

**FIRST ENGROSSMENT
with Senate Amendments**

Fifty-sixth
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1332

Introduced by

Representatives Keiser, Berg, Wald

1 A BILL for an Act to amend and reenact section 65-01-02, subsection 4 of section 65-05-28,
2 subsection 1 of section 65-05-28.2, and section 65-07-01 of the North Dakota Century Code,
3 relating to workers compensation definitions, medical treatment, coverage; to repeal section
4 65-07-04 of the North Dakota Century Code, relating to calculation of the wages of a
5 self-employed person; and to provide an effective date.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1. AMENDMENT.** Section 65-01-02 of the 1997 Supplement to the North
8 Dakota Century Code is amended and reenacted as follows:

9 **65-01-02. Definitions.** In this title:

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

determined under this ~~section~~ subsection must be rounded to the nearest dollar.

In cases where the employee's wages 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 ~~injury~~ date of first disability or during the tax year preceding the ~~injury~~ date of first disability, or ~~during~~ an average of the three tax years preceding the ~~injury~~ 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 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 he or she 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.

10. "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 ~~shall~~ does not include a married child unless actually dependent.

11. "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

- 1 compared with all other contributing causes combined. Unusual stress
2 means stress greater than the highest level of stress normally
3 experienced or anticipated in that position or line of work.
- 4 (4) Injuries arising out of employer-required or supplied travel to and from a
5 remote jobsite or activities performed at the direction or under the
6 control of the employer.
- 7 (5) An injury caused by the willful act of a third person directed against an
8 employee because of the employee's employment.
- 9 (6) A mental or psychological condition caused by a physical injury, but
10 only when the physical injury is determined with reasonable medical
11 certainty to be at least fifty percent of the cause of the condition as
12 compared with all other contributing causes combined, and only when
13 the condition did not preexist the work injury.
- 14 b. The term does not include:
- 15 (1) Ordinary diseases of life to which the general public outside of
16 employment is exposed or preventive treatment for communicable
17 diseases.
- 18 (2) A willfully self-inflicted injury, including suicide or attempted suicide, or
19 an injury caused by the employee's willful intention to injure or kill
20 another.
- 21 (3) Any injury caused by the use of intoxicants or the illegal use of
22 controlled substances.
- 23 (4) An injury that arises out of an altercation in which the injured employee
24 is an aggressor. This paragraph does not apply to public safety
25 employees, including law enforcement officers, or private security
26 personnel who are required to engage in altercations as part of their job
27 duties if the altercation arises out of the performance of those job
28 duties.
- 29 (5) An injury that arises out of an illegal act committed by the injured
30 employee.

- 1 (6) An injury that arises out of an employee's voluntary nonpaid
2 participation in any recreational activity, including athletic events,
3 parties, and picnics, even though the employer pays some or all of the
4 cost of the activity.
- 5 (7) Injuries attributable to a preexisting injury, disease, or other condition,
6 including when the employment acts as a trigger to produce symptoms
7 in the preexisting injury, disease, or other condition unless the
8 employment substantially accelerates its progression or substantially
9 worsens its severity.
- 10 (8) A nonemployment injury that, although acting upon a prior
11 compensable injury, is an independent intervening cause of injury.
- 12 (9) A latent or asymptomatic degenerative condition, caused in substantial
13 part by employment duties, which is triggered or made active by a
14 subsequent injury.
- 15 (10) A mental injury arising from mental stimulus ~~or a mental or emotional~~
16 ~~injury arising principally out of a bona fide personnel action, including a~~
17 ~~transfer, promotion, demotion, or termination except an action that is~~
18 ~~the intentional infliction of emotional harm.~~
- 19 12. "Date of first disability" means the first date the employee was unable to work ~~in~~
20 ~~relation to~~ because of a compensable injury.
- 21 13. "Date of maximum medical improvement" or "date of maximum medical recovery"
22 means the date after which further recovery from, or lasting improvement to, an
23 injury or disease can no longer reasonably be anticipated based upon reasonable
24 medical probability.
- 25 14. "Director" means the director of the bureau.
- 26 15. "Disability" means loss of earnings capacity and may be permanent total,
27 temporary total, or partial.
- 28 16. "Doctor" means doctor of medicine, ~~chiropractor,~~ or osteopathy, chiropractor,
29 dentist, optometrist, podiatrist, or psychologist acting within the scope of the
30 doctor's license.

1 17. "Employee" means a person who performs ~~services~~ hazardous employment for
2 another for remuneration unless the person is an independent contractor under the
3 "common law" test, ~~and:~~

4 a. The term includes:

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

19 b. The term does not include:

- 20 (1) Any person whose employment is both casual and not in the course of
21 the trade, business, profession, or occupation of that person's
22 employer.
23 (2) Any person who is engaged in an illegal enterprise or occupation.
24 (3) The spouse of an employer or a child under the age of twenty-two of
25 ~~the an employer dwelling in the household of the employer.~~ For
26 purposes of this paragraph and section 65-07-01, "child" means any
27 legitimate child, stepchild, adopted child, foster child, or acknowledged
28 illegitimate child.
29 (4) Any real estate broker or real estate salesperson, provided the person
30 meets the following three requirements:

- 1 (a) The salesperson or broker must be a licensed real estate agent
2 under section 43-23-05.
- 3 (b) Substantially all of the salesperson's or broker's remuneration for
4 the services performed as a real estate agent must be directly
5 related to sales or other efforts rather than to the number of
6 hours worked.
- 7 (c) A written agreement must exist between the salesperson or
8 broker and the person or firm for whom the salesperson or broker
9 works, which agreement must provide that the salesperson or
10 broker will not be treated as an employee but rather as an
11 independent contractor.
- 12 (5) The members of the board of directors of a business corporation who
13 are not employed in any capacity by the corporation other than as
14 members of the board of directors.
- 15 (6) Any individual delivering newspapers or shopping news, if substantially
16 all of the individual's remuneration is directly related to sales or other
17 efforts rather than to the number of hours worked and a written
18 agreement exists between the individual and the publisher of the
19 newspaper or shopping news which states that the individual is an
20 independent contractor.
- 21 (7) An employer.
- 22 c. Persons employed by a subcontractor, or by an independent contractor
23 operating under an agreement with the general contractor, for the purpose of
24 this chapter are deemed to be employees of the general contractor who is
25 liable and responsible for the payments of premium for the coverage of these
26 employees until the subcontractor or independent contractor has secured the
27 necessary coverage and paid the premium for the coverage. This subdivision
28 does not impose any liability upon a general contractor other than liability to
29 the bureau for the payment of premiums which are not paid by a
30 subcontractor or independent contractor.

- 1 18. "Employer" means a person who engages or received the services of another for
2 remuneration unless the person performing the services is an independent
3 contractor under the "common law" test. The term includes:
- 4 a. The state and all political subdivisions thereof.
 - 5 b. All public and quasi-public corporations in this state.
 - 6 c. Every person, partnership, limited liability company, association, and private
7 corporation, including a public service corporation.
 - 8 d. The legal representative of any deceased employer.
 - 9 e. The receiver or trustee of any person, partnership, limited liability company,
10 association, or corporation, having one or more employees as herein defined.
 - 11 f. The president, vice presidents, secretary, or treasurer of a business
12 corporation, but not members of the board of directors of a business
13 corporation who are not also officers of the corporation.
 - 14 g. The managers of a limited liability company.
 - 15 h. The president, vice presidents, secretary, treasurer, or board of directors of
16 an association or cooperative organized under chapter 6-06, 10-12, 10-13,
17 10-15, 36-08, or 49-21.
 - 18 i. The clerk, assessor, treasurer, or any member of the board of supervisors of
19 an organized township, if the person is not employed by the township in any
20 other capacity.
- 21 19. "Fee schedule" means the relative value scale, conversion factors, fee schedules,
22 and medical aid rules adopted by the bureau.
- 23 20. "Fund" means the North Dakota workers' compensation fund.
- 24 21. "Grandchild" and the terms defined in subsections 7 and 9 include only a person
25 who, at the time of the death of the deceased employee, is under eighteen years of
26 age, or if over that age, is incapable of self-support.
- 27 22. "Hazardous employment" means any employment in which one or more
28 employees are employed regularly in the same business or in or about the
29 establishment except:
- 30 a. Agricultural or domestic service.
 - 31 b. Any employment of a common carrier by railroad.

- 1 c. Any employment for the transportation of property or persons by
2 nonresidents, where, in such transportation, the highways are not traveled
3 more than seven miles [11.27 kilometers] and return over the same route
4 within the state of North Dakota.
- 5 d. All members of the clergy and employees of religious organizations engaged
6 in the operation, maintenance, and conduct of the place of worship.

7 23. "Health care provider" means a doctor or any recognized practitioner providing
8 skilled services pursuant to the prescription of, or under the supervision or
9 direction of, a doctor.

10 24. ~~"Orphan" means a child who has no lawful parent.~~

11 25. "Parent" includes a stepparent and a parent by adoption.

12 ~~26.~~ 25. "Permanent impairment" means the loss of or loss of use of a member of the body
13 existing after the date of maximum medical improvement or recovery, and includes
14 disfigurement resulting from an injury. The loss must be determined in accordance
15 with and based upon the most current edition of the American medical
16 association's "Guides to the Evaluation of Permanent Impairment". Any
17 impairment award, not expressly contemplated within the American medical
18 association's "Guides to the Evaluation of Permanent Impairment", must be
19 determined by clear and convincing medical evidence.

20 ~~27.~~ 26. "Permanent total disability" means an employee is determined incapable of
21 rehabilitation of earnings capacity as determined by the:

- 22 a. Nature of injury.
23 b. Degree of physical impairment.
24 c. Education.
25 d. Work history.
26 e. Vocational rehabilitation potential.

27 ~~28.~~ 27. "Rehabilitation services" means nonmedical services reasonably necessary to
28 restore a disabled employee to substantial gainful employment as defined by
29 section 65-05.1-01 as near as possible. The term may include vocational
30 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.

~~29.~~ 28. "Seasonal employment" includes an occupation that has periods of forty-five consecutive days of not receiving wages.

~~30.~~ 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.

~~31.~~ 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.

~~32.~~ 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. Subsection 4 of section 65-05-28 of the North Dakota Century Code is amended and reenacted as follows:

4. If an employee, or the employee's representative, refuses to submit to, or in any way intentionally obstructs, any examination or treatment, or refuses ~~reasonably~~ to reasonably participate in medical or other treatments or examinations, the employee's right to claim compensation under this title is suspended until the refusal or obstruction ceases. No compensation is payable while the refusal or obstruction continues, and the period of the refusal or obstruction must be deducted from the period for which compensation is payable to the employee.

SECTION 3. AMENDMENT. Subsection 1 of section 65-05-28.2 of the North Dakota Century Code is amended and reenacted as follows:

1. During the first sixty days after a ~~compensable~~ work injury, an employee of an employer who has selected a preferred provider under this section may seek

1 medical treatment only from the preferred provider for the injury. Treatment by a
2 provider other than the preferred provider is not compensable and the bureau may
3 not pay for treatment by a provider who is not a preferred provider, unless a
4 referral was made by the preferred provider. A provider who is not a preferred
5 provider may not certify disability or render an opinion about any matter pertaining
6 to the injury, including causation, compensability, impairment, or disability. This
7 section does not apply to emergency care nor to any care the employee
8 reasonably did not know was related to a ~~compensable~~ work injury.

9 **SECTION 4. AMENDMENT.** Section 65-07-01 of the North Dakota Century Code is
10 amended and reenacted as follows:

11 **65-07-01. Employer, spouse and children of employer, self-employed, and**
12 **volunteers may secure coverage.** Any employer, by special contract with the bureau, may
13 secure ~~insurance protection against~~ workers' compensation coverage for injuries to the
14 employer's own person or for the employer's own death ~~when such injury or death occurs in the~~
15 ~~course of the employer's work in an industry in which the employer has secured such protection~~
16 ~~against injuries to the employer's employees.~~ Any employer also may secure ~~such~~ coverage
17 for that employer's spouse and children ~~living in the same household as the employer.~~
18 Self-employed persons may contract with the bureau for ~~insurance protection~~ workers'
19 compensation coverage for themselves. In addition, any volunteer organization, not otherwise
20 provided for under this title, may contract with the bureau for ~~such insurance protection~~
21 workers' compensation coverage for its own members while ~~such~~ its members are engaged in
22 the specific activity provided for in ~~such~~ the contract.

23 **SECTION 5. REPEAL.** Section 65-07-04 of the North Dakota Century Code is
24 repealed.

25 **SECTION 6. EFFECTIVE DATE.** The change in subdivision a of subsection 5 of
26 section 1 of this Act dealing with calculation of disability benefits for seasonal employment for
27 up to the first twenty-eight consecutive days of disability is effective for all claims filed for
28 injuries occurring after July 31, 1999. The remainder of section 1 and sections 2 and 3 of this
29 Act are effective for all claims, regardless of the date of the injury. Section 4 is effective for all
30 employer accounts regardless of the date the account was established. Section 5 is effective
31 August 1, 1999.