

HOUSE BILL NO. 1060

Introduced by

Representative Wald

Senator J. Klein

(At the request of the Workers Compensation Bureau)

1 A BILL for an Act to create and enact a new section to chapter 65-05 of the North Dakota
2 Century Code, relating to retaliation by an employer against an employee for seeking workers'
3 compensation benefits; to amend and reenact subdivision b of subsection 5 and subsection 28
4 of section 65-01-02, sections 65-02-11 and 65-02-20, subsection 5 of section 65-05-07, section
5 65-05-10, subsection 1 of section 65-05-17, and sections 65-05-21, 65-05-22, 65-05-25, and
6 65-05-36 of the North Dakota Century Code, relating to calculation of the average weekly wage
7 of self-employed employers, the definition of seasonal employment, subpoenas issued by the
8 workers compensation bureau, dispute resolution of managed care decisions, modifications to
9 real estate for catastrophically injured workers, partial disability benefits, workers' compensation
10 death benefits, structured settlements, and the preferred worker program; to repeal sections
11 65-02-15 and 65-05-24 of the North Dakota Century Code, relating to binding arbitration in
12 workers' compensation disputes and workers' compensation death benefits; to provide a
13 penalty; and to provide for application.

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

15 **SECTION 1. AMENDMENT.** Subdivision b of subsection 5 of section 65-01-02 of the
16 North Dakota Century Code is amended and reenacted as follows:

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

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

3 28. "Seasonal employment" includes ~~an occupation that has periods of forty five~~
4 ~~consecutive days of not receiving wages~~ occupations that are not permanent or
5 that do not customarily operate throughout the entire year. Seasonal employment
6 is determined by what is customary with respect to the employer at the time of
7 injury.

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

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

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

30 **65-02-20. Bureau to establish managed care program.** The bureau shall establish a
31 managed care program, including utilization review and bill review, to effect the best medical

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

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

25 5. The bureau may not pay more than ~~twenty~~ fifty thousand dollars to provide
26 permanent additions, remodeling, or adaptations to real estate it determines
27 necessary for a worker who sustains a catastrophic injury as defined in chapter
28 65-05.1. The ~~twenty~~ fifty thousand dollar limit is for the life of the injured employee,
29 regardless of any subsequent claim. This subsection does not allow the bureau to
30 purchase any real estate or motor vehicles.

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

3 **65-05-10. Partial disability - Weekly benefit.** If the injury causes temporary partial
4 disability resulting in decrease of earning capacity, the disability benefit is sixty-six and
5 two-thirds percent of the difference between the injured employee's average weekly wages
6 before the injury and the employee's wage earning capacity after the injury in the same or
7 another employment. ~~However, the partial~~ Partial disability benefits ~~may not exceed benefit~~
8 ~~rates as defined in section 65-05-09~~ are subject to a maximum of one hundred ten percent of
9 the average weekly wage in the state. The combined partial disability benefits, dependency
10 allowance, and postinjury wage earning capacity may not exceed the preinjury weekly wage of
11 the employee after deductions for social security and federal income tax.

- 12 1. The benefits provided by this section are available to any otherwise eligible worker,
13 providing the loss of earning capacity occurs after July 1, 1989. Partial loss of
14 earning capacity occurring prior to July 1, 1989, must be paid at a rate to be fixed
15 by the bureau.
- 16 2. Benefits must be paid during the continuance of partial disability, not to exceed a
17 period of five years. The bureau may waive the five-year limit on the duration of
18 partial disability benefits in cases of catastrophic injury as defined in section
19 65-05.1-06.1 or when the injured worker is working and has long-term restrictions
20 verified by clear and convincing objective medical and vocational evidence that
21 limits the injured worker to working less than twenty-eight hours per week because
22 of the compensable work injury. This subsection is effective for partial loss of
23 earnings capacity occurring after June 30, 1991.
- 24 3. The employee's earnings capacity may be established by expert vocational
25 evidence of a capacity to earn in the statewide job pool where the worker lives.
26 Actual postinjury earnings are presumptive evidence of earnings capacity where
27 the job employs the employee to full work capacity in terms of hours worked per
28 week, and where the job is in a field related to the employee's transferable skills.
29 The presumption may be rebutted by competent evidence from a vocational expert
30 that the employee's actual earnings do not fairly reflect the employee's earnings

1 capacity in the statewide job pool, considering the employee's capabilities,
2 education, experience, and skills.

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

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

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

21 **65-05-21. Marriage settlement to spouse.** If a spouse who receives compensation
22 under the provisions of subsection 1 of section 65-05-17 remarries, there shall be paid to such
23 spouse a lump sum equal to one hundred four weeks' compensation. If, prior to such marriage,
24 such spouse has received a partial lump sum settlement which covers all or any portion of the
25 said one hundred four weeks following such spouse's marriage, the amount of such partial lump
26 sum settlement which covers all or any part of the said one hundred four weeks following such
27 spouse's marriage shall be deducted from such marriage settlement, and the spouse shall
28 receive only the remainder, if any, over and above such deduction. Any judgment annulling
29 such marriage shall not reinstate the right of such spouse to compensation if the action for
30 annulment is instituted more than six months after the marriage. The provisions of this section

1 apply only to remarriages that occur before August 1, 2003, regardless of the date of injury or
2 date of death of the decedent.

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

5 **65-05-22. Adjustment on cessation of compensation for death to one beneficiary.**

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

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

14 **65-05-25. Lump sum ~~settlement~~ settlements - Granted in discretion of bureau -**
15 **How computed.**

- 16 1. If an employee is determined to be permanently and totally disabled, the bureau
17 may pay the employee a lump sum equal to the present value of all future
18 payments of compensation. The probability of the employee's death before the
19 expiration of the period during which the employee is entitled to compensation
20 must be determined by generally accepted mortality studies. The bureau may not
21 pay the employee a lump sum unless it has first determined that there is clear and
22 convincing evidence that the lump sum payment is in the best interest of the
23 employee. Best interest of the employee may not be deemed to exist because the
24 employee can invest the lump sum in another manner to realize a better yield. The
25 employee must show a specific plan of rehabilitation which will enable the
26 employee to return to work as a productive member of society.
- 27 2. The bureau and an employee may compromise to resolve a disputed claim. The
28 contract of settlement made is enforceable by the parties. The contract may
29 provide that the employee shall utilize the funds to engage in certain rehabilitation
30 programs. If the employee breaches the contract, the bureau may require the
31 employee to repay the benefits received under the agreement. In cases in which

1 the extent of disability is disputed and resolved by agreement, the concept of
2 reopening a disability claim due to significant change in medical condition is
3 inapplicable.

4 3. If death results from an injury under the conditions specified in section 65-05-16,
5 the bureau may pay the decedent's spouse or the guardian of the decedent's
6 children a lump sum equal to the present value of all future payments of
7 compensation.

8 4. Notwithstanding any other provision of law, structured settlements may be used to
9 resolve a dispute or to provide for payment of ongoing future benefits. The bureau
10 may contract with a third-party vendor to provide structured settlement payments.

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

13 **65-05-36. Preferred worker program - Continuing appropriation.** For purposes of
14 this section, "preferred worker" means a worker who has incurred a compensable injury that
15 resulted in a disability that poses a substantial obstacle to employment. The bureau may
16 provide assistance as determined appropriate to preferred workers or employers who employ a
17 preferred worker. In addition, employers who apply for and are approved as a preferred worker
18 employer may not be assessed premiums on a preferred worker's salary for three years from
19 the date of hiring. The bureau may not charge claims costs incurred as a result of an injury
20 sustained by a preferred worker against the preferred worker's employer's account during the
21 first three years after the worker is hired. The bureau shall charge those claims costs to the
22 general fund. The bureau may adopt rules to regulate and manage the preferred worker
23 program authorized by this section. An employer or preferred worker may not appeal a bureau
24 decision not to provide assistance to that employer or preferred worker under this section.
25 Money in the workers' compensation fund is appropriated on a continuing basis to provide the
26 assistance authorized under this section.

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

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

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

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

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