more than sporadic employment resulting in an insubstantial income. SDCL § 62-4-53. The terms "community" and "sporadic employment resulting in an insubstantial income" are specifically defined by statute. SDCL § 62-4-52. The employee has the burden to make a prima facie case of total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant in the community. Other evidentiary requirements are also established by statute. SDCL § 62-4-53.

Permanent total disability benefits are paid for the life of the worker at the temporary total disability rate, with cost of living increases up to 3% per year for injuries occurring after July 1, 1988. For injuries occurring on or after July 1, 1993, there is an offset for social security retirement benefits as follows: 150% of the temporary total disability rate less the retirement benefits. In no event will the compensation benefits ever exceed the temporary total disability rate. SDCL § 62-4-7.

**25. How are death benefits calculated, including the minimum and maximum rates?**

**A. Funeral expenses.**

The Employer must pay for burial expense and headstone up to \$10,000.00. SDCL § 62-4-16. In addition, if death occurred outside the community where the employee lived, the employer is required to pay the cost of transportation of the body home. SDCL § 62-4-16.

**B. Dependency claims.**

Benefits are paid, at the temporary total disability rate, to the surviving spouse or dependents for the life of the spouse, unless the spouse remarries. Upon remarriage of the surviving spouse, payments to the eligible child or children may not commence until the expiration of two years from the date of remarriage. SDCL § 62-4-22.

**26. What are the criteria for establishing a "second injury" fund recovery?**

The Subsequent Injury Fund was abolished as of July 1, 1999. SDCL § 62-4-34.7 (1999 Supp.). However it was reenacted in 2001 to cover all injuries occurring prior to July 1, 2001. *Id.*

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

Either party can request a review due to a change in condition by filing a written petition. The Department of Labor can then end, diminish, or increase amounts if it finds that a change in condition warrants such action. The "change of condition" must be physical; an economic change is insufficient. SDCL § 62-7-33. The change of condition must be causally connected to the original complaint of injury and must have been unforeseeable at the time of settlement. *Kasuske v. Farwell, Ozmun, Kirk & Co.*, 2006 SD 14, 710 N.W.2d 451. 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. SDCL § 62-7-35.1.

28. What situation would place responsibility on the employer to pay an employee's attorney fees?

The employer can be required to pay where it is found that the refusal to pay benefits was vexatious or unreasonable. SDCL § 58-12-3. This determination is made in a separate hearing after the issues have been decided by the Department of Labor. SDCL § 58-12-3.1.

#### EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Worker's compensation is the exclusive remedy for injury or death against the employer, or any employee, partner, officer or director of such employer, except for rights and remedies arising from intentional tort. SDCL §§ 62-3-2, 62-3-3.

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

The intentional tort exception is very difficult to prove. The worker must allege facts that plausibly demonstrate an actual intent by the employer to injure or a substantial certainty that injury will

be the inevitable outcome of the employer's conduct. Substantial certainly is not to be equated with substantial likelihood, i.e., that an injury is probable. *Fryer v. Krantz*, 2000 SD 125, 616 N.W.2d 102, 109; *Harn v. Continental Lumber Co.*, 506 N.W.2d 91, 95-96 (S.D. 1993); *Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370, 372 (S.D. 1991). South Dakota has refused to allow a direct action against the employer under the dual capacity doctrine. *VerBouwens v. Hamm Wood Products*, 334 N.W.2d 874 (S.D. 1983), overruled by *Holscher v. Valley Queen Cheese Factory*, 2006 S.D. 35, 713 N.W.2d 66 on other grounds.

“[A] general contractor who is liable for worker’s compensation benefits is entitled to immunity but a subcontractor who is liable for the benefits is not entitled to such immunity.” *Thompson v. Mehlhaff*, 2005 S.D. 69, ¶ 19, 698 N.W.2d 512, 519. SDCL 62-3-2 operates as an exclusionary provision which prevents claims against fellow employees for injuries obtained in the scope of employment even when the employer does not operate under South Dakota worker’s compensation law. *Canal Ins. Co. v. Abraham*, 1999 SD 90, ¶ 22, 598 N.W.2d 513, 518.

**30. Are there any penalties against the employer for unsafe working conditions?**

Allegations of an unsafe workplace are not sufficient to establish a claim for intentional tort. *Shearer v. Homestake Mining Co.*, 557 F.Supp. 549 (D.S.D. 1983), *aff'd*, 727 F.2d 707 (8th Cir. 1984); *McMillin v. Mueller*, 695 N.W.2d 217, 2005 SD 41; *Fryer v. Krantz*, 616 N.W.2d 102 (S.D. 2000); SDCL § 58-20-21. All insurers writing worker's compensation insurance shall offer to conduct, or contract for, annual workplace safety review services, including review reports with written recommendations for improved safety procedures if the premium is \$5,000.00 or more. The insurer is not responsible for inspecting for compliance with federal or state safety laws or regulations. SDCL § 58-20-21. Employers are required to display informational postings promoting safety in the workplace in visible locations throughout the business premises. SDCL § 62-2-11.

**31. What penalty, if any, for an injured minor?**

No penalty provided for by statute. Law allows minor-employees to compensation under Title 62. SDCL § 62-1-3.

**32. What is the potential exposure for "bad faith" claims handling?**

South Dakota recognized a cause of action for bad faith in *Champion v. United States Fidelity & Guaranty Co.*, 399 N.W.2d 320 (S.D. 1987). The South Dakota Supreme Court adopted a two-prong test: (1) there must be an absence of a reasonable basis for denial of benefits; and (2)

knowledge or reckless disregard of a reasonable basis for denial. Implicit in that test is the conclusion that the knowledge of the lack of a reasonable basis may be inferred and imputed to an insurer where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured. Under these tests, an insurer may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to pay) a claim without a reasonable basis. This is a separate cause of action and the employer/insurer are not protected by exclusivity. Potential exposure includes punitive damages.

**33. What is the exposure for terminating an employee who has been injured?**

An employer may be civilly liable for wrongful discharge if it terminates an employee in retaliation for filing a lawful worker's compensation claim. SDCL § 62-1-16. A similar exception to the state's employment at will doctrine was recognized in *Niesent v. Homestake Mining Co.*, 505 N.W.2d 781 (S.D. 1993).

### THIRD PARTY ACTIONS

**34. Can third parties be sued by the employee?**

Subject to employer's rights to subrogation and statute barring double recovery, an employee may choose to proceed against third party so long as employee can prove that third party caused additional injury. See *Thompson v. Mehlhaff*, 2005 S.D. 69, 698 N.W. 2d 512; *National Farmers Union Property & Cas. Co. v. Bang*, 516 N.W.2d 313 (S.D. 1994).

**35. Can co-employees be sued for work-related injuries?**

No, co-employees are protected by the exclusive remedy provision except with regard to intentional torts and negligence subject to the employers right to subrogation paid to the employee. SDCL § 62-3-2; *Thompson v. Mehlhaff*, 2005 SD 69, 698 N.W.2d 512. See answer 29A.

**36. Is subrogation available?**

If the employee has received compensation and then recovers from the third party, the insurer may recover from the employee all benefits paid less the necessary and reasonable expense of

collecting the award, which expenses may include an attorney's fee not in excess of thirty-five percent of the compensation paid. SDCL §§ 62-4-38, 62-4-39. The employer has a first lien against the proceeds of a third-party recovery, subject to attorney fees. *Zoss v. Dakota Truck Underwriters*, 1998 S.D. 23, 575 N.W.2d 258; *Liberty Mutual Insurance Co. v. Garry*, 1998 SD 22, 574 N.W.2d 895. The lien applies to all damages awarded, including pain and suffering, but not for a spouse's loss of consortium. See *Zoss*. If the employee elects not to proceed against the third party, the employer may do so either in the employee's name or its own. If a recovery is made in excess of the compensation paid, the excess shall be held for the benefit of the employee, less a proportionate share of expenses, subject to the approval of the Department of Labor. SDCL § 62-4-40.

### MEDICALS

**37. Is there a time limit for medical bills to be paid, and are penalties available for late payment?**

The employer is subject to interest charges incurred on unpaid medical bills. In addition, there is an automatic penalty of 10% of the unpaid amount if payment is not made within 10 days from date it is due. SDCL § 62-4-10.1.

**38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?**

A medical practitioner treating an employee shall furnish a report of the injury and treatment to the employer and the Department of Labor within fourteen days following the first treatment. Thereafter, if the employee needs continued medical care or claims to be disabled from his employment, the medical practitioner shall provide status reports to the employer and the Department of Labor at no less than 30-day intervals. All medical and hospital information relevant to the particular injury shall, on demand, be made available to the employer, employee, insurer and the Department of Labor. No relevant information developed in connection with treatment or examination for which compensation is sought may be considered a privileged communication. If a medical practitioner willfully fails to make any report required of him, the Department of Labor may order the forfeiture of his right to all or part of payment due for services rendered. SDCL §§ 62-4-44, 62-4-45. The Department of Labor has, in contested cases, entered orders compelling a claimant to execute an authorization for release of medical records.

**39. What is the rule on (a) Claimant's choice of physician; and (b) Employer's right to a second opinion and/or Independent Medical Examination?**



**A. Claimant's choice of physician.**

The initial choice of physician is the employee's. SDCL 62-4-43. The employee is required to advise the employer in writing, either prior to an injury or within a reasonable time thereafter, of the selected physician. If the employee later seeks to change the choice of physician, written approval must be obtained from the employer/insurer. However, SDCL 58-20-24 mandates that all worker's compensation policies contain provisions to provide medical services and health care to injured workers for compensable injuries and diseases under a case management plan. The Department of Labor has issued administrative rules governing case management plans which address medical referrals and review of treatment. ARSD 47:03.

**B. Employer's right to a second opinion and/or Independent Medical Examination.**

The insurer retains the right to have the employee examined by a physician of its choosing as soon as practicable after the injury, again one week later, and then not more often than once every four weeks. SDCL § 62-7-1.

**40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?**

The employer is required to provide necessary first aid, medical, surgical and hospital services or other suitable care including medical and surgical supplies, apparatus, artificial members and body aids during the disability. SDCL § 62-4-1. Once the physician has been selected or acquiesced to, the employer has no authority to approve or disapprove the treatment rendered and if a disagreement arises it is the employer's burden to show the treatment was not necessary, suitable or proper. *Hanson v. Penrod Construction Co.*, 425 N.W.2d 396 (S.D. 1988). However, with the mandatory requirement of case management as referenced in No. 39(A), the case management plan will address treatment protocols and referrals.

**41. Which prosthetic devices are covered, and for how long?**

Prosthetic care is covered during the disability, for life. SDCL § 62-4-1.

**42. Are vehicle and/or home modifications covered as medical expenses?**

Yes, if they are considered medically necessary. *Howie v. Pennington County*, 1997 S.D. 45, 563 N.W.2d 116. The South Dakota Department of Labor has awarded home modifications and a

vehicle when the facts support it.

**43. Is there a medical fee guide or schedule, or other provisions for cost containment?**

The Department of Labor has, by administrative rule, adopted a medical fee schedule. SDCL § 62-7-8.

**44. What, if any, provisions or requirements are there for "managed care"?**

Both self-insured employers and worker's compensation insurers must provide medical services and health care to injured workers for compensable injuries under managed care plans certified by the Department of Labor. SDCL §§ 58-20-24, 62-5-21.

**45. What is the procedure for contesting all or part of a claim?**

If the parties are unable to reach an agreement, either may notify the Department of Labor in writing and request a hearing. SDCL § 62-7-12. Hearings are "contested case hearings" under South Dakota's Administrative Procedures Act (SDCL 1-26).

Every case management plan must contain a provision for dispute resolution. Parties dissatisfied with the result after completion of the dispute resolution procedure may file a Petition for Hearing with the Department of Labor. ARDS 47:03.

**46. What is the method of claim adjudication?**

**A. Administrative level.**

If the employer and employee do not agree as to compensability, in whole or in part, either may request the Department to conduct a mediation in accordance with rules promulgated by the Department. SDCL 62-7-37.

If a Petition for Hearing is filed, the initial hearing and decision is governed by the Administrative Procedures Act (SDCL Ch 1-26) and an administrative law judge from the Department of Labor hears the case. Written decisions constitute the decision of the Department. A review of the decision by the Secretary of Labor can be requested within 10 days after receipt of the agency decision. SDCL §§ 62-7-12 through 62-7-16.

**B. Trial court.**

Decisions of the Department are appealable to the circuit court. The appeal must be filed within 30 days from receipt of the final agency decision. SDCL § 15-26A-6. The standard of review is "clearly erroneous" for questions of fact while questions of law are fully reviewable. *Thomas v. Custer State Hospital*, 511 N.W.2d 576 (S.D. 1994).

**C. Appellate.**

The final level of appeal is the South Dakota Supreme Court. SDCL § 1-26-37. The appeal must be filed within 30 days of the circuit court's order. SDCL § 15-26A-6. The standard of review remains "clearly erroneous" for questions of fact, and there is full review for questions of law with no deference given to the circuit court's determination. *Sopko v. C & R Transfer Co.*, 1998 SD 8, 575 N.W.2d 225.

**47. What are the requirements for stipulations or settlements?**

Agreements must be approved by the Department of Labor. If an employer and employee reach an agreement as to compensation, then a memorandum must be filed with the department. The Agreement is deemed approved and enforceable if the Department does not respond within twenty days of the memorandum's filing. SDCL § 62-7-5.

**48. Are full and final settlements with closed medicals available?**

Yes, but only if compensability is at issue.

**49. Must stipulations and/or settlements be approved by the state administrative body?**

Yes. See answer 47.

### RISK FINANCE FOR WORKERS' COMPENSATION

50. What insurance is required, and what is available (e.g. private carriers, state Fund, assigned risk pool, etc.)?

Employers must either be insured or self-insured in order to come under Title 62. SDCL ch. 62-5. An employer may secure the payment of compensation by insuring and keeping insured with any insurer or any mutual employer's liability association authorized to transact the business of worker's compensation insurance in the state or in an association authorized to exchange reciprocal or interinsurance contracts by individuals, partnerships or corporations. SDCL § 62-5-1. South Dakota also has an assigned risk pool through NCCI. Failure to be insured or self-insured exposes an employer in circuit court under the worker's compensation act for double worker's compensation benefits or to a tort action in which all tort defenses are available. SDCL § 62-3-11.

51. What are the provisions/requirements for self-insurance?

A. For individual entities.

Employers who seek to be self-insured must annually furnish satisfactory proof to the Department of Labor of their solvency and financial ability to pay claims. Upon receipt of satisfactory proof, the Department of labor issues a certificate of exemption relieving the employer of the obligation to purchase worker's compensation insurance. It is sufficient proof of solvency if the employer is a member of an association or reciprocal insurer. An application fee up to \$2,500.00 is required with the application. The self-insured employer is required to provide a bond, or cash or certificate of deposit or approved governmental security in any combination in the total amount equal to the greater of: (1) \$250,000.00, (2) twice the amount of compensation and medical claims paid during the preceding calendar year, or (3) the amount designated by the employer as a reserve for workers' compensation claims. SDCL § 62-5-5, 62-5-10.

B. For groups or "pools" of private entities.

The South Dakota Insurance Code allows for the creation of reciprocal insurers which may, among other things, provide worker's compensation insurance. SDCL ch. 58-34. Additionally, two or more electric utility employers or their trade associations may form a self-insurance association to protect members against losses arising from worker's compensation. SDCL §§ 58-20-25 through 58-20-40.

52. **Are “illegal aliens” entitled to benefits of workers’ compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of “employee”?**

No case law or statute in South Dakota specifically addresses the availability of worker’s compensation benefits for illegal aliens. *But see Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370 (S.D. 1991) (holding that worker’s compensation provided the exclusive remedy for a minor even though the minor was illegally employed.) South Dakota law does prohibit illegal aliens from receiving unemployment benefits. SDCL61-6-34. In addition, South Dakota law defines covered employees under its Worker’s Compensation Act broadly, but does not specifically include ‘illegal aliens’ as covered employees. *See Answer to Question # 1.*

53. **Are terrorist acts or injuries covered or excluded under the workers’ compensation law?**

While there is no case on point in South Dakota, there does not appear to be any defense or exclusion that would preclude coverage if the injury arose out of and in the course of employment.

54. **Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare’s interests pursuant to the Medicare Secondary Payer Act?**

No.

55. **How are subrogation liens of Medicare and health insurers treated under workers’ compensation law?**

If an employer denies coverage on the basis that the injury is not compensable as defined by SDCL 62-1-1(7)(a)(b) or (c), the injury is presumed to be non-work related for other insurance purposes and any other insurer shall pay according to their policy provisions. If it is later determined that the injury is compensable, the employer shall immediately reimburse the parties not liable for all payments made, including interest. SDCL 62-1-1.3.

56. **What are the requirements of confidentiality and privacy of medical records under the workers’**

### compensation law and how are they affected by state and federal law (HIPAA)?

HIPAA, 45 C.F.R. parts 160-164 and 65 F.R. 82462 went into effect on April 14, 2003. The law provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. [45 C.F.R. 164.512(l)] Therefore, your current practice of obtaining medical records could proceed under state law.

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. All medical and hospital information relevant to the particular injury shall, on demand, be made available to the employer, employee, insurer and the department of labor. SDCL 62-4-45. Information obtained within the contemplation of the workers' compensation laws shall be used for no other purpose than for the information of the department or insurance company with reference to the duties imposed upon such department. However, the department may release information to an injured employee or his attorney, to a social security or welfare office having a claim by the employee or to any state or federal agency which rehabilitates handicapped persons; and the department may issue statistical information where individual claimants are not identified. SDCL 62-6-5. There are, at present, no state regulations similar to HIPAA and HIPAA exempts workers' compensation insurance. See 45 C.F.R. § 160.103. Additionally, entities to which the HIPAA privacy regulations apply "may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault." 45 C.F.R. § 164.512(l).

#### 57. What are the provisions for "Independent Contractors"?

An independent contractor is an individual that has been and will continue to be free from control or discretion over the performance of the service, both under his contract of service and in fact and the individual is customarily engaged in an independently established trade, occupation, profession or business. SDCL § 62-1-11.

#### 58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?

No.

#### 59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

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. SDCL § 62-1-10. To obtain certification, the owner-operator and the carrier shall provide written documentation that the following are substantially present:

- A. The owner-operator is responsible for the maintenance of the vehicle;
- B. 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;
- C. 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;
- D. 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;
- E. 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
- F. 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.

SDCL § 62-1-11.

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. SDCL § 62-1-13.

**60. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?**

Financial exposure to workers' compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized "Best Practices" plan.

Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.

**61. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interests when settling the right to medical treatment benefits under a claim?**

Under Medicare regulations (42 CFR §411.20, 411.40), Medicare is secondary payer to the payment of workers' compensation by a workers' compensation carrier or self-insured employer. The obligation to pay medical expenses for a compensable condition cannot be shifted to Medicare. 42 CFR § 411.32, 411.40, 411.46. Therefore, Medicare has an interest in all lump sum settlements of a workers' compensation matter if at the time of the settlement the employee meets the following criteria:

- (1) the employee is already a Medicare enrollee and the total settlement amount is greater than \$25,000; or
- (2) there is a reasonable expectation that the employee will be a Medicare enrollee within 30 months of the settlement and the settlement amount is greater than \$250,000. *See Frazer v. CNA Ins. Co.*, 374 F.Supp.2d 1067, 1076 (N.D. Ala. 2005). If the employee meets the criteria for consideration by Medicare, Medicare must be notified in the event of a settlement. *Id.*

Although there are no statutory or regulatory provisions that require parties to submit a Workers' Compensation Medicare Set-Aside Agreement ("WCMSA"), allocating a portion of the settlement towards future medical expenses, parties may choose to submit a WCMSA to the Centers for Medicare and Medicaid services for review and approval so long as the above thresholds are satisfied. DEP'T OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE AND MEDICAID SERVICES, May 11, 2011 Memorandum re: Medicare Secondary Payer-Workers' Compensation, *available at* <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/May-11-2011-Memorandum.pdf>.

There are no special provisions in Title 62 regarding the protection of Medicare's interests during settlement.



**62. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?**

Currently medical use of marijuana is illegal under South Dakota and Federal law. *See answer 9.*

However, on February 14, 2017, the South Dakota Legislature passed Senate Bill 157 which created an exception for the possession of less than five grams of marijuana with a valid medical marijuana card from another state. On March 17, 2017 Senate bill 95 was signed by Governor Dennis Daugaard which added cannabidiol to the list of Schedule IV controlled substances and excluded it from the definition of marijuana as long as it is a drug product approved by the United States Food and Drug Administration. Measure 26, approving medical marijuana, will be voted on in South Dakota on November 3, 2020.

Currently, there is no case law regarding whether medical marijuana may be covered under Workers Compensation in South Dakota even if the employee falls within the exceptions above.

**63. Does your state permit the recreational use of marijuana and what are the restrictions for use and for work activity in your state Workers' Compensation law?**

Currently recreational use of marijuana is illegal under South Dakota and Federal law. *See answer 9.* South Dakota will also vote on Constitutional Amendment A, approving the use of recreational marijuana, on November 3, 2020.

The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers' compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers' Compensation attorney for your state, listed below:

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