

WORKERS' COMPENSATION

CHAPTER 561

HOUSE BILL NO. 1065

(Representative Ruby)

(Senator Mutch)

(At the request of the Workers Compensation Bureau)

WORKFORCE SAFETY AND INSURANCE

AN ACT to amend and reenact sections 65-01-02, 65-01-17, and 65-02-01.1 of the North Dakota Century Code, relating to changing the name of the workers compensation bureau to workforce safety and insurance.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

<sup>266</sup> **SECTION 1. AMENDMENT.** Section 65-01-02 of the North Dakota Century Code is amended and reenacted as follows:

**65-01-02. Definitions.** In this title:

- 1. "Acute care" means a short course of intensive diagnostic and therapeutic services provided immediately following a work injury with a rapid onset of pronounced symptoms.
- 2. "Adopted" or "adoption" refers only to a legal adoption effected prior to the time of the injury.
- 3. "Artificial members" includes only such devices as are substitutes for, and not mere aids to, a natural part, organ, limb, or other part of the body. The term does not include eyeglasses or contact lenses unless the eye is, or eyes are, injured as a result of a compensable injury, and such injury causes a change in sight which requires fitting of eyeglasses or contact lenses not previously worn by the injured worker or requires a change in existing prescription.
- 4. "Artificial replacements" means mechanical aids including braces, belts, casts, or crutches as may be reasonable and necessary due to compensable injury.
- 5. "Average weekly wage" means the weekly wages the employee was receiving from all employments at the date of first disability. The average weekly wage determined under this subsection must be rounded to the nearest dollar. In cases where the employee's wages

<sup>266</sup> Section 65-01-02 was also amended by section 1 of House Bill No. 1060, chapter 562, and section 2 of House Bill No. 1060, chapter 562.

are not fixed by the week, they must be determined by using the first applicable formula from the schedule below:

- a. For seasonal employment, during the first consecutive days of disability up to twenty-eight days the average weekly wage is calculated pursuant to the first applicable formula in subdivisions b through g of this subsection, and after that are calculated as one-fiftieth of the total wages from all occupations during the twelve months preceding the date of first disability or during the tax year preceding the date of first disability, or an average of the three tax years preceding the date of first disability, whichever is highest and for which accurate, reliable, and complete records are readily available.
  - b. The "average weekly wage" of a self-employed employee is determined by the following formula: one-fiftieth of the net profits based on the preceding tax year or preceding fifty-two weeks whichever is higher if accurate, reliable, and complete records for those fifty-two weeks are readily available, plus depreciation, meal and travel expenses, and any expenses chargeable to use of personal residence as allowed under the federal tax laws.
  - c. Hourly or daily rate multiplied by number of hours or days worked per seven-day week.
  - d. Monthly rate multiplied by twelve months and divided by fifty-two weeks.
  - e. Biweekly rate divided by two.
  - f. The usual wage paid other employees engaged in similar occupations.
  - g. A wage reasonably and fairly approximating the weekly wage lost by the claimant during the period of disability.
6. "Average weekly wage in the state" means the determination made of the average weekly wage in the state by job service North Dakota on or before July first of each year, computed to the next highest dollar.
  7. "Board" means the ~~North Dakota workers compensation~~ workforce safety and insurance board of directors.
  8. "Brother" and "sister" include a stepbrother and a stepsister, a half brother and a half sister, and a brother and sister by adoption. The terms do not include a married brother or sister unless that person actually is dependent.
  9. ~~"Bureau" means the North Dakota workers compensation bureau, or the director, or any department heads, assistants, or employees of the bureau designated by the director, to act within the course and scope of their employment in administering the policies, powers, and duties of this title.~~
  40. "Child", for determining eligibility for benefits under chapter 65-05, means a child under eighteen years of age residing in the employee's

household or to whom the employee has a legal obligation of support; or a child eighteen years of age or over and physically or mentally incapable of self-support who is actually dependent upon the employee for support; or any child between eighteen and twenty-two years of age who is enrolled as a full-time student in any accredited educational institution who is actually dependent upon the employee for support. This term includes a legitimate child, a stepchild, adopted child, posthumous child, foster child, and acknowledged illegitimate child, but does not include a married child unless actually dependent.

~~44.~~ 10. "Compensable injury" means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.

a. The term includes:

- (1) Disease caused by a hazard to which an employee is subjected in the course of employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. Disease includes effects from radiation.
- (2) An injury to artificial members.
- (3) Injuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus, but only when caused by the employee's employment with reasonable medical certainty, and only when it is determined with reasonable medical certainty that unusual stress is at least fifty percent of the cause of the injury or disease as compared with all other contributing causes combined. Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work.
- (4) Injuries arising out of employer-required or supplied travel to and from a remote jobsite or activities performed at the direction or under the control of the employer.
- (5) An injury caused by the willful act of a third person directed against an employee because of the employee's employment.
- (6) A mental or psychological condition caused by a physical injury, but only when the physical injury is determined with reasonable medical certainty to be at least fifty percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not preexist the work injury.

b. The term does not include:

- (1) Ordinary diseases of life to which the general public outside of employment is exposed or preventive treatment for communicable diseases, except that the bureau may pay for preventive treatment for significant exposures documented

by emergency medical services providers under chapter 23-07.3, for significant exposures for the employees of licensed facilities as defined by chapter 23-07.3, and for exposure to rabies occurring in the course of employment.

- (2) A willfully self-inflicted injury, including suicide or attempted suicide, or an injury caused by the employee's willful intention to injure or kill another.
- (3) Any injury caused by the use of intoxicants or the illegal use of controlled substances.
- (4) An injury that arises out of an altercation in which the injured employee is an aggressor. This paragraph does not apply to public safety employees, including law enforcement officers or private security personnel who are required to engage in altercations as part of their job duties if the altercation arises out of the performance of those job duties.
- (5) An injury that arises out of an illegal act committed by the injured employee.
- (6) An injury that arises out of an employee's voluntary nonpaid participation in any recreational activity, including athletic events, parties, and picnics, even though the employer pays some or all of the cost of the activity.
- (7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.
- (8) A nonemployment injury that, although acting upon a prior compensable injury, is an independent intervening cause of injury.
- (9) A latent or asymptomatic degenerative condition, caused in substantial part by employment duties, which is triggered or made active by a subsequent injury.
- (10) A mental injury arising from mental stimulus.

- ~~42.~~ 11. "Date of first disability" means the first date the employee was unable to work because of a compensable injury.
- ~~43.~~ 12. "Date of maximum medical improvement" or "date of maximum medical recovery" means the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated based upon reasonable medical probability.
- ~~44.~~ 13. "Director" means the director of the bureau.
- ~~45.~~ 14. "Disability" means loss of earnings capacity and may be permanent total, temporary total, or partial.

- ~~46.~~ 15. "Doctor" means doctor of medicine or osteopathy, chiropractor, dentist, optometrist, podiatrist, or psychologist acting within the scope of the doctor's license.
- ~~47.~~ 16. "Employee" means a person who performs hazardous employment for another for remuneration unless the person is an independent contractor under the "common law" test.

a. The term includes:

- (1) All elective and appointed officials of this state and its political subdivisions, including municipal corporations and including the members of the legislative assembly, all elective officials of the several counties of this state, and all elective peace officers of any city.
- (2) Aliens.
- (3) County general assistance workers except those who are engaged in repaying to counties moneys that the counties have been compelled by statute to expend for county general assistance.
- (4) Minors, whether lawfully or unlawfully employed; a minor is deemed sui juris for the purposes of this title, and no other person has any claim for relief or right to claim workers' compensation benefits for any injury to a minor worker, but in the event of the award of a lump sum of benefits to a minor employee, the lump sum may be paid only to the legally appointed guardian of the minor.

b. The term does not include:

- (1) Any person whose employment is both casual and not in the course of the trade, business, profession, or occupation of that person's employer.
- (2) Any person who is engaged in an illegal enterprise or occupation.
- (3) The spouse of an employer or a child under the age of twenty-two of an employer. For purposes of this paragraph and section 65-07-01, "child" means any legitimate child, stepchild, adopted child, foster child, or acknowledged illegitimate child.
- (4) Any real estate broker or real estate salesperson, provided the person meets the following three requirements:
  - (a) The salesperson or broker must be a licensed real estate agent under section 43-23-05.
  - (b) Substantially all of the salesperson's or broker's remuneration for the services performed as a real estate agent must be directly related to sales or other efforts rather than to the number of hours worked.

- (c) A written agreement must exist between the salesperson or broker and the person or firm for whom the salesperson or broker works, which agreement must provide that the salesperson or broker will not be treated as an employee but rather as an independent contractor.
  - (5) The members of the board of directors of a business corporation who are not employed in any capacity by the corporation other than as members of the board of directors.
  - (6) Any individual delivering newspapers or shopping news, if substantially all of the individual's remuneration is directly related to sales or other efforts rather than to the number of hours worked and a written agreement exists between the individual and the publisher of the newspaper or shopping news which states that the individual is an independent contractor.
  - (7) An employer.
  - c. Persons employed by a subcontractor, or by an independent contractor operating under an agreement with the general contractor, for the purpose of this chapter are deemed to be employees of the general contractor who is liable and responsible for the payments of premium for the coverage of these employees until the subcontractor or independent contractor has secured the necessary coverage and paid the premium for the coverage. This subdivision does not impose any liability upon a general contractor other than liability to the bureau for the payment of premiums which are not paid by a subcontractor or independent contractor.
- ~~18.~~ 17. "Employer" means a person who engages or received the services of another for remuneration unless the person performing the services is an independent contractor under the "common law" test. The term includes:
- a. The state and all political subdivisions thereof.
  - b. All public and quasi-public corporations in this state.
  - c. Every person, partnership, limited liability company, association, and private corporation, including a public service corporation.
  - d. The legal representative of any deceased employer.
  - e. The receiver or trustee of any person, partnership, limited liability company, association, or corporation having one or more employees as herein defined.
  - f. The president, vice presidents, secretary, or treasurer of a business corporation, but not members of the board of directors of a business corporation who are not also officers of the corporation.
  - g. The managers of a limited liability company.

- h. The president, vice presidents, secretary, treasurer, or board of directors of an association or cooperative organized under chapter 6-06, 10-12, 10-13, 10-15, 36-08, or 49-21.
  - i. The clerk, assessor, treasurer, or any member of the board of supervisors of an organized township, if the person is not employed by the township in any other capacity.
- ~~19.~~ 18. "Fee schedule" means the payment formulas established in the bureau publication entitled "Medical and Hospital Fees".
- ~~20.~~ 19. "Fund" means the ~~North Dakota workers' compensation~~ workforce safety and insurance fund.
- ~~24.~~ 20. "Grandchild" and the terms defined in subsections ~~7~~ 8 and 9 include only a person who, at the time of the death of the deceased employee, is under eighteen years of age, or if over that age, is incapable of self-support.
- ~~22.~~ 21. "Hazardous employment" means any employment in which one or more employees are employed regularly in the same business or in or about the establishment except:
  - a. Agricultural or domestic service.
  - b. Any employment of a common carrier by railroad.
  - c. Any employment for the transportation of property or persons by nonresidents, where, in such transportation, the highways are not traveled more than seven miles [11.27 kilometers] and return over the same route within the state of North Dakota.
  - d. All members of the clergy and employees of religious organizations engaged in the operation, maintenance, and conduct of the place of worship.
- ~~23.~~ 22. "Health care provider" means a doctor or any recognized practitioner providing skilled services pursuant to the prescription of, or under the supervision or direction of, a doctor.
- 23. "Organization" means workforce safety and insurance, or the director, or any department head, assistant, or employee of workforce safety and insurance designated by the director, to act within the course and scope of that person's employment in administering the policies, powers, and duties of this title.
- 24. "Parent" includes a stepparent and a parent by adoption.
- 25. "Permanent impairment" means the loss of or loss of use of a member of the body existing after the date of maximum medical improvement and includes disfigurement resulting from an injury.
- 26. "Permanent total disability" means an employee is determined incapable of rehabilitation of earnings capacity as determined by the:
  - a. Nature of injury.

- b. Degree of physical impairment.
  - c. Education.
  - d. Work history.
  - e. Vocational rehabilitation potential.
27. "Rehabilitation services" means nonmedical services reasonably necessary to restore a disabled employee to substantial gainful employment as defined by section 65-05.1-01 as near as possible. The term may include vocational evaluation, counseling, education, workplace modification, and vocational retraining including on-the-job training or training for alternative employment with the same employer, and job placement assistance.
28. "Seasonal employment" includes an occupation that has periods of forty-five consecutive days of not receiving wages.
29. "Spouse" includes only the decedent's husband or wife who was living with the decedent or was dependent upon the decedent for support at the time of injury.
30. "Utilization review" means the initial and continuing evaluation of appropriateness in terms of both the level and the quality of health care and health services provided a patient, based on medically accepted standards. The evaluation must be accomplished by means of a system that identifies the utilization of medical services, based on medically accepted standards, and which refers instances of possible inappropriate utilization to the bureau to obtain opinions and recommendations of expert medical consultants to review individual cases for which administrative action may be deemed necessary.
31. "Wages" means an employee's remuneration from all employment reportable to the internal revenue service as earned income for federal income tax purposes. For purposes of chapter 65-04, "wages" may not include dismissal or severance pay.

**SECTION 2. AMENDMENT.** Section 65-01-17 of the North Dakota Century Code is amended and reenacted as follows:

**65-01-17. Agricultural employment exemption - Custom agricultural operations.** For purposes of the agricultural service exception to hazardous employment under subsection ~~22~~ 21 of section 65-01-02, an agricultural employer that engages in a custom agricultural operation, which is the planting, care, or harvesting of grain or field crops on a contract-for-hire basis, exclusive of hauling by special contractor, retains the exemption unless the employer's custom agricultural operations are based outside this state or require more than thirty actual working days of operation during the calendar year.

**SECTION 3. AMENDMENT.** Section 65-02-01.1 of the North Dakota Century Code is amended and reenacted as follows:



**65-02-01.1. Workers compensation bureau.** The North Dakota legislative council is hereby authorized to may delete, where appropriate, "~~workmen's workers~~ compensation bureau", "North Dakota workers compensation bureau", or any derivatives of those terms, which when used in context indicate an intention to refer to those terms, wherever it ~~appears~~ they appear in the North Dakota Century Code or in the supplements thereto and to insert in lieu of each deletion "~~workers compensation bureau~~ workforce safety and insurance". Such changes are to be made when any volume or supplement of the North Dakota Century Code is being reprinted. It is the intent of the legislative assembly that ~~the workers compensation bureau shall~~ workforce safety and insurance be substituted for, shall take any action previously to be taken by, and shall perform any duties previously to be performed by the ~~workmen's workers~~ compensation bureau. The legislative council may replace "bureau", where appropriate, wherever the term appears in the North Dakota Century Code or in the supplements of the North Dakota Century Code, with the term "organization". These changes are to be made when any volume or supplement is being reprinted.

Approved March 26, 2003

Filed March 26, 2003

## CHAPTER 562

### HOUSE BILL NO. 1060

(Representative Wald)

(Senator J. Klein)

(At the request of the Workers Compensation Bureau)

## WORKERS' COMPENSATION LAW REVISIONS

AN ACT to create and enact a new section to chapter 65-05 of the North Dakota Century Code, relating to retaliation by an employer against an employee for seeking workers' compensation benefits; to amend and reenact subdivision b of subsection 5 and subsection 28 of section 65-01-02, sections 65-02-11 and 65-02-20, subsection 5 of section 65-05-07, section 65-05-10, subsection 1 of section 65-05-17, and sections 65-05-21, 65-05-22, 65-05-25, and 65-05-36 of the North Dakota Century Code, relating to calculation of the average weekly wage of self-employed employers, the definition of seasonal employment, subpoenas issued by the workers compensation bureau, dispute resolution of managed care decisions, modifications to real estate for catastrophically injured workers, partial disability benefits, workers' compensation death benefits, structured settlements, and the preferred worker program; to repeal sections 65-02-15 and 65-05-24 of the North Dakota Century Code, relating to binding arbitration in workers' compensation disputes and workers' compensation death benefits; to provide a penalty; and to provide for application.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

<sup>267</sup> **SECTION 1. AMENDMENT.** Subdivision b of subsection 5 of section 65-01-02 of the North Dakota Century Code is amended and reenacted as follows:

- b. The "average weekly wage" of a self-employed ~~employee~~ employer is determined by the following formula: ~~one-fiftieth one~~ fifty-second of the net ~~profits based on~~ earnings reported the preceding tax year or preceding fifty-two weeks whichever is higher if accurate, reliable, and complete records for those fifty-two weeks are readily available; ~~plus depreciation, meal and travel expenses, and any expenses chargeable to use of personal residence as allowed under the federal tax laws.~~

<sup>268</sup> **SECTION 2. AMENDMENT.** Subsection 28 of section 65-01-02 of the North Dakota Century Code is amended and reenacted as follows:

28. "Seasonal employment" includes ~~an occupation that has periods of forty-five consecutive days of not receiving wages~~ occupations that are not permanent or that do not customarily operate throughout the entire

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<sup>267</sup> Section 65-01-02 was also amended by section 2 of House Bill No. 1060, chapter 562, and section 1 of House Bill No. 1065, chapter 561.

<sup>268</sup> Section 65-01-02 was also amended by section 1 of House Bill No. 1060, chapter 562, and section 1 of House Bill No. 1065, chapter 561.

year. Seasonal employment is determined by what is customary with respect to the employer at the time of injury.

**SECTION 3. AMENDMENT.** Section 65-02-11 of the North Dakota Century Code is amended and reenacted as follows:

**65-02-11. Process and procedure - Investigations - Examination of witnesses - Costs - Penalty.** Except as otherwise provided by this title, process and procedure under this title is governed by chapter 28-32. The bureau may make investigation as in its judgment is best calculated to ascertain the substantial rights of all the parties. Any member of the bureau, and any person specifically designated by the bureau may examine witnesses and records, with or without subpoena, examine, investigate, copy, photograph, and take samples at any pertinent location or facility, administer oaths to witnesses, require the attendance of witnesses without fee whenever the testimony is taken at the home, office, or place of work of those witnesses, and generally to do anything necessary to facilitate or promote the efficient administration of this title. The bureau may issue a subpoena to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and any other records deemed necessary by the bureau. Subpoenas may be enforced by applying to a judge of the district court for an order requiring the attendance of a witness, the production of all documents and objects described in the subpoena, or otherwise enforcing an order. Failure to comply with the order of the district court is contempt as provided in chapter 27-10. The bureau shall pay the costs of any medical examination, scientific investigation, medical or expert witness appearance or report, requested or approved by the bureau, relating to a claim for benefits, from the bureau general fund.

**SECTION 4. AMENDMENT.** Section 65-02-20 of the North Dakota Century Code is amended and reenacted as follows:

**65-02-20. Bureau to establish managed care program.** The bureau shall establish a managed care program, including utilization review and bill review, to effect the best medical solution for an injured employee in a cost-effective manner upon a finding by the bureau that the employee suffered a compensable injury. The program shall operate according to guidelines adopted by the bureau and shall provide for medical management of claims within the bounds of workers' compensation law. Information compiled and analysis performed pursuant to a managed care program which relate to patterns of treatment, cost, or outcomes by health care providers are confidential and are not open to public inspection to the extent the information and analysis identify a specific health care provider, except to the specific health care provider, bureau employees, or persons rendering assistance to the bureau in the administration of this title. If an employee, employer, or medical provider disputes a managed care decision, the employee, employer, or medical provider shall request binding dispute resolution on the decision. The bureau shall make rules providing for the procedures for dispute resolution. Dispute resolution under this section is not subject to chapter 28-32 or section 65-01-16 ~~or 65-02-15~~. A dispute resolution decision under this section requested by a medical provider concerning payment for medical treatment already provided or a request for diagnostic tests or treatment is not reviewable by any court. A dispute resolution decision under this section requested by an employee is reviewable by a court only if medical treatment has been denied to the employee. A dispute resolution decision under this section requested by an employer is reviewable by a court only if medical treatment is awarded to the employee. The dispute resolution decision may be reversed only if the court finds that there has been an abuse of discretion in the dispute resolution process. Any person providing binding dispute resolution services

under this section is exempt from civil liability relating to the binding dispute resolution process and decision.

**SECTION 5. AMENDMENT.** Subsection 5 of section 65-05-07 of the North Dakota Century Code is amended and reenacted as follows:

5. The bureau may not pay more than ~~twenty~~ fifty thousand dollars to provide permanent additions, remodeling, or adaptations to real estate it determines necessary for a worker who sustains a catastrophic injury as defined in chapter 65-05.1. The ~~twenty~~ fifty thousand dollar limit is for the life of the injured employee, regardless of any subsequent claim. This subsection does not allow the bureau to purchase any real estate or motor vehicles.

**SECTION 6. AMENDMENT.** Section 65-05-10 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-10. Partial disability - Weekly benefit.** If the injury causes temporary partial disability resulting in decrease of earning capacity, the disability benefit is sixty-six and two-thirds percent of the difference between the injured employee's average weekly wages before the injury and the employee's wage earning capacity after the injury in the same or another employment. ~~However, the partial~~ Partial disability benefits may not exceed benefit rates as defined in section 65-05-09 are subject to a maximum of one hundred ten percent of the average weekly wage in the state. The combined partial disability benefits, dependency allowance, and postinjury wage earning capacity may not exceed the preinjury weekly wage of the employee after deductions for social security and federal income tax.

1. The benefits provided by this section are available to any otherwise eligible worker, providing the loss of earning capacity occurs after July 1, 1989. Partial loss of earning capacity occurring prior to July 1, 1989, must be paid at a rate to be fixed by the bureau.
2. Benefits must be paid during the continuance of partial disability, not to exceed a period of five years. The bureau may waive the five-year limit on the duration of partial disability benefits in cases of catastrophic injury as defined in section 65-05.1-06.1 or when the injured worker is working and has long-term restrictions verified by clear and convincing objective medical and vocational evidence that limits the injured worker to working less than twenty-eight hours per week because of the compensable work injury. This subsection is effective for partial loss of earnings capacity occurring after June 30, 1991.
3. The employee's earnings capacity may be established by expert vocational evidence of a capacity to earn in the statewide job pool where the worker lives. Actual postinjury earnings are presumptive evidence of earnings capacity where the job employs the employee to full work capacity in terms of hours worked per week, and where the job is in a field related to the employee's transferable skills. The presumption may be rebutted by competent evidence from a vocational expert that the employee's actual earnings do not fairly reflect the employee's earnings capacity in the statewide job pool, considering the employee's capabilities, education, experience, and skills.

**SECTION 7. AMENDMENT.** Subsection 1 of section 65-05-17 of the North Dakota Century Code is amended and reenacted as follows:

1. To the decedent's spouse or to the guardian of the children of the decedent, an amount equal to the benefit rate for total disability under section 65-05-09. All recipients of benefits under this subsection are eligible for benefits at the rate provided in this section, regardless of the date of death of the deceased employee. These benefits continue until the death ~~or remarriage~~ of the decedent's spouse; or, if the surviving children of the decedent are under the care of a guardian, until those children no longer meet the definition of "child" in this title. If there is more than one guardian for the children who survive the decedent, the bureau shall divide the death benefits equally among the children and shall pay benefits to the children's guardians. Total death benefits, including supplementary benefits, paid on any one claim may not exceed ~~one hundred ninety-seven~~ two hundred fifty thousand dollars. ~~All recipients of benefits under this subsection are eligible for benefits at the rate provided in this section, regardless of the date of death of the deceased employee.~~

**SECTION 8. AMENDMENT.** Section 65-05-21 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-21. Marriage settlement to spouse.** If a spouse who receives compensation under the provisions of subsection 1 of section 65-05-17 remarries, there shall be paid to such spouse a lump sum equal to one hundred four weeks' compensation. If, prior to such marriage, such spouse has received a partial lump sum settlement which covers all or any portion of the said one hundred four weeks following such spouse's marriage, the amount of such partial lump sum settlement which covers all or any part of the said one hundred four weeks following such spouse's marriage shall be deducted from such marriage settlement, and the spouse shall receive only the remainder, if any, over and above such deduction. Any judgment annulling such marriage shall not reinstate the right of such spouse to compensation if the action for annulment is instituted more than six months after the marriage. The provisions of this section apply only to remarriages that occur before August 1, 2003, regardless of the date of injury or date of death of the decedent.

**SECTION 9. AMENDMENT.** Section 65-05-22 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-22. Adjustment on cessation of compensation for death to one beneficiary.** Upon the cessation of compensation payable to a beneficiary under the provisions of this chapter, the compensation of the remaining persons entitled to compensation for the unexpired part of the period during which their compensation is payable, shall be that which such persons would have received if they had been the only persons entitled to compensation at the time of the decedent's death. ~~This section, however, shall not be construed to increase the compensation of the children of a widow or widower upon remarriage of the widow or widower.~~

**SECTION 10. AMENDMENT.** Section 65-05-25 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-25. Lump sum ~~settlement~~ settlements - Granted in discretion of bureau - How computed.**

1. If an employee is determined to be permanently and totally disabled, the bureau may pay the employee a lump sum equal to the present value of all future payments of compensation. The probability of the employee's death before the expiration of the period during which the employee is

entitled to compensation must be determined by generally accepted mortality studies. The bureau may not pay the employee a lump sum unless it has first determined that there is clear and convincing evidence that the lump sum payment is in the best interest of the employee. Best interest of the employee may not be deemed to exist because the employee can invest the lump sum in another manner to realize a better yield. The employee must show a specific plan of rehabilitation which will enable the employee to return to work as a productive member of society.

2. The bureau and an employee may compromise to resolve a disputed claim. The contract of settlement made is enforceable by the parties. The contract may provide that the employee shall utilize the funds to engage in certain rehabilitation programs. If the employee breaches the contract, the bureau may require the employee to repay the benefits received under the agreement. In cases in which the extent of disability is disputed and resolved by agreement, the concept of reopening a disability claim due to significant change in medical condition is inapplicable.
3. If death results from an injury under the conditions specified in section 65-05-16, the bureau may pay the decedent's spouse or the guardian of the decedent's children a lump sum equal to the present value of all future payments of compensation.
4. Notwithstanding any other provision of law, structured settlements may be used to resolve a dispute or to provide for payment of ongoing future benefits. The bureau may contract with a third-party vendor to provide structured settlement payments.

**SECTION 11. AMENDMENT.** Section 65-05-36 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-36. Preferred worker program - Continuing appropriation.** For purposes of this section, "preferred worker" means a worker who has incurred a compensable injury that resulted in a disability that poses a substantial obstacle to employment. The bureau may provide assistance as determined appropriate to preferred workers or employers who employ a preferred worker. In addition, employers who apply for and are approved as a preferred worker employer may not be assessed premiums on a preferred worker's salary for three years from the date of hiring. The bureau may not charge claims costs incurred as a result of an injury sustained by a preferred worker against the preferred worker's employer's account during the first three years after the worker is hired. The bureau shall charge those claims costs to the general fund. The bureau may adopt rules to regulate and manage the preferred worker program authorized by this section. An employer or preferred worker may not appeal a bureau decision not to provide assistance to that employer or preferred worker under this section. Money in the workers' compensation fund is appropriated on a continuing basis to provide the assistance authorized under this section.

**SECTION 12.** A new section to chapter 65-05 of the North Dakota Century Code is created and enacted as follows:

**Retaliation by employer prohibited - Action for damages - Penalty.** An employer who willfully discharges or willfully threatens to discharge an employee for seeking or making known the intention to seek workers' compensation benefits is

liable in a civil action for damages incurred by the employee, including reasonable attorneys' fees. Damages awarded under this section may not be offset by any workers' compensation benefits to which the employee is entitled. A willful violation of this section is a class A misdemeanor.

**SECTION 13. REPEAL.** Sections 65-02-15 and 65-05-24 of the North Dakota Century Code are repealed.

**SECTION 14. APPLICATION OF ACT.** Section 6 of this Act applies to all claims for benefits filed after the effective date of this Act, regardless of the date of injury. The increase in the maximum amount of death benefits payable from one hundred ninety-seven thousand dollars to two hundred fifty thousand dollars in section 7 of this Act applies only to those deaths occurring after the effective date of this Act.

Approved April 7, 2003

Filed April 7, 2003

## CHAPTER 563

### SENATE BILL NO. 2298

(Senators J. Lee, Fischer, Grindberg)  
(Representatives Koppelman, Wieland)

## WORKERS' COMPENSATION STAFFING COVERAGE

AN ACT to amend and reenact section 65-01-08 of the North Dakota Century Code, relating to workers' compensation coverage of staffing services.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 65-01-08 of the North Dakota Century Code is amended and reenacted as follows:

**65-01-08. Contributing employer ~~or~~ and staffing service relieved from liability for injury to employee.**

1. If a local or out-of-state employer secured the payment of compensation to that employer's employees by contributing premiums to the fund, the employee, and the parents in the case of a minor employee, or the representatives or beneficiaries of either, do not have a claim for relief against the contributing employer or against any agent, servant, or other employee of the employer for damages for personal injuries, but shall look solely to the fund for compensation.
2. If a client company contracts with a staffing service for an employee's services, the client company and the staffing service are immune from any claim for relief by that employee or by another employee of the client company or staffing service, to the same extent granted under this title to contributing employers if the client company or staffing service secured the payment of compensation in accordance with this title. The ~~Although an account must include the name of the staffing service, the~~ employee is considered an employee of the client company and staffing service for purposes of application of immunity for injuries incurred by or caused by that employee.
3. For purposes of this section:
  - a. "Client company" means a person that contracts to receive services within the course of that person's usual business from ~~an employee of a staffing service~~ or that contracts to lease any or all of that person's employees from a staffing service.
  - b. "Staffing service" means an employer in the business of providing the employer's employees to persons to perform services within the course of that person's usual businesses. The term includes professional employer organizations' staff leasing companies, employee leasing organizations, and temporary staffing companies. The term "staffing service" must be broadly construed to encompass entities that offer services provided by a professional employer organization, staff leasing company, employee leasing



organization, or temporary staffing company regardless of the term used.

- (1) Within the meaning of staffing service as used in this section, "temporary staffing," or "temporary staffing service" means an arrangement by which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation including:

    - (a) An employee absence;
    - (b) A temporary skill shortage;
    - (c) A seasonal workload; or
    - (d) A special assignment or project with a targeted end date.
  - (2) The term does not include arrangements in which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.
4. A staffing service that provides only temporary staffing services is the employee's employer. The temporary staffing service shall maintain a workers' compensation account in the temporary staffing service's name and report the wages for those workers annually to the bureau. All other staffing services shall:
- a. Report annually the payroll detail for each North Dakota client company.
  - b. Maintain complete and separate records of the payroll of the staffing service's client companies. Claims must be separately identified by the staffing service for each client company.
  - c. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the contractual agreement between a staffing service and a client company is terminated, the employees become the sole employees of the client company.
  - d. Notify the bureau of the client company's name, workers' compensation account number, and the date the staffing service began providing services to the client company. The staffing service shall provide this information upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.
  - e. Supply the bureau with a copy of the agreement between the staffing service and client company.
  - f. Notify the bureau upon termination of any agreement with a client company, but no later than fifteen days from the effective date of termination.

- g. Notify the staffing service's client companies of an "uninsured" status for failure to pay workers' compensation premiums within fifteen days of notice by the bureau.
- 5. A staffing service that provides both temporary and long-term employees is subject to the reporting requirements associated with the type of employee provided to the client company.
- 6. a. The bureau shall maintain all employer data for each client company requiring coverage under this title. If a client company enters an agreement with a staffing service, the bureau shall generate a master billing for the staffing service detailing the staffing service's client companies.
  - b. Rate classifications for employees provided by a staffing service must be those which would apply as if the work were performed by the employees of the client company. A client company is eligible for bureau safety discount and dividend programs. If a client company enters an agreement with a staffing service, the client company shall retain the client company's experience rate, if applicable.
  - c. Both a staffing service and client company under this section are considered employers for purposes of section 65-04-26.1. A staffing service that provides employees to a client company that has been determined to be uninsured or ineligible for coverage under sections 65-04-27.1 and 65-04-33 may not secure workers' compensation coverage for those employees.
- 7. a. The bureau shall determine whether an entity is a staffing service. If the bureau determines an entity is a staffing service, the bureau may further determine if the entity is a temporary staffing service. In rendering either determination, the bureau may issue a decision under section 65-04-32. If the bureau determines an entity is not a staffing service, the client company shall maintain a workers' compensation account and pay the premium for coverage of the employees.
  - b. The factors the bureau may consider in determining whether an entity is a staffing service include the number of client companies handled by the staffing service, the length of time the staffing service has been in existence, the extent to which the staffing service extends services to the general public, the degree to which the client company and staffing service are separate and unrelated business entities, the repetition of officers or managers between the client company and staffing service, and the extent to which a client company has an ownership or other interest in the staffing service. The bureau also may consider the scope of the services provided by the staffing service, the relationship between the staffing service and the client company's workers, the written agreement between the staffing service and the client company, and any other factor deemed relevant by the bureau.
  - c. The bureau may require information from any staffing service, including a list of current client company accounts, staffing assignments, payroll information, and rate classification

information. A client company shall provide any information requested by the bureau regarding any staffing service.

8. The bureau may adopt rules consistent with this section which further define client company and staffing service and which provide a procedure by which the bureau may determine whether an entity meets these definitions.

Approved March 26, 2003

Filed March 26, 2003

## CHAPTER 564

### HOUSE BILL NO. 1149

(Representative Froseth)

(Senator Mutch)

(At the request of the Workers Compensation Bureau)

## WORKERS' COMPENSATION LAW REVISIONS

AN ACT to amend and reenact sections 65-01-09, 65-04-03.1, 65-04-04, 65-04-15, subsection 1 of section 65-04-26.1, subsections 1 and 2 of section 65-04-32, subsection 3 of section 65-04-33, sections 65-05-07.2, 65-05-28.1, 65-06-01, 65-06-02, 65-06-03, and 65-06-04 of the North Dakota Century Code, relating to the workers compensation bureau's subrogation interests and participation in third-party actions, elimination of the expiration date for the state entities account, employer certificates of coverage, release of information from employer files, personal liability for failure to pay premiums or file premium reports, notice of decisions issued by the workers compensation bureau affecting employer accounts, the penalty structure for failure to secure workers' compensation coverage, employer medical assessments, eligibility of an employer to select preferred providers to render medical treatment, and emergency and disaster volunteers and volunteer firefighters; to repeal section 65-04-19.2 and chapter 65-14 of the North Dakota Century Code, relating to state agency participation in the workers' compensation risk management program and the employee information program on hazardous substances; to provide an effective date; and to declare an emergency.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 65-01-09 of the North Dakota Century Code is amended and reenacted as follows:

**65-01-09. Injury through negligence of third person - Option of employee - Fund subrogated when claim filed.** When an injury or death for which compensation is payable under provisions of this title shall have been sustained under circumstances creating in some person other than the fund a legal liability to pay damages in respect thereto, the injured employee, or the employee's dependents may claim compensation under this title and proceed at law to recover damages against such other person. The fund is subrogated to the rights of the injured employee or the employee's dependents to the extent of fifty percent of the damages recovered up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits for the injured employee. The bureau's subrogation interest may not be reduced by settlement, compromise, or judgment. The action against such other person may be brought by the injured employee, or the employee's dependents in the event of the employee's death. Such action shall be brought in the injured employee's or in the employee's dependents' own right and name and as trustee for the bureau for the subrogation interest of the bureau. However, if the director chooses not to participate in a ~~health care malpractice~~ health care malpractice ~~an~~ action, the fund has no subrogation interest and no obligation to pay fees or costs under this section. If the injured employee or the employee's dependents do not institute suit within sixty days after date of injury, the bureau may bring the action in its own name and as trustee for the injured employee or the employee's dependents and retain as its subrogation interest the full amount it has

paid or would otherwise pay in the future in compensation and benefits to the injured employee or the employee's dependents. Within sixty days after both the injured employee and the bureau have declined to commence an action against a third person as provided above, the employer may bring the action in the employer's own name or in the name of the employee, or both, and in trust for the bureau and for the employee. The party bringing the action may determine if the trial jury should be informed of the trust relationship. If the action is brought by the injured employee or the employee's dependents, or the employer as provided above, the bureau shall pay fifty percent of the costs of the action, exclusive of attorney fee, when such costs are incurred. If there is no recovery of damages in the action, this shall be a cost of the bureau to be paid from the bureau general fund. When there is recovery of damages in the action, the costs of the action, exclusive of attorney's fees, must be prorated and adjusted on the percentage of the total subrogation interest of the bureau recovered to the total recovery in the action. The bureau shall pay attorney fees to the injured employee's attorney from the bureau general fund as follows:

1. Twenty percent of the subrogation interest recovered for the bureau when legal action is not commenced.
2. Twenty-five percent of the subrogation interest recovered for the bureau when action is commenced and settled before judgment.
3. Thirty-three and one-third percent of the subrogation interest recovered for the bureau when recovered through judgment.

The above provisions as to costs of the action and attorney fees is effective only when the injured employee advises the bureau in writing the name and address of the employee's attorney, and that the employee has employed such attorney for the purpose of collecting damages or of bringing legal action for recovery of damages. If a claimant fails to pay the bureau's subrogation interest within thirty days of receipt of a recovery in a third party action, the bureau's subrogation interest is the full amount of the damages recovered, up to a maximum of the total amount it has paid or would otherwise pay in the future in compensation and benefits to the injured employee or the employee's dependents, and no costs or attorney fees will be paid from the bureau's subrogation interest.

**SECTION 2. AMENDMENT.** Section 65-04-03.1 of the North Dakota Century Code is amended and reenacted as follows:

**65-04-03.1. (~~Effective through June 30, 2003~~) State entities account - Continuing appropriation - Report to budget section.**

1. The bureau shall establish a single workers' compensation account for state entities covered by chapter 32-12.2. The bureau shall use the combined payroll, premium, and loss history of selected agencies to determine future experience rates, dividends, assessments, and premiums. Classifications and premium rates must be based on the hazards and risks of the different occupations covered by this account. The payroll reporting period for this account is for a fiscal year of July first through June thirtieth. The office of management and budget shall furnish combined payroll information to the bureau in a format prescribed by the bureau.
2. Workers' compensation premiums from state entities covered by chapter 32-12.2 must be deposited in the risk management workers' compensation fund. The state investment board shall invest this fund in

accordance with chapter 21-10. Funds received as contributions from state entities, all other payments deposited in this fund, and interest and income received on investments are appropriated on a continuing basis for the purposes of this fund. The purposes of this fund are to pay workers' compensation premiums for state agencies and to pay workers' compensation claims costs not covered by the deductible contract. The risk management division of the office of management and budget shall administer this fund. Section 54-44.1-11 does not apply to this fund.

3. A state entity covered by chapter 32-12.2 shall participate in the risk management workers' compensation program unless exempted by the director of the office of management and budget.
4. The risk management division of the office of management and budget shall administer the account's internal workers' compensation return-to-work program. Every state entity is required to participate in the return-to-work program. The program may include assigning employees to agencies other than the agency for which the employee worked on the date of the injury.
5. The office of management and budget may adopt rules to administer the risk management workers' compensation program. The workers compensation bureau and the risk management division of the office of management and budget periodically shall report to the budget section of the legislative council on the success of this program.

**SECTION 3. AMENDMENT.** Section 65-04-04 of the North Dakota Century Code is amended and reenacted as follows:

**65-04-04. Employers obligated to pay premiums - Premium and certificates to be mailed.** Each employer subject to this title shall pay into the fund annually the amount of premiums determined and fixed by the bureau for the employment or occupation of the employer. The amount must be determined by the classifications, rules, and rates made and published by the bureau and must be based on a proportion of the annual expenditure of money by the employer for the service of persons subject to the provisions of this title. The bureau shall mail to the employer a certificate specifying that the payment has been made. The certificate, attested by the seal of the bureau, is prima facie evidence of the payment of the premium. Notwithstanding the provisions of section 65-04-15, the certificate may reflect the employer has paid the minimum premium and has estimated no wages for the period indicated on the certificate. If an employer defaults on premium payments after a certificate has been issued, the bureau may revoke that employer's certificate. The bureau shall provide that premiums to be paid by school districts, townships, and all public corporations or agencies, except municipal corporations, fall due at the end of the fiscal year of that entity, and that premiums to be paid by all municipal corporations fall due at the end of the calendar year, and may make provisions so that premiums of other employers fall due on different or specified dates. For the purpose of effectuating different or specified due dates the bureau may carry new or current risks for a period of less than one year and not to exceed eighteen months, either by request of the employer or action of the bureau. An employer subject to this chapter shall display in a conspicuous manner at the workplace and in a sufficient number of places to reasonably inform employees of the fact, a certificate of premium payment showing compliance with this chapter and the toll-free telephone number used to report unsafe working conditions and actual or suspected workers' compensation fraud. Any employer subject to this chapter is liable to pay a civil

penalty of two hundred fifty dollars for failure to display the notice of compliance and the toll-free telephone number as required by this section.

<sup>269</sup> **SECTION 4. AMENDMENT.** Section 65-04-15 of the North Dakota Century Code is amended and reenacted as follows:

**65-04-15. Information in employer's reports files confidential - Penalty if employee of bureau divulges information.** The information contained in an employer's ~~report~~ file is for the exclusive use and information of the bureau or its agents in the discharge of ~~its~~ their official duties and is not open to the public nor usable in any court in any action or proceeding ~~pending therein~~ unless the bureau is a party thereto. ~~The information contained in an employer's report may be provided to a federal or state law enforcement agency pursuant to a lawful order of a court upon a showing of necessity and prior notice to the bureau of an application for the order.~~ The information contained in the ~~report file~~, however, may be tabulated and published by the bureau in statistical form for the use and information of the state departments and of the public. Upon request, the bureau shall disclose the rate classification of an employer to the requester; however, the bureau may not disclose any information that would reveal the amount of payroll upon which that employer's premium is being paid or the amount of premium the employer is paying. The bureau may disclose whether an employer's file is active, cancelled, closed, pending, or delinquent. The information in the employer's file may not be released in aggregate form, except to those persons contracting with the bureau for exchange of information pertaining to the administration of this title or except upon written authorization by the employer for a specified purpose. Anyone who is convicted under section 12.1-13-01 is disqualified from holding any office or employment with the bureau.

The bureau may, upon request of the state tax commissioner or the secretary of state, furnish to them a list or lists of employers showing only the names, addresses, and bureau file identification numbers of such employers as those files relate to this chapter; provided, that any such list so furnished must be used by the tax commissioner or the secretary of state only for the purpose of administering their duties. The bureau may provide ~~the commissioner of labor or job service North Dakota with~~ any state or federal agency information obtained pursuant to the administration of this title. Any information so provided must be used only for the purpose of administering the duties of ~~the commissioner of labor or job service North Dakota~~ that state or federal agency. Whenever the bureau obtains information on activities of a contractor doing business in this state of which officials of the secretary of state, job service North Dakota, or tax commissioner may be unaware and that may be relevant to the duties of those officials, the bureau shall provide any relevant information to those officials for the purpose of administering their duties. The bureau may provide any state agency or a private entity with a list of names and addresses of employers for the purpose of jointly publishing or distributing publications or other information pursuant to section 54-06-04.3. Any information so provided may only be used for the purpose of jointly publishing or distributing publications or other information as provided in section 54-06-04.3.

**SECTION 5. AMENDMENT.** Subsection 1 of section 65-04-26.1 of the North Dakota Century Code is amended and reenacted as follows:

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<sup>269</sup> Section 65-04-15 was also amended by section 2 of House Bill No. 1334, chapter 508.

1. An officer or director of a corporation, or manager or governor of a limited liability company, or partner of a limited liability partnership, or employee of a corporation or limited liability company having twenty percent stock ownership who has control of or supervision over the filing of and responsibility for filing premium reports or making payment of premiums or reimbursements under this title and who fails to file the reports or to make payments as required, is personally liable for premiums under this chapter and reimbursement under section 65-05-07.2, including interest, penalties, and costs if the corporation or limited liability company does not pay to the bureau those amounts for which the corporation or limited liability company is liable.

**SECTION 6. AMENDMENT.** Subsections 1 and 2 of section 65-04-32 of the North Dakota Century Code are amended and reenacted as follows:

1. The bureau may issue a notice of decision based on an informal internal review of the record and shall serve notice of the decision on the parties by regular mail. The bureau shall include with the decision a notice of the employer's right to reconsideration.
2. An employer has thirty days from the date of service to file a written petition for reconsideration. The request must state specifically the alleged errors in the decision and the relief sought. The request may be accompanied by additional evidence not previously submitted to the bureau. The bureau shall reconsider the matter by informal internal review of the information of record. Absent a timely and sufficient request for reconsideration, the ~~administrative order~~ notice of decision is final and may not be reheard or appealed.

<sup>270</sup> **SECTION 7. AMENDMENT.** Subsection 3 of section 65-04-33 of the North Dakota Century Code is amended and reenacted as follows:

3. An employer who is uninsured is liable for any premiums plus penalties and interest due on those premiums, plus a penalty of twenty-five percent of all premiums due during the most recent year of noncompliance. An additional five percent penalty is due for each year of noncompliance before the most recent year; ~~not to exceed six years or fifty percent~~, beginning on the date the bureau became aware of the employer's uninsured status, resulting in the penalty for the second most recent year being thirty percent, for the third most recent year being thirty-five percent, for the fourth most recent year being forty percent, for the fifth most recent year being forty-five percent, and for the sixth most recent year being fifty percent. The bureau may not assess a penalty for more than six years of past noncompliance. The bureau may assess additional penalties, from the date the bureau became aware of the employer's uninsured status continuing until the effective date of coverage, equal to twenty-five percent of the premium due for that period. The penalties for employers are in addition to any other penalties provided by law. The bureau may reduce these penalties. However, the amount due from an employer may not be less than the

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<sup>270</sup> Section 65-04-33 was also amended by section 3 of House Bill No. 1334, chapter 508, and section 1 of Senate Bill No. 2309, chapter 566.



actual cost and reserves of any claim attributable to the employer during the time the employer was uninsured. An employer may not appeal a bureau decision not to reduce a penalty under this subsection.

**SECTION 8. AMENDMENT.** Section 65-05-07.2 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-07.2. Payment to bureau for certain claims.** The employer shall reimburse the bureau for all medical expenses related to a compensable injury to an employee if the expenses are not more than two hundred fifty dollars and shall reimburse the bureau for the first two hundred fifty dollars of medical expenses when the expenses are more than two hundred fifty dollars. If an employee's compensable injury is determined through a civil action to have been sustained through the fault or negligence of a third person, or if a settlement has been entered between the employee and a third person through which the third person agrees to compensate the employee for the injury, the bureau, upon receipt of its subrogation interest, shall credit the account of the employer to the extent of the payment made by the employer to the bureau under this section. Upon the bureau's determination that the claim is compensable, the bureau shall pay the medical expenses associated with the claim and notify the employer of payments to be made by the employer under this section. If the employer does not pay the bureau within ~~ninety~~ thirty days of notice by the bureau, the bureau may impose a penalty on that employer. The penalty may not exceed one hundred twenty-five percent of the payment owed by the employer. The bureau shall collect the penalty in a civil action against the employer and deposit the money in the fund. An employer may not directly or indirectly charge an injured employee for any payment the employer makes on a claim. When the cost of an injured employee's medical treatment exceeds two hundred fifty dollars, the bureau shall pay all further medical expenses pursuant to this title. This section is effective for all compensable injuries that occur after July 31, 1995. Compensable injuries paid under sections 65-06.2-04 through 65-06.2-08 are not subject to this section.

**SECTION 9. AMENDMENT.** Section 65-05-28.1 of the North Dakota Century Code is amended and reenacted as follows:

**65-05-28.1. Employer to select preferred provider.** Notwithstanding section 65-05-28, an employer subject to this title who maintains an ~~approved~~ a risk management program pursuant to section 65-04-19.1 approved by the bureau may select a preferred provider to render medical treatment to employees who sustain compensable injuries. "Preferred provider" means a designated provider or group of providers of medical services, including consultations or referral by the provider or providers.

**SECTION 10. AMENDMENT.** Section 65-06-01 of the North Dakota Century Code is amended and reenacted as follows:

**65-06-01. Volunteer fireman firefighter, emergency or disaster volunteer disaster emergency trainees, community emergency response team member, in training defined.** The term "volunteer ~~fireman~~ firefighter" means any active member of an organized volunteer fire department of this state and any other ~~person~~ individual performing services as a volunteer ~~fireman~~ firefighter for a municipality at the request of the chief or other ~~person~~ individual in command of the fire department of ~~such that~~ such that municipality or of any other officer of ~~such that~~ such that municipality having authority to demand ~~such~~ such service ~~as a firefighter~~. ~~Firemen~~ Firefighters who are paid a regular wage or stipend by the municipality ~~as such for serving as a firefighter~~, or whose entire time is devoted to ~~such services~~ service as a firefighter for the

municipality, for the purpose of this chapter, ~~shall~~ are not ~~be deemed~~ volunteer ~~firemen~~ firefighters.

The term "emergency or disaster volunteer disaster emergency trainee" means any ~~person~~ individual serving without remuneration who is actively engaged in training to qualify as a disaster emergency worker ~~in the event of an~~ or is responding to a hazard, emergency disaster, or enemy attack on this country, and who is registered with the disaster emergency organization of a municipality, which has been officially recognized by the director of the state division of emergency management.

The term "in training" ~~shall be limited to and~~ means only those periods of time, ~~prior to an enemy attack on this country,~~ during which ~~such an emergency or disaster volunteer disaster emergency trainee~~ is receiving instruction, or is engaged in exercises or operations, in preparation for qualification as a disaster emergency worker in the event of ~~an~~ a hazard, emergency, disaster, or enemy attack on this country.

The term "community emergency response team member" means an individual registered as a community emergency response team member with the appropriate authority. For purposes of this chapter, a community emergency response team member is acting as a community emergency response team member only when the individual is receiving approved community emergency response team training or is acting as a member of a community emergency response team in an emergency or disaster.

Upon request of the bureau, the disaster emergency organization of a municipality shall provide the bureau with its roster of registered community emergency response team members.

The term "municipality" when used in reference to emergency or disaster volunteer disaster emergency trainees means the state ~~or district thereof,~~ cities, counties, municipalities, districts, or any other geographical entity of this state. This definition is not in any way intended to alter any interpretation or ruling in regard to the use of the term "municipality" when used in reference to volunteer ~~firemen~~ firefighters.

**SECTION 11. AMENDMENT.** Section 65-06-02 of the North Dakota Century Code is amended and reenacted as follows:

**65-06-02. Volunteer firemen and firefighter, emergency or disaster volunteer disaster emergency trainees, and community emergency response team member declared employees - Covered by workers' compensation - Termination.** Volunteer firemen firefighters, emergency or disaster volunteers, and volunteer disaster emergency trainees community emergency response team members are employees of the municipalities which they serve and are entitled to the same protection and rights under the provisions of this title as are full-time paid employees of ~~such~~ those municipalities; ~~except, however, that the protection and rights granted to volunteer disaster emergency trainees by this section shall terminate and cease in the event of an enemy attack on this country, except as to rights to benefits that shall have vested prior to the time of such attack.~~

**SECTION 12. AMENDMENT.** Section 65-06-03 of the North Dakota Century Code is amended and reenacted as follows:

**65-06-03. Compensation benefits - How determined.** The basis of compensation and benefits to be paid to a volunteer fireman firefighter, an emergency or disaster volunteer and disaster emergency trainees, or a community emergency response team member under the terms of this chapter shall be determined in accordance with the provisions of section 65-05-09; provided, however, that the weekly wage of the claimant shall be determined from a computation of income derived from the claimant's business or employment.

**SECTION 13. AMENDMENT.** Section 65-06-04 of the North Dakota Century Code is amended and reenacted as follows:

**65-06-04. Assessment of premiums.** For the purpose of making assessments of premiums to be charged against municipalities for protection of volunteer firemen and volunteer firefighters, emergency or disaster emergency trainees volunteers, community emergency response team members, the bureau shall make such survey as may seem advisable to ascertain the probable annual expenditures necessary to be paid out of the fund to carry out the provisions of this chapter, and shall fix the annual charges and assessments which shall be made against municipalities employing volunteer firemen and volunteer disaster emergency trainees firefighters, emergency or disaster volunteers, and community emergency response team members. Such charge shall be a fixed sum for each one hundred of the population of the municipality involved, the same to be uniform as to all such municipalities but in proportion to the population thereof. In determining the amount of premium charge, the bureau may apply the system of experience rating provided in this title, as applied to other risks. The bureau may also establish a minimum charge or assessment to be applicable to municipalities where the fixed rate or charge multiplied by the number of hundreds of the population thereof would amount to less than the amount of such minimum charge or assessment. The population of a municipality shall be that shown by the latest official North Dakota state or United States government census, whichever may be the later.

**SECTION 14. REPEAL.** Section 65-04-19.2 and chapter 65-14 of the North Dakota Century Code are repealed.

**SECTION 15. EMERGENCY.** This Act is declared to be an emergency measure.

Approved March 12, 2003

Filed March 12, 2003

## CHAPTER 565

### HOUSE BILL NO. 1150

(Representative M. Klein)

(Senator J. Klein)

(At the request of the Workers Compensation Bureau)

## WORKERS' COMPENSATION BOARD AND EVALUATIONS

AN ACT to amend and reenact sections 65-02-03.1, 65-02-30, and 65-03-04 of the North Dakota Century Code, relating to the term of office of members and membership of the workers compensation bureau board of directors and biennial performance evaluations of the functions and operations of the workers compensation bureau; and to provide for application.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 65-02-03.1 of the North Dakota Century Code is amended and reenacted as follows:

#### **65-02-03.1. Workers compensation board of directors - Appointment.**

1. ~~Beginning September 1, 1997, the initial board of directors shall consist of the members on the state advisory council on December 15, 1996. The initial board shall submit to the governor a list of three names of potential candidates for each of the employer member positions and the medical association position. From each list the governor shall select an individual to fill the member position of the subsequent board. An organization that is statewide in scope and which through its affiliates embraces a cross section and a majority of organized labor in this state shall submit to the governor a list of three names of potential candidates for one of the three employee positions. The governor shall select an individual to fill this organized labor employee member position, and the governor shall appoint two individuals to fill the remaining two employee positions. The subsequent board is effective January 1, 1998.~~
2. ~~After December 31, 1997~~ the effective date of this Act, the board consists of ~~ten~~ eleven members. The appointment and replacement of the members must ensure that:
  - a. Six board members represent employers in this state that maintain active accounts with the bureau, at least one of which must be a participant in the risk management program, at least two of which must be employers with annual premiums greater than twenty-five thousand dollars, at least one of which must be an employer with an annual premium of ten thousand dollars but less than twenty-five thousand dollars, and at least one of which must be an employer with an annual premium of less than ten thousand dollars.

- b. Three members represent employees; at least one member must have received workers' compensation benefits; and at least one member must represent organized labor.
  - c. One ~~nonvoting~~ member is a member of the North Dakota medical association.
  - d. One member is a member at large who must be a resident of this state and at least twenty-one years of age.
3. 2. Board members shall serve ~~six-year~~ four-year terms, except of the initial board members, an employee representative and two employer representatives shall serve only through December 31, 1998; an employee representative and two employer representatives shall serve only through December 31, 2000; and an employee representative, two employer representatives, and the medical association representative shall serve only through December 31, 2002, as determined by lot to initiate a cycle that results in three members' terms expiring on December thirty-first of each even-numbered year, and beginning the initial term of office of the member at large to be appointed upon the effective date of this Act expires on December 31, 2006, and the term of office of the medical association member whose term of office became effective January 1, 2003, expires on December 31, 2006. The governor shall make the necessary appointments to ensure the term of office of members begins on January first of each odd-numbered year. Board members may not serve more than ~~two~~ three consecutive terms. A departing member representing an employer must be replaced by a member representing an employer, most of whose employees are in a different rate classification than those of the employer represented by the departing member. The governor shall appoint the replacement member for a departing employer representative or medical association representative from a list of three candidates submitted by the board. The governor shall select the replacement member for the departing organized labor employee representative from a list of three names of potential candidates submitted by an organization that is statewide in scope and which through its affiliates embraces a cross section and a majority of organized labor in this state, ~~and the~~. The governor shall select the replacement member for a departing nonorganized labor employee representative. The governor shall appoint the replacement member for the member at large from a list of three candidates submitted by the board. Vacancies in the membership of the board must be filled for the unexpired term by appointment by the governor as provided in this subsection.

**SECTION 2. AMENDMENT.** Section 65-02-30 of the North Dakota Century Code is amended and reenacted as follows:

**65-02-30. Independent performance evaluation - Bureau development of performance measurements - Continuing appropriation.** Biennially, the director shall request the state auditor to select a firm with extensive expertise in workers' compensation practices and standards to complete a performance evaluation of the functions and operations of the bureau during that biennium. This may not be construed to require the firm to be a certified public accounting firm. The As determined necessary by the state auditor, but at least once every other biennium, the biennial independent performance evaluation must evaluate the departments of the bureau to determine whether the bureau is providing quality service in an

efficient and cost-effective manner. ~~The firm also shall conduct a performance evaluation of;~~ evaluate the effectiveness of safety and loss prevention programs under section 65-03-04; and evaluate the board to determine whether the board is operating within section 65-02-03.3 and within the board's bylaws. The firm's report must contain recommendations for departmental improvement or an explanation of why no recommendations are being made. The director, the chairman of the board, and a representative of the firm shall present the evaluation report and any action taken to the legislative council's legislative audit and fiscal review committee and to the house and senate industry, business and labor standing committees during the next regular session of the legislative session following the performance evaluation. The director shall provide a copy of the performance evaluation report to the state auditor. The bureau shall develop and maintain comprehensive, objective performance measurements. These measurements must be evaluated as part of the independent performance evaluation performed under this section. Money in the workers' compensation fund is appropriated on a continuing basis for the payment of the expense of conducting the performance evaluation.

**SECTION 3. AMENDMENT.** Section 65-03-04 of the North Dakota Century Code is amended and reenacted as follows:

**65-03-04. Safety programs.** The bureau shall create and operate work safety and loss prevention programs to protect the health of covered employees and the financial integrity of the fund, including programs promoting safety practices by employers and employees through education, training, consultation, grants, or incentives. ~~The biennial independent performance evaluation of the bureau must evaluate and report on the effectiveness of these programs.~~

**SECTION 4. APPLICATION OF ACT.** The reduction in the term of office from six years to four years in section 2 of this Act does not affect the term of office of a member appointed before the effective date of this Act, except as provided in section 2 of this Act.

Approved March 12, 2003

Filed March 12, 2003

## CHAPTER 566

### SENATE BILL NO. 2309

(Senators O'Connell, Andrist, J. Lee)  
(Representatives Eckre, N. Johnson, Severson)

## TOWNSHIP REPORT PENALTY EXEMPTION

AN ACT to amend and reenact subsection 4 of section 65-04-33 of the North Dakota Century Code, relating to exempting townships from penalties for failing to furnish workers' compensation payroll reports.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

<sup>271</sup> **SECTION 1. AMENDMENT.** Subsection 4 of section 65-04-33 of the North Dakota Century Code is amended and reenacted as follows:

4. An employer who fails or refuses to furnish to the bureau the annual payroll report and estimate or who fails or refuses to furnish other information required by the bureau under this chapter is subject to a penalty established by the bureau of two thousand dollars. Upon the request of the bureau, the employer shall furnish the bureau any of that employer's payroll records, annual payroll reports, and other information required by the bureau under this chapter and an estimate of payroll for the advance premium year. If the employer fails or refuses to provide the records within thirty days of a written request from the bureau, the employer is subject to a penalty not to exceed one hundred dollars for each day until the bureau receives the records, in addition to the two thousand dollar penalty set forth above. The bureau may not assess a penalty that exceeds one hundred fifty dollars under this subsection against an organized township. The bureau may reduce penalties for employers under this subsection. However, an employer may not appeal a bureau decision not to reduce a penalty. The bureau shall notify an employer by regular mail of the amount of premium and penalty due the bureau from the employer. If the employer fails to pay that amount within thirty days, the bureau may collect the premium, penalties, and interest due by civil action. In that action, the court may not review or consider the action of the bureau regarding the acceptance or payment of a claim filed when the employer was uninsured. No exemptions except absolute exemptions under section 28-22-02 are allowed against any levy under executions pursuant to a judgment recovered in the action.

Approved March 12, 2003

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<sup>271</sup> Section 65-04-33 was also amended by section 7 of House Bill No. 1149, chapter 564, and section 3 of House Bill No. 1334, chapter 508.