

# State of South Dakota

NINETY-THIRD SESSION  
LEGISLATIVE ASSEMBLY, 2018

553Z0475

## SENATE BILL NO. 145

Introduced by: Senators Maher, Curd, Greenfield (Brock), Langer, Monroe, Novstrup, Peters, Stalzer, Wiik, and Youngberg and Representatives Peterson (Kent), Anderson, DiSanto, Hawley, Heinemann, Kettwig, Mickelson, Qualm, Reed, Willadsen, and Zikmund

1 FOR AN ACT ENTITLED, An Act to revise certain provisions related to claims regarding  
2 workers' compensation.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That chapter 58-20 be amended by adding a NEW SECTION to read:

5 The Legislature finds that the Department of Labor and Regulation is designated to be the  
6 exclusive fact-finder for any issue related to administration of Title 62 pursuant to §§ 62-2-5,  
7 62-7-12.1, and 62-7-13, and the exclusive fact-finder to assess any attorney's fees for vexatious  
8 or unreasonable refusal to pay loss under § 58-12-3. The Legislature finds that removing the  
9 determination of whether or not a wrongful act, omission, wrongful denial, or refusal to pay a  
10 loss was vexatious, without reasonable cause, or in bad faith from the department's duty as fact-  
11 finder is not within the Legislature's intent, and that the holding in In re Certification of a  
12 Question of Law (Champion v. U.S. Fidelity and Guaranty Co.), 399 N.W.2d 320 (S.D. 1987),  
13 which allowed for a civil remedy is abrogated.

14 Section 2. That chapter 58-20 be amended by adding a NEW SECTION to read:



1       Following a hearing under chapter 62-7 against an employer, employer who is self insured,  
2 a risk sharing pool, a third party administrator, or an insurance company, including any  
3 reciprocal or interinsurance exchange, on a policy or certificate regarding workers'  
4 compensation insurance, the Department of Labor and Regulation shall, if the department finds  
5 in favor of the employee in the department's decision under § 62-7-13, allow the employee a  
6 reasonable sum for attorney's fees to be recovered and collected as part of the costs following  
7 a separate hearing of record pursuant to section 3 of this Act if the evidence indicates that the  
8 employer, employer who is self insured, a risk sharing pool, a third party administrator, or the  
9 company refused to pay the full amount of the loss and the department determines at the  
10 separate hearing that the refusal was vexatious or without reasonable cause. If a tender is made  
11 by the employer, employer who is self insured, a risk sharing pool, a third party administrator,  
12 or the insurance company before the commencement of the hearing under chapter 62-7 in which  
13 the department finds in favor of the employee, and the amount to be recovered by the employee  
14 is not in excess of that tender, no costs under this section may be allowed. No person may bring  
15 or maintain a cause of action in relation to workers' compensation benefits sounding in tort or  
16 in contract against any employer, employer who is self insured, a risk sharing pool, a third party  
17 administrator, or any insurance company, including any reciprocal or interinsurance exchange,  
18 based on a wrongful act, omission, wrongful denial, or any claim for refusal to investigate a  
19 claim or pay a loss that was considered vexatious, without reasonable cause, or in bad faith.

20       Section 3. That chapter 58-20 be amended by adding a NEW SECTION to read:

21       The Department of Labor and Regulation shall hold a separate hearing of record in  
22 accordance with chapter 1-26 with evidence that may be submitted regarding an allowance for  
23 costs under section 2 of this Act. The separate hearing under this section shall be held upon the  
24 request of the claimant made not more than ten days following the entry of the decision or award

1 under the provisions of Title 62. At the separate hearing under this section the department shall  
2 determine the amount, if any, of attorney's fees to be allowed as costs for the employee, of civil  
3 damages, if any, that may be awarded to the employee, and of the civil penalty, if any, to be  
4 imposed against the employer, employer who is self insured, a risk sharing pool, a third party  
5 administrator, or insurance company.

6 In determining an allowance for a reasonable sum of attorney's fees, the department shall  
7 consider only those benefits or amounts the attorney secured for the employee's recovery under  
8 the provisions of chapter 62-7. The department may not consider the value of future medical  
9 treatment or expenses in the determination of any reasonable sum of attorney's fees.

10 The department may award civil damages against the employer, employer who is self  
11 insured, a risk sharing pool, a third party administrator, or insurance company payable to the  
12 employee. Any amount of civil damages awarded to the employee may not exceed the lesser of  
13 two hundred percent of the total compensation owed by the employer or insurance company  
14 pursuant to the employee's recovery under the provisions of chapter 62-7 or thirty thousand  
15 dollars.

16 If the department determines that the employer, employer who is self insured, a risk sharing  
17 pool, a third party administrator, or insurance company has engaged in a pattern of bad faith  
18 denials of benefits, the department may impose a civil penalty not to exceed twenty-five  
19 thousand dollars to be deposited into the state general fund for each wrongful denial. The  
20 amount of any civil penalty shall be directly related to the severity of the pattern of wrongful  
21 denials. The amount of any civil penalty imposed under this section may not be considered an  
22 element of loss for the purpose of establishing rates for workers' compensation insurance.

23 The department shall reduce to writing its findings regarding any allowance, civil damages,  
24 or civil penalty made under this section. Any allowance, civil damages, or civil penalty under

1 this section shall be included within the department's decision under § 62-7-13, and shall be the  
2 exclusive remedies for any wrongful act or omission or wrongful denial committed by an  
3 employer, employer who is self insured, a risk sharing pool, a third party administrator, or  
4 insurance company. The department shall forward a copy of the department's findings under this  
5 section to the Division of Insurance. Nothing in this section limits the division from regulating  
6 any employer, employer who is self insured, a risk sharing pool, a third party administrator, or  
7 any insurance company.

8 Section 4. That § 58-12-3 be amended to read:

9 58-12-3. In ~~all actions~~ any action or ~~proceedings hereafter~~ proceeding commenced against  
10 any employer who is ~~self-insured~~, self insured or any insurance company, including any  
11 reciprocal or interinsurance exchange, on any policy or certificate of any type or kind of  
12 insurance other than workers' compensation insurance, the trial court or the appellate court shall,  
13 if judgment or an award is entered for plaintiff, allow the plaintiff a reasonable sum for  
14 attorney's fees to be recovered and collected as part of the costs following a separate hearing of  
15 record pursuant to § 58-12-3.1 if it appears from the evidence indicates that such the employer  
16 or the company or exchange has refused to pay the full amount of such the loss, and that such  
17 refusal is and the court determines at the separate hearing that the refusal was vexatious or  
18 without reasonable cause, the Department of Labor and Regulation, the trial court and the  
19 appellate court, shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a  
20 reasonable sum as an attorney's fee to be recovered and collected as a part of the costs, provided,  
21 however, that when a. If a tender is made by such the employer who is self insured or the  
22 insurance company, exchange or self-insurer before the commencement of the action or  
23 proceeding in which judgment or an award is rendered, and the amount attorney's fees to be  
24 recovered is are not in excess of such that tender, no such costs shall under this section may be

1 allowed. The allowance of ~~attorney~~ attorney's fees hereunder shall not be construed to under this  
2 section does not bar any other remedy, whether in tort or contract, that an insured may have  
3 against the same employer who is self insured or the insurance company or self-insurer arising  
4 out of its refusal for refusing to pay such the full amount of the loss.

5 Section 5. That § 58-12-3.1 be amended to read:

6 58-12-3.1. The ~~determination of the trial court or the appellate court shall determine the~~  
7 entitlement to ~~an~~ and the amount of any allowance of ~~attorney~~ attorney's fees as costs ~~and the~~  
8 ~~amount thereof for any action or proceeding under § 58-12-3 shall be made by the court or the~~  
9 ~~Department of Labor and Regulation~~ at a separate hearing of record subsequent to the entry of  
10 a judgment or award in favor of the ~~person making claim against the insurance company, and,~~  
11 ~~if an allowance is made, the~~ plaintiff. The amount thereof of any attorney's fees, if allowed  
12 under this section, shall be inserted in or added to the judgment or award under § 58-12-3. Such  
13 ~~a~~ The separate hearing under this section shall be afforded held upon the request of the ~~claimant~~  
14 plaintiff made ~~within~~ not more than ten days ~~after~~ following entry of the judgment or award  
15 under § 58-12-3.