

Boyce

LAW FIRM LLP

Workers' Compensation 101

By LAURA HENSLEY 605-336-2424 • lkensley@boycelaw.com

(605) 336-2424 • www.boycelaw.com
300 S. Main Ave, Sioux Falls, SD 57104

SOUTH DAKOTA WORKERS' COMPENSATION

- Workers' Compensation is regulated by the South Dakota Department of Labor and Regulation.
 - Two Judges: Michelle Faw and Joe Thronson
 - Tom Hart (Deputy Director) and Bonnie Ackerman

What is covered?

- In order to be compensable, an injury must
 - 1. Arise out of the employment
 - 2. Be in the course of the employment
 - 3. Employee must give proper notice
 - 4. There must be a medical connection between the injury and the individual's condition
 - Two Standards: Major Contributing Cause and Contributes Independently
 - Mental Injuries: Compensable physical injury is and remains a major contributing cause (clear and convincing proof)
- If an injury meets these criteria, it will be compensable

Arising Out of Element

- **Arising out of: really just comes down to whether the employee is doing something reasonably expected of them**
 - **Majority of questions come from this element of the claim**
 - **Requires the most investigation**

Voeller v. HSBC

- Murder/Suicide – Husband killed wife while she was at work on a smoke break, family filed for workers’ compensation benefits
- Arising out of: Three Categories of Risks to Consider
 - Personal risks – Risks Personal to EE Only // Not Covered
 - Work related risks – Risks Tied to Employment // Generally Covered
 - Neutral risks – Not Specifically Related to Work // Fact-Specific
 - But for the employment activities, would the injury have occurred?
 - Not but for employment – that is just a location question
 - No other employee then and there present would have been met with the same fate – if this is true, then it is generally not covered

In the Course Of Element

- In the Course Of: Was the EE on premises during work hours?
 - *Terveen v. SD DOT*
- Parking lot cases – Fact Specific
- Action that take injury outside course of employment
 - Horseplay
 - Substantial deviation
 - Willful misconduct (SDCL 62-4-37)
 - Make sure the employer enforces the safety rule consistently

Causation Element

- The employment must be a major contributing cause of the condition from which the EE complains
- There is a lesser standard of contributes independently if the employee had a prior compensable work injury to the same body part
 - Must be same body part, same area
- Aggravation (New Injury) v. Recurrence (Same Injury, New Symptoms)
- You must have a medical opinion to deny on medical causation
 - Does the Claimant have a medical opinion?
 - If not, you do not have to run off and get one

IME or Record Reviews

- IME
 - Not many doctors who do IMEs in SD
 - Need to ask right questions
 - Must produce the IME to the Claimant
 - Doctor must be licensed in South Dakota
 - 62-7-1 and 62-7-3
 - If Claimant refuses to show up, can suspend, not deny benefits
- Record Reviews
 - Do not have to disclose if unfavorable
 - Great to start with record review, but later have an IME done if the case goes to hearing to have weight given to the opinion

Notice of Injury

- Must give written notice within 3 days of the injury
 - Statute says written notice, but that's not strictly applied
 - Three days may not begin on date of the injury
 - When should have the employee realized he suffered an injury at work
 - Things to look for
 - Very important to investigate these claims, get written or recorded statements and talk to employees
 - Recorded statement
 - Facts critical

What do you need to do?

- Investigate the claim
 - You have 20 days to do your investigation to see whether an injury is compensable
 - You can get a 30 day extension, but do not ask too soon
 - Must be completed online
 - Get your extension requested on time or you get a \$100 penalty
- Employer has 7 calendar days to notify the insurance carrier of a work injury and must keep a copy for 4 years.
- Insurer has 10 days to report the injury to the Department of Labor and Regulation – this is to be filed electronically

Claim Process

- Insurer shall review the First Report of Injury upon receipt and begin a prompt investigation.
- You then have two options: Accept or Deny
- If you accept, you start paying benefits
 - If there is lost time, you must file a Form 110
- If you deny, you will send a denial letter
 - Do not need a lot of detail, just the reasonable basis for denial
 - Must copy the department
 - Must indicate the claimant has two years to file a petition

Forms

- Form 107 – Monthly report to the state of payments made on a file – Things to keep in mind about this form
- Form 110 – Calculation of Compensation – must be completed and filed with the State if indemnity payments are issued
- Form 111 – Memorandum of Payment – Permanent Partial Disability – Submit with medical documentation

Claim Notes

- Keep Notes and Comments Professional During Investigation
 - Always write with the belief that your notes may be read by the Claimant or an attorney
 - Lawyer Humor: Dance like nobody is watching; Email like it may be read aloud in a deposition.
 - Your investigation may not be protected from disclosure – neither may correspondence between and employer and/or insurer
 - Liberty Mutual and UPS Example

Benefits

- If the claim is compensable, there are certain benefits available to the claimant:
 - 1. Temporary Total
 - 2. Temporary Partial
 - 3. Permanent Partial
 - 4. Retraining
 - 5. Permanent Total
 - 6. Medical treatment

Lost Time Benefits

- Must be off work for 7 consecutive days
 - Department has said does not have to be entire day
- Must have a doctor restricting the work.
- If the 7 day period is met, payment goes back to the date of the physician note.

Calculation of Lost Time Benefits

- Disability is paid at .6667 of the AWW.
 - Overtime counted at straight rate
- If possible, obtain 52 weeks of wages from Employer
 - Divided by 52 to calculate the average weekly wage.
- If you do not have 52 weeks of wages, use the number of weeks and fraction thereof and divide by amount earned
- Do not count holiday or sick pay, exclude and divide by reduced number
- Bonus issue

Lost Time (Cont.)

- Use the rate at the time of the injury
 - Changes every July 1 – New Max. and Min.
- If the AWW is below the state minimum (currently \$403.00) then net wages should be used to calculate the AWW.
- The state maximum payable is \$805.00.
- A Form 110, Calculation of Compensation must be completed and forwarded to the Claimant and to the State.

Lost Time (Cont.)

- Payment of lost time benefits should be paid in installments at the same intervals at which the employee was paid at the time of the injury (i.e. if paid every two weeks, benefits are paid that way too)
 - Failure to make payment of benefits within 10 days of the date which payment is due shall result in an automatic penalty of 10% of the unpaid amount.

Mileage

- Mileage paid at \$.42 a mile
- More unwritten rules
 - You will pay in town mileage if claimant is on TTD
 - You do not pay mileage if claimant is on TPD
- Do not need to pay mileage if claimant does not use local doctor, and instead decides to treat out of town

TTD Benefits

- Payable when an employee is ordered completely off of work
- Paid at the weekly comp rate

TPD Benefits

- If the claimant is working with restrictions, but with reduced hours, TPD benefits may be due.
- Payments are calculated by taking one half of the difference between the pre-injury wage and the post injury wage
 - DOL has unwritten rules on this you will want to discuss with your attorney
- The amount paid by the employer and by the insurance carrier must at least equal the TTD rate unless the employee refused suitable employment.
 - “Able to earn”

TTD v. TPD

- One important difference is whether, and when, the benefits may be suspended
 - Termination for misconduct
 - Seasonal Layoff
 - Refusing work

Disability – PPD

- PPD is paid at the same rate as TTD.
- PPD is paid when the claimant reaches maximum medical improvement AND has an impairment rating
- Must be narrowed down to specific body part
- AMA Guidelines, 4th Edition for injuries before 7-1-13
- 6th Edition for injuries 7-1-13 & after
- Form 111
 - Do not need to sign it
 - Kind of a useless form

Death Benefits

- Funeral expenses up to \$10,000
- Compensation is paid at the same rate as the injured worker to qualifying dependents.
 - Benefits for life unless spouse remarries, then two years lump sum
 - Several Statutes Address These Benefits
- Scholarships – Available for Children of Deceased Parent

Medical Care

- The employee has the initial selection of a medical provider - Emergency care does not count.
- Subsequent referrals may be directed by the Employer/Insurer.
- Injured worker **must** provide a signed medical release if needed for insurer to obtain records.
 - Employer must provide copies of all medical records to the injured worker without cost to the employee.

Medical (Cont.)

- The Employer/Insurer may request an IME once a month – SDCL 62-7-1
- If the injured worker refuses to attend an exam scheduled by the Employer, benefits may be suspended – SDCL 62-7-3
- An injured worker may obtain a 2nd opinion at their own expense
- Do not need to have a nurse case manager, but helpful in the right cases to manage care and develop a care plan with treating doctor

Bill Payment

- Medical bills for a compensable claim must be replied to within 30 days after receiving a proper submission.
- The bill must be paid, denied or additional information must be requested to support the billing within the 30 days
- A provider may charge for medical records - \$10.00 for the first 10 pages and \$.33 for each additional page
- South Dakota does utilize a medical fee schedule for payment of bills.
 - If the claim is denied, cannot use the fee schedule

Denials

Compensability of a report of injury may be denied for:

- Willful misconduct
- Self-inflicted injury
- Intoxication
- Use of illegal drug
- Failure or refusal to use furnished safety appliance

Time Limitations

- SDCL 62-7-35 – An injured worker must appeal a denial within 2 years of notification
- SDCL 62-7-35.1 – An injured worker must file within 3 years from the last payment of benefits
 - Barred unless there is a change in condition

Settlement

- Can settle out future medical benefits if there is any dispute
- All Agreements must be approved by the DOL to be binding
- *Whitesell* rule
 - Use amount paid, not billed to reimbursement party not liable

Subrogation

- If you paid money on a claim where a third party caused the injury, you are entitled to be reimbursed
 - SDCL 62-4-39 – if you paid benefits and then the injured party recovers from the negligent party, you are entitled to recover what you paid, less your proportionate share of costs and attorney’s fees not to exceed 35%
 - 62-4-40 – even if the Claimant does not want to pursue the claim, you can file suit in the claimant’s name, in the employer’s name, or in your own name
 - Anything you recover over and above the subrogation interest goes to the claimant
 - A natural conflict of interest arises

Subrogation (cont.)

- In addition to getting your money back, you also get a credit on “like damages” in the future - SDCL 62-4-38
 - “Like damages” defined
 - *Milbrandt*
- Claimant can pursue both comp and liability damages
- This means when there is a third party at issue, you have two issues, your subrogation lien and your future offset
- Contributory Negligence defense in SD

Bad Faith

- Rampant in South Dakota
 - Requires Insurers and Employers to tread carefully
- Cost of defense is extremely high even to get to summary judgment
- Must have “reasonable basis” to deny the claim
 - Looking for intentional or willful acts
 - *Mordhorst v. Dakota Truck Underwriters*
 - Duty of insurer to ensure doctor has correct information
 - Bad Faith and settlements
 - Can you release a bad faith claim in a comp settlement?

Fraud

- Fraud in SD
 - It is a Class 1 misdemeanor
 - Not aware of anyone ever being prosecuted
- Immunity for good faith report of fraud
 - Make written request to Department to terminate payments to a claimant for fraud
 - Then there is an investigation by you, and ultimately a hearing on the fraud claim

Aggregate Wages

- May 5, 2015, a Supreme Court decision, *Wheeler v. Cinna Bakers* came down providing that a claimant's average weekly wage included wages from other employment, i.e. aggregate wages.
- On February 19, 2016, the South Dakota Legislature passed Bill 1084, abrogating the holding in *Wheeler*.
- New Statutes Addressing this Found at SDCL 62-1-23, 62-1-24 & 62-1-25.

Questions?

Contacts

South Dakota Department of
Labor and Regulation
700 Governors Drive
Pierre, SD 57501
(605) 773-3681

- <http://dlr.sd.gov/workerscomp/default.aspx>
- www.nwcdn.com
 - Excellent resource for claims throughout country

Boyce Law Firm, LLP
300 S Main Avenue
Sioux Falls, SD 57104

(605) 336-2424
(605) 334-0618 (fax)