

**Fifty-eighth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 7, 2003**

HOUSE BILL NO. 1060
(Representative Wald)
(Senator J. Klein)
(At the request of the Workers Compensation Bureau)

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:

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.~~

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 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~~ twenty five 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~~ twenty five 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.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Fifty-eighth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1060.

House Vote: Yeas 92 Nays 0 Absent 2

Senate Vote: Yeas 43 Nays 3 Absent 1

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 2003.

Approved at _____ M. on _____, 2003.

Governor

Filed in this office this _____ day of _____, 2003,

at _____ o'clock _____ M.

Secretary of State