

# SOUTH DAKOTA WORKERS COMPENSATION SUMMARY<sup>1</sup>

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## I. Determining Compensability

SDCL 62-1-1(7) requires the EE to prove all of the following:

- ❖ *Arising out of*: An injury “arises out of” the employment if: (1) the employment contributes to causing the injury; (2) the activity is one in which the EE must be reasonably engaged; or (3) the activity brings about the disability upon which compensation is based.
- ❖ *In the course of*: The words “in the course of” refer to the time, place, and circumstances of the injury.
  - An EE is considered “within the course of” his employment if he is doing something that is either naturally or incidentally related to his employment or he was expressly or impliedly authorized to do.
- ❖ *Major Contributing Cause*:
  - Work activity must be a major contributing cause (“MCC”) to the condition complained of;
  - If the injury combines with a pre-existing non-work-related condition, the standard remains whether the work activity is and remains a MCC to the disability, impairment or treatment;
  - If, however, the injury combines with a pre-existing work related compensable injury, the subsequent injury is compensable if it “contributes independently” to the condition (this is a lesser standard).
- ❖ *Notice*: It is the EE’s burden to prove he provided timely notice.
  - SDCL 62-7-10 requires an EE to provide written notice to his ER within three business days of the injury.
  - An EE’s claim shall be denied if notice is not timely provided unless:
    - (1) The ER had actual knowledge of the injury; or
      - Note: the standard is whether a “reasonably conscientious manager should have known of the possibility of a compensable claim.”
    - (2) The EE had “good cause” (i.e. EE is incapacitated) for not providing written notice within 3 days. The 3-day period does not start until Claimant should have realized he was injured.

## II. Indemnity Benefits

- ❖ *Temporary Total Disability Benefits* (“TTD”)
  - TTD benefits are paid when an EE is incapacitated for seven consecutive days.
  - The maximum and minimum TTD rates change from year to year (current max is \$805, and min is \$403).
- ❖ *Temporary Partial Disability Benefits* (“TPD”): benefits calculated under SDCL 62-4-5.
  - Paid when an EE has been released to work but has not received an impairment rating.
  - The EE shall receive TPD benefits (subject to the statutory max.) equal to ½ the difference the EE earned before the accident, and the average amount which the EE is earning or is able to earn after the accident.
    - Note: the EE cannot receive less than his TTD rate unless he refuses suitable employment.
- ❖ *Permanent Partial Disability Benefits* (“PPD”) must use AMA Guidelines 4<sup>th</sup> Edition for all injuries **prior** to July 1, 2013. For all injuries **after** July 1, 2013, you must use the AMA Guides, 6<sup>th</sup> Edition, July 2009 reprint
- ❖ *Permanent Total Disability Benefits* (“PTD”): provides EE his comp rate for the remainder of his life.
  - An EE is permanently and totally disabled if the EE’s physical condition, in combination with the EE’s age, training, and experience and the type of work available in the EE’s community, cause the EE to be unable to secure anything more than sporadic employment resulting in insubstantial income.
  - One way to prove entitlement to PTD benefits is through the “odd-lot” doctrine. An EE can make a showing under the odd-lot category for PTD benefits by proving he is “obviously unemployable.” This is done by either (i) showing that his physical condition, coupled with his education, training and age make it obvious that he is disabled; or (ii) proving he is in continuous, severe, and debilitating pain.
  - If the EE cannot demonstrate entitlement under the odd-lot doctrine, the EE must demonstrate the unavailability of suitable employment by showing he made a reasonable effort to secure work but was unsuccessful. The EE cannot put unreasonable restrictions on his job search.
    - If the EE makes such the showing, the burden shifts to the ER to prove that some form of suitable work is regularly and continuously available to the EE in his community.

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<sup>1</sup> It is impossible to address everything so please call us with questions. This summary is intended to assist you in handling South Dakota claims, but is not an exhaustive examination of the law; this is as of July 1, 2018, and is subject to change.

- The EE must also prove that retraining is either unavailable or that it would be futile.
- ❖ **Rehabilitation Benefits:** The EE is entitled to rehabilitation benefits if he establishes:
  - (1) The EE is unable to return to his “usual and customary line of employment;”
    - Usual and customary line of employment is determined by these factors: (i) skills or abilities of the person; (ii) length of time spent at the job; (iii) proportion of time spent in the type of work at the time of injury versus working life; and (iv) the duties/responsibilities at the workplace.
  - (2) Rehabilitation is necessary to restore the EE to “suitable, substantial, and gainful employment;”
    - I.E., the employment (i) returns the EE to no < 85% of the EE’s prior wage-earning capacity; or (ii) returns the EE to employment which equals or exceeds the average wage for the job classification for the job held by the EE at the time of the injury (as determined by Department).
  - (3) The program of rehab is a reasonable means of restoring him to employment;
  - (4) The EE files a claim with his ER requesting rehabilitation benefits; and
  - (5) The EE actually pursues the program of rehabilitation.
- ❖ **Death Benefits:** payable to spouse, children or others if EE dies as a result of a work injury (tied to support).
  - Spouse entitled to EE’s comp rate for the remainder of her life, unless she remarries (2-year lump sum).
  - \$2000 a year scholarship to EE’s children if the child attends SD school (5-year maximum).
  - ER to compensate EE’s children under 18 (22 if in school) with an additional monthly benefit of \$50.
  - ER is also liable for a maximum of \$10,000 in burial expenses, plus cost to transport the body.

### III. Medical Benefits

- ❖ The ER shall provide necessary medical care or other suitable and proper care.
- ❖ The EE shall have the initial selection to secure a health care provider of his own choosing.
  - The EE must get written permission prior to switching providers (all referrals are authorized).
- ❖ The EE is entitled to mileage (currently \$.42 a mile) to and from treatment unless the EE chooses a provider outside of his home or workplace and there was a similar provider in the EE’s community or a closer community.
- ❖ If a disagreement arises as to whether the care is necessary or suitable and proper, the ER has the burden of establishing the care was not necessary or suitable and proper (need medical opinion).
  - Note: The Department defers to the treating physician in the majority of cases.
- ❖ The ER is not entitled to the medical fee schedule if the claim is denied.

### IV. Defenses

- ❖ **Willful misconduct:** no compensation is allowed if the injury or death was due to the EE’s willful misconduct (i.e., self-inflicted injuries, intoxication, illicit drug use, or failure to use a safety device furnished by the ER).
  - Note: the ER has the burden of establishing a causal connection between the injury and the misconduct. Essentially, the ER must prove that “but for” the misconduct the injury would not have occurred.
- ❖ **Falsification of employment application:** No compensation shall be payable if the ER can demonstrate the EE intentionally and willfully made a false representation as to his physical condition to procure employment.
  - The ER must prove: (i) the EE knowingly and willfully made a false representation as to his physical condition; (ii) the ER relied upon the false representation and its reliance was a substantial factor in the hiring; and (iii) there is a causal connection between the misrepresentation and the injury.
- ❖ **Statute of limitations:** an EE’s claim for benefits will be barred if (i) the EE does not file a Petition for Hearing within 2 years of the denial letter; (ii) the EE does not treat for 3 years from the last payment of benefits (unless the EE experiences a change in condition); or (iii) the EE does not treat for 7 years after the first report of injury.

### V. Miscellaneous

- ❖ **Successive injury:** In cases of successive injury, the carrier covering the risk at the time of the most recent injury bearing a causal relation to the disability is usually liable for the entire compensation.
  - The last injurious exposure rule requires an analysis whether the successive injury is a mere recurrence or an independent aggravation of the first injury. If the injury is a mere recurrence the original carrier is liable, but if there is an independent aggravation the subsequent carrier is responsible.
  - To find the second injury was an aggravation, the evidence must show: (i) a second injury; and (ii) the second injury contributed independently to causing the final disability.
  - To find the second injury was a mere recurrence, the evidence must show: (i) there have been persistent symptoms; and (ii) no specific incident can independently explain the second onset of symptoms.
  - Note: the initial employer has the burden of establishing an aggravation occurred.
- ❖ **Denial letter:** The denial letter must be in writing and notify the EE why the claim is being denied. The letter must be sent to the EE and to the Department.
- ❖ **Report to State:** ER has 7 days to provide FROI to Insurer. Insurer has 10 days to report injury to State. Insurer then has 20 days to make initial determination but can obtain a 30-day extension (electronically).