IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

KAREN M. FRANKEN, Individually and as the Personal Representative of the Estate of Craig Allen Franken, Claimant and Appellant, v. SMITHFIELD FOODS, INC., Employer & Self-Insurer and Appellee.	Ref. No. 30198 **BRIEF OF CLAIMANT AND APPELLANT KAREN M. FRANKEN**

Appeal from the decision and order of Hon. John Sogn, Circuit Court Judge, Second Judicial Circuit, Minnehaha

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Notice of Appeal was filed on December 22, 2022

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JURISDICTIONAL STATEMENT

The Claimant and Appellant, Karen M. Franken, seeks appellate review of the Final "Order Dismissing Claimant's Petition for Benefits Without Prejudice" of the Honorable Jon Sogn, Circuit Court, Second Judicial Circuit, Minnehaha County, dated November 30, 2022, and filed December 1, 2022. The Claimant and Appellant, Karen M. Franken, timely filed "Notice of Appeal" on December 22, 2022.

STATEMENT OF THE LEGAL ISSUES

Issue I. Whether the Circuit Court erred in determining the ALJ's decision and order dismissing the Petition for Hearing was correct because Franken has not asserted in her petition a definite time, place, and circumstance of exposure to COVID-19, so as alleged it is not "injury" for purposes of workers' compensation, and/or, because Franken did not suffer an "injury" within the meaning of SDCL 62-1- 1(7) and Title 62 . The Circuit Court determined the ALJ's decision dismissing the Petition for Hearing was correct because Franken has not asserted in her petition a definite time, place, and circumstance of exposure to COVID-19, so as alleged it is not "injury" for purposes of workers' compensation, and/or, because Franken did not suffer an "injury" within the meaning of SDCL 62-1- 1(7) and Title 62 and South Dakota law.

Meyer v. Roettele, 64 SD 36, 264 N.W. 191 (SD 1935)
Hanzik v. Interstate Power Co., 67 SD 128, 289 N.W. 589 (SD 1940)
Kirnan v. Dakota Midland Hosp., 331 N.W.2d 72 (SD 1983)
Grauel v. South Dakota School of Mines and Technology, 619 N.W.2d 260, 145 (SD 2000)
SDCL 15-6-12(b)(5); SDCL 19-19-201; and SDCL 62-1-1(7)
ARSD 47:03:01:01.01, and 47:03:01:02 and 02.01, and 47:03:01:08

Issue II. Whether the Circuit Court erred in determining the ALJ's decision and order dismissing the Petition for Hearing was correct because SDCL 21-68-6(3) refers to

"occupational disease"; and this indicates the Legislature's intention for SDCL Ch. 21-68 to apply to all claims, including all Workers' Compensation claims, including Franken's Workers' Compensation claims. The Circuit Court determined the ALJ's decision and order dismissing the Petition for Hearing was correct because SDCL 21-68-6(3) refers to "occupational disease"; and this indicates the Legislature's intention for SDCL Ch. 21-68 to apply to all claims, including all Workers' Compensation claims, including Franken's Workers' Compensation claims.

Sowards v. Hills Materials Co., 521 N.W.2d 649, 652 (SD 1994)
Blenner v. City of Rapid City, 670 N.W.2d 508, 515 ¶ 47 (SD 2003)
Canal Ins. Co. v. Abraham, 598 N.W.2d 512, 90 (SD 1999);
Andreson v. Brink Elec. Const. Co., 568 N.W.2d 290 (SD 1997)
SDCL 1-26-1(2);
SDCL 15-1-1(1);
SDCL 16-6-9(2)
Title 21 of SDCL; SDCL Ch 21-5; SDCL Ch. 21-68; SDCL 21-68-2 and 6.
Title 62 of SDCL; SDCL 62-1-1(7); SDCL 62-3-1 to 3; and SDCL 62-4-38 to 39, and SDCL 62-7-12, 12.1 and 12.2.

ISSUE III. Whether the Circuit Court erred in determining the ALJ's decision and order dismissing the Petition for Hearing was correct because SDCL Ch. 21-68 – enacted July 1, 2021 -- applies retroactive to Franken's work-related injury, conditions, and death on or about April 19, 2020, and Franken's workers' compensation claims for statutory death benefits which accrued and/or vested prior to legislative enactment of SDCL Ch. 21-68. The Circuit Court determined that the ALJ's decision and order dismissing the Petition for Hearing was correct because SDCL Ch. 21-68 – enacted July 1, 2021 -- applies retroactive to Franken's work-related injury, conditions, and death on or about April 19, 2020, and Franken's workers' compensation claims for statutory death benefits.

Rohlck v. J & L Rainbow, Inc., 553 N.W.2d 521, 115 (SD 1996)
Cadwell v. Bechtel Power Corp., 225 Mont. 423, 732 P.2d 1352, 1354 (Mont. 1987)

Capital Motors, LLC v. Schied, 660 N.W.2d 242, n.3 (SD 2003)
Sopko v. C & R Transfer Company, Inc., 665 N.W.2d ¶ 94 (SD 2003)
SDCL 2-14-16 and 21; and SDCL 2-16-13
SDCL 21-68-2, and SL 2021, Ch. 91, 7.

STATEMENT OF THE CASE

Claimant Karen Franken, individually and as personal representative of the estate of Craig Allen Franken, filed a Petition for Hearing with the South Dakota Department of Labor, against Smithfield Foods, Inc., for worker's compensation benefits regarding Craig Allen Franken's work-related injury and death. (AR 001-008). ("AR" means the Administrative Record in this matter). Smithfield Foods, Inc. filed a motion to "dismiss with prejudice" the Petition for Hearing under "SDCL 15-6-12(b)(5), as SDCL 21-68 prohibits and prevents Claimant's claim for benefits related to the claim, for Craig Franken's COVID diagnosis and death", and "[a]s such, there is no legal remedy available to Claimant pursuant to South Dakota law." (AR at 009-010). The Department in its letter decision, and Order, granted Smithfield's Motion to Dismiss the Petition for Hearing with prejudice, determining that Claimant-Franken's:

> claim is barred by both SDCL 62-1-7, the Act to Limit Liability for Certain Exposures to COVID-19, and SDCL 21-68-2, the Department concludes that Claimant has not made a claim upon which relief can be granted. It is hereby ORDERED that Employer and Insurer's Motion to Dismiss is GRANTED. Hearing file 84, 2021/22 is dismissed with prejudice."

(AR 049-052). Claimant Franken timely served and filed a Notice of Appeal. (053-065)

On appeal, the Circuit Court, in its letter decision dated November 27, 2022, and Order dated November 30, 2022, and filed December 1, 2022, affirmed the letter Decision and Order of the South Dakota Department of Labor and Regulation, Division of Labor and Management, dated June 21, 2022, dismissing the Petition for Hearing --- but without prejudice. ("Letter: Decision from Judge to Parties" at "Chronological

Index", "page 165" (9 pages)); (Appx-2). Claimant Franken timely filed this appeal.

STATEMENT OF THE FACTS

Claimant Franken filed a Petition for Hearing with the South Dakota Department of Labor dated February 25, 2022, HF No 84, 2021/22, alleging, in pertinent part, that:

> ***
>
> 4. At the time of his death described below, Craig A. Franken was an employee of Smithfield Foods, Inc.
>
> ***
>
> 6. On or about April 19, 2020, Craig A. Franken passed away because of complications from COVID-19.
>
> ***
>
> COUNT ONE
>
> 9. Claimant realleges paragraphs 1 through 7 and incorporates them herein by reference.
>
> 10. That on or about April 19, 2020, while engaged in the course and scope of Craig A. Franken's employment, Craig A. Franken suffered a work-related injury including, but not limited to, COVID-19 pursuant to SDCL 62-1-1(7)(a), 62-1-1(7)(b), and/or 62-1-1(7)(c).
>
> ***
>
> 12. The working conditions at Employer on or about April 19, 2020, are a major contributing factor for Craig A. Franken's need for medical treatment including, but not limited to, hospitalization.
>
> 13. The working conditions at Employer on or about April 19, 2020, are a major contributing factor for the death of Craig A. Franken.
>
> 14. As a result of being hospitalized prior to his death for COVID-19, Craig A. Franken, and Karen M. Franken, as Personal Representative of the Estate of Craig A. Franken, incurred medical expenses pursuant to SDCL 62-4-1 and/or 62-4-1.1.
>
> 15. As result of the passing of Craig A. Franken, Karen M. Franken, as Personal Representative of the Estate of Craig A. Franken incurred funeral expenses for his burial pursuant to SDCL 62-4-16.
>
> 16. As result of the passing of Craig A. Franken, Karen M. Franken, his spouse upon his death, is entitled to benefits pursuant to SDCL 62-4-12.
>
> ***
>
> WHEREFORE, Claimant is entitled to judgment rendered by the South Dakota Department of Labor against Employer and Insurer for one or more of the following:
>
> 1. For payment of all medical expenses in conjunction with treatment for [his] injuries under SDCL 62-4-1, 62-4-1.1 and/or 62-8-4;

2. For payment of temporary total disability benefits to which Claimant is entitled under SDCL 62-4-3;
3. For payment of funeral expenses to which Claimant is entitled under SDCL 62-4-16 and/or 62-8-4.
4. For payment of benefits to Karen M. Franken pursuant to SDCL 62-4-12 ....

***

8. For such other and further relief as the Department of Labor may deem just and equitable.

(AR at 057-059); (Appx-11).

Smithfield Foods, Inc. made a motion to dismiss the Petition for Hearing of Claimant Franken under SDCL 15-6-12(b)(5), on the grounds that "SDCL 21-68 prohibits and prevents Claimant's claim for benefits related to the claim for Craig Franken's COVID and death", and that, "[a]s such, there is no legal remedy available to Claimant under South Dakota law." (AR 009). The parties submitted briefs. (AR at 011-048). Smithfield argued in its brief (in support of its motion) that "Claimant makes no allegation of an injury that occurred while at work and a resulting disease therefrom" and therefore Craig Franken did not have an injury as defined by SDCL 62-1-1(7). (AR at 005). Smithfield further argued in its brief that SDCL Ch. 21-68 – specifically SDCL 21-68-2 and 3 --- states that "COVID-19 claims, in any form, were not legally recognized absent the rare circumstance where there was intentional exposure to COVID-19." (AR at 015). Smithfield further argued in its brief that SDCL 21-68-6 states that COVID-19 is not an "occupational disease" under state law, and because the "term 'occupational disease' is only found in Title 62 and Chapter 21-68" makes "it clear the South Dakota legislature meant for the limitations on COVID-19 claims to apply to worker compensation claims." (AR at 015). Finally, Smithfield argued that

> although not codified by the South Dakota Legislature, the Act to Limit Liability for Certain Exposures to COVID-19 ("The Act") applies to any exposure to

> COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues or begins, whether known, unknown, or latent between January 1, 2020, and December 31, 2022." Section 7 of this Session Law gives the Act retroactivity.

(AR at 014).

The South Dakota Department of Labor and Regulation, Division of Labor and Management, granted Smithfield's motion to dismiss Hearing file 84, 2021/22 "with prejudice", in its Decision and Order dated/entered June 21, 2022. (AR at 057-060). The Administrative Law Judge determined:

> Claimant alleges that Franken suffered a work-related injury pursuant to SDCL 62-1-1(7). She further alleges that the working conditions at Smithfield Foods, Inc. (Smithfield) on or about April 19, 2020, are a major contributing factor to Franken's need for medical treatment and his death.
>
> Smithfield moves to dismiss Claimant's Petition for Hearing, pursuant to SDCL 15-6-12(b)(5), as SDCL 21-68 prohibits and prevents Claimant's claim for benefits related to Franken's COVID-19 exposure diagnosis and death.
>
> ***
>
> The cases provided are distinguishable as none of them were directly addressed by legislation that limited exposure liability and potential for benefits.
>
> ***
>
> She is not alleging that Franken was intentionally exposed to COVID-19, therefore, pursuant to SDCL 21-68-2, his exposure is not compensable.
>
> By Session Law on February 8, 2021, the South Dakota Legislature provided that the Act to Limit Liability for Certain Exposures to COVID-19 applied retroactively … [to] between January 1, 2020, and December 31, 2022. [] The Legislature did not specify that workers' compensation claims were exempt from the Act.
>
> As her claim is barred by both SDCL 62-1-7, the Act to Limit Liability for Certain exposure to COVID-19, and SDCL 21-68-2, the Department concludes that Claimant has not made a claim upon which relief can be granted.

(AR 57-59).

On appeal, the Circuit Court determined that under South Dakota law a "disease or aggravation must be assigned to a definite time, place and circumstance", and Franken "has not asserted in her petition a definite time, place, and circumstance of exposures to COVID-19, so as alleged it is not an 'injury' for purposes of workers' compensation",

and "[a]ccordingly, the ALJ's decision dismissing Count 1 of Karen's petition was correct." (See Circuit Court letter decision dated November 27, 2022, pp.4-5) (Letter: Decision from Judge to Parties (nine pages), chronological index (165)). The Circuit Court further determined that:

> In this case, the Legislature specifically made SDCL Ch. 21-68 applicable retroactively. SL 2021, Ch 91, 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020, and December 31, 2022."
> ***
> SDCL 21-68-6, entitled "Construction" references "occupational disease," which phrase is only referenced in the code in the Workers' Compensation statutes.
> ***
> This indicates the Legislature's intention for SDCL ch. 21-68 to apply to all claims, including Workers' Compensation claims. Accordingly, even if Craig's COVID-19 was an "injury" or occupational disease within the meaning of the Worker's Compensation statutes, the provisions of SDCL Ch. 21-68 bar Karen's claims as alleged in her petition for benefits.

(See Circuit Court letter decision dated November 27, 2022, pp.6-8) (Letter: Decision from Judge to Parties (nine pages), chronological index at 165); (Appx-2).

ARGUMENT

Standards of Review and Rules of Construction

In a civil action on a motion to dismiss a complaint under SDCL 15-6-12(b)(5):

> Whether a complaint fails to state a claim upon which relief can be granted is a question of law we review de novo. [A] complaint attacked by a Rule 12(b)(5) motion to dismiss does not need detailed factual allegations… [but] enough to raise a right to relief above the speculative level. We test a motion to dismiss under SDCL 15-6-12(b)(5) for the legal sufficiency of the pleading, not the facts which support it. Therefore, we accept the material allegations as true and construe them in a light most favorable to the pleader to determine whether the allegations allow relief.
>
> [Under] SDCL 15-6-8(a) … a pleading shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled. *** Therefore, in order to plead a claim upon which relief can be granted, the complaint must have

> been sufficient to put a person of common understanding on notice, with reasonable certainty of the accusations against them so they may prepare their defense.

Kaiser Trucking, Inc. v. Liberty Mutual Fire Insurance Company, 981 N.W.2d 645, 650-651, 2022 S.D. 64 ¶¶ 13 and 14 [(*citation and quotation and brackets omitted*]. "Motions to dismiss in civil actions are generally disfavored"; and it does not matter if it may appear on the face of the pleadings that recovery is very remote and unlikely, or whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claim. *Riley v. Young*, 879 N.W.2d 108, 112, 2016 S.D. 39 ¶ 6.

The construction of a statute, and its application to the facts, present questions of law which must be reviewed *de novo. Mergen v. N. States Power Co.*, 14, ¶ 4, 621 N.W.2d 620, 621 (SD 2001).

> [P]roceedings under the Work[ers'] Compensation Law ... are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions." *Martin v. Am. Colloid Co.*, 2011 SD 57, ¶ 12, 804 N.W.2d 65, 68 (*alteration in original) (citation omitted*). When called upon to interpret workers' compensation statutes we apply two rules of construction to determine the legislative intent:
>
> > The first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction. When we must, however, resort to statutory construction, the intent of the legislature is derived from the plain, ordinary and popular meaning of statutory language.

Ries v. JM Custom Homes, LLC, --- N.W.2d ---- WL 365375920, *7, 52 ¶ 36 (SD 2022) (*citations and quotations omitted).*

South Dakota has "a long-standing policy to interpret workmen's compensation statutes liberally" --- a "policy [which is] based on the best interest of workers in general and cannot be subverted for one worker in particular." *South Dakota Medical Service,*

Inc. v. Minnesota Mut. Fire & Cas. Co., 303 N.W.2d 358, 361 (SD 1981). Because of this stated public policy, worker's compensation claimants should not be discouraged from petitioning the Department and pursuing statutory benefits/compensation. *Wilcox v. City of Winner*, 446 N.W.2d 772, 775 (SD 1989). In the workers' compensation context, "if the statute has an ambiguity, it should then be liberally construed in favor of injured employees." *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.*, 853 N.W.2d 878, 885 (SD 2014) (*citing, Caldwell v. John Morrell & Co., 489 N.W.2d 353, 364 (SD 1992)*).

> "The general purpose of the Workmen's Compensation Law is to substitute, in place of the doubtful contest for recovery on proof of an employer's negligence and the absence of common-law defenses, a right of relief based on the fact of employment (*stated to be practically automatic and certain*), which improves the economic status of the worker and obviates the uncertainties, delay, expense and hardship attendant upon the enforcement of common-law remedies. 58 Am. Jur., Workmen's Compensation, s 2."

Donovan v. Powers, 193 N.W.2d 796, 798 (SD 1972). "We all have compassion for those incurring industrial injury or industrial disease. The workers' compensation law reflects that compassion—providing compensation for all employees suffering employment injury or illness—whether or not the employer is at fault." *Stalnaker v. Boeing Co.*, 186 Cal.App.3d 129, 1231 Cal.Rptr. 323, 333 (Ct. App. Cal. 1986).

Under SDCL 62-7-12:

> "If the employer and injured employee or the employee's representative …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."

Pursuant to SDCL 62-2-5, the Department may promulgate rules pursuant to SDCL Ch. 1-26 governing procedures in worker's compensation matters. Under A.R.S.D.

47:03:01:01.01 "A party requesting a formal hearing shall file a written petition for hearing with the division". (Appx-72). Under A.R.S.D. 47:03:01:02 the petition "need follow no specified form", and "shall state clearly and concisely the cause of action for which hearing is sought, including … the time and place of accident, [and] the manner in which the accident occurred….". (Appx-73). Under ARSD 47:03:01:08, a claimant or an employer may move with supporting affidavits for summary judgment; but there is no rule allowing an employer to file, and the Department to entertain, a motion to dismiss under SDCL 15-6-12(b)(5) for failure of the Petition for Hearing to state a claim upon which relief can be granted. (Appx-75). On March 2, 2022, the Department notified Smithfield it had 30 days to file a response to the Petition, which, under ARSD 47:03:01:02.01, such response shall state clearly and concisely an admission or denial as to each allegation contained in the petition for hearing. (AR at 008); (Appx-73). Smithfield never served and filed a response to the petition clearly and concisely admitting or denying each allegation contained in the petition for hearing; rather, Smithfield filed a motion to dismiss under SDCL 15-6-12(b)(5) without any supporting affidavit. (AR at 009-016).

The Circuit Court determined that under South Dakota law a "disease or aggravation must be assigned to a definite time, place and circumstance", and Franken "has not asserted in her petition a definite time, place, and circumstance of exposure to COVID-19, so as alleged it is not 'injury' for purposes of workers' compensation", and "[a]ccordingly, the ALJ's decision dismissing Count 1 of Karen's petition was correct." (See letter decision dated November 27, 2022, pp.4-5) (Letter: Decision from Judge to Parties (nine pages), chronological index at 165); (Appx-2). The Department determined

the cases provided by Franken's briefs were distinguishable, as they were not directly addressed by legislation that limited exposure liability and potential for benefits. (AR 058).

Franken's Petition for Hearing Sufficiently States His Injury Under SDCL 62-1-1(7)

Since as far back as 1919, under Title 62 injury "'shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury.' Section 9490, Rev. Code 1919." *Edge v. City of Pierre*, 239 N.W. 191, 193 (SD 1931).

In 1935 the South Dakota Supreme Court ruled that an injured worker who, during noon lunch hour, was exposed to (*likely by mouth*) a germ called bacillus botulinus, and the germ injured Claimant's body with a botulism toxin produced by the germ, and that Claimant died by accidental injury arising out of and in the course of employment. *Meyer v. Roettele*, 64 SD 36, 264 N.W. 191 (SD 1935). There the Supreme Court cited a case (*Brintons v. Turvey*, [1905] A.C. 230, 2 Ann.Cas. 137) where through some accident (*possibly contact with the corner of his eye*) the germ of Bacillus anthracis found entrance into a workman's system and that the man's death was attributable to personal injury by accident arising out of, and in the course of, his employment. In that case (*Brintons v. Turvey, Supra*) the Court stated, "The accidental character of the injury is not removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of death." *Meyer*, 264 N.W. at 193 (*quoting, Brintons v. Turvey, Supra*). The Supreme Court added that the "Workmen's Compensation Act is remedial and should be liberally construed to effectuate its purpose", and the Court is "mindful of the interpretation of the

original act and the rule of liberal construction", and "this court has held that the phrase ['injury by accident'] is to be given the broader interpretation. *Johnson v. La Bolt Oil* Co., (SD) 252 N.W. 869." *Meyer*, 264 N.W. at 193. "If the element of suddenness or precipitancy is present and the disease, if not the ordinary or reasonably to be anticipated result of pursuing an occupation, it may be regarded as an injury by accident and compensable." *Id.*, 264 N.W. at 194. In *Piper v. Neighborhood Youth Corp.*, 90 SD 443, 241 N.W.2d 868, 871-872 (SD 1976), the Supreme Court stated: "We stated long ago that 'The Workmen's Compensation Act is remedial, and should be liberally construed to effectuate its purpose.' *Meyer v. Roettele*, 64 SD 36, 264 N.W. 191 (SD 1935). In *Meyer* we recognized a broad definition of the words 'injury by accident' so as to insure greater coverage of the act."

In *Hanzik v. Interstate Power Co.*, 67 SD 128, 289 N.W. 589 (SD 1940), the Supreme Court ruled Claimant's exposure to the influenza virus (*person usually exposed through nose, throat and/or lungs*), and encephalitis (*inflammation of the brain usually by a viral infection*), that ultimately resulted in his incapacitation, was an injury by accident even though the influenza and/or encephalitis did not supervene a bodily injury.

Other jurisdictions construing "injury" or "injury by accident" agree that workplace exposure to a pathogenic biological agent, or virus, like SARS-CoV-2, is an "injury by accident" or "injury" under workers' compensation law. In *Pierre v. ABF Freight*, 211 A.D.3d 1284, 180 N.Y.S. 3d 337 (Supreme Ct., App. Div., N.Y. 2022), a freight delivery driver applied for workers' compensation benefits on the basis of a diagnosis of COVID-19. Employer and insurer contended that COVID-19 was not a covered accident within Workers' Compensation Law. *Id.* The Workers' Compensation

Law Judge found that claimant met his burden of establishing that he had contracted COVID-19 through his employment; and the Worker's Compensation Board affirmed. *Pierre*, 211 A.D.3d at 1285. On appeal the Court affirmed, holding in pertinent part:

> [T]he contraction of COVID-19 in the workplace "reasonably qualif[ies] as an unusual hazard, not the natural and unavoidable result of employment" and, thus, is compensable under the Workers' Compensation Law.
> ***
> "[T]he claimant bears the burden of establishing that the subject injury arose out of and in the course of his or her employment and, further, must demonstrate, by competent medical evidence, the existence of a causal connection between his or her injury and his or her employment." "The concept of time-definiteness required of an accident can be thought of as applying to either the cause or the result, and it is not decisive that a claimant is unable to pinpoint the exact date on which the incident occurred.
> ***
> [S]ubstantial evidence supports the Board's conclusion that claimant had contracted COVID-19 in the course of his employment and therefore his injuries arose out of and in the course of his employment.

Pierre, 211 A.D.3d at 1285-1287 [(internal quotations marks, brackets, ellipsis and citations omitted)].

In *Dove v. Alpena Hide & Leather Co.*, 198 Mich. 132, 164 N.W. 253 (1917), where the deceased worker, who was unloading hides from a car and into a poorly ventilated hide house, became infected by septic germs that entered his body through the respiratory organs and first found lodgment in his throat, the Court answered the question "where the accident is which led to his death?", explaining: the accidental feature of the compensability of worker's injury and death by sepsis is that "by chance the septic germ or germs were taken up by his respiratory organs and carried into his system, an occurrence which the testimony shows probably did happen, but which was unusual in the work at which he was engaged." Id., 164 N.W. at 254.

In *City and County of San Francisco v. Industrial. Acc. Commission*, 183 Cal.

273, 277, 101 P. 26, 27 (CA 1920), where employee was exposed to orthomyxovirus (*influenza virus*) and taken with influenza and died of that disease eight days later, and was awarded worker's compensation benefits, the Court held that "compensation is allowable for the injury or harm done by disease, although the disease is not contracted as the result of any violence whatever in the ordinary sense of that word". The Supreme Court of California quoted an Indiana appellate decision:

> it is generally accepted that a *disease*, which is not the ordinary result of any employee's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, *is to be considered an injury* by accident, and comes within the provisions of acts providing for compensation for personal injury so caused [citing a long list of authorities]."

Id., (*quoting*, United Paperboard Co. v. Lewis, 117 N.E. 276 (Ind. App.)) (*citing* other compensable cases in MA, MI, WI, including death by pneumonia, contracting of glanders (from exposure to bacterium burkholderia mallei), death by anthrax (from exposure to bacillus anthracis), and death by typhoid fever (from exposure to salmonella serotype Typhi bacteria)). The Court further noted that there was a raging epidemic, and persons exposed as was Claimant (*a hospital steward*) the proportion of those attacked was from 5-8 times as great as the proportion of those not so exposed.). Id., 191 P. at 30.

In *Frey v. Gunston Animal Hosp. and Cincinnati Indem. O.*, 39 Va.App. 414, 573 S.E.2d 307 (2002), where a worker who was exposed to *rabies lyssavirus* after giving medicine to a cat whose saliva came in contact with her skin or a scratch on her skin, the Court ruled that, despite the lack of a positive rabies test on the cat, the cat had rabies, and, "for purposes of determining whether worker suffered an injury by accident it is not essential that the scratch on her hand be itself received in the course of employment, for the significance of the scratch lies in the abnormality and definiteness of the entry of

germs. 3 *Arthur Larson and Lex K. Larson*, Larson's Worker's Compensation Law 51.02 (2002)." Id., 573 S.E.2d at 311. The Court acknowledged the risk to which the worker was exposed, and that because rabies can be fatal, post-exposure prophylaxis and treatment is indicated regardless of the length of the delay, and to prove an injury by accident it is not necessary to show an immediate onset of the symptoms of an injury. Id. The Court cites other courts that have "held that person exposed to a serious risk of contracting a disease which is commonly known to be highly contagious/infectious and potentially deadly, have been "injured" for the purpose of receiving compensation under the Act." *Id.*, 573 S.E.2d at 311-312.

> [I]t would be contrary to the humanitarian and remedial purpose of the act to infer that the legislature intended that an employee who sustains actual exposure to a potentially fatal infectious disease must await the onset of the disease before he can recover expenses associate with necessary, and possibly lifesaving, medical intervention. Thus… when an employee has sustained actual exposures to life threatening infectious diseases in incidents that arose out of and occurred in the course of his employment, the employee has suffered compensable injuries under the act….

Id., 573 S.E.2d at 312.

In *Jackson Township Volunteer Fire Company v. Workmen's Compensation Appeal Board (Wallet)*, 140 Pa. Cmwlth. 620, 594 A.2d 826 (Cmwlth. Ct. of PA 1991), where volunteer ambulance attendant was somehow (*likely by contact with blood or bodily fluid*) exposed to HIV (*virus that can develop into AIDS*) and Orthohepadnavirus (*virus that can develop into hepatitis B*), the Court ruled this is an injury for the purpose of receiving compensation under the Act; as the risk created by exposure was serious and had immediacy --- the worker's exposure created a real, immediate, and serious risk of an infection; and there is a strong public policy in favor of restricting the spread of such serious and deadly contagious/infectious diseases as AIDS and hepatitis.

COVID-19 is a disease caused by a virus called SARS-CoV-2 or a virus mutation therefrom. SDCL 21-68-1. SARS-CoV-2 is a virus that can cause COVID-19 disease and conditions associated with the disease caused by SARS-Co-V2 or a virus mutating therefrom. SDCL 21-68-1.

> An "agent" is "a chemically, physically, or biologically active principle." Agent, Merriam-Webster Collegiate Dictionary, https://unabridged.merriam-webster.com/collegiate/agent. And a virus is defined, in part, as "any large group of submicroscopic infectious agents." Virus, Merriam-Webster Collegiate Dictionary, https://unabridged.merriam-webster.com/collegiate/virus.
> ***
> [A]ny agent, including a virus, that is … "physically harmful" (i.e., causing bodily harm) falls within OSHA's purview. An agent that causes bodily harm—a virus—falls squarely within the scope of that definition.
>
> Congress enacted the OSH Act under the Commerce Clause because Congress found that "illnesses arising out of work situations impose a substantial burden upon ... interstate commerce." 29 U.S.C 651(a) (emphasis added). Congress created the safety and health administration to protect workers from those illnesses by reducing "health hazards at their places of employment." Id. 651(b)(1). The Act's objectives include exploring "ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems ...." Id. 651(b)(6). And finally, the Act sought to "provid[e] medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience." Id. 651(b)(7).
> ***
> Given OSHA's clear and exercised authority to regulate viruses, OSHA necessarily has the authority to regulate infectious diseases that are not unique to the workplace. Indeed, no virus—HIV, HBV, COVID-19—is unique to the workplace and affects only workers. And courts have upheld OSHA's authority to regulate hazards that co-exist in the workplace and in society but are at heightened risk in the workplace.

In re MCP NO. 165, 21 F.4th 357, 369, 371 (Sixth Cir. 2021).

> Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting

COVID–19 that all face.

National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, 142 S.Ct. 661, 665-666, 211 L.Ed.2d 448 (S.Ct. 2022)

> A "virus" is "any of various submicroscopic agents that infect living organisms, often causing disease" which are "[u]nable to replicate without a host cell." Virus, The American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=VIRUS (last visited Aug. 11, 2021). Surely, in ordinary parlance, no one would understand a submicroscopic agent that infects a living organism to be capable of causing direct physical loss or damage to a brick-and-mortar structure, like a dental office building. Although a virus is a tangible, microscopic thing capable of "contaminating" property, one simply does not consider that attachment as damaging to a wall, ceiling, or floor—the physical presence of the virus on these structures, notwithstanding.
>
> People may take measures that modify property to protect themselves from any direct physical loss or damage caused by a virus, like putting up plexiglass barriers at a grocery store checkout area. But these physical measures are not there to protect property in the same way that, for example, hurricane shutters and sandbags protect property from direct physical loss or damage. Rather, these measures were meant to protect people from contracting the virus. Town Kitchen LLC v. Certain Underwriters at Lloyd's, London, 522 F.Supp.3d 1216, 1222 (SD Fla. 2021) ("[C]oronavirus particles damage lungs, they do not damage buildings."); *Johnson v. Hartford Fin. Servs. Grp., Inc.*, 510 F.Supp.3d 1326, 1334 (N.D. Ga. 2021) ("Any 'actual' change [to property where coronavirus is present] is instead premised on the omnipresent specter of COVID-19, a generalized 'alteration' experienced by every home, office, or business that welcomes individuals into an indoor setting across the globe.").

Scherder v. Aspen American Insurance Company, 553 F.Supp.3d 1098, 1104-1105 (D.M.D. Fla. 2021).

The court may, on its own or upon request of a party, and at any stage of the proceeding, take judicial notice of a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. SDCL 19-19-201; FRE. 201. "Because government publications are matters of public record and can be easily verified, they are proper subjects of judicial notice." *McGhee v. City of Flagstaff*, ___ Fed. Supp. ___, WL

2309881 *2 (D. Ariz. 2020); *Gent v. CUNA Mut. Ins. Soc'y*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (taking judicial notice of information concerning the transmission of Lyme Disease from the CDC website); *Jenner v. Dooley*, 590 N.W.2d 463, 470, 20 ¶ 15 (SD 1999)(and cases cited therein) (On a "12(b)(5)" motion the "court may take judicial notice of mater of general public record" and this "will not convert a dismissal motion into a motion for summary judgment"): *Jaludi v. Citigroup*, 2020 WL 7086142 (D.M.D.PA., 2020) ("'[W]e may properly take judicial notice of "records and reports of administrative bodies' such as OSHA); *Sturgeon v. Pharmerica Corp.*, 438 F. Supp. 3d 246, 258 (E.D. Pa. 2020); *Fadaie v. Alaska Airlines, Inc.*, 293 F. Supp. 2d 1210, 1214 (W.D. Wash. 2003) (taking judicial notice of administrative complaint filed with OSHA); See *In re American Apparel, Inc. Shareholder Litigation*, 855 F.Supp.2d 1043, 1062 (C.D.Cal.2012) ("Taking judicial notice of news reports and press releases is appropriate for show[ing] 'that the market was aware of the information contained in news articles'"). This includes a Rule 12(b) motion to dismiss for failure to state a claim. *Da Costa v. Immigration Investor Program Office*, --- F.Supp.3d ----, WL 17173186 (D.D.C. 2022) (The Court may consider facts alleged in the complaint, any documents attached to or incorporated in the complaint, and matters of which courts may take judicial notice, including information posted on official public websites of governmental agencies); *Jenner v. Dooley*, *Supra*; *Matthews v. JPMorgan Chase Bank, N.A.*, 2013 WL 12106937 n.3 (D.N.D. Ga. 2013); *Molina v. Washington Mutual Bank*, 2010 WL 431439 *3 (D.S.D. Cal. 2010); Krueger *v. Adventist Health System/West*, 2022 WL 2052652 *1 (D.E.D. Cal. 2022); *Jaludi v. Citigroup*, 2020 WL 7086142 (D.M.D.PA., 2020). Franken requests that this Court take judicial notice of certain facts published on official public websites of

governmental agencies --- the United States Center for Disease Control and Prevention (CDC), and the U.S. Department of Labor, Occupational Health and Safety Administration (OSHA) --- regarding the SAR-CoV-2 virus, safety in the workplace, COVID-19 and/or Smithfield's Sioux Falls plant where Franken worked. It is not clear if Smithfield disputes the authenticity of these websites or the accuracy of the information.

According to the United States Center for Disease Control (CDC):

> COVID-19 (coronavirus disease 2019) is a disease caused by a virus named SARS-CoV-2.... It is very contagious and has quickly spread around the world.
>
> COVID-19 most often causes respiratory symptoms that can feel much like a cold, a flu, or pneumonia. COVID-19 may attack more than your lungs and respiratory system. Other parts of your body may also be affected by the disease.
> ***
> - Hundreds of thousands of people have died from COVID-19 in the United States.
>
> ***
> The word corona means crown and refers to the appearance that coronaviruses get from the spike proteins sticking out of them. These spike proteins are important to the biology of this virus. The spike protein is the part of the virus that attaches to a human cell to infect it, allowing it to replicate inside of the cell and spread to other cells.

(https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html - Last updated Nov. 4, 2021. Source: National Center for Immunization and Respiratory Diseases (NCIRD), Division of Viral Diseases.); (Appx-50). "People with COVID-19 have had a wide range of symptoms reported – ranging from mild symptoms to severe illness. Symptoms may appear 2-14 days after exposure to the virus." (https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html - Last Updated Oct. 26, 2022. Source: National Center for Immunization and Respiratory Diseases (NCIRD), Division of Viral Diseases); (Appx-51).

According to OSHA:

SARS-CoV-2, the virus that causes COVID-19, is highly infectious and spreads from person to person, including through aerosol transmission of particles produced when an infected person exhales, talks, vocalizes, sneezes, or coughs. COVID-19 is less commonly transmitted when people touch a contaminated object and then touch their eyes, nose, or mouth. *** Particles containing the virus can travel more than 6 feet, especially indoors and in dry conditions with relative humidity below 40%.
***
Under the OSH Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm. Employers should … implement multi-layered interventions to protect … workers and mitigate the spread of COVID-19, including:
***

3 ***Implement physical distancing in all communal work areas*** …. *** *[G]*enerally at least 6 feet of distance is recommended, although this is not a guarantee of safety, especially in enclosed or poorly ventilated spaces.
***

7. ***Perform routine cleaning and disinfection***. If someone who has been in the facility within 24 hours is suspected of having or confirmed to have COVID-19, follow the CDC cleaning and disinfection recommendations.
***

Employers should take additional steps … due to the following types of workplace environmental factors …:

- **Close contact**– where … workers are working close to one another, for example, on production or assembly lines …. [and] when clocking in or out, during breaks, or in locker/changing rooms.

- **Duration of contact** – where … workers often have prolonged closeness to coworkers (e.g., for 6–12 hours per shift).

- **Type of contact** – where … workers may be exposed to the infectious virus through respiratory particles in the air—for example, when infected workers in a manufacturing or factory setting cough or sneeze, especially in poorly ventilated spaces. ***

It is also possible… that exposure could occur from contact with contaminated surfaces or objects, such as tools, workstations, or break room tables.
***
In these types of higher-risk workplaces – which include manufacturing; meat, … and poultry processing; … and agricultural processing settings – this Appendix provides best practices to protect … workers. Please note that these recommendations are *in addition to* those in the general precautions described above ….
***
In meat, poultry, and seafood processing settings; manufacturing facilities; and assembly line operations (including in agriculture) involving … workers:

- Ensure adequate ventilation in the facility….

- Space such workers out, ideally at least 6 feet apart.... Barriers are not a replacement for worker use of face coverings and physical distancing.

(https://www.osha.gov/coronavirus/safework - "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace"); (Appx-53-60).

On April 20, 2020 --- the day after Craig Franken's death --- The U.S. Department of Labor, OSHA, opened a Complaint Health Inspection against Smithfield and its Sioux Falls plant where Franken had worked; and, following that investigation, on September 9, 2020, OSHA issued a citation to Smithfield for a serious violation. (https://www.osha.gov/ords/imis/establishment.inspection_detail?id=1472736.015); (Appx-62). OSHA published a news release on its website dated September 10, 2020, that:

> The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has cited Smithfield Packaged Meats Corp. in Sioux Falls, South Dakota, for failing to protect employees from exposure to the coronavirus. OSHA proposed a penalty of $13,494, the maximum allowed by law.
>
> Based on a coronavirus-related inspection, OSHA cited the company for one violation of the general duty clause for failing to provide a workplace free from recognized hazards that can cause death or serious harm. At least 1,294 Smithfield workers contracted coronavirus, and four employees died from the virus in the spring of 2020.
> ***
> OSHA guidance details proactive measures employers can take to protect workers from the coronavirus, such as social distancing measures and the use of physical barriers, face shields and face coverings when employees are unable to physically distance at least 6 feet from each other.
> ***
> Smithfield has 15 business days from receipt of the citation and penalty to comply ... or contest the findings....
>
> OSHA's coronavirus response webpage offers extensive resources for addressing safety and health hazards during the evolving coronavirus pandemic.

(https://www.osha.gov/news/newsreleases/region8/09102020); (Appx-68-69). On September 23, 2020, Smithfield contested the "Serious" violation, "Nr Exposed: 46";

and on December 16, 2021, Smithfield entered into a formal settlement --- paying the $13,494.00 fine imposed.

(https://www.osha.gov/ords/imis/establishment.violation_detail?id=1472736.015&citation_id=01001); (Appx-70-71).

Prior to 1975, SDCL 62-1-1(2) defined "injury" as: "[O]nly injury by accident arising out of and in the course of the employment, and shall not include a disease in any form except as it shall result from the injury." *Kirnan v. Dakota Midland Hosp.*, 331 N.W.2d 72 (SD 1983). "In 1975 the phrase "by accident" was repealed by the legislature. 1975 SD Sess.L. ch. 322, 1." *Lather v. Huron College*, 413 N.W.2d 369, 372 (SD 1987). This legislative amendment was quite substantive when considered in light of the case law which had developed interpreting the term "by accident".

> The pre-1975 statute has been interpreted on numerous occasions. In cases involving the aggravation of a preexisting disease, this court has adopted the "unusual exertion rule." This position was set forth in *Oviatt v. Oviatt Dairy Co.*, 80 SD 83, 85, 119 N.W.2d 649, 650 (1963), in which this court stated:
>
> > It is settled law in this state that disease, or the aggravation of an existing disease, is compensable, but that such disease or aggravation must be assignable to a definite time, place and circumstance, and that the disease, or aggravation of such disease, must result from unusual exertion. (Citations omitted)
>
> The proposition that the law requires unusual exertion be assignable to a definite time, place and circumstance was most recently reaffirmed in *Wold v. Meilman Food Industries,* 269 N.W.2d 112 (SD 1978).
>
> None of these cases, however, have interpreted the statute in light of the 1975 amendment which deleted the phrase "by accident." By deleting this phrase, South Dakota joined the states of California, Iowa, Maine, Massachusetts, Minnesota, Pennsylvania and Rhode Island in eliminating the requirement. 1B Larson, Workmen's Compensation Law 37.10. Deletion of "by accident" has resulted in the rejection of the unusual exertion requirement in these jurisdictions. For example, soon after the deletion of "accident" from their statute, the Minnesota Supreme Court noted that it was no longer necessary to prove unusual exertion. *Fleischer v. State of Minnesota, Dept. of Highways,* 247 Minn. 396, 77

N.W.2d 288 (1956); *Golob v. Buckingham Hotel,* 244 Minn. 301, 69 N.W.2d 636 (1955). We agree with the approach taken by Minnesota and other jurisdictions which have deleted "by accident" from their statutes and we too choose to abandon the unusual exertion requirement.

This court's interpretation of SDCL 62-1-1 as amended was anticipated by the Division. The Division properly discarded the unusual exertion rule and proceeded to the relevant test of causation: whether the injury was one arising out of and in the course of the employment. 1B Larson, Workmen's Compensation Law, 38.30. As noted by the Minnesota Supreme Court in *Peterson v. Ruberoid Company*, 261 Minn. 497, 499, 113 N.W.2d 85, 86 (1962):

> [T]he fact that an employee dies from a heart attack at his usual place of employment and during his usual hours thereof is not sufficient, in itself, to impose coverage under the Workmen's Compensation Act. The claimant has the burden of establishing a causal connection between the employment and the disability. In other words, it must be shown that the heart attack was brought on by strain or overexertion incident to the employment, even though the exertion or strain need not be unusual or other than that occurring in the normal course of the employment.

Kirnan v. Dakota Midland Hosp., 331 N.W.2d 72, (SD 1983). In 1989 the South Dakota Supreme Court stated:

> To recover disability benefits under the worker's compensation statutes, the claimant has the burden of establishing a "causal connection between the employment and the disability." *Kirnan v. Dakota Midland Hosp.,* 331 N.W.2d 72, 74 (SD 1983) (quoting *Peterson v. Ruberoid Company*, 261 Minn. 497, 499, 113 N.W.2d 85, 86 (1962)). See also SDCL 62–1–1(2). The testimony of "professionals" is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion. *Wold, 269 N.W.2d at 115; Podio v. American Colloid Co., 83 SD 528, 534, 162 N.W.2d 385, 388 (1968).*

Lawler v. Windmill Restaurant, 435 N.W.2d 708, 709 (SD 1989). In making the 1975 deletion of the "by accident" phrase, it can only be assumed that the Legislature intended that an "injury" need not be traceable to a definite time and place nor need the determination of compensability in cases rise or fall on whether "unusual exertion" existed.

> A 1995 amendment of the statute declared that injuries as defined therein will be compensated only if proven by medical evidence and only if one of three

> conditions is satisfied. SDCL 62–1–1(7). The worker must show: (1) the employment or employment related activities was a major contributing cause of the condition complained of; or (2) where an injury combines with a preexisting disease or condition, the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment; or (3) where an injury combines with a preexisting work related compensable injury, the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment or need for treatment. *Id.*
>
> As we noted in *Steinberg,* the legislature's use of *condition* rather than *injury* in the amendment is significant. *Steinberg,* 2000 SD 36, ¶ 10, 607 N.W.2d at 600. *Injury* is the act or omission which causes the loss whereas *condition* is the loss produced by an injury, the result. *Id.* The addition of this new statutory language did not increase the causal connection a worker must show between his *injury* and his employment, but it did place a new burden on the worker to show that his employment activities were a major contributing cause of his resulting *condition. Id.* In short, in order to prevail, an employee seeking benefits under our workers' compensation law must show *both:* (1) that the *injury* arose *out of* and *in the course* of employment and (2) that the employment or employment related activities were a *major contributing cause* of the *condition* of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a *major contributing cause* of the disability, impairment, or need for treatment. SDCL 62–1–1(7)(a)–(b); *Steinberg,* 2000 SD 36, ¶ 29, 607 N.W.2d 596, 606.

Grauel v. South Dakota School of Mines and Technology, 619 N.W.2d 260, 263, 145 ¶¶ 8-9 (SD 2000). See *Pierre v. ABF Freight,* 211 A.D.3d 1284, 180 N.Y.S.3d 337 (Supreme Ct., App. Div., N.Y. 2022).

> "[A]rising out of" and "in the course of" are independent factors relevant to "the general inquiry of whether the injury or condition complained of is connected to the employment." Indeed, "the factors are prone to some interplay and 'deficiencies in the strength of one factor are sometimes allowed to be made up by the strength in the other.'" Moreover, "application of the workers' compensation statutes is not limited solely to the times when the employee is engaged in the work that he was hired to perform." Rather, we construe "arising out of and in the course of" liberally in favor of injured employees. Moreover, "workers' compensation is the exclusive remedy against employers for all on-the-job injuries to workers except those injuries intentionally inflicted by the employer." It is designed to replace the "common law's doubtful tort based recovery system with a system based on a right to relief upon establishing the fact of employment, 'automatic and certain, expeditious and independent of proof of fault.' "

1. "Arising out of the employment"

To prove that his injury arose "out of" the employment, [the Claimant] must prove that there exists a causal connection between the injury and the employment. "The employment need not be the direct or proximate cause of the injury [;] rather it is sufficient if 'the accident had its origin in the hazard to which the employment exposed the employee while doing [his] work.' " Therefore, an injury will be deemed to have arisen out of the employment if: 1) the employment "contributes to causing the injury; or 2) the activity is one in which the employee might reasonably be expected to engage; or 3) the activity brings about the disability upon which compensation is based."

***

2. "In the course of the employment"

"'[I]n the course of employment' refer[s] to 'the time, place and circumstances of the injury.' "'An employee [will be] considered in the course of the employment if he is doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment.' "

Petrik v. JJ Concrete, Inc., 865 N.W.2d 133, 137-138, 39 ¶¶ 11-12, 15. (SD 2015) [(citations omitted)] (horseplay was in the course of employment).; See *Krier v. Dick's Linoleum Shop*, 98 N.W.2d 486 (1959)

What is an injury? The Pennsylvania Supreme Court, in a worker's compensation appeal, aptly states:

> In *Creighan v. Firemen's Relief and Pension Fund Board,* 397 Pa. 419, 155 A.2d 844 (1959), this Court observed that, " 'in common speech the word "injury," as applied to personal injury to a human being, *includes whatever lesion or change in any part of the system produces harm or pain, or a lessened facility of the natural use of any bodily activity or capability.*' " Id. at 425, 155 A.2d at 847 (emphasis added) (quoting *Burns' Case,* 218 Mass. 8, 12, 105 N.E. 601, 603 (1914)). Going further, this Court in *Creighan* went on to state that " '[t]he word "injury," in ordinary modern usage, is one *of very broad designation* '," and that " '*its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by anyone* '. It is true that *Creighan* was about the rights of an allegedly injured person pursuant to a pension statute, and not the Workmen's Compensation Act. However, the case is greatly significant for our present purposes in that the Court had to give meaning to the word "injury" in the absence of an express statutory definition. Indeed, in *Workmen's Compensation Appeal Board v. Bernard S. Pincus Co., supra,* we embraced *Creighan's* broad definition of "injury" for the purpose of construing section 301(c)(1) of the Act.

Pawlosky v. W.C.A.B., 514 Pa. 450, 525 A.2d 1204, 1209 (Pa. 1987). In the *Creighan* case, the Pennsylvania Supreme Court stated:

> [W]e are compelled to give to the word injury its common, non-technical meaning. What is that meaning? Webster's International Dictionary defines injury as:
>
> 'Damage or hurt done to or suffered by a person or thing, detriment to, or violation of, person, character, feelings, rights, property, or interests, or the value of a thing * * * Synonyms: Detriment, hurt, loss, impairment, evil, ill, injustice, wrong * * * Injury is the general term for hurt of any sort, whether suffered by a person (often in the sense of a wrong) or a thing.'
>
> It will be noted that nowhere in the definition is violence a preliminary *sine qua non* to injury. Thus, according to Webster, a not inconsequential authority on words, a breakdown of tissue in the lungs may (under certain circumstances) be as much an injury as a laceration of flesh and muscle or even a fracture of bone, especially if the drastic change in the fabric of the lungs is the result of mishap or misadventure. Nor does the physical disablement need to occur simultaneously with the physical phenomenon which is its cause, in order for the disablement to be denominated an injury. For instance, a fireman who rubs against a poisonous chemical, whose injuring properties do not become manifest on the fireman's body until days, or even weeks, following the contact, is no less injured in the performance of his duty than the fireman who falls from a ladder. Nor should it be doubted that a fireman who contracts ivy poisoning while climbing the side of a building in performing rescue work is injured just as surely as if he had been struck by cascading debris.

Creighan v. Firemen's Relief and Pension Fund Bd. of City of Pittsburgh, 397 Pa. 419,423, 155 A.2d 844 (Pa. 1959) (tuberculosis). The Commonwealth Court of Pennsylvania in a worker's compensation case determined:

> Section 301(c)(1) of the Act states in pertinent part, "[t]he terms 'injury' and 'personal injury,' as used in this act, shall be construed to mean an injury to an employee, regardless of his previous physical condition, arising in the course of his employment and related thereto...." 77 P.S. 411(1). "Injury" is not defined beyond the emphasis that the condition must be related to employment.
>
> Our appellate courts decline to define the term in more detail, instead concentrating on the question of whether the injury is related to the employment. *See Workmen's Comp. Appeal Bd. (Squillacioti) v. Bernard S. Pincus Co.*, 479 Pa. 286, 388 A.2d 659 (1978)(no technical definition of "injury" warranted, standard dictionary or common speech definition adequate for

purposes of Act); *Jackson Twp. Volunteer Fire Co. v. Workers' Comp. Appeal Bd. (Wallet),* 140 Pa.Cmwlth. 620, 594 A.2d 826 (1991)("injury" broadly defined to encompass all work-related harm including any hurtful or damaging effect which may be suffered by anyone); *Barnes and Tucker Co. v. Workmen's Comp. Appeal Bd. (Sewalish),* 40 Pa.Cmwlth.152, 396 A.2d 900 (1979)("injury" under Act must be given liberal construction); *Workmen's Comp. Appeal Bd. (Young) v. Bethlehem Steel Corp.,* 23 Pa.Cmwlth.454, 352 A.2d 571 (1976)(injury need not be pinpointed to specific event or definable incident so long as the injury arises in the course of employment and is related thereto).

Merriam–Webster's Collegiate Dictionary 601 (10th ed.2001) defines "injury" as follows:

> **1 a:** an act that damages or hurts: WRONG **b:** violation of another's rights for which the law allows an action to recover damages **2:** hurt, damage, or loss sustained[.]

Considering the foregoing, we are aware of no authority that requires a worker's compensation injury to carry a professional diagnosis or descriptive tag. As discussed hereafter, pain itself, if causally related to employment, may be compensable under the Act as an injury. The presence of a diagnosis may impact the credibility of testimony addressing the existence of pain or its relationship to employment, but it is not a legal precondition.

Meadow Lakes Apartments v. W.C.A.B.(Spencer), 894 A.2d 214, 217 (Commonwealth. Ct. Pa. 2006). See *Logan v. New York City Health & Hosp. Corp.*, 139 A.D.3d 1200, 32 N.Y.S.3d 342, 345, 2016 N.Y. Slip Op. 03776 (S.Ct., App. Div., N.Y. 2016) ("the plain meaning of the term accident is not synonymous with the term injury"); See *Pierre v. ABF Freight,* 211 A.D.3d 1284, 180 N.Y.S.3d 337 (Supreme Ct., App. Div., N.Y. 2022) (contracting COVID in the workplace is a hazard and a compensable "injury"); *Tinker v. Firestone Tire & Rubber Co.*, 1935 WL 1817 *2, 19 Ohio Law Abs. 227, 228 (Ct. App. Ohio 1935)("'Injury' is defined in Webster's New International Dictionary as '1. Damage or hurt done to or suffered by a person or thing ***. 2. An act which damages, harms, or hurts; also a hurt or damage sustained; as, they suffered severe injuries.'"); *Smothers v. Gresham Transfer, Inc.*, 332 Or. 8, 323 P.3d 333, 339 (Oregon 2001) ("A standard

dictionary defined 'injury,' in part, as 'any wrong or damage done to a man's person, rights, reputation, or goods. That which impairs the soundness of the body or health, or which gives pain, is an injury.' Webster, American Dictionary at 606."); *In re Mauz*, 218 Mass. 8, 105 N.E. 601, 603 (Supreme Jud. Ct. Mass. 1914) ("In common speech the word 'injury,' as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability."); See *Taylor v. Imperial Cas. & Indem. Co.*, 82 SD 298, 144 N.W.2d 856, 858, and footnote 2 (1966) (*citing, Meyer v. Roettele)* (The general meaning attributed to the word "accident" as used in the Workmen's Compensation Law is not at variance with caselaw concerning insurance policies defining accident as "an designed, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force.").

Franken has alleged, that on or about April 19, 2020, while engaged in the course and scope of Craig A. Franken's employment, Craig A. Franken suffered a work-related injury including, but not limited to, COVID-19 pursuant to SDCL 62-1-1(7)(a), 62-1-1(7)(b), and/or 62-1-1(7)(c), and that the working conditions/activities at the Smithfield plant, are a major contributing factor for Craig A. Franken's need for medical treatment and hospitalization for his infection/injury, and Craig's COVID-19 condition and COVID-19--related death on April 19, 2020. (AR at 003); (Appx-11). We can reasonably infer and assume, for purposes of the motion to dismiss, many factual matters --- at all times material, "on or about April 19, 2020 --- supporting that Mr. Franken, while in the course and scope of his employment, suffered a compensable "injury" under SDCL 62-1-1-(7). Craig Franken was where his employer directed him to be. The plant

area where Craig Franken was working at Smithfield was a hot bed work environment (i.e., the condition of the premises and/or by the operation of Smithfield's business or affairs) teeming with the highly transmissible, pathogenic, biological agent, SARS-CoV-2 and/or mutation(s) thereof --- concentrated on, and contaminating, persons, animals, and surfaces, and concentrated in, and contaminating, the air --- in Craig Franken's work space. Smithfield, through the conditions of its premises and/or its business activities, exposed Franken to a bio-hazard incidental to his employment --- namely the presence of SARS-CoV-2 virus and/or mutations therefrom. The SARS-CoV-2 virus was transmitted to Craig Franken, while he was physically working at Smithfield, by one or more of the following modes of transmission: (a) direct, indirect, or close contact with infected people through infected secretions such as saliva and respiratory secretions or their respiratory droplets, which are expelled when an infected person coughs, sneezes, talks or sings, and the virus reaches the mouth, nose or eyes of a susceptible person and results in infection, and/or (b) indirect contact transmission involving contact of a susceptible host with a contaminated object or surface and followed by touching the mouth, nose, or eyes. The pathogenic, parasitic, biological agent, SARS-CoV-2 virus, invaded and insulted and caused harm to the physical structure(s) of Mr. Franken's body by his being unduly exposed at work. After viral entry into (invasion of) Franken's bodily tissue, over the next 2-14 days the parasitic viruses attached to and entered Mr. Franken's healthy living cells, and replicated, propagated, and proliferated in Mr. Franken's body, causing tissue injury, including his lungs and/or organs. This directly led to (the legal cause of) Mr. Franken developing medical symptoms and conditions, (like COVID-19 disease,

difficulty breathing, respiratory failure, cardiac arrest), including Craig Franken's premature, unfortunate death on April 19, 2020.

The Department's determination was correct that Claimant alleges: (a) Franken suffered a work-related injury pursuant to SDCL 62-1-1(7), and (b) the working conditions at Smithfield on or about April 19, 2020, are a major contributing factor to Franken's need for medical treatment and his death. (AR at 049). The Circuit Court erred in determining that under South Dakota law a "disease or aggravation must be assigned to a definite time, place and circumstance", and Franken "has not asserted in her petition a definite time, place, and circumstance of exposure to COVID-19, so as alleged it is not 'injury' for purposes of workers' compensation", and "[a]ccordingly, the ALJ's decision dismissing Count 1 of Karen's petition was correct." Alternatively, after (1) accepting the material allegations in the Petition as true and construing them in a light most favorable to the petitioner, (2) liberally construing SDCL 62-1-1(7), favoring the resolution of this case upon the merits rather than on failed or inartful accusations, it can be said, as a matter of law, that Franken's statements in the Petition (a) are enough to raise a right to worker's compensation benefits above the speculative level, (b) are sufficient to put a person of common understanding on notice, with reasonable certainty of the accusations against Smithfield so Smithfield may prepare its defense, and (c) adequately state a time (on or about April 19, 2020), a place (at his workplace while working), and circumstance (body unduly exposed to and invaded/infected by a highly transmissible, replicating, pathogenic, parasitic, biological agent, SARS-CoV-2). Considering the "plain, ordinary, and popular meaning" of the word "injury" in SDCL 62-1-1(7), Franken's authorized work activities at Smithfield and the hazardous workplace environment legally caused

"injury" to Franken as "injury" and "the injury" are defined by SDCL 62-1-1(7) and South Dakota law. *Pierre v. ABF Freight, supra; Meyer v. Roettele, supra; Hanzik v. Interstate Power Co., supra.* Otherwise, the word "injury" in SDCL 62-1-1(7) is ambiguous; and "if the statute has an ambiguity, it should then be liberally construed in favor of injured employees." *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.*, 853 N.W.2d 878, 885 (SD 2014) (citation and quotation omitted)).

SDCL Ch. 21-68 Does Not Apply to Franken's Workers' Compensation Claim/Case

"Worker's compensation was designed by the legislature to be the exclusive method of compensating worker's injured on the job in all but extraordinary circumstances." *Harn v. Continental Lumber Co*, 506 N.W.2d 91, 95 (SD 1993). That is why worker's compensation statutes are liberally construed to provide coverage even when everyone (*including the injured employee and employer*) would prefer otherwise. *Harn v. Continental Lumber Co*, 506 N.W.2d 91, 95 (SD 1993). Long before Mr. Franken's unfortunate death, and the subsequent enactment of SDCL 21-68, statutory benefits under Title 62-4 has been the exclusive remedy for all on-the-job injuries to employees, except an action for damages in circuit court against an employer – for intentional tort. Under SDCL 62-3-2, employers (*and co-employees*) are immune from an action for damages by an injured employee for negligence; as the responsibility that rests upon, and is assumed by, the employer under Title 62 for statutory compensation/benefits supplants the common law and is an absolute liability irrespective of negligence. *Hagemann ex rel. Estate of Hagemann v. NJS Engineering, Inc.*, 632 N.W.2d 840, 843-844 (SD 2001); SDCL 62-3-1; SDCL 62-3-3 (employer and employee are presumed to have accepted, and be bound by, the provision of Title 62).

"Title 62 … governs workers' compensation in South Dakota". *Martin v. American Colloid Co.*, 804 N.W.2d 65 ¶13 (SD 2011) "Proceedings under the Work[ers'] Compensation Law ... are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions." *Martin v. American Colloid Co.*, 804 N.W.2d 65 ¶ 12 (SD 2011); *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 364 (SD 1992) (quoting *Chittenden v. Jarvis*, 68 SD 5, 8, 297 N.W. 787, 788 (1941)).

The proceedings before the Department of Labor under SDCL Title 62 is a "contested case" ---"a proceeding… in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing …." (SDCL 1-26-1(2)). When a hearing is requested in a contested case under SDCL Title 62, the matter is heard before a "hearing examiner", who is an "employee of the Department of Labor and Regulation." (SDCL 62-7-12.1 and 12.2).

"The [workman's compensation] system is designed to be essentially nonadversarial. Whatever its faults, real or imagined, the system presupposes that all workers will benefit more if claims [for compensation] are processed routinely and paid quickly." *Sowards v. Hills Materials Co.*, 521 N.W.2d 649, 652 (SD 1994). "Workman's compensation proceedings are "nonadversarial, [and] informal [in] nature." *Sowards v. Hills Materials Co.*, 521 N.W.2d 649, 652 (SD 1994).

"An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement, determination, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding." (SDCL 15-1-1(1)); See *Sullivan v. Hudson*, 490 U.S.

877, 894, 109 S.Ct. 2248, 104 L.Ed.2d 941 (1989) ("[t]he plain meaning of 'civil action' is a proceeding in a court, see Black's Law Dictionary 26, 222 (5th ed. 1979)"); A worker's compensation proceeding (*and appurtenant appeal*) is not an action but a special proceeding. See *Hickman v. Gumerson*, 190 Okla. 514, 125 P.2d 765, 767 (OK 1942) ("It is settled law that the statutory right to compensation must, by statute, be established by resort to the special proceeding before the Industrial Commission"); *Loyd v. Family Dollar Stores of Nebraska, Inc.*, 304 Neb. 883, 937 N.W.2d 487, 490 (Neb. 2020); *Larsen v. D B Feedyards, Inc.*, 264 Neb. 483, 648 N.W.2d 306, 309 (Neb. 2002) ("It is well settled that a workers' compensation case is a "special proceeding" for appellate purposes."); *Ferguson v. State*, 151 Ohio St.3d 265, ¶ 23, 87 N.E.3d 1250 (Ohio 2017); *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wash.2d 974, 216 P.3d 374, 378 (Wash. 2009); *Hanson v. North Dakota Workmen's Compensation Bureau*, 63 N.D. 479, 248 N.W. 680, 685 (N.D. 1933); See *State v. Taylor*, 30 SD 304, 138 N.W. 372, 373 (SD 1912)(The proceeding for removal of a neglected child to a home for dependent children "was purely a special proceeding finding its authority solely in the statutes, and, like all other special proceedings, its conduct is governed by the express provisions of the statutes.").

Worker's compensation proceedings are generally not governed by the rules of civil procedure and their venue provisions. *Sowards v. Hills Materials Co.*, 521 N.W.2d 649, 652 (SD 1994); See SDCL 62-2-5. "[T]he plain and ordinary meaning of 'any civil action for damages' is an action brought by an injured party against the wrongdoer to recover compensation in the form of money damages for the full measure of the loss or injury that was naturally and proximately caused by the wrongful act in order to make the

injured party whole." *Nichols v. State Farm Mut.*, 851 So.2d 742, 756 (Ct. App. Fla. 2003) (Thomas D. Sawaya, concurring in part and dissenting in part) (*citing*, H*anna v. Martin*, 49 So.2d 585 (Fla.1950) ("Damage may be defined to be the loss, injury or deterioration caused by negligence, design or accident of one person to another in respect to his person or property".). "The term 'any' means that application … is not limited to negligence actions, but applies to other tort actions and to actions for breach of contract." *Nichols*, 851 So.2d at 756 (Ct. App. Fla. 2003).

SDCL 21–1–1 defines damages:

> Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefore in money, which is called damages. Detriment is a loss or harm suffered in person or property.

This definition utilizes the phrase "recover for the person in fault" as part of the definition of damages. Compensation under the workers' compensation law is not based on fault, but rather is a responsibility which the employer assumes. SDCL 62–3–1. An award for workers' compensation pursuant to a work-related injury is not encompassed by the wording of SDCL 21–1–13.1.

Blenner v. City of Rapid City, 670 N.W.2d 508, 515 ¶ 47 (SD 2003). "Compensation benefits" for an "injury" means the payments and benefits provided for in the South Dakota workers' compensation law, which include medical expenses, and benefits under SDCL Ch. 62-4, subject to the conditions and limitations contained in Title 62. *Lagge v. Corsica Co-Op*, 677 N.W.2d 569, 2004 SD 32 ¶ 38; See SDCL 62-8-1(1). "The compensation to which an employee is entitled arises out of his contract of employment, and … is not in the nature of damages for a tort." *Benson v. Sioux Falls Medical and Surgical Clinic*, 62 S.D. 324, 252 N.W. 864, 869 (SD 1934). An "action for damages, injury or death" does not include a worker's compensation claim or petition for statutory benefits. *Baker v. Shields*, 767 N.W.2d 404, 409 (Iowa 2009). See *Andreson v. Brink*

Elec. Const. Co., 568 N.W.2d 290 ¶ 16 (SD 1997) (Under SDCL 62-4-38 to 39, an employee may claim workers' compensation from the employer and/or pursue a common law legal action for damages against the tortfeasor). "An action is commenced as to each defendant when the summons is served on him…." (SDCL 15-2-30). The South Dakota Department of Labor is an agency --- a term which does not include the Legislature, or the Unified Judicial System. (SDCL 1-26-1 (1)). An action or claim for damages or relief that is removed from the exclusive remedy provision of SDCL Title 62 is not a right to, or claim for, compensation provided by or payable under Title 62. See e.g., *Dudley v. Mesa Industries*, 770 So.2d 1082, 1084 (Ala. 2000) (A tort action for damages is not a claim for workman's compensation).

SDCL Ch. 21-68 is not a part of Title 62 (*South Dakota Workers' Compensation Laws*), and makes no reference to Title 62, administrative proceedings under Title 62, or to compensation or statutory death benefits under SDCL Ch. 62-4. "Title 21 of the South Dakota Codified Laws governs South Dakota's judicial remedies", including, but not limited to, actions in circuit court for damages for breach of contract or for torts or for wrongful death, civil action for declaratory judgment by courts of record, and other civil actions at law or in equity in South Dakota circuit courts, which is part of the unified judicial system, and which, under article V, § 1 of the South Dakota Constitution have broad authority to "hear all civil actions". *Bingham Farms Trust v. City of Belle Fourche,* 932 N.W.2d 916, 2019 SD 50, ¶ 14 and n. 3; *Rupert v. City of Rapid City*, 827 N.W.2d 55, 68, 2013 SD 13 ¶ 34 (SD 2013) . The circuit courts have "common-law jurisdiction" and "original jurisdiction in all actions at law and in equity". (SDCL 16-6-8 and SDCL 16-6-9).

Under SDCL 21-5-9 "Where applicable the law relating to worker's compensation supersedes the provisions of this chapter [(SDCL 21-5 – Wrongful Death Actions)]." (Source: RC 1919, 2932; SDC 1939 & Supp. 37.2204). In a wrongful death case in circuit court the plaintiff must prove an additional element of fault (e.g., negligence or intentional tort) --- and the burden of proof is by a preponderance of the evidence (a higher level burden of proof than under Title 62), and legal causation is proximate cause (a higher level of legal causation than under Title 62[1]), and the alleged tortfeasor may assert one or more common law affirmative defenses of contributory negligence, assumption of the risk, consent, self-defense, defense of others, authority of law, and/or justification. (See SDCL 15-6-8(c)); See *In re Mauz*, 532 B.R. 589, 598-99, (Bkrtcy. M.D. Pa. 2015) (*citations omitted*). In a wrongful death action in circuit court the plaintiff is entitled to a jury trial and may be awarded damages for pecuniary injury to the estate (heirs/beneficiaries), and loss of society, companionship, and affection, and in some cases, conscious pain and suffering. *Zoss v. Dakota Truck Underwriters*, 590 N.W.2d 911, 913-914 (SD 1999).

Under SDCL 62-3-1 "The compensation provided by this title [62] is the measure of responsibility which the employer has assumed for injuries to or death of any employee."

> Worker's compensation was designed by the legislature to be the exclusive method for compensating workers injured on the job in all but extraordinary circumstances.... Consequently, this court construes worker's compensation statutes liberally to provide coverage even when the worker would prefer to avoid it." [citations omitted].

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[1] *Petrik v. JJ Concrete, Inc.*, 865 N.W.2d 133,137, 2015 S.D. 39 ¶ 12; *Hughes v. Dakota Mill and Grain, Inc.*, 959 N.W.2d 903, 909, 2021 S.D. 31 ¶ 20.

SDCL 62–3–2 states:

> The rights and remedies herein 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 such employee, his personal representatives, dependents, or next of kin, on account of such injury or death against his employer or any employee, partner, officer or director of such employer, except rights and remedies arising from intentional tort.

This Court has repeatedly stated that worker's compensation is the exclusive remedy for employees injured on the job, except for intentional torts.

Canal Ins. Co. v. Abraham, 598 N.W.2d 512, ¶¶18-20, 90 (SD 1999).

The chapter Employer Smithfield cites (SDCL 21-68), to support its motion, applies to "civil actions", and claims for damages, or relief, which can only be brought in circuit courts of general jurisdiction in the unified judicial system, such as: (a) Civil actions for damages against owner/possessors of property (e.g., premises liability claim by an invited or permitted entrant on land against homeowner, landlord, or business) for "any injuries sustained from the individual's exposure to COVID-19", except for intentional exposure with intent to transmit (SDCL 21-68-3); (b) Civil actions for damages against health care providers (medical malpractice tort claim) except for gross negligence, recklessness, or willful misconduct (SDCL 21-68-4); and (c) Civil actions against makers/suppliers/handlers alleging personal injury, death or property damage, caused by use of disinfectants, cleaning supplies, or personal protective equipment (PPE), except for any act or omission that constitutes gross negligence, recklessness, or willful misconduct. (Appx-29). SDCL Ch. 21-68 makes clear that it may not be construed to "eliminate or satisfy a required element of a claim or cause of action of any kind", "deem COVID-19 an occupational disease", or "abrogate, amend, repeal, alter, or affect any statutory or common law immunity or limitation of liability." (SDCL 21-68-6). This

would include immunity of employers[2] (and fellow employees) of injured workers (*under SDCL 62-3-2*) from actions for damages for personal injury or death except for intentional tort. This would include compensation for injury or death under Title 62, including SDCL 62-1-1(7), and SDCL Ch. 62-4 (medical expenses and disability (indemnity) benefits).

Nothing in the Chapter cited by Employer (SDCL 21-68) expresses any legislative intent to alter or affect an employer's or employee's rights and obligations under Title 62, or the right of any party in a contested case to appeal in the circuit court from a final decision, ruling or action by the Department of Labor. (SDCL 1-26-30.2); See *Jundt v. Fuller*, 736 N.W.2d 508, 513 ¶ 10 (SD 2007) ("[T]he constitutional separation of powers between the executive branch and the judicial branch prevents courts from involvement in review of administrative decisions unless there exists specific legislative empowerment for the judiciary to act regarding executive branch functions; when such delegation of power exists, appeals to the courts must follow such statutory procedures as a condition precedent to obtaining subject matter jurisdiction"). SDCL 21-68-2 cannot be interpreted the way Employer/Insurer propose; as this would frustrate the statutory design (*intent of legislature*) of Title 62 to provide an exclusive statutory, no-fault system and expeditious means of obtaining compensation for injured workers, and provide employers limited, determinate liability.

SDCL 21-68-2 – Enacted July 1, 2021 -- Does Not Apply Retroactive to Franken's Work-related Injury, Conditions, and His Death on or about April 19, 2020.

The Department determined that Chapter 68 of Title 21 (*including SDCL 21-68-2,*

[2] An employer who is deemed to operate under Title 62 by being insured or self-insured under SDCL 62-5-1 to 7.

3, and 4) did apply retroactively, and did apply to any exposure to, or injury from, COVID-19 between January 1, 2020, and December 31, 2022.

There is a deeply rooted jurisprudential presumption against retroactive legislation. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 245, 265, 114 S.Ct. 1483, 1487, 128 L.Ed.2d 229 (1994); See *Town of Goshen v. Town of Stonington*, 24 Conn. 209, 222-223, 18 (Supreme Court of Errors of Connecticut 1824) ("[A] statute is not to be construed as having a retrospect. Such a construction ought never to be given unless the expression of the law imperiously requires it."). Statutes affecting substantive rights are not given retroactive effect absent clearly stated intention of the legislature. *Sopko v. C & R Transfer Company, Inc.*, 665 N.W.2d 94 ¶ (SD 2003). "This rule is rooted in the notion that it would be unfair to change the grounds upon which an action may be maintained on parties who have already transacted or who are already committed to litigation." *Moore v. McNamara*, 201 Conn. 16, 513 A.2d 660, 663 (Conn. 1986).

> [A] rule of presumed legislative intent is that statutes affecting substantive rights shall apply prospectively only ... The rule is rooted in the notion that it would be unfair to impose a substantive amendment that changes the grounds upon which an action may be maintained on parties who have already transacted or who are already committed to litigation ... In civil cases, however, unless considerations of good sense and justice dictate otherwise, it is presumed that procedural statutes will be applied retrospectively ... Procedural statutes have been traditionally viewed as affecting remedies, not substantive rights, and therefore leave the preexisting scheme intact ... [A]lthough we have presumed that procedural or remedial statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary ... a statute which, in form, provides but a change in remedy but actually brings about changes in substantive rights is not subject to retroactive application ... While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress ... Put differently, substantive changes to statutes in the absence of any clear expression of legislative intent to the contrary [are] presumptively prospective." (Citations omitted; internal quotation marks omitted.) *Walsh v. Jodoin*, 283 Conn. 187, 195–96, 925 A.2d 1086 (2007).

Akkoyun v. Crescent Star, LLC, WL 3652083, *1 (Super. Ct. Conn. 2015).

SDCL 2-14-21 makes clear that "No part of the code of laws enacted by 2-16-13 shall be construed as retroactive unless such intention plainly appears". This includes "The 2004 revision of volume 13" (*also known as Title 21*), and the "2021 cumulative annual pocket parts" which includes SDCL Ch. 21-68. (Appx-38-40).

SDCL 21-68-2 became effective July 1, 2021. See SDCL 2-14-16 ("[A]n act of the Legislature which does not prescribe when it shall take effect, if passed at a regular session, takes effect on the first day of July after its passage ....") This is undisputed. Claimant died of Covid in April of 2020. This is undisputed.

The liability of an employer of an injured or deceased employee arises out of the employment agreement or contract for hire, express or implied, between them. *Rohlck v. J & L Rainbow, Inc.*, 553 N.W.2d 521, 115 ¶ 9 (SD 1996); *Goodman v. Sioux Steel Co.*, 475 N.W.2d 563, 564 (SD 1991); *Buckman v. Montana Deaconess Hospital and State Compensation Insurance Fund*, 224 Mont. 318, 730 P.2d 380, 384-386 (Mont. 1986) (citing *Estate of Baker*, 222 Kan. 127, 563 P.2d 431, 436 (Kan. 1977); *Sadler v. Philadelphia Coca-Cola*, 269 A.3d 690, 704 (Commonwealth. Ct. Pa. 2022), *app. den.*, 282 A.3d 687 (Pa. 2022). Workmen's Compensation is of the nature of public benefits-another unit in an overall system of wage-loss protection --- substantially the same as the nature of social security benefits – social welfare legislation. *Estate of Baker*, 222 Kan. 127, 563 P.2d 431,436 (Kan. 1977); *Crowe v. City of Detroit*, 631 N.W.2d 293 n.9 (Mich. 2001); *Drouillard v. Stroh Brewery Co.*, 449 Mich. 293, 536 N.W.2d 530, 536 (Mich. 1995); *Haney v. North Dakota Workers Compensation Bureau*, 518 N.W.2d 195, 199 (N.D. 1994); See *Jackson v. Lee's Travelers Lodge, Inc.*, 563 N.W.2d 858 (SD 1997)(It is

loss of earning capacity, not loss of wages per se, that is compensable in workers' compensation."). "Liability of an employer to an injured or deceased employee arises out of the contract between them; the terms of the workmen's compensation statute are embodied in the contract" *Cadwell v. Bechtel Power Corp.*, 225 Mont. 423, 732 P.2d 1352, 1354 (Mont. 1987); *Estate of Baker*, 222 Kan. 127, 563 P.2d 431,436 (Kan. 1977). "The statute in effect on the date of the injury determines the benefits to be received"; and "[t]hat sets the contractual rights and debts of the parties." *Cadwell v. Bechtel Power Corp.*, 225 Mont. 423, 732 P.2d 1352, 1354 (Mont. 1987)(citing *Trusty v. Consolidated Freightways*, 681 P.2d 1085, 1088 (Mont 1984); *Estate of Baker*, 222 Kan. 127, 563 P.2d 431, 436 (Kan. 1977); *Capital Motors, LLC v. Schied*, 660 N.W.2d 242, n.3 (SD 2003) (*citing Sandner v. Minnehaha County, 2002 SD 123, ¶ 8, 652 N.W.2d 778, 782 (citing Loewen v. Hyman Freightways, Inc., 1997 SD 2, ¶ 9, 557 N.W.2d 764, 766)*); *Estate of Baker*, 222 Kan. 127, 563 P.2d 431,436 (Kan. 1977). "Rights under the contract vest when the cause of action accrues; the cause of action accrues on the date of injury or death." *Cadwell v. Bechtel Power Corp.*, 225 Mont. 423, 732 P.2d 1352, 1354 (Mont. 1987)(*citing Buckman v. Montana Deaconess Hospital and State Compensation Insurance Fund*, 224 Mont. 318, 730 P.2d 380, 384-386 (Mont. 1986) and *Estate of Baker*, 222 Kan. 127, 563 P.2d 431,436 (Kan. 1977)); See *Weber v. Reihsen Mercantile Corp.*, 77 SD 377, 92 N.W.2d 154, 155 (SD 1958) (When the compensation act speaks of an injury it refers to a compensable injury; and in *Esposito v. Marlin-Rockwell Corporation*, the date of such injury is not the time of the accident or occurrence causing injury, but the time when the right to compensation accrues; and in such a case where a workman sustains an injury which is latent and does not become apparent until sometime

after the occurrence of the accident which caused it, the time for filing claim is computable from the time a compensable injury results).

Claimant's claim for, and right to, SDCL 62-4 compensation/benefits accrued and vested on the date of his injury and death. Clearly, any statute --- stating that an injured employee's claim for statutory benefits under Title 62 for Covid-related injury is abolished --- clearly affects substantive rights. See *Buckman v. Montana Deaconess Hospital and State Compensation Insurance Fund*, 224 Mont. 318, 730 P.2d 380, 384-386 (Mont. 1986) (retroactively applying social security offset, and discounting, statutory provisions regarding total disability benefits unconstitutionally impairs/affects substantive, accrued and vested rights*)*; *EBI/Orion Group v. Blythe*, 281 Mont. 50, 931 P.2d 38, 40 (Mont. 1997) (the right to statutory worker's compensation benefits allowed at the time of injury of an employee is a substantive right). Clearly, any statute --- stating that an injured employee making a claim for statutory benefits under Title 62 must now prove his claim by clear and convincing evidence, and must now prove fault or intentional exposure, and with intent to transmit --- clearly affects substantive rights. *People v. McRunels*, 237 Mich.App. 168, 603 N.W.2d 95, 99 (Ct. App. Mich. 1999) ("[C]hanges affecting the burden of proof are substantive…."); *Cole v. Celotex Corp.*, 588 So.2d 376, 384 (Ct. App. La. 1991), aff'd, 599 So.2d 1058, (La., 1992) ("[A] statute, such as comparative fault, that changes substantive rights has only prospective effect."); *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 817 (La. 1992)("Substantive laws either establish new rules, rights, and duties or change existing ones"); See *Buckman v. Montana Deaconess Hospital and State Compensation Insurance Fund*, 224 Mont. 318, 730 P.2d 380, 384-386 (Mont. 1986); *EBI/Orion Group v. Blythe*, 281 Mont. 50, 931

P.2d 38, 40 (Mont. 1997) (the right to statutory worker's compensation benefits allowed at the time of injury of an employee is a substantive right).

> Although courts at times use the terms "substantive" and "procedural" to determine whether a statute alters the legal consequences of past events, what is important is the law's effect, not its label or form. A statute which takes a seemingly procedural form and uses evidentiary language concerning burdens of proof may in effect alter or destroy a preexisting substantive right by imposing an evidentiary requirement with which it is impossible to comply. [Legislature may not under pretense of regulating procedure or rules of evidence deprive party of substantive right].

Murphy v. City of Alameda, 11 Cal.App.4th 906, 14 Cal.Rptr.2d 329, 333 (Ct. App Cal. 1992) (citations omitted); See *Blyer v. Hershman,* 156 Misc. 349, 281 N.Y.S. 942, 945-946 (City Ct. NY, NY County 1934) (Statute providing that in infant's personal injury action negligence or contributory negligence of parent or custodian is not imputed to infant held not retroactive, since the statute makes change in substantive law by amending common law by removing in one class of negligence cases an essential element necessary to the substantive proof on the part of plaintiff)

"Our rules of statutory construction require us to discern legislative intent based primarily on the language of the statute." *Perdue, Inc. v. Rounds,* 782 N.W.2d 375 ¶ 9 (SD 2010).

> A statute should not be applied retroactively unless an intention to have it so operate is clearly expressed. Courts must hesitate to imply in a statute an unexpressed legislative intent that its provisions should apply retrospectively.
> ***
> However, absent such language, we are not inclined to depart from the fundamental rule against retroactive application of laws.

State ex rel. Strenge v. Westling, 481 SD 34, 38, 130 N.W.2d 109 (SD 1946).

The legislature knows how to use clearly expressed language in a statutory provision in Title 21 to have it operate retroactively. See SDCL 21-1-13.1("This section

shall apply retroactively"; See *e.g.*, SDCL 62-4-7.1 (2000) ("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 … applies prospectively from July 1, 2000."); SDCL 58-10-16 ("The provisions of [certain subdivisions dealing with certain trusts] are effective retroactively to November 3, 1989); SDCL 38-32-22 ("The provisions [regarding per diem and expense reimbursement] shall be retroactive in effect to July 1, 1988. SDCL 21-68 is not applicable to this case where the Title 62 employee's work-related injury, condition and death occurred in April of 2020 --- when Craig Franken's substantive right to statutory death benefits, and Employer's obligation/debt to Franken, accrued and vested.

CONCLUSION

Claimant-Appellant, Franken, prays that the Supreme Court reverse the erroneous determinations of the Circuit Court and the Department of Labor --- including, but not limited to, the grant of Smithfield's motion to dismiss with prejudice of *Hearing file 84, 2021/22* --- and that the Supreme Court remand this contested case back to the Department of Labor so that the case may proceed under Title 62 (*a special proceeding*), ARSD Ch. 47:03, and SDCL Ch. 1-26, with Smithfield filing a written response to (*admission or denial of*) each allegation contained in the petition for hearing, and, thereafter, with discovery, pre-hearing motions, and/or a hearing on the merits.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4) the Supreme Court's "ORDER GRANTING MOTION FOR ADDITIONAL WORDS IN APPELLANT'S BRIEF #30198", dated and filed February 24, 2023, I certify that this appeal brief complies with the requirements set forth in the South Dakota Codified Laws, and "ORDER GRANTING MOTION FOR ADDITIONAL WORDS IN APPELLANT'S BRIEF #30198". Appellant's Brief was prepared using Microsoft Word and contains 13,778 words through the Conclusion (not including the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and certificate of counsel). I have relied on the word count of the word-processing program to prepare this Certificate.

Dated this 10th day of March 2023.

Bram Weidenaar
Attorney for Appellant-Franken

APPENDIX TABLE OF CONTENTS

STATE OF SOUTH DAKOTA):SS COUNTY OF MINNEHAHA	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

KAREN M. FRANKEN, Individually and as the Personal Representative of the Estate of Craig Allen Franken, Appellant/Claimant, v. SMITHFIELD FOODS, INC., Appellee.	49 CIV 22-1603 **ORDER DISMISSING CLAIMANT'S PETITION FOR BENEFITS WITHOUT PREJUDICE**

Based upon this Court's letter of decision dated November 27, 2022, it is hereby

ORDERED that the Department of Labor's decision dismissing Claimant's petition for benefits is affirmed. Claimant, however, has made a showing of prejudice regarding the Department of Labor's dismissal of Claimant's petition for benefits WITH PREJUDICE. Accordingly, the Department of Labor's dismissal of Claimant's petition for benefits WITH PREJUDICE is REVERSED; and it is hereby

ORDERED that Claimant's petition for benefits is dismissed WITHOUT PREJUDICE.

Dated: November 30, 2022.

BY THE COURT:

Honorable Jon Sogn
Circuit Court Judge, Second Judicial Circuit

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
Minnehaha County
425 N. Dakota Ave.
Sioux Falls, SD 57104

November 27, 2022

Bram Weidenaar
809 W. 10th St., Suite A
Sioux Falls, SD 57104

Laura Hensley
PO Box 5015
Sioux Falls, SD 57117

Re: Franken v. Smithfield Foods
49 CIV 22-1603

Dear Mr. Weidenaar and Ms. Hensley:

This letter is my decision on Karen Franken's appeal of the June 21, 2022, decision of the Department of Labor and Regulations dismissing Ms. Franken's petition for workers' compensation benefits on behalf of her late husband. Mr. Franken sadly passed away on April 19, 2020, due to complications related to COVID-19.

As I stated at our hearing last week, our sympathies are certainly extended to Ms. Franken on the loss of her husband. My decision today, however, must be based on the law, and based on the law I uphold the decision of the Department dismissing the petition for workers' compensation benefits.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Karen Franken (Karen) is the spouse of Craig Franken (Craig). Craig died on April 19, 2020, from complications related to COVID-19. At the time of his death, Craig was employed by Appellee Smithfield Foods, Inc. (Smithfield).

On February 25, 2022, Karen, individually and as the Personal Representative of the Estate of Craig Franken, filed a Petition for Hearing with the South Dakota Department of Labor (Department) seeking workers' compensation benefits related to Craig's death. Karen brought two counts alleging entitlement to workers' compensation benefits: (1) asserting that COVID-19 was a work-related injury under SDCL 62-1-1(7)(a), (b), and/or (c); and (2) asserting that COVID-19 was an occupational disease under SDCL 62-8-1(6).

On April 1, 2022, Smithfield filed a Motion to Dismiss the Petition for Hearing, arguing that Karen was not entitled to relief under South Dakota's workers' compensation statutes and further that SDCL Ch. 21-68 barred the claims. SDCL Ch. 21-68 was enacted on February 8, 2021 and was made retroactive by the Legislature. SL 2021, Ch. 91, § 7

provides: "This Act applies to any exposure to COVID–19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

In response to Smithfield's motion to dismiss, Karen argued that if SDCL Ch. 21-68 were applied as argued by Smithfield, the statutes are unconstitutional.

On June 21, 2022, Administrative Law Judge Michelle Faw (ALJ) issued a written decision granting Smithfield's Motion to Dismiss. The ALJ concluded that Karen failed to state a claim for workers' compensation benefits pursuant to SDCL 62-1-1(7) as COVID-19 is not an injury, that COVID-19 is not an occupational disease covered by SDCL Chapter 62, and further that the workers' compensation claims are barred by SDCL Ch. 21-68. The ALJ did not address the issue of whether SDCL Ch. 21-68 is constitutional.

Karen filed a timely appeal to circuit court.

STANDARD OF REVIEW

A Motion to Dismiss pursuant to SDCL 15-6-12(b)(5) tests the law of the claim, not the facts which support it. *O'Brien v. W. Dakota Tech. Inst.*, 2003 S.D. 127, ¶ 7, 670 N.W.2d 924, 926 (citing *Barnaud v. Belle Fourche Irrigation Dist.*, 2000 SD 57, ¶ 18, 609 N.W.2d 779, 783 (quoting *Thompson v. Summers,* 1997 SD 103, 5, 567 N.W.2d 387, 390 (citing *Stumes v. Bloomberg,* 1996 SD 93, ¶ 6, 551 N.W.2d 590, 592; *Schlosser v. Norwest Bank South Dakota,* 506 N.W.2d 416, 418 (S.D.1993)))). The South Dakota Supreme Court as outlined the review of an agency decision as follows: "Questions of law are reviewed de novo. Matters of reviewable discretion are reviewed for abuse. The agency's factual findings are reviewed under the clearly erroneous standard. The agency's decision may be affirmed or remanded but cannot be reversed or modified absent a showing of prejudice." *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, ¶ 10, 922 N.W.2d 784, 787 (quoting *Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 22, 915 N.W.2d 707, 715 (other citations omitted)).

LAW AND ANALYSIS

I. WHETHER THE ALJ CORRECTLY DETERMINED THAT KAREN'S PETITION FAILED TO STATE A CLAIM FOR RELIEF

Smithfield does not dispute that Franken was diagnosed with COVID-19 and later passed away on April 19, 2020. Smithfield, however, maintains that COVID-19 is not an "injury" compensable under South Dakota's workers' compensation statutes. The ALJ agreed in issuing her decision granting the motion to dismiss. Because it is a question of law, this Court reviews the issues de nova.

Work-Related "Injury"

Karen's first claim for relief is that COVID-19 is a work-related injury under SDCL 62-1-1(7). SDCL 62-1-1 sets forth definitions of terms used in the Title. "Injury" is defined as:

> (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[.]

SDCL 62-1-1(7) (emphasis added).

Smithfield argues that Karen's claim fails under the plain language of the statute as Karen requests benefits solely because Craig contracted COVID-19, a disease. Smithfield argues that the plain language of SDCL 62-1-1(7) states that an injury "does not include a disease in any form except as it results from the injury." Smithfield maintains that Karen has not alleged an "injury" and to hold otherwise would mean any disease or illness allegedly contracted at work could mean a compensable workers' compensation claim.

Karen cites to a number of cases for her position that Craig's infection with COVID-19 could be an "injury" under Workers' Compensation statutes, including *Meyer v. Roettele*, 264 N.W. 191 (S.D. 1935), *Hanzik v. Interstate Power Co.*, 289 N.W. 589 (S.D. 1940), and *Johnson v. Concrete Materials Co.*, 15 N.W.2d 4 (S.D. 1944).

In *Oviatt v. Oviatt Dairy, Inc.*, 119 N.W. 649 (S.D. 1963), the South Dakota Supreme Court stated:

> It is settled law in this state that disease, or the aggravation of an existing disease, is compensable, but that such disease or aggravation *must be assignable to a definite time, place and circumstance, Tennis v. City of Sturgis*, 75 S.D. 17, 58 N.W.2d 301, and that the disease, or aggravation of such disease, *must result from unusual exertion. Hanzlik v. Interstate Power Co.*, 67 S.D. 128, 298 N.W. 589; Campbell v. City of Chamberlain, 78 S.D. 245, 100 N.W.2d 707.

Oviatt, 119 N.W.2d at 650. *See also Wold v. Meilman Food Industries, Inc.*, 269 N.W.2d 112, 115 (S.D. 1978) (summarizing status of settled law that disease, or aggravation of an existing disease, is compensable, but that such disease or aggravation must be assignable to a definite time, place and circumstance, and that the disease, or aggravation of such disease, must result from unusual exertion) (applying version of statute including "by accident" language because it was the statute in effect at the time of claim).

In *Kirnan v. Dakota Midland Hosp.*, 331 N.W.2d 72, 74 (S.D. 1983), the employee performed general housekeeping duties at the hospital. On the day in question, she came to work, but was not feeling well. *Id.* at 73. After working for approximately two hours, she took a 15-minute break and returned to work. *Id.* She almost immediately became extremely ill and was later diagnosed with suffering a heart attack. *Id.* Employee had a preexisting artiosclerotic heart disease for which she took medication. *Id.* She was denied workers' compensation benefits. *Id.* The South Dakota Supreme Court reversed, stating:

> The fact remains that the heart attack occurred during the course of appellant's employment of cleaning and scrubbing patients' rooms and bathrooms on May 20, 1978. While we acknowledge that establishing causality in heart attack cases is not a precise art, and that her attack cannot be assigned to any unusual exertion or strain on that morning, it is nevertheless compensable under the amended statute and our interpretation of that statute. We conclude that appellant did establish a reasonable connection between her employment and the disabling heart attack suffered in this case.

Kirnan, 331 N.W.2d at 75. However, the Supreme Court appeared to still apply the requirement that such disease or aggravation *must be assignable to a definite time, place and circumstance*. In *Kirnan*, it was her cleaning on a specific date, May 20, 1978, and

her doctor testified that her work on that day was the precipitating event of the heart attack. *Id.* at 75.

A review of the case law supports the position that when a disease has been considered compensable as an "injury," there was an identifiable time, place, and circumstance related to the exposure or aggravation of a condition. That is not the case here where Karen has generally alleged that Craig contracted COVID-19 while engaged in the course and scope of his employment. Applying the plain language of SDCL 62-1-1(7) and the case law discussed above, Karen has not asserted in her petition a definite time, place, and circumstance of exposure to COVID-19, so as alleged it is not "injury" for purposes of workers' compensation.

Accordingly, the ALJ's decision dismissing Count 1 of Karen's petition was correct.

Occupational Disease

Karen also asserted in her Petition for Hearing that Frank contracted an occupational disease pursuant to SDCL 62-8-1(6) and therefore is entitled to Workers' Compensation benefits. SDCL 62-8-1(6) defines occupational disease as:

> "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[.]

Emphasis added. Karen has the burden of proving all elements necessary to qualify for compensation:

> Those seeking compensation for an occupational disease must prove: (1) they suffer from an occupational disease as defined in 62–8–1(6); (2) they are disabled from performing work in the last occupation in which they were injuriously exposed to the hazards 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 & Dry Cleaners, 2001 S.D. 24, ¶ 9, 622 N.W.2d 741, 744. The disease must be peculiar to the occupation. "Occupational disease must be attributable to conditions particular to an occupation, rather than conditions coincidental to a workplace." *Id.* at ¶ 14, 622 N.W.2d at 745.

In *Sauer*, employee worked at a commercial laundry. After she began her employment, she developed skin and bronchial problems. *Id.* at ¶1, 622 N.W.2d at 742. She asserted that the problems were related to bleach products present at her place of employment and

that she suffered from an occupational disease. Id. at ¶6, 622 N.W.2d at 743. The South Dakota Supreme Court held that she never established that her conditions are recognized risks for commercial laundry workers and had not established an occupational disease. *Id.* at ¶12, 622 N.W.2d at 744.

> A condition is peculiar to a particular occupation when it "is the result of a distinctive feature of the kind of work performed" by a claimant and others similarly employed. Unless the condition is "intrinsic" to an occupation, one does not suffer from an occupational disease.

Sauer, 2001 S.D. 24, ¶ 11, 622 N.W.2d at 744 (internal citations omitted). *See also Sauder v. Parkview Care Center*, 2007 S.D. 103, 740 N.W.2d 878 (employee, a Social Service Director designee working in an office, developed fungal sinusitis from black mold in her office, and South Dakota Supreme Court held that her condition arose because of an environmental condition of her workplace, not a distinctive feature of her occupation; therefore, it did not meet the definition of an occupational disease).

Karen has asserted no claim that COVID-19 is a condition or disease particular to Craig's occupation. Her petition fails to state a claim.

Further, SDCL 21-68-6(3) specifically states that COVID-19 is not an occupational disease under state law.

Accordingly, the ALJ's decision dismissing Count 2 of Karen's petition was correct.

Immunity under SDCL Chapter 21-68

Smithfield further argues that even if Craig's COVID-19 infection was deemed an "injury" under SDCL 62-1-1(7) or an occupational disease under SDCL Chapter 62-8, SDCL 21-68 bars relief. The ALJ agreed in granting Smithfield's Motion to Dismiss.

SDCL Ch. 21-68 was enacted by SL 2021, Ch. 91, §§ 1-7 during the 2021 legislative session and became law on July 1, 2021. Craig died on April 19, 2020. "[T]he general rule of statutory construction is that a statute will not operate retroactively unless the act clearly expresses an intent to do so." *West v. John Morrell & Co.*, 460 N.W.2d 745, 747 (S.D. 1990).

In this case, the Legislature specifically made SDCL Ch. 21-68 applicable retroactively. SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

SDCL 21-68-2 provides:

> A person may not bring or maintain any action or claim for damages or relief alleging exposure or potential exposure to COVID-19 unless the exposure results in a COVID-19 diagnosis and the exposure is the result of intentional exposure with the intent to transmit COVID-19. In alleging intentional exposure with the intent to transmit COVID-19, a party shall state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.

Further, SDCL 21-68-3 provides:

> A person who possesses or is in control of a premises, including a tenant, lessee, or occupant of a premises, who directly or indirectly invites or permits an individual onto a premises, shall not be liable for damages for any injuries sustained from the individual's exposure to COVID-19, whether the exposure occurs on the premises or during any activity managed by the person who possesses or is in control of a premises unless the person who possesses or is in control of the premises intentionally exposes the individual to COVID-19 with the intent to transmit COVID-19. In alleging intentional exposure with the intent to transmit COVID-19, a party must state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.

Karen argues that SDCL Ch. 21-68 makes no specific reference to Title 62 or South Dakota's Workers' Compensation law. She asserts that Title 21 governs judicial remedies and other civil actions at law or in equity in circuit courts, while a Workers' Compensation case is an administrative special proceeding, not an action for damages, injury, or death.

SDCL 21-68-6, entitled "Construction" references "occupational disease," which phrase is only referenced in the code in the Workers' Compensation statutes. SDCL 21-68-6 provides:

> This chapter may not be construed to do any of the following:
> (1) Create, recognize, or ratify a claim or cause of action of any kind;
> (2) Eliminate or satisfy a required element of a claim or cause of action of any kind;
> (3) *Deem COVID-19 an occupational disease. COVID-19 is not an occupational disease under state law*; or
> (4) Abrogate, amend, repeal, alter, or affect any statutory or common law immunity or limitation of liability.

Emphasis added. This indicates the Legislature's intention for SDCL ch. 21-68 to apply to all claims, including Workers' Compensation claims. Accordingly, even if Craig's COVID-19 was an "injury" or occupational disease within the meaning of the Worker's Compensation statutes, the provisions of SDCL Ch. 21-68 bar Karen's claims as alleged in her petition for benefits.

II. WHETHER SDCL CH. 21-68 IS CONSTITUTIONAL AND ENFORCEABLE

Finally, Karen asserts that application of SDCL Ch. 21-68 to bar her claims for workers' compensation benefits is unconstitutional and violates an injured worker's rights regarding property, due process, equal protection, open courts, contract clause and/or remedy for injury protections.

"Any legislative act is accorded a presumption in favor of constitutionality and that presumption is not overcome until the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles." *Tibbs v. Moody Cnty. Bd. of Comm'rs*, 2014 S.D. 44, ¶ 10, 851 N.W.2d 208, 213 (quoting *Accounts Mgmt., Inc. v. Williams*, 484 N.W.2d 297, 299 (S.D.1992) (other citations omitted)).

The ALJ did not address any constitutional challenges in her decision.

Smithfield asserts that this Court need not even consider Karen's constitutional challenges because she failed to notify the Attorney General of her challenge as required by SDCL 15-6-24(c). SDCL 15-6-24(c) states in relevant part:

> When the constitutionality of an act of the Legislature affecting the public interest is drawn in question in any action to which the state or an officer, agency, or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him the opportunity to intervene.

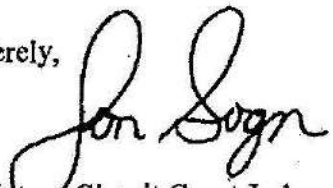
There is no indication in the administrative record that Karen provided notice to the Attorney General of her claims that provisions in SDCL Chapter 21-68 are unconstitutional, accordingly this Court will not address the issue on appeal.

CONCLUSION

I affirm the Department's decision that as alleged in Karen's petition for benefits, Craig's COVID-19 infection was not an "injury" as defined by SDCL 62-1-1(7), nor an "occupational disease" under SDCL 62-8-1(6). Further, Karen's claims regarding COVID-19 are barred by application of SDCL Ch. 21-68.

I do, however, reverse the ALJ's ruling that her dismissal of the petition was "with prejudice." I find that under the circumstances the dismissal should be "without prejudice."

Sincerely,



Jon Sogn – Circuit Court Judge

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
PIERRE, SOUTH DAKOTA 57501

Worker's Compensation

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KAREN M. FRANKEN,
Individually and as the
Personal Representative of the
Estate of Craig Allen Franken

Claimant,

vs.

SMITHFIELD FOODS, INC.,

Employer & Self-Insurer.

HF No. [illegible]
PETITION FOR HEARING

Comes now Karen M. Franken, as Personal Representative of the Estate of Craig A. Franken (hereinafter "Claimant"), by and through her attorney, Bram Weidenaar, ALVINE WEIDENAAR, LLP, and hereby applies for a hearing pursuant to SDCL § 62-7-12 to determine the amount of compensation and other benefits to which Claimant may be entitled under the provisions of SDCL §§ 62-1-1, et seq. In support of said application, Claimant states and alleges as follows:

FACTS

1. Upon the death of Craig A. Franken on April 19, 2020, Karen M. Franken was the spouse of Craig A. Franken.

2. Craig A. Franken and Karen M. Franken did not have any minor children at the time of the death of Craig A. Franken on or about April 19, 2020.

3. Karen M. Franken is the Personal Representative for the Estate of Craig A. Franken. (Please refer to the Letters of Personal Representative which is attached as Exhibit 1.)

002

4. At the time of his death described below, Craig A. Franken was an employee of Smithfield Foods, Inc.

5. Smithfield Food, Inc., (hereinafter "Employer") was the employer at the time of the death of Craig A. Franken as alleged herein.

6. On or about April 19, 2020, Craig A. Franken passed away because of complications from COVID-19.

7. Based upon information and belief, Employer was self-insurer the purposes of workers compensation at the time of the injury as alleged herein.

8. Claimant provided notice of the death of Craig A. Franken to Employer in accordance with SDCL §§ 62-7-10, 62-7-10(1) and/or 62-7-10(2).

COUNT ONE

9. Claimant realleges paragraphs 1 through 7 and incorporates them herein by reference.

10. That on or about April 19, 2020, while engaged in the course and scope of Craig A. Franken's employment, Craig A. Frank suffered a work-related injury including, but not limited to COVID-19 pursuant to SDCL §§ 62-1-1(7)(a), 62-1-1(7)(b), and/or 62-1-1(7)(c).

11. Employer and Self-Insurer have not paid any workers compensation benefits to either Karen M. Franken, as Person Representative of the Estate of Craig Franken and/or Craig A. Franken.

12. The working conditions at Employer on or about April 19, 2020, are a major contributing factor for Craig A. Franken's need for medical treatment including, but not limited to, hospitalization.

003

13. The working conditions at Employer on or about April 19, 2020, are a major contributing factor for the death of Craig A. Franken.

14. As a result of being hospitalized prior to his death for COVID-19, Craig A. Franken, and Karen M. Franken, as Personal Representative of the Estate of Craig A. Franken, incurred medical expenses pursuant to SDCL §§ 62-4-1 and/or 62-4-1.1.

15. As result of the passing of Craig A. Franken, Karen M. Franken, as Personal Representative of the Estate of Craig A. Franken incurred funeral expenses for his burial pursuant to SDCL § 62-4-16.

16. As result of the passing of Craig A. Franken, Karen M. Franken, his spouse upon his death, is entitled to benefits pursuant to SDCL § 62-4-12.

COUNT TWO

17. Claimant realleges paragraphs 1 through 16 realleges incorporates them by reference herein.

18. As result of his employment with Employer, Craig A. Franken contracted an occupational disease pursuant to SDCL § 62-8-1(6).

19. Employer was provided with adequate, timely notice of the occupational disease, and the death, of Craig A. Franken pursuant to SDCL § 62-8-29.

20. As a result of being hospitalized prior to his death for COVID-19, Craig A. Franken, and Karen M. Franken, as Personal Representative of the Estate of Craig A. Franken, incurred medical expenses pursuant to SDCL §§ 62-4-1, 62-4-1.1 and/or 62-8-4.

21. As result of the passing of Craig A. Franken, Karen M. Franken, as Personal Representative of the Estate of Craig A. Franken incurred funeral expenses for his burial pursuant to SDCL §§ 62-4-16 and/or 62-8-4.

22. As result of the passing of Craig A. Franken, Karen M. Franken, his spouse upon his death, is entitled to benefits pursuant to SDCL §62-8-4.

WHEREFORE, Claimant is entitled to judgment rendered by the South Dakota Department of Labor against Employer and Insurer for one or more of the following:

1. For payment of all medical expenses in conjunction with treatment for her injuries under SDCL §§ 62-4-1, 62-4-1.1 and/or 62-8-4;
2. For payment of temporary total disability benefits to which Claimant is entitled under SDCL § 62-4-3;
3. For payment of funeral expenses to which Claimant is entitled under SDCL §§ 62-4-16 and/or 62-8-4.
4. For payment of benefits to Karen A. Franken pursuant to SDCL §§ 62-4-12 and/or 62-8-4.
4. For attorney fees and costs incurred herein;
6. For prejudgment interest;
7. For post-judgment interest; and
8. For such other and further relief as the Department of Labor may deem just and equitable.

Dated this 15th day of February, 2022, at Sioux Falls, South Dakota.

Alvine Law Firm, LLP

Bram Weldenaar
Mark J. Weller
806 West 10th Street, Suite A
Sioux Falls, South Dakota 57104
Telephone (605) 275-0808
Facsimile (605) 271-7817
Bram@alvinelaw.com
Mark@alvinelaw.com
Attorney for Claimant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of February, 2022, he served a copy of the Petition for Hearing upon the person(s) named below by depositing a copy thereof in the United States mail, Sioux Falls, South Dakota, postage prepaid, addressed to:

South Dakota Department of Labor
Division of Labor and Management
123 West Missouri Avenue
Pierre, S.D. 57501

Smithfield Foods, Inc.
1400 N. Weber Ave.
Sioux Falls, SD 57103
Employer and Self-Insurer

whose address is the last known address of addressee known to the subscriber.

Alvine Law Firm, LLP

Bram Veldenaar
806 West 10th Street, Suite A
Sioux Falls, South Dakota 57104
Telephone (605) 275-0808
Facsimile (605) 271-7817
Bram@alvinelaw.com
Mark@alvinelaw.com
Attorney for Claimant

STATE OF SOUTH DAKOTA
SS
COUNTY OF MINNEHAHA

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
PRO 20-101

In the Matter of the Estate of
CRAIG ALLEN FRANKEN,
Deceased.

LETTERS OF PERSONAL REPRESENTATIVE

On April 24, 2020, Karen Franken was appointed and qualified as Personal Representative of the estate of Craig Allen Franken.

These Letters are issued as evidence of the appointment, qualification and authority of Karen Franken to do and perform all acts authorized by law.

Dated this 24TH day of April, 2020.

ANGELIA M. GRIES, CLERK

Appointed and Issued: 4/24/2020 by: /s/ Carol Van Houten, Clerk/Deputy
Clerk of Courts

[SEAL]

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business trip, defendant moved to enlarge, which was nine days after his answer was due and prior to commencement of suit, and defendant had told plaintiff to contact his attorney if he was going to proceed with a suit. SDCL 15-6-6(b). Colton Lumber Co. v. Siemonsma, 651 N.W.2d 871, 2002 S.D. 116. Pleading ⇐ 85(4)

"Excusable neglect," as would allow a circuit court in its discretion to grant a motion to enlarge time to answer a plaintiff's summons and complaint, must be neglect of a nature that would cause a reasonable, prudent person to act similarly under similar circumstances. SDCL 15-6-6(b). Colton Lumber Co. v. Siemonsma, 651 N.W.2d 871, 2002 S.D. 116. Pleading ⇐ 85(4)

Term excusable neglect, as would allow a circuit court in its discretion to grant motion to enlarge time to answer a plaintiff's summons and complaint, has no fixed meaning and is to be interpreted liberally to insure that cases are heard and tried on the merits. SDCL 15-6-6(b). Colton Lumber Co. v. Siemonsma, 651 N.W.2d 871, 2002 S.D. 116. Pleading ⇐ 85(4)

To prevail on a motion to enlarge time to file an answer after expiration of the 30 days, the defendant must show a probable meritorious defense. SDCL 15-6-6(b). Colton Lumber Co. v. Siemonsma, 651 N.W.2d 871, 2002 S.D. 116. Pleading ⇐ 85(4)

3. —— Discretion of court, enlargement of time

The granting of an extension of time to answer is a matter largely within the discretion of the trial court. Chamberlain Sanitarium & Benevolent Ass'n of Seventh Day Adventists v. American Ry. Exp. Co., 1921, 43 S.D. 604, 181 N.W. 841. Pleading ⇐ 85(2)

4. —— Review, enlargement of time

Granting or refusing leave to file late answer is a matter largely within discretion of trial court, and it is only upon clear abuse of that discretion that the Supreme Court will reverse such an order. Tingle v. Parkston Grain Co., 1989, 442 N.W.2d 252. Appeal And Error ⇐ 956(1); Pleading ⇐ 85(2)

5. Personal jurisdiction

President of corporation whose assets were to be liquidated to satisfy judgment against corporation for breach of contract did not waive his personal jurisdiction defenses in connection with permanent injunction that had been entered against him prohibiting him from competing with corporation as part of order approving receiver's proposed sale of corporation's assets by failing to file a motion to dismiss, as president made no motion that would have required the inclusion of a motion to dismiss for lack of personal jurisdiction and services of process, no party filed any "pleading" against president to which a responsive pleading was permitted, and upon receiving receiver's proposed findings and conclusions first asserting claim for injunctive relief, president timely filed written objections asserting that proposed injunctive relief was improper because he was not a party to breach of contract action. Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc., 798 N.W.2d 683, 2011 S.D. 23. Injunction ⇐ 1548

6. Opening default judgment

An order opening a default for failure to answer, and further ordering that the answer filed with the motion papers on a previous date stands as duly served on said date, operates, in the absence of a showing of prejudice or exception to the order, to make the service of the answer effective as of the date on which it was made. Moody v. Lambert, 1904, 18 S.D. 572, 101 N.W. 717. Judgment ⇐ 174; Pleading ⇐ 85(3)

15–6–12(b). Manner of presenting defenses and objections

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;
(2) Lack of jurisdiction over the person;
(3) Insufficiency of process;
(4) Insufficiency of service of process;
(5) Failure to state a claim upon which relief can be granted;
(6) Failure to join a party under § 15–6–19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being

joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.

Source: SDC 1939 & Supp 1960, § 33.1002; SD RCP, Rule 12 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; as amended by Sup. Ct. Order No. 2, March 31, 1969, effective July 1, 1969; SL 2006, ch 285 (Supreme Court Rule 06-11), eff. July 1, 2006.

Historical and Statutory Notes

SL 2006, ch 285 (Supreme Court Rule 06-11), in the third sentence of the last paragraph, substituted "the party" for "he".

Cross References

Statute of limitations, defense asserted in answer, see § 15-2-1.

Library References

Judgment ⇐183.
Pleading ⇐78.
Pretrial Procedure ⇐554 to 561, 622.
Process ⇐155.
Westlaw Topic Nos. 228, 302, 307A, 313.

C.J.S. Dismissal and Nonsuit §§ 56 to 58, 62 to 72.
C.J.S. Judgments §§ 314 to 315, 318 to 324, 341 to 344, 350 to 351.
C.J.S. Pleading §§ 159 to 160.
C.J.S. Process §§ 130, 132.

Research References

ALR Library

General appearance, objection before judgment to jurisdiction of court over subject matter as constituting, 25 A.L.R.2d 833.
General objection or exception to evidence admitted without qualification, which was competent against one or more parties, but not all, sufficiency of, 106 A.L.R. 467.
Objection to jurisdiction in court against which writ is sought as condition of application for writ of prohibition, 35 A.L.R. 1090.

United States Supreme Court

Due process,
Opportunity to present every available defense, see Philip Morris USA Inc. v. Scott, 2010, 131 S.Ct. 1, 177 L.Ed.2d 1040.

Notes of Decisions

Hoover, 1975, 89 S.D. 608, 236 N.W.2d 635. Criminal Law ⇐ 396(2)

3. Jury deliberations

Doctrine of completeness did not apply so as to permit jury during deliberations to review entire videotape of rape defendant's interview with police, where portions of videotape were never introduced into evidence to explain admitted portions of videotape. State v. Midgett, 680 N.W.2d 288, 2004 S.D. 57. Criminal Law ⇐ 396(2)

ARTICLE II
JUDICIAL NOTICE

19-19-201. Judicial notice of adjudicative facts

(a) Scope. This section governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of facts that may be judicially noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) Is generally known within the trial court's territorial jurisdiction; or

(2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking notice. The court:

(1) May take judicial notice on its own; or

(2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to be heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Source: SL 1979, ch 358 (Supreme Court Rule 78-2, Rule 201); SDCL §§ 19-10-1 to 19-10-7; SL 2016, ch 239 (Supreme Court Rule 15-23), eff. Jan. 1, 2016.

Cross References

Administrative proceedings, judicial notice in contested cases, see § 1-26-19.
Uniform Judicial Notice of Foreign Law Act, see § 19-8-1 et seq.

Law Review and Journal Commentaries

Hutton, South Dakota Evidence: Comments on a "Giant Step", 59 S.D. L. Rev. 343 (2014).

Library References

Criminal Law ⇐304, 783.
Evidence ⇐1 to 52.
Trial ⇐207.

Section

Law Review and Journal Commentaries

Swier and Slaughter, The Employee/Independent Contractor Dichotomy in South Dakota for Unemployment Compensation and Workers' Compensation Purposes: An Examination and Suggested Analytical Framework, 43 S.D. L.Rev. 56 (1998).

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 engaged at the time of his 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 him by the nature of his employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, they shall be deemed a part of his 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.

Source: SDC 1939, § 64.0102 (3) to (7); SL 1943, ch 313; SL 1974, ch 333, § 1; SL 1975, ch 322, § 1; SL 1978, ch 370, § 20; SL 1992, ch 364, § 4; SL 1993, ch 379, § 1; SL 1994, ch 395; SL 1994, ch 396, § 5; SL 1995, ch 296, § 6; SL 1995, ch 297, § 6; SL 1999, ch 261, § 2; SL 2011, ch 1 (Ex. Ord. 11-1), § 33, eff. Apr. 12, 2011.

Cross References

Application of statutory definitions, see § 2-14-4.
Occupational diseases, see § 62-8-1 et seq.

Law Review and Journal Commentaries

Cole, Comment: Causation in Workers' Compensation Heart Attack Cases: An Argument For a New Standard, 37 S.D. L. Rev. 540 (1992).

Marso, Note: The New Causation and Expert Requirements in Workers' Compensation Claims After *Caldwell v. John Morrell & Co.*, 38 S.D. L. Rev. 402 (1993).

Pfeifle, Note: *Lather v. Huron College*: South Dakota Rejects an Award of Workers' Compensation for Mental Injury Allegedly Caused by On-the-Job Stress, 38 S.D. L. Rev. 424 (1993).

Swier and Slaughter, The Employee/Independent Contractor Dichotomy in South Dakota for Unemployment Compensation and Workers' Compensation Purposes: An Examination and Suggested Analytical Framework, 43 S.D. L. Rev. 56 (1998).

Jurisdiction	Laws	Effective Date	Statutory Citation
Connecticut	1971, P.A. 854	1-1-1972	C.G.S.A. §§ 4-166 to 4-189.
District of Columbia	1968, Pub.L. 90-614	10-21-1969	D.C. Official Code, 2001 Ed. §§ 1-207.42, 2-501 to 2-510.
Georgia	1964, p. 338	7-1-1965	Ga. Code Ann. §§ 50-13-1 to 50-13-23.
Hawaii	1961, c. 103		HRS §§ 91-1 to 91-18.
Illinois	1975, P.A. 79-1083	9-22-1975	S.H.A. 5 ILCS 100/1-1 to 100/15-10.
Iowa	1974, c. 1090	7-1-1975	I.C.A. §§ 17A.1 to 17A.34.
Louisiana	1966, No. 382	7-1-1967	LSA-R.S. 49:950 to 49:972.
Maine	1977, c. 551	7-1-1978	5 M.R.S.A. §§ 8001 to 11008.
Maryland	1957, c. 94	6-1-1957	Code, State Government, § 10-201 et seq.
Michigan	1969, No. 306	7-1-1970	M.C.L.A. §§ 24.201 to 24.315.
Missouri	1945, p. 1504		V.A.M.S. §§ 536.010 to 536.160.
Montana	1971, c. 2	12-31-1972	MCA 2-4-101 to 2-4-711.
Nebraska	1945, c. 255		R.R.S.1943, §§ 84-901 to 84-920.
Nevada	1965, c. 962		N.R.S. 233B.010 to 233B.150.
New York	1975, c. 167	9-1-1976	McKinney's State Administrative Procedure Act § 100 et seq.
Oklahoma	1963, c. 371		75 Okl.St.Ann. §§ 250.3 to 250.5, 302 to 323.
Oregon	1957, c. 717	6-13-1957*	ORS 183.310 to 183.690.
Rhode Island	1962, c. 112	1-1-1964	Gen.Laws 1956, §§ 42-35-1 to 42-35-18.
South Dakota	1966, c. 159		SDCL 1-26-1 to 1-26-41.
Tennessee	1974, c. 725	7-1-1975	T.C.A. §§ 4-5-101 to 4-5-404.
Vermont	1967, No. 360	7-1-1969	3 V.S.A. §§ 801 to 849.
West Virginia	1964, c. 1	7-1-1964	Code, 29A-1-1 to 29A-7-4.
Wisconsin	1955, c. 221		W.S.A. 227.01 to 227.60.
Wyoming	1965, c. 108	1-1-1966	Wyo.Stat.Ann. §§ 16-3-101 to 16-3-115.

* Date of approval.

Law Review and Journal Commentaries

Spurlin, Garry, Bishop, Hollers and Boyle, The Role of Public Comment in the Administrative Agency Process: A Case Study of the Rule-making Processes of One South Dakota Agency, 14 Sustainable Dev. L.J. 148 (2011).

1-26-1. Definition of terms

Terms used in this chapter mean:

(1) "Agency," each association, authority, board, commission, committee, council, department, division, office, officer, task force, or other agent of the state vested with the authority to exercise any portion of the state's sovereignty. The term includes a home-rule municipality that has adopted its own administrative appeals process, whose final decisions, rulings, or actions rendered by that process are subject to judicial review pursuant to this chapter. The term does not include the Legislature, the Unified Judicial System, any unit of local government, or any agency under the jurisdiction of such exempt departments and units unless the department, unit, or agency is specifically made subject to this chapter by statute;

(2) "Contested case," a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but the term does not include the proceedings relating to rule making other than rate-making, proceedings related to inmate disciplinary matters as

defined in § 1-15-20, or student academic proceedings under the jurisdiction of the Board of Regents;

(3) "Emergency rule," a temporary rule that is adopted without a hearing or which becomes effective less than twenty days after filing with the secretary of state, or both;

(4) "License," the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law;

(5) "Licensing," the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;

(6) "Party," each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;

(7) "Person," all political subdivisions and agencies of the state;

(8) "Rule," each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) Statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public;

(b) Declaratory rules issued pursuant to § 1-26-15;

(c) Official opinions issued by the attorney general pursuant to § 1-11-1;

(d) Executive orders issued by the Governor;

(e) Student matters under the jurisdiction of the Board of Regents;

(f) Actions of the railroad board pursuant to § 1-44-28;

(g) Inmate disciplinary matters as defined in § 1-15-20;

(h) Internal control procedures adopted by the Gaming Commission pursuant to § 42-7B-25.1;

(i) Policies governing specific state fair premiums, awards, entry, and exhibit requirements adopted by the State Fair Commission pursuant to § 1-21-10;

(j) Lending procedures and programs of the South Dakota Housing Development Authority; and

(8A) "Small business," a business entity that employs twenty- five or fewer full-time employees.

(9) "Substantial evidence," such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion.

Source: SDC 1939, § 65.0106; SL 1966, ch 159, § 1; SL 1968, ch 210; SL 1972, ch 8, § 3; SL 1973, ch 264, § 1; SL 1974, ch 16, §§ 1, 2; SL 1975, ch 16, §§ 7, 8; SL 1976, ch 14, §§ 1, 2; SL 1977, ch 13, § 1; SL 1977, ch 14; SL 1980, ch 17; SL 1982, ch 20, § 2; SL 1983, ch 199, § 1; SL 1989, ch 20, § 42; SL 1990, ch 343, § 9A; SL 1992, ch 8, § 3; SL 1995, ch 3, § 2; SL 1996, ch 10, § 1; SL 1996, ch 130, § 15A; SL 1999, ch 6, § 1; SL 2004, ch 20, § 1; SL 2012, ch 7, § 1; SL 2014, ch 73, § 1.

CHAPTER 15-1

DEFINITIONS AND GENERAL PROVISIONS

United States Code Annotated

State law to be regarded as rules of decision in civil actions in federal actions where applicable, see 28 U.S.C.A. § 1652.

15-1-1. Definition of terms

The following words have in this title the significance attached to them in this section unless otherwise apparent from the context:

(1) An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement, determination, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding;

(2) The word "writ" signifies an order or precept in writing, issued in the name of the state or of a court or judicial officer; and the word "process" a writ or summons issued in the course of judicial proceedings. All process in civil actions shall run in the name of the State of South Dakota;

(3) The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the district and territories and other possessions of the United States.

Source: SDC 1939 & Supp 1960, § 33.0102; SL 1984, ch 12, § 33.

Cross References

Statutory construction, application of statutory definitions, see § 2–14–4.

Law Review and Journal Commentaries

Hansman, Time Does Not Heal All Wounds: An Analysis of the Defendant Disarming Decision in *Murray v. Mansheim*, 56 S.D. L. Rev. 155 (2011).

Notes of Decisions

Action 1

1. Action

Both permissive and compulsory counterclaims seeking affirmative relief are actions subject to statutes of limitation. Murray v. Mansheim, 779 N.W.2d 379, 2010 S.D. 18. Limitation Of Actions ⇐ 41

Proceeding in probate to set inheritance taxes is special proceeding for purposes of statute permitting revision of interlocutory orders. SDCL 15–1–1(1), 15–6–54(b). Matter of Estate of Davis, 1994, 524 N.W.2d 125. Action ⇐ 20

15–1–2. Civil and criminal remedies not merged

Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

Source: SDC 1939 & Supp 1960, § 33.0103.

Cross References

Crimes, civil remedies, see § 22–2–1.

Library References

Action ⇐18.
Westlaw Topic No. 13.
C.J.S. Actions § 116.

15–1–3. Time during which action is pending

An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied.

Source: SDC 1939 & Supp 1960, § 33.0104.

Cross References

Civil Appellate Procedure Rules, time for taking appeal, see § 15–26A–6.
Limitation of actions, commencement of actions, see §§ 15–2–30 and 15–2–31.
Lis pendens notice, action pending from time of filing notice, see § 15–10–2.

Library References

Action ⇐71.
Lis Pendens ⇐11(1).
Westlaw Topic Nos. 13, 242.

business of the court at a place other than the county seat of such county but within said county where such judge resides.

Source: SL 1923, ch 143; SDC 1939, § 32.0405; SL 1957, ch 169; SL 1963, ch 218; SL 1975, ch 162, § 16.

Library References

Courts ⇐72, 73.
Westlaw Topic No. 106.
C.J.S. Courts §§ 3 to 4, 166 to 168.

16–6–8. Chancery and common-law jurisdiction of circuit court

The circuit court possesses chancery as well as common-law jurisdiction.

Source: CCivP 1877, § 27; CL 1887, § 4824; RCCivP 1903, § 29; RC 1919, § 2113; SDC 1939 & Supp 1960, § 32.0903.

Cross References

Jurisdiction of circuit courts, see Const. Art. V, § 5.
Rules of civil procedure, jurisdiction and venue, see § 15–6–82.

Library References

Courts ⇐153.1.
Westlaw Topic No. 106.

Notes of Decisions

Equity jurisdiction 1
Jurisdiction by consent 2

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1. Equity jurisdiction

In action brought by purchaser against vendor for alleged deceit in sale of property, trial court acted properly in disposing of matter on equitable side of court by allowing rescission of oral contract for sale of property, although complaint had sounded in tort for deceit, in view of fact that prayer for relief also prayed for such other and further relief as to the court seemed just and assuming court was correct in its determination that there was insufficient evidence of fraud to sustain action for deceit, purchaser would have been left in position of having to start another action to recover his downpayment. Maresh v. Unverzagt, 1981, 304 N.W.2d 712. Trial ⇐ 10

The rule of retaining equity jurisdiction to adjust all claims does not extend to a claim having no relation to the rights of the plaintiffs or the cause alleged in the complant. Lass v. Erickson, 1952, 74 S.D. 503, 54 N.W.2d 741. Equity ⇐ 39(1)

Under its general equity jurisdiction, the circuit court had power pending administration of an estate to adjudicate the equitable issues presented with relation to the alleged existence of a contract by the decedent to make a will disposing of the property comprising the estate. Const. art. 5, § 14. Lass v. Erickson, 1952, 74 S.D. 503, 54 N.W.2d 741. Courts ⇐ 475(2)

2. Jurisdiction by consent

Where intervening defendants made timely and preliminary objection in their answer challenging the jurisdiction of the court of equity to determine the issue in which they were interested, jurisdiction by consent, if conferable by the parties at all, was not obtained notwithstanding that intervenors participated in the proceedings after their objection was denied. Lass v. Erickson, 1952, 74 S.D. 503, 54 N.W.2d 741. Equity ⇐ 53(1)

16–6–9. Original civil jurisdiction of circuit court

The circuit court has original jurisdiction as follows:

(1) In all actions or proceedings in chancery;

(2) In all actions at law and in equity;

(3) In all cases where the title or boundary to real property comes in question;
(4) In all actions for divorce or annulment of marriage;
(5) In all matters of probate, guardianship, conservatorship, and settlement of estates of deceased persons;
(6) Proceedings relating to minors under chapters 26-7A, 26-8A, 26-8B, and 26-8C;
(7) In all other cases now or hereafter provided by law granting jurisdiction to the circuit court, and as heretofore granted to district county, municipal, justice of the peace, and police magistrate courts.

Source: CCivP 1877, § 28; CL 1887, § 4825; RCCivP 1903, § 30; RC 1919, § 2114; SDC 1939 & Supp 1960, § 32.0904; SL 1973, ch 130, § 2; SL 1993, ch 213, § 94.

Commission Note

The Code Commission substituted a reference to "chapters 26-7A, 26-8A, 26-8B, and 26-8C" for a reference to "chapter 26-8" in subdivision (6) to reflect the transfer of sections in chapter 26-8 to chapters 26-7A, 26-8A, 26-8B and 26-8C.

Cross References

Adoption proceedings, circuit court jurisdiction, see § 25-6-6.
Jurisdiction of circuit courts, see Const. Art. V, § 5.
Rules of civil procedure, jurisdiction and venue, see § 15-6-82.

Library References

Courts ⇐153.1, 200.
Westlaw Topic No. 106.

Research References

Encyclopedias

16 Am. Jur. Proof of Facts 2d 175, Matrimonial Dispute: Vexatious Choice of Forum.
39 Am. Jur. Proof of Facts 2d 587, Establishment of Person's Domicil.

Treatises and Practice Aids

Bogert - the Law of Trusts and Trustees § 974, Statutory Regulation of Accounts.
Will Contests § 13:7, Applicability of Civil Discovery Rules in Formal Discovery.

United States Supreme Court

Jurisdiction,

In general,

Acquiescence of parent to child's desire to live with other parent, jurisdiction of state of residence of other parent in that parent's action to establish foreign judgment, see Kulko v. Superior Court of California In and For City and County of San Francisco, U.S.Cal.1978, 98 S.Ct. 1690, 436 U.S. 84, 56 L.Ed.2d 132 rehearing denied 98 S.Ct. 3127, 438 U.S. 908, 57 L.Ed.2d 1150.

Custody, whether a state court properly assumed jurisdiction under the Uniform Child Custody Jurisdiction Act is purely a question of state law not properly subject to review in the United States Supreme Court, see Webb v. Webb, U.S.Ga.1981, 101 S.Ct. 1889, 451 U.S. 493, 68 L.Ed.2d 392.

Frivolous actions and proceedings, lack of subject matter jurisdiction, see Willy v. Coastal Corp., U.S.Tex.1992, 112 S.Ct. 1076, 503 U.S. 131, 117 L.Ed.2d 280, rehearing denied 112 S.Ct. 2001, 504 U.S. 935, 118 L.Ed.2d 596.

Public use requirement, jurisdiction, see Hawaii Housing Authority v. Midkiff, U.S.Haw.1984, 104 S.Ct. 2321, 467 U.S. 229, 81 L.Ed.2d 186, on remand 740 F.2d 15.

State courts, power to bar in-personam actions in federal courts, jurisdiction, see General Atomic Co. v. Felter, U.S.N.M.1977, 98 S.Ct. 76, 434 U.S. 12, 54 L.Ed.2d 199.

passenger was entitled to new trial on issue of damages, on survival claim against driver and mother, who allegedly gave driver permission to drive home from party; passenger endured pain and suffering while suffocating to death after being trapped in van. Welch v. Haase, 672 N.W.2d 689, 2003 SD 141. New Trial ⇐ 75(5)

After jury awarded zero damages despite admission of liability on part of van driver and his mother, special administrator of estate of van passenger killed in accident was entitled to new trial of wrongful-death claim against driver and mother, who allegedly gave driver permission to drive home; evidence was presented regarding purchases passenger had planned for his mother and grandfather, and there was evidence of loss of companionship and society. Welch v. Haase, 672 N.W.2d 689, 2003 SD 141. New Trial ⇐ 75(5)

21-5-8. Apportionment of damages among beneficiaries

The amount received by such personal representative, whether by settlement or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment, in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries.

Source: SL 1909, ch 301, § 3; RC 1919, § 2931; SDC 1939, § 37.2203; SL 1947, ch 173; SL 1951, ch 193; SL 1957, ch 194; SL 1963, ch 235; SL 1967, ch 149; SL 1984, ch 158, § 2.

Library References

Death ⇐101.
Westlaw Key Number Search: 117k101.
C.J.S. Death §§ 58 to 66.

Research References

ALR Library

Assignability of proceeds of claim for personal injury or death, 33 A.L.R.4th 82.

Division among beneficiaries of amount awarded by jury or received in settlement upon account of wrongful death, 171 A.L.R. 204.

Effect of death of beneficiary upon right of action under death statute, 13 A.L.R.4th 1060.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in farming, ranching, or agricultural labor, 46 A.L.R.4th 220.

Encyclopedias

65 Am. Jur. Trials 261.

22 Am. Jur.2d, Death, §§ 179-188.

Notes of Decisions

In general 1

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1. In general

Trial court division of wrongful death proceeds, which awarded mother of decedent $54,956.81 and father of decedent $1.00, was not an abuse of discretion; decedent had resided with his mother while an adult, he supported mother and claimed her as a dependent on his income tax returns, trial court determined that when decedent reached adulthood he decided to have no contact with father, and father was unable to offer any evidence that decedent had previously supported him. In re Estate of Watson, 673 N.W.2d 60, 2003 SD 142. Death ⇐ 101

21-5-9. Worker's compensation law governs where applicable

Where applicable the law relating to worker's compensation supersedes the provisions of this chapter.

Source: RC 1919, § 2932; SDC 1939 & Supp 1960, § 37.2204.

CHAPTER 21-68

LIMITATION OF LIABILITY FOR EXPOSURE TO COVID-19

21-68-1. Definitions

Terms used in this chapter mean:

(1) "COVID-19," the novel coronavirus identified as SARS-CoV-2, the disease caused by the novel coronavirus SARS-CoV-2 or a virus mutating therefrom, and conditions associated with the disease caused by the novel coronavirus SARS-CoV-2 or a virus mutating therefrom;

(2) "Disinfecting or cleaning supplies," hand sanitizers, disinfectants, sprays, and wipes;

(3) "First responders," law enforcement officers, firemen, emergency medical services workers, and other similarly situated persons;

(4) "Health care facility":

(a) Any facility regulated under chapter 34-12; or

(b) Residential care facilities, nursing facilities, intermediate care facilities for persons with mental illness, intermediate care facilities for persons with intellectual disabilities, hospice programs, elder group homes, dental clinics, orthodontic clinics, optometric clinics, chiropractic clinics, and assisted living programs;

(5) "Health care professional," physicians and other health care practitioners who are licensed, certified, or otherwise authorized or permitted by the laws of this state to administer health care services in the ordinary course of business or in the practice of a profession, whether paid or unpaid, including persons engaged in telemedicine or telehealth. The term includes the employer or agent of a health care professional who provides or arranges health care;

(6) "Health care provider," a health care professional, health care facility, home health care facility, and any other person or facility otherwise authorized or permitted by any federal or state statute, rule, order, or public health guidance to administer health care services or treatment, including first responders;

(7) "Health care services," services for the diagnosis, prevention, treatment, care, cure, or relief of a health condition, illness, injury, or disease;

(8) "Person," a natural person, corporate or common law entity, business entity registered pursuant to § 37-11-1, and the state and any political subdivision thereof, including school districts. The term includes an agent of a person;

(9) "Personal protective equipment," protective clothing, gloves, face shields, goggles, facemasks, respirators, gowns, aprons, coveralls, and other equipment designed to protect the wearer from injury or the spread of infection or illness;

(10) "Premises," any real property and any appurtenant building or structure, and any vehicle, serving a commercial, residential, educational, religious, governmental, cultural, charitable, or health care purpose;

(11) "Public health guidance," written guidance related to COVID-19 issued by any of the following:

(a) The Center for Disease Control and Prevention of the federal Department of Health and Human Services;

(b) The Centers for Medicare and Medicaid Services of the federal Department of Health and Human Services;

(c) The federal Occupational Safety and Health Administration;

(d) The Office of the Governor; or

(e) Any state agency, including the Department of Health;

(12) "Qualified product:"

(a) Personal protective equipment used to protect the wearer from COVID-19 or to prevent the spread of COVID-19;

(b) Medical devices, equipment, and supplies used to treat COVID-19, including medical devices, equipment, or supplies that are used or modified for an unapproved use to treat COVID-19 or to prevent the spread of COVID-19;

(c) Medical devices, equipment, and supplies used outside of their normal use to treat COVID-19 or to prevent the spread of COVID-19;

(d) Medications used to treat COVID-19, including medications prescribed or dispensed for off-label use to attempt to treat COVID-19;

(e) Tests to diagnose or determine immunity to COVID-19; or

(f) Any component of an item described in this subdivision.

(13) "Vehicle," a device used for transporting people, goods, or substances, including, but not limited to, an automobile, truck, bus, train, helicopter, or airplane.

Source: SL 2021, ch 91, § 1.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

Research References

ALR Library

COVID-19 Related Litigation: Breach of Contract and Related Claims Against Universities and Other Schools for Remote Learning Instead of In-Person or On-Campus Instruction, 71 A.L.R.7th Art. 5.

COVID-19 Related Litigation: Cruise Line Liability During Pandemic, 70 A.L.R.7th Art. 1.

21-68-2. Limitation—Actions—Diagnosis—Intentional exposure

A person may not bring or maintain any action or claim for damages or relief alleging exposure or potential exposure to COVID-19 unless the exposure results in a COVID-19 diagnosis and the exposure is the result of intentional exposure with the intent to transmit COVID-19. In alleging intentional exposure with the intent to transmit COVID-19, a party shall state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.

Source: SL 2021, ch 91, § 2.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

Research References

ALR Library

COVID-19 Related Litigation: Cruise Line Liability During Pandemic, 70 A.L.R.7th Art. 1.

21-68-3. Limitation—Actions—Owner—Premises

A person who possesses or is in control of a premises, including a tenant, lessee, or occupant of a premises, who directly or indirectly invites or permits an individual onto a premises, shall not be liable for damages for any injuries sustained from the individual's exposure to COVID-19, whether the exposure occurs on the premises or during any activity managed by the person who possesses or is in control of a premises unless the person who

possesses or is in control of the premises intentionally exposes the individual to COVID–19 with the intent to transmit COVID–19. In alleging intentional exposure with the intent to transmit COVID–19, a party must state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID–19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.

Source: SL 2021, ch 91, § 3.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID–19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

Research References

ALR Library

COVID-19 Related Litigation: Cruise Line Liability During Pandemic, 70 A.L.R.7th Art. 1.

21–68–4. Limitation—Actions—Health care provider

A health care provider is not liable for any damages for causing or contributing, directly or indirectly, to the death or injury of a person as a result of the health care provider's acts or omissions in response to COVID–19. This section applies to all of the following:

(1) Injury or death resulting from screening, assessing, diagnosing, caring for, or treating persons with a suspected or confirmed case of COVID–19;

(2) Prescribing, administering, or dispensing a pharmaceutical for off-label use to treat a patient with a suspected or confirmed case of COVID–19; and

(3) Acts or omissions while providing health care to persons unrelated to COVID–19 if those acts or omissions support the state's response to COVID–19, including any of the following:

(a) Delaying or canceling nonurgent or elective dental, medical, or surgical procedures, or altering the diagnosis or treatment of a person in response to any federal or state statute, regulation, order, or public health guidance;

(b) Diagnosing or treating patients outside the normal scope of the health care provider's license or practice;

(c) Using medical devices, equipment, or supplies outside of their normal use for the provision of health care, including using or modifying medical devices, equipment, or supplies for an unapproved use;

(d) Conducting tests or providing treatment to any person outside the premises of a health care facility;

(e) Acts or omissions undertaken by a health care provider because of a lack of staffing, facilities, medical devices, equipment, supplies, or other resources attributable to COVID–19 that renders the health care provider unable to provide the level or manner of care to any person that otherwise would have been required in the absence of COVID–19; and

(f) Acts or omissions undertaken by a health care provider relating to the use or nonuse of personal protective equipment.

This section does not relieve any person or health care provider of liability for civil damages for any act or omission that constitutes gross negligence, recklessness, or willful misconduct.

Source: SL 2021, ch 91, § 4.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID–19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

21–68–5. Limitation—Actions—Personal protective equipment

Any person that designs, manufactures, labels, sells, distributes, or donates disinfecting or cleaning supplies, personal protective equipment, or a qualified product in response to

COVID–19 is not liable in a civil action alleging personal injury, death, or property damage caused by or resulting from the design, manufacturing, labeling, selling, distributing, or donating of the disinfecting or cleaning supplies, personal protective equipment, or a qualified product.

Any person that designs, manufactures, labels, sells, distributes, or donates disinfecting or cleaning supplies, personal protective equipment, or a qualified product in response to COVID–19 is not liable in a civil action alleging personal injury, death, or property damage caused by or resulting from a failure to provide proper instructions or sufficient warnings.

This section does not relieve any person of liability for civil damages for any act or omission that constitutes gross negligence, recklessness, or willful misconduct.

Source: SL 2021, ch 91, § 5.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID–19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

21–68–6. Construction

This chapter may not be construed to do any of the following:

(1) Create, recognize, or ratify a claim or cause of action of any kind;

(2) Eliminate or satisfy a required element of a claim or cause of action of any kind;

(3) Deem COVID–19 an occupational disease. COVID–19 is not an occupational disease under state law; or

(4) Abrogate, amend, repeal, alter, or affect any statutory or common law immunity or limitation of liability.

Source: SL 2021, ch 91, § 6.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID–19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

Research References

ALR Library

COVID-19 Related Litigation: Breach of Contract and Related Claims Against Universities and Other Schools for Remote Learning Instead of In-Person or On-Campus Instruction, 71 A.L.R.7th Art. 5.

COVID-19 Related Litigation: Cruise Line Liability During Pandemic, 70 A.L.R.7th Art. 1.

CHAPTER 62–3

COVERED EMPLOYMENT AND EMPLOYER'S RESPONSIBILITY

Section

Cross References

Definition of terms used in chapter, see §§ 62–1–1 to 62–1–3.
Public officers and employees covered, see § 62–1–4 et seq.

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.

Source: SL 1917, ch 376, § 27; RC 1919, § 9462; SDC 1939, § 64.0103; SL 2008, ch 278, § 4.

Historical and Statutory Notes

SL 2008, ch 278, § 4 made form and style revisions to this section.

Cross References

Employee defined, see § 62–1–3.

Library References

Workers' Compensation ⇐1 to 9, 2084.
Westlaw Topic No. 413.

C.J.S. Worker's Compensation §§ 1 to 7, 23 to 45, 1721 to 1725, 1748 to 1749.

Research References

ALR Library

Applicability of state Workmen's Compensation Act to injury occurring on or in connection with contracts in relation to federal property within state, 153 A.L.R. 1050.

Right to Workers' Compensation for Emotional Distress or Like Injury Suffered by Claimant as Result of Nonsudden Stimuli–Compensability Under Particular Circumstances, 108 A.L.R.5th 1.

Right to Workers' Compensation for Emotional Distress or Like Injury Suffered by Claimant as Result of Nonsudden Stimuli—Requisites of, and Factors Affecting, Compensability, 106 A.L.R.5th 111.

Right to Workers' Compensation for Emotional Distress or Like Injury Suffered by Claimant as Result of Nonsudden Stimuli—Right to Compensation Under Particular Statutory Provisions, 97 A.L.R.5th 1.

Right to Workers' Compensation for Injury Suffered at Worker's Home Where Home is Claimed as "Work Situs", 4 A.L.R.6th 57.

Right to Workers' Compensation for Injury Suffered by Employee While Driving Employer's Vehicle, 28 A.L.R.6th 1.

Right to Workers' Compensation for Injury Suffered by Worker En Route to or from Worker's Home Where Home Is Claimed as "Work Situs", 15 A.L.R.6th 633.

Right to Workers' Compensation for Physical Injury or Illness Suffered by Claimant as Result of Nonsudden Mental Stimuli—Compensability of Particular Physical Injuries or Illnesses, 112 A.L.R.5th 509.

Right to Workers' Compensation for Physical Injury or Illness Suffered by Claimant as Result of Nonsudden Mental Stimuli—Compensability Under Particular Circumstances, 39 A.L.R.6th 445.

Right To Workers' Compensation for Physical Injury or Illness Suffered by Claimant as Result of Nonsudden Mental Stimuli—Requisites of, and Factors Affecting, Compensability, 13 A.L.R.6th 209.

Right to Workers' Compensation for Physical Injury or Illness Suffered by Claimant as Result of Nonsudden Mental Stimuli—Right to Compensation Under Particular Statutory Provisions, 122 A.L.R.5th 653.

Right to Workers' Compensation for Physical Injury or Illness Suffered by Claimant as Result of Sudden Mental Stimuli—Compensability of Particular Injuries and Illnesses, 20 A.L.R.6th 641.

Right to Workers' Compensation for Physical Injury or Illness Suffered by Claimant as Result of Sudden Mental Stimuli—Compensability Under Particular Circumstances, 107 A.L.R.5th 441.

Right to Workers' Compensation for Physical Injury or Illness Suffered by Claimant as Result of Sudden Mental Stimuli—Right to Compensation Under Particular Statutory Provisions and Requisites of, and Factors Affecting, Compensability, 109 A.L.R.5th 161.

Treatises and Practice Aids

31 Causes of Action 2d 307, Cause of Action to Recover Workers' Compensation Benefits Under "Special Mission" or "Dual Purpose" Exception to "Going and Coming" Rule.

Modern Workers' Compensation § 102:1, Workers' Compensation as Exclusive Remedy.

Notes of Decisions

Torts 1

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1. Torts

Compensation under Workmen's Compensation Law is based on relationship of employer and employee, and is not in nature of damages for tort. Rev.Code 1919, § 9436 et seq., as amended. Benson v. Sioux Falls Medical and Surgical Clinic, 1934, 62 S.D. 324, 252 N.W. 864. Workers' Compensation ⇐ 4

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.

Source: SL 1917, ch 376, § 5; RC 1919, § 9440; SDC 1939, § 64.0104; SL 1977, ch 422; SL 1978, ch 370, § 2; SL 2008, ch 278, § 5.

Historical and Statutory Notes

SL 2008, ch 278, § 5 made form and style revisions to this section.

Note ½

½. In general

South Dakota employer can have an employment relationship outside of South Dakota, and a foreign employer can have an employment relationship inside South Dakota for workers' compensation purposes. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

1. Choice of law

Although claimant, whose employer was headquartered in South Dakota, had already filed a valid workers' compensation claim in Wyoming, where claimant was injured, the full faith and credit clause of the United States Constitution did not preclude claimant from receiving a successive workers' compensation award from South Dakota, nor was employer's interest in limiting its potential liability within the State of South Dakota of controlling importance. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

2. Due process

To determine whether employment of workers' compensation claimant has a "substantial connection" with a state, such that the state can consistently, with the requirements of due process, award relief to a person under the state's workers' compensation statute, appellate court considers if (a) the person is injured in the state, or (b) the employment is principally located in the state, or (c) the employer supervised the employee's activities from a place of business in the state, or (d) the state is that of most significant relationship to the contract of employment with respect to the issue of workers' compensation or (e) the parties have agreed in the contract of employment or otherwise that their rights should be determined under the workers' compensation act of the state, or (f) the state has some other reasonable relationship to the occurrence, the parties and the employment. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

South Dakota had a substantial connection to workers' compensation claimant's and her employer's employment relationship sufficient to provide the Department of Labor and Regulation with authority to adjudicate workers' compensation claim of claimant, who was injured in Wyoming while working for South Dakota employer, and accordingly, her claim for workers' compensation benefits did not offend principles of due process; claimant lived in South Dakota and was injured out-of-state, her employer managed and operated its accounting, payroll, and human resources services from its headquarters in South Dakota, South Dakota represented the place where the parties negotiated and executed the employment contract, and while Wyoming, where claimant was injured, shared a relationship to her employment based on the location of her duties and the accident, this did not diminish South Dakota's connection to the circumstances of the employment relationship. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

The location of the accident is not solely determinative of which state has a substantial connection to the employment relationship, as required for jurisdiction over workers' compensation claim. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

3. Authority of department

Statutory presumption that employer has accepted the terms of the Workers' Compensation Act unless an exemption in the Act applies does not refer to the Department of Labor and Regulation's authority, but, rather, serves to protect the employer who procures insurance. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

Although an employer who procures insurance coverage may seek the protections of Workers' Compensation Act, the claim must, as a prerequisite, be within the scope of the Department of Labor and Regulation's authority. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

Workers' compensation policy brought South Dakota employer within South Dakota's workers' compensation statutory scheme, but the Department of Labor and Regulation could not be presumed to have authority over claimant's workers' compensation claim simply because her employer had purchased a qualifying insurance policy. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

Statute providing that every employer and employee shall be presumed to have accepted the provisions of Workers' Compensation Act, and shall be thereby bound, whether injury or death resulting from such injury occurs within the state or elsewhere, does not set forth exclusively the scope of the Department of Labor and Regulation's authority to hear workers' compensation claims. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

Statute providing that every employer and employee shall be presumed to have accepted the provisions of Workers' Compensation Act, and shall be thereby bound, whether injury or death resulting from such injury occurred within the state or elsewhere, did not apply to confer upon Department of Labor and Regulation the presumption of authority to hear claim for permanent total disability benefits brought by claimant, a truck driver who was injured in Wyoming while working for South Dakota employer. Even though employer purchased a qualifying insurance policy, statutory presumption did not refer to Department's authority but rather served to protect an employer who procured insurance. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

4. Failure to carry insurance

Failure to carry insurance constitutes an election not to operate under the protections of statute providing that every employer and employee shall be presumed to have accepted the provisions of Workers' Compensation Act, and shall be thereby bound, whether injury or death resulting from such injury occurs within the state or elsewhere.

proof of employee's intoxication. SDCL 32-23-7(3), 62-4-37. Therkildsen v. Fisher Beverage, 545 N.W.2d 834, 1996 S.D. 39. Workers' Compensation ⇐ 1371

17. Admissibility of evidence

Opinion of employer's service manager that workers' compensation claimant's failure to use safety appliance proximately caused claimant's electrical burns and, thus, amounted to willful misconduct, was unreliable and, consequently, inadmissible as expert testimony, where it was not shown what the electrical fault was that caused claimant's electrical shock; rather manager's proof was purely anecdotal by showing that he performed same job using the safety appliance without experiencing a shock. Wells v. Howe Heating & Plumbing, Inc., 677 N.W.2d 586, 2004 S.D. 37. Workers' Compensation ⇐ 1394

18. Questions of law or fact

The ultimate decision on proximate cause in a workers' compensation action is made by the finder of fact based on all the evidence, including expert and eye-witness testimony. VanSteenwyk v. Baumgartner Trees and Landscaping, 731 N.W.2d 214, 2007 S.D. 36. Workers' Compensation ⇐ 1717

Issues of causation in worker's compensation cases are factual issues that are best determined by the Department of Labor. Holscher v. Valley Queen Cheese Factory, 713 N.W.2d 555, 2006 S.D. 35. Workers' Compensation ⇐ 1717

19. Review

The Supreme Court reviews de novo the Department of Labor's conclusions of law in a workers' compensation proceeding. Kendall v. John Morrell & Co., 809 N.W.2d 851, 2012 S.D. 13. Workers' Compensation ⇐ 1939.1

Employer failed to cite to authority to support allegation that ALJ was required to make specific findings of fact as to expert witness's credibility, and thus employer waived issue in workers' compensation action and court would not consider the issue on appeal. VanSteenwyk v. Baumgartner Trees and Landscaping, 731 N.W.2d 214, 2007 S.D. 36. Workers' Compensation ⇐ 1933

In worker's compensation proceeding, deputy director of the Division of Labor and Management was not clearly erroneous in finding that auto accident which gave rise to employee's claim was proximately caused by employee's intoxication, and thus deputy director correctly concluded that statute which bars compensation for any injury or death due to employee's willful misconduct barred employee's claim. SDCL 62-4-37. Driscoll v. Great Plains Marketing Co., 1982, 322 N.W.2d 478. Workers' Compensation ⇐ 1604

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.

Source: SDC 1939, § 64.0301; SL 1964, ch 224; SL 1994, ch 398.

Library References

Workers' Compensation ⇐399, 934.1 to 934.11, 1104 to 1110, 2103 to 2109, 2250. Westlaw Topic No. 413.

C.J.S. Worker's Compensation §§ 187, 280 to 281, 701 to 711, 844, 849 to 869, 1753 to 1759, 1845, 1848 to 1849.

Research References

ALR Library

Construction and Application of Exclusive Remedy Rule Under State Workers' Compensation Statute With Respect to Liability for Injury or Death of Employee as Passenger in Employer-Provided Vehicle—Against Whom May Rule Be Invoked and Applica-

the damages recovered by decedent's estate could be used to satisfy the lien could not have been litigated in the wrongful death action, and decedent's widow did not obtain an express allocation of what portion, if any, of the settlement proceeds were "like damages," nor did the federal court attempt such an allocation in an effort to settle all accounts. Dakota Plains AG Center, LLC v. Smithey, 772 N.W.2d 170, 2009 S.D. 78. Workers' Compensation ⇐ 2240

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.

Source: SDC 1939, § 64.0301 as added by SL 1964, ch 224; SL 1994, ch 396, § 17.

Library References

Workers' Compensation ⇐2247 to 2250.
Westlaw Topic No. 413.

C.J.S. Worker's Compensation §§ 1844 to 1849.

Research References

ALR Library

Compensation of Attorneys for Services in Connection With Claim Under Workmen's Compensation Act, 159 A.L.R. 912.

Constitutionality, construction, and application of provision of act for deduction on account of recovery from third person responsible for injury, 142 A.L.R. 170.

Right of Employer or Workers' Compensation Carrier to Lien Against, or Reimbursement Out Of, Uninsured or Underinsured Motorist Proceeds Payable to Employee Injured by Third Party, 33 A.L.R.5th 587.

Treatises and Practice Aids

Automobile Liability Insurance § 35:6, Right of Employer or Workers' Compensation Carrier to Subrogate Against Uninsured Motorist Benefits.

28 Causes of Action 2d 523, Cause of Action by Injured Worker Against Third-Party.

Modern Workers' Compensation § 206:7, Third Party Action Subrogation Liens--Generally.

Modern Workers' Compensation § 207:6, Statutes Governing Workers' Compensation Offsets.

Modern Workers' Compensation § 206:18, Statutes Governing Workers' Compensation Liens.

Modern Workers' Compensation § 321:19, Third Party Claims Generally and Third Party Settlement.

Notes of Decisions

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1. Subrogation

Employer who pays workers' compensation benefits is entitled to subrogation. SDCL 62-4-39, 62-4-40. Isaac v. State Farm Mut. Auto. Ins. Co., 1994, 522 N.W.2d 752. Workers' Compensation ⇐ 2189

2. Lien

Statutory lien of workers' compensation insurer against settlement between employee's estate and third party extended to benefits owed but not yet paid to estate. SDCL 62-4-38.

Notes of Decisions

In general 1

1. In general

Affirmative vote by two of three present members of five-member historic commission in favor of issuing certificate of appropriateness was insufficient to constitute valid action by commission, under South Dakota law, and without valid vote, city could not issue building permit and developers had no property interest protected by procedural due process. SDCL 2-14-15; U.S.C.A. Const.Amend. 14. Achtien v. City of Deadwood, 1993, 814 F.Supp. 808. Constitutional Law ⇐ 4322; Environmental Law ⇐ 84; Environmental Law ⇐ 92

Majority ruled when four guardians were appointed for ward, and thus three of four guardians had decision-making authority. SDCL 2-14-15, 30-27-25, 30-27-26 (Repealed). Matter of Guardianship of Estabrook, 1994, 512 N.W.2d 744. Mental Health ⇐ 179

Although there is no specific statute that addresses any requirement that a quorum of county commissioners be present to conduct business, this section generally addresses the matter for a wide range of public entities where joint authority is given to three or more public officers or other persons and it should be construed to require a majority; therefore, at least a majority of the county commissioners must be present to conduct any official action at a meeting; thus, three members of the county's fivemember board must be present to form a quorum and, further, three must vote in agreement in order to take any official action; and meetings must be rescheduled absent a quorum. Op.Atty. Gen. Opinion No. 94-15 (Dec. 28, 1994), 1994 WL 732283.

Since ch. 14-1 gives "joint authority" to three or more persons, it must be construed as giving the authority to the majority of them as provided in this section; therefore, a quorum of the State Library Board consists of four duly appointed and acting members. In addition, there must be at least four affirmative votes in order for the Board to take any official action. Op. Atty.Gen. Opinion No. 87-18, 1987 WL 341013.

"Majority" must be of full membership, not members present. Op.Atty.Gen. Opinion No. 87-18, 1987 WL 341013.

2-14-16. Effective date of legislative acts

Subject to the provisions of the Constitution and statutes relating to vetoes and the referendum, an act of the Legislature which does not prescribe when it shall take effect, if passed at a regular session, takes effect on the first day of July after its passage and if passed at a special session on the ninety-first day after the final adjournment of such session.

Source: SDC 1939, § 55.0607.

Cross References

Constitutional provision as to effective date, see Const. Art. III, § 22.
Referendum power reserved, see Const. Art. III, § 1.
Rule-making power conferred by legislation, time initial exercise allowed, see § 1-26-4.4.
Veto power of Governor, see Const. Art. IV, § 4.

Law Review and Journal Commentaries

Spurlin, The Basics of Legislative History in South Dakota, 56 S.D. L. Rev. 114 (2011).

Notes of Decisions

In general 1

1. In general

Purpose of constitutional and statutory delay provisions with respect to effective date of legislation is to allow citizens time to obtain sufficient signatures to begin referendum process. SDCL 2-1-3 to 2-1-14, 2-14-16; Const. Art. 3, §§ 1, 18, 22. SDDS, Inc. v. State, 1992, 481 N.W.2d 270. Statutes ⇐ 1419

ute unless the action is permitted to survive by the operation of a savings clause or by the vesting of a right under the statute. SDCL 2-14-18. State Highway Commission On Behalf Of State v. Wieczorek, 1976, 248 N.W.2d 369. Constitutional Law ⇐ 2648; Statutes ⇐ 1574(1); Statutes ⇐ 1575

2. Criminal prosecution

Prosecution, in which defendant was convicted of rioting to obstruct prior to adoption of criminal code revision, was preserved, contrary to contention that riot statute had been repealed without benefit of sufficient saving legislation. SDCL 2-14-18, 22-10-4. State v. Means, 1978, 268 N.W.2d 802. Riot ⇐ 1

3. License revocation

Revocation of insurance agent's license for misconduct was a "penalty" within the meaning of saving statute that kept repealed statute in force for the purpose of sustaining any proper action or prosecution for the enforcement of statutory penalty; thus, Insurance Division could seek revocation of license for conduct occurring before repeal of statute, even though repeal preceded commencement of proceedings. In re Tinklenberg, 716 N.W.2d 798, 2006 S.D. 52, rehearing denied. Insurance ⇐ 1618

4. Real estate transactions

General saving statute did not apply to allow assignee of contract for deed purchasers to assert statutory remedy of equitable adjustment after repeal of statute. SDCL 2-14-18; SDCL 21-50-2 (Repealed). Schultz v. Jibben, 1994, 513 N.W.2d 923. Real Property Conveyances ⇐ 1105

2-14-19. Revival not implied by repeal of repealer

Whenever any act of the Legislature is repealed, which repealed a former act, such former act shall not thereby be revived unless it shall be expressly so provided.

Source: SDC 1939, § 65.0202 (13).

Research References

ALR Library

Constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, applicability to repeal or amendment by implication, 5 A.L.R.2d 1270.

Simultaneous repeal and reenactment of all, or part, of legislative act, 77 A.L.R.2d 336.

Unconstitutionality of later statute as affecting provisions purporting specifically to repeal earlier statute, 102 A.L.R. 802.

Notes of Decisions

In general 1

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1. In general

Prior claims or liens were not reinstated by repeal of § 27B-9-28. Op.Atty.Gen. Opinion No. 80-1, 1980 WL 119176.

2-14-20. Omitted

Commission Note

This section, relating to the effective date of the South Dakota Code of 1939, is omitted as obsolete.

2-14-21. Code not retroactive

No part of the code of laws enacted by § 2-16-13 shall be construed as retroactive unless such intention plainly appears.

Source: SDC 1939, § 65.0202 (22).

CHAPTER 2–14

CONSTRUCTION AND EFFECT OF STATUTES

2–14–1. Words used in ordinary sense

Notes of Decisions

Public policy 17.5

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1. In general

Resolving an issue of statutory interpretation necessarily begins with an analysis of the statute's text. Matter of Appeal by Implicated Individual, 966 N.W.2d 578, 2021 S.D. 61.

5. Construction with other statutes—In general

Even where statutes appear to conflict, it is a court's responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them harmonious and workable. State v. Bettelyoun, 2022, 2022 S.D. 14, 2022 WL 804314.

6. —— General or specific statutes, construction with other statutes

Generally, when multiple statutes may apply to the same subject matter, a court should construe the statutes in such a way as to give effect to all of the statutes if possible. Jans v. Department of Public Safety, 964 N.W.2d 749, 2021 S.D. 51.

Statutes of specific application take precedence over statutes of general application. Jans v. Department of Public Safety, 964 N.W.2d 749, 2021 S.D. 51.

When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute. Jans v. Department of Public Safety, 964 N.W.2d 749, 2021 S.D. 51.

8. —— Presumptions, construction with other statutes

When analyzing two statutes touching upon the same subject matter, there is a presumption that the Legislature intended the two to coexist and that it did not intend an absurd or unreasonable result. State v. Bettelyoun, 2022, 2022 S.D. 14, 2022 WL 804314.

13. Plain meaning

If the words and phrases in the statute have plain meaning and effect, courts should simply declare their meaning and not resort to statutory construction. Anderson v. Tri State Construction, LLC, 964 N.W.2d 532, 2021 S.D. 50.

Words and phrases in a statute must be given their plain meaning and effect. Jans v. Department of Public Safety, 964 N.W.2d 749, 2021 S.D. 51.

17.5. Public policy

Court's duty is to construe statutes according to fair import of their terms and policies they support, whether that be rehabilitation, public safety, or both. State v. Bettelyoun, 2022, 2022 S.D. 14, 2022 WL 804314.

18. Clear, certain, and unambiguous

When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and the court's only function is to declare the meaning of the statute as clearly expressed. Jans v. Department of Public Safety, 964 N.W.2d 749, 2021 S.D. 51.

52. Review

Supreme Court defers to text of statute where possible. State v. Bettelyoun, 2022, 2022 S.D. 14, 2022 WL 804314.

Issues of constitutional and statutory interpretation are subject to de novo review by the Supreme Court. Thom v. Barnett, 967 N.W.2d 261, 2021 S.D. 65.

CHAPTER 2–16

CODES AND COMPILATIONS

2–16–13. Publications constituting official code

The official code of laws of the State of South Dakota, which may be referred to as the code, consists of all the statutes of a general and permanent nature contained in:

(1) The 2018 revision of volume 1;
(2) The 2021 revision of volume 2;
(3) The 2021 revision of volume 2A;
(4) The 2021 revision of volume 3;
(5) The 2004 revision of volume 4;
(6) The 2004 revision of volume 5;
(7) The 2020 revision of volume 6;
(8) The 2020 revision of volume 7;
(9) The 2018 revision of volume 8;
(10) The 2018 revision of volume 9;
(11) The 2014 revision of volume 10;
(12) The 2014 revision of volume 10A;
(13) The 2014 revision of volume 11;
(14) The 2016 revision of volume 12;
(15) The 2004 revision of volume 13;
(16) The 2017 revision of volume 14;
(17) The 2016 revision of volume 15;
(18) The 2013 revision of volume 16;
(19) The 2016 revision of volume 17;
(20) The 2004 revision of volume 18;
(21) The 2011 revision of volume 19;
(22) The 2011 revision of volume 19A;
(23) The 2011 revision of volume 20;
(24) The 2013 revision of volume 21;
(25) The 2015 revision of volume 22;
(26) The 2015 revision of volume 22A;
(27) The 2004 revision of volume 23;
(28) The 2004 revision of volume 24;
(29) The 2004 revision of volume 25;
(30) The 2004 revision of volume 26;
(31) The 2007 revision of volume 27;
(32) The 2004 revision of volume 28;
(33) The 2017 revision of volume 29;
(34) The 2012 revision of volume 30;
(35) The 2012 revision of volume 31;
(36) The 2019 revision of volume 32;
(37) The 2019 revision of volume 33;
(38) The 2015 revision of volume 34;
(39) The 2004 revision of the Parallel Tables volume;
(40) The December 2021 Interim Update Service of the South Dakota Codified Laws beginning with Title 1, chapter 1-1 and ending with Title 62, chapter 62-9; and
(41) The 2021 cumulative annual pocket parts.

Source: SL 1970, ch 17, § 1; SL 1972, ch 14, § 2; SL 1974, ch 28, § 2; SL 1975, ch 27, § 2; SL 1976, ch 29, § 1; SL 1977, ch 25, § 1; SL 1978, ch 23, § 2; SL 1979, ch 17, § 1; SL 1980, ch 25, § 1; SL 1981, ch 19, § 1; SL 1982, ch 27, § 1; SL 1983, ch 11, § 1; SL 1984, ch 18, § 1; SL 1985, ch 18, § 1; SL 1986, ch 26, § 1; SL 1987, ch 23, § 1; SL 1988, ch 26, § 1; SL 1989, ch 31, § 1; SL 1990, ch 29, § 1; SL 1991, ch 25, § 1; SL 1992, ch 25, § 1; SL 1993, ch 33, § 1; SL 1994, ch 30, § 1; SL 1995, ch 15, § 1; SL 1996, ch 23, § 1; SL 1997, ch 22, § 1; SL 1998, ch 12, § 1; SL 1999, ch 10, § 1; SL 2000, ch 22, § 1; SL 2001, ch 20, § 1; SL 2002, ch 20, § 1; SL 2003, ch 22, § 1; SL 2004, ch 31, § 1; SL 2005, ch 23, § 1; SL 2006, ch 14, § 1; SL 2007, ch 18, § 1; SL 2008, ch 18, § 1; SL 2009, ch 19, § 1; SL 2010, ch 18, § 1; SL 2011, ch

18, § 1; SL 2012, ch 22, § 1; SL 2013, ch 18, § 1; SL 2014, ch 16, § 1; SL 2015, ch 19, § 1; SL 2016, ch 29, § 1; SL 2017, ch 21, § 1; SL 2018, ch 31, § 1; SL 2019, ch 16, § 1; SL 2020, ch 9, § 1; SL 2021, ch 20, § 1; SL 2022, ch 10, § 1.

Historical and Statutory Notes

SL 2022, ch 10, § 1 inserted new subd. (3) and redesignated the following subdivisions accordingly, in subds. (2) and (4) substituted "2021" for "2012" and "2013", and in subds. (40) and (41) substituted "2021" for "2020".

2–16–15. Invalid laws not validated by codification

No provision of the code enacted by § 2–16–13, as to which any action or proceeding, civil or criminal, has been commenced prior to July 1, 2022, to determine whether or not such provision was constitutionally enacted, is validated by the enactment of this code.

The enactment of the code:

(1) Does not affect the validity of any transaction;

(2) Does not impair the curative or legalizing effect of any statute; and

(3) Does not release or extinguish any penalty, confiscation, forfeiture, or liability; which accrued, occurred, or took effect prior to the time the code took effect.

Source: SL 1970, ch 17, § 3; SL 1972, ch 14, § 3; SL 1974, ch 28, § 3; SL 1975, ch 27, § 3; SL 1976, ch 29, § 2; SL 1977, ch 25, § 2; SL 1978, ch 23, § 3; SL 1979, ch 17, § 2; SL 1980, ch 25, § 2; SL 1981, ch 19, § 2; SL 1982, ch 27, § 2; SL 1983, ch 11, § 2; SL 1984, ch 18, § 3; SL 1985, ch 18, § 2; SL 1986, ch 26, § 2; SL 1987, ch 28, § 2; SL 1988, ch 26, § 2; SL 1989, ch 31, § 2; SL 1990, ch 29, § 2; SL 1991, ch 25, § 2; SL 1992, ch 25, § 2; SL 1993, ch 33, § 2; SL 1994, ch 30, § 2; SL 1995, ch 15, § 2; SL 1997, ch 22, § 2; SL 1998, ch 12, § 2; SL 1999, ch 10, § 2; SL 2000, ch 22, § 2; SL 2001, ch 20, § 2; SL 2002, ch 20, § 2; SL 2003, ch 22, § 2; SL 2004, ch 31, § 2; SL 2005, ch 23, § 2; SL 2006, ch 14, § 2; SL 2007, ch 18, § 2; SL 2008, ch 18, § 2; SL 2009, ch 19, § 2; SL 2010, ch 18, § 2; SL 2011, ch 18, § 2; SL 2012, ch 22, § 2; SL 2013, ch 18, § 2; SL 2014, ch 16, § 2; SL 2015, ch 19, § 2; SL 2016, ch 29, § 2; SL 2017, ch 21, § 2; SL 2018, ch 31, § 2; SL 2019, ch 16, § 2; SL 2020, ch 9, § 2; SL 2021, ch 20, § 2; SL 2022, ch 10, § 2.

Historical and Statutory Notes

SL 2022, ch 10, § 2 in the introductory paragraph, substituted "July 1, 2022" for "July 1, 2021".

2–16–16. Statutes enacted at latest legislative session prevail over code—Citation of codified laws

All statutes, other than this code, enacted at the 2022 session of the Legislature shall be deemed to have been enacted subsequently to the enactment of this code. If any statute repeals, amends, contravenes, or is inconsistent with the provisions of this code, the provisions of the statute shall prevail. Any enactment in the 2022 session of the Legislature that cites South Dakota Codified Laws for the purpose of amendment or repeal shall be construed as having reference to the code enacted by § 2–16–13.

Source: SDC 1939, § 65.0202(23); SDCL § 2–14022; SL 1970, ch 17, § 4; SL 1972, ch 14, § 4; SL 1974, ch 28, § 4; SL 1975, ch 27, § 4; SL 1976, ch 29, § 3; SL 1977, ch 25, § 3; SL 1978, ch 23, § 4; SL 1979, ch 17, § 3; SL 1980, ch 25, § 3; SL 1981, ch 19, § 3; SL 1982, ch 27, § 3; SL 1983, ch 11, § 3; SL 1984, ch 18, § 4; SL 1985, ch 18, § 3; SL 1986, ch 26, § 3; SL 1987, ch 28, § 3; SL 1988, ch 26, § 3; SL 1989, ch 31, § 3; SL 1990, ch 29, § 3; SL 1991, ch 25, § 3; SL 1992, ch 25, § 3; SL 1993, ch 33, § 3; SL 1994, ch 30, § 3; SL 1995, ch 15, § 3; SL 1996, ch 23, § 2; SL 1997, ch 22, § 3; SL 1998, ch 12, § 3; SL 1999, ch 10, § 3; SL 2000, ch 22, § 3; SL 2001, ch 20, § 3; SL 2002, ch 20, § 3; SL 2003, ch 22, § 3; SL 2004, ch 31, § 3; SL 2005, ch 23, § 3; SL 2006, ch 14, § 3; SL 2007, ch 18, § 3; SL 2008, ch 18, § 3; SL 2009, ch 19, § 3; SL 2010, ch 18, § 3; SL 2011, ch 18, § 3; SL 2012, ch 22, § 3; SL 2013, ch 18, § 3; SL 2014, ch 16, § 3; SL 2015, ch 19, § 3; SL 2016, ch 29, § 3; SL 2017, ch 21, § 3; SL 2018, ch 31, § 3; SL 2019, ch 16, § 3; SL 2020, ch 9, § 3; SL 2021, ch 20, § 3; SL 2022, ch 10, § 3.

South Dakota Codified Laws

Volume 13
2021
Cumulative Annual Pocket Part

Title 21

Includes laws through the 2021 Regular Session

PUBLISHED BY AUTHORITY OF THE LEGISLATURE
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SOUTH DAKOTA CODE COMMISSION

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USER'S GUIDE

The 2021 Cumulative Pocket Parts bring to date the text of the South Dakota Codified Laws through the 2021 Regular Session of the Ninety-Sixth Legislature, Executive Order 2021-05, and Supreme Court Rule 21-06.

SDCL § 2-14-16 provides that an act of the Legislature which does not prescribe when it takes effect, if passed at a regular session, takes effect on the first day of July after its passage and if passed at a special session on the ninety-first day after the final adjournment of that session.

Decisions of the state and federal courts, opinions of the attorney general, law review and journal commentaries, and references have also been updated.

Notes of decisions close with cases decided as of April 13, 2021. Opinions of the Attorney General are included through No. 21-01. The annotations from the South Dakota Law Review are current through Volume 65 S.D. L. Rev. 608 (2020).

Later laws and annotations will be cumulated in subsequent Pamphlets and Pocket Parts.

Up-to-date tables relating to the South Dakota Codified Laws are located in a separate Parallel Tables volume.

See the main volume User's Guide for an explanation of all annotative features.

For additional information or research assistance call the reference attorneys at 1-800-REF-ATTY (1-800-733-2889). Contact our U.S. legal editorial department directly with your questions and suggestions by e-mail at editors.us-legal@tr.com.

THE PUBLISHER

June, 2021

(b) This chapter is subject to § 15–2–22.

Source: SL 2020, ch 77, § 7.

Historical and Statutory Notes

Uniform Law

This section is similar to § 7 of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act. See Uniform Laws Annotated, Master Edition, or Uniform Laws Annotated on Westlaw.

21–67–8. Construction

This chapter shall be construed to be consistent with the Communications Decency Act of 1996, 47 U.S.C. Section 230.

Source: SL 2020, ch 77, § 8.

Historical and Statutory Notes

Uniform Law

This section is similar to § 8 of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act. See Uniform Laws Annotated, Master Edition, or Uniform Laws Annotated on Westlaw.

21–67–9. Uniformity of application and construction

In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: SL 2020, ch 77, § 9.

Historical and Statutory Notes

Uniform Law

This section is similar to § 9 of the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act. See Uniform Laws Annotated, Master Edition, or Uniform Laws Annotated on Westlaw.

CHAPTER 21–68

LIMITATION OF LIABILITY FOR EXPOSURE TO COVID–19

21–68–1. Definitions

Terms used in this chapter mean:

(1) "COVID–19," the novel coronavirus identified as SARS–CoV–2, the disease caused by the novel coronavirus SARS–CoV–2 or a virus mutating therefrom, and conditions associated with the disease caused by the novel coronavirus SARS–CoV–2 or a virus mutating therefrom;

(2) "Disinfecting or cleaning supplies," hand sanitizers, disinfectants, sprays, and wipes;

(3) "First responders," law enforcement officers, firemen, emergency medical services workers, and other similarly situated persons;

(4) "Health care facility":

(a) Any facility regulated under chapter 34–12; or

(b) Residential care facilities, nursing facilities, intermediate care facilities for persons with mental illness, intermediate care facilities for persons with intellec-

tual disabilities, hospice programs, elder group homes, dental clinics, orthodontic clinics, optometric clinics, chiropractic clinics, and assisted living programs;

(5) "Health care professional," physicians and other health care practitioners who are licensed, certified, or otherwise authorized or permitted by the laws of this state to administer health care services in the ordinary course of business or in the practice of a profession, whether paid or unpaid, including persons engaged in telemedicine or telehealth. The term includes the employer or agent of a health care professional who provides or arranges health care;

(6) "Health care provider," a health care professional, health care facility, home health care facility, and any other person or facility otherwise authorized or permitted by any federal or state statute, rule, order, or public health guidance to administer health care services or treatment, including first responders;

(7) "Health care services," services for the diagnosis, prevention, treatment, care, cure, or relief of a health condition, illness, injury, or disease;

(8) "Person," a natural person, corporate or common law entity, business entity registered pursuant to § 37-11-1, and the state and any political subdivision thereof, including school districts. The term includes an agent of a person;

(9) "Personal protective equipment," protective clothing, gloves, face shields, goggles, facemasks, respirators, gowns, aprons, coveralls, and other equipment designed to protect the wearer from injury or the spread of infection or illness;

(10) "Premises," any real property and any appurtenant building or structure, and any vehicle, serving a commercial, residential, educational, religious, governmental, cultural, charitable, or health care purpose;

(11) "Public health guidance," written guidance related to COVID-19 issued by any of the following:

(a) The Center for Disease Control and Prevention of the federal Department of Health and Human Services;

(b) The Centers for Medicare and Medicaid Services of the federal Department of Health and Human Services;

(c) The federal Occupational Safety and Health Administration;

(d) The Office of the Governor; or

(e) Any state agency, including the Department of Health;

(12) "Qualified product::"

(a) Personal protective equipment used to protect the wearer from COVID-19 or to prevent the spread of COVID-19;

(b) Medical devices, equipment, and supplies used to treat COVID-19, including medical devices, equipment, or supplies that are used or modified for an unapproved use to treat COVID-19 or to prevent the spread of COVID-19;

(c) Medical devices, equipment, and supplies used outside of their normal use to treat COVID-19 or to prevent the spread of COVID-19;

(d) Medications used to treat COVID-19, including medications prescribed or dispensed for off-label use to attempt to treat COVID-19;

(e) Tests to diagnose or determine immunity to COVID-19; or

(f) Any component of an item described in this subdivision.

(13) "Vehicle," a device used for transporting people, goods, or substances, including, but not limited to, an automobile, truck, bus, train, helicopter, or airplane.

Source: SL 2021, ch 91, § 1.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

21-68-2. Limitation—Actions—Diagnosis—Intentional exposure

A person may not bring or maintain any action or claim for damages or relief alleging exposure or potential exposure to COVID-19 unless the exposure results in a COVID-19

diagnosis and the exposure is the result of intentional exposure with the intent to transmit COVID-19. In alleging intentional exposure with the intent to transmit COVID-19, a party shall state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.

Source: SL 2021, ch 91, § 2.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

21-68-3. Limitation—Actions—Owner—Premises

A person who possesses or is in control of a premises, including a tenant, lessee, or occupant of a premises, who directly or indirectly invites or permits an individual onto a premises, shall not be liable for damages for any injuries sustained from the individual's exposure to COVID-19, whether the exposure occurs on the premises or during any activity managed by the person who possesses or is in control of a premises unless the person who possesses or is in control of the premises intentionally exposes the individual to COVID-19 with the intent to transmit COVID-19. In alleging intentional exposure with the intent to transmit COVID-19, a party must state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.

Source: SL 2021, ch 91, § 3.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

21-68-4. Limitation—Actions—Health care provider

A health care provider is not liable for any damages for causing or contributing, directly or indirectly, to the death or injury of a person as a result of the health care provider's acts or omissions in response to COVID-19. This section applies to all of the following:

(1) Injury or death resulting from screening, assessing, diagnosing, caring for, or treating persons with a suspected or confirmed case of COVID-19;

(2) Prescribing, administering, or dispensing a pharmaceutical for off-label use to treat a patient with a suspected or confirmed case of COVID-19; and

(3) Acts or omissions while providing health care to persons unrelated to COVID-19 if those acts or omissions support the state's response to COVID-19, including any of the following:

(a) Delaying or canceling nonurgent or elective dental, medical, or surgical procedures, or altering the diagnosis or treatment of a person in response to any federal or state statute, regulation, order, or public health guidance;

(b) Diagnosing or treating patients outside the normal scope of the health care provider's license or practice;

(c) Using medical devices, equipment, or supplies outside of their normal use for the provision of health care, including using or modifying medical devices, equipment, or supplies for an unapproved use;

(d) Conducting tests or providing treatment to any person outside the premises of a health care facility;

(e) Acts or omissions undertaken by a health care provider because of a lack of staffing, facilities, medical devices, equipment, supplies, or other resources attributable to COVID-19 that renders the health care provider unable to provide the level or manner of care to any person that otherwise would have been required in the absence of COVID-19; and

(f) Acts or omissions undertaken by a health care provider relating to the use or nonuse of personal protective equipment.

This section does not relieve any person or health care provider of liability for civil damages for any act or omission that constitutes gross negligence, recklessness, or willful misconduct.

Source: SL 2021, ch 91, § 4.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

21-68-5. Limitation—Actions—Personal protective equipment

Any person that designs, manufactures, labels, sells, distributes, or donates disinfecting or cleaning supplies, personal protective equipment, or a qualified product in response to COVID-19 is not liable in a civil action alleging personal injury, death, or property damage caused by or resulting from the design, manufacturing, labeling, selling, distributing, or donating of the disinfecting or cleaning supplies, personal protective equipment, or a qualified product.

Any person that designs, manufactures, labels, sells, distributes, or donates disinfecting or cleaning supplies, personal protective equipment, or a qualified product in response to COVID-19 is not liable in a civil action alleging personal injury, death, or property damage caused by or resulting from a failure to provide proper instructions or sufficient warnings.

This section does not relieve any person of liability for civil damages for any act or omission that constitutes gross negligence, recklessness, or willful misconduct.

Source: SL 2021, ch 91, § 5.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

21-68-6. Construction

This chapter may not be construed to do any of the following:

(1) Create, recognize, or ratify a claim or cause of action of any kind;

(2) Eliminate or satisfy a required element of a claim or cause of action of any kind;

(3) Deem COVID-19 an occupational disease. COVID-19 is not an occupational disease under state law; or

(4) Abrogate, amend, repeal, alter, or affect any statutory or common law immunity or limitation of liability.

Source: SL 2021, ch 91, § 6.

Commission Note

SL 2021, ch 91, § 7 provides: "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues, or begins, whether known, unknown, or latent between January 1, 2020 and December 31, 2022."

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CONSULT GENERAL INDEX

CDC Centers for Disease Control and Prevention
CDC 24/7: Saving Lives, Protecting People™

COVID-19

Basics of COVID-19

Updated Nov. 4, 2021

CDC is reviewing this page to align with updated guidance.

About COVID-19

COVID-19 (coronavirus disease 2019) is a disease caused by a virus named SARS-CoV-2 and was discovered in December 2019 in Wuhan, China. It is very contagious and has quickly spread around the world.

COVID-19 most often causes respiratory symptoms that can feel much like a cold, a flu, or pneumonia. COVID-19 may attack more than your lungs and respiratory system. Other parts of your body may also be affected by the disease.

- Most people with COVID-19 have mild symptoms, but some people become severely ill.
- Some people including those with minor or no symptoms may suffer from post-COVID conditions — or "long COVID".
- Older adults and people who have certain underlying medical conditions are at increased risk of severe illness from COVID-19.
- **Hundreds of thousands of people have died from COVID-19 in the United States.**
- Vaccines against COVID-19 are safe and effective. Vaccines teach our immune system to fight the virus that causes COVID-19.

About SARS-CoV-2, the virus that causes COVID-19

COVID-19 is caused by a virus called SARS-CoV-2. It is part of the coronavirus family, which include common viruses that cause a variety of diseases from head or chest colds to more severe (but more rare) diseases like severe acute respiratory syndrome (SARS) and Middle East respiratory syndrome (MERS).

Like many other respiratory viruses, coronaviruses spread quickly through droplets that you project out of your mouth or nose when you breathe, cough, sneeze, or speak.

The word corona means crown and refers to the appearance that coronaviruses get from the spike proteins sticking out of them. These spike proteins are important to the biology of this virus. The spike protein is the part of the virus that attaches to a human cell to infect it, allowing it to replicate inside of the cell and spread to other cells. Some antibodies can protect you from SARS-CoV-2 by targeting these spike proteins. Because of the importance of this specific part of the virus, scientists who sequence the virus for research constantly monitor mutations causing changes to the spike protein through a process called genomic surveillance.

As genetic changes to the virus happen over time, the SARS-CoV-2 virus begins to form genetic lineages. Just as a family has a family tree, the SARS-CoV-2 virus can be similarly mapped out. Sometimes branches of that tree have different attributes that change how fast the virus spreads, or the severity of illness it causes, or the effectiveness of treatments against it. Scientists call the viruses with these changes "variants". They are still SARS-CoV-2, but may act differently.

Last Updated Nov. 4, 2021
Source: National Center for Immunization and Respiratory Diseases (NCIRD), Division of Viral Diseases

CDC Centers for Disease Control and Prevention

Symptoms of COVID-19

Updated Oct. 26, 2022

People with COVID-19 have had a wide range of symptoms reported – ranging from mild symptoms to severe illness. Symptoms may appear 2-14 days after exposure to the virus. Anyone can have mild to severe symptoms.

Possible symptoms include:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

This list does not include all possible symptoms. Symptoms may change with new COVID-19 variants and can vary depending on vaccination status. CDC will continue to update this list as we learn more about COVID-19. Older adults and people who have underlying medical conditions like heart or lung disease or diabetes are at higher risk for getting very sick from COVID-19.

Feeling Sick?

If you are experiencing any of these symptoms, consider the following options:

- Get tested for COVID-19
- If you have already tested positive for COVID-19, learn more about CDC's isolation guidance

When to Seek Emergency Medical Attention

Look for emergency warning signs* for COVID 19:

- Trouble breathing
- Persistent pain or pressure in the chest
- New confusion
- Inability to wake or stay awake
- Pale, gray, or blue-colored skin, lips, or nail beds, depending on skin tone

If someone is showing any of these signs, call 911 or call ahead to your local emergency facility. Notify the operator that you are seeking care for someone who has or may have COVID-19.

*This list is not all possible symptoms. Please call your medical provider for any other symptoms that are severe or concerning to you.

Difference Between Flu and COVID-19

Influenza (Flu) and COVID-19 are both contagious respiratory illnesses, but they are caused by different viruses. COVID-19 is caused by infection with a coronavirus named SARS-CoV-2, and flu is caused by infection with influenza viruses. You cannot tell the difference between flu and COVID-19 by symptoms alone because some of the symptoms are the same. Some PCR tests can differentiate between flu and COVID-19 at the same time. If one of these tests is not available, many testing locations provide flu and COVID-19 tests separately. Talk to a healthcare provider about getting tested for both flu and COVID-19 if you have symptoms.

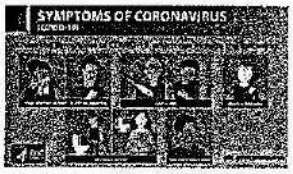
Learn more

Resources

Print Resources

Symptoms of COVID-19 [460 KB, 1 page]

Videos



Symptoms of COVID-19

Video Length: 00:00:21

Watch Video

ASL Symptoms of Coronavirus

Video Length: 00:09:25

Watch Video

More Information

Understanding Your Risk

Healthcare Workers: Information on COVID-19

Last Updated Oct. 26, 2022

Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

OSHA will update this guidance over time to reflect developments in science, best practices, and standards.

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Summary of changes **August 13, 2021**

- Update to reflect the July 27, 2021 Centers for Disease Control and Prevention (CDC) mask and testing recommendations for fully vaccinated people
- Reorganize Appendix recommendations for Manufacturing, Meat and Poultry Processing, Seafood Processing, and Agricultural Processing Industries
- Add links to guidance with the most up-to-date content

On this Page

Purpose

This guidance is designed to help employers protect workers who are unvaccinated (including people who are not fully vaccinated) or otherwise at-risk (as defined in the text box below), including if they are immunocompromised, and also implement new guidance involving workers who are fully vaccinated but located in areas of substantial or high community transmission.

This guidance contains recommendations as well as descriptions of the Occupational Safety and Health Administration's (OSHA's) mandatory safety and health standards, the latter of which are clearly labeled throughout as "**mandatory OSHA standards.**" The recommendations are advisory in nature and informational in content and are intended to assist employers in providing a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.

OSHA emphasizes that vaccination is the most effective way to protect against severe illness or death from COVID-19. OSHA strongly encourages employers to provide paid time off to workers for the time it takes for them to get vaccinated and recover from any side effects. Employers should also consider working with local public health authorities to provide vaccinations for unvaccinated workers in the workplace. Finally, OSHA suggests that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated. People are considered fully vaccinated for COVID-19 two weeks or more after they have completed their final dose of a COVID-19 vaccine authorized for Emergency Use Authorization (EUA) by the U.S. Food and Drug Administration in the United States.

Executive Summary

This guidance is intended to help employers and workers not covered by the OSHA's COVID-19 Emergency Temporary Standard (ETS) for Healthcare, helping them identify COVID-19 exposure risks to workers who are unvaccinated or otherwise at risk even if they are fully vaccinated (e.g., if they are immunocompromised). See Text Box: Who Are "At-Risk" Workers?

This guidance is also intended to help employers and workers who are located in areas of substantial or high community transmission, who should take appropriate steps to prevent exposure and infection regardless of vaccination status. The U.S. Centers for Disease Control and Prevention (CDC) reports in its latest Interim Public Health Recommendations for Fully Vaccinated People that infections in fully vaccinated people (breakthrough infections) happen in only a small proportion of people who are fully vaccinated, even with the Delta variant. Moreover, when these infections occur among vaccinated people, they tend to be mild, reinforcing that vaccines are an effective and critical tool for bringing the pandemic under control.

However, preliminary evidence suggests that fully vaccinated people who do become infected with the Delta variant can be infectious and can spread the virus to others.

This evidence has led CDC to update recommendations for fully vaccinated people to reduce their risk of becoming infected with the Delta variant and potentially spreading it to others, including by:

- wearing a mask[1] in public indoor settings in areas of substantial or high transmission;
- choosing to wear a mask regardless of level of transmission, particularly if individuals are at risk or have someone in their household who is at increased risk of severe disease or not fully vaccinated; and
- getting tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19 and wearing a mask in public indoor settings for 14 days after exposure or until a negative test result.[2]

In this guidance, OSHA adopts analogous recommendations.

CDC has also updated its guidance for COVID-19 prevention in K-12 schools to recommend universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status.[3] CDC's Face Mask Order requiring masks on public transportation conveyances and inside transportation hubs has not changed, but CDC has announced that it will be amending its Face Masks Order to not require people to wear a mask in outdoor areas of conveyances (if such outdoor areas exist on the conveyance) or while outdoors at transportation hubs, and that it will exercise its enforcement discretion in the meantime.

Who Are "At-Risk Workers"?

Some conditions, such as a prior transplant, as well as prolonged use of corticosteroids or other immune-weakening medications, may affect workers' ability to have a full immune response to vaccination. To understand more about these conditions, see the CDC's page describing Vaccines for People with Underlying Medical Conditions and further definition of People with Certain Medical Conditions. Under the Americans with Disabilities Act (ADA), workers with disabilities may be legally entitled to reasonable accommodations that protect them from the risk of contracting COVID-19 if, for example, they cannot be protected through vaccination, cannot be vaccinated, or cannot use face coverings. Employers should consider taking steps to protect these at-risk workers as they would unvaccinated workers, regardless of their vaccination status.

COVID-19 and Prevention

Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), the virus that causes **COVID-19**, is highly infectious and can spread from person to person, including through aerosol transmission of particles produced when an infected person exhales, talks, vocalizes, sneezes, or coughs. The virus that causes COVID-19 is highly transmissible and can be spread by people who have no symptoms. Particles containing the virus can travel more than 6 feet, especially indoors and in dry conditions (relative humidity below 40%), and can be spread by individuals who do not know they are infected.

Vaccines authorized by the U.S. Food and Drug Administration in the United States are highly effective at protecting most fully vaccinated people against symptomatic and severe COVID-19. OSHA encourages employers to take steps to make it easier for workers to get vaccinated and encourages workers to take advantage of those opportunities. However, CDC recognizes that even some fully vaccinated people who are largely protected against severe illness and death may still be capable of transmitting the virus to others. Therefore, this guidance mirrors CDC's in recommending masking and testing even for fully vaccinated people in certain circumstances.

OSHA also continues to recommend implementing multiple layers of controls (e.g. mask wearing, distancing, and increased ventilation). Along with vaccination, key controls to help protect unvaccinated and other at-risk workers include removing from the workplace all infected people, all people experiencing COVID symptoms, and any people who are not fully vaccinated who have had close contact with someone with COVID-19 and have not tested negative for COVID-19 immediately if symptoms develop and again at least 5 days after the contact (in which case they may return 7 days after contact). Fully vaccinated people who have had close contact should get tested for COVID-19 3-5 days after exposure and be required to wear face coverings for 14 days after their contact unless they test negative for COVID-19. Additional fundamental controls that protect unvaccinated and other at-risk workers include maintaining ventilation systems, implementing physical distancing, and properly using face coverings (or other Personal Protective Equipment (PPE) and respiratory protection such as N95 respirators when appropriate), and proper cleaning. Fully vaccinated people in areas of

substantial or high transmission should be required to wear face coverings inside (or other appropriate PPE and respiratory protection) as well. Employees may request reasonable accommodations, absent an undue hardship, if they are unable to comply with safety requirements due to a disability. For more information, see the Equal Employment Opportunity Commission's (EEOC's) What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.

Finally, OSHA provides employers with specific guidance for environments at a higher risk for exposure to or spread of COVID-19, primarily workplaces where unvaccinated or otherwise at-risk workers are more likely to be in prolonged, close contact with other workers or the public, or in closed spaces without adequate ventilation.

Scope

OSHA provides this guidance for employers as recommendations to use in protecting unvaccinated workers and otherwise at-risk workers, and to help those workers protect themselves. This guidance also incorporates CDC's recommendations for fully vaccinated workers in areas of substantial or high transmission. Employers and workers should use this guidance to determine any appropriate control measures to implement.

While this guidance addresses most workplaces, many healthcare workplace settings will be covered by the **mandatory OSHA COVID-19 Emergency Temporary Standard**. Pursuant to the Occupational Safety and Health Act (the OSH Act or the Act), employers in those settings must comply with that standard. All employers must comply with any **other applicable mandatory safety and health standards and regulations** issued and enforced either by OSHA or by an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their workers with a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. Employers who are not covered by the OSH Act (like public sector employers in some states) will also find useful control measures in this guidance to help reduce the risk of COVID-19 in their workplaces.

This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of existing **mandatory OSHA standards**, the latter of which are clearly labeled throughout. The recommendations are advisory in nature and informational in content and are intended to assist employers in recognizing and abating hazards likely to cause death or serious physical harm as part of their obligation to provide a safe and healthful workplace.

About COVID-19

SARS-CoV-2, the virus that causes COVID-19, is highly infectious and spreads from person to person, including through aerosol transmission of particles produced when an infected person exhales, talks, vocalizes, sneezes, or coughs. COVID-19 is less commonly transmitted when people touch a contaminated object and then touch their eyes, nose, or mouth. The virus that causes COVID-19 is highly transmissible and can be spread by people who have no symptoms and who do not know they are infected. Particles containing the virus can travel more than 6 feet, especially indoors and in dry conditions with relative humidity below 40%. The CDC estimates that over fifty percent of the spread of the virus is from individuals with no symptoms at the time of spread.

More information on COVID-19 is available from the Centers for Disease Control and Prevention.

What Workers Need To Know about COVID-19 Protections in the Workplace

SARS-CoV-2, the virus that causes COVID-19, spreads mainly among unvaccinated people who are in close contact with one another - particularly indoors and especially in poorly ventilated spaces.

Vaccination is the key element in a multi-layered approach to protect workers. Learn about and take advantage of opportunities that your employer may provide to take time off to get vaccinated. Vaccines authorized by the U.S. Food and Drug Administration are highly effective at protecting vaccinated people against symptomatic and severe COVID-19 illness and death. According to the CDC, a growing body of evidence suggests that fully vaccinated people are less likely to have symptomatic infection or transmit the virus to others. See CDC's Guidance for Fully Vaccinated People; and Science Brief.

You should follow recommended precautions and policies at your workplace. Multi-layered controls tailored to your workplace are especially important for those workers who are unvaccinated or otherwise at-risk. Many employers have established COVID-19 prevention programs that include a number of important steps to keep unvaccinated and otherwise at-risk workers safe. These COVID-19 prevention programs include measures such as telework and flexible schedules, engineering controls (especially ventilation), administrative policies (e.g., vaccination policies), PPE, face coverings, physical distancing, and enhanced cleaning programs with a focus on high-touch surfaces.

In addition, the CDC recommends that fully vaccinated people wear a mask in public indoor settings if they are in an area of substantial or high transmission. Fully vaccinated people might choose to mask regardless of the level of transmission, particularly if they or someone in their household is immunocompromised or at increased risk for severe disease, or if someone in their household is unvaccinated. Ask your employer about plans in your workplace. In addition, employees with disabilities who are at-risk may request reasonable accommodation under the ADA.

Even if your employer does not have a COVID-19 prevention program, if you are unvaccinated or otherwise at risk, you can help protect yourself by following the steps listed below:

- You should get a COVID-19 vaccine as soon as you can. Ask your employer about opportunities for paid leave, if necessary, to get vaccinated and recover from any side effects.
- Properly wear a face covering over your nose and mouth. Face coverings are simple barriers worn over the face, nose and chin. They work to help prevent your respiratory droplets or large particles from reaching others. Individuals are encouraged to choose higher quality masks so that they are providing a greater measure of protection to themselves as well as those around them. CDC provides general guidance on masks, including face coverings.
- If you are working outdoors, you may opt not to wear face coverings in many circumstances; however, your employer should support you in safely continuing to wear a face covering if you choose, especially if you work closely with other people.
- Unless you are fully vaccinated and not otherwise at-risk, stay far enough away from other people so that you are not breathing in particles produced by them – generally at least 6 feet (about 2 arm lengths), although this approach by itself is not a guarantee that you will avoid infection, especially in enclosed or poorly ventilated spaces. Ask your employer about possible telework and flexible schedule options at your workplace, and take advantage of such policies if possible. Perform work tasks, hold meetings, and take breaks outdoors when possible.
- Participate in any training offered by your employer/building manager to learn how rooms are ventilated effectively, encourage your employer to provide such training if it does not already exist, and notify the building manager if you see vents that are clogged, dirty, or blocked by furniture or equipment.
- Practice good personal hygiene and wash your hands often. Always cover your mouth and nose with a tissue, or the inside of your elbow, when you cough or sneeze, and do not spit. Monitor your health daily and be alert for COVID-19 symptoms (e.g., fever, cough, or shortness of breath). See CDC's Daily Activities and Going Out and CDC's Interim Public Health Recommendations for Fully Vaccinated People.
- Get tested regularly, especially in areas of substantial or high community transmission.

COVID-19 vaccines are highly effective at keeping you from getting COVID-19. If you are not yet fully vaccinated or are otherwise at risk, optimum protection is provided by using multiple layers of interventions that prevent exposure and infection.

The Roles of Employers and Workers in Responding to COVID-19

Under the OSH Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm.

CDC's Interim Public Health Recommendations for Fully Vaccinated People explains that under some circumstances, fully vaccinated people need not take all the precautions that unvaccinated people should take, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance. However, in light of evidence related to the Delta variant of the SARS-CoV-2 virus, the CDC updated its guidance to recommend that even people who are fully vaccinated wear a mask in public indoor settings in areas of substantial or high transmission, or if they have had a known exposure to someone with COVID-19 and have not had a subsequent negative test 3-5 days after the last date of that exposure. Schools should continue to follow applicable CDC guidance, which recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status.

Employers should engage with workers and their representatives to determine how to implement multi-layered interventions to protect unvaccinated and otherwise at-risk workers and mitigate the spread of COVID-19, including:

1. ***Facilitate employees getting vaccinated.*** Employers should grant paid time off for employees to get vaccinated and recover from any side effects. The Department of Labor and OSHA, as well as other federal agencies, are working diligently to ensure access to COVID-19 vaccinations. CDC provides information on the benefits and safety of vaccinations. Businesses with fewer than 500 employees may be eligible for tax credits under the American Rescue Plan Act if they provide paid time off from April 1, 2021, through September 30, 2021, for employees who decide to receive the vaccine or to accompany a family or household member to receive the vaccine and to recover from any potential side effects from the vaccine. Employers should also consider working with local public health authorities to provide vaccinations in the workplace for unvaccinated workers. Finally, OSHA suggests that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated.
2. ***Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for SARS-CoV-2, and all workers with COVID-19 symptoms to stay home from work*** to prevent or reduce the risk of transmission of the virus that causes COVID-19. As recommended by the CDC, fully vaccinated people who have a known exposure to someone with suspected or confirmed COVID-19 should get tested 3-5 days after exposure and should wear a mask in public indoor settings for 14 days or until they receive a negative test result. People who are not fully vaccinated should be tested immediately after being identified, and, if negative, tested again in 5–7 days after last exposure or immediately if symptoms develop

during quarantine. Ensure that absence policies are non-punitive. Eliminate or revise policies that encourage workers to come to work sick or when unvaccinated workers have been exposed to COVID-19. Businesses with fewer than 500 employees may be eligible for refundable tax credits under the American Rescue Plan (ARP) Act if they provide paid time off for sick and family leave to their employees due to COVID-19-related reasons. The ARP tax credits are available to eligible employers that pay sick and family leave for qualified leave from April 1, 2021, through September 30, 2021. More information is available from the IRS.

3. ***Implement physical distancing in all communal work areas for unvaccinated and otherwise at-risk workers.*** A key way to protect such workers is to physically distance them from other such people (workers or customers) – generally at least 6 feet of distance is recommended, although this is not a guarantee of safety, especially in enclosed or poorly ventilated spaces. In a workplace, workers often are required to work in close proximity to each other and/or customers or clients for extended periods of time. Maintaining physical distancing at the workplace for such workers is an important control to limit the spread of COVID-19.

   Employers could also limit the number of unvaccinated or otherwise at-risk workers in one place at any given time, for example by implementing flexible worksites (e.g., telework); implementing flexible work hours (e.g., rotate or stagger shifts to limit the number of such workers in the workplace at the same time); delivering services remotely (e.g., phone, video, or web); or implementing flexible meeting and travel options, for such workers.

   At fixed workstations where unvaccinated or otherwise at-risk workers are not able to remain at least 6 feet away from other people, transparent shields or other solid barriers can separate these workers from other people. Barriers should block face-to-face pathways between individuals in order to prevent direct transmission of respiratory droplets, and any openings should be placed at the bottom and made as small as possible. The height and posture (sitting or standing) of affected workers, directional airflow, and fire safety should be considered when designing and installing barriers, as should the need for enhanced ventilation.

4. ***Provide workers with face coverings or surgical masks,[4] as appropriate, unless their work task requires a respirator or other PPE.*** In addition to unvaccinated and otherwise at-risk workers, CDC recommends that even fully vaccinated people wear masks in public indoor settings in areas of substantial or high transmission and notes that fully vaccinated people may appropriately choose to wear masks in public indoor settings regardless of community level of transmission, particularly if they are at risk or have someone in their household who is at risk or not fully vaccinated.

   Workers should wear a face covering that covers the nose and mouth to contain the wearer's respiratory droplets and to help protect others and potentially themselves. Face coverings should be made of at least two layers of a tightly woven breathable fabric, such as cotton, and should not have exhalation valves or vents. They should fit snugly over the nose, mouth, and chin with no large gaps on the outside of the face.

   Employers should provide face coverings to workers who request them at no cost (and make replacements available to workers when they request them). Under federal anti-discrimination laws, employers may need to provide reasonable accommodations for any workers who are unable to wear or have difficulty wearing certain types of face coverings due to a disability or who need a religious accommodation under Title VII of the Civil Rights Act of 1964. In workplaces with employees who are deaf or hard of hearing, employers should consider acquiring masks with clear coverings over the mouth to facilitate lip-reading.

   Unless otherwise provided by federal, state, or local requirements, workers who are outdoors may opt not to wear face coverings unless they are at risk, for example, if they are immunocompromised. Regardless, all workers should be supported in continuing to wear a face covering if they choose, especially in order to safely work closely with other people.

   When an employer determines that PPE is necessary to protect unvaccinated and otherwise at-risk workers from exposure to COVID-19, the employer must provide PPE in accordance with **relevant mandatory OSHA standards** and should consider providing PPE in accordance with other industry-specific guidance. Respirators, if necessary, must be provided and used in compliance with 29 CFR 1910.134 (e.g., medical determination, fit testing, training on its correct use), including certain provisions for voluntary use when workers supply their own respirators, and other PPE must be provided and used in accordance with the applicable standards in 29 CFR part 1910, Subpart I (e.g., 1910.132 and 133). There are times when PPE is not called for by OSHA standards or other industry-specific guidance, but some workers may have a legal right to PPE as a reasonable accommodation under the ADA. Employers are encouraged to proactively inform employees who have a legal right to PPE as a reasonable accommodation for their disability about how to make such a request. Other workers may want to use PPE if they are still concerned about their personal safety (e.g., if a family member is at higher risk for severe illness, they may want to wear a face shield in addition to a face covering as an added layer of protection). Encourage and support voluntary use of PPE in these circumstances and ensure the equipment is adequate to protect the worker.

   For operations where the face covering can become wet and soiled, provide workers with replacements daily or more frequently, as needed. Face shields may be provided for use with face coverings to protect them from getting wet and soiled, but they do not provide adequate protection by themselves. See CDC's Guide to Masks.

Employers with workers in a setting where face coverings may increase the risk of heat-related illness indoors or outdoors or cause safety concerns due to introduction of a hazard (for instance, straps getting caught in machinery) may wish to consult with an occupational safety and health professional to help determine the appropriate face covering/respirator use for their setting.

5. ***Educate and train workers on your COVID-19 policies and procedures using accessible formats and in languages they understand.*** Train managers on how to implement COVID-19 policies. Communicate supportive workplace policies clearly, frequently, and via multiple methods to promote a safe and healthy workplace. Communications should be in plain language that unvaccinated and otherwise at-risk workers understand (including non-English languages, and American Sign Language or other accessible communication methods, if applicable) and in a manner accessible to individuals with disabilities. Training should be directed at employees, contractors, and any other individuals on site, as appropriate, and should include:
   A. Basic facts about COVID-19, including how it is spread and the importance of physical distancing (including remote work), ventilation, vaccination, use of face coverings, and hand hygiene.
   B. Workplace policies and procedures implemented to protect workers from COVID-19 hazards.

   For basic facts, see About COVID-19 and What Workers Need to Know About COVID-19 above and see more on vaccinations, improving ventilation, physical distancing (including remote work), PPE, and face coverings, respectively, elsewhere in this document. Some means of tracking which workers have received this information, and when, could be utilized by the employer as appropriate.

   In addition, ensure that workers understand their rights to a safe and healthful work environment, whom to contact with questions or concerns about workplace safety and health, and their right to raise workplace safety and health concerns free from retaliation. (See Implementing Protections from Retaliation, below.) This information should also be provided in a language that workers understand. Ensure supervisors are familiar with workplace flexibilities and other human resources policies and procedures.

6. ***Suggest or require that unvaccinated customers, visitors, or guests wear face coverings in public-facing workplaces such as retail establishments, and that all customers, visitors, or guests wear face coverings in public, indoor settings in areas of substantial or high transmission.*** This could include posting a notice or otherwise suggesting or requiring that people wear face coverings, even if no longer required by your jurisdiction. Individuals who are under the age of 2 or are actively consuming food or beverages on site need not wear face coverings.

7. ***Maintain Ventilation Systems.*** The virus that causes COVID-19 spreads between people more readily indoors than outdoors. Improving ventilation is a key engineering control that can be used as part of a layered strategy to reduce the concentration of viral particles in indoor air and the risk of virus transmission to unvaccinated and otherwise at-risk workers in particular. A well-maintained ventilation system is particularly important in any indoor workplace setting and when working properly, ventilation is an important control measure to limit the spread of COVID-19. Some measures to improve ventilation are discussed in CDC's Ventilation in Buildings and in the OSHA Alert: COVID-19 Guidance on Ventilation in the Workplace. These recommendations are based on American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Guidance for Building Operations and Industrial Settings during the COVID-19 Pandemic. Adequate ventilation will protect all people in a closed space. Key measures include ensuring heating, ventilation, and air conditioning (HVAC) systems are operating in accordance with the manufacturer's instructions and design specifications, conducting all regularly scheduled inspections and maintenance procedures, maximizing the amount of outside air supplied, installing air filters with a Minimum Efficiency Reporting Value (MERV) 13 or higher where feasible, maximizing natural ventilation in buildings without HVAC systems by opening windows or doors, when conditions allow (if that does not pose a safety risk), and considering the use of portable air cleaners with High Efficiency Particulate Air (HEPA) filters in spaces with high occupancy or limited ventilation.

8. ***Perform routine cleaning and disinfection.*** **If someone who has been in the facility within 24 hours is suspected of having or confirmed to have COVID-19, follow the CDC cleaning and disinfection recommendations.** Follow requirements in **mandatory OSHA standards** 29 CFR 1910.1200 and 1910.132, 133, and 138 for hazard communication and PPE appropriate for exposure to cleaning chemicals.

9. ***Record and report COVID-19 infections and deaths:*** Under **mandatory OSHA rules in 29 CFR part 1904**, employers are required to record work-related cases of COVID-19 illness on OSHA's Form 300 logs if the following requirements are met: (1) the case is a confirmed case of COVID-19; (2) the case is work-related (as defined by 29 CFR 1904.5); and (3) the case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7) (e.g., medical treatment, days away from work). Employers must follow the requirements in 29 CFR part 1904 when reporting COVID-19 fatalities and hospitalizations to OSHA. More information is available on OSHA's website. Employers should also report outbreaks to local health departments as required and support their contact tracing efforts.

   In addition, employers should be aware that Section 11(c) of the Act prohibits reprisal or discrimination against an employee for speaking out about unsafe working conditions or reporting an infection or exposure to COVID-19 to an employer. In addition, **mandatory OSHA standard** 29 CFR 1904.35(b) also prohibits discrimination against an employee for reporting a work-related

illness.

Note on recording adverse reactions to vaccines: OSHA, like many other federal agencies, is working diligently to encourage COVID-19 vaccinations. OSHA does not want to give any suggestion of discouraging workers from receiving COVID-19 vaccination or to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR part 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination at least through May 2022. OSHA will reevaluate the agency's position at that time to determine the best course of action moving forward. Individuals may choose to submit adverse reactions to the federal Vaccine Adverse Event Reporting System.

10. ***Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards:*** Section 11(c) of the OSH Act prohibits discharging or in any other way discriminating against an employee for engaging in various occupational safety and health activities. Examples of violations of Section 11(c) could include discriminating against employees for raising a reasonable concern about infection control related to COVID-19 to the employer, the employer's agent, other employees, a government agency, or to the public, such as through print, online, social, or any other media; or against an employee for voluntarily providing and safely wearing their own PPE, such as a respirator, face shield, gloves, or surgical mask.

    In addition to notifying workers of their rights to a safe and healthful work environment, ensure that workers know whom to contact with questions or concerns about workplace safety and health, and that there are prohibitions against retaliation for raising workplace safety and health concerns or engaging in other protected occupational safety and health activities (see educating and training workers about COVID-19 policies and procedures, above); also consider using a hotline or other method for workers to voice concerns anonymously.

11. ***Follow other applicable mandatory OSHA standards:*** All of OSHA's standards that apply to protecting workers from infection remain in place. These **mandatory OSHA standards** include: requirements for PPE (29 CFR part 1910, Subpart I (e.g., 1910.132 and 133)), respiratory protection (29 CFR 1910.134), sanitation (29 CFR 1910.141), protection from bloodborne pathogens: (29 CFR 1910.1030), and OSHA's requirements for employee access to medical and exposure records (29 CFR 1910.1020). Many healthcare workplaces will be covered by the **mandatory OSHA COVID-19 Emergency Temporary Standard**. More information on that standard is available on OSHA's website. Employers are also required by the General Duty Clause, Section 5(a)(1) of the OSH Act, to provide a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.

Appendix: Measures Appropriate for Higher-Risk Workplaces with Mixed-Vaccination Status Workers

Employers should take additional steps to mitigate the spread of COVID-19 among unvaccinated or otherwise at-risk workers **due to the following types of workplace environmental factors**, especially in locations of substantial or high transmission:

- **Close contact**– where unvaccinated and otherwise at-risk workers are working close to one another, for example, on production or assembly lines or in busy retail settings. Such workers may also be near one another at other times, such as when clocking in or out, during breaks, or in locker/changing rooms.
- **Duration of contact** – where unvaccinated and otherwise at-risk workers often have prolonged closeness to coworkers (e.g., for 6–12 hours per shift). Continued contact with potentially infectious individuals increases the risk of SARS-CoV-2 transmission.
- **Type of contact** – where unvaccinated and otherwise at-risk workers may be exposed to the infectious virus through respiratory particles in the air—for example, when infected workers in a manufacturing or factory setting cough or sneeze, especially in poorly ventilated spaces. Confined spaces without adequate ventilation increase the risk of viral exposure and transmission. It is also possible, although less likely, that exposure could occur from contact with contaminated surfaces or objects, such as tools, workstations, or break room tables. Shared closed spaces such as break rooms, locker rooms, and interior hallways in the facility may contribute to risk.
- **Other distinctive factors that may increase risk among unvaccinated or otherwise at-risk workers include:**
    - A common practice at some workplaces of sharing employer-provided transportation such as ride-share vans or shuttle vehicles;
    - Frequent contact with other individuals in community settings, especially in areas where there is substantial or high community transmission; and
    - Communal housing or living quarters onboard vessels with other unvaccinated or otherwise at-risk individuals.

In these types of higher-risk workplaces – which include manufacturing; meat, seafood, and poultry processing; high-volume retail and grocery; and agricultural processing settings – this Appendix provides best practices to protect unvaccinated and otherwise at-risk workers. Please note that these recommendations are *in addition to* those in the general precautions described above, including isolation of infected or possibly infected workers, and other precautions.

In all workplaces with heightened risk due to workplace environmental factors where there are unvaccinated or otherwise at-risk workers in the workplace:

- Stagger break times in these generally high-population workplaces, or provide temporary break areas and restrooms to avoid groups of unvaccinated or otherwise at-risk workers congregating during breaks. Such workers should maintain at least 6 feet of distance from others at all times, including on breaks.
- Stagger workers' arrival and departure times to avoid congregations of unvaccinated or otherwise at-risk workers in parking areas, locker rooms, and near time clocks.
- Provide visual cues (e.g., floor markings, signs) as a reminder to maintain physical distancing.
- Require unvaccinated or otherwise at-risk workers, and also fully vaccinated workers in areas of substantial or high community transmission, to wear masks whenever possible, encourage and consider requiring customers and other visitors to do the same.
- Implement strategies (tailored to your workplace) to improve ventilation that protects workers as outlined in CDC's Ventilation in Buildings and in the OSHA Alert: COVID-19 Guidance on Ventilation in the Workplace, and ASHRAE Guidance for Building Operations and Industrial Settings During the COVID-19 Pandemic.

In high-volume retail workplaces (or well-defined work areas within retail workplaces) where there are unvaccinated or otherwise at-risk workers, customers, or other people:

- Ask customers and other visitors to wear masks—or consider requiring them—especially in areas of substantial or high transmission.
- Consider ways to promote physical distancing between unvaccinated or otherwise at-risk people and/or limiting occupancy to allow for physical distancing consistent with CDC guidance.
- Move the electronic payment terminal/credit card reader farther away from unvaccinated and otherwise at-risk workers in order to increase the distance between customers and such workers, if possible.
- Adjust stocking activities to limit contact between unvaccinated and otherwise at-risk workers and customers.

Unvaccinated or otherwise at-risk workers are also at risk when traveling to and from work in employer-provided buses and vans.

- Notify unvaccinated and otherwise at-risk workers of this risk and, to the extent feasible, help them limit the number of such workers in one vehicle.
- Make sure all unvaccinated and otherwise at-risk workers sharing a vehicle are wearing appropriate face coverings. Make sure all workers wear appropriate face coverings in areas of substantial or high community transmission.
- Where not prohibited by weather conditions, open vehicle windows.

In meat, poultry, and seafood processing settings; manufacturing facilities; and assembly line operations (including in agriculture) involving unvaccinated and otherwise at-risk workers:

- Ensure adequate ventilation in the facility, or if feasible, move work outdoors.
- Space such workers out, ideally at least 6 feet apart, and ensure that such workers are not working directly across from one another. Barriers are not a replacement for worker use of face coverings and physical distancing.
- If barriers are used where physical distancing cannot be maintained, they should be made of a solid, impermeable material, like plastic or acrylic, that can be easily cleaned or replaced. Barriers should block face-to-face pathways and should not flap or otherwise move out of position when they are being used.
- Barriers do not replace the need for physical distancing – at least six feet of separation should be maintained between unvaccinated and otherwise at-risk individuals whenever possible.

[1] CDC provides information about face coverings as one type of mask among other types of masks. OSHA differentiates face coverings from the term "mask" and from respirators that meet OSHA's Respiratory Protection Standard.

CDC's definition of masks includes those that are made of cloth, those that are disposable, and those that meet a standard. Cloth face coverings may be commercially produced or improvised (i.e., homemade) and are not considered personal protective equipment (PPE). Surgical masks are typically cleared by the U.S. Food and Drug Administration as medical devices and are used to protect workers against splashes and sprays (i.e., droplets) containing potentially infectious materials; in this capacity, surgical masks are considered PPE.

[2] People who are not fully vaccinated should be tested immediately after being identified (with known exposure to someone with suspect or confirmed COVID-19), and, if negative, tested again in 5–7 days after last exposure or immediately if symptoms develop during quarantine.

[3] The CDC and the Department of Education have addressed situations where a student cannot wear a mask because of disability. *See* Guidance for COVID-19 Prevention in K-12 Schools and COVID-19 Manual - Volume 1 (updated).

[4] See footnote 1 for more on masking.

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Washington, DC 20210
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Inspection Detail

Case Status: CLOSED

Inspection: 1472736.015 - Smithfield Packaged Meats Corporation

Inspection Information - Office: Sioux Falls Area Office

Inspection Nr: 1472736.015

Report ID: 0830400

Open Date: 04/20/2020

Site Address:
Smithfield Packaged Meats Corporation
1400 North Weber Avenue
Sioux Falls, SD 57103

Mailing Address:
1400 North Weber Avenue, Sioux Falls, SD 57103

Union Status: Union

SIC:

NAICS: 311611/Animal (except Poultry) Slaughtering

Inspection Type: Complaint

Scope: Partial

Advanced Notice: N

Ownership: Private

Safety/Health: Health

Close Conference: 09/02/2020

Emphasis:

Close Case:11/18/2022

Related Activity

Type	Activity Nr	Safety	Health
Complaint	1566977		Yes
Inspection	1482567		Yes

Case Status: CLOSED

Violation Summary

Violations/Penalties	Serious	Willful	Repeat	Other	Unclass	Total
Initial Violations	1					1
Current Violations				1		1
Initial Penalty	$13,494	$0	$0	$0	$0	$13,494
Current Penalty	$0	$0	$0	$13,494	$0	$13,494
FTA Penalty	$0	$0	$0	$0	$0	$0

Violation Items

#	Citation ID	Citaton Type	Standard	Issuance Date	Abatement Due Date	Current Penalty	Initial Penalty	FTA Penalty	Contest	Latest Event	Note
1.	01001	Other	19100132 A	09/09/2020	11/08/2022	$13,494	$13,494	$0	09/23/2020	F - Formal Settlement	

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OSHA News Release - Region 8

U.S. Department of Labor

Please note: As of January 20, 2021, information in some news releases may be out of date or not reflect current policies.

September 10, 2020

**U.S. Department of Labor Cites Smithfield Packaged Meats Corp.
For Failing to Protect Employees from Coronavirus**

SIOUX FALLS, SD – The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has cited Smithfield Packaged Meats Corp. in Sioux Falls, South Dakota, for failing to protect employees from exposure to the coronavirus. OSHA proposed a penalty of $13,494, the maximum allowed by law.

Based on a coronavirus-related inspection, OSHA cited the company for one violation of the general duty clause for failing to provide a workplace free from recognized hazards that can cause death or serious harm. At least 1,294 Smithfield workers contracted coronavirus, and four employees died from the virus in the spring of 2020.

"Employers must quickly implement appropriate measures to protect their workers' safety and health," said OSHA Sioux Falls Area Director Sheila Stanley. "Employers must meet their obligations and take the necessary actions to prevent the spread of coronavirus at their worksite."

OSHA guidance details proactive measures employers can take to protect workers from the coronavirus, such as social distancing measures and the use of physical barriers, face shields and face coverings when employees are unable to physically distance at least 6 feet from each other. OSHA guidance also advises that employers should provide safety and health information through training, visual aids, and other means to communicate important safety warnings in a language their workers understand.

Smithfield has 15 business days from receipt of the citation and penalty to comply, request an informal conference with OSHA's area director or contest the findings before the independent Occupational Safety and Health Review Commission.

Employers with questions on compliance with OSHA standards should contact their local OSHA office for guidance and assistance at 800-321-OSHA (6742). OSHA's coronavirus response webpage offers extensive resources for addressing safety and health hazards during the evolving coronavirus pandemic.

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to help ensure these conditions for America's working men and women by setting and enforcing standards, and providing training, education and assistance. For more information, visit https://www.osha.gov.

The mission of the Department of Labor is to foster, promote and develop the welfare of the wage earners, job seekers and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.

###

Media Contact:

Megan Sweeney, 202-693-4661, sweeney.megan.p@dol.gov

Release Number: 20-1684-NAT

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Violation Detail

Standard Cited:19100132 A *General requirements.*

Violation Items

Nr: 1472736.015	**Citation: 01001**	Issuance: 09/09/2020		ReportingID: 0830400	
Viol Type:	Other	NrInstances:	1	**Contest Date:**	09/23/2020
Abatement Date:	11/08/2022 2	**Nr Exposed:**	46	Final Order:	12/16/2021
Initial Penalty:	$13,494.00	REC:	C;P	Emphasis:	
Current Penalty:	$13,494.00	**Gravity:**	10	Haz Category:	

Penalty and Failure to Abate Event History

Type	Event	Date	Penalty	Abatement	Type	FTA Insp
Penalty	Z: Issued	09/09/2020	$13,494.00	09/30/2020	Serious	
Penalty	C: Contested	09/24/2020	$13,494.00	09/30/2020	Serious	
Penalty	F: Formal Settlement	12/16/2021	$13,494.00	11/08/2022	Other	

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47:03:01:01. Procedure for setting hearings. Hearings shall be conducted by the division pursuant to SDCL 1-26 as contested cases at the earliest convenient date. Notice of hearing shall be served by the division upon all parties of record to the hearing.

Source: SL 1975, ch 16, § 1; 9 SDR 81, 9 SDR 124, effective July 1, 1983.

General Authority: SDCL 62-2-5.

Law Implemented: SDCL 62-7-12.

47:03:01:01.01. Petition for hearing. A party requesting a formal hearing shall file a written petition for hearing with the division.

Source: 27 SDR 1, effective July 19, 2000.

General Authority: SDCL 62-2-5, 62-7-12.

Law Implemented: SDCL 62-7-12.

47:03:01:02. Contents of petition. The petition shall be in writing and need follow no specified form. It shall state clearly and concisely the cause of action for which hearing is sought, including the name of the claimant, the name of the employer, the name of the insurer, the time and place of accident, the manner in which the accident occurred, the fact that the employer had actual knowledge of the injury within 3 business days or that written notice of injury was served upon the employer, and the nature and extent of the disability of the employee. A general equitable request for an award shall constitute a sufficient prayer for awarding compensation, interest on overdue compensation, and costs to the claimant. A letter which embodies the information required in this section is sufficient to constitute a petition for hearing.

Source: SL 1975, ch 16, § 1; transferred from § 47:03:01:03, 9 SDR 81, 9 SDR 124, effective July 1, 1983; transferred from § 47:03:01:04, 27 SDR 1, effective July 19, 2000.

General Authority: SDCL 62-2-5.

Law Implemented: SDCL 62-7-12.

47:03:01:02.01. Notice of filing petition for hearing -- Response. The division shall mail notice of the filing of a petition for hearing to all parties. Any adverse party has 30 days after the date of the mailing of the notice to file a response. The response shall be in writing and need follow no specific form. The response shall state clearly and concisely an admission or denial as to each allegation contained in the petition for hearing.

Source: 27 SDR 1, effective July 19, 2000.

General Authority: SDCL 62-2-5.

Law Implemented: SDCL 62-7-12.

47:03:01:08. Summary judgment. A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Source: 16 SDR 226, effective June 24, 1990.

General Authority: SDCL 62-2-5.

Law Implemented: SDCL 62-7-12.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of March, 2023, a true and correct copy of the forgoing **Brief of Claimant and Appellant Karen M. Franken with Appendix and Certificate of Compliance** was served via the Odyssey file and serve program upon the following:

Laura Hensley
Boyce Law Firm
300 S. Main St.
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whose address is the last known address of addressee known to the subscriber.

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Bram@AlvineLaw.com

Attorney for Appellant Franken

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30198

KAREN M. FRANKEN, Individually and as the Personal Representative of the Estate of Craig Allen Franken,
Claimant/Appellant,

v.

SMITHFIELD FOODS, INC., Employer and Self-Insurer/Appellee

APPELLEE'S BRIEF

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Jon Sogn

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NOTICE OF APPEAL FILED December 21, 2022

Filed: 4/19/2023 12:37 PM CST Supreme Court, State of South Dakota #30198

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Cases

Statutes

PRELIMINARY STATEMENT

Employer and Self-Insurer/Appellee, Smithfield Foods, Inc., shall hereto be referred to as "Smithfield." Appellant, Karen M. Franken, Individually and as the Personal Representative of the Estate of Craig Allen Franken, shall be referred to as "Karen." Craig Allen Franken shall be referred to as "Craig." Karen's Petition for Workers' Compensation Benefits shall be referred to as "the Petition." The South Dakota Department of Labor and Regulation, Workers' Compensation Division, will be referred to as the "Department." The Second Judicial Circuit Court of South Dakota, Minnehaha County, shall be referred to as the "Circuit Court." The settled record transmitted by the Circuit Court shall be referenced as "SR" followed by the page number assigned by the Minnehaha County Clerk of Courts. The Brief of Claimant and Appellant Karen M. Franken shall be referenced as "KB" followed by the corresponding page number.

JURISDICTIONAL STATEMENT

On November 30, 2022, the Circuit Court issued an order dismissing the Petition without prejudice. SR 178. A notice of entry of order was filed on December 1, 2022. SR 176. Karen timely filed this appeal on December 21, 2022. SR 179.

STATEMENT OF LEGAL ISSUES

Karen raises three issues in her appeal.

1. *Whether exposure to COVID-19 is an "injury" under SDCL 62-1-1(7).*

   The Circuit Court held exposure to COVID-19 was not an "injury" under the "time, place, and circumstance" test. SR 185–88.

   SDCL 21-68-2
   SDCL 62-1-1(7)

2. *Whether COVID-19 is an "occupational disease" under SDCL 62-8-1(6).*

The Circuit Court held COVID-19 is not an occupational disease because Karen had not shown that COVID-19 was particular to Craig's occupation and SDCL 21-68-6(3) states that "COVID-19 is not an occupational disease under state law." SR 188–89.

SDCL 21-68-6(3)
SDCL 21-68-2
SDCL 62-8-1(6)

3. *Whether SDCL 21-68 may be applied retroactively.*

The Circuit Court declined to address this issue because Karen failed to notify the South Dakota Attorney General of her challenge to SDCL 21-68 as required by SDCL 15-6-24(c). SR 191.

Matter of Adams, 329 N.W.2d 882 (S.D. 1983)
SDCL 15-6-24(c)
Argus Leader v. Hagen, 2007 SD 96, 739 N.W.2d 475

Smithfield contends that the issues may be condensed into the single issue of whether SDCL 21-68 bars relief. Nonetheless, Smithfield adopts and addresses each of Karen's arguments in turn.

STATEMENT OF THE CASE

Karen brings this appeal seeking relief from the order of the Honorable Jon Sogn, Circuit Judge in the Second Judicial Circuit, dismissing her Petition for workers' compensation benefits.

Karen was married to Craig. SR 21. Craig was an employee of Smithfield. SR 22. Tragically, on April 19, 2020, at the beginning of the COVID-19 global pandemic, Craig passed away from complications of COVID-19. SR 22. At the time of his death, Craig continued to work at Smithfield. SR 22.

In response to the global COVID-19 pandemic, South Dakota, like many states,[1] passed legislation to provide clarity and guidance on the scope of liability for COVID-19 exposure. On July 1, 2021, the Limitation of Liability for Exposure to COVID-19 Act ("the COVID-19 Act") was enacted. The COVID-19 Act applied retroactively to claims arising after January 1, 2020 and until December 31, 2022. *See* An Act to limit liability for certain exposures to COVID-19, S.D. 2021 Laws, ch.91, § 7 ("This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues or begins, whether known, unknown, or latent between January 1, 2020, and December 31, 2022.").

Broadly, the COVID-19 Act limited liability for unintentional exposure to COVID-19—from January 2020 to December 2022. First and most broadly, SDCL 21-68-2 barred ***all claims*** based on exposure to COVID-19 ***unless*** based on intentional

---

[1] For instance, many states have barred liability for COVID-19 exposure except in cases of gross negligence, recklessness, and/or willful misconduct. *See, e.g.,* (Missouri) Mo. Ann. Stat. 537.1005; (Wisconsin) Wis. Stat. 895.476; (North Carolina) N.C. Gen. Stat. Ann. 99E-71; (Utah) Utah Code Ann. 78B-4-517; (Tennessee) Tenn. Code Ann. 14-5-101; (Georgia) Ga. Code Ann. 51-16-2; (Idaho) Idaho Code Ann. 6-3403; (Wyoming) Wyo. Stat. Ann. 35-4-114. Other states have limited liability except in cases of failure to comply with applicable public health guidelines, which may include federal and/or state guidelines in effect at the time of the alleged exposure. *See, e.g.,* (Oklahoma) Okla. Stat. Ann. tit. 76, 111; (Nebraska) Neb. Rev. Stat. Ann. 25-3603; (Kansas) Kan. Stat. Ann. 60-5504; (Michigan) Mich. Comp. Laws Ann. 691.1455; (Nevada) Nev. Rev. Stat. Ann. 41.835. Other states have crafted more unique standards of liability. *See, e.g.,* (Florida) Fla. Stat. 768.38 (limiting liability for COVID-19 exposure when a defendant made a "good faith" effort to comply with government health guidelines); (Texas) Tex. Civ. Prac. & Rem. Code Ann. 148.003 (limiting liability for COVID-19 exposure except in cases of knowing failure to warn or remediate a condition likely to cause exposure to COVID-19 or knowing failure to follow applicable health guidelines); *see also* Josh Cunningham, *COVID-19: Workers' Compensation* (Jan. 24, 2022), NAT'L CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/labor-and-employment/covid-19-workers-compensation (providing a list of state statutes defining the scope of liability for COVID-19 exposure).

exposure with the specific intent to transmit COVID-19, pleaded with particularity.

SDCL 21-68-2 states in full:

> A person may not bring or maintain ***any action or claim*** for damages or relief alleging exposure or potential exposure to COVID-19 ***unless the exposure results in a COVID-19 diagnosis and the exposure is the result of intentional exposure with the intent to transmit COVID-19.*** In alleging intentional exposure with the intent to transmit COVID-19, a party shall state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.
>
> SDCL 21-68-2 (emphasis added).[2]

Second and more specifically, SDCL 21-68-3 limited the liability of possessors of real property for exposing others to COVID-19, except when a possessor intentionally exposed another to COVID-19 with the specific intent to transmit the virus. SDCL 21-68-3 states:

> ***A person who possesses or is in control of a premises***, including a tenant, lessee, or occupant of a premises, who directly or indirectly invites or permits an individual onto a premises, ***shall not be liable for damages for any injuries sustained from the individual's exposure to COVID-19***, whether the exposure occurs on the premises or during any activity managed by the person who possesses or is in control of a premises ***unless the person who possesses or is in control of the premises intentionally exposes the individual to COVID-19 with the intent to transmit COVID-19.*** In alleging intentional exposure with the intent to transmit COVID-19, a party must state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and

[2] Like South Dakota, North Dakota has limited liability for exposure to COVID-19 except in cases of intentional exposure. *See* (North Dakota) N.D.C.C. 32-48-02 (limiting liability except in cases of "actual malice"). Like South Dakota, states have also applied a heightened pleading standard to claims based on exposure to COVID-19. *See, e.g.*, (Tennessee) Tenn. Code Ann. 14-5-101; (Florida) Fla. Stat. 768.38; (Nevada) Nev. Rev. Stat. Ann. 41.835; (Wyoming) Wyo. Stat. Ann. 35-4-114. And, like South Dakota, some states have applied statutes limiting liability for COVID-19 exposure retroactively. *See, e.g.*, (Indiana) Ind. Code Ann. 34-30-32-1; (North Dakota) N.D.C.C. 32-48-01.

convincing evidence.

SDCL 21-68-3 (emphasis added).

Third, SDCL 21-68-4 limited the liability of health care providers diagnosing, treating or caring for COVID-19 patients based on negligence, but allow suits for "gross negligence, recklessness, and willful misconduct." SDCL 21-68-4. Fourth, SDCL 21-68-5 limited the liability for manufacturers and distributors of personal protective equipment, except in cases of "gross negligence, recklessness, or willful misconduct." SDCL 21-68-5. Finally, the Legislature stated the COVID-19 Act "may not be construed to . . . [d]eem COVID-19 an occupational disease. COVID-19 is not an occupational disease under state law." SDCL 21-68-6(3).

Approximately two years after Craig's death, on February 25, 2022, Karen brought the Petition in her capacity as the personal representative of Craig's Estate. SR 21–25. Therein, Karen alleged Craig contracted COVID-19 while he was working at Smithfield and she is entitled to relief under South Dakota's workers' compensation statutes because (1) exposure to COVID-19 was a compensable "injury" under SDCL 62-1-1(7); and (2) COVID-19 was an occupational disease compensable under SDCL 62-8-1(6). SR 22–24. In the Petition, Karen did not refer to the COVID-19 Act or allege Smithfield intentionally exposed Craig to COVID-19 with the specific intent to transmit COVID-19. SR 21–25.

On April 1, 2022, Smithfield filed a motion to dismiss the Petition. SR 28. Smithfield argued SDCL 21-68-2, barring liability for exposure to COVID-19 except in cases of exposure with the specific intent to transfer the virus, barred Karen's request for relief based on a workplace "injury" pursuant to SDCL 62-1-1(7). SR 32–35. As to

Karen's request for relief based on "occupational disease" pursuant to SDCL 62-8-1, Smithfield claimed SDCL 21-68-6(3), stating "COVID-19 is not an occupational disease under state law," barred the claim. SR 32–35. Karen responded in opposition, arguing, among other things, the COVID-19 Act was not applicable to workers' compensation claims and, alternatively, it was unconstitutional. SR 45–47. Karen did not notify the Attorney General of her constitutional challenge to the COVID-19 Act as required by SDCL 15-6-24(c).[3] SR 191.

The Department granted Smithfield's Motion to Dismiss.[4] SR 70. Applying the plain language of SDCL 21-68-2, the Department found Karen had not alleged Craig "was intentionally exposed to COVID-19, therefore, pursuant to SDCL 21-68-2, his exposure is not compensable." SR 70. Additionally, applying the plain language of SDCL 21-68-6(3), stating "COVID-19 is not an occupational disease under state law," the Department found COVID-19 is not a compensable "occupational disease" under SDCL 62-8-1. SR 69. The Department did not address Karen's constitutional challenge to the COVID-19 Act. SR 68–71.

Karen timely appealed the Department's decision to the Circuit Court. SR 74. Karen raised 14 issues on appeal, a majority of which related to constitutionality of the COVID-19 Act and whether the COVID-19 Act barred Karen's claim of a compensable "injury" under SDCL 62-1-1(7). SR 80–83. Smithfield responded, arguing COVID-19

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[3] SDCL 15-6-24(c) states: "[w]hen the constitutionality of an act of the Legislature affecting the public interest is drawn in question in any action to which the state or an officer, agency, or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him the opportunity to intervene." SDCL 15-6-24(c).

[4] The Department dismissed the Petition with prejudice. SR 70.

Act barred the Petition in full. SR 131–35. Additionally, even if the COVID-19 Act did not apply, Smithfield claimed that COVID-19 was not an "injury" under the plain language of SDCL 62-1-1(7), stating "injury *does not include a disease in any form except as it results from the injury.*" SDCL 62-1-1(7); SR 131–35.

The Circuit Court affirmed the Final Decision and issued an order dismissing the Petition on November 30, 2022.[5] SR 173–75. First, the Circuit Court found that Karen had not stated a claim under SDCL 62-1-1(7) because she had not alleged an injury assignable to a "definite time, place and circumstance." SR 168–70. The "time, place and circumstance" test is described in the 1963 case *Oviatt v. Oviatt Dairy*, in which the Court held that a "disease" or "aggravation of an existing disease" is only compensable under SDCL 62-1-1(7) when "assignable to a definite time, place and circumstance." *Oviatt v. Oviatt Dairy, Inc.*, 80 SD 83, 85, 119 N.W.2d 649, 650 (1963). The Circuit Court also held COVID-19 was not an occupational disease because Karen did not allege "COVID-19 [was] a condition or disease peculiar to Craig's occupation" and further because "SDCL 21-68-6(3) specifically states that COVID-19 is not an occupational disease under state law." SR 171.

Finally and additionally, the Circuit Court held SDCL 21-68-2—limiting liability for COVID-19 exposure except when a defendant had the specific intent to transmit the virus—and SDCL 21-68-6(3)— stating that "COVID-19 is not an occupational disease"

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[5] While the Circuit Court affirmed dismissal of the Petition, it reversed the Department's order dismissing the Petition with prejudice and dismissed the Petition without prejudice. SR 192. *See Hayes v. Rosenbaum Signs & Outdoor Advert., Inc.*, 2014 SD 64, ¶ 11, 853 N.W.2d 878, 882 (explaining that the "phrase 'without prejudice' ordinarily imports contemplation of further proceedings and the only adjudication by such judgment is that nothing is adjudged").

— were applicable to *all* civil claims, including the Petition, and barred relief. SR 171–73. The Circuit Court declined to address Karen's constitutional challenges to the COVID-19 Act "because she failed to notify the Attorney General of her challenge as required by SDCL 15-6-24(c)." SR 173.

LEGAL STANDARDS

The South Dakota Supreme Court "review[s] the Department's decision in the same manner as the circuit court." *Hughes v. Dakota Mill & Grain, Inc.*, 2021 SD 31, ¶ 12, 959 N.W.2d 903, 907. SDCL 1-26-37. The Court gives the Department's factual findings "great weight" and overturns those finding only if "clearly erroneous." *Id.* The Department's factual findings are "clearly erroneous" if, "after reviewing the evidence," the Court is "left with a definite and firm conviction that a mistake has been made." *Id.* "[The] Department's conclusions of law are reviewed de novo. Mixed questions of law and fact are also fully reviewable." *May v. Spearfish Pellet Co., LLC*, 2021 SD 48, ¶ 8, 963 N.W.2d 761, 764.

"[W]orkers' compensation is the exclusive remedy against employers for all on-the-job injuries to workers except those injuries intentionally inflicted by the employer." *Petrik v. JJ Concrete, Inc.*, 2015 SD 39, ¶ 11, 865 N.W.2d 133, 137. Because "proceedings under the Workmen's Compensation Law[s] are purely statutory," the provisions of South Dakota workers' compensation statutes must control. *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 364 (S.D. 1992). Thus, "if the language of a statute is clear, we must assume that the legislature meant what the statute says and we must, therefore, give its words and phrases a plain meaning and effect." *Id.* And when a statute is ambiguous, "it should then be liberally construed in favor of injured

employees." *Id.*; *see also Wheeler v. Cinna Bakers LLC*, 2015 SD 25, ¶ 6, 864 N.W.2d 17, 20–21.

South Dakota's workers' compensation statutes do not define "injury" except to state that "injury" is "only [an] 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***." SDCL 62-1-1(7) (emphasis added). However, the South Dakota Supreme Court has stated that "'arising out of' and 'in the course of' are" separate, "independent factors" and that these factors are relevant to whether the "injury" alleged is "connected to the employment." *Petrik*, 2015 SD 39, ¶ 11, 865 N.W.2d at 137. An injury "arose out of employment," if "a causal connection [exists] between the injury and the employment. The employment need not be the direct or proximate cause of the injury; rather it is sufficient if the accident had its origin in the hazard to which the employment exposed the employee while doing his work." *Id.* at ¶ 12. On the other hand, "[t]he term 'in the course of employment' refers to the time, place, and circumstances of the injury." *Terveen v. S. Dakota Dep't of Transp.*, 2015 SD 10, ¶ 12, 861 N.W.2d 775, 779. "An employee is acting 'in the course of employment' when an employee is doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment." *Id.* The South Dakota Supreme Court has held that these two factors—"arising out of" and "in the course of"— "are prone to some interplay and deficiencies in the strength of one factor are sometimes allowed to be made up by the strength in the other." *Petrik,* 2015 SD 39, ¶ 11, 865 N.W.2d at 137. These factors and are also liberally construed "in favor of injured employees." *Id.*

SDCL 62-8-1 defines an "'[o]ccupational disease,' [as] a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment. . . ." SDCL 62-8-1(6). Under SDCL 62-8-1, "[a] condition is peculiar to a particular occupation *when it is the result of a distinctive feature of the kind of work performed* by a claimant and others similarly employed." *Sauer v. Tiffany Laundry & Dry Cleaners*, 2001 SD 24, ¶ 11, 622 N.W.2d 741, 744. In other words, "[t]o be an occupational disease[,] the injury must be caused by a distinctive feature of the claimant's occupation, not by the environmental conditions of the claimant's workplace. . . . Unless the condition is 'intrinsic' to an occupation, one does not suffer from an occupational disease." *Sauder v. Parkview Care Ctr.*, 2007 SD 103, ¶ 31, 740 N.W.2d 878, 885.

Significantly, as explained above, the COVID-19 Act has defined the scope of liability for ***all*** claims based on exposure to COVID-19, including workers' compensation claims. SDCL 21-68-2 states:

> A person may not bring or maintain ***any action or claim*** for damages or relief alleging exposure or potential exposure to COVID-19 unless the exposure results in a COVID-19 diagnosis ***and the exposure is the result of intentional exposure with the intent to transmit COVID-19.*** In alleging intentional exposure with the intent to transmit COVID-19, a party shall state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.

SDCL 21-68-2 (emphasis added). Further, the Legislature made it clear the COVID-19 Act would apply retroactively to bar claims arising during the period of Craig's infection with COVID-19, stating "[t]his Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues or begins, whether

known, unknown, or latent between January 1, 2020, and December 31, 2022." An Act to limit liability for certain exposures to COVID-19, S.D. 2021 Laws, ch.91, § 7. SDCL 21-68-6 also states that "COVID-19 is not an occupational disease under state law." SDCL 21-68-6(3).

ARGUMENT AND ANALYSIS

I. Exposure to COVID-19 is not an "injury" under SDCL 62-1-1(7).

Whether exposure to COVID-19 is an "injury" under SDCL 62-1-1(7) is an issue of first impression in South Dakota. Karen alleges that Craig's alleged exposure to the SARS-CovV-2 virus, while he was working on Smithfield's premises and performing his work duties, was an "injury" under SDCL 62-1-1(7). KB 28–29. In support, Karen cites authority from other states as well as to several South Dakota workers' compensation cases from the first half of the twentieth century. KB 21–31. In one such case, *Meyer v. Roettele*, the South Dakota Supreme Court interpreted the predecessor statute of SDCL 62-1-1, which defined a "injury" as "[o]nly injury *by accident* arising out of and in the course of the employment." *Cooper v. Vinatieri*, 73 SD 418, 422, 43 N.W.2d 747, 749 (1950) (emphasis added) (quoting SDC 64.0102(4)). In *Meyer*, the Supreme Court held that exposure to a certain bacterial pathogen—precipitating a claimant's death—was compensable when the exposure to such a pathogen was "accidental," unexpected in the line of work, and "assignable to a definite, time, place, and circumstance"). *Meyer v. Roettele*, 64 SD 36, 264 N.W. 191, 194 (SD 1935); *see also Hanzik v. Interstate Power Co.*, 67 SD 128, 289 N.W. 589 (SD 1940) (considering *Meyer*'s holding). Karen further alleges the Petition sufficiently pled an injury under the "the time, place and

circumstance" test set forth in *Meyer* and reiterated *Oviatt v. Oviatt Dairy, Inc.*, 80 SD at 85, 119 N.W.2d at 650. KB 30.

Here, SDCL 21-68-2 is controlling. Under plain language of this statute, Karen has not alleged any viable claim. As this Court has repeatedly explained, "t]here are two primary rules of statutory construction. The first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." *Abata v. Pennington Cnty. Bd. of Commissioners*, 2019 SD 39, ¶ 18, 931 N.W.2d 714, 721. "Only when the language is ambiguous, unclear, or if confining ourselves to the express language would produce an absurd result do we look beyond the express language of statutes." *Id.*

SDCL 21-68-2 plainly states no person may bring "***any action or claim for damages or relief*** alleging exposure or potential exposure to COVID-19 unless the exposure results in a COVID-19 diagnosis ***and the exposure is the result of intentional exposure with the intent to transmit COVID-19***," pleaded with particularly. SDCL 21-68-2 (emphasis added). Karen has not alleged nor presented any evidence that Smithfield exposed Craig to COVID-19 with the specific intent to transmit the disease. SR 21–24. As such, Karen has not pled any viable claim, and the Petition should be dismissed.

Even if SDCL 21-68-2 did not bar relief, Karen's claim that exposure to COVID-19 is an "injury" under SDCL 62-1-1(7) fails under the plain language of that statute. SDCL 62-1-1(7) defines "injury" 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 results from the injury*." SDCL 62-1-1(7) (emphasis added). Karen asks this Court to hold that mere

potential exposure to a disease-carrying pathogen, such as SARS virus carrying COVID-19, is an "injury" under SDCL 62-1-1(7). But such an interpretation is contrary to the Court's well-established rules of statutory construction. Courts "read statutes as a whole along with the enactments relating to the same subject." *Faircloth v. Raven Indus., Inc.*, 2000 SD 158, ¶ 6, 620 N.W.2d 198, 201. Courts do "not interpret laws to nullify or make meaningless any of the words actually used." *Pete Lien & Sons, Inc. v. Zellmer*, 2015 SD 37 n.16, 865 N.W.2d 451, 463 n.16; *see also Faircloth*, 2000 SD 158, ¶ 6, 620 N.W.2d at 201 ("We assume that the Legislature intended that no part of its statutory scheme be rendered mere surplusage."). The cardinal rule of statutory construction is that "repeal by implication is strongly disfavored." *Faircloth*, 2000 SD 158, ¶10, 620 N.W.2d at 202.

If the Court were to accept Karen's argument—and hold that exposure to a disease-carrying virus is an injury—exposure to any and all diseases in the workplace becomes compensable under SDCL 62-1-1(7). As such, SDCL 62-1-1(7), stating "injury" is "***does not include a disease in any form*** *except as it results from the injury*" becomes null. Additionally, such a holding would repeal South Dakota's entire chapter on occupational diseases, limiting relief to only those "occupational disease[s] . . . peculiar to the occupation in which the employee was engaged," by implication. SDCL 62-8-1(6). The Court construes ambiguous statutes in favor of injured employees. *Petrik*, 2015 SD 39, ¶ 11, 865 N.W.2d at 137. But Karen asks the Court to do far more than liberally interpret an ambiguous statute in her favor. Instead, by accepting her claim that an alleged exposure to COVID-19 is an "injury," the Court would nullify much of South Dakota's workers' compensation statutes. As such, even if the COVID-19 Act did not apply and bar relief, the Court should reject Karen's claim that exposure to a disease is an

"injury" under SDCL 62-1-1(7). *See Faircloth*, 2000 SD 158, ¶¶ 9–10, 620 N.W.2d at 202 (declining to interpret a statute in a way that renders part of the statute surplus).[6]

II. COVID-19 is not an "occupational disease" under SDCL 62-8-1.

Karen requests review of the Circuit Court's finding that COVID-19 is not an "occupational disease" under South Dakota law. *See* KB 2 (requesting review of the Circuit Court's finding on this matter). Karen does not argue COVID-19 is an "occupational disease" directly. *See* KB 35–48. However, she claims that the COVID-19 Act does not affect any rights or remedies set forth in South Dakota workers' compensation statutes because the COVID-19 Act is in chapter 21 of South Dakota's statutory code, providing judicial remedies, while South Dakota workers' compensation statutes are set forth in chapter 62. KB 45–48.

Initially, the Legislature may enact statutes in separate chapters of the statutory code that affect the same subject, and such enactments on that subject are valid and enforceable. *See Benson v. State*, 2006 SD 8, ¶ 71, 710 N.W.2d 131, 158 (stating that in

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[6] It is unnecessary to consider Karen's argument that she sufficiently pled an injury under the "time, place, and circumstance" test because SDCL 21-68-2 precludes relief. The "time, place, and circumstance" test was most recently recognized 40 years ago in *Kirnan v. Dakota Midland Hosp.*, 331 N.W.2d 72, 73 (S.D. 1983). Under this test, a disease or aggravation of an existing disease may be a compensable "injury" under South Dakota workers' compensation statutes when "such disease or aggravation [is] assignable to a definite time, place and circumstance." *Id.* South Dakota workers' compensation law has evolved in the decades since the test was first applied in 1935, so the precedential authority of this test is unclear. *See Meyer*, 64 SD 36, 264 N.W. at 194 (first holding a "disease" was compensable after determining the disease was "attributable to the unexpected and undesigned occurrence of the presence of the poisonous toxin and is assignable to a definite time, place, and circumstance"). Regardless, assuming (without conceding) that the "time, place, and circumstance" test is relevant and applicable in this case, Karen has plainly failed to allege the "time, place, and circumstance" of the alleged "injury" with sufficient particularity. *See* SR 21–24 (simply stating that Craig was employed at Smithfield at the time of his death from COVID-19).

construing Legislative intent on a subject, a court considers statutes as a whole as well as other "enactments relating to the same subject"); *State v. Krahwinkel*, 2002 SD 160, ¶ 13, 656 N.W.2d 451, 458 (same); *State v. Young*, 2001 SD 76, ¶ 11, 630 N.W.2d 85, 89 ("We assume that the Legislature, when enacting a provision, has in mind previously enacted statutes relating to the same subject."). Here, SDCL 21-68-6 expressly states that "COVID-19 is not an occupational disease under state law." SDCL 21-68-6. "If the language of a statute is clear, we must assume that the legislature meant what the statute says and we must, therefore, give its words and phrases a plain meaning and effect." *Long v. State*, 2017 SD 79, ¶ 40, 904 N.W.2d 502, 516. Therefore, COVID-19 is not an occupational disease as a matter of law.

Even if SDCL 21-68-6 did not expressly state that "COVID-19 is not an occupational disease," SDCL 62-8-1(6) bars relief. SDCL 62-8-1 defines an "occupational disease" as "a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment." SDCL 62-8-1(6). This Court has held that "[a] condition is peculiar to a particular occupation *when it is the result of a distinctive feature of the kind of work performed* by a claimant and others similarly employed." *Sauer*, 2001 SD 24, ¶ 11, 622 N.W.2d at 744 (emphasis added). "To be an occupational disease[,] the injury must be caused by a distinctive feature of the claimant's occupation, *not by the environmental conditions of the claimant's workplace.*" *Sauder*, 2007 SD 103, ¶ 31, 740 N.W.2d at 885 (emphasis added).

The global COVID-19 pandemic was caused by a highly contagious respiratory infection. As such, Craig's COVID-19 diagnosis was not "the result of a distinctive

feature of the kind of work" he performed or a "distinctive feature of [his] occupation. *Sauer*, 2001 SD 24, ¶ 11, 622 N.W.2d at 744; *Sauder*, 2007 SD 103, ¶ 31, 740 N.W.2d at 885. Therefore, COVID-19 is not an "occupational disease" under SDCL 62-8-1(6). *See Sauder*, 2007 SD 103, ¶ 31, 740 N.W.2d at 885 (stating an "occupational disease" is not caused "by the environmental conditions of the claimant's workplace").

III. SDCL 21-68 applies retroactively and therefore bars relief.

In Karen's briefs to the Circuit Court, she raised many constitutional challenges to the COVID-19 Act. SR 88–124. But the Circuit Court rightly refused to address these arguments because Karen had not notified the Attorney General of her claims as required by SDCL 15-6-24(c). SR 173. In Karen's brief to this Court, she does not challenge the constitutionality of the COVID-19 Act. KB 39–44. Instead, Karen simply argues that the COVID-19 Act may not be applied retroactively. *See* KB 39–44. Karen argues that because "Craig's work-related injury, condition and death occurred in April of 2020," before the COVID-19 Act was signed into law, the COVID-19 Act does not bar relief. *See* KB 39–44.

"The general rule is that newly enacted statutes will not be given a retroactive effect unless such an intention is plainly expressed by the legislature." *Dahl v. Sittner*, 474 N.W.2d 897, 901 (S.D. 1991); *see also West v. John Morrell & Co.*, 460 N.W.2d 745, 747 (S.D. 1990). Here, in response the global COVID-19 pandemic, the Legislature plainly stated that the COVID-19 Act would apply retroactively to claims arising after January 1, 2020 and until December 31, 2022. An Act to limit liability for certain exposures to COVID-19, S.D. 2021 Laws, ch.91, § 7 ("This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs,

accrues or begins, whether known, unknown, or latent between January 1, 2020, and December 31, 2022."). Therefore, SDCL 21-68 applies retroactively and bars relief. *See Matter of Adams*, 329 N.W.2d 882, 884 (S.D. 1983) ("A legislative act will not operate retroactively unless the act clearly expresses an intent to so operate."*); see also Sopko v. C & R Transfer Co.,* 665 N.W.2d 94, 98 (S.D. 2003) (stating statutes affecting remedies may be given retroactive effects); *Stratmeyer v. Stratmeyer*, 1997 SD 97, ¶ 16, 567 N.W.2d 220, 223 (stating that "[i]f retroactive impact is clearly intended for some of the provisions of an act, it seems logical to assume that the legislature intended retroactive impact for" the entire act).

Further, if this Court determines Karen has raised any constitutional challenge to the COVID-19 Act, it should decline to review such a challenge because Karen did not provide proper notice to the Attorney General as required by law. "When the constitutionality of an act of the Legislature affecting the public interest is drawn in question in any action to which the state . . . is not a party, the party asserting the unconstitutionality of the act shall ***notify the attorney general*** thereof within such time as to afford him the opportunity to intervene." SDCL 15-6-24(c) (emphasis added). "When an adjudication of unconstitutionality may seriously affect the general public, it is proper for the Attorney General to appear on behalf of the legislature and the people." *Argus Leader v. Hagen*, 2007 SD 96, ¶ 34, 739 N.W.2d 475, 484–85. Applying SDCL 15-6-24(c), when the Attorney General has not been given an opportunity to be heard on a constitutional challenge to a statute, the South Dakota Supreme Court has abstained from considering such a constitutional challenge "***unless the matter is an 'existing emergency***.'" *Argus Leader*, 2007 SD 96, ¶ 35, 739 N.W.2d at 485 (emphasis added).

It is self-evident that COVID-19 liability from the global COVID-19 pandemic is of significant public interest to individuals and business in this state. *See supra*, p.3 fn.1 (providing a short overview of some of COVID-19 legislation enacted by states in response to the COVID-19 global health crisis). Further, with the recession of the COVID-19 pandemic, the enforceability of SDCL 21-68 is not an "existing emergency." *See Argus Leader*, 2007 SD 96, ¶ 35, 739 N.W.2d at 485. Therefore, because the Attorney General has not been given an opportunity to be heard, the Court should decline to review any constitutional challenge to the COVID-19 Act in this case. *See W. Two Rivers Ranch v. Pennington Cnty.*, 549 N.W.2d 683, 687 (S.D. 1996) (declining to consider a plaintiff's constitutional challenge to state statute when there was "no evidence [the plaintiff] provided notice of [that] constitutional challenge to the Attorney General as required by SDCL 15–6–24(c)"); *Argus Leader*, 2007 SD 96, ¶ 34, 739 N.W.2d at 484–85 (similarly declining to review a constitutional challenge to a statute when the Attorney General had not been given an opportunity to be heard).[7]

CONCLUSION

For the foregoing reasons, Smithfield respectfully requests that this Court affirm the Circuit Court's decision dismissing the Petition. In addition, if Smithfield is

[7] Furthermore, Karen has not met her burden to show that SDCL 21-68 is unconstitutional. There is a strong presumption that statutes are constitutional. *State v. Asmussen*, 668 N.W.2d 725, 728 (S.D. 2003). To defeat the strong presumption of constitutionality, the statute's challenger must "clearly and unmistakenly show[that] there is no reasonable doubt that [the statute] violates constitutional principles." *Id.; see also Sedlacek v. S. Dakota Teener Baseball Program*, 437 N.W.2d 866, 868 (S.D. 1989) (stating the "strong presumption that the laws enacted by the legislature are constitutional . . . is rebutted only when it clearly, palpably and plainly appears that the statute violates a provision of the constitution"). In her brief to this Court, Karen has not identified any constitutional basis for challenging the COVID-19 Act. *See* SR 38–44.

determined to be a prevailing party in this matter, Smithfield respectfully requests that any applicable costs Smithfield incurred be recovered under SDCL § 15-30-6.

REQUEST FOR ORAL ARGUMENT

Smithfield requests oral argument in this matter.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said brief containing 5,800 words, Times New Roman Font, 12 point, 30,490 characters (no spaces) and 36,223 characters (with spaces).

Dated this 19th day of April, 2023.

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CERTIFICATE OF SERVICE

I, Laura K. Hensley, do hereby certify that I am a member of BOYCE LAW FIRM, L.L.P., attorney for Appellee, and that on the 19th day of April, 2023, a true and correct copy of the within and foregoing Appellee's Brief was served via Odyssey File & Serve:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

KAREN M. FRANKEN, Individually and as the Personal Representative of the Estate of Craig Allen Franken, Claimant and Appellant, v. SMITHFIELD FOODS, INC., Employer & Self-Insurer and Appellee.	Ref. No. 30198 **REPLY BRIEF OF CLAIMANT AND APPELLANT KAREN M. FRANKEN**

Appeal from the decision and order of Hon. John Sogn, Circuit Court Judge, Second Judicial Circuit, Minnehaha

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Smithfield (Appellee) argues, at page 3 of its Brief, that "SDCL 21-68-2 barred all claims". This is untrue. SDCL 21-68-2 states "A person may not bring or maintain any action or claim for damages or relief." An "action or claim for damages or relief" is an ordinary proceeding at law or equity in a court of original jurisdiction in the unified judicial system, like breach of contract or tort damages, declaratory judgment relief, and/or equitable relief (e.g., contract recission or revision, specific performance or injunction, restitution, subrogation, and/or constructive trust). A petition (claim) for workers' compensation under Title 62 is not an ordinary proceeding at law or equity, but a special proceeding, a contested case, for an administrative remedy --- all within the original and exclusive jurisdiction of the South Dakota Department of Labor and Regulation which "shall, under the direction and control of the secretary of labor and regulation, administer the provisions of Titles 60, 61, and 62." SDCL 1-37-3.

Smithfield cites, at page 3 of its brief, a website publication from one Josh Cunningham --- who is not a lawyer and who has no juris doctorate degree --- who is employed by, and/or affiliated with, a nongovernmental organization called the National Conference of State Legislatures. This article is not a part of the record. It is hearsay. It is not the type of publication proper for judicial notice. (SDCL 19-19-201). Smithfield also cites various statutes of other states regarding liability for harm by COVID-19. While many other states may have addressed by statute liability for injury by SARS-CoV-2 or COVID-19, those statutes from other states are not relevant to this case, SDCL Ch 21-68, and the South Dakota Workmen's Compensation Laws (Title 62). In this case, the Court is left to discover the true intent of the South Dakota legislature by looking at

the plain language of the South Dakota statutes which are the subject-matter of this case (*what the legislature said and not what the Court thinks it said*), and whether such statute applies to claims for compensation benefits, special proceedings, and/or contested cases under Title 62 (*i.e., matters not covered are to be treated as not covered*), and whether such statute, in whole or material part, is subject to another (other) reasonable interpretation(s), including consideration of the overall or broader statutory scheme or context underlying Title 21 and/or Title 62. *Argus Leader v. Hagen*, 739 N.W.2d 475, 2007 S.D. 96 ¶ 15.

Smithfield, on pages 4-5 of its brief, cites and quotes SDCL§§ 21-68-3, 4 and 5; but Smithfield does not argue how these provisions support it on the issues which are the subject of this case. In looking at the title of Ch 21-68 ("LIMITATIONS OF LIABILITY FOR EXPOSURE TO COVID-19"), and considering the provisions therein, it is clear Ch. 21-68 limits liability for an individual's exposure to COVID-19. *In re Certification of a Question of Law from the U.S. Dist. Court, Dist. of S.D., W. Div.*, 402 N.W.2d 340, 342 (S.D.1987) (citation omitted). SDCL 21-68-3 speaks of limiting liability "for damages for any injuries sustained from the individual's exposure to COVID-19, whether the exposure occurs on the premises or during any activity managed by the person who possesses or is in control of a premises". SDCL 21-68-4 provides that a "health care provider is not liable for any damages" for such provider's acts or omissions, save "liability for civil damages for any act or omission that constitutes gross negligence, recklessness, or willful misconduct." SDCL 21-68-5 states that designers, manufacturers, labelers, and suppliers, of chattels or products or goods, in response to COVID-19, are not "liable for personal injury, death or property damage" resulting from such design,

manufacture, labelling, supplying, and/or failure to provide "proper instructions or sufficient warnings", save "civil damages for any act or omission that constitutes gross negligence, recklessness, or willful misconduct." Like SDCL 21-68-2 ("a person may not bring or maintain any action or claim for damages"), these other provisions (SDCL §§ 21-68-3, 4, and 5) limit liability in a civil action for damages in an ordinary proceeding at law in a court of original jurisdiction in the unified judicial system. These provisions clearly do not limit liability for worker's compensation death benefits (an administrative remedy) in a special proceeding (a contested case) within the original and exclusive jurisdiction of the South Dakota Department of Labor and Regulation which "shall, under the direction and control of the Secretary of Labor and Regulation, administer the provisions of Title [] … 62."

Franken asserts that Franken experienced an injury arising out of and in the course of his employment, and that his employment and/or employment related activities at Smithfield are a major contributing cause of the conditions complained of, which, we now know, may include, among other things, symptoms of viral infection, affliction, pain, COVID-19 disease, harm to his bodily organs and system(s), spiraling medical conditions, severe illness, difficulty breathing, respiratory failure, cardiac arrest, and premature death. SDCL 21-68 does not state that it applies to a claim of "injury" under SDCL 61-1-1(7), for compensation or SDCL §§ 62-4-12 to 22 death benefits, before the South Dakota Department of Labor and Regulation which "shall, under the direction and control of the Secretary of Labor and Regulation, administer the provisions of Title [] … 62."

The law is clear that "Compensation benefits" for an "injury" means the payments

and benefits provided for in the South Dakota workers' compensation law, which include medical expenses, and benefits under SDCL Ch. 62-4, subject to the conditions and limitations contained in Title 62; and a worker's compensation claim for compensation benefits under Title 62, and/or a special proceeding (contested case) for compensation benefits under Title 62, is not "an action or claim for damages." *City of Brunswick v. King*, 65 Ga.App. 44, 14 S.E.2d 760, 763, 1942 A.M.C. 182 ("It is well settled that State compensation acts are based on a theory of compensation, entirely distinct from the previously existing theories of damages at common law or by statute arising out of a tort or breach of contract, and a claim for compensation under the workmen's compensation act is not a claim for damages for injuries to person or property. 71 C.J. 225, 232."); *Pennsylvania Turnpike Commission, to Use of Albright v. U. S. Fidelity & Guaranty Co.*, 343 Pa. 543, 547 23 A.2d 416 (Pa. 1942)("Obviously, the use of the words 'responsible for all damages of every kind' in this portion of the paragraph was not intended to include workmen's compensation payments, for a proceeding under the Workmen's Compensation Act... is not one by which 'damages' are recovered, but rather one for 'compensation': 71 C.J. 232."); *Brown v. Town of Patrick*, 202 S.C. 23624 S.E.2d 365, 368 (SC 1943) ("[P]ayment of workmen's compensation, where such liability exists" "is ...certainly not a tort liability, the payment is of compensation, not damages, and conditions for tort liability need not exist. 71 C.J. 232, et sequi."); *Pacific Employers Ins. Co. v. Industrial Accident Commission*, 10 Cal.2d 567, 576, 75 P.2d 105, 83 Cal. Comp. Cases 8 (Cal. 1938) ("[The] proceeding brought ... in California sought an award under the Compensation Law and is not an action for damages."); *Broderick v. Industrial Commission*, 63 Utah 210, 224 P. 876, 881 (Utah 1924) ("A proceeding before the

Industrial Commission is ... in no sense an action for damages...."); *Lagge v. Corsica Co-Op*, 677 N.W.2d 569, 2004 SD 32 ¶ 38 ("Compensation benefits" for an "injury" means the payments and benefits provided for in the South Dakota workers' compensation law, which include medical expenses, and benefits under SDCL Ch. 62-4, subject to the conditions and limitations contained in Title 62.); *Benson v. Sioux Falls Medical and Surgical Clinic*, 62 S.D. 324, 252 N.W. 864, 869 (SD 1934) (The compensation to which an employee is entitled arises out of his contract of employment, and as we have stated is not in the nature of damages for a tort.); *Baker v. Shields*, 767 N.W.2d 404, 409 (Iowa 2009) (An "action for damages, injury or death" does not include a worker's compensation claim or petition for statutory benefits.); See also *Carr v. South Dakota Dept. of Labor, Unemployment Ins. Div.*, 355 N.W.2d 10, 13 (SD 1984). (Where chiropractor in his notice of appeal, from the agency decision to the circuit court, included a "counterclaim" for damages, the Supreme Court affirmed the circuit court's dismissal of the counterclaim for damages, holding that under SDCL 1–26–30 the circuit court lacks jurisdiction to review matters outside the confines of the administrative action appealed from, and the chiropractor's counterclaim is a separate and distinct civil action and thus is controlled by rules of civil procedure set out in SDCL ch. 15–6.). Furthermore, the Black's Law Dictionary (4th ed 1968), defines "**RELIEF**" AS:

> a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity. It may be thus used of such remedies as specific performance, or the reformation or rescission of a contract; but it does not seem appropriate to the awarding of money damages."

See also *Figgs v. City of Milwaukee*, 121 Wis.2d 44, 357 N.W.2d 548 (Wis. 1984) ("Black's Law Dictionary (5th ed.) defines 'relief' as: '... a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court,

particularly in equity. It may be thus used of such remedies as specific performance, injunction, or the reformation or rescission of a contract.'"); *In re Elliott*, 504 S.W.3d 455, 465 (Ct. App. Tex. 2016); *Institute of Contemporary Art, Miami, Inc. v. Philadelphia Indemnity Insurance Company*, Not Reported in Fed. Supp., 2015 WL 11234137, *6 (D.S.D. Fla. 2015) (citing, RSUI Indemnity Co. v. Desai, No. 8:13-cv-2629-T-30TGW, 2014 WL 4347821, at *4 (D.M.D. Fla. Sept. 2, 2014)) "'[t]he redress or benefit, esp. equitable in nature ... that a party asks of a court.'); *Emp'rs Fire Ins. Co. v. ProMedica Health Sys., Inc.*, 524 Fed.Appx. 241, 251 (6th Cir. 2013) ("In a legal context, 'relief' means 'the redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court.'"); *Diamond Glass Companies, Inc. v. Twin City Fire Ins. Co.*, Not Reported in F.Supp.2d, 2008 WL 4613170, *4 (D.S.D.N.Y. 2008); *International Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers v. Rafferty,* 348 F.2d 307, 315 (9th Cir. 1965); *Brown Goldstein Levy LLP v. Federal Insurance Company*, 2021 WL 894579 * 8 (D. Md. 2021); *Shelby County Health Care Corp. v. Nationwide Mut. Ins. Co.*, 325 S.W.3d 88, 96 (Tenn. 2010); *Foster v. Summit Medical Systems, Inc.*, 610 N.W.2d 350, 354 (Ct. App. Minn. 2000) . A worker's compensation claim for compensation benefits under Title 62, and/or a special proceeding (contested case) for compensation benefits under Title 62, is not "an action or claim for damages or relief."

Smithfield does not venture to define "injury" within the meaning of SDCL 62-1-1(7), other than to declare, without scientific or legal support, that "injury" under SDCL 62-1-1(7) does not include "mere potential exposure to a disease-carrying pathogen, such as SARS virus carrying COVID-19". No genuine issue of material fact exists that, and,

as a matter of law, SARS-CoV-2 (**S**evere **A**cute **R**espiratory **S**yndrome-**Co**rona-**V**irus) is a highly infectious pathogenic virus that may cause COVID-19 (**Co**rona-**Vi**rus-**D**isease-**2019**), a disease. What COVID-19 is not, is a virus. What SARS-CoV-2 is not, is a disease. Many wide ranging symptoms and/or medical conditions caused by SARS-CoV-2 (virus) infection, and/or associated with COVID-19 (disease), include aches and pain, vomiting, loss of taste or smell, respiratory distress, inflammation (*of the heart, brain, or muscle tissues*), hypotension (*low blood pressure*), blood clots in the veins and arteries (*of the lungs, heart, legs or brain*), Sepsis (*a life-threatening illness caused by the body's extreme response to an infection*), cardiac illness/injury (*i.e., myocarditis, ventricular dysfunction, heart attacks and stroke)*, multiple-organ failure (*i.e., respiratory failure, kidney failure, shock*[1] *(circulatory collapse)*), and death. See Centers for Disease Control and Prevention, "Similarities and Differences between Flu and COVID-19", https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm (Page last reviewed: September 28, 2022, Content source: Centers for Disease Control and Prevention, National Center for Immunization and Respiratory Diseases (NCIRD)); Appx-71 to 75 attached..

Smithfield argues (at page 13 of its brief) that "to accept Karen's argument" and hold exposure to SARS-CoV-2 "is an injury" under SDCL 62-1-1(7), "would repeal South Dakota's entire chapter on occupational diseases", and "would nullify much of South Dakota's workers' compensation statutes." This argument is without merit. Franken's arguments do not render part of the South Dakota Workmen's Compensation statutory scheme mere "surplus"/surplusage, and do not "nullify" or "make meaningless"

[1] *Trusz v. Secretary of Dept. of Health and Human Services*, Not Reported in Cl.Ct., 1991 WL 100811, n.6 (U.S.Cl.Ct. 1991).

words used therein, as Smithfield argues on pages 13 and 14 of its brief. We have had a "South Dakota Workers' Compensation Law" since about 1919. SDCL 62-1-9 ("Source: SL 1917, ch 376, § 1; RC 1919, § 9436; SDC 1939, § 64.0101; SL 1975, ch 322, § 3"). Since as far back as 1919, under Title 62 "injury" "shall mean only injury ... arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury.' Section 9490, Rev. Code 1919." *Edge v. City of Pierre*, 239 N.W. 191, 193 (SD 1931) (Where employee-decedent suffered a work injury when his right leg was broken below the knee by a dropped piece of heavy cast iron water pipe, and employee died about 8 months later from a disease -- either encephalitis or cerebrospinal meningitis, such disease and death were held not compensable for failure to prove legal causation between the injury and the disease and death); Meyer v. Roettele, 64 SD 36, 264 N.W. 191 (SD 1935) (citing sections 9437 and 9490 of RC 1919). In 1935 the South Dakota Supreme Court ruled that an injured worker who, during noon lunch hour, was exposed to (*likely by mouth*) a germ called bacillus botulinus, and the germ injured Claimant's body with a botulism toxin produced by the germ, and the Claimant died by accidental injury arising out of and in the course of employment. *Meyer v. Roettele*, 64 SD 36, 264 N.W. 191 (SD 1935). The Court in Meyer understood the difference between a compensable "injury" and an "occupational disease":

> We are of the view that a disease may be an "injury by accident" within the meaning of our statute. The exclusion is of any disease which is not an accidental injury, or which does not result from such injury. It is generally recognized that accident as contemplated by the Workmen's Compensation Law is distinguished from so-called occupational diseases which are the natural and reasonably to be expected result of workmen following certain occupations for a considerable period of time. On the other hand, if the element of suddenness or precipitancy is present and the disease is not the ordinary or reasonably to be anticipated result of pursuing an occupation, it may be regarded as an injury by accident and compensable. The general subject is reviewed, and several cases are cited in a

> note found in L.R.A. 1916A, 289. The case of *Edge v. City of Pierre*, 59 S.D. 193, 239 N.W. 191, 193, relied on by appellants, is not opposed to this interpretation. Compensation in that case was denied to a surviving dependent of a deceased workman. The question determined was that the evidence as to the connection between an injury and subsequent disease did not warrant disturbing the industrial commissioner's finding adverse to claimant. Referring to the statutory definition of injury, this court said: "Before compensation can be allowed for disability or death by disease, it must be established that the disease was proximately caused by the accident." The determination was not that a disease may not be considered an injury by accident, but that the disease which supervened after the injury was not proximately caused by the accident from which the deceased sustained an injury.

Meyer, 264 N.W. 194 (SD 1935). Later the Court in *Hanzik v. Interstate Power Co.*, 67 SD 128, 289 N.W. 589 (SD 1940), ruled that Claimant's exposure to the influenza virus (*person usually exposed through nose, throat and/or lungs*), and encephalitis (*inflammation of the brain usually by a viral infection*), that ultimately resulted in his incapacitation, was an injury by accident even though the influenza and/or encephalitis did not supervene a bodily injury, stating:

> Appellants assert that the employee was stricken with a disease which did not result from an "injury" and, therefore, is not entitled to compensation under the statute. This contention is based upon the definition of "injury" contained in section 9490, Rev. Code of 1919, SDC 64.0102, reading as follows: "Injury' or 'personal injury' shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury."
>
> That the disease did not supervene a bodily injury is established by the findings. The employee recognizes this indisputable fact but contends that under the circumstances at bar a disease is compensable although not resulting from bodily injury according to the pronouncement of this court in the case of *Meyer et al. v. Roettele et al.*, 64 S.D. 36, 264 N.W. 191, 194. In that case, in dealing with botulism as a disease, this court said: "We are of the view that a disease may be an 'injury by accident' within the meaning of our statute. The exclusion is of any disease which is not an accidental injury, or which does not result from such injury. It is generally recognized that accident as contemplated by the Workmen's Compensation Law is distinguished from so-called occupational diseases which are the natural and reasonably to be expected result of workmen following certain occupations for a considerable period of time. On the other hand, if the element of suddenness or precipitancy is present and the disease is not the ordinary or

> reasonably to be anticipated result of pursuing an occupation, it may be regarded as an injury by accident and compensable."
>
> The reply of the appellant to this contention makes two points. It attacks the validity of the rule announced in Meyer et al. v. Roettele et al., supra, and questions whether the circumstances at bar bring the disease of the employee within the compass of that rule.
>
> 1 In view of the fact that Meyer et al. v. Roettele et al., supra, according to the theory of statutory interpretation, has received legislative approval through the subsequent reenactment of the statute construed as a part of the South Dakota Code (Cf. *Stewart v. Rapid City*, 48 S.D. 554, 205 N.W. 654; Brink v. Dann et al., 33 S. D. 81, 144 N.W. 734), we are not disposed to reexamine the holding therein announced. In arriving at this conclusion, we are mindful of the fact that the events here under consideration antedated the enactment of the revision of 1939.
>
> 2 Viewing the record in the light of the tests announced in Meyer et al. v. Roettele et al., supra, we are of the opinion that findings based upon substantial evidence support the conclusion that claimant's disease constituted an "injury by accident." His collapse came suddenly upon the heels of unusual exertion, exposure and exhaustion, as an untoward, unexpected, and unanticipated result of pursuing his employment.

Hanzik v. Interstate Power Co., 289 N.W. at 590.

Ch 62-8 is available only to employees (1) who suffer from an occupational disease (i.e., a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment), (2) and are 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 (3) 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. SDCL §§ 62-8-1 and 2. Under SDCL 62-8-6:

> [T]he liability of the employer under [Ch 62-8] is exclusive and in place of any other civil liability, at common law or otherwise to such employee (or next of kin) 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.

Under SDCL 62-8, all rights to compensation for disability, or death, from an occupational disease are forever barred 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, written notice of such death is given within ninety days after the occurrence. SDCL 62-8-29. Under SDCL 62-7-10, failure to provide to employer written notice of the "injury" within three business days after its occurrence prohibits a claim for compensation unless the employee or the employee's representative can show employer's actual knowledge of the injury, or good cause for employee's failure to give timely written notice. Under SDCL 62-8 the time period within which a claimant must file a claim for compensation with the Department of Labor is 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. SDCL 62-8-11; See also SDCL 62-8-32 (Claims "for further compensation shall be made within one year after the last payment."). The time within which a written petition for hearing for compensation must be filed with the Department of Labor under the South Dakota Workmen's Compensation Law for a compensable injury under SDCL 62-1-1(7) is substantively different than under Ch 62-8. See SDCL § 62-7-35 (i.e., two years from written denial); See SDCL 62-7- 35.1 ("claim for additional compensation...barred unless the claimant files a written petition for hearing ... within three years from the date of the last payment of benefits"); See SDCL 62-7-35.3 ("The right to compensation ... is ...barred ... if no medical treatment has been obtained within seven years after the employee files the first report of injury."). "Total disability" under

Ch 62-8-1(3) does not mean the same thing under SDCL 62-4-53.

Regarding an "injury":

> An employee seeking benefits under our workers' compensation law must show *both:* (1) that the *injury* arose *out of* and *in the course* of employment and (2) that the employment or employment related activities were a *major contributing cause* of the *condition* of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a *major contributing cause* of the disability, impairment, or need for treatment. SDCL 62–1–1(7)(a)–(b); *Steinberg*, 2000 SD 36, ¶ 29, 607 N.W.2d 596, 606.

Grauel v. South Dakota School of Mines and Technology, 619 N.W.2d 260, 263, 145 ¶¶ 8-9 (SD 2000). "Whether an injury arose out of and in the course of employment is essentially a question of fact." *Powell v. OTAC, Inc.*, 223 A.3d 864, 870 (Del. 2019); *Estate of Graber v. Dillon Companies*, 309 Kan. 509, 513, 439 P.3d 291, 294 (Kan. 2019); *Vawter v. United Parcel Service, Inc.*, 155 Idaho 903, 318 P.3d 893, 898 (Idaho 2014); *Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 183 P.3d 126, 132-133 (Nev. 2008); *Thornton v. Thyssen Krupp Elevator Mfg., Inc.*, Not Reported in S.W.3d, 2007 WL 1203586 * 3 (Tenn. 2007) (Special Worker Compensation Appeals Panel); *Perry v. State ex rel. Wyoming Workers' Safety and Compensation Div.*, 134 P.3d 1242, 1246, 2006 WY 61 ¶ *12* (Wyo. 2006); *Cokes v. Bullard Bros. Const. Co.*, Not Reported in N.W.2d, 1995 WL 49302 *7 (Ct. App. Neb. 1995*); *Erickson v. Erickson & Co.*, 212 Minn. 119, 2 N.W.2d 824, 826 (Minn. 1942).

Smithfield asserts, at page 16 of its brief, that the Supreme Court should not consider argument as to the constitutionality of SDCL 21-68 in relationship to application to the South Dakota Workmen's Compensation Law (Title 62). The Department, in its June 21, 2022, letter decision, did not address the Franken's argument that the application of Chapter 68 of Title 21 (*including SDCL 21-68-2, 3, and 4*) to the Franken claim under

Title 62 for worker's compensation benefits was unconstitutional. On July 13, 2022, Franken provided written notice to Attorney General Mark Vargo of Franken's challenges of the constitutionality of SDCL 21-68, and SDCL 21-68-2 and 3, and provided the Attorney General copies of the served/filed Notice of Appeal, Statement of Issues on appeal, and Letter Decision by the Department of Labor. See "Reply Brief of Claimant-Appellant Karen M. Franken, Individually and as the Personal Representative of the Estate of Craig Allen Franken," filed 9/21/2022, at page 8 (Chronological Index 142) with attached letter dated July 13, 2022, to the Office of the Attorney General. On August 16, 2022, Franken served upon attorney for Smithfield, and upon the Attorney General, a copy of Franken's appeal Brief that Franken submitted to the Circuit Court on appeal. See "Reply Brief of Claimant-Appellant Karen M. Franken, Individually and as the Personal Representative of the Estate of Craig Allen Franken," filed 9/21/2022, at page 8 (Chronological Index 142) and attached letters and certificate of service dated August 16, 2022, to the Office of Attorney General and to attorney for Smithfield. The Attorney General has not moved to intervene and has not responded.

Smithfield concedes, at page 17 of its Brief, that its proposed application of Ch. 21-68 to Title 62 employees is of substantial "public interest" and substantially affects the public interest; but Smithfield argues the matter is not an "existing emergency". According to the Centers for Medicare and Medicaid Services, the federal Public Health Emergency (PHE) for COVID-19, declared under Section 319 of the Public Health Service Act, has not expired, however, "[b]ased on current COVID-19 trends, the Department of Health and Human Services is planning for the federal Public Health Emergency (PHE) for COVID-19, declared under Section 319 of the Public Health

Service Act, to expire at the end of the day on May 11, 2023." See https://www.cms.gov/about-cms/agency-information/emergency/epro/current-emergencies/current-emergencies-page (updated April 26, 2023), page 1; Appx.-76. Smithfield cannot deny that this Court's legal construction of Ch 21-68, in the context of Title 62 claims for compensation benefits which have accrued and/or vested long before enactment of Ch 21-68, is before this Court, timely (in the wake of the pandemic), very important, in need of the Court's immediate attention, and emergent.

"An injured employee's right to receive workers' compensation benefits is a property right protected by procedural due process safeguards including notice and an opportunity to be heard." *Isaac v. Green Iguana, Inc.*, 871 So.2d 1004, 1006 (DCA Fla. 2004); *Iphaar v. Industrial Com'n of Arizona*, 171 Ariz. 423, 831 P.2d 422, 426 (Ariz. C. App. 1992); See *Jackson v. Lee's Travelers Lodge, Inc.*, 563 N.W.2d 858, 865 (SD 1997); South Dakota Constitution article VI, § 2 *("[n]o person shall be deprived of life, liberty or property without due process of law.")*; See SDCL § 60-8-3 *("No person may be deprived of life, liberty, or property without due process of law.")*; *Hughes v. Hughes*, 132 N.J.Super. 559, 334 A.2d 379, 381 (Super. Ct. N.J. 1975) (*A workmen's compensation claim can fairly be characterized as a statutory substitute for a common law chose in action for personal injuries*). As previously argued by Franken, the liability of an employer to an injured or deceased employee arises out of the contract of employment between them; and the terms of the workmen's' compensation statute are embodied in such contract of employment; and these rights to statutory compensation/benefits vest when the claim for benefits accrues; and the claim for compensation/benefits accrues on the date of injury, disability and/or or death to the

employee. See "Brief of Claimant and Appellant Karen M. Franken" at pp. 39-43. An injured, disabled, or deceased employee's right to compensation is a substantive right. It was not the intention of our legislature to legally impair an injured, disabled or deceased worker's substantive right to Title 62 compensation by changing the burden of proof (e.g., preponderance to clear and convincing) and by changing the essential elements (e.g., no fault to specific intent to injure or transmit), as that would be fundamentally unfair and manifestly unjust, and it would work an absurd result. It was not the intention of our legislature to unfairly discriminate against a class of workers --- workers injured/disabled//killed by a form of SARS-CoV-2 and/or COVID-19 ---, as that would be fundamentally unfair, and manifestly unjust, and it would work an absurd result. Craig Franken's right to compensation under Title 62 had already accrued and vested on Craig Franken's death in April of 2020 --- long before enactment of Ch 21-68. It was not the intention of the legislature that Ch 21-68 apply to employees injured, disabled, and/or killed within the course and scope of their employment by a form of SARS-CoV-2 and/or COVID-19, and whose permanent disability or death occurred, and whose right to benefits accrued and vested, in April of 2020 --- long before enactment of Ch 21-68, as that would be fundamentally unfair, and manifestly unjust, and would unduly impair or destroy substantive legal rights, and would work an absurd result.

Dated this 10th day of May 2023.

Bram Weidenaar
Attorney for Appellant-Franken

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4) the Supreme Court's "REPLY BRIEF OF CLAIMANT AND APPELLANT KAREN M. FRANKEN #30198" dated and filed May 10th, 2023, I certify that this appeal brief complies with the requirements set forth in the South Dakota Codified Laws, and "REPLY BRIEF OF CLAIMANT AND APPELLANT KAREN M. FRANKEN #30198". Appellant's Brief was prepared using Microsoft Word and contains 4,799 words through the Conclusion (not including the Cover Page, Table of contents, Table of authorities, Appendix and the Certificates of Compliance and Service). I have relied on the word count of the word-processing program to prepare this Certificate.

Dated this 10th day of May, 2023.

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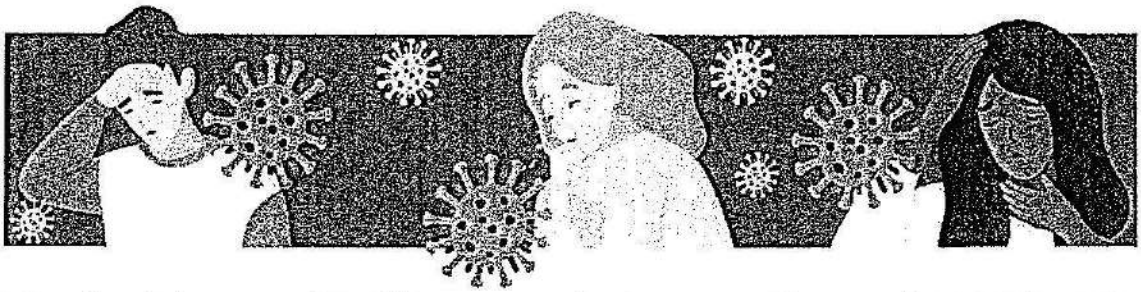
Attorney for Appellant Franken

REPLY BRIEF APPENDIX TABLE OF CONTENTS



Similarities and Differences between Flu and COVID-19

More information on COVID-19 symptoms and testing is available.

What is the difference between Influenza (Flu) and COVID-19?

Influenza (flu) and COVID-19 are both contagious respiratory illnesses, but they are caused by different viruses. COVID-19 is caused by infection with a coronavirus (SARS-CoV-2) first identified in 2019. Flu is caused by infection with a flu virus (influenza viruses).

From what we know, COVID-19 spreads more easily than flu. Efforts to maximize the proportion of people in the United States who are up to date with their COVID-19 vaccines remain critical to reducing the risk of severe COVID-19 illness and death. More information is available about COVID-19 vaccines and how well they work.

Compared with flu, COVID-19 can cause more severe illness in some people. Compared to people with flu, people infected with COVID-19 may take longer to show symptoms and may be contagious for longer periods of time.

You cannot tell the difference between flu and COVID-19 by the symptoms alone because they have some of the same signs and symptoms. Specific testing is needed to tell what the illness is and to confirm a diagnosis. Having a medical professional administer a specific test that detects both flu and COVID-19 allows you to get diagnosed and treated for the specific virus you have more quickly. Getting treated early for COVID-19 and flu can reduce your risk of getting very sick. Testing can also reveal if someone has both flu and COVID-19 at the same time, although this is uncommon. People with flu and COVID-19 at the same time can have more severe disease than people with either flu or COVID-19 alone. Additionally, some people with COVID-19 may also be affected by post-COVID conditions (also known as long COVID).

We are learning more everyday about COVID-19 and the virus that causes it. This page compares COVID-19 and flu, given the best available information to date.

Learn more about how to protect yourself and others from COVID-19.

Learn more about how to protect yourself and others from flu this season.

Signs and Symptoms

Similarities:

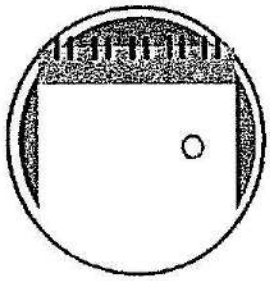
Both COVID-19 and flu can have varying degrees of symptoms, ranging from no symptoms (asymptomatic) to severe symptoms. Common symptoms that COVID-19 and

flu share include:

- Fever or feeling feverish/having chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue (tiredness)
- Sore throat
- Runny or stuffy nose
- Muscle pain or body aches
- Headache
- Vomiting
- Diarrhea (more frequent in children with flu, but can occur in any age with COVID-19)
- Change in or loss of taste or smell, although this is more frequent with COVID-19.

Flu Symptoms
COVID-19 Symptoms

How Long Symptoms Appear After Exposure and Infection



Similarities:

For both COVID-19 and flu, one or more days can pass from when a person becomes infected to when they start to experience symptoms of illness. It is possible to be infected with the virus that causes COVID-19 without experiencing any symptoms. It is also possible to be infected with flu viruses without having any symptoms.

Differences:

If a person has COVID-19, it could take them longer from the time of infection to experience symptoms than if they have flu.

Flu

Typically, a person may experience symptoms anywhere from one to four days after infection.

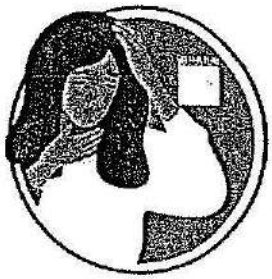
Flu Symptoms

COVID-19

Typically, a person may experience symptoms anywhere from two to five days, and up to 14 days after infection.

COVID-19 Symptoms

How Long Someone Can Spread the Virus



Differences:

If a person has COVID-19, they could be contagious for a longer time than if they have flu.

Flu

- People with flu virus infection are potentially contagious for about one day before they show symptoms. However, it is believed that flu is spread mainly by people who are symptomatic with flu virus infection.
- Older children and adults with flu appear to be most contagious during the first 3-4 days of their illness, but some people might remain contagious for slightly longer periods.
- Infants and people with weakened immune systems can be contagious for even longer

How Flu Spreads

COVID-19

- On average, people can begin spreading the virus that causes COVID-19 2-3 days before their symptoms begin, but infectiousness peaks one day before their symptoms begin.
- People can also spread the virus that causes COVID-19 without experiencing any symptoms.
- On average, people are considered contagious for about eight days after their symptoms began.

How COVID-19 Spreads

How it Spreads

Similarities:

Both COVID-19 and flu can spread from person to person between people who are near or in close contact with one another. Both are spread mainly by large and small particles containing virus that are expelled when people with the illness (COVID-19 or flu) cough, sneeze, or talk. These particles can land in the mouths or noses of people who are nearby and possibly be inhaled into the respiratory tract. In some circumstances, such as indoor settings with poor ventilation, small particles containing virus might be spread longer distances and cause infections.

Most spread is by inhalation of large and small droplets; however, it may be possible that a person can get infected by touching another person (for example, shaking hands with someone who has the virus on their hands), or by touching a surface or object that has virus on it, and then touching their own mouth, nose, or eyes.

Differences:

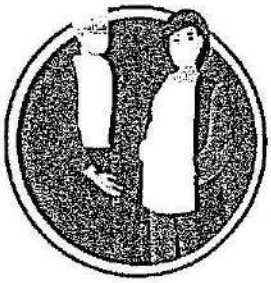
While the virus that causes COVID-19 and flu viruses are thought to spread in similar ways, the virus that causes COVID-19 is generally more contagious than flu viruses. Also, COVID-19 has been observed to have more superspreading events than flu. This means the virus that causes COVID-19 can quickly and easily spread to a lot of people and result in continual spreading among people as time progresses.

The virus that causes COVID-19 can be spread to others by people before they begin showing symptoms, by people with very mild symptoms, and by people who never experience symptoms (asymptomatic people).

How Flu Spreads How COVID-19 Spreads

People at Higher Risk for Severe Illness

Similarities



Both COVID-19 and flu illness can result in severe illness and complications. Those at increased risk include:

- Older adults
- People with certain underlying medical conditions (including infants and children)
- People who are pregnant

Differences:

Differences:

Overall, COVID-19 seems to cause more severe illness in some people.

Severe COVID-19 illness resulting in hospitalization and death can occur even in healthy people.

Some people that had COVID-19 can go on to develop post-COVID conditions or multisystem inflammatory syndrome (MIS)

People at Increased Risk of COVID-19 Severe Illness

Complications

Similarities:

Both COVID-19 and flu can result in complications, including:

- Pneumonia
- Respiratory failure
- Acute respiratory distress syndrome (fluid in the lungs)
- Sepsis (a life-threatening illness caused by the body's extreme response to an infection)
- Cardiac injury (for example, heart attacks and stroke)
- Multiple-organ failure (respiratory failure, kidney failure, shock)
- Worsening of chronic medical conditions (involving the lungs, heart, or nervous system or diabetes)
- Inflammation of the heart, brain, or muscle tissues
- Secondary infections (bacterial or fungal infections that can occur in people with flu or COVID-19)

Differences:

Flu

Most people who get flu will recover on their own in a few days to two weeks, but some people will experience severe complications, requiring hospitalization. Some of these complications are listed above. Secondary bacterial infections are more common with influenza than with COVID-19.

Diarrhea is more common in young children with flu than in adults with flu.

Flu complications

COVID-19

Additional complications associated with COVID-19 can include:

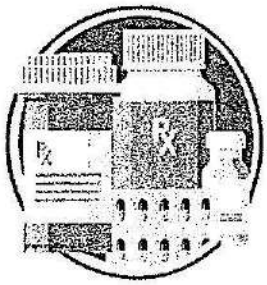
- Blood clots in the veins and arteries of the lungs, heart, legs or brain
- Multisystem Inflammatory Syndrome in Children (MIS-C) and in Adults (MIS-A)

Anyone who has had COVID-19, even if their illness was mild, or if they had no symptoms can experience post-COVID conditions. Post-COVID Conditions are a range of symptoms that can last weeks or months after first being infected with the virus that causes COVID-19 or can appear weeks after infection.

Approved Treatments

Similarities:

People at higher risk of complications or who have been hospitalized for COVID-19 or flu should receive recommended treatments and supportive medical care to help relieve symptoms and complications.



Differences:

Flu

Prescription influenza antiviral drugs are FDA-approved to treat flu. These antiviral drugs are only for treatment of flu and not COVID-19.

People who are hospitalized with flu or who are at increased risk of complications and have flu symptoms are recommended to be treated with antiviral drugs as soon as possible after illness onset.

Flu Treatment

COVID-19

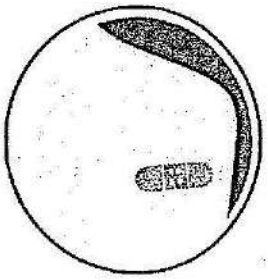
The National Institutes of Health (NIH) has developed guidance on treatment of COVID-19 [↗], which is regularly updated as new evidence on treatment options emerge. This includes antiviral treatment for non-hospitalized people at increased risk for severe COVID-19 and antiviral treatment for people hospitalized with severe COVID-19. People who are at increased risk of severe COVID-19 should seek treatment within days of when their first symptoms start.

What to Do If You Are Sick with COVID-19

Vaccine

Similarities:

Vaccines for COVID-19 and flu are approved or authorized for emergency use (EUA) by FDA.



Differences:

Flu

There are multiple FDA-licensed influenza vaccines produced annually to protect against the four flu viruses that scientists expect will circulate each year.

Flu Vaccines

COVID-19

Multiple COVID-19 vaccines are authorized or approved for use in the United States to help prevent COVID-19. More information on COVID-19 vaccine and booster recommendations is available.

COVID-19 Vaccines

Page last reviewed: September 28, 2022

CMS.gov

Current emergencies

Update 4/26/2023: Based on current COVID-19 trends, the Department of Health and Human Services is planning for the federal Public Health Emergency (PHE) for COVID-19, declared under Section 319 of the Public Health Service Act, to expire at the end of the day on May 11, 2023. Learn more by reading Frequently Asked Questions: CMS Waivers, Flexibilities, and the End of the COVID-19 Public Health Emergency (PDF).

- **Update:** COVID Over The Counter Test Coverage (English PDF) (Spanish PDF) (4/28/2023)

Potential Impact of House Joint Resolution 7 (H.J.Res.7): In response to questions related to how the ending of the National Emergency by H.J.Res.7 impacts the Public Health Emergency for COVID-19, we wanted to share the following question and answer broadly:

What happens if a national emergency ends before the PHE ends?

To be clear, the federal Public Health Emergency (PHE) for COVID-19 declared under section 319 of the Public Health Service Act, is not the same as the COVID-19 National Emergency declared by the Trump Administration in 2020 and implicated by H.J.Res.7. Therefore, an end to the COVID-19 National Emergency does not impact current operations at HHS, and does not impact the planned May 11 expiration of the federal PHE for COVID-19 or any associated unwinding plans. Even if the COVID-19 National Emergency were to end, any existing waivers currently in effect and authorized under the 1135 waiver authorization for the pandemic, would remain in place until the end of the federal PHE for COVID-19.

Feedback

Based on current COVID-19 trends, the Department of Health and Human Services is planning for the federal Public Health Emergency (PHE) for COVID-19, declared under Section 319 of the Public Health Service Act, to expire at the end of the day on May 11, 2023. Learn more by reading What Do I Need to

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of May, 2023, a true and correct copy of the forgoing **Reply Brief of Claimant and Appellant Karen M. Franken with Appendix and Certificate of Compliance** was served via the Odyssey file and serve program upon the following:

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